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DEPUTY

No.

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON, Respondent,**

v.

**BRIAN ZANE WOMAC, Petitioner.**

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**PETITION FOR DISCRETIONARY REVIEW**

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Court of Appeals No. 31557-2-II  
Appealed from the Superior Court for Pierce County  
Superior Court Cause No. 02-1-05575-5

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## **A. IDENTITY OF PETITIONER**

Your Petitioner for discretionary review is Brian Zane Womac, the Defendant and Appellant in this case.

## **B. COURT OF APPEALS DECISION**

The Petitioner seeks review of the opinion in the Court of Appeals, Division II, cause number 31557-2-II, which was filed on November 22, 2005. A copy of the opinion is attached hereto in the Appendix. No motion for reconsideration has been filed in the Court of Appeals.

## **C. ISSUES PRESENTED FOR REVIEW**

- A. Did the court of appeals err when it held that the trial court is not required to vacate convictions that constitute double jeopardy?
- B. Did the court of appeals err when it held that it was not erroneous for the trial court to admit testimony of Womac's prior unrelated conduct toward his other children?
- C. Did the court of appeals err when it held that cumulative error did not deprive Womac of a fair trial?

## **D. STATEMENT OF THE CASE**

Brian Womac's three convictions arose from one incident. On December 1, 2002, at around 2:45 p.m., Womac's and his girlfriend, Christa Owings, brought their son, Anthony Owings, to the emergency

room with a head injury. RP2 130. Unfortunately, the skull fracture the baby had sustained caused a subdural hematoma that eventually led to his death. RP4 516.

On the day of Anthony's injury, Womac had cared for Anthony since early that morning. RP3 271. Womac's account of the accident that led to Anthony's injury never changed. Womac said that Anthony fell from his arms as he reached into his crib to get a blanket. RP3 284. After Anthony fell, Womac administered CPR, and then placed his other two children and Anthony in the car to take him to Olympia to pick up the child's mother. RP3 285. Owings is a nursing assistant and was working across the street from a hospital. After picking up Owings, the couple drove Anthony across the street to the hospital. RP3 278.

Womac was charged with three crimes arising from Anthony's death: homicide by abuse, felony murder in the second degree based on the predicate offense of criminal mistreatment in the first or second degree, and assault of a child in the first degree. CP 5-6. The defense showed through medical testimony that both the skull fracture and the subdural hematoma could have been caused by a short fall as Womac described. RP4 597, 622, 631. The State attempted to show through medical testimony that Womac's account of the accident was inconsistent with Anthony's injuries.

In the end, the jury convicted Womac of all three charges. CP 14, 15, Supp CP. Womac objected, asserting that in view of the conviction for homicide by abuse, the convictions for felony murder in the second degree and assault in the second degree constituted double jeopardy. RP6 1035-43. The State conceded that the murder in the second degree conviction did constitute double jeopardy and that, at a minimum, all three charges constituted the same criminal conduct. RP6 1034-35. The court found that, in view of the homicide by abuse conviction, both the murder in the second degree and the assault in the first degree convictions constituted double jeopardy. RP6 1042-43. However, the court found that this conclusion required only that no sentence be imposed on the erroneous convictions and refused, over defense objection, to dismiss the convictions for homicide by abuse and assault in the first degree. RP6 1042-43, CP 28, 37.

In sentencing Womac on murder in the second degree, the court found that on an offender score of zero, the standard range for the conviction was 240-320 months. CP 28. But the trial court imposed an exceptional sentence of 480 months, making factual findings in support of two legal justifications for the exceptional sentence: particular vulnerability of the victim due to extreme youth, and abuse of a position of trust. CP 30, 43.

On appeal, Womac argued that the exceptional sentence was unconstitutional under *Blakely v. Washington*, that failing to dismiss the felony murder and first degree assault convictions violated the double jeopardy clause, and that the trial court violated ER 404(b) when it admitted evidence of Womac's prior unrelated conduct toward his other children.

On November 22, 2005, the court of appeals issued its opinion. The court affirmed Womac's conviction for homicide by abuse, but remanded for re-sentencing within the standard range. (Opinion, p. 1) The court held that double jeopardy would be satisfied by a conditional dismissal of the felony murder and first degree assault convictions. (Opinion, pp. 8-9) The court further held that ER 404(b) was not violated by the admission of prior bad acts. (Opinion, pp. 5-6)

#### **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

The petitioner asserts that the issues raised by this Petition should be addressed by the Supreme Court because this case raises a significant question under the Constitution of the United States and this case involves an issue of substantial public interest that should be determined by the Supreme Court, as set forth in RAP 13.4(b).

