NO. 45588-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER MOTHERSHEAD,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

At this trial, based exclusively on alleged assault through administration of eye medication, the eye medication itself should have been suppressed because it was seized from Jennifer Mothershead's personal, zipped cooler by a government actor without a warrant. The denial of the motion to suppress allowed in evidence that not only advantaged the State, but allowed it to move forward. On the other hand, on numerous occasions, the trial court excluded evidence and argument that would have rebutted the State's case. The most significant excluded evidence related to another suspect's motive and opportunity to assault the child. The trial court further burdened Ms. Mothershead's ability to present her defense by denying an inferior degree offense instruction that was supported by the evidence. Standing alone, or in combination with a burden of proof diluted through instruction and argument, these errors denied Ms. Mothershead a fair trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Ms. Mothershead's motion to suppress the cooler, and the medications inside, searched and seized by staff members of Harborview Medical Center, a public hospital.

2. To the extent an assignment of error is necessary, the trial court erred in entering the "reasons for admissibility of the evidence" as it

pertains to the Criminal Rule (CrR) 3.6 motion, including that the Harborview Medical Center staff members were not governmental actors, that a warrant was not required for the medications because they were prescribed to K.M., and that Ms. Mothershead voluntarily abandoned the medications. CP 237.[1]

3. The trial court violated Ms. Mothershead's constitutional right to present a defense and failed to comply with the Rules of Evidence when it barred her from presenting evidence relating to another suspect's culpability for the charged offense.

4. The trial court violated Ms. Mothershead's right to present a defense in ruling Ms. Mothershead could not present an instruction on the inferior degree offense of assault of a child in the third degree.

5. Prosecutorial misconduct denied Ms. Mothershead a fair trial.

6. The trial court abused its discretion and violated ER 404(a)(1) and ER 405 by precluding Ms. Mothershead from admitting testimony about a relevant character trait.

7. The trial court abused its discretion by excluding relevant testimony after the State had opened the door on the topic.

[1] The Findings and Conclusions on Admissibility of Evidence CrR 3.6 are attached as Appendix A.

8. The court's instruction number 2 misstated the definition of proof beyond a reasonable doubt and diluted the State's burden of proof. CP 170.

9. Cumulative trial errors denied Ms. Mothershead's right to a fair trial.

10. The evidence was insufficient to support the deliberate cruelty and particular vulnerability aggravators because there was no evidence that enabled the jury to determine exceptionalness in this case.

11. The deliberate cruelty and particular vulnerability aggravators are unconstitutionally vague.

12. Imposition of the deliberate cruelty and particular vulnerability aggravators violates the prohibition against double jeopardy where the underlying offense is assault of a child in the first degree.

13. The trial court erred in entering finding II for the exceptional sentence. CP 231.[2]

14. Finding II for the exceptional sentence is not supported by the evidence. CP 231.

15. The trial court erred in entering finding IV for the exceptional sentence. CP 232.

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[2] A copy of the court's Findings of Fact and Conclusions of Law for Exceptional Sentence are attached as Appendix B.

16. Finding IV for the exceptional sentence is not supported by the evidence. CP 232.

17. The trial court erred in entering conclusion of law I for the exceptional sentence. CP 232-33.

18. The trial court erred in entering conclusion of law II for the exceptional sentence. CP 233.

19. The 480-month sentence is clearly excessive.

20. The trial court exceeded its statutory authority in barring Ms. Mothershead from having contact with all minors for life because the order is not crime-related.

21. Even if crime-related, the trial court abused its discretion in barring Ms. Mothershead from having contact with all minors for life.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, section 7 protects Ms. Mothershead's personal affairs from warrantless government invasion and the Fourth Amendment precludes warrantless intrusion into property in which she had a reasonable expectation of privacy. The staff at the publicly run Harborview Medical Center are governmental actors. Were these constitutional protections breached when Harborview staff searched a cooler Ms. Mothershead left at her child's bedside in her child's hospital

room after Ms. Mothershead was told that she must leave the hospital and that she could not administer the contents of the cooler to her daughter?

2. A criminal defendant is constitutionally guaranteed a meaningful opportunity to present a complete defense. Because the evidence rules must be interpreted consistently with these protections, a defendant must be allowed to present evidence of another suspect's culpability where the defendant can show motive and opportunity. Did the trial court violate Ms. Mothershead's constitutional right to present a defense by preventing her from presenting evidence related to other suspect culpability because although she could show motive and opportunity she had not shown another suspect took a step towards commission of the offense?

3. The moving party is entitled to a jury instruction on an inferior degree offense when, looking at the evidence in the light most favorable to the moving party, affirmative evidence demonstrates a reasonable inference that only the inferior degree offense occurred. Did the trial court err in ruling assault of a child in the third degree is not legally an inferior degree offense of assault of a child in the first degree, and should the requested third degree assault of a child instruction have been given where affirmative evidence allowed the jury to find only that offense occurred?

4. Did the trial court err in prohibiting Ms. Mothershead from presenting evidence as to her peaceful conduct where character for peacefulness is pertinent to an assault charge and pertinent character evidence of the accused is admissible under ER 404(a) and ER 405?

5. Where one party opens the door to a relevant topic through the admission of evidence on direct examination, another party is entitled to explain, clarify or rebut the evidence, even with evidence that would otherwise be inadmissible. Did the trial court err in excluding Ms. Mothershead's explanatory, clarifying and rebuttal evidence on many occasions?

6. Did the trial court's erroneous rulings excluding character evidence and evidence explaining, clarifying or rebutting topics admitted on direct examination violate Ms. Mothershead's constitutional right to present a defense?

7. A prosecutor commits misconduct by trivializing the burden of proof, by misstating the State's burden of proof, by shifting the burden to the defendant, and by nullifying the presumption of innocence. Here, the prosecutor argued to the jury that Ms. Mothershead did not present evidence that she did not commit the crime, that Ms. Mothershead did not present evidence that she lacked the requisite intent, and that the beyond a reasonable doubt standard is like the everyday decision of disciplining

one's child. Ms. Mothershead's objection to the State's burden shifting was overruled. Did the prosecutor commit misconduct that requires reversal?

8. It is the jury's role to decide whether the prosecution met its burden of proof; its duty is not to search for the truth. Over Ms. Mothershead's objection, the court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." Did the court misstate and dilute the burden of proof in violation of due process by focusing the jury on whether it believed the charge was true?

9. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the state and federal constitutions. In light of the cumulative effect of the errors assigned above, was Ms. Mothershead denied a fundamentally fair trial?

10. Should the exceptional sentence be reversed where the underlying aggravating factors were not supported by sufficient evidence, the deliberate cruelty and particular vulnerability aggravators are unconstitutionally vague, and application of those aggravators violate double jeopardy because the conduct is subsumed in the underlying offense?

11. Is imposition of a 40-year sentence clearly excessive where the aggravating circumstances are inherent to the underlying offense, the sentence is four times the top of Ms. Mothershead's standard range sentence, the sentence exceeds even the standard range with an offender score of nine or more, and the sentence greatly exceeds the standard range sentence that could be imposed for the more serious crime of homicide by abuse?

12. The Sentencing Reform Act (SRA) authorizes a sentencing court to impose crime-related prohibitions. Furthermore, if a sentencing condition burdens a fundamental right, it must be narrowly tailored to meet a compelling State interest. Where Ms. Mothershead was convicted of assaulting her biological child over whom she had primary custody, did the court exceed its authority by prohibiting Ms. Mothershead from having any contact with any minor under any condition?

D. STATEMENT OF THE CASE

1. Factual background.

From the time her daughter was born, Jennifer Mothershead took K.M. to regular medical checkups with a family medicine doctor in Enumclaw.[3] K.M. was a healthy child.[4]

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[3] 9/26/13 RP 108, 111-12, 119; 10/1/13 RP 39, 42-43.

[4] 9/26/13 RP 111-12; 10/1/13 RP 42-43; *see* CP __ (Letters in Support of Defendant, pp.2, 3, 6, 10-11 (Nov. 15, 2013) (noting Ms. Mothershead's love for children

On March 23, 2011, K.M. sustained an eye irritation playing in a barn while being watched by Matthew Bowie and Courtney Valvoda.[5] Ms. Mothershead rode horses and coached an equestrian drill team.[6] It was not uncommon for K.M. to go to the barn with her mother.[7] At the time, Ms. Mothershead was separated from K.M.'s father, Cody Mothershead.[8] Ms. Mothershead had moved out of their home and stayed with her father or the couple's friends, Matthew Bowie and Courtney Valvoda (whose last name has now changed to Bowie).[9] Ms. Mothershead was K.M.'s primary caretaker.[10] K.M. was about 13 months old.[11]

Ms. Mothershead took K.M. to her family medicine physician that day to have her eye irritation checked.[12] Over the next seven to eight weeks, Ms. Mothershead took K.M. back to her family medicine doctor and to numerous specialists for initial appointments and follow up,

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as well as horses)). A supplemental designation of clerk's papers has been filed for the documents identified in this brief by "CP __" and the document name.

[5] 9/23/13 RP 167-68; 9/24/13 RP 50-51; 9/24/13 RP 105-06, 119-20; 9/30/13 RP 13, 53; 10/1/13 RP 57-60.

[6] 9/24/13 RP 102-03; 9/30/13 RP 55-561 10/1/13 RP 44-52.

[7] 9/12/13 RP 120; 10/1/13 RP 136-37; *see* 9/24/13 RP 145-48.

[8] 9/30/13 RP 6-8; 10/1/13 RP 46-47. To avoid confusion, because Jennifer Mothershead and her ex-husband share a last name, Mr. Mothershead will be referred to as Cody or Cody Mothershead. No disrespect is intended.

[9] 9/23/13 RP 118-20, 122-23, 142-43; 9/24/13 RP 99-101; 10/1/13 RP 52-54.

[10] *E.g.*, 9/23/13 RP 122-23; 9/30/13 RP 10-11, 16-18.

[11] 9/24/13 RP 103; 9/26/13 RP 118.

[12] 9/26/13 RP 109-13; 10/1/13 RP 60-62.

including the Chief of Optometry at Seattle Children's Hospital.[13] Despite numerous appointments, tests and procedures, no one was able to pinpoint a cause for K.M.'s eye troubles.[14] Over the course of time, Ms. Mothershead received prescriptions for several medications to treat K.M.'s irritation, including Tobramycin eye drops.[15] Tobramycin, which is compounded specially by the Seattle Children's pharmacy, was prescribed twice, the first bottle was dated April 26, 2011, and the second was dated May 2, 2011.[16] It was not easy to administer eye drops to K.M.; a combination of Ms. Mothershead, Mr. Bowie and Courtney Valvoda would use one person to hold K.M. in place and another to place the drops into her eyes.[17] Over time, K.M.'s eye condition worsened, and spread to both eyes.[18]

Mr. Bowie was watching K.M. and his own son one evening in May when he noticed a "squishy" spot on K.M.'s head.[19] He showed his girlfriend, Ms. Valvoda, who said they needed to tell Ms. Mothershead

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[13] 9/12/13 RP 4, 15-50, 90-91, 103-07; 9/18/13 RP 30, 38-44; 9/23/13 RP 86, 91-92, 97-98, 102; 9/24/13 RP 27, 31, 60, 141-42; 9/26/13 RP 113-17, 120-24, 126-27; 10/1/13 RP 61-72, 74-96.

