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NO. 71112-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY PAUL WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Susan Cook, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain appellant's Manslaughter conviction.

2. Appellant was denied his Sixth Amendment right to effective representation when his attorneys failed to ensure jurors were instructed on critical trial defenses to Manslaughter.

3. The trial court erred, and denied appellant a fair trial, when it rejected a proper defense instruction on superceding intervening cause for an erroneous instruction proposed by the State.

4. To the extent defense counsel failed to preserve appellant's challenges to the erroneous instruction on superceding intervening cause, appellant was denied his Sixth Amendment right to effective representation.

5. Because appellant was convicted of Manslaughter as an accomplice, and most of the aggravating circumstances in support of his exceptional sentence may improperly be based on his liability as an accomplice, his exceptional sentence must be vacated.

6. The trial court violated appellant's constitutional right to a public trial during jury selection.

7. The trial court violated appellant's constitutional right to be present for all critical stages of trial during jury selection.

Issues Pertaining to Assignments of Error

1. Appellant's daughter died of hypothermia while under the exclusive supervision of appellant's wife. Although appellant was not present and there is no evidence he knew what was happening in his absence, he was convicted of Manslaughter as an accomplice. Where the State failed to establish that appellant knowingly participated in the reckless conduct that led to his daughter's death from hypothermia, must his conviction be vacated?

2. A primary argument in appellant's defense turned on causation. His attorneys argued there was no evidence he proximately caused his daughter's death and, even if there were, his wife's unexpected reckless conduct was a superceding intervening event that terminated any criminal liability on his part. Unfortunately, appellant's attorneys failed to ensure jurors received instructions that would allow them to consider these arguments for Manslaughter. Did this failure deny appellant his Sixth Amendment right to competent representation and a fair trial?

3. The defense proposed a correct instruction on superceding intervening cause, but it was rejected in favor of a State-proposed instruction that contained errors and left no possibility jurors would find for appellant on this subject. Did the trial court err and deny appellant a fair trial?

4. To the extent defense counsel did not lodge a sufficient objection to the State's instruction on superceding intervening cause, thereby arguably waiving the issue for appeal, did this failure deny appellant his Sixth Amendment right to competent representation?

5. Aggravating circumstances in support of an exceptional sentence may not be based on notions of accomplice liability. Where almost all of the aggravating circumstances found against appellant may be based merely on accomplice principles, must appellant's exceptional sentence be vacated?

6. The parties exercised peremptory challenges against 20 jurors during a private sidebar conference conducted outside the sight and sound of the general public. Was this a violation of appellant's constitutional right to a public trial?

7. Appellant also was excluded from the sidebar conference at which 20 jurors were excused. Did this violate appellant's constitutional right to be present and participate at trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Skagit County Prosecutor's Office charged Larry and Carri Williams with Homicide By Abuse and, alternatively, Manslaughter in the First Degree in connection with the death of their daughter, Hana Williams, on May 12, 2011. CP 10-11; 4RP[1] 7, 9. The Manslaughter charge included several alleged aggravating circumstances that would allow the State to seek an exceptional sentence. CP 11-12; 4RP 8-11. Carri and Larry also were charged with one count of Assault of a Child in the First Degree in connection with their son, I.W. CP 11; 4RP 8-10.

[1] This brief refers to the verbatim report of proceedings as follows: 1RP – 3/14/12; 2RP – 8/17/12, 11/28/12, 12/7/12, 1/2/13, 1/17/13, 7/16/13; 3RP – 12/13/12, 4/4/13 (date not noted on cover), 5/9/13; 4RP – 7/22/13; 5RP – 7/22-24/13; 6RP – 7/23/13; 7RP – 7/24/13; 8RP – 7/25/13; 9RP – 7/26/13; 10RP – 7/29/13; 11RP – 7/30/13; 12RP – 7/31/13; 13RP – 8/1/13; 14RP – 8/2/13; 15RP – 8/5/13; 16RP – 8/6/13; 17RP – 8/7/13 (labeled 8/7/14); 18RP – 8/8/13; 19RP – 8/9/13; 20RP – 8/13/13; 21RP – 8/14/13; 22RP – 8/15/13; 23RP – 8/16/13; 24RP – 8/19/13; 25RP – 8/20/13; 26RP – 8/21/13; 27RP – 8/22/13; 28RP – 8/23/13; 29RP – 8/26/13; 30RP – 8/27/13; 31RP – 8/28/13; 32RP – 8/29/13; 33RP – 8/30/13 (a.m.); 34RP – 8/30/13 (p.m.); 35RP – 9/4/13; 36RP – 9/5-6/13 and 9/9/13; 37RP – 7/26/13 and 10/29/13.

A jury convicted Carri of all three crimes and found each of the aggravating circumstances established. 36RP 193-195. In light of her conviction for Homicide By Abuse, her Manslaughter conviction was vacated on double jeopardy grounds. 37RP 96. At sentencing, the Honorable Susan Cook sentenced Carri to 320 months for Homicide by Abuse and 123 months for Assault of a Child, to run consecutively, for a total sentence of 443 months. 37RP 142.

The State failed to establish that Larry committed Homicide by Abuse, jurors could not reach unanimity, and Judge Cook declared a mistrial on that charge. 36RP 191, 195-196, 198-199; CP 313, 321-322. Jurors convicted him, however, of Manslaughter in the First Degree under a theory he was an accomplice to Hana's death and found the aggravating circumstances for that charge established. 36RP 191-193; 37RP 141; CP 314, 319-320. Jurors also convicted Larry of Assault of a Child in the First Degree concerning I.W. 36RP 191; CP 316. Judge Cook sentenced Larry to an exceptional 210-month sentence for Manslaughter and 123 months for Assault of a Child, to run consecutively, for a total sentence of 333 months. 37RP 141; CP 371-372.

Larry timely filed his Notice of Appeal. CP 382.

2. Substantive Facts

a. Events prior to May 11-12, 2011

Larry and Carri Williams married in 1990. 31RP 87. Larry worked for Boeing and Carri stayed at home to raise their children. 30RP 43-44. In 2003, the family moved to Sedro Woolley, where they built a home for their growing family. 30RP 43, 114; exhibits 108-109, 120. The Williams have seven biological children. 30RP 43-44.