**ISSUE 1: THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE TRIAL COURT IS NOT REQUIRED TO VACATE CONVICTIONS THAT CONSTITUTE DOUBLE JEOPARDY.**

Following the conviction of Womac on all three charges, CP 14, 15, Supp CP, Womac objected, asserting that in view of the conviction for homicide by abuse, the convictions for felony murder in the second degree and assault in the second degree constituted double jeopardy and must therefore be dismissed. RP6 1035-43. The State conceded that the murder in the second degree conviction did constitute double jeopardy and that, at a minimum, all three charges constituted the same criminal conduct. RP6 1034-35.

The court found that in view of the homicide by abuse conviction, both the murder in the second degree and the assault in the first degree convictions constituted double jeopardy. RP6 1042-43. However, the court found that this conclusion required only that no sentence be imposed on the erroneous convictions and refused, over defense objection, to dismiss the convictions for homicide by abuse and assault in the first degree. RP6 1042-43, CP 28, 37. The court's written findings erroneously concluded that both the murder in the second degree conviction and the assault in the first degree convictions were "valid convictions," despite the conclusion that they were double jeopardy. CP 37.

Once a conviction is found to be double jeopardy, the constitution requires the dismissal of that conviction. A double jeopardy violation occurs at the inception of trial, which is why an order denying a motion to dismiss on double jeopardy grounds is immediately appealable. *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). “[T]he double jeopardy clause protects an individual against more than being subjected to double punishments. It is a guarantee against twice being put to trial for the same offense.” *Abney*, at 660-61. Once the court determines that the multiple convictions violate double jeopardy, both the conviction and sentence for the erroneous charges are vacated. *See e.g. State v. Schwab*, 98 Wn. App. 179, 190, 988 P.2d 1045 (1999); *State v. Read*, 100 Wn. App. 776, 793, 998 P.2d 897 (2000).

The State has not appealed the court’s conclusion that both the murder in the second degree and the assault in the first degree convictions constituted double jeopardy. The court was in fact correct to so find.

“The guaranty against double jeopardy protects against multiple punishments for the same offense.” *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing *Whalen v. United States*, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)). Though the guaranty speaks of punishments, it is clear from precedent that “punishment” includes not just the sentence, but also the conviction itself. The way the court analyses if

the legislature has authorized “multiple punishments” for the same offense is to look at the statutes defining the crimes charged. *See State v. Schwab*, 98 Wn. App. 179, 182-83, 988 P.2d 1045 (1999).

In this case, the court of appeals held that the proper remedy for the double jeopardy violations in this case was to remand to the trial court and “If after remand the defendant so requests, the trial court shall dismiss Counts II and III, provided that Count I is not later reversed, vacated, or otherwise set aside.” (Opinion, p. 9)

The United States Supreme Court has addressed this question in *Ball v. United States*, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985). In *Ball*, the Court addressed sentencing under federal law for both possession of a firearm and unlawful delivery of that same firearm. The Court held that:

while the Government may seek a multiple-count indictment against a felon for violations of [the law] involving the same weapon where a single act establishes the receipt and possession, *the accused may not suffer two convictions or sentences on that indictment.*

470 U.S. at 866 (emphasis added). The Court held that the only remedy consistent with the double jeopardy clause is for the trial court “to vacate one of the underlying convictions.” 470 U.S. at 864. “One of the convictions, as well as its concurrent sentence, is unauthorized punishment

for a separate offense.” *Ball*, at 864, citing *Missouri v. Hunter*, 459 U.S. 359, 368, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant’s eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant’s credibility and certainly carries the societal stigma accompanying any criminal conviction.

*Ball*, at 865 (emphasis in original).

*Ball* unequivocally requires that the convictions violating double jeopardy be vacated, not conditionally dismissed as the court of appeals did here. To “vacate” is:

To annul; to set aside; to cancel and rescind. To render the act void; as, to vacate an entry of record, or a judgment. As applied to a judgment or decree it is not synonymous with “suspend” which means to stay enforcement of judgment or decree.

*Black’s Law Dictionary*, Sixth Edition, p. 1548. To vacate is not synonymous with conditional dismissal. Therefore, the court of appeals erred when it held that the proper remedy for the double jeopardy violations in this case was the conditional dismissal of the two offending convictions.

**ISSUE 2: THE COURT OF APPEALS ERRED WHEN IT HELD THAT IT WAS NOT ERRONEOUS FOR THE TRIAL COURT TO ADMIT TESTIMONY OF WOMAC’S PRIOR UNRELATED CONDUCT TOWARD HIS OTHER CHILDREN.**

The court of appeals erred when it held that the trial court properly permitted the State to introduce testimony purporting to show that Mr. Womac had spanked or hit his other two sons in the past. None of these prior incidents resembled the State's theory of how Anthony became injured and none of these prior incidents led to serious injury or death. In short, there was no relevance of these prior incidents other than to try to show that Mr. Womac was a "bad man" who had some propensity to abuse his children.