[14] *Id.*

[15] 9/12/13 RP 21-50, 92-93, 97-101, 103-05, 109, 111; 9/18/13 RP 44-45; 9/24/13 RP 39-41; 10/1/13 RP 168-69.

[16] 9/12/13 RP 95; 9/17/13 RP 75-76; 9/24/13 RP 41; 9/26/13 RP 12, 16-17, 22-23, 47.

[17] 9/18/13 RP 71-72, 141; 9/23/13 RP 22-24, 133-34, 173-77; 9/23/13 RP 138 (Bowie and Cody administered drops together once when Bowie decided to show Cody how); 9/24/13 RP 67-69, 117; 10/1/13 RP 96-98, 160-61.

[18] *E.g.*, 9/23/13 RP 97, 102-03, 132-33; 9/24/13 RP 109-10.

[19] 9/23/13 RP 33, 139, 158-60, 163.

about the spot.[20] Ms. Mothershead agreed that K.M. needed to be seen by a doctor.[21] She could think of a couple falls K.M. had recently had, but none seemed to explain the spot, which was later diagnosed as a subdural hematoma.[22] K.M.'s most recent caretakers, Mr. Bowie and Ms. Valvoda, claimed to not have an explanation for the spot.[23]

Ms. Mothershead contacted K.M.'s doctors the next morning, May 12, 2011.[24] She was referred from Enumclaw Medical Center to St. Elizabeth's Hospital who in turn had K.M. airlifted to Harborview Medical Center in Seattle, Washington ("Harborview") based on the results of a head scan showing a slight bleed on the brain.[25] Ms. Mothershead picked up her cooler with K.M.'s medications inside and her friend Ms. Valvoda, and drove immediately to Harborview.[26] She placed the cooler at her daughter's bedside.[27]

Law enforcement arrived and spoke with Ms. Mothershead, Ms. Valvoda and Cody Mothershead, who had arrived separately, for about 40 minutes.[28] After law enforcement also spoke with Child Protective Services and medical providers, the police informed Ms. Mothershead that

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[20] 9/23/13 RP 140; 9/24/13 RP 125, 152-55.
[21] 9/24/13 RP 126; 10/1/13 RP 101-16.
[22] 9/18/13 RP 69-71; 9/19/13 RP 17, 113.
[23] 9/23/13 RP 140.
[24] 10/1/13 RP 115-19.
[25] 10/1/13 RP 115-19.
[26] 9/24/13 RP 126-27, 161-62; 10/1/13 RP 119-20, 123.
[27] 8/21/13 RP 11-13, 37, 57-58; 9/23/13 RP 29; 9/24/13 RP 166.
[28] 9/18/13 RP 63-68, 79-80; 9/23/13 RP 17-18, 24, 59-60; 9/30/13 RP 22-23.

K.M. would be taken into protective custody and Ms. Mothershead and the others had to leave the hospital.[29] Ms. Mothershead asked if she could deliver the medications in her cooler to her daughter but was informed the hospital would provide K.M.'s medical care.[30] Complying with law enforcement orders, Ms. Mothershead, Cody and Ms. Valvoda left the hospital.[31]

2. Procedural background.

Concerned with K.M.'s eye condition, a Harborview resident and attending physicians in charge of K.M.'s care decided to test the pH levels of the medications inside Ms. Mothershead's cooler.[32] Without obtaining a warrant and without obtaining consent from Ms. Mothershead, Dr. Justin Heistand unzipped the closed cooler, which was still in K.M.'s room, removed the medication and tested them.[33] While the pH levels were normal, he noticed the Tobramycin had a noxious odor.[34] Following Harborview's evidence collection policies, Dr. Heistand packaged up the

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[29] 8/21/13 RP 41-42, 59; 9/18/13 RP 60-63, 73-74, 81-83; 9/23/13 RP 17-18, 26-27.

[30] 8/20/13 RP 33-36; 8/21/13 RP 37; 9/18/13 RP 84-85, 148; 9/23/13 RP 28-29, 65-66.

[31] 8/21/13 RP 41-43; 9/23/13 RP 29; 10/1/13 RP 125.

[32] 8/21/13 RP 9-10, 15-16, 41; *see* 8/21/13 RP 45-46 (doctor informed Sergeant Berg that she was going to have medication tested); 9/18/13 RP 88-89 (same).

[33] 8/21/13 RP 16-19, 75-77.

[34] 8/21/13 RP 19-20, 27.

medication and it was turned over to the Pierce County Sheriff's Department.[35]

Pierce County opened the medications themselves and then had them tested by the Washington State Patrol Crime Lab and the Federal Drug Administration Lab.[36] Neither lab determined the actual makeup of the medications.[37] The FDA technicians found the Tobramycin prescribed on May 2, 2011 reacted similarly to the standard composite Tobramycin with bleach added.[38] Over Ms. Mothershead's objection, this evidence was admitted at trial despite the warrantless search of her cooler.[39]

The State charged Ms. Mothershead[40] with assault of a child in the first degree "on or about the period between the 23rd of March, 2011 and the 12th day of May, 2011" alleging an assault with reckless infliction of great bodily harm, or "causing substantial bodily harm and the person has previously engaged in a pattern or practice of assaulting the child which has resulted in bodily harm that is greater than transient physical pain or

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[35] 8/21/13 RP 22-23, 25, 38-39. Citations to the record here and in the argument challenging the trial court's suppression ruling below are to those portions of the record that were before the trial court during the Criminal Rule 3.6 hearing.

[36] 8/21/13 RP 47-48, 51-55, 62, 65, 68-69, 78-79; 9/17/13 RP 7, 13-14, 38-40; 9/18/13 RP 10-12, 95-99, 104-07, 130-32; 9/23/13 RP 34-38; *see* 9/18/13 RP 28 (FDA testimony on why it is bad practice to open medication bottle of evidentiary value).

[37] 9/17/13 RP 61-62, 86-87, 116, 136; 9/18/13 RP 109-10; 9/19/13 RP 91, 94-95.

[38] 9/17/13 RP 61-62, 75-76, 86-87, 9, 147-48; *see* 9/12/13 RP 63-65, 68-69; 9/24/13 RP 47-48.

[39] CP 42-57, 88-93, 234-39.

[40] The State did not determine the cause of the subdural hematoma, but provided immunity to Matt Bowie and Courtney Valvoda. 9/24/13 RP 72-73; 10/3/13 RP 80. The assault charge here was based exclusively on the eye condition. *E.g.*, CP 173; 10/3/13 RP 80.

minor temporary marks" or "causing substantial bodily harm and the person has previously engaged in a pattern or practice of causing the child physical pain or agony that is equivalent to that produced by torture." CP 1-3 (charging under RCW 9A.36.120(1)(b)(i), (b)(ii)(A) or (b)(ii)(B) in the alternative); CP 9-11 (same).[41] The State also alleged three aggravators: "defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim"; "defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance"; and "defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." CP 1-3 (citing RCW 9.94A.535(3)(a), (b), and (n)); CP 9-11 (same). After Ms. Mothershead was denied a lesser offense instruction for third degree assault, the jury convicted under all three alternatives and found each of the charged aggravators.[42]

Because she has no criminal record, Ms. Mothershead's standard range sentence was 93 to 123 months. CP 203; RCW 9.94A.510. The court imposed an exceptional sentence of 480 months—four times the high-end of the standard range and two times the low-end of the standard

[41] A copy of RCW 9A.36.120, the assault of a child in the first degree statute, is attached as Appendix C.

[42] CP 123, 126-31, 194-99; 10/2/13 RP 20-23, 31, 33, 37-39, 43-53.

range with an offender score of nine or more points. CP 206, 231-33; RCW 9.94A.510. The sentencing conditions included an order barring contact with K.M. for life in addition to a sentencing condition barring contact with all minors for life. CP 205, 207, 209, 211. Additional facts relevant to the issues presented below are recited in those argument sections.

E. ARGUMENT

1. The evidence obtained from inside Ms. Mothershead's cooler should have been suppressed because the cooler was searched by a government actor without a warrant.

A warrantless search is per se unconstitutional. U.S. Const. amend. IV; Const. art. I, § 7; *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the heavy burden of demonstrating a warrantless search or seizure falls into one of the few "jealously and carefully drawn" exceptions to the warrant requirement. *Williams*, 102 Wn.2d at 736.

Ms. Mothershead moved to suppress the evidence seized from her cooler when it was searched by Harborview staff then transferred to law enforcement custody. CP 42-48; *see* CP 49-57. The trial court denied the motion, concluding that the medical staff at Harborview were private individuals not government actors and were not acting at the direction of law enforcement, that Ms. Mothershead had abandoned the medications

inside the cooler, and that the eye medications inside the cooler were K.M.'s property, not Ms. Mothershead's. CP 237-38; 9/9/13 RP 14-24.

This Court reviews conclusions of law set forth in a suppression order de novo. *State v. Evans*, 159 Wn.2d 402, 406, 150 P.3d 105 (2007). The application of the law to the facts is also reviewed de novo. *State v. Meneese*, 174 Wn.2d 937, 942, 282 P.3d 83 (2012). Although the trial court's findings following a suppression hearing are given weight by a reviewing court, and Ms. Mothershead does not assign error to the factual findings, the constitutional rights at issue compel this Court to conduct an independent, thorough evaluation of the evidence. *State v. Daugherty*, 94 Wn.2d 263, 269, 616 P.2d 649 (1980).

a. The staff of Harborview Medical Center are government actors pursuant to United States Supreme Court authority.

Members of the staff of a public hospital are "government actors, subject to the strictures of the Fourth Amendment" and article I, section 7. *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (holding state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct and then to turn that evidence over to law enforcement is an unreasonable search if the patient has not consented).

Harborview Medical Center "is owned by King County, governed by a board of trustees appointed by the county and managed by the University of Washington." http://www.uwmedicine.org/harborview/about (last visited July 7, 2014). "As representatives of King County, Harborview Medical Center's Board of Trustees oversees the operation and management of the Medical Center." http://www.kingcounty.gov/exec/boards/list.aspx#harborview (last visited July 7, 2014). Thus, like the state hospital at issue in *Ferguson*, Harborview is a state agency and its staff members are government actors for purposes of the Fourth Amendment and article I, section 7. *Ferguson*, 532 U.S. at 76; *see Oliver v. Harborview Medical Center*, 94 Wn.2d 559, 566, 618 P.2d 76 (1980) (finding Harborview to be a state or local agency for purposes of Public Records Act).

