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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA MOBLEY, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## I. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it did not allow the defendant to present alternative suspect evidence regarding Jeanynes Bell if she was not at or near the crime scene at the time of the murder and she did not have the opportunity to commit the murder?

2. Was the search warrant authorized by the superior court sufficiently particular regarding the search for and collection of DNA at the Mobley residence and their vehicle?

3. After conducting a child competency hearing with a statutory presumption that C.M., a seven-year-old witness, was competent to testify, did the trial court manifestly abuse its discretion when it determined that C.M. was competent to testify at trial if the defense failed to provide any evidence to the contrary?

4. If none of the prosecutor's remarks during closing argument were objected to, is the defendant's claim of error waived since the defendant has not established that the prosecutor's remarks were so flagrant and ill-intentioned that the complained of remarks could not have been cured by an instruction from the court?

5. Did the State comment on the defendant's prearrest silence if that alleged "silence" was truly a voluntary, noncustodial remark made

when the defendant and police first greeted each other at the defendant's home?

6. Did the trial court abuse its discretion by admitting the 911 call placed by the victim's mother, finding it more probative than prejudicial, if the defense had named the victim's mother as an alternative suspect to the crime?

7. Did the trial court violate the real facts doctrine when sentencing the defendant if the trial court only relied on the trial record and the jury's finding of the aggravating factors?

## **II. STATEMENT OF THE CASE**

Joshua Mobley was charged by amended information with second-degree felony murder of C.H., a ten-month-old child, with the predicate crime of second-degree assault of a child,<sup>1</sup> and in the alternative, first-degree manslaughter which occurred on February 27, 2017. CP 1119-20. The State also alleged several aggravating circumstances. CP 1119-20. A jury convicted Mobley of second-degree murder and found the aggravating

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<sup>1</sup> Second-degree felony murder of a child required the State to prove that the defendant committed a second-degree assault against C.H., which caused the death of C.H. CP 1527. Second-degree assault, as defined for the jury, required the State to prove the defendant "intentionally assaulted C.H. and thereby recklessly inflicted substantial bodily harm; or (b) intentionally assaulted C.H. and caused bodily harm that was greater than transient physical pain or minor temporary marks and the defendant had previously engaged in a pattern or practice of assaulting C.H. which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks[.]" RP 1529.

factors that the victim was particularly vulnerable or incapable of resistance, that Mobley used his position of trust or confidence to facilitate the murder, and the crime involved a destructive and foreseeable impact on persons other than the victim. CP 1550, 1553.

*Substantive facts.*

In early 2017, Crystal Henry, her four-year-old daughter, and her 10-month-old son, C.H., resided in an apartment located at 2901 East Wellesley in Spokane. RP 1216, 1236. The victim, C.H., was born on May 3, 2016, and was a healthy child prior to his death. RP 980, 1232-34. Before the murder, C.H. generally only cried when left alone or hungry. RP 1219. Kristie Stolgitis, a pediatric nurse practitioner at Northwest Spokane Pediatrics examined C.H. at regular intervals beginning in May 2016, with his last visit on February 14, 2017. RP 1710, 1712-15. The nurse never observed any bruises, scratches, scrapes, or any other physical injuries when she examined C.H. between May 2016 and February 2017. RP 1716-17, 1720. Based upon the nurse's observations, Ms. Henry and C.H. were "very well bonded." RP 1717. As of February 14, 2017, C.H. did not exhibit any respiratory distress, asthma, or signs of pneumonia. RP 1721, 1731.

Nathaniel Brown-Magee, a neighbor who lived next door to Ms. Henry in the apartment complex, never observed any injuries on C.H., nor did he observe anything unusual or that caused him concern regarding Ms.

Henry. RP 1633. Another neighbor, Heavenly Davis, did not hear any concerning sounds or crying from Ms. Henry's apartment during the several hours preceding C.H.'s death. RP 1636.

Ms. Henry and Jenifer Mobley both worked at the Money Tree prior to the date of the murder, beginning in 2015. RP 1238-39, 1305. The defendant was married to Ms. Mobley. RP 1025. While Ms. Henry worked at the Money Tree, several different individuals provided daycare for C.H. RP 1237. During that period, C.H. did not have any bruises, bumps, marks or the like. RP 1238. Thereafter, the defendant and Ms. Mobley suggested that Ms. Mobley could provide daycare for C.H.<sup>2</sup> RP 1239-40. The Mobleys began providing care for C.H. on February 1, 2017; apart from Ms. Henry, no one else, except the Mobleys, watched C.H during February 2017. RP 1241, 1259. The Money Tree accommodated Ms. Henry and Ms. Mobley regarding their respective work schedules. RP 1242, 1484. If their work schedules overlapped, the defendant babysat C.H. RP 1242, 1483. He did so approximately five times until C.H.'s death on February 27, 2017. RP 1243.

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<sup>2</sup> The Mobleys never watched or babysat Ms. Henry's daughter. RP 1348. Her daughter had never been to the Mobley home. RP 1349. Ms. Henry's daughter was with her father during the night of February 26, 2017, and the following morning. RP 1360, 1666.

Ms. Henry first observed bruises on C.H. on February 20, 2017. RP 1243. On that date, Ms. Mobley watched C.H until she had to go to work around 5:00 p.m.; the defendant then babysat C.H. for the remainder of the day. RP 1243-44, 1314-15, 1573. Ms. Mobley testified that to her knowledge no other adults were in the Mobley home on this day. RP 1553. After Ms. Henry and Ms. Mobley got off work around 10:30 p.m., they arrived at the Mobley household. RP 1243-45. Ms. Mobley brought C.H. to the car, she returned to the house and the defendant drove Ms. Henry and C.H. home. RP 1244-45. They arrived at Ms. Henry's apartment around 11:00 p.m. RP 1245. For the first time, the defendant carried C.H into the apartment. RP 1246. The defendant avoided eye contact with Ms. Henry. RP 1246.

After the defendant left the apartment, Ms. Henry observed bruising on C.H.'s face and a red spot on one of his eyes. RP 1246-47. Concerned about the bruising, Ms. Henry texted her sister and several friends as Ms. Henry was unsure of what she should do. RP 1247-49, 1641-42, 1664. Ms. Henry also sent a text to Ms. Mobley that evening regarding the injuries. RP 1268. Ms. Mobley did not respond. RP 1255-56. Ms. Henry took several photographs of the injuries. RP 1249; Exs. P-11–P-17 (RP 1249-1252, 1255).

The next morning, on February 21, 2017, Ms. Henry called the Mobleys; Ms. Mobley had no explanation for the injuries. RP 1260. The defendant then arrived at Ms. Henry's apartment and remarked to her that C.H. must have hit his head against a crib in the Mobley residence.<sup>3</sup> RP 1260, 1262. Prior to February 20, 2017, C.H never had this type of bruising on his head. RP 1261-62, 1266. The defendant stated he would no longer place C.H. in a crib at the Mobley residence. RP 1262. At that time, Ms. Henry was satisfied with the defendant's explanation. RP 1263, 1337, 1353.

On February 25, 2017, the defendant dropped C.H off at Ms. Henry's apartment and remarked to her that C.H. had bit his lip while he had thrown C.H. into the air. RP 1265. C.H. had not previously had a cut lip. RP 1265. Ms. Henry photographed that injury. RP 1273-74.

The next day, on February 26, 2017, the defendant babysat C.H. RP 1269, 1482, 1485. Ms. Mobley worked at the Money Tree on that date. RP 1482. Other than the defendant and C.H., the only other individuals present at the Mobley home that day were the Mobley children. RP 1485, 1487. The prior bruising had healed by this date. RP 1273. Ms. Henry packed a diaper bag for C.H. before leaving for work. RP 1272, 1274-75. The defendant picked up Ms. Henry and C.H. around 9:45 a.m. RP 1277. C.H. was placed

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<sup>3</sup> Ms. Henry did not have a crib in her apartment. RP 1261. Rather, she had a bassinet. RP 1255. C.H. never struck his head on the bassinet. RP 1255.

in a car seat and began crying and screaming, and continued to cry as Ms. Henry was dropped off for work at the Money Tree. RP 1278-79. Ms. Henry left work early around 5:00 p.m. because of an eye complication and a headache; she went to Holy Family Hospital. RP 1280, 1338. In conjunction with other medication, Ms. Henry was administered Benadryl which caused her to become drowsy. RP 1610, 1614, 1619. However, Ms. Henry was alert and oriented. RP 1619.

While at the hospital, Ms. Henry received a telephone call from the defendant. RP 1283. The defendant remarked that C.H. slept all day and had not eaten anything. RP 1283. Ms. Henry had never known C.H. to sleep all day or not eat. RP 1283. The defendant volunteered and sent a photograph of C.H. to Ms. Henry. RP 1283. The manner of how C.H. was positioned in the photo was different than how C.H. normally slept. RP 1284. The defendant had never previously sent a photo of C.H. to Ms. Henry, or called or texted her while he babysat C.H. RP 1285. The defendant volunteered to keep C.H. overnight if Ms. Henry remained in the hospital. RP 1287.

In the interim, Ms. Mobley got off work around 7:30 p.m. RP 1502. The defendant, Ms. Mobley, and their children drove to the defendant's parents' house. RP 1524. Upon their arrival, the defendant carried C.H. into the home and directly to an upstairs bedroom. *Id.* During the evening, a family member suggested that someone check on C.H.; the defendant

accommodated that request and was the only person to check on C.H. while at his parents' house. RP 1532, 1540, 1899-1900, 1903. The defendant remarked that C.M. was breathing heavily because he had asthma. RP 1901, 1922-23. C.H. was wrapped in a blanket and taken out of the house by the defendant. RP 1906, 1923. Thereafter, the defendant put C.H. into the Mobleys' vehicle. RP 1540. C.M. did not wake or cry on the drive to the defendant's parent's residence, during the entirety of the family visit, or during the drive to the hospital. RP 1524, 1538, 1543, 1900, 1909, 1952.