ER 404(b) provides:

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

The admission of evidence under ER 404(b) is also subject to the limitations of ER 402 and ER 403 as to relevance and prejudice. Thus, even if evidence of prior crimes falls under one of the exceptions recognized in ER 404(b), it should not be admitted if the prejudice clearly outweighs the probative value. *State v. Bacotgarcia*, 59 Wn. App. 815, 819, 801 P.2d 993 (1990), review denied, 116 Wash.2d 1020 (1991). The purpose of ER 404(b) is to prohibit the introduction of evidence which could lead a jury to determine that a defendant committed the crime with which he or she is charged simply because he or she committed a similar

crime in the past. However, in recognition that evidence of prior crimes may be particularly relevant to certain specific issues, such as proof of motive, intent or identity, ER 404(b) allows its admittance if its probative value outweighs its prejudice. See 1 John William Strong, McCormick on Evidence sec. 190, at 798 (4th ed. 1992). ER 404(b) rulings are to be reviewed under an abuse of discretion standard. *Bacotgarcia*, 59 Wash.App. at 824, 801 P.2d 993.

In this case, Mr. Womac's ex-wife, Michelle Womac, was allowed to testify that in 2001 she reported a bruise on her 3-year-old son's leg, which she had noticed after he returned from a visit with Mr. Womac. RP3 328-331. Ms. Womac testified that her son told her Mr. Womac had hit him. RP3 331-32. Ms. Womac said that when she asked Mr. Womac about it, he said he had spanked the child. RP3 342.

Kim Womac, Mr. Womac's other ex-wife, was called to testify that in 1990 Mr. Womac had spanked their infant son when he cried. RP3 354. Although Ms. Womac never saw Mr. Womac spank their son, she testified that Mr. Womac told her he had. RP3 355. In addition, she testified that in 1991 or 1992, Mr. Womac had hit their 18-month-old son "a couple of times" and told him to "shut up" when he kept them up with his crying. RP3 358.

Prior to trial, the defense had asked the court to exclude the above

testimony, objecting that under ER 404(b) and ER 403, this was propensity evidence and its prejudicial effect outweighed any limited probative value. RP1 16. The court ruled that the prior incidents with Mr. Womac's other children were admissible to show motive, intent, and absence of mistake or accident. RP1 70.

***a. This prior bad act evidence was admitted for the improper purpose of showing propensity to commit crime.***

Evidence of dissimilar acts of abuse against Mr. Womac's other children does not show his motive to intentionally harm Anthony. Our state Supreme Court has defined the word "motive" to mean "[a]n inducement, or that which leads or tempts the mind to indulge [in] a criminal act." *State v. Tharp*, 96 Wash.2d 591, 597, 637 P.2d 961 (1981), (quoting) *Black's Law Dictionary* 1164 (4th rev. ed. 1968). It is difficult to ascertain how these unproven prior assaults on Mr. Womac's other two sons could be a motive or inducement for his later supposed assault on Anthony. There is no contention that the last assault was carried out in order to conceal the prior crimes. The earlier assaults had no logical relevance to Mr. Womac's motive for the last assault. Therefore, the trial court erred by admitting these prior acts as proof of motive.

Moreover, because the prior acts introduced in this case bear no relationship to facts of this case, it is hard to see how they can be at all

relevant to intent or prove absence of mistake. The State argued in this case that Mr. Womac had deliberately “bashed” the victim into a wall or floor. RP6 957. In closing, the State argued that Mr. Womac’s prior treatment of his other children showed that “the defendant’s treatment of [the victim] is a pattern or practice of abuse. And it’s not accidental that [he] was treated in this fashion.” RP6 948.

Yet, the incidents described with Mr. Womac’s other children are hitting or spanking. There was no evidence that Mr. Womac had in the past thrown one of his children against a wall or the floor. There was no evidence that one of his children had been injured in the past and Mr. Womac had claimed that he dropped the child or that it happened by accident. There is nothing about these prior incidents that connects them in any way to the circumstances of Anthony’s death.

What makes this case different from cases in which prior acts of violence were ruled admissible is that the prior acts admitted in this case involved victims other than the victim of the crime charged. For example, in *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995), prior assaults against the defendant’s wife were admitted to show intent and motive in a trial accusing him of his wife’s murder. In *State v. Bell*, 10 Wn. App. 808, 881 P.2d 268 (1994), the State was allowed to introduce evidence of prior physical abuse of the same child he was accused of killing to show intent

and absence of mistake or accident. Likewise, in *State v. Toennis*, 52 Wn. App. 176 (1988), the prior acts of violence admitted involved the same child.