Carri is fluent in American Sign Language and, in 2007, she and Larry decided to adopt I.W., a deaf child from Ethiopia. 30RP 47; 31RP 88-91. While watching a video of I.W. provided by the adoption agency, they saw a second child, Hana, and decided to adopt her as well. 30RP 47-48; 31RP 91. The seven biological children were thrilled and excited to welcome their two new siblings to the family. 22RP 64.

The children arrived from Ethiopia in August 2008. 31RP 88; exhibit 2. Hana, who may have been as young as 13 when she arrived or perhaps several years older,[2] integrated well. 15RP 24-

[2] For international adoptions from Ethiopia, children are not always their stated age. 11RP 181-182. Hana's age was a point of contention at trial, and experts provided estimates suggesting her stated birth date may have been off by several years. See 19RP 32; 20RP 116; 27RP 45, 111-112; 28RP 41; 30RP 91; 32RP 24.

25; 22RP 65; 30RP 49-51; 31RP 91-92, 102. I.W., however, who was 7 years old, presented challenges from the beginning. 10RP 15; 15RP 25; 30RP 51. He often would disobey or ignore other family members. He also would become violent toward his siblings, hitting and kicking them. 15RP 25-26; 22RP 87; 30RP 151-155; 31RP 46, 58, 100-101.

Despite the challenges I.W. presented, family members and friends reported seeing a happy and integrated family the first year following the adoptions; all of the children played together and joined in family activities. 10RP 146; 16RP 175; 17RP 97; 19RP 74; 22RP 155-160. Carri and Larry were openly affectionate with Hana and I.W., who appeared to enjoy their new parents and family very much. 10RP 146; 16RP 70-71; 17RP 40; 19RP 112; 22RP 183; 28RP 72-73; 30RP 50-51, 90.

Larry's shift at Boeing required him to leave home everyday around noon and he would not return until after midnight. 30RP 45. The 130-mile round trip commute to Everett required an hour and ten minute drive each way. 28RP 111, 118.

Carri home schooled the children. 30RP 44. And with Larry away during the week, a schedule for chores and studying was critical to maintaining order. 22RP 152-153; 30RP 44-45. When

rules were violated, punishment followed. All seven of the Williams' biological children had experienced these punishments, which ranged from a verbal correction, to "boot camp" (extra chores), to light swats, to actual spanking. 15RP 54-56, 75-78; 30RP 192; 31RP 103-128. When spanking was deemed necessary, it was done with a "switch" (a piece of plumbing line), a "glue stick" (apparently the flexible type used for glue guns), or – in very rare circumstances – a belt. 15RP 54, 57, 120-121; 17RP 13, 48-50; 22RP 105-110, 173; 25RP 159-160; 31RP 114-117.

One issue not in dispute in this case is that punishments directed at Hana and I.W. eventually got way out of hand in both severity and frequency. While I.W. presented behavioral challenges from the beginning, even Hana became defiant after the first year or year and a half. 22RP 191-192; 23RP 40; 31RP 102-103. Both children were spanked frequently. 10RP 22-31, 38-53; 15RP 135-136; 17RP 13. And both children were sometimes excluded from family activities on holidays or other special occasions. 13RP 104.

I.W., who had bladder control issues, sometimes wet himself on purpose. He was washed or hosed down with cold water in an attempt to stop this behavior. 10RP 55-58; 13RP 13-15; 30RP 63-

64; 31RP 136-137. And some nights when he wet his bed he was required to sleep on the floor or in the "shower room," one portion of the main children's bathroom containing a shower. 13RP 15-19; 31RP 138. I.W. claimed that he had been hit with a "beating stick" all over his body, that hits to the bottom of his feet made it painful to walk, and that one time he was hit on the head, which caused him to bleed. 10RP 22, 28-31, 43-44.

The State's assault charge (requiring substantial bodily harm) was premised largely on scars located on I.W.'s back, which a doctor did not notice at his first well-care checkup and about which I.W. had no knowledge. 10RP 43; 18RP 109-111. Multiple individuals noticed that, when I.W. arrived from Ethiopia, he already had scars on his back. 15RP 82, 125; 16RP 79; 22RP 167; 23RP 86-87; 30RP 120-121; 31RP 48, 58-59, 96-100. Although I.W. did not know the source of these scars, he claimed one mark on his side was from being hit by his parents. 10RP 49-50.

Hana snuck out of her bedroom at night and stole junk food from the kitchen. 30RP 178-179; 31RP 145; 33RP 54-56. To stop this and other oppositional behavior, she often was required to sleep in a location where she no longer had access to the kitchen – a barn on the property (a few nights in the summer), the shower

room (a few weeks), a nursery adjoining the master bedroom, or the closet in that same room, where she also was placed during the day. 13RP 36-48; 15RP 44-50; 23RP 157; 30RP 179-185; 31RP 141-151. Hana, who had chronic and contagious hepatitis B, created safety issues in the bathroom with intentional and unsanitary practices involving her menstruation. 13RP 121; 18RP 98, 132-133; 30RP 85-86; 31RP 130-131. Thereafter, she was required to use a port-a-potty on the property, which was serviced regularly, and she was sometimes required to shower outside using a hose. 22RP 16-17; 30RP 87-89; 31RP 129-136.

Meals also played a role in punishments. Hana and I.W. often were required to eat their meals away from the main dining table and the other children – usually at a kitchen table or a sheltered picnic table on the outside patio. 13RP 25-27; 17RP 67; 31RP 156-160. Hana and I.W. would sometimes receive sandwiches for lunch that had been made soggy with water. 13RP 29; 16RP 27; 31RP 153. They also were given unheated frozen vegetables with some of their meals. 13RP 27-28; 15RP 42; 16RP 24-25; 31RP 151-153. At other times, they were forced to skip a meal altogether, although they were given extra food the following

meal.[3] 13RP 30-31; 15RP 42, 142-144; 24RP 10-11; 31RP 154-156; 33RP 66-67.

Hana's weight fluctuated following her arrival from Ethiopia. When she first arrived, her Body Mass Index was in the 50th percentile. 10RP 77. Later, it went up to the 90th percentile (85th percentile is considered overweight and 95th percentile is considered obese). 10RP 77, 130. By May 2011, however, it had fallen to below the 5th percentile. 10RP 78. Her weight loss was noticeable, but because it was gradual, it did not trigger concern from family members. 30RP 185-186; 31RP 161; 32RP 139-140; 33RP 58, 76.