Recognizing members of the Harborview staff are government actors is consistent with case law pertaining to other non-law enforcement government actors. *In re Matter of Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997) (actions of employee of public utility district, which is a municipal corporation created and defined by statute, while acting in official capacity are subject to protections of art. I, § 7); *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 306-07, 178 P.3d 995 (2008) (presuming school district is State actor in determining whether

random urine analysis of student athletes constitutes a disturbance of one's private affairs); *Keuhn v. Renton School Dist. No. 403*, 103 Wn.2d 594, 600, 694 P.2d 1078 (1985) (unlawful search by parents at direction of school officials prior to band performance trip); *City of Seattle v. McCready*, 123 Wn.2d 260, 267-68, 868 P.2d 134 (1994); (holding art. I, § 7 applies to city building inspectors' authority to perform nonconsensual inspections); *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37, 105 S. Ct. 733, 740, 83 L. Ed. 2d 720 (1985) (public school officials act as representatives of the state when carrying out searches and disciplinary functions); *Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) (municipal fire, health and building inspectors are subject to strictures of Fourth Amendment when conducting administrative searches). Just as students do not lose their constitutional rights when they enter school grounds, parents do not lose their constitutional rights when they accompany their patient-children to the hospital. *See Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

The court below presumed the Harborview staff members were private individuals and, therefore, evaluated whether they were acting as an agent or instrumentality of State. CP 237-38. But, as set forth, staff members of a public hospital like Harborview are government actors for

purposes of the Fourth Amendment and article I, section 7. *See Ferguson*, 532 U.S. at 76. No further analysis was necessary.

b. The cooler was Ms. Mothershead's private affair, which could not be searched without a warrant and which she did not abandon when she brought it to her daughter's hospital bedside and parted with it only when the police told her it was time for her to leave the hospital and she could not administer the contents of the cooler to her daughter.

"Purses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment." *State v. Kealey*, 80 Wn. App. 162, 168, 907 P.2d 319 (1995). However, voluntarily abandoned property can be searched without a warrant, but only if the owner's actions and intent demonstrate the property was actually abandoned. *Evans*, 159 Wn.2d at 407-08. "Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered." *Id.* (quoting *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001)). The evaluation must focus on whether the owner reasonably relinquished her expectation of privacy in her private affairs by leaving the property. *Id.* at 408-09.

In *Evans*, the defendant denied the officers consent to search a locked briefcase located on the backseat of his truck and denied ownership of it. The police seized the briefcase and later obtained a search warrant

and searched it. 159 Wn.2d at 405-06. Our Supreme Court held that the defendant's denial of ownership was not enough alone to consider the locked briefcase abandoned. Rather, looking to the lock, the defendant's objection to the seizure, and the location of the briefcase in the backseat of his truck, the court held the defendant had not abandoned the property, the motion to suppress should have been granted, and the matter was reversed and remanded for a new trial. *Id.* at 412-13.

In *Dugas*, the defendant removed his jacket in police presence, with police permission, and put it on the hood of his car. 109 Wn. App. at 593-95. He was subsequently arrested and transported by the police, leaving his jacket. *Id.* Although the defendant never asked for his jacket, this Court held that he had not abandoned it when he left it on the hood of the car and was removed from that area by police. *Id.* at 596-97.

The circumstances here show even less evidence of abandonment than in *Dugas*. First, Ms. Mothershead asserted her ownership of and interest in the cooler and never disavowed it. 8/21/13 RP 12-13, 37, 57-58; *Evans*, 159 Wn.2d at 412; *State v. Hamilton*, 179 Wn. App. 870, 885, 320 P.3d 142 (2014) (disavowing ownership is a factor to be considered). In fact, she was argumentative over her right to control it. 8/20/13 RP 33. Her assertion of an interest in the cooler is central to the inquiry, not whether she actually regained control of it. *See, e.g.*, *State v. Jordan*, 29

Wn. App. 924, 925, 927, 631 P.2d 989 (1981) (individuals demonstrated expectation of privacy by drawing curtains even though officers were able to peer into window through a gap left open); *Kealey*, 80 Wn. App. at 169 (defendant's attempt to search for her misplaced purse is significant, not that she did not succeed at locating it). Moreover, by marking the cooler with her daughter's name, zipping it closed, and placing it near her daughter's bedside, Ms. Mothershead took reasonable precautions to ensure the privacy of her cooler. 8/21/13 RP 11-12, 17; *see Kealey*, 80 Wn. App. at 168-69 (subjective expectation of privacy under Fourth Amendment where defendant took normal precautions to preserve privacy of purse by leaving it zipped shut, closed to public viewing); *Evans*, 159 Wn.2d at 412-13 (engaged lock on briefcase critical to finding that the property was not abandoned even where defendant disavowed ownership of it).

Like in *Dugas*, where the defendant was removed from his property upon arrest, Ms. Mothershead left the hospital only after she was told by law enforcement that she could not stay and that she could not deliver the contents of her cooler to K.M. 8/21/13 RP 42, 49, 74, 77-78. Likewise, in finding property not abandoned in *Hamilton*, this Court considered that the defendant was removed from the area around her property by police action rather than willful abandonment. 179 Wn. App.

at 876, 880-88 (conviction reversed for ineffective assistance of counsel where trial counsel failed to move to suppress evidence seized from purse despite conflicting evidence of defendant's assertion of ownership and where defendant parted with purse upon request from law enforcement); *see State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990) (garbage not abandoned where law requires property owner to place garbage off her own real property, physically separating it from herself, for collection). Like in *Boland*, where the defendant could reasonably infer that only trash collectors would handle his trash, Ms. Mothershead could reasonably presume that her cooler would only be invaded for a medical or health need. 115 Wn.2d at 576 ("One can reasonably infer from these ordinances that only trash collectors and not others will handle one's trash. It would be improper to require that in order to maintain a reasonable expectation of privacy in one's trash that the owner must forego use of ordinary methods of trash collection."); *see State v. Gunwall*, 106 Wn.2d 54, 67, 720 P.2d 808 (1986) (exposure of dialed telephone numbers to telephone company does not evidence an intent to open information up for government intrusion).

This case is unlike *Reynolds* or *Young*, where the defendants dropped their property in a public area or disavowed ownership of the property when seized by police. Although Ms. Mothershead physically

separated from her cooler when she was told she had to leave the hospital, she did not evince an intent to offer it up to the public or law enforcement. She left it in a private hospital room at her daughter's bedside. *See Hamilton*, 179 Wn. App. at 85-86 (abandonment will not generally be found where property left in protected area).[43] While one might reasonably expect hospital staff to have access to items left in a hospital room for medical and safety purposes, no parent would expect that personal items left at their child's hospital bedside would be subject to warrantless government seizure.

c. Because the cooler was searched by a government actor without a warrant, the results of the search should have been suppressed.

The exclusionary rule bars the State from presenting at trial evidence seized during an illegal search. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). "[T]he right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy." *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). "[W]henever the right is unreasonably violated, the remedy must follow." *Id.*

[43] See also *Boland*, 115 Wn.2d at 580 (noting location of searched item does not control lawfulness of government's warrantless intrusion; holding warrant required to search garbage placed at public curb).

Suppression is required here. Government actors in the form of public hospital staff invaded Ms. Mothershead's private affairs without a warrant by searching her cooler. The search violated article I, section 7 and the Fourth Amendment. The evidence obtained from the unlawful search should have been suppressed.

2. By requiring a foundation in addition to motive and opportunity before other suspect evidence could be admitted by Ms. Mothershead, the trial court violated her right to a meaningful opportunity to present a defense.

The federal and state constitutions guarantee Ms. Mothershead "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 90 L. Ed. 2d 646 (1986); *accord, e.g.*, U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (emphasis added).

There is no per se rule against admitting circumstantial evidence of another person's motive, ability, or opportunity to commit the charged

offense. *State v. Franklin*, __ Wn.2d __, 325 P.3d 159, 160 (2014). Rather, where there is an adequate nexus between the alleged other suspect and the crime, such as motive and opportunity, such evidence should be admitted. *Id.*; *State v. Kwan*, 174 Wash. 528, 532-33, 25 P.2d 104 (1933). The so-called "other suspect rule" is merely a "'specific application' of the general evidence rule permitting a judge 'to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.'" *Franklin*, 325 P.3d at 162 (quoting *Holmes*, 547 U.S. at 327).

While only relevant evidence is admissible, relevance is a low threshold. *See* ER 401, 402. Evidence is relevant if: (1) the evidence has a tendency to prove or disprove a fact (probative value), and (2) the fact is "of consequence in the context of the other facts and the applicable substantive law (materiality)." *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987) (citing 5 K. Tegland, *Wash. Practice* § 82, at 168 (2d ed. 1982)); *Davidson v. Metro. Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)). Moreover, "[e]vidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (emphasis added).

If the evidence is relevant, the State has the burden to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Jones*, 168 Wn.2d at 720; ER 401. The State's interest in excluding prejudicial evidence must "'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" *Id.* (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). The integrity of the fact-finding process and a defendant's right to a fair trial are important considerations. *Id.* at 720. Therefore, for evidence of high probative value, no state interest is compelling enough to preclude its introduction consistent with the Sixth Amendment and article I, section 22. *Id.*

In *Franklin*, the trial court required the defendant to show more than motive and opportunity to present evidence that another suspect was responsible for the charged conduct. 325 P.3d at 162, 163. The court required the defendant to show specific facts that someone else committed the crime. *Id.* at 162. Our Supreme Court reversed, holding that Mr. Franklin's constitutional right was violated when the trial court required him to show more than motive and opportunity to admit other suspect evidence. *Id.* at 164.

Like in *Franklin*, the trial court here erred when it prevented Ms. Mothershead from presenting evidence that Matthew Bowie or another might have assaulted K.M. The trial court recognized Ms. Mothershead proved Mr. Bowie had motive and opportunity to commit the crime. 10/2/13 RP 12-19. However, the court repeatedly asserted that Ms. Mothershead could not admit other suspect evidence, or point the finger at Mr. Bowie, unless she could show more. 9/9/13 RP 10, 30-31; 9/24/13 9-13; 10/2/13 RP 12-19. In addition to motive and opportunity, the trial court required her to show that the other suspect took a step towards assaulting K.M. *Id.* Based on this ruling, the trial court precluded Ms. Mothershead from pointing the finger at Mr. Bowie and from admitting evidence that he had a syringe with liquid in it in the "man room" in which K.M. stayed when she was at his home. 9/23/13 RP 169-71; 9/24/13 9-14; 10/2/13 RP 12-19; *see* 9/23/13 RP 126-27 (testimony re "man room"), 181-87, 190 (excluding testimony that Bowie offered to pay to abort Mothershead's pregnancy). Like in *Franklin*, this additional requirement burdened Ms. Mothershead's constitutionally guaranteed opportunity to present a meaningful defense. In fact, it placed a greater requirement on Ms. Mothershead than even the State had to meet—for the State could offer no direct evidence that Ms. Mothershead had taken a step towards assaulting K.M.

Like in *Franklin*, the trial court erred by requiring Ms. Mothershead to show more than another suspect's motive and opportunity. *See Franklin*, 325 P.3d at 164; *see State v. Maupin*, 128 Wn.2d 918, 925-28, 913 P.2d 808 (1996) (error to exclude evidence that other suspect was seen with kidnapped girl after the time of kidnapping, which "testimony would not necessarily have exculpated Maupin" but "at least would have brought into question the State's version of the events" and "does point directly to someone else as the guilty party").

The error requires reversal unless the State can prove the exclusion harmless beyond a reasonable doubt. *Franklin*, 325 P.3d at 164-65; *Maupin*, 128 Wn.2d at 928-30. The State cannot meet that burden here because its case against Ms. Mothershead was circumstantial—no one could attest to her tampering with the medication, whereas Mr. Bowie also cared for K.M. on his own and administered the Tobramycin drops to K.M. *E.g.*, 9/23/13 RP 132-35, 138, 173-77. Indeed Mr. Bowie was watching K.M. in the barn when the eye injury was first discovered and he was alone with her when the spot on her head was discovered. 9/23/13 RP 139, 159-60, 163, 167-68; *see* 10/2/13 RP 13. Moreover, Ms. Mothershead had maintained K.M.'s health throughout her first year, including by taking her to regular well check-ups. *E.g.*, 9/26/13 RP 108, 111-12. On the other hand, K.M. had only recently been staying with Mr.

