

63017-2

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NO. 63017-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC EARL HOLZKNECHT,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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COURT OF APPEALS
STATE OF WASHINGTON



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I. ISSUES

1. Has the defendant waived any objection to admission of his statements at trial where the court made a tentative ruling on a motion in limine and the defendant did not renew his objection at trial?

2. RCW 10.58.035 permits a defendant's confession, admission, or other statement to be admitted in evidence under certain circumstances where independent proof of the corpus delicti is absent. Does this statute violate the defendant's due process rights or the separation of powers doctrine?

3. Was there sufficient prima facie evidence to support the corpus delicti of the crime so as to render the defendant's statements admissible?

4. Was it an abuse of discretion to permit two expert witnesses to testify to their respective opinions that the victim's injuries were the result of non-accidental trauma?

5. The jury was instructed that it was not to consider punishment except insofar as it made them careful. The defendant argues this instruction was no longer a correct statement of the law.

a. Has the defendant failed to preserve this issue for review?

b. Is this a correct statement of the law when juries do not fix punishment in non-capital cases?

6. The defendant argues the instruction defining assault was an incorrect statement of the law.

a. Has he failed to preserve this issue for review?

b. When the theory was the assault was committed by an actual battery should the jury have been instructed that the defendant had any other mental state beyond the intent to do the act which constituted the assault?

7. Was the evidence sufficient to prove beyond a reasonable doubt that the defendant was guilty of assault of a child in the second degree and assault of a child in the third degree?

8. Should the defendant get a new trial because the State did not produce a witness to testify to a statement another witness allegedly made which the other witness denied making when the statement related to a collateral matter?

9. One of the expert witnesses expressed who an opinion about the cause of the victim's injuries based in part on the opinions of other experts she consulted. The testifying expert recounted some of the non-testifying experts' statements. The

defendant did not object to this testimony he now asserts was improper.

- a. May he raise this issue for the first time on appeal?
- b. Was the testimony improper?
- c. If it was improper was any error harmless?

10. The defendant did not object to the instructions defining criminal negligence, knowledge, and recklessness. He now asserts the instruction violated his due process rights.

- a. May he raise this issue for the first time on appeal?
- b. Where the instructions clearly stated the elements the jury had to find in order to convict the defendant did the instructions violate the defendant's due process rights?
- c. If the instructions were erroneous was the error harmless?

II. STATEMENT OF THE CASE

G.H. was born September 27, 2007. By December 1, 2007 she has suffered three distinct fractures to her legs. 1 RP 69; 2 RP 214.

During that period of her life G.H. lived with her mother, Amy Holzkecht, and father, Eric Holzkecht, the defendant. The three of them lived with the defendant's parents, the defendant's sister, and the sister's boyfriend in his parent's home. Everyone but Ms.

Holzkecht¹ worked outside the home. Ms. Holzkecht stayed home to care for G.H. When he was not working the defendant also cared for his daughter, including changing her diaper. There were three or four occasions in which Ms. Holzkecht went out and left G.H. solely in the defendant's care. 1 RP 69-71, 74-75, 84.

G.H. had generally been a fussy baby from the time that she was born. About once a week the defendant found her fussiness so frustrating that he had to leave the home for a time. 1 RP 78-79, 88.

At times Ms. Holzkecht became concerned about how the defendant was handling G.H. She believed the defendant was not handling G.H. as gently as she needed to be treated. She described the defendant as treating her "too rough". Other members of the family also noticed that when the defendant changed G.H.'s diaper and re-dressed her he moved too quickly or roughly with her. In contrast Ms. Holzkecht's aunt saw her treating G.H. gently and not at all roughly. 1 RP 76-78, 129-130.

Ms. Holzkecht was concerned enough about the way she saw the defendant handle their daughter that she asked him on

¹ The references to Ms. Holzkecht relate to G.H.'s mother, not the defendant's mother.

several occasions to be more gentle with her. Sometimes he would slow down, but other times he became irritated with his wife. Ms. Holz knecht thought there were times that the defendant may have hurt G.H. 1 RP 79, 81-82.

In early to mid-November 2007 the defendant was changing G.H.'s diaper in their room while Ms. Holz knecht was in the next room. When Ms. Holz knecht came back into their room the defendant was crying. He told Ms. Holz knecht that he thought that he had hurt G.H. during the diaper change. G.H. had begun to defecate and the defendant pulled her by her leg out of the way. Ms. Holz knecht noticed there was immediate bruising on G.H.'s legs. One bruise was close to the knee while the other was close to the ankle. 1 RP 82-83.

On the afternoon of November 30, 2007 Ms. Holz knecht left G.H. in the defendant's care in order to look for a job. She was gone from about 3:00 p.m. to 5:00 p.m. About 7:30 p.m. Ms. Holz knecht noticed G.H. was extremely fussy. She was not able to console G.H. and G.H. cried throughout the night. About 12:30 a.m. G.H. was still crying. The defendant got up to change her diaper. Ms. Holz knecht noticed that G.H. was holding her right leg up and inward, as if she were protecting it. 1 RP 84, 86-87.

The next morning, December 1, the defendant and Ms. Holzknecht took G.H. to the walk in clinic, and then to the emergency room at the hospital. Mr. Tamburri, a physician's assistant, first saw G.H. at the emergency room. The only abnormality that Mr. Tamburri observed was pain in her right leg. He had G.H.'s leg x-rayed. The x-ray showed a fracture to her right femur. 1 RP 30, 35-37, 88.

Mr. Tamburri talked to the defendant and Ms. Holzknecht about the possible causes for G.H.'s broken leg. They both denied any fall or other mechanism of trauma that would have caused the injury, or that anyone but them had cared for her in the last 24 hours. Mr. Tamburri consulted with Dr. Chandra. After examining G.H. Dr. Chandra and Tamburri told the defendant and Ms. Holzknecht that G.H. should go to Children's Hospital. Mr. Tamburri explained that it was not safe to transport G.H. in any vehicle other than an ambulance. G.H.'s parents expressed reluctance to employ an ambulance due to the cost. Ultimately the hospital paid for G.H.'s transportation. 1 RP 38 – 44.

G.H. was given a full body x-ray at Children's Hospital. In addition to the femur fracture doctors observed two other fractures to her right and left tibia known as CML fractures. As a result of

what the medical team observed police and CPS were called to investigate. 1 RP 54-55, 162-166; 2 RP 214.

Doris Bartel, a social worker who was part of the medical team, talked to Ms. Holzkecht. Ms. Holzkecht stated that she had been concerned with how rough the defendant had been with G.H. during diaper changes. The defendant also talked to Ms. Bartel. He confirmed that had been rough with G.H. during diaper changes in the morning. He attributed his roughness to being tired, and suggested that he may have pulled on G.H.'s leg too hard. 1 RP 55-56.

Officer Sheheen also talked with Ms. Holzkecht and the defendant. Ms. Holzkecht told the officer that she had seen the defendant pick G.H. up by one leg. On several occasions she had to warn the defendant to be more careful with her because he seemed a little rough. Ms. Holzkecht admitted that the defendant would sometimes lose his patience with G.H. 1 RP 136.

The defendant confirmed what Ms. Holzkecht said. He admitted that he did not have the patience that he should have. He admitted that he had grabbed G.H. by the legs, and may have accidentally injured her. 1 RP 138. The defendant wrote a statement. In it he said there may have been times when he was

too rough with G.H. When recounting the incident in which he changed G.H.'s diaper and she began to defecate he said

I was a little frustrated with the situation and accidentally grabbed and pushed a little too hard. After grabbing her, I realized that she had marks on her legs and that she was hurt. I felt horrible for hurting my child. I would never intentionally hurt my child, but I feel that the injuries could be my fault. There have been times when I grabbed [G.H.] by one leg to change her. The break could have happened during one of those changing incidents or last night when I was examining her possible leg injury.

1 RP 143; Ex. 2.

A team of doctors at Children's Hospital examined G.H. and reviewed her case. Dr. Sugar and Dr. Done were two of those doctors. The doctors considered all possible causes of G.H.'s injuries, including genetic, metabolic, and non-accidental trauma. G.H. did not have a family history that would suggest a genetic cause. There was no evidence the injuries were caused by some metabolic reason. The CML fractures in particular were most often associated with non-accidental trauma. After considering all of the potential causes, both Dr. Sugar and Dr. Done concluded that someone had caused G.H.'s injuries. 1 RP 154, 159, 165-70; 2 RP 215, 218, 220-22, 233, 236-241.

After December 2007 the defendant did not have contact with his daughter. During that time G.H. suffered no injuries or broken bones. 1 RP 76.

The defendant was charged with three counts of assault of a child in the second degree. The State alleged as an aggravating factor for each count that the defendant knew or should have known that the victim was particularly vulnerable and incapable of resistance. A jury convicted him of one count of assault of a child in the third degree and two counts of assault of a child in the second degree. Additionally the jury found the aggravating factor had been proved as to each count. 1 CP 46-51, 90-91.