Larry eventually realized the punishment regime established for Hana and I.W. was not working and that changes needed to be implemented. 30RP 106-107. He spoke to his brother-in-law, a school psychologist familiar with children's behavioral issues. 19RP 84-87. He also expressed concern to, and sought guidance from, members of his carpool. 28RP 105-107, 119-120. He told

[3] The State hired two experts to testify that punishments meted out against Hana and I.W. – including isolation, spanking, and food deprivation – if true, met the international definitions of "torture," which these experts defined as "cruel, inhumane, and degrading treatment" or "severe psychological and/or physical pain or suffering." 13RP 146; 14RP 40; 21RP 70-79, 89-90.

Carri he wanted changes, which led to a disagreement. Ultimately, however, nothing changed. 30RP 108-109.

The Williams' oldest son overheard his parents' arguments and he recalled that, closer to the time of Hana's death, his parents began to argue more frequently concerning issues of discipline for Hana and I.W. 30RP 25-26. Moreover, in the last year of Hana's life, there seemed to be a shift in authority from his father to his mother concerning Hana's discipline, and the degree and frequency of that discipline continued in an upward trajectory. 30RP 32, 35-37.

b. Events of May 11-12, 2011

Consistent with the usual practice, on the morning of May 11, Larry handled breakfast duties, feeding the children before he left for Boeing around noon. 22RP 60-61; 30RP 45, 109, 127; 31RP 161-162. The following events then occurred entirely in Larry's absence.

During the several hours before lunch, Hana was in and out of the house with the other children. 31RP 162. She was wearing shorts and a short sleeve shirt, which Carri deemed appropriate for the weather that day. 32RP 141; 33RP 82-83; exhibit 50. The temperature when Hana first went out was in the mid to upper 50s.

33RP 92-93. Later, however, it would start to rain and become cold. 16RP 95-96; 31RP 165.

Hana would not use the port-a-potty unless escorted, and Carri took her there before lunch. 31RP 163. Hana was then served lunch outside around 3:00 or 3:30 p.m. 31RP 162-163. About an hour later, when Carri told Hana to come inside, Hana walked up to the door and just stood there, refusing to come in. 31RP 163-164. Carri closed the door and left her outside. 31RP 164; exhibit 116.

Carri could see Hana from the kitchen window and checked on her periodically. 31RP 164. She took Hana to the port-a-potty again around 6:00 p.m. As before, Carri then told her to come inside, but Hana did not come in. 31RP 164. It began raining outside, and Carri could see Hana walking around out back. 31RP 165. Additional attempts to convince Hana to come inside were not successful. 31RP 165.

Around 8:30 p.m., Carri again escorted Hana to the bathroom. 31RP 165. This time, however, Hana began throwing herself on the ground (including the gravel), crawling, getting up, and then repeating this behavior all the way to the port-a-potty.[4]

[4] Altered mental status is a symptom of hypothermia. 29RP 25.

31RP 166, exhibit 127. Hana did the same thing on the way back to the house (this time on the gravel and cement). 31RP 166-167. When she threw herself down on the patio, she repeatedly hit her head on the cement. 31RP 167; exhibit 116. As Carri would later recall, she "couldn't watch" Hana do this to herself, so she went inside and continued to monitor Hana from inside. 31RP 167.

Hana would not come inside and continued to "throw herself around" outside for twenty to thirty minutes. 31RP 167. Carri could see that Hana had scraped her knees and elbows and had a knot on her forehead. 31RP 168. Carri sent her oldest son outside and instructed him to tell Hana to come inside. If she refused, he was to swat her on the bottom and tell her to do some exercises to stay warm. Carri watched as her son swatted Hana three times on the bottom. Hana then began to do exercises (jumping jacks or sit-squats), but quickly stopped. 31RP 168, 200. Carri then sent her next oldest son outside. He also swatted Hana, who briefly began exercising again before stopping. 31RP 168-169. Carri then sent a third son, who also swatted Hana and caused her to exercise some more. 31RP 169.

It was now about 9:30 or 10:00 p.m. 31RP 200. Carri went outside again to convince Hana to come inside.[5] She then served Hana her dinner outside. 31RP 170. Hana repeatedly put food on her fork, lifted it toward her mouth without eating, and then put the fork back down again. 31RP 171. Eventually, Carri decided to carry Hana inside. When she tried to lift her, however, Hana went limp. 31RP 171.

Hana was wet from the rain, which had washed blood from her scrapes down her legs and onto her socks and shoes. 31RP 172. Carri told two of the boys to go outside, pick Hana up, and bring her in. But first, Carri instructed one of the boys to put on rubber gloves (to avoid the blood) and remove her socks and shoes before bringing her inside. 31RP 171-172. As one of the sons went outside, Hana took off her pants and underwear.[6] 15RP 104; 31RP 172-173; exhibit 105. With Hana now naked from the waist down, Carri sent her son back inside. 31RP 173-174.

Carri retrieved dry clothes for Hana, brought them outside, and told her to change. Carri then turned off the outside light so

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[5] Some of the children reported seeing Carri spanking Hana. 15RP 140; 22RP 228; 23RP 210. Carri denied this. 33RP 103.

[6] The false sensation of warmth and removal of clothing – called "paradoxical undressing" – is also a common sign of hypothermia. 11RP 81.

that Hana could change privately. 15RP 104; 31RP 174. When Carri turned on the light five to ten minutes later, Hana was on her hands and knees and reaching for a paper towel Carri provided to wipe her bloody knees and elbows. 31RP 174-175. Carri turned off the light again. 31RP 175. Ten minutes later, she had another daughter turn on the light and check on her. The daughter reported Hana was still changing. 31RP 175. Five to ten minutes later, Carri turned on the light again and saw Hana now completely naked and sitting on the patio. Carri turned off the light and turned her attention to helping another child with schoolwork. 31RP 175-176.

At this point, Larry called – as he usually did – once he had arrived with his vanpool at a local park and ride and was getting in his own vehicle for the relatively short drive home. 30RP 109, 144; 31RP 175. It was now around midnight. 30RP 144-145. At this point, Carri told him that Hana – whose usual bedtime was around 10:30 p.m. – was outside and refusing to come in. 17RP 47; 30RP 109. What Larry did not know is just how long she had been out there, but he told Carri to get her inside. 30RP 109-110, 144-145. One of the Williams' sons overheard the call and described it as an argument. He could hear Larry questioning Carri's assertion that

Hana had been falling down on purpose. 22RP 185, 196; 31RP 191.