Bowie regularly, Ms. Mothershead was recently pregnant with Mr. Bowie's child, and Mr. Bowie was motivated by their recent affair to keep her close to him (she was particularly dependent on her friends while K.M. was unhealthy). *E.g.*, 9/23/13 RP 128-30, 141-42; 10/2/13 RP 12-14. In addition to this evidence, the court prevented Ms. Mothershead from presenting evidence that Mr. Bowie had a liquid-filled syringe in K.M.'s room and offered to pay to end Ms. Mothershead's pregnancy. 9/23/13 RP 169-71, 181-87, 190. The motive and opportunity aligned such that the jury might have reached a different verdict if it had been allowed to consider all the evidence. Consequently, like in *Franklin*, the conviction must be reversed and remanded for a just trial. *Franklin*, 325 P.3d at 165.

3. The trial court should have provided an instruction on assault of a child in the third degree because it is an inferior degree of the charged offense and affirmative evidence created a reasonable inference that only that crime occurred.

An accused may only be convicted of those offenses charged in the information or those offenses which are either lesser included offenses or inferior degrees of the charged offense. U.S. Const. amend. VI; Const. art. I, § 22; *Schmuck v. United States*, 489 U.S. 705, 717-18, 109 S. Ct. 2091, 103 L. Ed. 734 (1989); *State v. Tamalini*, 134 Wn.2d 725, 953 P.2d 450 (1998) (citing *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1998); RCW 10.61.003). Also, she is "entitled to have the jury fully instructed

on the defense theory of the case." *State v. Fernandez-Medina*, 141 Wn.2d 448, 461-62, 6 P.3d 1150 (2000) (quoting *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)).

Where the defendant requests an inferior degree instruction, the instruction is legally proper if the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense." *Id.* This is distinct from the inquiry required on a lesser included offense. *Id.* There, the court must evaluate whether each element of the lesser offense must necessarily be proved to establish the greater offense as charged. *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Before either an inferior degree or a lesser included offense instruction can be provided, the court must also determine that affirmative evidence leads to a reasonable inference that only the inferior crime occurred. *Fernandez-Medina*, 141 Wn.2d at 454-55.

Like many courts, Ms. Mothershead's trial court blurred the distinction between inferior degree and lesser included offenses. *Fernandez-Medina*, 141 Wn.2d at 454 (noting that like "many courts" the trial court and Court of Appeals "failed to observe the distinction" between inferior degree and lesser included offenses). As elaborated

below, the court should have provided the jury with an instruction on the inferior degree offense of assault of a child in the third degree.[44]

a. Assault of a child in the third degree is an inferior degree of assault of a child in the first degree, even if it is not a lesser included crime.

The State charged Ms. Mothershead with assault of a child in the first degree. CP 1-3, 9-11. Ms. Mothershead proposed inferior degree instructions for assault of a child in the second and third degrees. CP 123, 126-31.

The statutes criminalizing assault are divided into degrees that charge the single crime of assault. *State v. Peterson*, 133 Wn.2d 885, 890-91, 948 P.2d 381 (1997); *State v. Foster*, 91 Wn.2d 466, 471-72, 589 P.2d 789 (1979). Assault of a child is organized the same. *Compare* RCW 9A.36.011, -.021, -.031, -.041 *with* RCW 9A.36.120, -.130, -.140. When assault or assault of a child is charged, regardless of which alternative means is alleged, any inferior degree assault may also be instructed. *Peterson*, 133 Wn.2d at 890-91 (holding assault 2 instruction for assault by torture could be provided where defendant charged with assault 1 for intentionally inflicting great bodily harm); *Foster*, 91 Wn.2d at 471-73 (court properly instructed on inferior degree assault 2 by negligence where State charged assault 1 with intent to kill).

[44] Copies of the assault of a child statutes are attached at Appendix C.

Like the crimes at issue in *Peterson* and *Foster*, assault of a child in the second and third degree are inferior degree offenses to assault in the first degree. Those offenses each criminalize the single offense of assault of a child, which is divided into degrees. *See Fernandez-Medina*, 141 Wn.2d at 454. Legally, the jury should be instructed on them if offered. *See* 10/2/13 RP 43 (prosecutor agrees, after consultation with colleagues and appellate unit, that legal test is met "automatically" for inferior degrees of assault).

The trial court overlooked the inferior degree test in evaluating Ms. Mothershead's request for a lesser offense instruction. 10/2/13 RP 20-23, 31, 33, 37-39, 43-53.[45] Rather than determining whether assault of a child in the first degree and assault of a child in the third degree charge but one offense, the trial court looked to whether each of the elements of the lesser crime is a necessary element of the charged offense—assault of a child in the first degree. 10/2/13 RP 37-39, 47-53. The court was arguably correct in determining that assault of a child in the third degree is not a lesser included crime of assault of a child in the first degree. *Peterson*, 133 Wn.2d at 891 (holding lower court correctly found that assault in the first and second degree have different elements and the latter is not a lesser

[45] The court was willing to instruct the jury on assault of a child in the second degree, finding the legal elements comparable to first degree assault of a child as charged. But Ms. Mothershead elected not to have the jury instructed on the second degree offense if it would not also be instructed on third degree assault of a child. 10/2/13 RP 21-26.

included crime of the former). But, as discussed above, the court applied the improper test. *Fernandez-Medina*, 141 Wn.2d at 454 (discussing distinct tests for inferior degree and lesser included offenses). The court should have only looked to whether the crimes charge but one offense, the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense. *Id.* As set forth above, the requested assault of a child in the third degree satisfies that legal test here.

b. An instruction on assault of a child in the third degree should have been provided because affirmative evidence created a reasonable inference that only the inferior degree crime occurred.

The factual inference required to satisfy the factual prong is the same for inferior degree and lesser included offense instructions. *Fernandez-Medina*, 141 Wn.2d at 455. First, in applying the factual prong, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *Id.* at 455-56. Here, that is Ms. Mothershead. Second, affirmative evidence must support the inference that only the lesser offense was committed. *Id.* at 456.

The jury could have found that Ms. Mothershead committed third degree assault of a child but not first degree assault of a child if it found that she, (a) with at least criminal negligence, (b) caused bodily harm with

an instrument or thing likely to produce bodily harm or caused bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering but (c) that she did not cause great bodily harm or engage in a pattern or practice of assaulting the child or causing her physical pain or agony. *Compare* RCW 9A.36.120(1)(b) *with* RCW 9A.36.140 (incorporating RCW 9A.36.031(d), (f)). There was affirmative evidence at trial that this occurred. The medication that the State had tested was prescribed to K.M. on May 2, 2011. Ms. Mothershead testified she had administered drops from that prescription only a few times before K.M. was taken into protective custody on May 12, 2011. 10/1/13 RP 155-58. The Pierce County Sheriff's Department opened the bottle and saw it was full. 9/18/13 RP 97-99; 9/23/13 RP 34-38. Thus, affirmative evidence allowed a reasonable inference that Ms. Mothershead did actually assault K.M. by administering drops from a contaminated version of the May 2 prescription, but that she did not do so repeatedly from March 23 to May 12. It is also a reasonable inference that, if Ms. Mothershead only administered the contaminated eye drops on one or a handful of occasions she inflicted only bodily harm not great bodily harm or physical pain or agony equivalent to that of torture. *Compare* RCW 9A.36.120(1)(b) *with* RCW 9A.36.140.[46]

[46] The factual component of the test looks to affirmative evidence in the record

Assault of a child in the third degree also contains a less culpable mens rea than assault in the first degree. But the above affirmative evidence would have allowed the jury to find only the inferior degree offense was committed regardless of the mens rea involved. That is true because, where criminal negligence is at issue, the element is proved if the accused acted intentionally, knowingly, or recklessly. RCW 9A.08.010(2) ("When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly."). Thus, in the light most favorable to Ms. Mothershead, affirmative evidence permitted a reasonable inference that only the inferior degree offense—assault of a child in the third degree—occurred.

The trial court erred in failing to grant Ms. Mothershead a jury instruction on the inferior degree offense of assault of a child in the third degree. The conviction must be reversed and remanded for a new trial. *Fernandez-Medina*, 141 Wn.2d at 462 (reversing conviction where court failed to give inferior degree instruction of assault 2).

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without regard to any alternative or competing explanations. *Fernandez-Medina*, 141 Wn.2d at 457-61. The courts will not weigh evidence or preclude a defendant's right to present inconsistent defenses. *Id.*

4. Evidentiary errors denied Ms. Mothershead's right to present a defense by prohibiting her from introducing evidence of her good character for peacefulness, a trait pertinent to assault, and from providing complete testimony as to her conduct after the State inquired of witnesses on direct examination.

a. Because an accused's peaceful nature is relevant to the assault charged against Ms. Mothershead, the trial court erred in excluding testimony of her peaceful character.

Although character evidence is generally not admissible for proving propensity to commit a charged crime, Evidence Rule 404(a)(1) provides an exception. *See* ER 404. "Evidence of a pertinent trait of character offered by an accused" is specifically admissible under this rule. "'[P]ertinent,' as used in ER 404(a)(1), is synonymous with 'relevant,'" and therefore "'a pertinent character trait is one that tends to make the existence of any material fact more or less probable.'" *State v. Perez-Valdez*, 172 Wn.2d 808, 819-20, 265 P.3d 853 (2011) (quoting *City of Kennewick v. Day*, 142 Wn.2d 1, 6, 11 P.3d 304 (2000) (quoting in turn *State v. Eakins*, 127 Wn.2d 490, 495-96, 902 P.2d 1236 (1995))).

Assault of a child in the first degree, and the inferior second degree assault, required the State to prove intent to inflict bodily harm. RCW 9A.36.120, -.130; CP 175; *see Eakins*, 127 Wn.2d at 491-92, 496 (discussing intent required for assault and citing *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). Whether Ms. Mothershead had the

requisite intent or malice was thus an essential element of the charged crime. *Eakins*, 127 Wn.2d at 495. Evidence of Ms. Mothershead's peacefulness, if believed by the jury, would make it less probable that she would intentionally harm her child. *Id.* at 500 (citing *Byrd*, 125 Wn.2d at 713-16). Evidence she was peaceful and nonviolent prior to and around the time period charged pertained directly to whether Ms. Mothershead could have formed the intent to intentionally or recklessly harm her child. *Id.* at 501 (quoting and discussing *State v. Aplaca*, 74 Haw. 54, 837 P.2d 1298 (1992) (holding character for peacefulness relevant to third degree assault)). Thus, the evidence was pertinent and should have been admitted. *Perez-Valdez*, 172 Wn.2d at 819-20.

However, when Ms. Mothershead sought to introduce evidence of her peacefulness—through testimony of witnesses who knew her personally, the trial court purported to rely on ER 404(a)(1) in excluding it. 8/21/13 RP 113-18; 9/23/13 RP 164-67; 9/30/13 RP 66. As a result, K.M.'s father's testimony that he never saw Ms. Mothershead lose her temper or strike out in anger was excluded along with all other evidence of Ms. Mothershead's peacefulness. *See id.*; ER 405(b) (allowing evidence of specific instances of conduct).

b. The trial court erred in precluding Ms. Mothershead's evidence as to topics on which the State had developed testimony.