III. ARGUMENT

A. WHETHER THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED HAS NOT BEEN PRESERVED FOR REVIEW. THE DEFENDANT'S STATEMENTS WERE PROPERLY ADMITTED IN EVIDENCE.

1. The Defendant Waived His Objection to Admission Of His Statements. The Trial Court Did Not Abuse Its Discretion When It Admitted the Defendant's Statements.

Before trial defense counsel sought to exclude the defendant's statements arguing the corpus delicti could not be established. The prosecutor argued that the State could establish the corpus delicti and alternatively that the statements were admissible pursuant to RCW 10.35.035. 1 RP 14-18. The court

issued a tentative ruling admitting the evidence. 1 RP 22. Defense counsel did not further object to the defendant's statement coming into evidence.

The defendant now challenges the introduction of his statements on both statutory and corpus delicti grounds. He has failed to preserve this issue for review. While a defendant who brings a motion in limine need not renew his objection at trial when the court has made a final ruling, he must renew his objection if the court's ruling is only tentative. State v. Powell, 126 Wn.2d 244, 256 - 57, 893 P.2d 615 (1995).

In Powell the Court held the trial court made final rulings on motions in limine when it did not state further objection would be required, when the rulings were expressed in language that was not tentative or equivocal, and when it specifically said certain evidence was admissible. Id. at 257. In contrast, where the court reserved ruling on a motion indicating that counsel needed to provide further support for exclusion the ruling was tentative. Id. at 257. Like the latter rulings in Powell the court's ruling here was merely advisory. The court said "assuming the State can meet the burden that's set forth in that statute" it would be prepared to admit the defendant's statements. The court instructed the defendant to raise the issue

again if he believed the State had not met its burden of proof. 1 RP 22. Because the ruling was tentative, and the defendant did not renew his objection at trial, the issue has been waived. Powell, 126 Wn.2d at 257.

Even if the Court does consider the issue the trial court did not err in admitting the defendant's statements. RCW 10.58.035 permits a court to admit a lawfully obtained and otherwise admissible confession, admission or other statement made by the defendant when the victim of the crime is either dead or incompetent to testify and when there is substantial independent evidence that tends to establish the trustworthiness of the defendant's confession, admission, or other statement, even though independent proof of the corpus delicti is absent RCW 10.58.035(1). The statute requires the court to issue a written order setting forth its rationale for admitting the statements. RCW 10.58.035(3).

The Court did not issue a written order as required at the time of trial. The defendant argues the failure of the court to provide that order requires reversal. BOA at 18. Alternatively the defendant argues the remedy should be to remand the case for a new hearing on admissibility of the extra judicial statements. BOA

at 19, n. 8. The trial court has now issued a written order stating the reasons it found the defendant's statements admissible under the statute. 2 CP ____ (sub 90, findings of fact and conclusions of law regarding admissibility of defendant's statements).² Those reasons support the Court's decision to admit the statements.

The statute requires the court to consider four non-exclusive criteria for assessing the trustworthiness of the defendant's statements. The court found the statement made to medical and police personnel were recorded at or near the time they were made. None of the medical or police personnel had any relationship with the defendant. There was physical evidence which corroborated the statements.

The defendant argues that the statutory requirements were not met because not all of the factors to be considered favored finding the statements trustworthy. The statute does not direct how each factor should be assessed, nor does it state each factor must be met preliminary to finding the statements were trustworthy. The procedure for admitting the defendant's statements under this statute is analogous to admission of child hearsay pursuant to RCW 9A.44.120. Not every factor which bears on the reliability of a

² A copy of the findings and conclusions is attached to this response.

child's statement must be met in order to find them trustworthy. State v. Justiniano, 48 Wn. App. 572, 580, 740 P.2d 872 (1987). There is no reason to treat the reliability analysis for the defendant's statements any differently than for a child victim's statements. The trial court does not abuse its discretion in admitting the defendant's statements even if all four factors are not met.

Moreover the defendant mischaracterizes the evidence he argues weigh in favor of finding the statements unreliable. No one ever accused the defendant of causing those injuries. Rather the defendant and Ms. Holzknrecht were asked generally what they thought may have caused G.H.'s injuries. 1 RP 38, 50, 137, 157.

2. RCW 10.35.045 Is Constitutional.

The defendant next challenges admission of those statements on the basis that RCW 10.35.035 is unconstitutional. He argues the statute violates due process and the separation of powers doctrine.

Statutes are presumed constitutional. State v. Stevenson, 128 Wn. App. 179, 189, 114 P.3d. 699 (2005). The party challenging the constitutionality of the statute bears the burden to prove the statute is unconstitutional beyond a reasonable doubt.

State v. Ramos, 149 Wn. App. 266, 270, 202 P.3d 383 (2009). The reason for the high standard is based on the Court's respect for the Legislature as a co-equal branch of government which is sworn to uphold the constitution just as the Court is sworn to do so. Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

The defendant first challenges the statute on due process grounds arguing the statute permits unreliable and uncorroborated statements to support a conviction. Whether RCW 10.58.035 violates due process was decided in State v. Dow, 142 Wn. App. 971, 176 P.3d 597 (2008), review granted, 164 Wn.2d 1007, 195 P.3d 87 (2008). Dow discussed the history of the corpus delicti rule. Washington's version of the rule is not based on its constitution. Id. at 978, quoting Bremerton v. Corbett, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986). Federal case authority also established that the corpus delicti rule was a judicial rule and not constitutional requirement. Id. at 983. The Court thus concluded "that the independent evidence or corroboration requirement is not constitutionally based and that there is no constitutional impediment to admitting a defendant's statement found trustworthy under RCW 10.58.035(1)." Id. at 983.

The defendant fails to discuss why the Court's decision in Dow should not be followed in his case. Instead he relies on Bartholomew to support his argument that due process requires independent evidence of the crime. State v. Bartholomew, 101 Wn.2d 631, 640, 683 P.2d 1078 (1984). Bartholomew held that the due process provisions of the state constitution are offended by the provisions of RCW 10.95.060(3) in a case involving capital punishment by allowing evidence regardless of its admissibility under the rules of evidence and allowing evidence of prior criminal activity regardless of whether the defendant had been charged or convicted of that activity. Id. at 640. The reasoning in Bartholomew has no application here because RCW 10.58.035 specifically requires the statements at issue to be "lawfully obtained and otherwise admissible." Thus, the rules of evidence which concerned the Bartholomew Court do apply here.

The defendant next argues RCW 10.58.035 violates the separation of powers doctrine. The separation of powers doctrine has traditionally been presumed to exist from the division of government into three distinct branches; executive, legislative, and judicial. Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The purpose of the doctrine is to prevent one branch of

government from encroaching on the “fundamental functions” of another. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

The doctrine does not absolutely bar different branches performing similar functions. “The validity of this doctrine does not depend on the branches of government being hermetically sealed off from one another.” Carrick 125 Wn.2d at 135. Whether the doctrine has been violated is determined by asking “whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

When a court rule and a statute appear to conflict the Court will attempt to harmonize them in order to give effect to both. Where the subject matter relates to the court’s inherent power and the conflict cannot be reconciled the court rule will be given effect. Fircrest v. Jensen, 158 Wn.2d 384, 394, 153 P.3d 776 (2006), cert. denied, 549 U.S. 1254, 127 S.Ct. 1382, 167 L.Ed.2d 162 (2007).

Subjects which include the court’s inherent authority include regulation of the practice of law. Washington State Bar Ass’n v. State, 125 Wn.2d 901, 907, 890 P.2d 1047 (1995). The court has the inherent authority to ensure that justice is fairly and impartially administered. Iverson v. Marine Bancorporation, 83 Wn.2d 163,

166, 517 P.2d 197 (1973). In addition the legislature has delegated to the Supreme Court the authority to adopt rules of procedure. State v. Fields, 85 Wn.2d 126, 128, 530 P.2d 284 (1975).

The defendant states without citation to authority that the corpus delicti rule is procedural rule, judicially adopted by the court. BOA at 20. He argues the Legislature cannot “overrule” the Supreme Court’s decision to adopt this rule.

The corpus delicti rule is an evidence rule governing the foundation for admission of a defendant’s statements or admission. Dow, 142 Wn. App. at 978. The Supreme Court has recognized that its authority to adopt rules of evidence was delegated to the judiciary by the Legislature. “Therefore, rules of evidence may be promulgated by both the legislative and judicial branches.” City of Fircrest, 158 Wn.2d at 394. The defendant’s argument that the corpus delicti rule is procedural is in conflict with Supreme Court authority. State v. Sears, 4 Wn.2d 200, 215, 103 P.3d 337 (1940) (the legislature has the power to enact laws which create rules of evidence), State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929) (“rules of evidence are substantive law”). The defendant’s argument does not support the conclusion that the statute

governing admission of the defendant's statements violates the separation of powers doctrine.