Carri asked a daughter to check on Hana again. The daughter turned on the light and saw that Hana was still completely naked, now face down, and lying partly on the patio and partly on top of a molehill in the grass. 15RP 70; 31RP 174. Carri grabbed a sheet, went outside, covered Hana, and tried to lift her with the assistance of her daughter. Carri was afraid they might drop Hana, so she called to two of her sons, who helped take Hana inside. 15RP 71-72; 31RP 176-177.

It appeared that Hana had no pulse. 31RP 178. Carri called Larry, who was still en route. 30RP 111; 31RP 178. Larry told her to hang up immediately and call 911, which she did. 30RP 111, 146; 31RP 178. With the operator's assistance, Carri began chest compressions. 31RP 178. She was still doing chest compressions when Larry arrived. 30RP 112; 31RP 178. The two then took turns with CPR until medics arrived. 30RP 147; 31RP 178-179. Larry was distraught and crying. 16RP 66-67; 30RP 112.

Hana was taken by ambulance to Skagit Valley Hospital. 18RP 146. The treating physician noted that while Hana was thin, she was not so thin that her appearance was concerning. 18RP

172. Hana could not be revived and was pronounced dead around 1:30 a.m. the morning of May 12th. 18RP 152.

c. Autopsy Results

Dr. Daniel Selove conducted an autopsy and concluded that Hana's cause of death was hypothermia, which led to cardiac arrest. 11RP 21, 82. Hypothermia is an acute condition (rather than chronic) that occurs during a period of exposure. 29RP 100-101. Dr. Selove also identified two conditions that may have potentially been contributing factors in Hana's death because they might have increased the risk for hypothermia: malnutrition and Helicobacter pylori gastritis. 11RP 21, 88.

Hana's malnutrition resulted in thinness, and thin people tend to lose heat faster, which makes them more susceptible to hypothermia. 11RP 89. Dr. Selove could not quantify the impact of Hana's thinness, but she was at much greater risk compared to a person of normal weight. 11RP 89-90. Even if she had been 30 lbs. heavier, however, she may have died of hypothermia under the circumstances on May 11. 11RP 90.

The Helicobacter pylori bacteria found in Hana's stomach had caused gastritis (inflammation of her stomach lining), which can cause discomfort, decreased appetite, and loss of weight.

11RP 55-57, 74, 91. According to Dr. Selove, this "reasonably might have altered" Hana's appetite for months or longer and also led to her thinness and increased her risk of hypothermia. 11RP 57, 93, 116.

Dr. Selove also documented abrasions and bruises Hana suffered in her mother's presence while repeatedly throwing herself on the ground, gravel, and cement. 11RP 41-55.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN LARRY WILLIAMS' MANSLAUGHTER CONVICTION.

In criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

To obtain a conviction against Larry Williams for Manslaughter in the First Degree, the State had to prove each of the following elements beyond a reasonable doubt:

> (1) That on or about the 12th day of May, 2011, the defendant Larry Williams, or his accomplice, engaged in reckless conduct;
>
> (2) That Hana Williams died as a result of Larry Williams', or his accomplice's reckless acts; and
>
> (3) That any of these acts occurred in the State of Washington.

CP 286. Jurors were told:

> For purposes of Manslaughter in the First Degree, a person is reckless or acts recklessly when he knows of and disregards a substantial risk that a death may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP 287. Jurors also were told parents have a duty to provide the basic necessities of life, including seeking medical assistance when prudent, and that a reckless breach of these duties can support a Manslaughter conviction. CP 288.

Since Larry was not present for any of the relevant events on May 11-12, the State theorized that he was Carri's accomplice. To that end, jurors were instructed, in part:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or

> facilitate the commission of the crime, he or she either:
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 282.

In order to be an accomplice, however, an individual must have the purpose to promote or facilitate the conduct forming the basis for the charge. State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000) (citing Model Penal Code § 2.06 cmt. 6(b) (1985)). Stated another way, an individual cannot be an accomplice unless "he associates himself with the undertaking, participates in it as something he desires to bring about, and seeks by action to make it succeed." In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting State v. J-R Distribs., Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)). Prior participation in some type of criminal

activity will not suffice; he must knowingly promote or facilitate the particular crime at issue. State v. Bauer, 180 Wn.2d 929, 943-944, 329 P.3d 67 (2014).

Awareness and physical presence at the scene of an ongoing crime – even when coupled with assent – are not even enough to prove accomplice liability unless the purported accomplice stands "ready to assist" in the crime at issue. Wilson, 91 Wn.2d at 491; State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Moreover, foreseeability that another might commit the crime also is insufficient. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001).

Even in the light most favorable to the State, the evidence at trial fell well short of establishing Larry's guilt as an accomplice to Manslaughter. When Larry left for work, Hana was not suffering any effects of hypothermia, which is an acute condition. He was not there (and there is no evidence he knew) when Carri repeatedly failed to take appropriate measures to bring Hana inside after 8 hours or more outside. He was not there (and there is no evidence he knew) when Carri failed to act as it began to rain, turned cold, and Hana's already inadequate clothing became wet. He was not there (and there is no evidence he knew) when Hana showed signs

of hypothermia to the point she could not feed herself, was falling to the ground, was slamming her head against the cement, and removed all of her clothing ("paradoxical undressing"). And he was not there (and there is no evidence he knew) when Hana still was left outside thereafter, eventually fell to the ground, and went into cardiac arrest.

If mere presence and knowledge will not suffice, absence and ignorance certainly won't. The record is lacking any evidence that Larry had the purpose to promote or facilitate Carri's reckless conduct on May 11, that he actively participated in her conduct that day, or that he in any way sought to help her succeed. And although foreseeability is not enough for accomplice liability, there is no evidence Larry could have ever predicted his wife's monumental failures that day. As soon as Larry learned that Hana was outside around midnight, he immediately challenged Carri's assertions that Hana was faking and indicated she should be brought inside right away. 30RP 109-110, 144-145.

Not surprisingly, the State's explanation during closing argument regarding why Larry should be convicted of Manslaughter as an accomplice to Carri was thin on substance.