"[O]nce a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence." *State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008), *abrogated on other grounds by State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). Even otherwise inadmissible evidence may be admissible if the opposing party first "opens the door" and the inadmissible evidence is relevant. *State v. West*, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967); *State v. Stockton*, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). This precept prevents a party from exploring broad inferences at will, leaving inferences with the jury, and then precluding the other side from offering an explanation for or rebutting the evidence. *West*, 70 Wn.2d at 754. "Where one party has introduced part of a conversation, the opposing party is entitled to introduce the balance thereof [even if otherwise inadmissible] in order to explain, modify, or rebut evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved." *Id.* at 754-55.

The trial court prohibited Ms. Mothershead from introducing evidence on multiple occasions in response to the State's direct testimony. For example, Sergeant Teresa Berg testified on direct that she was told in the hospital that K.M. needed to be swaddled when eye drops were

administered and that she was referred to as "the fighter." 9/18/13 RP 71-72. On cross-examination, Ms. Mothershead sought to clarify that it was Ms. Mothershead that made these statements to Sergeant Berg. 9/18/13 RP 141. The State then cutoff her questioning, objecting that "continuing along these lines" is "self-serving hearsay." *Id.* Despite Ms. Mothershead's argument that the State opened the door and she was entitled to present the complete story to the jury, the trial court sustained the objection in part, ruling that Ms. Mothershead could only elicit those precise statements that were testified to on direct but not any others. 9/18/13 RP 141-44; *see* 8/21/13 RP 119-23 (argument on pretrial motion in limine).

Ms. Mothershead was precluded from asking additional questions of this witness related to her conduct when she left the hospital. 9/18/13 RP 148-49. This time, Ms. Mothershead sought to elicit whether she asked to return to K.M.'s room and say goodnight. *Id.* The court sustained the State's objection without discussion. *Id.*

Later, Ms. Mothershead tried to ask the other police officer, Lynelle Anderson, similar questions. 9/23/13 RP 63-65. The court again sustained the State's objection on hearsay grounds. *Id.*[47] Most simply, the

[47] The State frequently objected to admission of these statements as "self-serving hearsay." *E.g.*, CP __ (State's trial brief, p.7 (July 12, 2013)); 9/18/13 RP 141-43; 9/23/13 RP 63. But as the State eventually acknowledged, there is not prohibition against

ruling was erroneous because whether Ms. Mothershead asked a particular question is not an out-of-court statement subject to the hearsay rules. *See* ER 801(a), (c). But even if the fact of whether she made a statement could be considered hearsay, Ms. Mothershead was entitled to elicit the evidence because the State opened the door. *E.g.*, *West*, 70 Wn.2d at 754-55; *Stockton*, 91 Wn. App. at 40.

Ms. Mothershead subsequently asked Detective Anderson if she told Detective Anderson "about going to the doctor the day before." 9/23/13 RP 70. The State's hearsay objection was again sustained despite the State's introduction of this topic (Detective Anderson's conversation with Ms. Mothershead on same occasion) on direct. 9/23/13 RP 31-34.

In precluding Ms. Mothershead from exploring these areas, the court violated the precept that the accused is entitled to offer testimony to rebut, modify or explain topics on which the State opened the door. *West*, 70 Wn.2d at 753-55. Consequently, the evidence was erroneously excluded.

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self-serving hearsay. *State v. Pavlik*, 165 Wn. App. 645, 268 P.3d 986 (2011) ("We agree that there is no "self-serving hearsay" rule that bars admission of statements that would otherwise satisfy a hearsay rule exception."); 9/23/13 RP 63-65.

c. These errors combined to deny Ms. Mothershead's constitutional right to present a defense and prejudiced the outcome of the trial.

Individually, or combined, these errors denied Ms. Mothershead's constitutional right to present a defense. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; *see* Section E.1.a, *supra*. The trial court's rulings took away her "right to put before the jury evidence that might influence the determination of guilt." *Ritchie*, 480 U.S. at 56. This constitutional violation requires reversal unless the State can show beyond a reasonable doubt that the evidence did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967).

As set forth above, Ms. Mothershead's specific intent was an element the State was required to prove beyond a reasonable doubt. Yet, Ms. Mothershead was precluded from admitting testimony that she had never exhibited such an intent by lashing out or losing her temper. *E.g.*, 9/23/13 RP 164-67; 9/30/13 RP 66. The trial court also denied Ms. Mothershead the opportunity to explain, modify and rebut evidence about her own conduct and statements. These rulings permitted the State to leave the jury with inferences to which Ms. Mothershead objected and found unfair. *See West*, 70 Wn.2d at 754. Moreover, Ms. Mothershead ultimately had to take the stand in her own defense to admit evidence she was entitled to elicit through other witnesses. 10/1/13 RP 124-30

(testifying that she asked to go into K.M.'s hospital room to say goodnight). The State cannot prove the errors were harmless beyond a reasonable doubt.

"[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). Thus even if these errors are considered merely evidentiary errors, and not constitutional errors, reversal is required because "the error[s], within reasonable probability, materially affected the outcome" of the trial. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002); *Eakins*, 127 Wn.2d at 503 (reversing due to exclusion of peaceful character evidence); *id.* at 504 (Guy, J. concurring in result).

5. The deputy prosecuting attorney committed misconduct by trivializing, misstating and shifting the burden of proof and by washing away the presumption of innocence.

Every prosecutor is a quasi-judicial officer of the court, charged with the duty to seek verdicts free from prejudice, and "to act impartially in the interest only of justice." *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *accord State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). A prosecutor bears the complimentary obligation to ensure an accused person receives a fair and impartial trial. *E.g.*, *Berger v.*

United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

"The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. at 88. "[W]hile [a prosecutor] may strike hard blows, [he or she] is not at liberty to strike foul ones." *Id.* "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

A prosecutor's misconduct may deny an accused his right to a fair trial and is grounds for reversal if the conduct was improper and prejudicial. *State v. Swanson*, __ Wn. App. __, 327 P.3d 67, 69-70 (2014) (citing *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *Monday*, 171 Wn.2d at 675). Where the accused objects to a prosecutor's improper argument, reversal is required if the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

a. Over Ms. Mothershead's overruled objection, the prosecutor shifted the burden to Ms. Mothershead and diluted her presumption of innocence by arguing she failed to present evidence of her innocence.

The deputy prosecuting attorney committed misconduct when she argued Ms. Mothershead should be found guilty because she did not present certain evidence of her own innocence. *See State v. Traweek*, 43 Wn. App. 99, 106-07, 715 P.2d 1148 (1986), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). While the State may properly comment on its own evidence, the prosecutor may not "comment on a failure of the defense to do what it has no duty to do." *Id.* at 107. It is axiomatic that a criminal defendant has no duty to present evidence; the "State bears the entire burden of proving each element of its case beyond a reasonable doubt." *Id.* (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

The deputy prosecutor may not imply that the accused bore the burden of providing a reason for the jury not to convict her. *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). Yet, that is precisely what occurred here. After talking about Ms. Mothershead's credibility as a witness, the deputy prosecuting attorney told the jury, "I submit to you that she never said she didn't put anything into [K.M.]'s eye drops. She said that she didn't know anything about the change of color,

no personal knowledge about that or the toxic smell." 10/3/13 RP 42. In rebuttal, the prosecutor repeated this theme that the defendant was required to offer something affirmative to show her innocence. She argued, "You know, she's being prescribed this medication, doing what the doctor tells her and giving her medications. But again, I submit to you, I submit to you that this is the case. The defendant never said that she didn't intentionally do something to the drops." 10/3/13 RP 80. Defense counsel's objection as "Burden shifting" was promptly overruled. 10/3/13 RP 80-81.

The court should have sustained the objection. By arguing that Ms. Mothershead should have presented further evidence of her innocence, that she had any obligation to bring forth any evidence, and that her lack of evidence proves her guilt, the deputy prosecutor shifted the burden to the accused and washed away the critical presumption of innocence. *See Traweek*, 43 Wn. App. at 106-07.

b. The prosecutor committed further misconduct when she trivialized the State's burden of proof by comparing it to everyday tasks and misstated the burden.

In other portions of her argument, the deputy prosecutor trivialized and misstated the burden of proof. A prosecutor's "comments discussing the reasonable doubt standard in the context of everyday decision making" are "improper because they minimize[] the importance of the reasonable

doubt standard and of the jury's role in determining whether the State has met its burden." *Anderson*, 153 Wn. App. at 431. Comparing the certainty required to convict an accused of a criminal offense with the certainty people often require to make their everyday decisions, a prosecutor trivializes the criminal justice process and "fails to convey the gravity of the State's burden and the jury's role in assessing its case against [the accused]." *Id.* Accordingly, such argument is improper.

The deputy prosecutor here trivialized the burden and misstated it early and often in her closing argument. She told the jury that the beyond a reasonable doubt standard is comparable to that a parent uses in deciding whether his child ate the brownies missing from the kitchen. When she reached the point in her story where the accused child points to the pet, the prosecutor went beyond trivializing the burden; she affirmatively misstated it. Here, she argued "Again, what's the reasonable inference? Are there other possibilities? There will always be other possibilities. But what's the reasonable conclusion based on what you do have? That your son ate the brownies." 10/3/13 RP 13. While the prosecutor might have accurately summarized the burden a parent ascribes in parenting, she misstated the burden in a criminal trial. The State did not simply have to show that Ms. Mothershead's guilt is a "reasonable inference" or a

"reasonable conclusion." The State had to prove that Ms. Mothershead assaulted her child beyond a reasonable doubt.

The deputy prosecutor here simply told the jury to treat its duty with the same rigor it uses to determine who ate a brownie off the kitchen counter. 10/3/13 RP 40-41. This trivialization diluted the burden of proof.

c. In the cumulative, if not individually, these improper comments require reversal of Ms. Mothershead's conviction.

Ms. Mothershead's objection to the prosecutor's burden shifting was overruled. As previously stated, objected to misconduct requires reversal if it had a substantial likelihood of affecting the jury's verdict. *McKenzie*, 157 Wn.2d at 52. In fact, where a trial court overrules a defendant's timely objection to an improper comment it increases the likelihood that the misconduct affected the jury's verdict. *Swanson*, 327 P.3d at 73 (citing *State v. Perez-Mejia*, 134 Wn. App. 907, 920, 143 P.3d 838 (2006)). The court's overruling of Ms. Mothershead's objection "lent an aura of legitimacy to what was otherwise improper argument." *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213(1984). Unobjected to misconduct, on the other hand, must be flagrant and ill intentioned such that an instruction could not have cured the resulting prejudice. *State v. Lindsay*, __ Wn.2d __, 326 P.3d 125, 129 (2014).

The presumption of innocence is the "bedrock upon which [our] criminal justice system stands." *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010) (quoting *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007) (alteration in original)). A misstatement about this presumption "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Id.* Thus reversal is required even under the flagrant and ill-intentioned standard. *Id.* (reversing for unobjected to prosecutorial misconduct that diluted the burden of proof; holding it was incurable by a trial court instruction). Even though our courts presume a jury follows the court's instruction on the presumption of innocence, the prosecutorial dilution of that principle cannot be harmless.