Ms. Henry was discharged early from the hospital between 9:00 p.m. and 9:30 p.m. RP 1288-89. The defendant and Ms. Mobley volunteered to pick up Ms. Henry. RP 1288. After her hospital visit, Ms. Henry was very tired due to an early start in the day and the medications administered to her at the hospital. RP 1289. When Ms. Henry entered the Mobleys' car, Ms. Mobley uncharacteristically sat in the rear seat next to C.H.; Ms. Mobley usually sat in the front seat and Ms. Henry sat in the back seat next to C.H. RP 1290-91. On the way to Ms. Henry's residence, C.H. made no noises and did not cry even when Ms. Henry closed the car door. RP 1292-93. C.H. normally awakened when he heard Ms. Henry's voice and he "fussed" when placed inside a car. RP 1293, 1495.

When they arrived at Ms. Henry's residence, Ms. Henry moved to take C.H. out of the car; however, the defendant told Ms. Henry he would

carry C.H. into her apartment. RP 1295, 1546. C.H.'s head oddly dropped as the defendant removed him from the car and C.H. remained quiet. RP 1294. The defendant brought C.H., who was wrapped in a blanket, into the apartment; the defendant did not turn the apartment lights on and stated that C.H. was heavily sleeping. RP 1295. The defendant remarked that he attempted to teach C.H. to walk down the stairs despite that C.H. was unable to crawl or walk during that time. RP 1295-96. When Ms. Henry attempted to kiss C.H., the defendant put his hand up and directed Ms. Henry to let C.H. sleep. RP 1296. Ms. Henry did not want to disturb or wake C.H. RP 1296. Ms. Henry went to bed and woke up after midnight to give C.H. his nighttime feeding. RP 1297. Generally, C.H. awoke and cried before his feeding. RP 1297. Ms. Henry tried to awaken C.H.; however, C.H.'s face was ice cold and he did not appear to be breathing. RP 1297. Ms. Henry attempted CPR and called 911. RP 1298-99.

On February 27, 2017, at approximately 2:50 a.m., Spokane Police officers responded to Ms. Henry's address. RP 933, 935, 950. Upon their arrival, Ms. Henry was loudly crying inside her apartment;<sup>4</sup> an officer entered that apartment and observed C.H. was on his back in the living room laying on several blankets. RP 935, 937, 940, 947, 980-81, 987, 1006; Exs.

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<sup>4</sup> The structure was a house converted into apartments. RP 975.

P-49-P-52 (RP 1676-77). Officers began applying infant CPR on the child until fire department personnel arrived on scene; Ms. Henry remained frantic and in a panic. RP 936, 939, 951-52. C.H. had bruising on both sides of his cheeks, on his forehead, several abrasions on his nose, and markings on his back. RP 940-41, 963, 979, 998-1000.

The fire department determined C.H. was deceased. RP 959-61. C.H. was wearing a shirt (sized for three months) and had an unsoiled diaper. RP 988-89, 1161. At that time, C.H. regularly wore apparel for age 12 months; C.H. did not wear apparel for a three-month old infant.<sup>5</sup> RP 1301, 1496. C.H., was almost 10 months old at the time. RP 980. Ms. Henry remained upset and confused but was cooperative and helpful to the officers. RP 981-82. She agreed to be taken to the police station to be interviewed. RP 982, 993-94. During the interview around 4:27 a.m., Ms. Henry continued crying and appeared disoriented at times; she consented to a search of her apartment and her cell phone. RP 995, 1178-80, 1182.

Inside Ms. Henry's living room, a diaper bag, a bottle of Similac formula, and Ms. Henry's cell phone were observed by law enforcement. RP 989-92, 1007. A playpen was found in the bedroom; the residence was not well-kept. RP 1009-10. The diaper bag, a Winnie-the-Pooh blanket, and

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<sup>5</sup> One of the Mobley children wore apparel sized for the three-month age range. RP 1497.

Ms. Henry's cell phone were collected. RP 1006, 1185-86. The diaper bag contained a pair of blue infant corduroy pants, red socks with a Mickey Mouse emblem, and an "infant" sized red, white, and blue checkered shirt. RP 1013. The shirt was "sopping wet" upon inspection; there was reddish staining on the front of the shirt. RP 1013, 1191-93.

Later that morning, around 8:15 a.m., on February 27, 2017, officers responded to the defendant's residence at 1906 East Weile in Spokane. RP 1015, 1020. The defendant, Jenifer Mobley, and their children resided at that address. RP 1016. The defendant responded to the knock at the door and was wearing a dress shirt, a tie, and dress pants. RP 1020. When asked if he could speak with the officers, the defendant said he was busy at the moment and asked if he could speak with the officers at a later time. RP 1021, 1023. When the defendant was told that it pertained to an important matter, the defendant turned and walked into the kitchen inside the residence. RP 1024. Ms. Mobley then invited the officers into the residence. RP 1022. The defendant and Ms. Mobley were advised that C.H. was deceased and the defendant's face "went from a flush color to pale white." RP 1025.

Ultimately, law enforcement obtained a search warrant for the Mobley residence and searched it on February 27, 2017. RP 1029, 1134, 1155-56, 1166. A Verizon smart phone, a Winnie-the-Pooh blanket, and a

onesie that had staining (located on some wet towels in the TV room) were collected by detectives. RP 1136, 1138, 1140, 1779, 1781-82. Inside an upstairs child's bedroom, officers observed a reddish stain on a bed sheet inside a crib which appeared to be blood. RP 1141-42, 1767; Exs. P-93, P-95, P-96 (RP 1144-45). The bed sheet was also collected by a detective. RP 1146-47, 1767.

Additionally, a Money Tree work schedule (dated February 19, 2017, through March 4, 2017), a Department of Social and Health Services letter addressed to Ms. Henry, which authorized Ms. Mobley to provide daycare for C.H., and a child daycare log were collected from the Mobley residence.<sup>6</sup> RP 1042, 1046-48, 1050, 1052, 1115, 1161.

During the investigation, law enforcement obtained photographs from Ms. Henry's cell phone, which she took of C.H. (time/date stamped) during the several weeks C.H. was in the care of the defendant. RP 1053-55.

- C.H. did not have any apparent injuries on the photographs taken on February 16, 2017; however, photographs taken of C.H., by Ms. Henry on February 20, 2017, between 11:04 p.m. and 12:09 a.m., depicted bruises and other injuries to C.H.'s face. RP 1066-68, 1070, 1103; Exs. 10-24 (RP 1065, 1068-71).

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<sup>6</sup> Detective Craig Wendt compared the Money Tree work schedule dates and times and the daycare log dates and times to the dates and times the photographs were taken. RP 1054-56.

- Ms. Henry and Ms. Mobley worked overlapping shifts at the Money Tree on February 20, 2017, between 2:00 p.m. and 11:00 p.m. RP 1068. Ms. Mobley worked from 5:30 p.m. to 10:00 p.m. and Ms. Henry worked from 2:30 p.m. to 10:30 p.m. on that date. RP 1057, 1107, 1118-19. Per the daycare logs,<sup>7</sup> C.H. was at the Mobleys' residence between 2:00 p.m. and 11:00 pm on February 20, 2017. RP 1068.
- Photographs taken of C.H. on February 25, 2017, at 7:06 a.m. showed fading and less prominent bruising. RP 1071. The Money Tree work schedule showed that Ms. Henry worked 10:00 a.m. to 6:00 p.m. and Ms. Mobley worked from 8:30 a.m. to 7:00 p.m. on that date. RP 1072. The defendant admitted watching C.H. on February 25, 2017. RP 2041-42.

Detectives observed that the defendant was wearing a ring at the time law enforcement contacted him on February 27, 2017; the ring had four raised corners which held a stone in place. RP 1079-80. The four prongs that held the stone in place on the ring were similar in size and distance to the pattern injury to the left side of C.H.'s nose. RP 1080, 1208-09, 1212. The ring was later collected and shown to the jury. RP 1208-10. Ms. Henry did not wear any rings. RP 1301.

C.M. was the defendant's daughter and turned eight-years-old on November 2, 2019. RP 1734-36. C.M. observed both the defendant and Ms. Mobley babysit C.H. RP 1740. C.M. and the defendant became irritated during C.H.'s daycare visits because C.H. routinely attempted to crawl

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<sup>7</sup> The daycare log contained the dates and times the Mobleys watched C.H. between February 1, 2017 and February 25, 2017. RP 1105-06. Based on the log, the Mobleys did not watch any other children during this period. RP 1117.

underneath a couch in the Mobley living room. RP 1743. When C.H. cried at the Mobley residence, the defendant placed him in a car in the Mobley garage. RP 1744. C.H. was very loud when he cried. RP 1747. When the defendant babysat C.H., no other adults were present. RP 1815-16. After remarking several times on the stand that discussing C.H and her father made C.M. sad, and that she only wanted to answer questions about the “happy times,” C.M. testified she observed her father stand and move his foot from left to right over C.M. at the Mobley residence. RP 1813-14, 1816, 1819.

Washington State Patrol DNA Scientist Nathan Brueschoff analyzed evidence collected by law enforcement; namely, C.H.’s one piece garment, which had observable blood stains and was collected from a heap of wet towels in the Mobley home,<sup>8</sup> the crib sheet collected at the Mobley residence,<sup>9</sup> the defendant’s wedding ring, C.H.’s reference blood sample, and the defendant’s reference DNA sample. RP 1171, 1362-63, 1367-68, 1386, 1479. Brueschoff found two separate areas of blood (the rear mid-

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<sup>8</sup> See RP 1160, 1167, 1171, 1203, 1207, 1367.

<sup>9</sup> See RP 1368.

back and lower middle interior) on C.H.'s one-piece garment which matched C.H.<sup>10</sup> RP 1374-76, 1378-79.

The scientist further found human blood located on two separate areas on the crib sheet collected from the Mobley residence. RP 1380-81, 1398. Both samples were a mixture with the major contributor being C.H.<sup>11</sup> RP 1382. Finally, the scientist determined the DNA profile for the defendant's wedding ring was too complex for analysis and it was inconclusive. RP 1384. Upon further analysis, the scientist excluded C.H. from the sample. RP 1387. The scientist opined that it is possible to remove DNA if a person washes his or her hands. RP 1387.