First, the State argued that Larry was an accomplice because he and Carri generally agreed on matters of discipline for the children and generally talked during the day, suggesting that perhaps Larry was kept abreast of everything happening with Hana as she stayed outside on May 11 and perhaps he even approved or encouraged it. 35RP 58-59; 36RP 134. But there is no evidence of any such communications that day. Larry *usually* called from work to check in at home during the workday, but Carri typically did not bother him with problems at home during those calls. 14RP 186; 16RP 106-108; 30RP 130. Importantly, police had Larry's phone and access to all of his calls for May 11, and the State only presented evidence of two calls (the first when Larry arrived at the park and ride and the second when Carri called Larry and he told her to immediately dial 911). 16RP 111-116, 185-186; 22RP 148; 23RP 29-31. Consistent with this evidence, Larry testified that it was during his first call from the park and ride that he found out Hana was outside. 30RP 109-110.

Second, the State argued that even if Carri ultimately caused Hana's death by hypothermia, Larry should be deemed partially responsible for her malnutrition and weight loss, which Dr. Selove concluded was a possible contributing factor to her death

because it made her more susceptible to hypothermia. 36RP 134-135, 137, 141, 143, 153-154. According to the State, Larry's contribution to Hana's weight loss was "part of an inexorable chain of events that led to Hana's death from hypothermia," meaning "[h]e caused her death just as surely as if he were in the kitchen there, with Carri, watching Hana die." 36RP 141, 143.

The State's argument in this regard misses the mark. Even if jurors partially attributed Hana's diminished weight to Larry's conduct prior to May 11, Dr. Selove indicated malnutrition was merely a possible contributing factor in Hana's death because it may have increased her risk for hypothermia. 11RP 21, 88. Quoting another medical examiner, the Washington Supreme Court has recognized that, in contrast to the cause of death, which is "the main process that has brought about the death," a "contributing factor is sort of a, maybe if you want to call it a minor event, that would have contributed to the cause of death or added to it or complicated it." State v. Perez-Cervantes, 141 Wn.2d 468, 478-479, 6 P.3d 1160 (2000).

To convict Larry of Manslaughter, the State had to prove his involvement in a reckless act and that Hana died as a result of that reckless act. CP 286. Hana did not die from malnutrition. Rather,

her established cause of death was hypothermia, which developed when her mother (and only her mother) left her exposed to the elements the afternoon and night of May 11th, a period during which Larry was never home and did not know what was happening.

Because the State's evidence failed to establish Larry was guilty of manslaughter as an accomplice to Carri's acts on May 11, this Court should vacate his conviction for Manslaughter in the First Degree. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE JURORS WERE INSTRUCTED ON TWO PRIMARY TRIAL DEFENSES CONCERNING CAUSATION.

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845

P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

Competent counsel conducts research on the law applicable to the case at hand. Bush v. O Connor, 58 Wn. App. 138, 148, 791 P.2d 915 (an attorney unquestionably has a duty to investigate the applicable law), review denied, 115 Wn.2d 1020, 802 P.2d 125 (1990); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (reasonable attorney conduct includes a duty to investigate the facts and law), review denied, 90 Wn.2d 1006 (1978); see also Strickland, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations").

Jury instructions are sufficient only if they are supported by substantial evidence, allow the parties to argue their theories of the case, and properly inform jurors of the applicable law. They are reviewed de novo as a question of law. State v. Clausing, 147 Wn.2d 620, 626-627, 56 P.3d 550 (2002). The failure to propose a proper and necessary instruction is deficient performance. See State v. Thomas, 109 Wn.2d 222, 226-229, 743 P.2d 816 (1987) (counsel ineffective for failing to offer instruction regarding defendant's mental state where intent a critical trial issue). There

can be no legitimate tactic behind an instruction that improperly eases the State's burden of proof. State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009).

Two primary defense arguments were aimed at causation. First, defense counsel argued that the State had failed to prove causation, i.e., that Larry's actions were a proximate cause of Hana's death, because she died from hypothermia when Larry was neither present nor aware of what was happening. 35RP 71-77, 99. Second, even if jurors believed Larry's actions prior to May 11-12, 2011 played some role in Hana's physical condition on that date and, therefore, were a proximate cause of her death, hypothermia was a superceding intervening cause that severed any criminal liability. 35RP 72, 89. Larry's counsel made these arguments for Homicide by Abuse. 35RP 71, 89. And they made these arguments for Manslaughter in the First Degree. 35RP 119 ("the causation issue for Manslaughter First Degree . . . is the same as it is for Homicide by Abuse"); see also 35RP 120-123 (Larry not home and unaware Hana dying of hypothermia under Carri's supervision; he was not the proximate cause of her death).

Unfortunately, defense counsel performed deficiently when they failed to ensure jurors were instructed in such a manner that

they could actually consider these defenses to Manslaughter in the First Degree.

The pattern jury instruction for proximate cause in homicide cases provides:

> To constitute *[murder][manslaughter][homicide by abuse][or][controlled substance homicide]*, there must be a causal connection between the criminal conduct of a defendant and the death of a human being such that the defendant's *[act][or][omission]* was a proximate cause of the resulting death.
>
> The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.
>
> *[There may be more than one proximate cause of a death].*

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 25.02 (3d ed. 2014). The bracketed alternatives in this pattern instruction establish its relevance to any homicide offense where causation is an issue.

At Larry's trial, the State proposed WPIC 25.02, but only included the bracketed words "homicide by abuse" while leaving out "manslaughter." See Supp. CP ___ (sub no. 308, State's Proposed Jury Instructions (with citations), instruction 10). Thus, the proposed instruction, which the trial court adopted, is applicable solely to the charge of Homicide by Abuse. See CP 284 ("To constitute homicide

by abuse, there must be a causal connection . . . ."). Defense counsel failed to object to this omission and failed to offer an alternative instruction with the missing language for Manslaughter. See CP 224-241; 34RP 109-110; 35RP 4-6.