The prejudice to Ms. Mothershead is particularly clear when the multiple instances of objected to and unobjected to misconduct are viewed together and in light of the circumstantial nature of the evidence against her. The Court should allow Ms. Mothershead to receive a new, constitutionally fair trial.

6. The court's instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge diluted the State's burden of proof in violation of the due process right to a fair trial.

"The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added) (quoting *Anderson*, 153 Wn. App. at 431); *accord State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012); *State v. McCreven*, 170 Wn. App. 444, 472-73, 284 P.3d 793 (2012). "[A] jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. Therefore, "[t]elling the jury that its job is to 'speak the truth,' or some variation thereof, misstates the burden of proof and is improper." *Lindsay*, 326 P.3d at 132.

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *Bennett*, 161 Wn.2d at 315-16. The court bears the obligation to vigilantly protect the presumption of innocence. *Id.* "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Emery*, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

Although the "beyond a reasonable doubt" standard may be a complicated one to explain, it is not beyond explanation. For example, the United States Court of Appeal for the Ninth Circuit recommends the following model language:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.
>
> A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.
>
> If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Ninth Circuit Court of Appeals, *Manual of Model Criminal Jury Instructions* § 3.5 (2014); *see United States v. Ruiz*, 462 F.3d 1082, 1087 (9th Cir. 2006) (upholding use of model instruction).

Washington has also adopted a model instruction. It provides, in relevant part:

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [*If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*]

Washington Pattern Instruction: Criminal 4.01. The final sentence is optional; that is, it is not necessary to the defining the beyond a reasonable doubt standard. *Id.* (Comment).

The trial court here included this language, instructing the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 170 (instruction # 2). This language was proposed by the State and accepted by the court in lieu of Ms. Mothershead's proposed instruction, which did not reference the abiding belief in the truth language. 10/1/13 RP 172; 10/2/13 RP 27, 31 CP __ (Plaintiff's Proposed Jury Instruction, p.6 (Sept. 5, 2013)).

By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741.

In *Bennett*, the Supreme Court did not comment on the bracketed "belief in the truth" language. And notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved in that case.

Recent cases highlight the problematic nature of this language. In *Emery*, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly held these remarks misstated the jury's role. *Id.* at 764. However, the error was harmless because the "belief in the truth" theme was not part of the court's instructions and because the evidence was overwhelming. *Id.* at 764 n.14.

The Supreme Court reviewed the "belief in the truth" language almost 20 years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in *Pirtle,* the issue before the Court was whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the Court did not determine whether the "belief in the truth" phrase minimizes the State's burden and suggests to the jury that they should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

The erroneous instruction diluted the burden of proof. *Emery*, 174 Wn.2d at 741 (error where jury told its job is to search for the truth). Because the State was not held to the standard of proof beyond a reasonable doubt, Ms. Mothershead was denied her constitutional right to a fair trial. Her conviction should be reversed and the matter remanded.

7. Cumulative trial errors denied Ms. Mothershead her constitutional right to a fair trial.

Each of the above trial errors requires reversal. If this Court disagrees, it should look to the aggregate effect of these trial court errors, as in the cumulative they denied Ms. Mothershead a fundamentally fair trial.

The cumulative error doctrine counsels that, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). Under this doctrine reversal is required where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Viewed together, the errors discussed above created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. While the State's case against Ms. Mothershead was circumstantial, she was precluded from putting evidence before the jury that showed Matthew Bowie could very easily have been the perpetrator and she was prevented from arguing he was the proper suspect. Under the

trial court's rulings, this case became just about her. Yet, the court also precluded her from presenting evidence as to her pertinent character for peacefulness and precluded her from completing the picture when the State introduced partial evidence. Furthermore, the jury was not allowed to deliberate on a lesser offense to assault of a child in the first degree. On top of all that, the jury likely applied a lesser burden than proof beyond a reasonable doubt due to prosecutorial misconduct in closing argument and the court's faulty instruction focusing on the truth of the charge. In the cumulative, Ms. Mothershead's trial was unfair to the extent that it prejudiced the result.

8. The exceptional 480-month sentence should be reversed because no evidence supported the a-typicality of this offense and because 480 months is clearly an excessive sentence.

If this Court affirms Ms. Mothershead's conviction, it should vacate the exceptional sentence.

a. The deliberate cruelty and particular vulnerability aggravators require circumstances beyond those that ordinarily adhere to the offense, but the jury received no evidence to support such a finding.

The reasons for an exceptional sentence "must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense." *State v. Chadderton*, 119 Wn.2d 390, 395, 832 P.2d 481 (1992) (quoting *State v. Nordby*, 106 Wn.2d 514, 518,

723 P.2d 1117 (1986)). The factfinder "may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range." *Id.* (quoting *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991)). "[F]actors inherent in the crime—inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and [that] do not distinguish the defendant's behavior from that inherent in all crimes of that type—may not be relied upon to justify an exceptional sentence." *State v. Ferguson*, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001).

"For example, planning is inherent in the premeditation element of first degree murder and was necessarily considered by the Legislature in establishing the standard sentence range; it therefore may not serve to justify an exceptional sentence for first degree murder." *Chadderton*, 119 Wn.2d at 395 (citing *State v. Dunaway*, 109 Wn.2d 207, 218, 743 P.2d 1237 (1987)). Likewise, "the seriousness of the injuries of a victim of vehicular assault may not be used to justify an exceptional sentence for vehicular assault because infliction of "serious bodily injury" is a prerequisite for the crime and therefore was already considered by the

Legislature in setting the presumptive range." *Id.* (citing *Nordby*, 106 Wn.2d at 519).[48]

A trial judge is arguably in a position to know what factors inhere in the standard range sentence for a particular offense. But these aggravating factors can no longer be decided by a judge where the accused exercises her right to a jury trial. RCW 9.94A.537. While the court sets the actual sentence, a jury must find any alleged aggravating factors beyond a reasonable doubt. *Id.*; *see State v. Pillatos*, 159 Wn.2d 459, 468, 150 P.3d 1130 (2007) (describing the post-*Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) amendments to our aggravated sentencing scheme).

On a challenge to the sufficiency of the evidence, this Court must reverse when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found 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. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

"Deliberate cruelty" means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in

[48] The Legislature has provided for an exceptional sentence in the extreme case where the injuries "substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." RCW 9.94A.535(3)(y); *State v. Papas*, 176 Wn.2d 188, 190, 197, 289 P.3d 634 (2012). However, that aggravator was not alleged here.

itself, and which goes beyond what is inherent in the elements of the crime. CP 184 (instruction # 16). This is a correct statement of the law. "Deliberate cruelty" requires a showing "of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. . . . [T]he cruelty must go beyond that normally associated with the commission of a charged offense or inherent in the elements of the offense." *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003). Put otherwise, an aggravating deliberate cruelty finding must be based on conduct that is "significantly more serious or egregious than is typical of" other assaults of a child in the first degree. *Id.* at 370. But none of the evidence at trial informed the jury what constitutes a "typical" first degree assault of a child.

The jury was likewise correctly instructed on the particular vulnerability aggravator. "A victim is 'particularly vulnerable' if he or she is more vulnerable to the commission of the crime than the typical victim of assault of a child in the first degree. The victim's vulnerability must also be a substantial factor in the commission of the crime." CP 185 (instruction # 17). It should be obvious that it is not enough that the victim was vulnerable. The Legislature did not simply set an aggravator for a "vulnerable" victim but only for a "particularly vulnerable" victim. Nonetheless, neither the court's instruction nor the evidence in this case

foretold how the jury was to determine whether K.M. was "more vulnerable to the commission of the crime than the typical victim of assault of a child in the first degree." CP 185. An average juror does not know what the "typical victim of assault of a child in the first degree" looks like.

This aggravator has been upheld where the crime was a generic offense that was not limited to harm to a child. *State v. Berube*, 150 Wn.2d 498, 501, 512, 79 P.3d 1144 (2003) (affirming 640-month sentence for conviction of homicide by abuse in death of 23-month old child); *State v. Armstrong*, 106 Wn.2d 547, 551, 723 P.2d 1111 (1986) (burns inflicted on 10-month-old victim by defendant's throwing boiling coffee on the child and plunging the child's foot in the coffee were injuries accounted for in the offense of second degree assault and could not justify an exceptional sentence but particular vulnerability of victim could be applied because charge was generic assault and victim was 10 months old). Here, however, the crime assault of a child specifies the victim must be a child and that vulnerability inheres in the standard sentencing range.

Furthermore, injuries already accounted for in determining the presumptive standard range for assault of a child in the first degree cannot form the factual predicate for a deliberate cruelty or a particular vulnerability finding. The Legislature considered the ongoing nature of

child abuse in setting the standard range for this offense. *State v. Marchi*, 158 Wn. App. 823, 831, 243 P.3d 556 (2010) (citing legislative history, including that "'We are trying to get to those situations where an adult repeats the offense against a child—several times—and based on the harm done to the child establishes then whether it is going to be assault against the child in the first, second, or third degree.'"). More particularly, Ms. Mothershead was convicted under the "pattern or practice" alternatives. CP 194-95. Therefore, repetitive abuse that causes great bodily harm, substantial bodily harm greater than transient physical pain or minor temporary marks, and substantial bodily harm that includes physical pain or agony equivalent to that produced by torture cannot be the basis for a jury finding of these aggravators.

b. The deliberate cruelty and particular vulnerability aggravators are unconstitutionally vague.

Regardless of the evidence actually presented in this case, the exceptional sentence should be reversed because the deliberate cruelty and particular vulnerability aggravators are unconstitutionally vague.

"A statute is void for vagueness if it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or it does not provide standards sufficiently specific to prevent arbitrary enforcement." *State v. Duncalf*, 177 Wn.2d 289, 296-97, 300 P.3d 352

(2013) (internal quotation omitted). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. *Id.* at 297. A statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. *Smith v. Goguen*, 415 U.S. 574, 578, 94 S. Ct. 1242, 15 L. Ed. 2d 447 (1973). The Court reviews a vagueness challenge de novo. *State v. Williams*, 159 Wn. App. 298, 319, 244 P.3d 1018 (2011).

The constitutional requirement must be applied to sentencing aggravators in light of recent federal cases. In *State v. Baldwin*, our Supreme Court held "the void for vagueness doctrine should have application only to laws that 'proscribe or prescribe conduct' and that it was 'analytically unsound' to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentences.'" 150 Wn.2d 448, 458, 78 P.3d 1005 (2003) (quoting *State v. Jacobson*, 92 Wn. App. 958, 966, 967, 965 P.2d 1140 (1998)). But this holding is incorrect in light of *Blakely*, 542 U.S. 296 and *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013). *Baldwin*'s holding that aggravating factors "do not . . . vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature" cannot withstand these United States Supreme Court decisions finding

statutory factors do alter the statutory maximum for the offense and must be first found by a jury beyond a reasonable doubt. *E.g.*, *Blakely*, 542 U.S. at 306-07. Our United States Supreme Court has also made clear that "due process and associated jury protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Apprendi v. New Jersey*, 530 U.S. 466, 484, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *Apprendi*, *Blakely*, and *Alleyne* clearly establish that aggravating factors affect a liberty interest protected by the Due Process Clause; this Court should adhere to those precedents rather than to the conflicting holding in *Baldwin*.