Where prior acts involving a different victim were admitted, it was because the prior acts were so strikingly similar to the crime charged that it rose to the level of a *modus operandi*. For example, in *State v. Roth*, 75 Wn. App. 808, 881 P.2d 268 (1994), the defendant was charged with the murder of his wife, who he had heavily insured with policies in which he was the beneficiary. The defendant claimed his wife's death was an accident. The defendant's former wife, also heavily insured, died under similar circumstances. The court found that the facts of both deaths were so unique and unusual that they were not coincidental and therefore admitted to rebut a defense of accident. *Roth*, at 820. The court remarked:

Here, the marked similarities between the victims, the physical circumstances of the crimes, and the relatively complex nature of the crimes support a commences inference that the deaths of Roth's spouses were not mere fortuities. Both Janis Roth and the victim of the charged crime were single mothers, both married Roth after very short courtships, both obtained large life insurance policies after the marriage, and both died within a year of marrying Roth. Each death occurred during a recreational outing that was planned by Roth so that he could be alone with the victim, and the location of each death was remote, with no witness nearby. Each killing was an orchestrated plot, predesigned to ensure the availability of a large life

insurance policy and to cloak the victim's death with the appearance of accident. We are convinced that these similarities are sufficiently unusual to ensure that even a second recurrence would be objectively improbable.

*Roth*, at 820.

This case is clearly distinguishable from cases such as *Roth* where evidence of prior bad acts against other victims was deemed admissible. The prior acts in this case were dissimilar to the alleged crime against the victim. There are certainly no similarities that would demonstrate a modus operandi.

What the State attempted to show with this prior bad act evidence was that because of Mr. Womac's prior acts of violence against his other two sons, the jury could conclude that he has a propensity for anger and violence against children, and, therefore, he was violent in this case and guilty of the intentional killing of Anthony. This type of inference based on propensity is exactly what ER 404(b) is designed to forbid.

Therefore, this evidence should have been excluded as improper under ER 404(b).

***b. Any limited probative value of this prior bad act evidence is outweighed by its prejudicial effect.***

Furthermore, even if the prior acts were theoretically admissible under ER 404(b), the prejudicial effect far outweighed the probative value.

“ER 404(b) must be read in conjunction with ER 402 and 403.” *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). ER 402 prohibits admission of evidence that is not relevant. Relevant evidence is defined in ER 401 as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. ER 403 requires the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Any doubts about admitting ER 404(b) evidence must be resolved in favor of exclusion. *State v. Bowen*, 48 Wn. App. 187, 738 P.2d 316 (1987).

The courts have recognized that in certain cases, evidence of prior bad acts carries even more likelihood of unfair prejudice. For example, in sex crime cases, the courts have been particularly careful about ER 404(b) evidence:

A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where prejudice potential of prior acts is at its highest.

Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

*State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Likewise, the chance of prejudice in a child abuse case is exceptionally high. Having

been told by the witnesses that Mr. Womac has been assaultive with his children in the past, it would be difficult for the jury to come to an independent conclusion based on the facts proven in this case.

With the probative value of the prior acts in this case already in question (see above), it is also clear that the prejudicial effect of this evidence was unfair and the evidence should have been excluded.

The court of appeals erred when it affirmed a conviction based on this improper and prejudicial evidence.

**ISSUE 3: THE COURT OF APPEALS ERRED WHEN IT HELD THAT CUMULATIVE ERROR DID NOT DEPRIVE WOMAC OF A FAIR TRIAL.**

The combined effects of error may require a new trial even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. *Mak v. Blodgett*, 970 F.2d 614 (9<sup>th</sup> Cir. 1992); *United States v. Frederick*, 78 F.3d 1370, 1381 (9<sup>th</sup> Cir. 1996).

In this case, there were several errors that combine to deprive Mr. Womac of his right to a fair trial.

- (1) *The State's witness impermissibly commented on his opinion as to Mr. Womac's guilt.*

During direct examination, Dr. Steven West, an expert medical witness for the state, testified that “*I am sure, no reasonable doubt, this didn’t occur from a ground level fall.*” RP2 204. The defense immediately objected. RP2 204. The court struck the testimony but did not give a corrective instruction to the jury. RP2 204.

No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference. *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); *State v. Haga*, 8 Wn.App. 481, 492, 507 P.2d 159, *review denied*, 82 Wn.2d 1006 (1973). *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This type of opinion invades the jury’s independent determination of the facts and violates the defendant’s constitutional right to a fair trial before a jury. *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999).