On February 28, 2017, Spokane County Medical Examiner Sally Aiken performed an autopsy on C.H. RP 1408, 1413-14, 1418. At the time of autopsy, C.H. weighed 22 pounds, and his height was 29 and one-quarter inches. RP 1443. C.H. was above the 75<sup>th</sup> percentile in growth averages. RP 1443. His toxicology screen was negative. RP 1445. C.H.'s stomach was empty at the time of autopsy. RP 1442. He had not eaten anything or had

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<sup>10</sup> “[T]he estimated chance of randomly selecting someone from the U.S. population with a matching profile is approximately 1 in 179 nonillion.” RP 1380.

<sup>11</sup> “[T]he estimated chance of selecting someone randomly from the U.S. population with a matching profile is approximately 1 in 170 nonillion.” RP 1383. Regarding the minor contributor to those samples, the scientist concluded that the minor contributors were inconclusive. RP 1402-03. The scientist stated: “So I can’t tell you whether they’re the same person [as the major contributor] or a different person. There’s just not enough information present to do that.” RP 1403.

anything to drink for a length of time before death. RP 1442. In addition, C.H. had not urinated or had a bowel movement for a certain time based upon the contents of his diaper. RP 1455. Dr. Aiken opined that an unconscious person does not eat food or drink liquids.<sup>12</sup> RP 1457-58.

Dr. Aiken observed bruising and a small, linear pattern injury on the right side of C.H.'s abdomen (near his belly button) and internal injuries to the left side of his abdomen (approximately 80 percent of the time this type of injury is caused by a blow to the abdomen). RP 1420-24. These injuries were nonaccidental in that they were blunt impact injuries and were not the type of injuries normally observed on an infant. RP 1423, 1425. C.H. also had an injury to his right lung in proximity to the injuries to the upper abdomen, hemorrhaging on the upper liver, a blunt force injury and a laceration to the large bowel, and hemorrhaging to the left kidney. RP 1424-26, 1458. The doctor also observed that C.H. had a tiny contusion on his left wrist and a small abrasion near his fingernail on his ring finger; both injuries were caused by blunt force. RP 1426-27. A pattern injury was located on the left side of the bridge of C.H.'s nose (described as four small dots that formed a square approximately one-quarter inch in diameter). RP 1427-28.

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<sup>12</sup> For that matter, when Ms. Mobley babysat C.H. rather than the defendant, she would give him both a morning and afternoon bottle during the day, and other snacks. RP 1492.

An additional contusion from the hairline to the bridge of the nose was noted on the left side of C.H.'s forehead; in addition, two additional bruises and scabs were documented across his forehead. RP 1428-29. Moreover, C.H. had bruising and two scabs on his left cheek. RP 1428-29. Furthermore, hemorrhaging was seen throughout all layers of both C.H.'s retinas, which is associated with nonaccidental trauma. RP 1439-40.

More so, the doctor observed a bruise and scrapes on the right of C.H.'s right forehead. RP 1429-30. There was also a contusion and a linear scab seen on C.H.'s right cheek. RP 1430. C.H.'s inner, lower left lip had two abrasions caused by his lip impacting with his teeth; this injury likely resulted from blunt force. RP 1430. C.H. had a healing injury (a scratch) on the right side of his face. RP 1431. A very small pattern injury, in the shape of a square, and bruising was documented on his forehead. RP 1431-32, 1472. None of the scratch marks observed on C.H.'s stomach was caused by climbing up or down stairs. RP 1468.

Based upon the doctor's internal examination, C.H. had various levels of hemorrhaging of his neck and around the spine and spinal cord, which was caused by blunt force. RP 1458-59. Furthermore, C.H. had a large, subdural hemorrhage on the back of his head which was new and had no signs of healing; there were multiple impact sites to the back of C.H.'s head which were caused by blunt force and were nonaccidental. RP 1434-

37. Upon removal of C.H.'s brain, Dr. Aiken observed that it was swollen, which was caused by the brain being pushed into the spinal canal. RP 1438-39. There was also evidence that the brain had previously hemorrhaged prior to the most recent, new hemorrhaging. RP 1448.

Dr. Aiken found that the injuries to the abdomen, back of the head, and the left wrist were all new injuries (no signs of healing). RP 1447. The injuries to C.H.'s face had different stages of healing. RP 1455. The doctor reviewed the photographs of C.H.'s injuries taken by Ms. Henry on February 20, 2017. RP 1464. The older bruising found at autopsy corresponded to the location of the injuries documented on the photographs taken on February 20, 2017.

Dr. Aiken attributed death to a "bilateral subdural hemorrhage due to blunt impact to [C.H.'s] head." RP 1446. The doctor stated: "So typically, with that injury, infants are – and I'm talking about the subdural hemorrhage, infants are almost immediately unconscious, and as the brain swells, they remain unconscious, and then when herniation occurs, they die." RP 1453. C.H. would have developed pneumonia, resulting in C.H. coughing, gagging or having difficult or loud breathing before his death. RP 1454. Dr. Aiken roughly estimated C.H. suffered between 15 and 20 blows. RP 1447. Dr. Aiken concluded that none of C.H.'s injuries, outside of one or two on his forehead, would have resulted from C.H. hitting his head on

a crib. RP 1468. Dr. Steven Rostad, a board-certified pathologist, analyzed C.H.'s brain tissue and a part of his spinal cord and dura (layers which cover the brain), and concluded that C.H. had suffered traumatic brain injury. RP 1695-96, 1699-1700, 1706.

After autopsy, Dr. Aiken looked at the defendant's wedding ring and believed the ring was consistent with the pattern injury observed to the left side of C.H.'s nose. RP 1432. The stone had four extending pieces around a square which was consistent with the nature and size of C.H.'s injury. RP 1432.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT PERMIT THE DEFENDANT TO INTRODUCE PURPORTED ALTERNATIVE SUSPECT EVIDENCE REGARDING JEANYNES BELL.**

The defendant named Jeanynes Bell as a third successive, potential alternative suspect. Ms. Bell was not at or near the victim or the crime scene, nor did she have any opportunity to inflict the fatal blows that killed C.H. Any alleged threats made by Ms. Bell against Ms. Henry or C.H., without more, did not constitute relevant, admissible alternative suspect evidence. The trial court did not abuse its discretion.

#### *Standard of review.*

A trial court's decision on the admission of alternative suspect evidence is reviewed for manifest abuse of discretion. *State v. Franklin*, 180

Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Initially, the defense moved the trial court to admit alternative suspect evidence regarding Ms. Henry. RP 72; CP 1020-25. After argument, the trial court denied, in part, that motion. RP 100-04. The defendant does not assign error to that ruling.

The defendant then named Ms. Henry's daughter [A.],<sup>13</sup> who was five-years-old at the time of the murder, as his second named alternative suspect. RP 78, 84-85, 91-92, 96, 101-02, 722-23, 726-27, 729; *see also* RP 733-34 (specifically named [A.] as an alternative suspect).

Subsequently, the defense moved to admit evidence regarding a third alternative suspect; namely, Jeanynes Bell. The defendant alleged that Ms. Bell had threatened and stalked Ms. Henry; Ms. Bell was jealous of C.H. because he was conceived prior to Ms. Bell's marriage to C.H.'s father; Ms. Bell contacted Ms. Henry at her work place; Ms. Bell referred to C.H. in a racially abhorrent manner to an associate (date unknown) and sent racially repugnant text messages to Ms. Henry between September 2016 and January 2017; Ms. Bell suggested that Ms. Henry should kill

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<sup>13</sup> The child's last name was not proffered during the litigation.

herself; and Ms. Bell was in Spokane between February 26, 2017, and February 27, 2017, but her exact whereabouts were unknown. CP 1216-18.<sup>14</sup> The defendant further alleged that in early February 2017, Ms. Henry texted C.H.'s father exclaiming she did not want Ms. Bell to kill C.H; and no DNA or trace evidence was located inside Ms. Henry's residence. CP 1216-18; *see* RP 877-886 (Defense counsel's argument).

The trial court exercised its discretion and rejected the proposed alternative suspect evidence because it failed to connect Ms. Bell to the killing. After reviewing the probative value of the evidence and its prejudicial effect and whether the proposed evidence created a reasonable doubt regarding the defendant's guilt, the court found: the alleged threats made by Ms. Bell were primarily directed at Ms. Henry; there was no evidence presented that Ms. Bell was at Ms. Henry's apartment at the time of the murder; there was no evidence that Ms. Bell acted on any of her alleged threats; and there was no evidence that Ms. Bell had contact with or ever saw C.H. CP 1665.<sup>15</sup> Ultimately, the court held that the defendant failed to show "a non-speculative, 'clear nexus' between [Ms.] Bell and the charged crime." CP 1665.

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<sup>14</sup> Defendant's supplemental motion in limine re: Jeanynes Bell other suspect evidence.

<sup>15</sup> Findings of Fact and Conclusions of Law re: other suspect evidence.

A defendant bears the burden of establishing the relevance and materiality of “other suspect” evidence. *State v. Starbuck*, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016). In *Starbuck*, this Court outlined the parameters for admission of alternative suspect evidence:

As the proponent of the evidence, the defendant bears the burden of establishing relevance and materiality. In establishing a foundation for admission of “other suspect” evidence, the defendant must show a clear nexus between the other person and the crime. The proposed evidence must also show that the third party took a step indicating an intention to act on the motive or opportunity.

*Id.* at 752 (internal citations omitted).

Importantly, the inquiry focuses on whether the evidence tends to create a reasonable doubt as to the defendant’s guilt, and not on whether it establishes a third party’s guilt beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 381. Accordingly, the threshold analysis for “other suspect” evidence is a focused relevance inquiry, reviewing the evidence’s materiality and probative value for “whether the evidence has a logical connection to the crime.” *Id.* at 381-82. Evidence is relevant if it makes “the existence of any fact that is of consequence to the determination of the action more probable or less probable.” ER 401. Relevant evidence is generally admissible at trial, but can be excluded where its value is outweighed by other considerations such as misleading the jury or wasting

time. ER 402, 403. A criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence. *Starbuck*, 189 Wn. App. at 750.