Unfortunately, not only did this omission in instruction 11 relieve the prosecution of its burden to prove that Larry proximately caused Hana's death for Manslaughter, it also infected instruction 12, which explained the circumstances under which another, unforeseen proximate cause qualified as a superceding intervening cause of death and severed Larry's criminal liability. Instruction 12 provides:

> If you are satisfied beyond a reasonable doubt that the acts or omissions of the defendant or his accomplice were a proximate cause of the death, it is not a defense that the conduct of the deceased may also have been a proximate cause of the death.
>
> However, if a proximate cause of the death was a new independent intervening act of the deceased which the defendant, or his accomplice, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's, or his accomplice's, acts are superceded by the intervening cause and are not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's, or his accomplice's acts or omissions have been committed.
>
> However, if in the exercise of ordinary care, the defendant or his accomplice should reasonably have

> anticipated the intervening cause, that cause does not supercede defendant's or his accomplice's original acts and defendant's or his accomplice's acts are a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant or his accomplice should have reasonably anticipated.

CP 285.

Since instruction 11 only required proof that Larry was a proximate cause of Hanna's death for Homicide by Abuse and not Manslaughter, instruction 12 – defining when that proximate cause is severed by the acts of another – also necessarily was limited to Homicide by Abuse. Jurors also would have concluded these instructions only applied to Homicide by Abuse because they immediately follow the "to convict" instruction for that crime. See CP 283-285. Competent counsel would have recognized these deficiencies and rectified them.

There can be no doubt that counsels' failure to ensure instructions 11 and 12 applied to Manslaughter prejudiced Larry at trial because there is a reasonable probability that but for counsels' errors, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (quoting

Strickland, 466 U.S. at 693-94). Jurors did not find Larry guilty of Homicide by Abuse (to which the instructions applied), but convicted him of Manslaughter (to which they did not apply). And while defense counsel argued their application to Manslaughter during closing arguments, jurors were bound to follow the instructions rather than these arguments. See CP 273 ("You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.").

For the reasons already discussed, the evidence was insufficient to support Larry's Manslaughter conviction. Even if this were not true, however, counsels' errors, which denied Larry available defenses pertaining to causation, undermine confidence in the outcome below and require reversal.

3. THE TRIAL COURT ERRED WHEN IT REJECTED DEFENSE COUNSELS' PROPOSED INSTRUCTION ON SUPERCEDING INTERVENING CAUSE IN FAVOR OF THE STATE'S INCORRECT INSTRUCTION.

Not only is reversal warranted because instructions 11 and 12 omit Manslaughter from considerations of proximate and superceding intervening cause, but reversal also is warranted because instruction 12 misstates the law of superceding intervening

cause, thereby further removing the concept from jurors' consideration of Larry's conduct.

Defense counsel proposed a proper pattern instruction on superceding intervening cause that provides:

> If you are satisfied beyond a reasonable doubt that the acts of the defendant were a proximate cause of the death, it is not a defense that conduct of the deceased or another may also have been a proximate cause of the death. However, if a proximate cause of the death was a new independent intervening act of the deceased or another which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's acts are superceded by the intervening cause and are not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's acts have been committed.

CP 231; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 25.03 (3d ed. 2014).

Notably, this instruction addresses "the defendant" and not an accomplice. Moreover, it potentially terminates proximate cause based either on an intervening act of the deceased or an intervening act of some other individual ("the deceased or another").

Conversely, the State's proposed instruction – ultimately adopted by the trial court and already quoted in full above – deleted the possibility someone other than the deceased was responsible for

a superceding intervening act and added "or his accomplice" following every reference to "the defendant." The State's version also added a final paragraph based on the WPIC, similarly modifying it with the "or accomplice" language not found in the pattern instruction. See Supp. CP ___ (sub no. 308, State's Proposed Jury Instructions (with citations), at 11); 34RP 84; CP 285.

Defense counsel objected to the State's proposed instruction, arguing that even if the other person who engages in a superceding intervening act might otherwise be considered an accomplice, that person's independent acts could terminate causation for the defendant. 34RP 85. Judge Cook rejected that argument and gave the State's modified instruction. 34RP 85. This was error.

By permitting the State to remove from the pattern instruction language indicating that someone other than the deceased may break the causal chain, the court removed any argument from the defense that Carri's acts of permitting Hana to die from hypothermia qualified as an unexpected superceding intervening event. The addition of "or his accomplice" also had this impact, since it told jurors that Larry's accomplice (which could only be Carri) was excluded from those who could commit such an intervening act. See CP 285 ("An intervening cause is an action that actively operates to

produce harm to another after the defendant's, or his accomplice's acts or omissions have been committed.").

Instructional error is presumed prejudicial unless if affirmatively appears to be harmless. Clausing, 147 Wn.2d at 628 (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). The improper modifications to the WPIC made it impossible for Larry's attorneys to argue – or the jury to find – that Carri's conduct severed Larry's criminal liability for any part he played in the events of May 11, 2011. Defense counsel argued that hypothermia was a superceding intervening cause even if jurors believed Larry's earlier actions played some relevant role (for example, contributed to her weight loss). 35RP 89, 119. But instruction 12 precluded jurors from finding that Carri's actions or omissions had this impact because it limited superceding intervening cause to *Hana's* actions. In other words, jurors had to find Hana responsible for her own death for Larry's liability to be severed. And where the trial evidence demonstrated Carri, and not Hana, was to blame for Hana's death by hypothermia, the erroneous instruction removed any reasonable chance jurors would find a superceding intervening cause of death.

One final point. Although Larry's attorneys proposed a proper instruction under WPIC 25.03 and argued against the

State's modified version, counsel did not object again to instruction 12 when putting "formal exceptions" on the record. Compare 34RP 84-85 with 35RP 4-6. To the extent counsel failed to properly preserve for appeal the challenges to instruction 12, counsel was ineffective. Larry can demonstrate both deficient performance and prejudice. State v. Benn, 120 Wn.2d at 663. Competent counsel would have specifically identified all of the deficiencies in instruction 12 and formally placed full and proper objections on the record. If counsel's failure to do so waives the issue for appeal, Larry has suffered prejudice in his inability to raise a meritorious issue in this Court and will be denied his Sixth Amendment rights unless the issue is addressed.

4. BECAUSE THE EXCEPTIONAL SENTENCE FOR MANSLAUGHTER MAY BE BASED ON ACCOMPLICE LIABILITY, IT MUST BE VACATED.

For Manslaughter, jurors were told to consider five aggravating circumstances:

> (1) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim;
>
> (2) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance;

> (3) That the victim and the defendant were family or household members; and
>
> (i) That the offense was part of an ongoing pattern of psychological or physical abuse of a victim manifested by multiple incidents over a prolonged period of time . . . .;
>
> (ii) That the offense was committed within sight or sound of the defendant's child or children who were under the age of 18 years; or
>
> (iii) That the defendant's conduct during the commission of the offense manifested deliberate cruelty or intimidation of the victim;
>
> (4) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense; and
>
> (5) The offense involved a destructive and foreseeable impact on persons other than the victim.