In this case, the doctor’s testimony was of the most prejudicial nature in that he actually stated, indirectly, that Mr. Womac’s account of how his son suffered injury was a lie, beyond any “reasonable doubt.” The trial court’s failure to take further corrective action to remove that taint from the jury was error.

(2) *Permitting the State to introduce evidence that Mr. Womac may have been physically abusive with his other sons.*

This error is discussed in detail above. In a case as emotional as this one, allowing the State to in essence argue that Mr. Womac had a propensity to abuse children is unfairly prejudicial and certainly prejudiced Mr. Womac's right to a fair trial.

*(3) Denying the motion for mistrial based on the State's repeated use of a baby doll as an "illustrative exhibit" for the sole purpose of inflaming the prejudices of the jury.*

On the afternoon of the third day of trial, the State brought a baby doll to court and placed it on the table. The defense objected to the use of the doll on the grounds that the doll could not be qualified as an illustrative exhibit because there was no proof that it was substantially like the real item. RP4 633-34. This objection was ruled premature. RP4 634. During the course of cross-examination, the prosecutor grabbed the doll by the leg, flung it out as though against a wall, causing the doll's hat to fly off and land in front of the jury. RP5 698. Following that the State repeatedly shook the doll or modeled the act of tossing it against a wall. RP5 698.<sup>1</sup> The prosecutor's actions with the doll were essentially a "re-

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<sup>1</sup> In this, as well as the other descriptions of what occurred with the doll, the record cannot show what actually happened. However, both counsel put on the record their recollections of what had happened. The State conceded that it had used the doll to illustrate throwing the baby into the wall, though it

creation” of the State’s theory of how Anthony came to be injured, but without any foundation to show that this “re-creation” rose to the level of evidence. The court found that the doll was an “illustrative exhibit,” admitted it into evidence, and denied the motion for mistrial. RP5 710-712.

In a case such as this, where a very young child dies, the jury will be understandably emotional. In such a setting, for the prosecutor to reenact its theory graphically by abusing a proxy of the baby is overwhelmingly prejudicial. Furthermore, the State laid out no foundation for this “illustrative exhibit” to show that it was in any way relevant to the case. Therefore, it was error to admit the doll into evidence and to permit the State to put on a show for the jury with it. That error caused unfair prejudice to Mr. Womac’s right to a fair trial.

The cumulative effect of the above errors was so prejudicial as to deny Mr. Womac a constitutionally fair trial under the federal and state constitutions. Therefore, his conviction(s) should be reversed.

## **F. CONCLUSION**

The Supreme Court should accept review for the reasons indicated in Part E, reverse the court of appeals, and reverse Womac’s conviction

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disputed the number of times this occurred. RP5 708. During the cross-examination of Dr. Plunkett, the defense objected to the use of the doll three

for homicide by abuse, and vacate his convictions for felony murder and first degree assault.

DATED: December 22, 2005.

By: Rebecca W. Bouchey  
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Attorney for Petitioner

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CERTIFICATE OF SERVICE

I certify that on the 22d day of December 2005, I caused a true and correct copy of this Petition for Review to be served on the following via prepaid first class mail:

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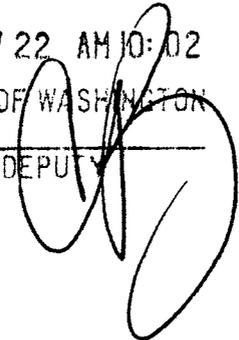
times, at RP4 639, RP4 640, and RP4 684.

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DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

BRIAN ZANE WOMAC,

Appellant.

No. 31557-2-II

PUBLISHED OPINION

MORGAN, J.P.T.<sup>1</sup> — Brian Zane Womac appeals a jury verdict and sentence for homicide of a child by abuse (Count I), and jury verdicts for second degree felony murder (Count II) and first degree assault (Count III). He argues that the trial court violated ER 404(b), *Blakely v. Washington*,<sup>2</sup> and the double jeopardy clause. We affirm the verdict on Count I, remand for re-sentencing on that count within the standard range, and, if Womac so requests after remand, direct the trial court to conditionally dismiss Counts II and III.

<sup>1</sup> Judge J. Dean Morgan heard oral argument in this case while serving as a member of this court. Since retired, he is now serving as Judge Pro Tempore.

<sup>2</sup> 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Womac has fathered at least three sons, Brandon, Zachary, and Anthony.<sup>3</sup> Brandon's mother is Kimberly Womac, Womac's first wife; Zachary's mother is Michelle Womac, Womac's second wife; and Anthony's mother is Christa Owings, Womac's girlfriend at the times pertinent here. Anthony was born on July 8, 2002.