When considering this question as it relates to evidentiary statutes courts have found that evidence rules adopted by the legislature that were also addressed by court rules did not violate the doctrine when the statute left admission of evidence to the trial court's discretion. In Fircrest the Court held a statute which addressed admissibility of BAC tests in a DUI prosecution did not violate the separation of powers doctrine because the trial court was permitted, but not required to admit the test at trial. Fircrest 158 Wn.2d at 399. Similarly in Ryan the Court held the Child Hearsay Statute did not violate the separation of powers doctrine in part because the hearsay was admissible only if the trial court found that it contained particularized guarantees of trustworthiness. State v. Ryan, 103 Wn.2d 165, 178-179, 691 P.2d 197 (1984).

The reasoning in Ryan and Fircrest is applicable here. The court is not required to admit a defendant's confession, admission, or statement under any circumstances. Rather that evidence is admitted only if it is lawfully obtained and otherwise admissible and the trial court determines that there is substantial independent evidence that tends to establish the trustworthiness of the evidence

in question. Like the evidence at issue in Fircrest and Ryan the court had discretion to admit or reject evidence of the defendant's statements based on its evaluation of other factors. For that reason RCW 10.58.035 does not threaten the independence or integrity or invades the prerogatives of the judicial branch of government.

The defendant argues the Legislature cannot overrule a decision of the Supreme Court on a question of evidence, and the court is not required to follow the Legislatures attempts to change the law. The cases he relies upon for this statement do not support his position. Each of these cases demonstrates that the Court does follow Legislative enactments concerning admission of evidence in criminal trials to the extent that they can be harmonized with other rules of evidence. RCW 10.58.035 can be harmonized with other rules of evidence because by the terms of the statute itself the rules of evidence apply to admission of the defendant's statements. The defendant's claim that the statute violates the separation of powers doctrine should be rejected.

3. Even Under The Corpus Delicti Rule The Defendant's Statements Were Properly Admitted.

In order to establish the corpus delicti of a crime there must be independent evidence of a criminal act or result which forms the

basis of the charge and the existence of a criminal agency as the cause of such act or result. State v. Meyer, 37 Wn.2d 759, 762, 226 P.2d 204 (1951). The independent evidence may be direct or circumstantial. State v. Lung, 70 Wn.2d 365, 371, 423 P.2d 72 (1967). It must support a reasonable hypothesis that a crime was committed; if it supports both a criminal and innocent hypothesis of guilt it is not sufficient. State v. Brockob, 159 Wn.2d 311, 330, 150 P.3d 59 (2006). The evidence is sufficient if it prima facie establishes the corpus delicti. Meyer, 37 Wn.2d at 764. However, it need not prove all of the elements of the crime. State v. Angulo, 148 Wn. App. 642, 653, 200 P.3d 752 (2009). The corpus delicti may be established through a combination of the independent proof and the confession at issue. State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996).

Here there was independent evidence that G.H.'s injuries were the result of a criminal act. Amy Holzkecht said she had been concerned that the defendant was too rough with G.H. during diaper changes. Ms. Holzkecht told police that she believed the defendant move too quickly when he changed G.H. and that it hurt G.H. when he did so. Ms. Holzkecht said that she had reminded the defendant on a few occasions to be gentler with G.H. because

he seemed a little rough with her. Ms. Hozknecht said she thought her husband had an anger problem and would sometimes lose his patience. 1 RP 55, 82, 136, 157. Ms. Feagles saw the defendant handling G.H. right after she was born. Her impression was that the defendant was handling G.H. quickly and roughly. 1 RP 128-29.

Mr. Tamburri, the emergency room physician's assistant stated he had never seen the type of fractures G.H. suffered in a two month old, but he had seen them secondary to significant trauma. They were not the kind of injuries that would occur as part of a normal diaper change. 1 RP 40. Dr. Sugars, a doctor who specializes in child abuse cases, examined G.H. and reviewed her case. She stated that two month old children are not capable of much movement on their own. G.H.'s injuries were typical of injuries caused by abuse. Dr. Sugars considered other potential causes for G.H.'s injuries and concluded that the fractures were the result of abuse and that someone had hurt her. 1 RP 150, 151-169, 173-174.

The defendant states that the only independent evidence which established G.H.'s injury was caused by criminal means was the opinions of the expert witnesses. He argues that because that

evidence was not admissible it could not serve as the independent evidence required to find the corpus delicti of the crime.

“The corpus delicti rule is an evidentiary rule that establishes the foundational requirements for admitting a defendant’s statements or admissions.” Dow, 142 Wn. App. at 978. The rules of evidence do not apply to preliminary questions of fact when determining the admissibility of other evidence. ER 1101(c)(1). The State does not agree that expert testimony was improperly admitted. However, even if it was, it would not preclude the trial court from considering that evidence when assessing whether the corpus delicti had been established as a prerequisite to admitting the defendant’s statements.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED EXPERT WITNESSES OPINION TESTIMONY.

Prior to trial the defendant moved in limine to prohibit the use of the terms “child physical abuse” and “non-accidental trauma.” He had no objection to the doctors characterizing the injury as “inflicted.” The trial court denied the motion, holding under ER 704 an expert opinion encompassing those terms was admissible. 1 CP 93; 1 RP 8-10.

A trial court has wide discretion in ruling on the admissibility of expert testimony. Miller v. Likins, 109 Wn. App. 140, 147, 34 P.3d 835 (2001). An abuse of discretion occurs when a decision is based on untenable grounds or for untenable reasons. State ex. rel Carrol v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). Particular deference is given to the trial court's decision when there are fair arguments to be made both for and against admission. Davidson v. Municipality of Metropolitan Seattle, 43 Wn. App. 569, 710 P.2d 569, review denied, 106 Wn.2d 1009 (1986).

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. ER 702. Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. ER 704. An expert may not express an opinion about the defendant's guilt. State v. Cruz, 77 Wn. App. 811, 814, 894 P.2d 573 (1995). Thus a witness must not state the defendant is guilty, or testify in such a way that leaves no other conclusion that the defendant is guilty. Id. at 815.

However, testimony that does not directly comment on the defendant's guilt or the veracity of a witness, is helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011, 869 P.2d 1085 (1994). When considering the admissibility of opinion evidence the court takes into account the type of witness who will testify, the specific nature of the testimony, the nature of the charges, the type of defense, and other evidence presented. State v. Baird, 83 Wn. App. 477, 485, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012, 932 P.2d 1256 (1997).

Courts have found expert opinions which embrace an ultimate issue to be decided were not improper where the opinion left trier of fact with questions to decide. Thus, in a murder trial testimony from the medical examiner that he issued a presumptive death certificate was a proper opinion because the testimony was not an opinion that the defendant was guilty of the murder. State v. Mason, 160 Wn.2d 910, 932, 162 P.3d 369 (2007), cert. denied, ___ U.S. ___, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008). In a first degree assault case where the defense was voluntary intoxication the doctor's opinion that the injuries were deliberately inflicted was

proper. The testimony did not tell the jury what to decide nor did it rely on the doctor's opinion about the defendant's credibility, but rather was based on the doctor's experience and training in treating that type of injury. Baird, 83 Wn. App. at 486. See also State v. Read, 100 Wn. App. 776, 998 P.2d 897 (2000) review granted, cause remanded, 142 Wn.2d 1007, 13 P.3d 1065 (2000), State v. We, 138 Wn. App. 716, 158 P.3d 1235 (2007), review denied, 163 Wn.2d 1008, 180 P.3d 785 (2008).

Here Dr. Sugar and Dr. Done were qualified to express an opinion regarding the cause of G.H.'s injuries. Dr. Sugar specialized in pediatric medicine for at least 18 years. She had published articles on child abuse and conditions that could be confused with child abuse. 1 RP 148-150. Dr. Done has over 20 years experience in pediatrics and pediatric radiology. He has lectured on child abuse and non-accidental trauma. 2 RP 208-209. The opinions expressed by both doctors were based on their training and experience, their observations of G.H., her history, and consideration of all possible causes for her injuries. 1 RP 153-170; 2 RP 212, 215. Neither doctor's opinion touched on who was responsible for the injuries to G.H. It did not comment on the

credibility of any witness. Thus the trial court did not abuse its discretion when it permitted that testimony.

The defendant argues the court erred because the doctor's opinions constituted legal conclusion that they were not qualified to make. He cites definitions for "accident" used by the Court in discussing Article 17 of the Warsaw Convention imposing liability for air carriers on international flights. Olympic Airways v. Husain, 540 U.S. 644, 124 S.Ct. 1221, 157 L.Ed.2d 1146 (2004). He cites the definition of "abuse" contained in the Washington Administrative Code section related to Child Protective Services. He does not explain how definitions applicable to these laws are applicable in his assault case. Nor should they be.

Under RCW 9A.36.021 and RCW 9A.36.130 the State is not required to prove the injury was not the result of accident or abuse. Rather the State must prove an intentional assault which recklessly caused substantial bodily harm. Both intent and recklessness have legal definitions. RCW 9A.08.010(1)(a), (c). Neither opined that the defendant's conduct met those legal definitions.