RCW 9.94A.535(3)(a), (b), (h), (n), and (r); CP 11-12, 303-308, 311-312.

As previously discussed, because Larry was not even present during the events of May 11, 2011 that caused Hana's death from hypothermia, he was tried and convicted as an accomplice to Carri. During the discussion of the alleged aggravating circumstances, defense counsel argued that the charged circumstances could not apply under a theory of accomplice liability. 29RP 159. Defense counsel was correct.

In State v. Hayes, ___ Wn.2d ___, 342 P.3d 1144, 1148 (2015), the Supreme Court held that aggravating circumstances aimed at the current offense cannot be applied to a defendant based merely on his complicity as an accomplice. Rather, for such aggravating circumstances to apply to an accomplice, "the jury must find that the defendant had some knowledge that informs that factor," which "ensures that the defendant's own conduct formed the basis of the sentence." Id. For example, addressing the aggravating circumstances at issue in Hayes, where the aggravating circumstance was that the offense involved multiple victims, jurors should have been asked expressly whether Hayes knew the offense involved multiple victims. And where the aggravating circumstance was that the offense involved a high degree of sophistication or planning or would occur over a lengthy period of time, jurors should have been asked expressly whether Hayes knew this to be true. Id. Because this language was not used in Hayes' case, jurors may have simply found the aggravating circumstances satisfied based on his guilt as an accomplice rather than his own conduct. Thus, his exceptional sentence could not stand. Id.

The same critical language is missing in Larry's case for most of the aggravating circumstances. The special verdict form contains the following questions:

> Were Larry Williams and Hana Williams members of the same family or household?
>
> Did Larry Williams's conduct during the commission of the crime manifest deliberate cruelty to the victim?
>
> Did Larry Williams know, or should he have known, that the victim was particularly vulnerable or incapable of resistance?
>
> As to the defendant Larry Williams, was this offense an aggravated domestic violence offense?
>
> Did Larry Williams use his position of trust to facilitate the commission of the crime?
>
> As to the defendant Larry Williams, did the crime involve a destructive and foreseeable impact on persons other than the victim?

CP 319-320.

Only the circumstance focusing on particular vulnerability included the necessary language requiring jurors to focus on Larry's own knowledge. Therefore, jurors' verdicts on four of five circumstances must be vacated. And because it is impossible to conclude that Judge Cook would have imposed the same sentence based on one circumstance, resentencing is required if Larry's Manslaughter conviction is not reversed. See State v. Cardenas,

129 Wn.2d 1, 12, 914 P.2d 57 (1996) (resentencing necessary unless reviewing court satisfied judge would have imposed precisely the same sentence based on one aggravating circumstance).

In response, the State will rely on Division Two's decision in State v. Weller, ___ Wn. App. ___, 2015 WL 686791 (February 18, 2015), where a panel of that court held that simply referring to "the defendant" in a special verdict question satisfies Hayes. Weller, at *6-*7 (approving question, "Did the defendant's conduct during the commission of the crime manifest deliberate cruelty to the victim?"). The flaw in this reasoning is that reference to "the defendant's conduct" still does not reveal whether jurors are assessing the question with reliance on principles of accomplice liability, i.e., jurors may simply be determining "the defendant's conduct" through the lense of accomplice liability. Only by asking – as Hayes requires – what the defendant *knew* can we be certain "the accomplice's own conduct informs the aggravating factor." See Hayes, 342 P.3d at 1147-1148.

Larry Williams' exceptional sentence must be vacated.

5. THE PROCEDURES USED AT JURY SELECTION VIOLATED WILLIAMS' CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL AND TO BE PRESENT FOR ALL CRITICAL STAGES OF TRIAL.[7]

During voir dire, after all parties indicated they had no additional challenges for cause, Judge Cook invited the attorneys (but not the defendants) to the bench "to select who are going to be on the jury." 8RP 71. Specifically, Judge Cook announced:

> Ladies and Gentleman, what we are going to do is have the attorneys come up to the bench. We are going to select who are going to be on the jury. Because of the length of the trial we are going to select 15 people. Helga has a couple of extra chairs up here for people who won't fit in the jury box. It's going to take a few minutes to go through this process. Please just bear with us. If you need to stand up and get blood flowing to your lower extremities I understand that. Stay where you are vis-à-vis one another so we can look out there and remind ourselves if we need to.
>
> Alright. Counsel.

8RP 71.

[7] The Washington Supreme Court is considering both of these issues in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), review granted, 181 Wn.2d 1029, 340 P.3d 228 (2015). The decision in Love will likely dictate, or at least guide, a decision on these issues.

After an unknown amount of time with the attorneys at sidebar, Judge Cook announced that the jury had been selected and called each of the 15 jurors to the jury box by number and name. 8RP 71-72. At no time did the court identify in open court which jurors had been stricken with peremptory challenges or by which party. 8RP 71-72. Rather, those jurors were simply dismissed from the courtroom, as a group, with all other potential jurors not selected for service. 8RP 72.

The only way for the public to determine which jurors had been excluded by which party was to request to see written notes in the court file, which were filed at some point after voir dire. According to those notes, prosecutors excused six individuals, counsel for Carri excused seven, and counsel for Larry also excused seven. See Supp. CP ___ (sub no. 269.200, Trial Minutes, "Judge's List").

a. Public Trial Violation

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174,

137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id.

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 176 Wn.2d at 11. Before a trial judge can close any part of voir dire, it must analyze the five factors identified in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Orange, 152 Wn.2d at 806-07, 809; see also State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (a trial court violates a defendant's right to a public trial if the court orders

the courtroom closed during jury selection but fails to engage in the Bone-Club analysis).

Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-260; Wise, 176 Wn.2d at 12.

A violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. Wise, 176 Wn.2d at 13-15; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814. Moreover, the error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517-518.