In late 2002, Womac, Owings, and Anthony were living in Tacoma. Owings had a job in Olympia, and Womac cared for Anthony while Owings was at work.

On December 1, Womac drove Owings to and from her work in Olympia, taking Anthony both ways. In the morning, Anthony was normal and healthy. In the afternoon, Anthony was limp and pale, and his eyes were rolled back in his head. Womac and Owings took him to the nearest emergency room, where Dr. Steven West ordered a CT scan. While waiting for the results, Dr. West asked Womac what had happened, and Womac said Anthony had fallen "out of his arms onto the floor" and lost consciousness.<sup>4</sup> The scan showed skull fractures and a subdural hematoma which, according to later medical testimony, were not consistent with a short fall to the floor. Anthony was airlifted to a Seattle trauma center, where he died a few hours later.

On December 5, 2002, the State filed an information which, as later amended, alleged homicide by abuse<sup>5</sup> (Count I), second degree felony murder<sup>6</sup> with criminal mistreatment in the

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<sup>3</sup> The parties and record refer to the child both as Anthony Owings and Aiden Owings. The charging documents and jury verdicts use Anthony, so we will also.

<sup>4</sup> Report of Proceedings (RP) at 206. Womac also made statements to other witnesses that we need not recite here.

<sup>5</sup> RCW 9A.32.055.

<sup>6</sup> RCW 9A.32.050(1)(b).

first or second degree as the predicate offense<sup>7</sup> (Count II), and first degree assault of a child (Count III).<sup>8</sup>

On January 7, 2004, the court held a pretrial hearing to determine whether the State could admit evidence of uncharged acts under ER 404(b). The parties and the court understood that the central issue at trial would be whether Anthony had “suffered fatal injuries as the result of an intentional assault perpetrated by the defendant, or by an accidental short-fall to a carpeted floor.”<sup>9</sup> Over Womac’s objection, the trial court admitted the following evidence:

1. Evidence that the defendant spanked his son Brandon Womac on a number of occasions when Brandon was six to eight weeks old (1990) and that each time Kim Womac told the defendant that Brandon was too young to be spanked.
2. Evidence that when Brandon was approximately 18-months-old (1991) the defendant and Kim Womac took Brandon on a camping trip. The family slept in a tent. Brandon was fussy and crying during the night, which caused the defendant to reach over several times in the dark and hit Brandon. Defendant later removed Brandon from the tent.
3. Evidence that the defendant struck his son Zachary Womac and left a 4” x 4” bruise on Zachary’s thigh in April 2001 when Zachary was 3-years-old.<sup>10</sup>

The court reasoned that the evidence was “relevant to prove the defendant’s intent in striking [Anthony] and the absence of mistake or accident in the defendant’s act of striking [Anthony]”;

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<sup>7</sup> RCW 9A.42.020, .030.

<sup>8</sup> RCW 9A.36.120(1)(b)(i).

<sup>9</sup> Clerk’s Papers (CP) at 80.

<sup>10</sup> CP at 78-79; *see also* RP at 70-73, 1033. The hearing also addressed proposed testimony about several other incidents in which Womac lost his temper and hurt or threatened to hurt Brandon, plus proposed testimony from Kimberly Womac and Michelle Womac about Womac’s violence toward them. That testimony was ruled inadmissible and is not in issue here.

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that “[t]here were no eyewitnesses . . . other than the defendant”; and that probative value was not substantially outweighed by the danger of unfair prejudice within the meaning of ER 403.<sup>11</sup>

On January 14, 2004, the court began a jury trial. The State called Owings, Kimberly, Michelle, Dr. West, and a number of other witnesses. Dr. West opined that Anthony’s injuries were caused by substantial force and were not consistent with a short fall to the floor. Likewise, Dr. Katherine Raven, a King County Medical Examiner, opined that Anthony’s injuries could not have been caused by a fall of approximately three feet to a carpeted surface. Womac rested at the end of the State’s case in chief, and the jury found him guilty as charged.

On March 19, 2004, the court imposed an exceptional sentence on Count I. The court determined that Womac’s offender score was zero and his standard range 240-320 months. Sitting without a jury, the court found that Anthony had been particularly vulnerable due to his young age and that Womac had violated a position of trust. Using its own findings as well as the findings inherent in the jury’s verdict, the court ordered that Womac serve 480 months.