The deliberate cruelty and particular vulnerability of the victim aggravators are impermissibly vague because it is impossible to know what inheres in a typical assault of a child in the first degree, or any crime for that matter. The statute provides no standards against which the jury, the accused, or the trial judge can measure the alleged conduct. *See* RCW 9.94A.535(3)(a), (b). A jury has no reference point from which to determine the conduct that constitutes deliberate cruelty or particular vulnerability, just as the public has no way of knowing which conduct is proscribed. In Ms. Mothershead's case in particular, the jury had no reference point with regard to cruelty beyond that normally associated with the commission of assault of a child or more vulnerable to the

commission of the crime than the typical victim of assault of a child in the first degree was the instant case. These statutory provisions are vague because they are ripe for arbitrary enforcement. *Goguen*, 415 U.S. at 578.

c. Increasing Ms. Mothershead's punishment based on these aggravators violates the constitutional prohibition against double jeopardy.

The deliberate cruelty and particular vulnerability aggravators were improperly used to increase Ms. Mothershead's sentence beyond the standard range for an additional reason—it violates the double jeopardy prohibition. The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution bar multiple punishments for the same offense and from prosecuting for the same offense after acquittal or conviction. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).

As with vagueness challenges, *Apprendi*, *Blakely*, and *Alleyne* require reconsideration of prior holdings that double jeopardy does not apply to aggravating circumstances outside the death penalty context. *Accord Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) ((holding that aggravating factors are "'the functional equivalent of an element of a greater offense'" for purposes of the Sixth Amendment (quoting *Apprendi*, 530 U.S. at 494 n.19)).

As set forth above, deliberate cruelty is subsumed in the elements of assault of a child in the first degree. The jury here found Ms. Mothershead inflicted great bodily harm and caused substantially bodily harm along with a previous pattern or practice "which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks" and which caused "physical pain or agony that is equivalent to that produced by torture." The standard range sentence was the same in law and fact as deliberate cruelty.

Likewise, the assault of a child statute already contemplates a particularly vulnerable victim. It distinguishes the crime from general assault in the first degree. The Legislature created punishments particular to the fact that the victim is a child and the perpetrator an adult. Quadrupling Ms. Mothershead's sentence based on that same fact violates the prohibition against double jeopardy.

d. Alternatively, the exceptional sentence should be reversed because a prison term four times the standard range is clearly excessive in this case.

The exceptional 40-year sentence should be reversed on an independent basis. This Court will reverse an exceptional sentence under an abuse of discretion standard if the sentence is clearly excessive. *State v. Alvarado*, 164 Wn.2d 556, 560-61, 192 P.3d 345 (2008); *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013) *review denied* 179

Wn.2d 1015 (2014). A "clearly excessive" sentence is one that is clearly unreasonable, for example if it is "exercised on untenable grounds or for untenable reasons, or [represents] an action that no reasonable person would have taken." *State v. Knutz*, 161 Wn. App. 395, 410, 253 P.3d 437 (2011) (internal quotations omitted). An exceptional sentence is clearly excessive if its length, in light of the record, "shocks the conscience." *State v. Kolesnik*, 146 Wn. App. 790, 805, 192 P.3d 937 (2008) (internal quotations omitted) (holding sentence of twice the standard range, 240 months, appropriate for first degree assault that inflicted life-threatening injuries on a police officer).

The sentence imposed here, 480 months, is far beyond the 240 to 318 month standard range sentence for a class XII offense where the offender has an offender score of nine or more points. In fact, it is twice as long as the low end of that range. *See, e.g.*, *State v. Hyder*, 159 Wn. App. 234, 244 P.3d 454 (2011) (affirming exceptional sentence as not clearly excessive where sentenced imposed was half statutory maximum). Of course, Ms. Mothershead had no criminal history. Her offender score was a "zero." The standard range sentence for first degree abuse of a child for Ms. Mothershead is 93 to 123 months. Eight to ten years in prison is by no means a slap on the wrist. But the trial court imposed four times that prison term, by sentencing Ms. Mothershead to 40 years in prison.

Forty years is close to a life sentence for a woman of Ms. Mothershead's age. *See* 10/1/13 RP 39 (Mothershead 31 years old at trial).

In setting the standard range for assault of a child in the first degree, the Legislature intended for the offense to be punished as harshly as first degree simple assault but punished less than homicide by abuse. *See Marchi*, 158 Wn. App. at 831. But the trial court ignored that distinction here by imposing a prison term far greater than Ms. Mothershead would have received for homicide by abuse. Homicide by abuse carries a seriousness level of XV. RCW 9.94A.515. With an offender score of zero, had she killed K.M., Ms. Mothershead's standard range would have been 240 to 320 months—13 years less than the sentence she received for assault. RCW 9.94A.510. Only with an offender score of "six" to "eight," would the 480-month sentence fall within the standard range for homicide by abuse. Without minimizing the injuries to K.M., she is alive, she has "drastically" recovered, she plays around, and she is "happy." 9/30/13 RP 29-30. A 40-year sentence is clearly excessive.

9. The trial court abused its discretion by imposing an order requiring Ms. Mothershead not to have contact with any minors for life.

The Sentencing Reform Act of 1981, RCW 9.94A.505(8), authorizes the trial court to impose "crime-related prohibitions" as a

condition of sentence. *State v. Warren*, 165 Wn.2d**Error! Bookmark not defined.** 17, 32, 195 P.3d 940 (2008). On appeal, the imposition of crime-related prohibitions is reviewed for an abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010). A no-contact order with the victim is a crime-related prohibition. *State v. Armendariz*, 160 Wn.2d 106, 113, 156 P.3d 201 (2007) (defining "crime-related" to include no contact with the victim of a no-contact order violation who merely witnessed an assault). However, even a crime-related prohibition must comport with constitutional protections. Thus a crime-related prohibition that affects a fundamental right, such as the right of association, must be narrowly drawn, requiring there be no other way to achieve the state's interests. *Warren*, 165 Wn.2d at 33-34. The scope and duration of the prohibition is relevant. *Rainey*, 168 Wn.2d at 381.

In *Warren*, the Court held a no-contact order reasonably crime-related as to the mother of the two child victims of sexual abuse for which the defendant was convicted because the defendant attempted to induce the mother not to cooperate in the prosecution of the crime, she testified against the defendant, the defendant's criminal history included convictions for murder and for physically abusing her, and nothing in the record suggested she objected to the no-contact order. 165 Wn.2d at 33-34

Here, on the other hand, the trial court imposed a blanket order prohibiting Ms. Mothershead from having contact with any minors under any circumstances for the rest of her life. CP 205, 207, 209, 211; 11/15/13 RP 2-3, 18-19. Although Ms. Mothershead was convicted of harming her child, nothing in the record suggests she had or would harm a non-biological child. CP __ (Letters in Support of Defendant (Nov. 15, 2013) (letters in support of Mothershead indicating her positive, trustworthy relationship with other children). Thus, the order here fails to comport with the SRA because it is not crime-related.

Alternatively, the breadth and duration of this order constitutes an abuse of the trial court's discretion. "[A] no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life." *Rainey*, 168 Wn.2d at 381. Neither the State nor the court addressed the need for a lifetime prohibition against contact of any form under all circumstances with all minors. *See* CP 205, 207, 209, 211; 11/15/13 RP 2-3, 18-19. A separate order bars Ms. Mothershead from all contact with K.M., the victim, for life.

This Court limited a similarly broad no-contact order in *State v. Ancira*, 107 Wn. App. 650, 654-55, 27 P.3d 1246 (2001). There, upon conviction for violating a prior no-contact order as to wife, the court entered an order prohibiting contact with his children, who bore witness to

the domestic violence. *Id.* at 652-53. This Court held that the State failed to show that a complete ban on contact with the defendant's non-victim children was necessary to protect their safety or that accommodations such as supervised visits and indirect contact, such as through the mail, were not appropriate. *Id.*

Conversely, in *State v. Corbett*, this Court upheld a no-contact provision barring contact with the defendant's sons where his step-daughter was the victim of the underlying crime. 158 Wn. App. 576, 598-601, 242 P.3d 52 (2010). But unlike, here and in *Ancira*, the prohibition was limited. The trial court in *Corbett* only prohibited unapproved contact with the defendant's sons. *Id.* at 601 n.14. Upon approval from supervisors, the defendant could have contact with them. *Id.* The order here, on the other hand, prohibits all contact with all minors under all circumstances. The Court should order it stricken.

F. CONCLUSION

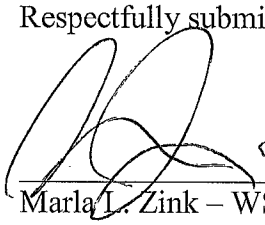
Rather than benefitting from the presumption of innocence, the trial court stacked the deck of cards steeply against Jennifer Mothershead. The court admitted evidence obtained unlawfully, and then denied Ms. Mothershead the opportunity to present a complete picture to the jury through evidence of another suspect, through her character for peacefulness, by providing the full context of scenarios elicited by the

State, and by arguing the evidence amounted at most to a lesser offense. In addition, the beyond a reasonable doubt framework through which the jury was to view the limited evidence admitted was diluted through instruction and argument. These errors require reversal and remand.

Alternatively, the court should vacate the sentence imposed.

DATED this 28th day of July, 2014.

Respectfully submitted,



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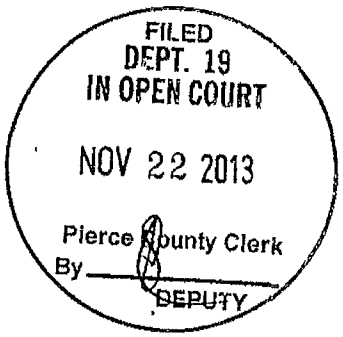
APPENDIX A



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JENNIFER LYNN MOTHERSHEAD, Defendant	CAUSE NO. 12-1-01509-2 FINDINGS AND CONCLUSIONS ON ADMISSIBILITY OF EVIDENCE CrR 3.6

THIS MATTER having come on before the Honorable Linda CJ Lee on the 21st day of August, 2013, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

I. THE UNDISPUTED FACTS

1. On May 12, 2011 the defendant's 13-month old daughter, K.M., was admitted to Harborview Medical Center in Seattle, Washington for a head injury that was diagnosed as a subdural hematoma.

2. The defendant brought eye medications that were all prescribed to K.M with her to the hospital, which consisted of two eye drop bottles, one for Cefazolin and one for Tobramycin, both prescribed to K.M. most recently on May 2, 2011, and a tube of erythromycin ointment.

3. The eye medications were contained in a cooler that the defendant brought into K.M.'s hospital room.

4. The cooler containing the eye medications remained in K.M.'s room after the defendant left the room to wait in a waiting room, and after K.M. was taken into protective custody and the defendant left the hospital.

5. Pierce County Sheriff's Detectives Lynelle Anderson and Teresa Berg responded to Harborview Medical Center at the request of medical personnel and spoke with the defendant, who advised that she did not know how K.M. had gotten the head injury and that K.M. had had an ongoing eye condition for several weeks for which she had been seeing Dr. Avery Weiss at Seattle Children's Hospital and had been prescribed eye medication.