A showing that it was possible for the third party to commit the crime is insufficient. *State v. Rehak*, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). The proposed evidence must also show that the third party took a step indicating an intention to act on the motive or opportunity. *Id.* However, evidence that merely establishes a motive to commit the crime is insufficient to establish the connection. *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933); *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). Likewise, mere speculation does not meet this standard. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004).

For that matter, the mere fact that someone sent a “hostile” text message to a victim is insufficient for admission of other suspect evidence. In *State v. Wade*, 186 Wn. App. 749, 346 P.3d 838, *review denied*, 184 Wn.2d 1004 (2015), the defendant was convicted of a murder. The “other suspect” evidence focused primarily on the victim’s ex-boyfriend. *Id.* at 763. The former boyfriend had assaulted the victim several years earlier, had a no-contact order in place with the victim, and left “implied threats” on her voicemail three months before the murder. *Id.* at 765. There was no

evidence the ex-boyfriend was at the victim's apartment at the time of the killing. *Id.* at 765-66.

Division One of this Court held the "other suspect" evidence was not admissible, observing that the trial court "properly focused solely on the connection of the proffered other suspect evidence to the crime." *Id.* at 766. The fact that the ex-boyfriend was a "bad actor" with a violent history and "a motive to harm her" was not enough. *Id.* at 766-67. The court noted that there was "no physical evidence connecting" the boyfriend to the murder and "no evidence" that he "was anywhere near" the "apartment when the crime occurred." *Id.* at 767. Accordingly, there was no evidence leading to a "nonspeculative" link between the crime and the ex-boyfriend. *Id.*

This case is factually the same. The defendant failed to present *any* evidence that put Ms. Bell at the scene, or even in the general vicinity before, during, or after the murder. At most, the defendant could only allegedly place Ms. Bell in the Spokane area at the time of the murder. Moreover, Ms. Bell did not have the opportunity to commit the murder as C.H was in the charge of only the defendant and Ms. Henry before his death. The fact that Ms. Bell allegedly posed threats toward Ms. Henry and had an on-going dispute with her was irrelevant. There was no evidence that Ms. Bell could physically commit the murder. Therefore, the trial court had a tenable basis to exclude the defendant's proposed evidence. This claim fails.

**B. THE SEARCH WARRANT WAS SUFFICIENTLY PARTICULAR REGARDING THE DNA COLLECTION AS IT WAS AS SPECIFIC AS THE CIRCUMSTANCES PERMITTED.**

The trial court properly denied the defendant's motion to suppress the search warrant authorized by the superior court on February 27, 2017, allowing law enforcement to search for and seize "DNA evidence to include any body fluids, hair, blood, saliva, vomitus and/or other bodily fluids" from the premises located at 1906 East Weile, Spokane, Washington (the Mobley residence) and a 2015 Ford Explorer, bearing Washington vehicle license (ATA6972) (the Mobley vehicle). CP 968-70. The search warrant had sufficient particularity to limit the seizure of DNA collected by law enforcement. *See* CP 968-70. Specifically requesting a search for only C.H.'s DNA in the described areas of the search, as argued by the defendant, would have been unrealistic and impossible under the circumstances. Law enforcement had no on-site forensic means available to determine whose particular DNA it collected from the Mobley residence or their vehicle.

*Standard of review.*

Whether a warrant meets the Fourth Amendment's particularity requirement is reviewed de novo. *State v. Perrone*, 119 Wn.2d 538, 546, 834 P.2d 611 (1992). De novo review gives great deference to the issuing judge's assessment of probable cause and resolves any doubts in favor of

the search warrant's validity. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

A general warrant is one that vests an officer with “unbridled discretion” to conduct “a general exploratory, rummaging in a person’s belongings.” *Coolidge v. New Hampshire*, 403 U.S. 443, 447, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The particularity requirement requires “a ‘particular description’ of the things to be seized.” *Id.* at 467. Thus, “[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927).

However, the degree of specificity required in a search warrant varies with the circumstances and the type of items involved. *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997); *Perrone*, 119 Wn.2d at 546. A description is valid if it is as specific as the circumstances and the nature of the activity or crime under investigation permits. *Stenson*, 132 Wn.2d at 692; *Perrone*, 119 Wn.2d at 547. A reviewing court takes into consideration practicality, necessity, and common sense. *Perrone*, 119 Wn.2d at 549. “The fact that a warrant lists generic classifications ... does not necessarily result in an impermissibly broad warrant.” *Stenson*, 132 Wn.2d at 692.

In *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001), *cert. denied*, 534 U.S. 1000 (2001), the defendant was convicted of kidnapping, raping, and murdering a 7-year-old girl. He challenged the warrant to search his van for trace evidence from the victim on particularity grounds, claiming “because the ... search warrant merely authorized a search for trace evidence it failed to meet the constitutional requirement of particularity.” *Id.* at 754.

Our high court disagreed and concluded the warrant authorizing a search for “trace evidence” did not amount to a general warrant because “[a]s a term of art, ‘trace evidence’ means ‘small items of a foreign material left on another,’ of which there are many possible types, including ‘blood, hairs, [and] fibers.’” *Id.* at 1018 (citations omitted). Within the context of the circumstances of that case, the Court reasoned that “[d]ue to the inherent size and multiplicity of kinds of trace evidence [in a murder investigation], their prior identification in a warrant is impossible and thus a generic classification ... is appropriate.” *Id.* Importantly, the Court found:

Merely because the search for trace evidence involved the search of many items in the van for trace evidence, including parts of the walls and floors of the vehicle, does not therefore make the search a general, exploratory rummaging in a person’s belongings prohibited by the Fourth Amendment.

*Id.* at 755 (citations omitted).

Similarly, in *State v. Reid*, 38 Wn. App. 203, 687 P.2d 861 (1984), a search warrant authorized police to search a murder suspect's house and car for "a shotgun, ammunition for the shotgun, a dark leather or vinyl jacket, a pillowcase or other bedlinen with a pattern of daisies, leaves, and strawberries on it, nitrates, and any other evidence of the homicide." *Id.* at 211. Reid argued on appeal that the "any other evidence of the homicide" language allowed the police to conduct a general search. *Id.* at 212. Division One of this Court disagreed and found the phrase "any other evidence of the homicide" specifically limited the warrant to the murder under investigation. *Id.* It also found that the specific items listed provided guidelines for the officers conducting the search. *Id.* Accordingly, it held "these limitations were adequate to prevent a general exploratory search." *Id.*

In *State v. Lingo*, 32 Wn. App. 638, 641, 649 P.2d 130 (1982), where the defendants were convicted of assaulting and raping a woman in their camper truck, the warrant authorized a search of the vehicle:

[f]or any and all evidence of assault and rape including but not limited to bedding, clothing, female clothing, blood stains, semen stains, and residue or other residue of sexual activity; human hair and any and all weapons that may have been used in the commission of said crimes.

*Id.* at 640.

Division Two of this Court rejected the defendants' claim the warrant was overbroad. The court reasoned the wording "any and all evidence" was specifically limited to the crimes of assault and rape, and additional restrictions in the form of listing particular items provided limitations that adequately prevented any danger of a general search and seizure of the wrong property. *Id.* at 642.

The defendant's reliance on *State v. Higgins*, 136 Wn. App. 87, 147 P.3d 649 (2006), is misplaced and is easily distinguished. In *Higgins*, an officer obtained a search warrant authorizing seizure of "certain evidence of a crime, to-wit: 'Assault 2nd DV' RCW 9A.36.021.'" *Id.* at 90. The warrant did not contain a list of the items to be seized, did not incorporate the affidavit describing the items to be seized, and did not state which alternative means of second-degree assault was under investigation. *Id.* Division One held that the warrant was overbroad on several grounds, including its failure to specify the specific crime in question, that it contained no list of examples to limit the search, and it allowed the seizure of innocuous items. *Id.* at 94.

In the present case, the defendant's real complaint is that the warrant did not limit the seizure of DNA to only that of the victim; such an argument elevates form over substance. The defendant fails to explain how officers would have distinguished the victim's DNA from others at the crime scene

or in the Mobleys' vehicle without on-scene scientific analysis if the warrant had only allowed seizure of the victim's DNA. Indeed, once suspected DNA (in the form of blood, saliva, hair, vomitus, or other bodily fluids) is collected, it necessarily requires a trained DNA scientist in a forensic setting to utilize a DNA kit, specialty instrumentation, and eventual analysis to differentiate one individual's DNA from another. In that regard, DNA is not readily apparent and is visually undecipherable at a crime scene as compared to tangible objects such as books, documentation, contraband, controlled substances, money, firearms, and the like, which can be readily identified at a crime scene.

The description of the premises, the vehicle and the items to be seized related to DNA appropriately limited the discretion of the officers when they executed the search warrant and limited the search to biological samples and fluids containing potential DNA evidence. The warrant did not vest the officers with unbridled discretion to conduct an exploratory rummaging through defendant's property. Rather, the warrant described in both specific and inclusive terms, as the circumstances permitted, what was to be seized – potential DNA evidence. This claim fails.

**C. C.M., A SEVEN-YEAR-OLD WITNESS, WAS COMPETENT TO TESTIFY AT THE TIME OF TRIAL. THE DEFENDANT FAILS TO ESTABLISH OTHERWISE.**

The defendant does not demonstrate the trial court manifestly abused its discretion when it found that C.M. was competent to testify.

*Standard of review.*

An appellate court reviews the trial court's determination of competency to testify for a manifest abuse of discretion. *State v. Brousseau*, 172 Wn.2d 331, 340, 259 P.3d 209 (2011). Our Supreme Court has recognized that "[t]here is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness." *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005), *as amended* (July 27, 2005). The witness's manner, capacity, and intelligence "are matters that are not reflected in the written record for appellate review." *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967); *see also State v. Borland*, 57 Wn. App. 7, 11, 786 P.2d 810, *review denied*, 114 Wn.2d 1026 (1990), *disapproved on other grounds by State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997) ("[t]he trial judge is in a position to assess the body language, the hesitation or lack thereof, the manner of speaking, and all the intangibles that are significant in evaluation [of competency] but are not reflected in a written record").