During the March 19th hearing, Womac moved to dismiss Counts II and III. He seems to have claimed that immediate and final dismissal was required if his right to double jeopardy was not to be violated. The State conceded that all the elements of Counts II and III were included within the elements of Count I, and that the court could not sentence on Counts II and III without violating double jeopardy. Nonetheless, the State asked that the charges and verdicts on Counts II and III not be dismissed until Count I had survived post-sentence challenges. Holding that Counts II and III were “valid convictions” but that “[i]mposing separate punishments . . . would

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<sup>11</sup> CP at 80.

violate constitutional double jeopardy,"<sup>12</sup> the trial court declined to impose sentence on Counts II and III, denied Womac's motion to dismiss those charges and verdicts, and simply left them in place on the public record.

I.

Womac argues on appeal that the trial court erred by admitting evidence of his uncharged acts under ER 404(b). He contends that the incidents involving his other children showed only, or primarily, that he had a propensity to hit children.

Evidence of a defendant's prior bad acts is logically relevant<sup>13</sup> *but legally inadmissible* to show<sup>14</sup> that on the charged occasion, the defendant had and was acting in conformity with criminal propensities.<sup>15</sup> Sometimes, however, the same evidence is logically relevant *and legally admissible* to show a fact other than propensity, "such as. . . motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>16</sup> When evidence is relevant both for the improper purpose of showing propensity and for the proper purpose of showing a fact other than propensity, the trial court must decide, using ER 403, whether the probative value that will result from using the evidence properly will be substantially outweighed

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<sup>12</sup> CP at 28, 37.

<sup>13</sup> ER 401; *State v. Herzog*, 73 Wn. App. 34, 43-45, 47-48, 867 P.2d 648, *review denied*, 124 Wn.2d 1022 (1994).

<sup>14</sup> ER 404(a)(preamble); ER 404(b)(first sentence).

<sup>15</sup> *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

<sup>16</sup> ER 404(b).

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by the unfair prejudice that will result from using the evidence improperly.<sup>17</sup> The decision is a discretionary one,<sup>18</sup> and we must uphold it unless it is manifestly unreasonable or untenable.<sup>19</sup>

Washington courts have applied these principles in cases similar to this one. In *State v. Terry*, for example, the court stated:

[W]here the defendant asserts that a child has died as a result of an accident in the absence of any intent on his part to harm the child, evidence of prior and subsequent incidents involving the defendant's treatment of children, including the deceased, may be relevant and necessary to prove an essential ingredient of the state's case.<sup>[20]</sup>

In this case, evidence of Womac's prior uncharged acts was logically relevant but legally inadmissible to show that he had a propensity to hit young children. In addition however, such evidence was logically relevant and legally admissible to rebut his claim—which comprised the central issue at trial—that he had dropped Anthony by accident. Applying ER 403, the trial court held that considerable probative value would result from using the evidence to show lack of accident, and that such value was not substantially outweighed by the unfair prejudice that might result if the evidence were used to show Womac's propensity to hit young children. As this was a reasonable view of the overall situation, we cannot say that the trial court abused its discretion.

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<sup>17</sup> *Herzog*, 73 Wn. App. at 48-50.

<sup>18</sup> *Herzog*, 73 Wn. App. at 49-50; *State v. Terry*, 10 Wn. App. 874, 884, 520 P.2d 1397 (1974).

<sup>19</sup> *State v. O'Connor*, 155 Wn.2d 335, 351, 119 P.3d 806 (2005); *State v. Elmore*, 139 Wn.2d 250, 284-85, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837 (2000).

<sup>20</sup> 10 Wn. App. at 883; *see also State v. Fitzgerald*, 39 Wn. App. 652, 661-62, 694 P.2d 1117 (1985); *State v. Bouchard*, 31 Wn. App. 381, 384-85, 639 P.2d 761, *review denied*, 97 Wn.2d 1021 (1982); 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 404.21, at 438 (4th ed. 1999).

II.

Citing *Blakely v. Washington*,<sup>21</sup> Womac argues that the trial court erred by imposing an exceptional sentence. *Blakely* held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>22</sup> The effect is to require that a jury find each fact needed to support the sentence that the defendant actually must serve.<sup>23</sup> The jury did not find each fact needed here, as the trial judge’s findings of particular vulnerability and abuse of trust are essential to uphold an exceptional sentence of 480 months. Hence, the trial court erred.

In a brief filed before the Supreme Court’s recent decision in *State v. Hughes*,<sup>24</sup> the State concedes that the trial court erred under *Blakely*. It argues, however, that the error was harmless or, if we reverse, that we should authorize an exceptional sentence after remand.

In *Hughes*, the Supreme Court held that a *Blakely* error cannot be harmless<sup>25</sup> and requires remand for re-sentencing within the standard range.<sup>26</sup> Accordingly, we vacate the 480-month sentence imposed on Count I and remand for re-sentencing within the standard range.

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<sup>21</sup> 542 U.S. 296.