The authorities cited by the defendant to support the argument the testimony was an impermissible legal opinion likewise is not applicable to his case. Christopher was a prescription forgery

case. State v. Christopher, 114 Wn. App. 858, 60 P.3d 677, review denied, 149 Wn.2d 1034, 75 P.3d 968 (2003). The Court held an exhibit containing the pharmacist's note that he received a "fraudulent" call for a prescription was an improper lay opinion about an ultimate fact for the jury to decide and it addressed all four elements of the crime that the defendant had been charged with. Id. at 862-863.

Here the witnesses were experts in the field of physical child abuse. Their testimony was expert opinions which only addressed one issue; whether there was an intentional assault. It did not constitute an opinion that the defendant was guilty of the charges, or whether the injuries were the result of reckless conduct.

The expert opinion at issue in Clausing is also completely different from the opinions at issue here. State v. Clausing, 147 Wn.2d 620, 56 P.3d 550 (2002). There the executive director of the Pharmacy Board gave a legal opinion regarding the scope of the law regulating a physician's license to practice medicine. Id. at 628. The opinion at issue in this case was not an opinion about what the law relating to assault of a child encompassed.

C. THE DEFENDANT FAILED TO PRESERVE ANY ISSUE REGARDING INSTRUCTIONS ADDRESSING PUNISHMENT. THE INSTRUCTION DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

1. The Defendant Has Not Established Manifest Error Of A Constitutional Right.

The jury was instructed;

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

1 CP 57.

Courts in Washington agree “[t]he question of the sentence to be imposed by the court is never a proper issue for the jury’s deliberation, except in capital cases.” State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001) quoting State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). Nevertheless, the defendant argues that this instruction was improper because jurors do have a role in sentencing after the Court’s decisions in Apprendi v. New Jersey, 530, U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The defendant concedes that he did not object to this portion of the instruction at trial. He asserts that he is entitled to raise the issue now because it is a constitutional error that should be reviewed pursuant to RAP 2.5(a)(3).

Generally the Court will not review an issue that was not raised in the trial court. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). A Court may review an issue for the first time on appeal if it is manifest and truly of constitutional dimensions. State v. Boss, 144 Wn. App. 878, 890-91, 184 P.3d 1264(2008), review granted, 165 Wn.2d 1019, 203 P.3d 379 (2009). Alleged error is manifest if the defendant was actually prejudiced by the error. Id. at 891.

The defendant asserts the error is of constitutional magnitude because it violated his right to a jury trial and his due process rights. He argues in the wake of Apprendi and Blakely the jury now does have a role in sentencing. As discussed below, those two cases do not stand for that proposition, and the instruction was not erroneous.

Even if there was some error in the instruction the defendant completely fails to address how the instruction actually prejudiced him in the trial of his case. The jury's role was limited to a

determination of whether an alleged aggravating factor was supported by the evidence. RCW 9.94A.537(3). If found, the judge, and not the jury, was required to determine whether the aggravating factor constituted a substantial and compelling reason to go above the standard range. RCW 9.94A.537(6). That is what occurred here. Thus the defendant has failed to establish a manifest constitutional error which justifies the Court considering this issue for the first time on appeal.

2. The Instruction Was A Correct Statement Of The Law.

A jury's function is to find facts and decide whether those facts prove the defendant has committed a crime. A judge's role is to impose sentence on the defendant once he has been convicted by the jury. Shannon v. U.S., 512 U.S. 573, 579, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994). Generally a jury has no sentencing function, and should be told to reach a verdict "without regard to what sentence might be imposed." Rogers v. U.S., 422 U.S. 35, 40, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975), Townsend, supra. Thus the instruction was a correct statement of the law, and it was not error to so instruct the jury.

The decisions in Apprendi and Blakely do not alter the jury's role in a criminal trial. In Apprendi the issue was whether the Due

Process clause of the Constitution required a jury to find an additional fact used to enhance a sentence beyond the maximum prescribed by law for the charge. Apprendi, 530 U.S. at 469. The Court recognized the traditional function of the jury was to find facts which constituted a violation of the law. The judge retained his role in sentencing, limited only by the facts as found by the jury. Id. at 479-483.

Blakely applied the holding in Apprendi to Washington's sentencing scheme. Blakely, 542 U.S. at 301. Blakely continued to recognize the judge's role was to sentence the defendant. The judge's authority to do so derived from the jury's verdict. Id. at 306. The Court's reference to the jury as the "circuitbreaker in the State's machinery of justice" referred to the jury's role in finding facts which were a necessary prerequisite to imposition of sentence. Id. at 306-307. The Court did not alter the jury's function in non-capital cases to include handing down sentences in the case of a violation of law.

The defendant's historical reference to juror's knowledge of sentencing consequences used to nullify the verdict should be rejected as a reason to find the instruction here was erroneous. To support this argument the defendant relies on United States v.

Polizzi, 549 F. Supp.2d 308 (E.D.N.Y. 2008), reversed, 564 F.3d 142 (2nd Cir. 2009). The District Court in Polizzi relied on Apprendi and Blakely to find the defendant had a right to have the jury instructed regarding the sentencing consequences. Polizzi, 549 F. Supp. at 326-33. The Court of Appeals reversed, holding those cases did not support a Sixth Amendment right to advise the jury regarding mandatory minimum sentences upon conviction. The Court rested its reasoning in part on the conclusion that until the United States Supreme Court overturned its decision in Shannon it was still controlling precedent. Polizzi, 564 F.3d at 160-61.

The Supreme Court held it was error to tell the jury about potential sentencing consequences in State v. Townsend, 142 Wn.2d 838, 15 P.2d 145 (2001). The Court reasoned this strict prohibition ensured impartial juries and prevents unfair influence on a jury's deliberations. Id. at 846. Post Apprendi and Blakely the Court has refused to alter that position. State v. Mason, 160 Wn.2d 910, 930, 162 P.3d 396 (2007), State v. Hicks, 163 Wn.2d 477, 487, 181 P.3d 831 (2008). If it is error to inform the jury about sentencing alternatives, it is certainly not error to inform the jury it should not consider the possibility of punishment except insofar as it makes the jury careful in its decision.

D. THE DEFENDANT FAILS TO ESTABLISH THE INSTRUCTION DEFINING ASSAULT RAISES A MANIFEST CONSTITUTIONAL ERROR. THE INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW.

The defendant argues that instruction number 13 defining assault was erroneous because it did not instruct the jury that it must find the defendant not only intended to touch or strike another person, but that he intended that touching or striking to be offensive. He further argues the instruction was deficient because it did not include the element that the touching or striking was unlawful, or without consent or permission. BOA at 33, 38.

The defendant did not object to Instruction 13, defining assault. 2 RP 261. He excuses this omission by arguing the instruction failed to instruct the jury on an essential element of the crime, which constitutes manifest constitutional error pursuant to RAP 2.5, citing State v. Mills, 154 Wn.2d 1, 6-8, 109 P.3d 415 (2005). Mills does not support the defendant's argument because that case considered whether it was error to bifurcate elements of the offense into two instructions, where one of the elements elevated the offense from a misdemeanor to a felony. Id. at 4. Instruction number 13 was taken from WPIC 35.50. That instruction sets out a definition of assault. It does not add any

element to the crime of assault. State v. Daniels, 87 Wn. App. 149, 155-56, 940 P.2d 690 (1997), review denied, 133 Wn.2d 1031, 950 P.2d 476 (1998).

The defendant's argument that the Court should review his issue should also fail because the instruction was a correct statement of the law. Washington recognizes three forms of assault; (1) assault by actual battery; (2) assault by attempting to inflict bodily injury on another while having apparent present ability to inflict such injury; and (3) assault by placing the victim in reasonable apprehension of bodily harm. State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000), review denied, 143 Wn.2d 1023, 25 P.3d 1020 (2001), Daniels, 87 Wn. App. at 152. While the latter two categories of assault require a specific intent to assault in a particular manner, assault by committing an actual battery does not. Daniels, 87 Wn. App. at 155. Rather an assault by battery requires intent to do the physical act constituting an assault. Hall, 104 Wn. App. at 62.

The defendant acknowledges that the Court has applied this rule in State v. Keend, 140 Wn. App. 858, 866-867, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041, 187 P.3d 270 (2008), State v. Esters, 84 Wn. App. 180, 185, 927 P.2d 1140 (1996),

review denied, 131 Wn.2d 1024, 937 P.2d 1101 (1997). BOA at 38, n. 17. He attempts to distinguish the holdings in these cases on the basis that they addressed whether the actor could commit an assault by actual battery without the specific intent to cause substantial bodily harm. That distinction is without a difference however. The rule stated in Hall is equally applicable here. No additional intent is required beyond the intent to do the physical act constituting the assault.