ER 601 provides, “every person is competent to be a witness except as otherwise provided by statute or by court rule.” Accordingly, under RCW 5.60.050, all witnesses, children and adults alike, are presumed competent until proved otherwise by a preponderance of the evidence. *Brousseau*, 172 Wn.2d at 341. A person challenging the competency of a child witness “has the burden of rebutting [the] presumption with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly.” *State v. S.J.W.*, 170 Wn.2d 92, 102, 239 P.3d 568 (2010). A child’s age is not determinative of the child’s competency to testify. *Woods*, 154 Wn.2d at 617.

A young child is competent to testify if she: (1) understands the obligation to speak the truth on the witness stand; (2) has the mental capacity, at the time of the occurrence concerning which she is to testify, to receive an accurate impression of it; (3) has a memory sufficient to retain an independent recollection of the occurrence; (4) has the capacity to express in words her memory of the occurrence; and (5) has the capacity to understand simple questions about the occurrence.

*Id.* at 618.

Here, the record does not reflect that the defendant met his burden.

At the hearing, the defendant did not contest *Woods*’ factors 1, 2, 4 and 5

cited above.<sup>16</sup> CP 1256 (CL 6). Rather, the defendant argued at the hearing and now on appeal that C.M. could not form an “independent recollection” of the events surrounding the time of C.H.’s death because of improper influence and the passage of time.

*1. Obligation to tell the truth.*

The trial court found that C.M. understood the obligation to tell the truth based upon the court’s review of the forensic interviews of C.M. and based upon her testimony at the time of the hearing. CP 1252 (FF 2); *see* RP 243-46. At the time of hearing, C.M. was seven-years-old; her birthday is November 2, 2011. RP 246. At the time of the incident, C.M. was five-years-old. RP 267.

*2. Mental capacity to receive accurate information.*

The court found C.M. was very bright and articulate, and used a variety of words which established her maturity and understanding of the English language. CP 1253 (FF 4, 5). C.M. also demonstrated her ability to correct the forensic interviewer when she believed the interviewer was wrong. CP 1254 (FF 6). During her testimony at the competency hearing, C.M. remembered specific details about the previous forensic interviews.

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<sup>16</sup> The defendant does not challenge any of the court’s findings of fact regarding competency. Unchallenged findings of fact are verities on appeal. *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012).

CP 1254 (FF 8). C.M. also remembered past events such as birthdays. CP 1254 (FF 7); *see also* RP 1244-51, 254-56, 259-60.

3. *C.M had a memory sufficient to retain an independent recollection of the events leading up to the murder, the capacity to express her memory of those events, and the ability to understand simple questions.*

During her testimony at the competency hearing, C.M. did not remember C.H., “but then recalled he was little and brown, that he cried a lot and had to be put in the garage, where he cried even louder.” CP 1253 (FF 9); *see* RP 256-57. The court concluded that C.M. had the ability to accurately testify and the capacity to both express in words her memory of the occurrence and to understand simple questions. CP 1255 (CL 8). The court also concluded that the testimony of defense expert, Dr. Daniel Reisberg, went to the weight and not admissibility of C.M.’s testimony. CP 1255 (CL 9).

In the trial court’s letter opinion dated May 29, 2019, which predated its findings of fact and conclusions of law, the court remarked:

Regarding [C.M.’s] “memory sufficient to retain an independent recollection of the occurrence,” [C.M.] was questioned about her recollection of her various past birthdays. She remembers details easily. In addition, she remembered the forensic interview she had with the lady asking her questions. She colored with smelly pens, talked about her favorite food, and recalled there were 3 cameras in the room but one of them did not work. During [C.M.’s] hearing testimony, she first testified that she did not remember who [C.H.] was but then recalled he was little and brown. He cried a lot and had to be put in the garage, where he cried even louder. She clearly

recalled the day her Papa was taken by the police. She became very emotional on the stand and had to take a break. Her statement about calming herself down was very mature. She appeared to be recalling a traumatic event for her. It is clear from the evidence that [C.M.] can remember past events. The evidence provided several examples of this.

CP 1171-72.

There are several flaws in the argument regarding the defendant's claim that C.M. lacked a memory sufficient to retain an independent recollection.

First, no one asked C.M. at the competency hearing or at trial whether she remembered or heard her mother allegedly discussing another child homicide with another person, or what she heard or recalled about the event at a shopping mall where words were allegedly exchanged between Ms. Henry and C.H.'s grandmother.<sup>17</sup> Indeed, during cross-examination at trial, C.M. remarked that she did not remember officers speaking with her mother shortly after C.H.'s death. RP 1824.

Even accepting as true that those events occurred, including C.M.'s presence during the initial police interview of Ms. Mobley and hearing various remarks made by adults, there was no evidence produced at the hearing that C.M.'s statement that the defendant took C.H. into the garage,

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<sup>17</sup> See RP 240-51, 254-61 (competency hearing), 1733-54, 1809-27 (trial testimony).

which caused C.H. to cry louder and that she observed her father step on C.H., was the product of any outside influence or that it was introduced by anything other than the actual events as C.M. remembered them.

Second, defense expert Dr. Daniel Reisberg never interviewed C.M. or observed her testimony during the competency hearing. Rather, he based all of his opinions on social scientific studies generally related to the memory of young children. *See* RP 337-38, 341-52, 362-63, 373. Indeed, the psychologist opined during cross-examination that: “I have no view and will offer no view about whether [C.M.’s] memories are factually correct,” and added that he had no opinion on whether C.M.’s factual renditions during the forensic interviews were accurate or that C.M. was influenced by any outside sources. RP 353-54; *see also* RP 384-85. The expert commented: “Whether the risk of confusion [in a young child] actually did produce an error in a particular case is, I assume, up to the finder of fact and not up to me.” RP 354. The psychologist admitted on cross-examination that if a child had witnessed the assault on C.H., it would have been “quite traumatic,” “well-remembered” and “memorable.” RP 358-59. The psychologist remarked that he observed nothing in the data that he reviewed that C.M. had a motive to lie during the forensic interviews or had a history of lying. RP 368.

Notwithstanding that the defense expert could not form a specific opinion regarding C.M.,<sup>18</sup> he cast his oblique opinions in broad generalizations; such opinions were of little value when determining whether C.M. was specifically “influenced” by any outside forces before her forensic interviews, her testimony at the hearing, or that her memory was faulty due to the passage of time. Moreover, all seven-year-old children are different. That is why a trial court is required to hold a child competency hearing because each child is different in terms of maturity, intelligence, age, problem solving, education, and the like. All children cannot be pitched into the same vast empirical, social scientific mold as was argued by the defense counsel at the hearing and indirectly expressed by his expert. Indeed, there is nothing in the record that C.M.’s statements were impacted by any outside force or that her memory was faulty regarding the events surrounding C.H.’s death due to the passage of time or the influence of others.

To the degree that the defendant attempts to persuade this Court to reweigh issues of conflicting testimony, credibility of witness, and the persuasiveness of the evidence, an appellate court defers to the trier of fact

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<sup>18</sup> “[A]n expert’s lack of certainty goes to the weight of the testimony, not its admissibility.” *State v. Lord*, 117 Wn.2d 829, 854-55, 822 P.2d 177 (1991), *abrogated on other grounds by State v. Schierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018).

for those determinations. *Thomas*, 150 Wn.2d at 874-75. Trial courts have wide latitude in determining what weight, if any, to give an expert's opinion. *Matter of Marriage of Sedlock*, 69 Wn. App. 484, 491, 849 P.2d 1243, review denied, 122 Wn.2d 1014 (1993); *Lord*, 117 Wn.2d at 854-55 (weight to be afforded expert is a matter for the trier of fact). A court may "reject expert testimony in whole or in part in accordance with its views as to the persuasive character of that evidence." *Brewer v. Copeland*, 86 Wn.2d 58, 74, 542 P.2d 445 (1975).

In the present case, the trial court was free to accept or reject part or all of the defense expert's opinions. Other than disagreeing with the trial court's decision and the weight, if any, the trial court placed on the defense expert, the defendant offers no substantive argument as to how the trial court erred. Finally, the defendant fails to show how the child provided incompetent testimony at trial. The trial court did not abuse its discretion when it determined C.M. was competent to testify at trial.

**D. THE STATE DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT; ANY CONCEIVABLE MISCONDUCT WAS NOT SO FLAGRANT AND ILL-INTENTIONED THAT A CURATIVE INSTRUCTION WOULD NOT HAVE REMEDIED ANY POTENTIAL PREJUDICE.**

None of the comments made by State during closing or rebuttal arguments were objected to; any claim of prosecutorial misconduct has been waived by the defendant because he has not established there is a substantial

likelihood that the asserted improper remarks affected the jury's verdict, in the context of the total argument made by the State, and that any alleged misconduct could not have been cured by an instruction from the court.

*Standard of review.*

Prosecutors have wide latitude to draw and express reasonable inferences from the evidence in their closing arguments. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). In evaluating a claim of prosecutorial misconduct, an appellate court reviews a prosecutor's remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prosecutorial misconduct is prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012); *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). Prosecutors are presumed to act impartially in the interest of justice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Where a defendant does not object during trial to the alleged misconduct, the claim is considered waived unless the misconduct is “so flagrant and ill-intentioned that it cause[d] an enduring and resulting prejudice that could not have been neutralized by a curative instruction.” *Matter of Phelps*, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018). In *Phelps*, our high court observed it has found prosecutorial misconduct that was flagrant and ill-intentioned only “in a narrow set of cases where [the Court was] concerned about the jury drawing improper inferences from the evidence, such as those comments alluding to race or a defendant’s membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner.” *Id.* at 170.

In that regard, an appellate court evaluates a claim of prosecutorial misconduct by focusing “less on whether the prosecutor’s misconduct was flagrant or ill[-]intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 165-66 (internal quotation marks omitted). The reviewing court considers that “[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *as clarified on denial of reconsideration* (June 22, 1990).