At Larry's trial, the court conducted peremptory challenges in the privacy of a sidebar discussion without ever considering or even articulating the Bone-Club factors. While members of the public could subsequently look at the court minutes to determine which party challenged which prospective juror, the mere opportunity to find out, sometime after the process, which side eliminated which jurors was not sufficient. The challenged jurors were never identified in open court. Thus, even if members of the public scrutinized the minutes, there was no way to associate a juror's name with a particular individual. It was therefore impossible, for example, to determine whether any particular racial group has been purposefully excluded. See Batson v. Kentucky, 476 U.S. 79, 88-89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (prohibiting such exclusions); State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992); see also State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention), cert. denied, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013).

Because the trial court failed to consider the Bone-Club factors before conducting peremptory challenges at sidebar, it

violated Larry Williams' right to public trial. Reversal is the only proper course.

b. Violation of Right To Be Present

The federal and state constitutions also guarantee criminal defendants the right to be present at trial. State v. Irby, 170 Wn.2d 874, 880-881, 246 P.3d 796 (2011). The federal Constitution does not explicitly guarantee the right to be present, but the right is rooted in the Sixth Amendment's confrontation clause and the Fourteenth Amendment's due process guarantee. Irby, 170 Wn.2d at 880-881. Under the federal Constitution, a defendant has the right to be present "'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" Id. at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)).

The federal constitutional right to be present for the selection of one's jury is well recognized.[8] See Lewis v. United States, 146 U.S. 370, 373-374, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501

[8] Consistent with this constitutional guarantee, CrR 3.4(a) explicitly requires the defendant's presence "at every stage of the trial including the empanelling of the jury . . . ."

(2007). "Jury selection is the primary means by which [to] enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability[.]" Gomez, 490 U.S. 858 at 873 (citations omitted). The defendant's presence "is substantially related to the defense and allows the defendant 'to give advice or suggestion or even to supersede his lawyers.'" Wilson, 141 Wn. App. at 604 (quoting Snyder, 291 U.S. at 106); see also United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors).

In contrast to the United States Constitution, article 1, section 22 of the Washington Constitution explicitly guarantees the right to be present,[9] and provides even greater rights. Under our state provision, the defendant must be present to participate "'at every stage of the trial when his substantial rights may be affected.'" Id. at 885 (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)). This right does not turn "on what the defendant might do or gain by attending . . . or the extent to which

[9] Article 1, section 22 provides, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

the defendant's presence may have aided his defense[.]" Id. at 885 n.6.

Whether there has been a violation of the constitutional right to be present at trial is a question of law this Court reviews de novo. Irby, 170 Wn.2d at 880. There was a violation in Larry Williams' case when he was excluded from the sidebar conference during which 20 prospective jurors were excused. See 8RP 71 (only counsel called up).

The circumstances in this case are similar to those in People v. Williams, 52 A.D.3d 94, 858 N.Y.S.2d 147 (2008). At Williams' trial, the court conducted sidebar discussions during voir dire to determine whether three prospective jurors should be excused. At each conference, only the judge, counsel, and the juror were included in the discussion. One potential juror was retained and ultimately served. Two other jurors were excused on consent of the attorneys based on concern regarding their abilities to put aside prior experiences. Williams, 52 A.D.3d at 95-96.

On appeal, Williams alleged a violation of her right to be present at all critical stages of trial based on her absence from the sidebar conferences. The Supreme Court of New York agreed and reversed her convictions. Williams, 52 A.D.3d at 96. The Court

held that the exclusion of a juror – without a knowing, intelligent, and voluntary waiver of the right to be present – requires reversal, even when the juror is excused on consent of counsel. Id. The Court also rejected "the People's speculative suggestion that the defendant may have been able to hear what was said during the sidebar[.]" Id. at 97 (citation omitted); see also Lewis, 146 U.S. at 372 ("where the [defendant's] personal presence is necessary in point of law, the record must show the fact."); Irby, 170 Wn.2d at 884 (same).

The only remaining issue is whether the violations of Williams' rights can be deemed harmless. When a defendant is excluded from a portion of jury selection, reversal is required unless the State proves the violation was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 886. The only way to accomplish that task is to show that no juror excused in violation of the defendant's rights had a chance to sit on the jury. If a prospective juror in question fell within the range of jurors who ultimately comprised the jury, reversal is required. Id.

Peremptory challenges will always fall within this range. Indeed, notes from jury selection indicate that juror 101 (Donald Dubose) was the last individual chosen to sit on the jury. The last

prospective juror against whom a peremptory challenge was used was juror 100 (David Shulberg). See Supp. CP ___ (sub no. 269.200, Trial Minutes, "Judge's List" at 6 of 9). Thus, all 20 excused jurors fell within the range of individuals who ultimately served, and the error was not harmless beyond a reasonable doubt. Reversal is required.

D. CONCLUSION

Larry Williams was not present when his daughter died of hypothermia, and the evidence is insufficient to support his conviction for Manslaughter as an accomplice to his wife's recklessness. That conviction must be vacated.

The Manslaughter conviction also must be reversed because the jury instructions on proximate cause and superceding intervening cause contain critical errors – they exclude these principles from jurors' consideration of the Manslaughter charge and misstate the applicable standards. Moreover, to the extent defense counsel contributed to these errors and/or the inability to raise them on appeal, Williams was denied his Sixth Amendment right to competent representation.

Because Larry Williams was convicted of Manslaughter as an accomplice and the special verdict forms did not contain

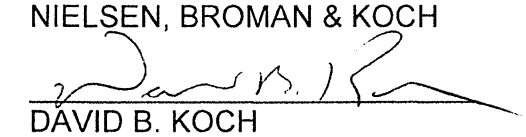
necessary language under State v. Hayes regarding knowledge, his exceptional sentence must be vacated.

Finally, Williams' convictions for both Manslaughter and Assault must be vacated based on violations of his right to public trial and right to be present for all critical stages of trial. The process by which peremptory challenges were exercised violated both of these constitutional rights.

DATED this 31st day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71112-1-I
	)	
LARRY WILLIAMS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LARRY WILLIAMS
DOC NO. 370101
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 31, 2015 - 1:41 PM

Transmittal Letter

Document Uploaded: 711121-Appellant's Brief.pdf

Case Name: Lary Williams
Court of Appeals Case Number: 71112-1

Party Respresented:
Is this a Personal Restraint Petition? ○ Yes ◉ No
Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Appellant's
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

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