The defendant argues the criminal concept of assault derives from the civil tort of battery, relying on Seattle v. Taylor, 50 Wn. App. 384, 388, 748 P.2d 693, review denied, 110 Wn.2d 1036 (1988). The issue in Taylor was whether the Seattle Municipal Code section defining the crime of assault was unconstitutionally vague. This Court cited both criminal and civil authorities for the proposition that the ordinance was not unconstitutionally vague, stating “[t]he concept of offensive touching is well-rooted, and persons of ordinary understanding from the early days of the common law to the present have understood its meaning.” Id. at 388. This Court did not state that an assault caused by an actual

battery required any further mental state beyond the intent to do the act which constitutes the assault.³

Even if the law of torts should be assimilated into the definition of assault by actual battery, the authorities cited by the defendant are consistent with the criminal law. In both civil cases cited by the defendant court refers to an act done with the intent to bring about harmful or offensive contact. Garratt v. Dailey, 46 Wn.2d 197, 200, 279 P.2d 1091 (1955), O'Donoghue v. Riggs, 73 Wn.2d 814, 827, 440 P.2d 823 (1968). The phrase "harmful or offensive" modifies "contact". Thus the actor must commit an act which brings about contact, and that contact must be considered harmful or offensive. Those authorities do not state that the actor must intend the contact be harmful or offensive.

Instruction number 13 correctly stated the definition of assault committed by an actual battery. The Court should not consider whether the instruction was erroneous, but if it does, the Court should reject the defendant's arguments.

³ The Court has said that committing an assault by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting harm is thought to have been assimilated into criminal law from tort law. State v. Byrd, 125 Wn.2d 707, 712-713, 887 P.2d 396 (1995). However that is a different method of committing an assault which is not relevant here where the State's theory was the defendant committed an actual battery.

E. THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT OF ASSAULT OF A CHILD IN THE SECOND AND THIRD DEGREES.

The jury convicted the defendant of Assault of a Child in the Third Degree, Count I, and Assault of a Child in the Second Degree Counts II and III. 1 CP 49, 50, 51. The defendant argues the evidence was insufficient to convict him of these charges.

Evidence is sufficient if, when viewing all the evidence in the light most favorable to the State, and drawing all reasonable inferences in the State's favor, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When a defendant claims the evidence is insufficient to prove the elements of the crime, he admits the truth of the State's evidence and all inferences that could reasonably be drawn there from. State v. O'Neal, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007). The reviewing court defers to the trier of fact to resolve conflicts in the testimony, weigh the persuasiveness of the evidence, and assess the credibility of the witnesses. State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964, review denied, 135 Wn.2d 1015, 960 P.2d 939 (1998). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99

(1980). It is not necessary that the reviewing court be convinced beyond a reasonable doubt. State v. Smith, 31 Wn. App. 226, 228, 640 P.2d 25 (1982).

To convict the defendant of the crime of assault of a child in the second degree the State was required to prove (1) the defendant committed the crime of assault second degree against G.H., (2) that the defendant was 18 years or older and G.H. was under the age of 13, and (3) the acts occurred in the State of Washington. 1 CP 67-68. A person commits the crime of second degree assault when he intentionally assaults another and thereby recklessly inflicts substantial bodily harm. 1 CP 69.

The second and third elements of assault of a child in the third degree are the same as the second and third elements of assault of a child in the second degree. In addition to those elements the State was required to prove that the defendant committed the crime of assault in the third degree against G.H. 1 CP 74. A person commits third degree assault when, with criminal negligence, he causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. 1 CP 77.

The defendant raises two challenges to the evidence. First he argues the evidence does not prove he caused G.H.'s injuries. Second, he argues that even if the evidence were sufficient to show that he caused G.H.'s injuries, as to counts II and III the evidence does not establish that he acted with the requisite mental state.

The evidence showed G.H. suffered three distinct fractures within weeks of her admission to the hospital. 1 RP 159-160. Amy reported that G.H. was always in either her or the defendant's care, although the defendant's parents helped out with her care at times. Within the last few weeks before she was taken to the hospital the defendant had exclusive care of G.H. on three occasions. Amy expressed concern to both the defendant and hospital personnel that the defendant was handling G.H. too roughly at times, including when he was changing her diaper. Amy did not have that concern about any other person who helped care for G.H. The defendant agreed that he had been rough with G.H., at one point admitting that he had hurt her. 1 RP 55, 78-79, 82, 117, 136, 138, 143-144, 157, 196, 256.

Amy's aunt observed the defendant and Amy with G.H. She described the defendant changing G.H.'s diaper in a quick or rough manner. She observed Amy was not at all rough with G.H. 1 RP

129. At the time of trial the defendant had no contact with G.H. for nearly one year. During that time G.H. did not suffer any broken bones. 1 RP 74-76.

A rational trier of fact could conclude from the forgoing evidence that any injury G.H. suffered was caused by the defendant. The defendant's arguments to the contrary do not affect the sufficiency of the evidence which identify him as the person responsible for her broken legs.

Similarly there was sufficient circumstantial evidence that the defendant committed the crime of second degree assault against G.H.. Both Dr. Sugar and Dr. Done who examined G.H. considered all possible causes of her injuries. Each independently ruled out genetic or metabolic reasons for G.H.'s injuries. 1 RP 170, 178, 182-183; 2 RP 239-241. G.H.'s spiral fracture of her femur was a twisting, pulling or jerking of her leg. 2 RP 217, 233-234. The tibia fracture were "virtually diagnostic of non-accidental trauma" in infants. They are caused by twisting or yanking on the limb. 1 RP 172-174, 2 RP 232-234. Both Doctor's concluded that G.H.'s injuries were the result of someone hurting her. 1 RP 169; 2 RP 241.

In addition to the Doctor's findings the defendant admitted that on at least one occasion he hurt G.H. He told the social worker at the hospital that he may have pulled on G.H.'s leg too hard. 1 RP 56. In his statement to police the defendant recounted an incident where he was changing G.H.'s diaper. He stated:

Upon changing the diaper, [G.H.] began to defecate on the changing table. I grabbed [G.H.'s] legs and pushed a little too hard. After grabbing her, I realized that she had marks on her legs and that she was hurt.

1 RP 143.

From the doctor's testimony and the defendant's admission the jury could reasonably find that on three occasions the defendant committed an assault by actual battery on G.H. resulting in three distinct fractures to her legs. Dr. Done testified the three fractures occurred at three different times, based on the estimated age of each fracture. 2 RP 214, 217, 243. The defendant had repeated warnings from his wife to handle G.H. more gently than he was. 1 RP 79. It was reasonable for the jury to conclude that after the first occasion in which the defendant assaulted G.H. he should have known that the manner in which he handled her created a substantial risk of seriously hurting her. It was further reasonable for the jury to conclude that in breaking G.H.'s legs on two more

occasions the defendant disregarded that risk, and that his disregard was a gross deviation from the conduct of a reasonable person in the same situation. Thus, the evidence was sufficient to establish the defendant had committed the crime of second degree assault against G.H. as charged in counts II and III.

The defendant states his only motive was to help G.H. by changing her diaper. He argues that at most his conduct resulting in G.H.'s injuries was negligent, and therefore the evidence was insufficient to prove that he recklessly inflicted substantial bodily harm. The defendant did tell police that he did not intend to injure G.H. 1 RP 143. However there was also evidence that the kind of injury that G.H. suffered could not have occurred during any normal diaper change. 1 RP 40, 2 RP 249. The jury was free to reject the defendant's explanation as not credible. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

F. THE STATE'S RE-DIRECT EXAMINATION OF AMY HOLZKNECHT DOES NOT ENTITLE THE DEFENDANT TO A NEW TRIAL.

During cross-examination Amy Holzkecht was asked to describe her relationship with the defendant around the time G.H. was born. Ms. Holzkecht described their relationship as wonderful, indicating in part that they had a "great faith life." 1 RP

97. On re-direct examination the prosecutor asked Ms. Holzkecht to explain what she meant by a "great faith life." Specifically the prosecutor asked her if that meant that included being submissive to her husband, meaning "submitting to what he wants to do and what he wants to see happen" Ms. Holzkecht said "no, I don't think so." The prosecutor asked Ms. Holzkecht if she remembered an interview for a CPS assessment in which she said she was submissive to her husband. Ms. Holzkecht replied "no I do not." 1 RP 123-124. The prosecutor did not produce a witness to testify that Ms. Holzkecht had described herself as submissive to the defendant.

The defendant argues the prosecutor's attempt to impeach Ms. Holzkecht on this point by referring to extrinsic evidence without then producing that evidence violated his confrontation rights. He asserts that he is entitled to a new trial because the jury was left with the impression that Ms. Holzkecht was lying.