The defendant complains about the following points made by the State both during its opening and rebuttal closing arguments:<sup>19</sup>

*Now, yes, we have prior injuries. Could the injuries that were inflicted at this time or on these times have been done by a different person than the person who ultimately -- who inflicted the fatal blows? Theoretically. But how likely is that? Is this more of a pattern of hurting baby [C.H.] or were there -- what would be the two chances, what would be the chances of two people<sup>20</sup> in the universe assaulting baby [C.H.] within a week or so in the same manner? Incontestable.*

Now, there's some other clues that were discovered during the course of the autopsy. We see a pattern injury. Now, we see four dots, and Joshua Mobley has a ring with -- that is consistent with causing those injuries. There's been a lot of discussion about how definitively anyone can say that that ring caused the injuries. And, no, nobody can for sure say that that ring caused the injuries to [C.H.]' nose. Nobody can say that the defendant backhanded him and struck him in the bridge of the nose with his ring, but they can't rule it out either. And you have all the photographs of Ms. Henry's house and the defendant's house, and knowing that she wore no rings, *is there anything else in those two homes that would cause a pattern to this, that's a better fit than the defendant's ring?* And remember, this would have been a movement or not hitting a flat surface, and hopefully, the child was moving in an attempt to get away. So would you expect a full-on four-prong mark under those circumstances? No. But this is pretty close, and it's a good match that it came from the defendant's ring.

RP 2183-84 (emphasis added).

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<sup>19</sup> The deputy prosecutor's asserted offending remarks are italicized. Other statements made by the deputy prosecutor are added to place the alleged misconduct into context.

<sup>20</sup> Presumably, the defendant and Ms. Henry, as C.H. was in the care of both individuals before his death.

The deputy prosecutor also stated:

What can we glean from those clues? Well, could it be that [C.H.] was struck and bled and rendered unconscious, that he was picked up and put on that baby chair and posed so a picture could be taken of him to make it look like he was sleeping rather than on the road to dying. Could it be that efforts were made to wake him up and that's why the towels were wet, that's why his plaid shirt was wet that was found in the diaper bag? And could it be that when he realized he had to pick up his wife from work, then the defendant frantically changed [C.H.] out of the wet shirt and put him in one of his own kids' shirts?

*How else do all these clues fit together? Were we there? No, none of us were there. But what else makes sense with this combination of facts?* Now, we know that whatever happened -- what happened to [C.H.] hurt, it hurt a lot, and we know that his death was not instantaneous, that it took time.

RP 2187-88.

These remarks were not objected to by defense counsel. *See* RP 2179-85. In context, these remarks were preceded by the deputy prosecutor explaining that there were only two people who could have committed the murder and asked the jury to review the "clues." The deputy prosecutor stated, "So look at the first set of clues" regarding what the autopsy revealed. *See* RP 2182. It is apparent the deputy prosecutor asked the jury to review the facts from the autopsy when making its determination. The deputy prosecutor engaged in reasonable deduction to establish the State's burden of proof. The word "clue" is defined as "a piece of evidence leading to a solution." MERRIAM-WEBSTER DICTIONARY 137 (7<sup>th</sup> ed. 2018).

Certainly, the defendant provides no authority that referencing “facts” as “clues” is objectionable, notwithstanding it is his burden is to establish the remarks were flagrant and ill-intentioned and could not have been cured by an instruction.

Moreover, the deputy prosecutor made the argument that there was no evidence presented at trial that the separate assaults, committed on different days against C.H., were committed by more than one person. The deputy prosecutor simply highlighted the consistency of the events and evidence pointing to the defendant’s guilt. This argument, taken in context, did not “pit” the defendant against Ms. Henry. It was uncontested at trial that C.H. was in the care of only two people – the defendant and Ms. Henry – before his death and in the care of the defendant when C.H. was separately assaulted prior to his death. For that matter, the defendant testified and denied assaulting or killing C.H. while the infant was in his care during the approximate two-week period. RP 2024-25, 2030-32, 2036-39, 2047, 2068-69.

The deputy prosecutor’s argument is akin to that made in *State v. Killingsworth*, 166 Wn. App. 283, 269 P.3d 1064, *review denied*, 174 Wn.2d 1007 (2012), where the prosecutor argued that the only “reasonable explanation” for the evidence was the defendant’s guilt. Division One of this Court affirmed the defendant’s conviction, noting that the prosecutor

“did not argue or imply that the defense had failed to offer other reasonable explanations or comment on [the defendant’s] failure to testify. Rather, he simply argued that the evidence did not support any other reasonable explanation.” *Id.* at 291. The court concluded there was no misconduct and that any improper comments were neither flagrant and ill-intentioned nor incurable.

The defendant’s attempt to analogize comments made in other cases such as “fill-in-the-blank” or “declare the truth” to the argument made by the deputy prosecutors in the present case is inapt. For example, in *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), the deputy prosecutor argued to the jury that, “in order to find the defendant not guilty, you have to say ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank.” *Id.* at 424. The *Anderson* court concluded that this statement was improper, in part, because it shifted the burden to Anderson to provide a reason why he was not guilty and that the prosecutor implied that the jury should find Anderson guilty unless it could come with a reason not to do so. *Id.* at 431. Similarly, in *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010), the deputy prosecutor stated, “In order to find the defendant not guilty, you have to say to yourselves: ‘I doubt the defendant is guilty, and my reason is’–blank.” *Id.* at 523. The court concluded that when a deputy prosecutor uses an improper “fill-in-the-

blank” argument, the prosecutor risks reversal of the conviction. *Id.* at 523-24.

The deputy prosecutor in the present case did not argue or imply that the defense had failed to offer other reasonable explanations or attempt to diminish the State’s burden of proof. Nor did the deputy prosecutor assert a “fill-in-the-blank” argument. Rather, the deputy prosecutor argued that the *evidence* did not support any reasonable explanation other than that the defendant killed C.H. A prosecutor is entitled to argue inferences from the evidence and to point out improbabilities or a lack of evidentiary support for the defense theory of the case. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994); *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009); *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). As important, the deputy prosecutor stressed the State’s burden of proof:

Mr. Mobley is presumed innocent. The state bears very high burden of proving to you beyond a reasonable doubt that he is guilty of the charges of second-degree murder, and that we can do that by direct or circumstantial evidence, the Court read you an instruction on that, and that ... evidence can carry equal weight. So direct evidence would be somebody seeing Josh Mobley shaking [C.H.] or striking him so hard that his head flew back. That’s direct evidence, but we don’t have that. But we have lots of circumstantial evidence, all the clues, the breadcrumbs of clues that lead to Josh Mobley as the person who inflicted the fatal blow.

RP 2205.

More so, the jury was instructed both before and after the presentation of the evidence to disregard any remarks, statements, or arguments by the lawyers which were not supported by the evidence. CP 1520; RP 899, 2161. Jurors are presumed to follow the court's instructions. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). The defendant cannot establish any alleged improper remarks could not have been neutralized by an instruction from the court. This argument is waived.

The defendant next complains about the deputy prosecutor's characterization of the assault and murder of C.H.

Perhaps the most difficult thing about this case is that we are all forced to accept something that is really inexplicable, it's painful, and it's bewildering. *Somebody, somebody savagely beat a ten-month-old child to death.* There's no doubt about that. Drs. Aiken and Davis were able to tell us about the injuries to [C.H.'s] body. There were injuries to his abdomen, there was a tear to his large bowel, there were hemorrhages to his small bowel, there was bilateral and retinal optic nerve sheath hemorrhages, there was blunt force trauma to his head, there were facial contusions, there was bilateral subdural hemorrhages, and that [C.H.'s] brain swelled to the point that his skull could no longer contain it, ultimately resulting in death.

RP 2242.<sup>21</sup>

The above remarks were not improper and were based upon the uncontested evidence produced at trial, in the context of the medical examiner's testimony, that C.H. suffered a myriad of violent blows prior to

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<sup>21</sup> See fn. 19 above.

his death. In closing argument, “[p]rosecutors are free to argue their characterization of the facts presented at trial and what inferences these facts suggest.” *Matter of Phelps*, 190 Wn.2d at 167. The deputy prosecutor’s characterization that C.H. was “savagely beaten” was a proper and accurate description of the evidence. Even if improper, the defendant cannot show this remark was so flagrant and ill-intentioned that a curative instruction could not have neutralized any claimed prejudice. The defendant’s claim is waived.

During rebuttal argument, the deputy prosecutor argued:

The evidence does tell us there are only two people that had access, the time, and the opportunity to kill [C.H.]. One of those persons is Crystal Henry. The other is Joshua Mobley. One of those people testified truthfully, and the other did not. *As [C.M.] stated when she was on the stand, somebody is lying.*<sup>22</sup> *It will be your job, as jurors, to decide who is telling the truth and who is not.*

RP 2244.<sup>23</sup>

In relation to those remarks, the deputy prosecutor immediately followed up and read the court’s instruction<sup>24</sup> informing the jury, amongst other things, that they were the sole judges of the credibility of the witnesses

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<sup>22</sup> Without objection, C.M. stated during cross-examination by the deputy prosecutor that she knew the police were going to take her father away, that her father did not kill C.H., and “somebody’s lying about that.” *See* RP 1824-25.

<sup>23</sup> *See* fn. 19 above.

<sup>24</sup> *See* CP 1519-20; RP 2160.

and reviewed the instruction's criteria for determining credibility. RP 2244-45. Importantly, the deputy prosecutor did not state anyone was untruthful during trial but rather reminded the jury of C.M.'s unobjected-to testimony that someone was "lying" regarding the death of C.H., in the context that C.M. did not believe her father killed C.H. The deputy prosecutor reminded the jury it should weigh the credibility of all witnesses.