6. The defendant told detectives that she was the primary caregiver of K.M. and the primary administrator of K.M.'s eye medications.

7. The defendant did not ask the detectives if she could take the cooler of eye medications, or communicate an intent to take the eye medications, with her when she left the hospital after K.M. had been taken into protective custody.

8. The defendant did tell the detectives that K.M. had to have her eye medications and that the defendant had to give K.M. her eye medications.

9. The detectives did not instruct the defendant to leave the cooler containing the eye medications at the hospital.

10. On May 13, 2011 then-resident Dr. Justin Heistand tested the pH of the eye medications in K.M.'s room at the request of Dr. Naomi Sugar.

11. Dr. Heistand conducted the pH testing of the medications inside K.M.'s hospital room at a counter after removing them from the cooler.

12. When Dr. Heistand opened the bottle of Tobramycin eye drop medication he noted that the medication had a strong noxious odor that filled the room, causing others in the nurses station outside of the room to comment on the odor.

13. Dr. Heistand testified at the 3.6 hearing that such an odor was not typical of Tobramycin.

14. Dr. Heistand notified Dr. Sugar of the results of the testing and the odor of the Tobramycin and Dr. Sugar instructed Dr Heistand to package all of the medications and store them for law enforcement to retrieve them

15 Pierce County Sheriff's Detectives Anderson and Berg were notified of Dr. Heistand's findings and requested that Pierce County Sheriff's Detective John Sample retrieve the medications from Harborview Medical Center.

16. Detective Sample retrieved the medications from Harborview on May 13, 2011 and placed them into the Pierce County Sheriff's Department property room.

17. Neither Detectives Anderson, Berg, nor any law enforcement requested or instructed Harborview hospital staff take possession of or test the eye medications prescribed to K.M. that were in the cooler that the defendant brought into K.M.'s room.

18. Detectives Anderson and Berg accessed K.M.'s prescription eye medication at the Pierce County Sheriff's Department property room on May 18, 2011 and noted a noxious odor from the Tobramycin, as well as a mild redness reaction on Detective Anderson's exposed skin on her wrist. The detectives also noted that the Tobramycin bottle was full.

Detective Anderson opened a bottle of medicine and

19. The detectives placed the medications back into the property room and requested that the medications be sent to the Washington State Patrol Crime Lab for testing.

20. The eye medications, the Cefazolin and the Tobramycin, were sent to the Crime Lab on May 20, 2011 for testing, and then to the Food and Drug Administration's lab in Ohio on August 8, 2011 for further testing

21. The detectives were not aware of any problem or issue with any of K.M.'s prescription eye medication until after the medications had been tested by Dr. Heistand and placed into the Pierce County Sheriff's Department property room.

22. Detectives Anderson and Berg testified in open court during the 3.6 hearing and identified the defendant, JENNIFER LYNN MOTHERSHEAD, as the individual they spoke with at Harborview Medical Center on May 12, 2011 and identified as K M 's mother.

II. THE DISPUTED FACTS

1. Whether Detectives Anderson and Berg would have allowed the defendant to take K.M.'s eye medications with her when she left the hospital after K M. had been taken into protective custody if the defendant had requested or expressed an intent to do so.

III. FINDINGS AS TO DISPUTED FACTS

1. Detectives Anderson and Berg would have allowed the defendant to take K.M.'s eye medications with her when she left the hospital had she requested or expressed an intent to do so.

IV. REASONS FOR ADMISSIBILITY ~~OR INADMISSIBILITY~~ OF THE EVIDENCE

Harbroview Medical Center hospital staff, to include but not limited to, Dr. Naomi Sugar and Dr. Justin Heistand, were not acting as an instrumentality of the State in testing, holding and then providing K.M.'s prescription eye medications to Pierce County Sheriff's Detective Sample on May 13, 2011. Harborview staff were acting as private citizens, as a private entity. There is no evidence that Harborview staff were acting at the direction of the Pierce County Sheriff's

Department or any law enforcement. Detectives Anderson and Berg did not have any concerns regarding the eye medications nor were they aware of any issues or problems with the eye medications until after Dr. Heistand accessed and tested the medications and the medications were placed in the Pierce County Sheriff's Department property room. The detectives' focus and concern at the time they were at the Harborview was the subdural hematoma K.M. suffered for which no one who participated in K.M 's care had an explanation

Dr. Naomi Sugar was a medical doctor employed at Harborview Medical Center on May 12-13, 2011 and investigated suspected incidents of child abuse from a medical perspective; Dr. Sugar was not a law enforcement officer, nor was she acting at the behest or direction of law enforcement when she instructed Dr. Heistand to test the pH of the eye medications and then to package and provide the medications to the Pierce County Sheriff's Department. Harborview medical staff were acting as a private entity, as private citizens, in accessing, testing and providing K.M.'s eye medications to law enforcement on May 13, 2011.

As such, a warrant was not required for law enforcement to obtain the eye medications given to them by Harboview Medical Center staff.

Further, the eye medications were all prescribed to K.M. The eye medications were K.M.'s. The defendant did not manifest an expectation of privacy in the medications. The defendant did not request to take the medications with her when she left the hospital, therefore, even if the evidence supported the assertion that the medications belonged to the defendant, she voluntarily abandoned the medications. Finally, society does not recognize a reasonable expectation of privacy in another person's medications.

Note The medicine bottles were not tested by Dr. Heistand until after K.M. had been taken into protective custody. pe

12-1-01509-2

The defendant did not have a reasonable expectation of privacy in K.M.'s eye medications; therefore, a warrant was not required for law enforcement to obtain the eye medications given to them by Harborview Medical Center staff.

In addition to the case law cited in the [redacted] briefing on this issue, the court also relied upon, in support of its ruling denying the defendant's motion to suppress: ***State v. Smith***, 110 Wash.2d 658, 756 P.2d 722 (1988), ***State v. Link***, 136 Wash.App 685, 150 P 3d 610, ***State v. Swenson***, 104 Wash.App. 744, 9 P 3d 933 (2000). The eyedrops are admissible at trial.

DONE IN OPEN COURT this 22nd day of November, 2013.

JUDGE LINDA CJ LEE

Presented by:

KARA E. SANCHEZ
Deputy Prosecuting Attorney
WSB # 35502

Approved as to Form: Without Waiving Objection

JANE C. PIERSON
Attorney for Defendant
WSB # 23085

FILED
DEPT. 19
IN OPEN COURT
NOV 22 2013
Pierce County Clerk
By _____ DEPUTY

APPENDIX B

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JENNIFER LYNN MOTHERSHEAD, Defendant.	CAUSE NO. 12-1-01509-2 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR EXCEPTIONAL SENTENCE

THIS MATTER having come on before the Honorable Linda CJ Lee, Judge of the above entitled court, for sentencing on November 15, 2013, the defendant, JENNIFER LYNN MOTHERSHEAD, having been present and represented by her attorney, JANE C. PIERSON, and the State being represented by Deputy Prosecuting Attorney KARA E. SANCHEZ, and the court having considered all argument from both parties and having considered all written reports presented, and deeming itself fully advised in the premises, does hereby make the following Findings of Fact and Conclusions of Law by a preponderance of the evidence.

FINDINGS OF FACT

I.

The defendant was found guilty at trial on October 4, 2013 of one count of Assault of a Child in the First Degree. That the standard range sentence is 93 to 123 months imprisonment.

II.

The following aggravating factors are applicable: the defendant used her position of trust to facilitate the commission of the offense, that the defendant knew or should have known that

the victim was particularly vulnerable or incapable of resistance and the defendant's conduct during the commission of the offense manifested deliberate cruelty. These aggravating factors are found in RCW 9.94A.535(3)(n),(b) and (a), respectively. The evidence of these aggravating factors is testimony of witnesses and photographic evidence admitted at trial. The jury found all three aggravating factors existed beyond a reasonable doubt. The legislature did not consider these factors in determining the standard range.

III.

The victim in this case, K.M. was 13 to 14 months old at the time of the offense and the defendant is her biological mother who had primary physical custody of K.M and was her primary caregiver. Given her age, I.M. was completely dependent upon the defendant, her mother, for her health, safety and welfare.

IV.

Because of the presence of the above aggravating factors, and considering the purposes of the Sentencing Reform Act, sentencing with the standard range is not an appropriate sentence. 480 months in the Department of Corrections is an appropriate sentence on Count I. with the aggravating factors found beyond a reasonable doubt by the jury.

CONCLUSIONS OF LAW

I.

That there are substantial and compelling reasons justifying an exceptional sentence outside the standard range; the defendant repeatedly placed a toxic substance in K.M.'s eyes and used her position of trust as K.M.'s mother with primary physical custody and primary caretaking duties to do so. The defendant knew or should have known that K.M. was particularly vulnerable given her very young age of 13 months and in the defendant's custody. The defendant's actions in repeatedly, multiple times a day over a period of weeks, placing a toxic substance into K.M.'s eyes causing permanent damage to K.M.'s vision demonstrated deliberate

* This assault on K.M. was not an incident that occurred in a spur of the moment loss of temper or out of pent up frustration. Rather, this was a prolonged assault of K.M.'s eyes over weeks without regard to the obvious pain and injury caused to K.M.

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cruelty. The court hereby additionally incorporates its oral ruling regarding the defendant's sentence on November 15, 2013 at the sentencing hearing in the presence of the defendant.

II.

Defendant JENNIFER LYNN MOTHERSHEAD, should be incarcerated in the Department of Corrections for a determinate period of 480 months on Count I.

DONE IN OPEN COURT this 22nd day of November, 2013.

JUDGE LINDA CJ LEE

Presented by:

KARA E. SANCHEZ
Deputy Prosecuting Attorney
35502

Approved as to Form ONLY:

JANE C. PIERSON
Attorney for Defendant
23085

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APPENDIX C

RCW 9A.36.120
Assault of a child in the first degree.

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the first degree if the child is under the age of thirteen and the person:

(a) Commits the crime of assault in the first degree, as defined in RCW 9A.36.011, against the child; or

(b) Intentionally assaults the child and either:

(i) Recklessly inflicts great bodily harm; or

(ii) Causes substantial bodily harm, and the person has previously engaged in a pattern or practice either of (A) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or (B) causing the child physical pain or agony that is equivalent to that produced by torture.

(2) Assault of a child in the first degree is a class A felony.

[1992 c 145 § 1.]

RCW 9A.36.130
Assault of a child in the second degree.

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

(a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child; or

(b) Intentionally assaults the child and causes bodily harm that is greater than transient physical pain or minor temporary marks, and the person has previously engaged in a pattern or practice either of (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or (ii) causing the child physical pain or agony that is equivalent to that produced by torture.

(2) Assault of a child in the second degree is a class B felony.

[1992 c 145 § 2.]

RCW 9A.36.140
Assault of a child in the third degree.

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the third degree if the child is under the age of thirteen and the person commits the crime of assault in the third degree as defined in RCW 9A.36.031(1) (d) or (f) against the child.

(2) Assault of a child in the third degree is a class C felony.

[1992 c 145 § 3.]

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 45588-9-II
v.	)	
	)	
JENNIFER MOTHERSHEAD,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] JENNIFER MOTHERSHEAD 370440 WCC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332-8300	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JULY, 2014.

X_____

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