To support his position the defendant cites State v. Miles, 139 Wn. App. 879, 162 P.3d 1169 (2007) and State v. Babich, 68 Wn. App. 438, 440, 842 P.2d 1053, review denied, 121 Wn.2d 1015, 854 P.2d 42 (1993). In each case the challenged cross examination related to a central issue at trial. "[W]hen ...the

prosecution asks damning questions that go to a central issue in the case, these questions must be supported by evidence available or inferable from the trial record.” United States v. Elizondo, 92 F.2d 1308, 1313 (7th Cir. 1990).

The identity of the person who delivered controlled substances to the informant was the central issues for the jury to decide in Miles, supra. The Court held it was improper for the State to cross examine the defendant and his witness about events that would discredit his evidence tending to show he had not committed the crime, without then producing evidence of those events. Miles, 139 Wn. App. at 887-888.

The defendant in Babich claimed she had been entrapped into delivering drugs on one count. Babich, 68 Wn. App. at 440. On cross examination of two witnesses the defendant produced to support her defense the prosecutor asked about prior statements the witnesses had made to the informant that would have undermined that defense. The prosecutor did not thereafter produce evidence that the witnesses had made those statements. The Court held this was prejudicial error because cross-examination on that point directly impacted the asserted defense of entrapment. Id. at 446.

However, “the government does not have a duty in every case to introduce the factual predicate for a potentially prejudicial question posed on cross-examination.” United States v. Jungles, 903 F.2d 468, 478 (7th Cir. 1990). See Tegland §613.15. Here the nature of the relationship between the defendant and his wife did not relate to a determination of either an element of the offense, or a defense to the charge. The questions were designed to test Ms. Holzkecht’s credibility to the extent that she may have minimized what she observed. That Ms. Holzkecht was minimizing was already apparent from her testimony. She admitted previously stating that the defendant had been too rough with G.H., but amended that to state “I really strongly feel that that was much too harsh of a word.” 1 RP 76-77.

The defendant was also not prejudiced because unlike the cases he relied upon, Ms. Holzkecht was not the only witness the State relied upon to prove the charges. Ms. Holzkecht volunteered to Dr. Sugar and to the social worker, Ms. Zahn, that the defendant had been too rough with G.H., and that she had asked the defendant numerous times to be more gentle. 1 RP 157-158; 2 RP 256-257. The defendant admitted to treating G.H. roughly during at least one diaper change. There was no evidence that anyone

else treated G.H. roughly at any time. In order to produce the type of injuries sustained by G.H. a person would have to handle her more than just “roughly”. A person would have to yank or twist on her legs with sufficient force to break her bones. 1 RP 40, 161, 166-167, 173, 214, 217, 232-234.

The defendant argues the prejudice stems from impact on Ms. Holzkecht’s insistence that her husband had not intentionally hurt G.H., and whatever roughness she observed was insufficient to cause the fractures she suffered. Ms. Holzkecht’s position at trial regarding her husband’s responsibility for G.H.’s injuries was consistent with her position when she was interviewed by Dr. Sugar when G.H. was first admitted into the hospital. 1 RP 157.

To the extent the challenged questions had any bearing on Ms. Holzkecht’s credibility it had no impact on her opinion as to the cause of G.H.’s fractures. The defendant has failed to establish any error resulting when the State did not produce a witness to testify that Ms. Holzkecht had previously described her relationship with the defendant as submissive.

Moreover, he did not object at any time, move for a mistrial, or, request a limiting instruction when the State did not introduce extrinsic evidence regarding what Ms. Holzkecht told a CPS

evaluator. The defendant argues he was excused from the obligation to object relying on Babich. BOA at 45. Babich reasoned that no objection was necessary because the error resulted from the failure to prove the statements on rebuttal. Because the defendant could not be aware of the error until the State rested it was too late to undue the prejudice. Babich 68 Wn. App. at 438.

That reasoning overlooks several functions of an objection. If defense counsel is aware that the evidence exists, he may deliberately chose not to raise the point to avoid giving the prosecutor a chance to cure the error. Counsel “cannot remain silent, gamble on a favorable verdict, and then assert error for the first time on appeal.” State v. Stamm, 16 Wn. App. 603, 614, 559 P.2d 1 (1976), review denied, 91 Wn.2d 1013 (1977).

Additionally, had counsel objected it would have given the trial court an opportunity to give a curative instruction. An instruction may have eliminated the claimed prejudice resulting from the prosecutor’s questions. Id. at 614. It also allows the court to determine whether such an instruction would be effective. Since the trial court is in the best position to judge the prejudice of a statement its ruling on a mistrial motion is reviewed for abuse of

discretion. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). If no motion is made, the court is deprived of the opportunity to exercise that discretion. Consequently, this Court should ordinarily require that a mistrial motion be made before the issue is considered on appeal. Absent such a motion, the issue should be reviewed only if the existing record resulted in incurable prejudice. The record here does not meet that standard.

G. WHETHER THE DOCTOR'S OPINION REGARDING THE CAUSE OF G.H.'S INJURIES VIOLATED THE DEFENDANT'S CONFRONTATION RIGHTS HAS NOT BEEN PRESERVED FOR REVIEW. THE DOCTOR'S TESTIMONY WAS PROPER OPINION TESTIMONY. ALTERNATIVELY, ANY ERROR WAS HARMLESS.

Both Dr. Sugar and Dr. Done testified that in each doctor's opinion G.H.'s fractures were the result of non-accidental trauma. Each doctor's conclusion was the result of eliminating all other potential causes for those fractures, specifically metabolic or genetic causes. Dr. Done, the radiologist eliminated other potential causes, including osteogenesis imperfecta, rickets, and scurvy, from reviewing her x-rays, and comparing them to x-rays where those conditions existed. Dr. Sugar relied on the reports of other doctors, as well as her own examination and interview with Ms. Holzkecht, to form her opinion. Dr. Sugar considered the opinion

of one of three geneticists who evaluated G.H. for osteogenesis imperfecta before coming to her conclusion. Dr. Sugar testified that two of the three geneticists concluded that there was no evidence of that disorder, and a third could not rule it out as a cause of G.H.'s fractures. She also recounted the report of an endocrinologist who stated that G.H.'s lab reports showed normal calcium and vitamin D levels, ruling out a metabolic bone disease. 1 RP 151, 159, 165-170, 178-183; 2 RP 241.

The defendant argues that Dr. Sugar's testimony recounting the opinions of the geneticists violated his confrontation rights. He did not object to that testimony at trial. If Dr. Sugar's testimony was error the defendant has not explained how it was manifest, permitting review for the first time on appeal.

The Court found a claimed confrontation violation was manifest constitutional error in State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007). The court reasoned that had the defendant successfully raised his challenge in the trial court the State's case would have been fatally undermined. Id. at 900-901.

Unlike Kronich, had the defendant successfully objected to Dr. Sugar testifying to the other doctor's opinions the State would still have been able to prove its case. Dr. Sugar would still have

been able to state her opinion that based on a review of all available sources of information and her examination of G.H. that G.H.'s injuries were the result of non-accidental trauma, and not the result of a genetic or metabolic cause. ER 703, State v. Brown, 145 Wn. App. 62, 74, 184 P.3d 1284 (2008), review denied, 165 Wn.2d 1014, 199 P.3d 410 (2009). Further it would have had no impact on Dr. Done's testimony. Dr. Done considered and ruled out genetic an metabolic bases for G.H.'s injuries, independently concluding that her injuries were non-accidental. Because the challenged testimony did not have a practical and identifiable affect on the outcome of the case, the defendant has not established a reason to review this issue now.

The circumstances of this case are similar to those in State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992). At trial the State sought to introduce hearsay evidence of a witness it argued was unavailable because he would likely assert his Fifth Amendment right against self incrimination. The defendant did not object and the trial court admitted the evidence. When the defendant appealed arguing the evidence violated his Confrontation rights, this Court determined any claimed constitutional error was not manifest because had the defendant objected the State could have

called the witness who most certainly would have asserted his Fifth Amendment rights. Lynn, 67 Wn. App. at 346.

Like Lynn had the defendant objected to Dr. Sugar recounting the findings of the other non-testifying doctors the State could have brought those doctors in to testify as to their findings and conclusions.⁴ Thus any error in permitting Dr. Sugar to testify regarding the other doctor's findings was not manifest.

Moreover Dr. Sugar's testimony did not violate the defendant's confrontation rights. An expert may testify in the form of an opinion. ER 702. That opinion may be based on facts or data made known to the expert before trial. Those facts and data need not be admissible in evidence. ER 703. The fact that an expert bases her opinion on the opinions of other experts has been held not to violate the defendant's confrontation rights. State v. Ecklund, 30 Wn. App. 313, 317-318, 633 P.2d 933 (1981), State v. Russell, 125 Wn.2d 24, 75, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

⁴ Counsel's decision not to object to the testimony was likely a strategic decision. Had the State brought in the additional experts the State's case would only have been stronger that G.H.'s injuries were the result of someone causing them, rather than a metabolic or genetic cause.