The defendant primarily relies on *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997), and *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), for support of his argument. In *Fleming*, Division One reversed when the deputy prosecutor told the jury that it must find that the defendants were lying or mistaken in their testimony in order to acquit. 83 Wn. App. at 213. Essentially, the State misstated the burden of proof because it required the defendant to prove something to support an acquittal. In *Johnson*, the defendant argued that the prosecutor's statements required the jury to disbelieve his testimony to acquit the defendant. 158 Wn. App. at 683. However, Division Two concluded that the deputy prosecutor's statement that the jury must believe the defendant's testimony regarding his unwitting possession of the cocaine to acquit him on that basis was an accurate statement of the law insofar as that was the only evidence Johnson presented about his defense and it was not improper. *Id.* at 683-84.

In contrast, in *State v. Wright*, 76 Wn. App. 811, 818, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995), superseded on other grounds by former RCW 9.94A.360(6), Division One analyzed a deputy prosecutor's closing argument that pitted the defendant's veracity against the State's witnesses. The prosecutor argued that, because the two sides presented different versions of the same event, the jury would need to find that the State's witnesses were mistaken if it were to believe the defendant. *Id.* at 824. The appellate court held that when the parties present conflicting factual narratives and witness credibility is central to the case, "there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other." *Id.* at 825.

The instant case is comparable with *Wright*. The deputy prosecutor's short-lived statement during rebuttal argument directed the jury to carefully evaluate Ms. Henry's and the defendant's testimony and their credibility and suggested it was central to the jury's determination. Indeed, both the State's and defense's theory of the case and evidence presented by both sides were diametrically opposed. The State suggested to the jury that it should accept the State's version of the facts which was not improper.

Further, courts have not reversed in circumstances where a curative instruction could have offset any prejudice based on a prosecutor's veracity arguments during closing arguments. *See State v. Wheless*, 103 Wn. App.

749, 758, 14 P.3d 184 (2000), *as amended on reconsideration* (Feb. 5, 2001) (“[o]ur review of the record indicates that although the extent to which the State emphasized the theme of lying during closing arguments was likely improper, it was not so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury”) (internal quotation marks and footnote reference omitted); *State v. Riley*, 69 Wn. App. 349, 351, 354, 848 P.2d 1288 (1993) (in closing argument, the prosecutor stated that, in order to believe Riley’s story, the jury would have to disbelieve the testimony of the officers and gang members. Because Riley did not object to the prosecutor’s improper closing argument, request a curative instruction, or move for a mistrial, Riley did not make a showing that the prosecutor’s misconduct was so egregious that the resulting prejudice could not have been obviated by a curative instruction and the defendant did not meet this burden); *State v. Barrow*, 60 Wn. App. 869, 876, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991) (finding that a curative instruction would have cured the prejudice engendered from similar liar arguments).

Here, the defense did not object to the deputy prosecutor’s passing remark, request a curative instruction or move for a mistrial. When defense counsel fails to object, it “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the

context of the trial.” *Swan*, 114 Wn.2d at 661. Had defense counsel objected to the instance of alleged misconduct, the trial court could have evaluated the objection and issued a curative instruction if needed. The defendant cannot show that an instruction would not have cured or avoided any alleged prejudice. Because an appellate court presumes jurors follow instructions from the court, a curative instruction would have alleviated any asserted prejudice from the argument. *See State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). This claim is waived and has no merit.

*Prearrest silence.*

The trial court conducted a CrR 3.5 hearing on the admissibility of the defendant’s statements to law enforcement. Thereafter, the court entered findings of fact and conclusions of law. CP 1175-81. The defendant does not assign error to any factual findings or conclusions of law, but rather claims the deputy prosecutor committed misconduct. Conclusion of Law 3 states:

As it relates to Mr. Mobley’s initial contact with law enforcement at the Mobley residence on the morning of February 27, 2017, the Court concludes that Mr. Mobley was not in custody and that any statements he made were voluntary, and therefore admissible pursuant to CrR 3.5.

CP 1179.<sup>25</sup>

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<sup>25</sup> *See* Finding of Fact 2 (describing officers initial contact with the defendant and his remark that he was getting ready for work or taking care of his children). CP 1117; RP 1023-25 (trial testimony).

The defendant challenges the following passage from the State's closing argument:

Now, the other clue is from Mr. Mobley himself when contacted by law enforcement. First, he says -- remember, they introduced themselves, hi, we're with the police department. Oh, can we do this later, I'm too busy. What, if anything, strikes you about the first words that come out of this man's mouth? They hadn't even told him why they were there yet, and he's already saying he's too busy.

RP 2197.<sup>26</sup>

The defendant did not object to this argument. Moreover, his claim that the State commented on his "prearrest silence" is not factually or legally accurate. The State did not comment on the defendant's "silence" during its closing argument, but rather highlighted the defendant's prearrest, voluntary statement to the police. "[C]omment" means the State uses the defendant's *silence* to suggest to the jury that the refusal to talk is an admission of guilt. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The defendant does not contend that his statement was the product of custodial interrogation, requiring *Miranda*<sup>27</sup> warnings. Nor does he

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<sup>26</sup> The trial court had previously conducted a CrR 3.5 hearing and subsequently entered written findings of fact and conclusions of law. RP 136-197 (testimony and argument), 419-28 (oral ruling); CP 1175-81 (written findings of fact and conclusions of law).

<sup>27</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *Miranda* warnings are required before custodial interrogation by a state agent. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

explain how his voluntary statement, described above, to the police constitutes “prearrest silence.”

A defendant’s exercise of his Fifth Amendment right to *silence* may not be introduced at trial as substantive evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). “Silence” is defined as “the fact of abstaining from speech (altogether, or on a particular subject); a state or condition resulting from this; muteness, taciturnity.” *United States v. Velarde-Gomez*, 269 F.3d 1023, 1031 (9th Cir. 2001) (internal quotation marks omitted). Rather than remaining “silent,” the defendant willingly chose to make a statement regarding his availability when he first greeted the police.

The trial court determined that the defendant’s prearrest *statement* was voluntary and admissible at the time of trial. The defendant does not challenge that ruling on appeal. The defendant’s statement was not elicited under a constitutionally impermissible circumstance nor was it improper for the deputy prosecutor to use that statement during closing argument. Having failed to object or request a curative instruction, the error is waived because the defendant has not established the deputy prosecutor’s remark was flagrant and ill-intentioned and could not have been cured. It is waived.

If there was constitutional error, it was harmless. When the State’s closing argument directly violates a constitutional right, an appellate court

applies a constitutional harmless error standard. *See, e.g., State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (prosecutor commented on defendant's prearrest silence). A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Burke*, 163 Wn.2d at 222. Under the facts, the deputy prosecutor's comment regarding the defendant's availability to speak with the police was momentary in relation to a lengthy trial, the totality of the State's closing argument, and was only marginally relevant. Any rational trier of fact would necessarily have found the defendant guilty, independent of the State's transient mention of the defendant's availability when first meeting with law enforcement. This claim fails.

**E. INTRODUCTION OF MS. HENRY'S 911 CALL WAS NOT AN ABUSE OF DISCRETION; IF ERROR, IT WAS INVITED AND HARMLESS.**

At the time of the defense motion to exclude Ms. Henry's 911 call after she found her child unresponsive, the defense attorney had previously named Ms. Henry as an alternative suspect. Although the defense may have changed strategies regarding alternative suspects during the litigation, there is nothing in the record that the defense informed the court or the State that it had abandoned that theory. Accordingly, admission of the 911 call was

relevant and not unduly prejudicial to rebut the defense theory that Ms. Henry was responsible for C.H.'s death. Even if there was error, it was invited and did not materially impact the jury's verdict. The trial court did not abuse its discretion.

*Standard of review.*

Admissibility of evidence is within the discretion of the trial court. *State v. Atsbeha*, 142 Wn.2d 904, 913, 16 P.3d 626 (2001). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. An appellate court reviews a trial court's decision as to relevance for manifest abuse of discretion. *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). An appellate court will overturn the court's balancing of the danger of unfair prejudice against the probative value of the evidence "only if no reasonable person could take the view adopted by the trial court." *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560, 564 (2007).

The trial court is in the best position to evaluate the dynamics of a jury trial and the prejudicial effect of a piece of evidence. *Id.* at 648; *State v. Taylor*, 60 Wn.2d 32, 40, 371 P.2d 617 (1962). Accordingly, any error in admitting evidence is grounds for reversal only if, within reasonable

probabilities, the error materially affected the outcome of the trial. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); *see also State v. Gould*, 58 Wn. App. 175, 180, 791 P.2d 569 (1990) (reversible error is found only in the exceptional circumstance of a manifest abuse of discretion because of the trial court has considerable discretion in determining the prejudicial impact of a piece of evidence).

Relevant evidence encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense. *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). Facts tending to establish a party's theory of the case will generally be found relevant. *State v. Mak*, 105 Wn.2d 692, 703, 718 P.2d 407 (1986), *overruled on other grounds, State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice."<sup>28</sup> ER 403. Yet, "nearly all evidence will prejudice one side or the other," and "[e]vidence is not rendered inadmissible under ER 403 just because it may be prejudicial." *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). "[W]here the evidence is undeniably probative of a central

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<sup>28</sup> "Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another. However, 'unfair prejudice' is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors." *Rice*, 48 Wn. App. at 13 (citations omitted).

issue,” the danger that unfair prejudice will outweigh the evidence’s probative value is “quite slim.” *Id.* at 224.

Before trial commenced, the State moved for a preliminary ruling on the admission of a 911 call placed by Ms. Henry regarding C.H. Ex. 193. Defense counsel argued that admission of the call was prejudicial because Ms. Henry was emotional and panicked when she placed the call. RP 65-68. The State countered, arguing at that time in the motion, it was the defense theory that Ms. Henry injured C.H., and ultimately caused his death. RP 71-73. The trial court ruled, in pertinent part:

[I]t is clearly a recording of a very hysterical individual. There were very few comments that the -- that I could discern as I was listening to this. I did make a few notes with regards to sleeping and the babysitter dropped him off. There was a lot of, oh my gods, please god, Jesus please, so the emotion is pretty clear from the 911 tape. I believe there was something with regards to five hours ago and then a picture that he sent her. Those are a little bit more unclear from the purposes -- or for my purposes as to the exact wording, and as the state indicated, a transcript is on the way. I don’t, frankly, think that a transcript for my purposes is needed today. So that’s what I have with regards to the 911 actual recorded voices.