<sup>22</sup> 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

<sup>23</sup> *State v. Borboa*, 124 Wn. App. 779, 786-87, 102 P.3d 183 (2004), review granted, 154 Wn.2d 1020 (2005).

<sup>24</sup> 154 Wn.2d 118, 110 P.3d 192 (2005).

<sup>25</sup> *Hughes*, 154 Wn.2d at 148. The United States Supreme Court recently granted certiorari, apparently to review this proposition. See *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), cert. granted, 2005 U.S. LEXIS 7658 (Oct. 17, 2005).

<sup>26</sup> *Hughes*, 154 Wn.2d at 156.

III.

Womac argues that his right against double jeopardy was violated when the trial court denied his motion to dismiss Counts II and III and left them on the record without accompanying sentences. The question that he raises is this: When the State concurrently charges alternative crimes, one greater and one lesser; the trier of fact returns guilty verdicts on both; and the trial court imposes sentence on the greater verdict but not on the lesser, does the defendant's right against double jeopardy entitle him to have the lesser charge and verdict dismissed before the greater verdict has survived whatever post-judgment challenges the defendant may elect to make? And if so, should the dismissal be conditional or unconditional?

We perceive four possible answers to these questions. One is to immediately dismiss the lesser charge and verdict unconditionally, even though the greater verdict and sentence are not yet final. Another is to immediately dismiss the lesser charge and verdict conditionally, allowing for its reinstatement if the greater verdict and sentence are later set aside. A third is to delay dismissal, so that the lesser charge and verdict remain in place until the greater verdict and sentence become final. A fourth is not to dismiss at all, so that the lesser charge and verdict remain in place forever. The record here shows that the trial court adopted the third or fourth of these possible answers, but it does not clearly show which one.

We reject the first, third, and fourth of these possible answers. The first gives insufficient weight to the State's interest in having one full and fair opportunity to prosecute its charges.<sup>27</sup> The fourth gives insufficient weight to the defendant's right not to suffer whatever social stigma

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<sup>27</sup> *State v. Corrado*, 81 Wn. App. 640, 645-46, 915 P.2d 1121 (1996) ("jeopardy should 'terminate' when the State has had—but not before the State has had—one full and fair opportunity to prosecute").

might arise if the lesser verdict is left on the public record.<sup>28</sup> The third gives insufficient weight to the defendant's right not to be socially stigmatized,<sup>29</sup> and also seems impractical—should the lesser charge and verdict be finally dismissed after the greater verdict and sentence were affirmed on direct appeal, or only after all possible post-conviction relief had been exhausted? If the latter, for how long should the lesser charge and verdict remain undismissed? If the former, what would happen if the lesser charge and verdict were dismissed after direct appeal, but then the defendant successfully obtained collateral relief?

For all these reasons, we think that the second of our possible answers is preferable to the others. To immediately dismiss recognizes the defendant's interest in not being socially stigmatized, and to dismiss conditionally recognizes the State's interest in having one full and fair opportunity to prosecute. If after remand the defendant so requests,<sup>30</sup> the trial court shall dismiss Counts II and III, provided that Count I is not later reversed, vacated, or otherwise set aside.

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<sup>28</sup> See *State v. Gohl*, 109 Wn. App. 817, 822, 37 P.3d 293 (2001) (“The fact of multiple convictions, with the concomitant societal stigma and potential to increase sentence under recidivist statutes for any future offense violated double jeopardy even where, as here, the trial court imposed only one sentence for the two offenses.”).

<sup>29</sup> *Gohl*, 109 Wn. App. at 822.

<sup>30</sup> Nothing herein requires the trial court to dismiss if the defendant does not so request. We recognize that under particular circumstances, a defendant might wish to leave the lesser charge and verdict in place to minimize procedural concerns, e.g., appealability. Our discussion here is limited to the facts before us, one of which is that Womac moved for immediate dismissal.

IV.

Lastly, Womac complains that the trial court committed “several errors that combine[d] to deprive [him] of his right to a fair trial.”<sup>31</sup> If his first claimed error was error at all, it was cured when the trial court sustained his objection and struck the testimony. His last claimed error involves non-verbal conduct by the prosecutor that the trial judge could observe and allowed, that does not show in the record, and that we have no way to adequately review. We dealt with his other claimed errors in Section I. We conclude that cumulative error did not deny Womac a fair trial.

Summarizing, we affirm the conviction on Count I, remand for re-sentencing on that count within the standard range, and, if Womac so requests after remand, direct the trial court to conditionally dismiss Counts II and III in the manner discussed above.

  
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MORGAN, J.P.T.

We concur:

  
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ARMSTRONG, P.J.

  
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HUNT, J.

<sup>31</sup> Br. of Appellant at 17.