To support his argument that his confrontation rights were violated the defendant relies Crawford v. Washington, 541 U.S.36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Crawford held that out of court statements which were testimonial were not admissible unless the speaker was unavailable and there had been a prior opportunity for cross examination. Non-testimonial hearsay was exempted from the Confrontation clause, and was governed by the State's hearsay rules. Id. at 68. Testimonial statements included those that were made without an ongoing emergency, and whose primary purpose was to establish a past fact potentially relevant to a later criminal prosecution. Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Finally, the Confrontation clause did not bar the use of testimonial statements for some purpose other than establishing the truth of the matter asserted. Id. at 59, n. 9.

It does not appear that after Crawford Washington courts have addressed the application of the Confrontation clause to ER 703. Other courts have had that opportunity and have not found a confrontation violation. U.S. v. Steed, 548 F.3d 961 (11th Cir. 2008)(refusing to find plain error when the defendant did not object to an officer's expert opinion based in part on his conversations

with other law enforcement officers because the Supreme Court had not addressed what otherwise inadmissible sources an expert may rely on when forming an opinion), People v. Jones, 871 N.E.2d 823, 834-835, review denied, 875 N.E.2d 1118 (Ill. 2007)(an expert may testify about the findings and conclusions of a non-testifying expert that he used in forming his expert opinion without violating Crawford.), State v. Tucker, 160 P.3d 177, 194, cert. denied, 522 U.S. 923, 128 S.Ct. 296, 160 L.Ed.2d 211 (Ariz. 2007) (evidence of a non-testifying expert's opinion introduced only to show the basis for a testifying expert's opinion is not hearsay and does not violate the Confrontation clause.)

Dr. Sugar's challenged testimony did not violate the defendant's confrontation right because it was not testimonial. Dr. Sugar was called to consult on G.H.'s case by the Emergency Room physician who treated her. 1 RP 152. Her work on G.H.'s case was not designed to determine G.H. had been physically abused. Her work, and the work of other experts who examined G.H., was designed to find out what caused the fractures. The cause could be medical or it could be non-accidental. But in either event the purpose of the examination was not to establish evidence for a future prosecution.

Dr. Sugar's challenged testimony also did not violate the defendant's confrontation rights because it was introduced to explain Dr. Sugar's ultimate conclusion that G.H.'s injuries were not caused by some medical abnormality. It was not introduced for the truth of what the other doctor's stated and therefore was not hearsay.

Even if there was a violation of the defendant's confrontation rights, it was harmless. Confrontation errors are harmless if the court is convinced beyond a reasonable doubt that the verdict is not attributable to the error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The test is whether the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

The defendant argues that both Dr. Sugar and Dr. Done's testimony was tainted, and therefore cannot be considered as part of the evidence in support of the conviction. His argument overstates the reach of any tainted evidence in this case.

The majority of Dr. Sugar's testimony involved her examination of G.H., her consultation with G.H.'s family and her opinion that G.H.'s fractures were caused by non-accidental

trauma. Since Dr. Sugar was available for cross-examination, at the very least her opinion as to the cause of injury and the reasons for that opinion did not violate the defendant's confrontation rights.

As for Dr. Done, the defendant only points to his testimony that "we" did certain things in evaluating G.H.'s injuries. BOA at 49, n. 20. The testimony cited by the defendant was an answer to the question "what did you rule out?" 2 RP 237. It is not clear whether the doctor was referring to himself or to a group of people that he worked with. But in any event he was not reporting hearsay from any other person. He clearly was stating what he observed. His observations were the basis for his ultimate opinion that G.H. suffered non-accidental trauma, ruling out genetic or metabolic reasons for the fractures. 2 RP 240-245.

Other evidence which supported the conviction included the defendant's admission he was too rough with G.H., and his account of one incident in which he believed he hurt her. It also included evidence from Ms. Holzknacht's and Ms. Feagles that the only person who anyone had concerns about handling G.H. too roughly was the defendant. Significantly G.H. had three fractures within the first 9 weeks of her life, the only time the defendant was in contact with her. In the year after that the defendant had no contact with

her, and she had no more fractures. 1 RP 76. This evidence, coupled with the opinions of two skilled doctors that G.H.'s injuries were the result of non-accidental trauma presented overwhelming evidence that the defendant caused G.H.'s three fractures.

H. THE INSTRUCTIONS DEFINING THE MENTAL STATE WERE NOT MANIFEST CONSTITUTIONAL ERROR. THE INSTRUCTIONS DID NOT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS.

1. The Defendant Has Failed To Preserve The Issue For Review.

The defendant challenges Instructions 21, 22, and 23 on the basis that they violated his Due Process rights. Those instructions defined the mental states of criminal negligence, recklessness, and knowledge. Consistent with RCW 9A.08.010(2) the last paragraph of each instruction stated that proof of a lesser mental state was established by proof of a greater mental state. The defendant argues the instructions were erroneous because they created a mandatory presumption and relieved the State of the burden of to prove the defendant recklessly inflicted substantial bodily harm.

The defendant acknowledges that he did not object to any of these instructions. He argues that he is excused from the requirements of RAP 2.5 because the court in Hayward accepted review on this same issue. State v. Hayward, ___ Wn. App. ___, 217

P.3d 354 (2009). SBOA at 3, n. 1. Hayward explained that it accepted review of the issue because it was an issue of constitutional magnitude. Id. at 360, n. 4. Hayward did not explain why the error was “manifest” as required by RAP 2.5(b). Hayward should not be accepted as authority for this Court to accept review in the absence of the defendant’s objection at the trial level.

Error is “manifest” if the defendant was actually prejudiced by it. Boss, 144 Wn. App. at 890-91. The defendant argues the instruction conflated the mental state required for the act (intentional assault) with the mental state for the result (recklessly inflicting substantial bodily harm) into a single element, thereby relieving the State of the burden to prove the mental state for the result. If there was any error here it was not manifest.

The same argument made here and in Hayward was rejected in Keend, 140 Wn. App. at 865-67. In Keend the court instructed the jury on the elements of second degree assault and separately defined intent and recklessness. The Court noted that under the actual battery theory of assault a defendant could intend to commit an assault without intending to inflict substantial bodily harm. Id. at 867. Under the statute and jury instructions the jury could convict the defendant if the result of his intentional assault

was an intentional, a knowing, or a reckless result. Therefore it was appropriate to instruct the jury regarding the substitute mental states. Id. at 867. Further, since the jury was presumed to read the instructions as a whole there was no possibility that the jury would be confused because the instructions did not conflate the mental states. The sentence defining substitute mental states did not allow the jury to presume the mental state for the result simply because the State had proved the act. Id. at 868.

Similar to the instruction in Keend the instructions here were clear. Instruction 12 defined when a person committed the crime of second degree assault. It separately instructed the jury that it must find the defendant (1) intentionally assaulted another, and (2) thereby recklessly inflicted substantial bodily harm. 1 CP 69. That is exactly what the jury was instructed in the “to convict” instruction in Keend. Keend, 140 Wn. App. at 867. Like Keend, it is not possible under these instructions that if the jury found that the State had met its burden to prove the defendant intentionally assaulted G.H. it would have automatically met its burden to prove he recklessly inflicted substantial bodily harm.

Moreover, there is no chance the jury would have conflated any mental state as it related to the assault of a child in the third

degree charge. The jury only had to find one mental state, criminal negligence. State v. Gerdts, 136 Wn. App. 720, 728, 150 P.3d 627 (2007).

The Court in Keend did review this issue even though the defendant had not objected to the instruction at trial. Keend recognized that the Court would not ordinarily review an issue raised for the first time on review. It did so there because the issue was framed in terms of ineffective assistance of counsel. The defendant here does not allege that counsel was ineffective. Rather he relies solely on the holding in Hayward stating that Hayward “essentially overruled its prior decision” in Keend.

Hayward did not overrule Keend. Hayward merely stated that had the Court in Keend decided the case after the 2008 amendments to WPIC 10.03 (defining recklessness) it may have reached a different decision. Hayward 217 P.3d at 361(emphasis added). Since the WIPIC committee clarified the instructions in response to the Court’s decision in Gobel⁵ and the Court in Keend specifically distinguished the facts in that case with the facts in Gobel the Hayward Court’s prediction is not very likely.

⁵ State v. Gobel, 131 Wn. App. 194, 126 P.3d 821 (2005).

2. The Instructions Did Not Violate The Defendant's Due Process Rights.

The defendant rests his argument that Instructions 21, 22, and 23 violated his rights on Hayward arguing that case controls the outcome of this case. The Court should reject that argument for several reasons. First, as discussed above, Hayward did not overrule Keend. Thus there are two decisions addressing the same issue with completely different outcomes. For reasons discussed below this Court should adopt the rationale employed in Keend. Second, the elements of the charges here are different than the elements of the charges in Hayward and Keend. The elements of the charges here are not affected by the challenged instructions.