...

So the issue then becomes whether its prejudicial nature outweighs its probative affect, and I have spent some time reviewing the case law that has been proffered, and kind of thinking about this as it moves forward, and very frankly, it is prejudicial in nature, as I will anticipate the autopsy photos to be. The very nature of this case is chilling and horrific. The emotions, I don’t anticipate to change, whether it be from the initial recordings made to 911 or on the body

cams to the testimony being had in court, and all of that will affect this jury. I don't think there's any way for the Court to whitewash any of that.

All of that being said, I am going to admit the 911 tapes. I do think they are probative in nature to the issue here.

RP 73-76.

The 911 call was probative at the time of the motion because the defense theory was that Ms. Henry killed C.H. CP 1020-25. Presumably, the State moved to introduce the 911 call because it purportedly contradicted a material fact alleged by the defendant. Indeed, in the defendant's March 22, 2019, brief in support of his alternative suspect evidence, and before the argument regarding the admissibility of the 911 call, counsel stated:

A key aspect of this trial will be the time of death of C.H. In this vein, Crystal Henry had sole custody of C.H. for over five hours prior to when she allegedly found C.H. deceased. It is undisputed that Mr. Mobley's last contact with C.H. ... was at approximately 9:30 p.m. on February 26, 2017. Mr. Mobley seeks to admit "other suspect evidence" regarding Crystal Henry.

CP 1021.

For that matter, following the admission of the 911 call and during argument regarding admission of "other suspect" evidence, defense counsel again suggested that Ms. Henry killed C.H. RP 78, 86-87. Defense counsel, after reviewing the C.H.'s Child Protective Service reports, also argued that Ms. Henry's young daughter could have caused some of the C.H.'s injuries.

RP 84-86, 96. Certainly, it was the State's and presumably the trial court's perception that the defense continued offering Ms. Henry as an alternative suspect based upon defendant's prior briefing and argument on the issue. RP 88. Indeed, even during closing argument, defense counsel intimated that Ms. Henry could have injured C.H. after she returned home from the hospital, while under the influence of medication. *See* RP 2226.

With the mindset that defense counsel continued to offer Ms. Henry as an alternative suspect at the motion and during trial, the 911 call was probative and tended to counter the defendant's theory that Ms. Henry caused C.H.'s death. Certainly, if it was defense counsel's strategy at that time to blame Ms. Henry, the probative value of the 911 call outweighed any danger of unfair prejudice; the jury would be required to evaluate Ms. Henry's tone, accuracy and the information she provided 911 dispatch after finding her unresponsive child, when determining whether she caused C.H.'s death. Further, the call provided context for the 911 call and death of C.H., and corroborated her testimony on the stand.

Regarding any alleged undue prejudice, the trial court instructed the jury that:

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To

assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 1520; RP 2161-62.

A jury is presumed to follow the trial court's instructions absent evidence to the contrary. *Dye*, 178 Wn.2d at 556. There is no indication in the record that introduction of the 911 call was unfairly prejudicial in that it caused the jury to make a decision on an improper basis. Indeed, our high court recognized long ago that a brutal crime cannot "be explained to a jury in a lily-white manner to save the members of the jury the discomfort of hearing and seeing the results of such criminal activity." *State v. Adams*, 76 Wn.2d 650, 656, 458 P.2d 558 (1969), *reversed on other grounds*, 403 U.S. 947 (1971).

In addition, if there was error, it was invited. By representing to the court and the State that the defense would rely on Ms. Henry as an alternative suspect, which allegedly placed the child's death in of Ms. Henry's hands, the defendant set up the State's request to introduce the 911 call to show Ms. Henry's demeanor and tone when she called 911. The invited error doctrine prohibits a party who sets up an error at trial from claiming that very action as error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). The doctrine applies when "a defendant affirmatively assented to the error, materially contributed to it, or benefited

from it.” *Id.* at 154 (citations omitted). If the doctrine applies, an appellate court’s review is precluded. *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016). An appellate court applies this doctrine whether the error was made negligently or in bad faith, even when the error is of constitutional magnitude and presumed prejudicial. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). As discussed above, the defense represented Ms. Henry as an alternative suspect during pretrial motions. Defense counsel did nothing to correct the assumption by the State and the trial court of that trial strategy; he did not move for reconsideration of the court’s ruling after it appeared he changed strategies to place blame on Ms. Henry’s daughter and then Ms. Bell for the killing. He materially contributed to the trial court’s ruling on the admission of the 911 tape.

Finally, if the trial court erred when it allowed the introduction of this evidence, it was harmless. An error is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (internal quotation marks omitted). “The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Id.* at 403. Here, the admission of the 911 call was of minor significance in relation to the number witnesses called, the large

number of admitted exhibits and the evidence introduced at trial. There was no error. If error, it was harmless.

**F. THE TRIAL COURT DID NOT CONSIDER FACTS OUTSIDE THE TRIAL RECORD WHEN IMPOSING THE DEFENDANT'S SENTENCE.**

The trial court referenced multiple times when imposing sentence that it considered only the jury's finding of the multiple aggravating circumstances and the evidence presented at trial. The trial court did not violate the real facts doctrine. At sentencing, the court remarked:

But with an offender score of zero, there is a sentencing range that has been outlined and agreed to by both parties of 123 months to 220 months. That does not include the ability of this Court to sentence based upon the aggravating factors that were found by the jury, and the statute outlines those aggravating circumstances that can be found and it is an exclusive list and the jury did find that after considering all of the testimony here.

They found that the defendant knew or should have known that the victim was particularly vulnerable. They also found that the defendant used a position of trust or confidence to facilitate the commission of the crime, and that the crime involved a destructive and foreseeable impact on persons other than the victim. Based upon those findings then, the statute does authorize this Court to sentence up to the maximum of this particular crime, and the Court is required to then consider, for purposes of the Sentencing Reform Act, as well as finding that there are substantial and compelling reasons that justify an exceptional sentence.

RP 2304.

If I have done my calculations correct, I believe Mr. Mobley is 31 years of age as he sits here before the Court, so sentencing to life is significant. In reviewing the factors and going back to contemplate the facts that were put before this Court at trial, those facts

established, and the jury then found, so this is findings of the jury, and the jury is that whose decision that this Court is bound to follow, that the defendant took the life of a ten-month-old child, that would be [C.H.].

RP 2305.

So with all of that in mind, and attempting to use the best discretion that I have, having the facts at trial that I am cognizant of, I have additional facts because I sat through the pretrial motions, so there is other things that the Court is aware of that isn't necessarily something that the jury was aware of, but this jury made the decision that it did. And while I understand that the appeal is going to occur, that is not something I take into consideration when I impose sentence at this stage.

RP 2307.

As I've indicated, I don't believe that the high end of that sentencing range is appropriate, given the aggravating factors that the jury did find. So taking all of that into consideration, and I have gone, frankly, many different directions with regards to this matter in coming to the decision, but one of those is, no matter what kind of sentence this Court imposes, whether it is the low end, just over ten years, whether it is the high end of the sentencing range, eighteen years, whether it's forty years, whether it's life, that is not any type of -- imposing that type of a sentence doesn't justify the taking of a life.

There is nothing that justifies the taking of a life. I can't quantify it that way. I can't reduce [C.H.'s] life under those circumstances to that, nor is there any sentence, whether it be the low end, midrange, or life that will bring [C.H.] back. And I think that there's not a person in this courtroom who wouldn't trade perhaps some time in prison for [C.H.] to be back, but again, not an option that this Court has, nor is any kind of sentence that I impose going to relieve the pain that has been cast upon [C.H.'s] family, nor do I think that it will in any way assist the pain that has been cast upon your family, Mr. Mobley.

So based upon, frankly, what the jury decided, and based upon the legislative authority that I believe I have, I am going to impose the following sentence. So at this point in time, I do need to have you stand. And again, contemplating all of this, I am going to impose the high end of the standard range, so that would be 220 months of the standard sentencing range. From an exceptional sentence standpoint, I am going to impose an additional 116 months. With that, makes a total of 336 months of incarceration.

RP 2307-09.

The real facts doctrine requires a defendant's sentence to be based on his current conviction, his criminal history, and the circumstances of the crime. *State v. Morreira*, 107 Wn. App. 450, 458, 27 P.3d 639 (2001). "An exceptional sentence may not be based on an unproven or uncharged crime." *State v. Quiros*, 78 Wn. App. 134, 138-39, 896 P.2d 91, review denied 127 Wn.2d 1024 (1995) (citing *State v. McAlpin*, 108 Wn.2d 458, 466, 740 P.2d 824 (1987)). "The underlying facts and nature of the crime can and should, however, be a basis for an exceptional sentence." *Id.* (citing *State v. Perez*, 69 Wn. App. 133, 138, 847 P.2d 532 (1993)).

Here, the trial court did not base its decision to impose an exceptional sentence upward on any factor outside the record produced at trial and as found by the jury. The challenged remark of the court, taken in context, was not the basis for the exceptional sentence. The court said it was aware of facts not before the jury. However, there is nothing in the record establishing that the court relied on any fact outside the trial record when

imposing sentence. The court stated several times it relied on the jury's finding of the several aggravating circumstances and the court relied strongly on the age and nature of the injuries of the victim when imposing its sentence. Relying on nothing other than supposition, the defendant's claim fails.

**G. THERE IS NO CUMULATIVE ERROR.**

The cumulative error doctrine permits reversal where the cumulative effect of repetitive errors compromises a person's right to a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Where there are no errors or the errors have little to no effect on the trial's outcome, the cumulative error doctrine does not apply. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant has not demonstrated any error that could have affected his trial, so the doctrine does not apply.

**IV. CONCLUSION**

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 10 day of July, 2020.

LAWRENCE H. HASKELL  
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Deputy Prosecuting Attorney  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MOBLEY,

Appellant.

NO. 36999-4-III

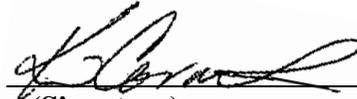
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SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on July 10, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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7/10/2020  
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(Place)

  
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