Both Hayward and Keend analyzed the issue in light of the Court's prior decision in Gobel, supra. In Keend the court distinguished Goble by considering the instructions as a whole, finding that unlike the instructions in Gobel, the instructions there were "clear, accurate, and separately listed." Keend, 140 Wn. App. at 868. For the same reasons that the claimed constitutional error is not manifest, there is no error arising from the instructions defining the mental states in this case.

Hayward relied heavily on the WPIC committee's decision to amend the instructions after the Court's decision in Gobel. The Court recognized that WPIC's are not the law. Despite that the Court relied on the WPIC committee's amendments to the instruction to conclude that the former instruction was erroneous. Id. at 361.

The WPIC committee's decision to clarify a jury instruction does not necessarily mean the former version of the instruction was wrong. The Court refused to find giving the former version of WPIC 155.00⁶ violated the defendant's constitutional rights even though the Court held revised WPIC 155.01 was the correct state of the law in Washington. State v. Labanowski, 117 Wn.2d 405, 423-24, 816 P.2d 26 (1991). For the reasons discussed the former version of WPIC 10.02, 10.03, and 10.04 defining knowledge, recklessness, and criminal negligence respectively did not violate the defendant's due process rights in this case.

In addition the 2008 amendment to the WPIC added the phrase "as to a particular [result][fact]" in brackets. The note on

⁶ Former WPIC 155.00 required the jury to acquit the defendant on the charged count before considering the lesser included offense. Revised WPIC 155.00 permitted the jury to hang on the charged count before considering the lesser offense.

usage for each of the relevant WPIC state the bracketed materials should be used as applicable. The comment to WPIC 10.03 referred to the comments in WPIC 10.02 discussing Goble regarding the relationship between recklessness and higher culpability requirements. The comments to WPIC 10.02 state “the bracketed phrases may be used depending on the evidence and arguments of a particular case.” WPIC. 10.02. Clearly the WPIC committee contemplated that the bracketed phrase was not necessary in all cases. Thus, Hayward placed undue emphasis on the WPIC committee's decision to clarify the instructions defining mental states when concluding the instructions in that case were confusing.

Secondly, the defendant in Hayward and the defendant here were charged with two different crimes. The elements of second degree assault required the jury to find (1) the defendant intentionally assaulted another, and (2) the defendant thereby recklessly inflicted substantial bodily harm on the other person. WPIC 35.13, RCW 9A.36.021(a). The elements of assault of a child in the second degree are that (1) the defendant committed the crime of assault second degree against another (2) that the defendant was over the age of 18 and the victim was under the age

of 13, and (3) the acts occurred in the State of Washington. RCW 9A.36.130(1)(a); WPIC 35.37.01, State v. Daniels, 87 Wn. App. 149, 155, 940 P.2d 690 (1997), review denied, 133 Wn.2d 1031, 950 P.2d 476 (1998). The elements of assault of a child third degree are (1) the defendant committed a third degree assault against another, and (2) the defendant was eighteen or older and the victim was under thirteen years old. RCW 9A.36.140; WPIC 35.39. Nothing about instructions 21, 22, or 23 created any confusion about the actual elements of the offenses the defendant was charged with which would relieve the State of the burden to prove all of those elements.

The definitions for second degree assault and third degree assault tracked the language of the statutes. Compare instructions number 12 and 20 with RCW 9A.36.021(1)(a) and RCW 9A.36(1)(d). 1 CP 69, 78. They clearly set out the facts which the jury had to find. Thus there was no danger the jury could have concluded the resulting injury was recklessly inflicted simply because they concluded the defendant had intentionally assaulted G.H.

Finally, even if the instructions were wrong, any error was harmless. A constitutional error does not require reversal when it

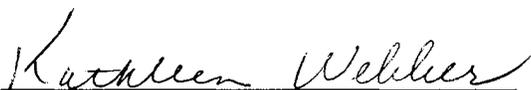
is clear beyond a reasonable doubt that the jury verdict is unattributable to the error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Unlike the Guloy jury, the jury here expressed no confusion about the instructions defining the mental states. The only questions from the jury had to do with how to assign the counts to the injuries. 1 CP 52, 53. The jury's decision that the defendant acted only with criminal negligence as to the first count is evidence the jury understood that it had to address the mental state for the resulting injury separate from the mental state required for the assault. Thus, even if the court should have included the bracketed material from the revised WPIC instructions it had no effect on the outcome of the case.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's convictions.

Respectfully submitted on December 10, 2009.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER, WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent



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2009 OCT 29 PM 3:39

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

HOLZKNECHT, ERIC EARL

Defendant.

No. 07-1-03743-2

FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING ADMISSIBILITY OF
DEFENDANT'S STATEMENTS

On November 17, 2008 during trial, the defendant moved to suppress the defendant's statements. The court considered the testimony of the witnesses at trial and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

At the time of trial, G.H., the victim, was 14 months old and unable to explain what happened to her when she was two months old.

The defendant stipulated that the Constitutional requirements under Fifth Amendment grounds for admissibility of his statements to law enforcement were met.

ORIGINAL

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The defendant and Amy Holzknrecht discovered that there was something wrong with G.H.'s leg on November 30, 2007.

The defendant spoke with Nicholas Tamburri, P.A. at the Providence Emergency Room about transporting G.H. to Children's Hospital. Mr. Tamburri documented the conversation in a medical report. The defendant had no prior relationship with Mr. Tamburri.

On December 1, 2007, shortly after G.H. arrived at Children's Hospital, the defendant spoke with Seattle Police Officer Sheheen and contemporaneously provided a written statement in which the defendant admitted, among other things, that he had grabbed G.H.'s legs and pushed to hard; and that he felt G.H.'s injuries could be his fault. The defendant had no prior relationship with Officer Sheheen.

The defendant told Doris Bartel, M.S.W. that he handled G.H. roughly and may have pulled on her leg too hard. Ms. Bartel documented the conversation in a medical report. The defendant had no prior relationship with Ms. Bartel.

The defendant's wife, Amy Holzknrecht, told at least six people, including the defendant that the defendant was too rough or not as gentle as he should be with G.H.

After ruling out any other medical reason for G.H.'s fractures, at least four doctors concluded that the causes of the fractures were non-accidental traumas

At least three people saw bruises on G.H. Dr. Sugar testified that it is unusual for a child of G.H.'s age to have bruising caused by anything other than non-accidental trauma inflicted by another.

On one occasion, the defendant's wife, Amy Holzknrecht, came into a room immediately after the defendant yanked on G.H.'s leg; G.H. started screaming; and the defendant said that he thought he might have hurt her.

II. CONCLUSIONS OF LAW

G.H. was incompetent to testify.

The defendant's statements were lawfully obtained.

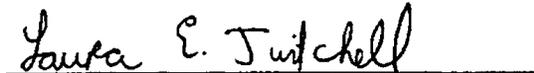
There is substantial independent evidence that would tend to establish the trustworthiness of the statements of the defendant.

Pursuant to RCW 10.58.035, the defendant's statements are admissible.

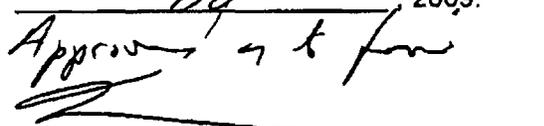
DONE IN OPEN COURT this 20 day of Oct, 2009.


JUDGE

Presented by:


LAURA E. TWITCHELL, #28697
Deputy Prosecuting Attorney

Copy received this 20th day of Oct, 2009.


KAREN HALVERSON, #19193
Attorney for Defendant

ERIC EARL HOLZKNECHT
Defendant



**Snohomish County
Prosecuting Attorney**

Criminal Division
Joanie Cavagnaro, Chief Deputy
Mission Building
3000 Rockefeller Ave., M/S 504
Everett, WA 98201-4046
(425) 388-3333
Fax (425) 388-3572

December 10, 2009

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

2009 DEC 14 AM 11:02
STATE OF WASHINGTON
COURT OF APPEALS

**Re: STATE v. ERIC E. HOLZKNECHT
COURT OF APPEALS NO. 63017-2-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

**KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney**

cc: Neil M. Fox
Appellant's attorney

I have enclosed a properly stamped envelope
to be sent to the attorney for the defendant that
contains a copy of this document.

I declare under penalty of perjury under the laws of the
State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office

this 11th day of Dec 20 09

Administration
Bob Lenz, Operations Manager
Admin East 7th Floor
(425) 388-3333
Fax (425) 388-7172

Civil Division
Jason Cummings, Chief Deputy
Admin East 7th Floor
(425) 388-6330
Fax (425) 388-6333

Family Support Division
Marie Turk, Chief Deputy
Admin East 6th Floor
(425) 388-7280
Fax (425) 388-7295

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

THE STATE OF WASHINGTON,

Respondent.

v.

ERIC E. HOLZKNECHT,

Appellant.

No. 63017-2-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 11th day of December, 2009, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NEIL M. FOX
COHEN & IARIA
1008 WESTERN AVENUE, SUITE 302
SEATTLE, WA 98104

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 17th day of December, 2009.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit