

93127-5

Supreme Court No. (to be set)
Court of Appeals No. 46357-1-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.

Justin Moses
Appellant/Petitioner

Pierce County Superior Court Cause No. 12-1-03277-9
The Honorable Judge Stephanie Arend

PETITION FOR REVIEW

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant/Petitioner

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. IDENTITY OF PETITIONER..... 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 1

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED..... 6

A. The admission of Aimee’s police interview violated Justin’s confrontation right. The Supreme Court should accept review because this significant question of constitutional law is of substantial public interest. RAP 13.4 (b)(3) and (4). 6

B. The trial judge should have severed Aimee and Justin’s trials under CrR 4.4(c). The Supreme Court should accept review because this case presents an issue of substantial public interest. RAP 13.4 (b)(4). 11

C. The child hearsay statute only allows admission of a statement that describes an “act of physical abuse;” it does not apply to cases involving chronic neglect. The Supreme Court should accept review because this case presents an issue of substantial public interest. RAP 13.4(b)(4). 13

D. Mr. Moses adopts and incorporates any issues raised by Aimee Moses in her Petition for Review..... 18

CONCLUSION 18

Appendix: Court of Appeals Decision

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Bruton v. United States</i> , 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).....	7, 9, 10
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	6, 10
<i>Gray v. Maryland</i> , 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998)	7
<i>Richardson v. Marsh</i> , 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).....	9

WASHINGTON STATE CASES

<i>Ellensburg Cement Products, Inc. v. Kittitas Cnty.</i> , 179 Wn.2d 737, 317 P.3d 1037 (2014).....	15, 16, 17
<i>Estate of Bunch v. McGraw Residential Ctr.</i> , 174 Wn.2d 425, 275 P.3d 1119 (2012).....	14, 15
<i>Fellows v. Moynihan</i> , 175 Wn.2d 641, 285 P.3d 864 (2012)	14, 15
<i>In re Det. of Hawkins</i> , 169 Wn.2d 796, 238 P.3d 1175 (2010)	14
<i>In re Farina</i> , 94 Wn. App. 441, 972 P.2d 531 (1999), as amended on reconsideration (Apr. 13, 1999)	15, 16
<i>Lindeman v. Kelso Sch. Dist. No. 458</i> , 162 Wn.2d 196, 172 P.3d 329 (2007).....	13
<i>Potter v. Washington State Patrol</i> , 165 Wn.2d 67, 196 P.3d 691 (2008)	14, 15
<i>State v. Christensen</i> , 153 Wn.2d 186, 102 P.3d 789 (2004).....	13
<i>State v. Davis</i> , 160 Wn. App. 471, 248 P.3d 121 (2011).....	14

<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003)	14
<i>State v. Engel</i> , 166 Wn.2d 572, 210 P.3d 1007 (2009).....	14
<i>State v. Gunderson</i> , 181 Wn.2d 916, 337 P.3d 1090 (2014)	17
<i>State v. Lilyblad</i> , 163 Wn.2d 1, 177 P.3d 686 (2008).....	13
<i>State v. Mason</i> , 160 Wn.2d 910, 162 P.3d 396 (2007)	6
<i>State v. O’Cain</i> , 169 Wn. App. 228, 279 P.3d 926 (2012).....	15
<i>State v. Punsalan</i> , 156 Wn.2d 875, 133 P.3d 934 (2006).....	14
<i>State v. Reeves</i> , 336 P.3d 105 (Wash. Ct. App. 2014).....	15
<i>State v. Thomas</i> , 150 Wn.2d 821, 883 P.3d 970 (2004)	18
<i>State v. Vincent</i> , 131 Wn. App. 147, 120 P.3d 120 (2005).....	9
<i>State v. Williams</i> , 171 Wn.2d 474, 251 P.3d 877 (2011).....	13

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV	18
------------------------------	----

WASHINGTON STATUTES

Chapter 13.32A RCW.....	16
Chapter 13.34 RCW	16
Chapter 9A.72 RCW.....	16
RCW 26.44.020	16
RCW 9.94A.655.....	16
RCW 9A.04.110.....	17
RCW 9A.42.030.....	8, 9, 10, 12
RCW 9A.44.120.....	5, 13, 15, 16, 17, 18

Title 26 RCW 16

OTHER AUTHORITIES

CrR 4.4 1, 11, 12

ER 801 18

People v. Johnson, --- N.E. 3d---, 2016 WL 1190422 (N.Y. Mar. 29, 2016)
..... 9

RAP 1.2 18

RAP 10.1 18

RAP 13.4 6, 10, 11, 13, 18

I. IDENTITY OF PETITIONER

Petitioner Justin Moses,¹ the appellant below, asks the court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Justin Moses seeks review of the Court of Appeals published opinion entered on April 12, 2016. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the admission of Aimee Moses’s police interview violate Justin Moses’s confrontation rights because it helped the state establish two essential elements of criminal mistreatment?

ISSUE 2: In light of the prejudice caused by admission of the codefendant’s police interview, did the trial court abuse its discretion under CrR 4.4(c) by failing to sever Justin and Aimee Moses’s trials?

ISSUE 3: Is the child hearsay statute inapplicable to child neglect cases involving no “act of physical abuse”?

IV. STATEMENT OF THE CASE

The Muckleshoot tribe placed M.A. in the home of Justin and Aimee Moses without telling them how to handle the child’s serious

eating disorder.² RP (4/30/14) 793-794, 839. M.A. often overate to the point of illness. He was at risk of diabetes, and even tried to eat garbage and other non-food items such as lotion and chicken bones. RP (4/29/14) 631, 666-667, 678-681; RP (5/5/14) 1213-1216; RP (5/6/14) 1318.

Aimee Moses assumed primary responsibility for M.A. Under her care, M.A. began to lose weight. Aimee maintained contact with the tribe via email. RP (2/25/14) 224-225. She regularly updated the social worker on M.A.'s weight loss. In one email (dated January 22nd, 2012), she wrote:

[M.A.] is super smart and has been working with me on slowing down when he eats, I have him count to five before taking another bite, that way he [doesn't gorge] himself and get sick... he's been doing really well with it and we [haven't] had any problems with sicknesses, other than on visit day because mom lets them overeat and over drink!

Ex. 37.

After M.A. lost eight pounds, he proudly showed off his weight loss at his ECEAP class.³ RP (4/29/14) 641, 643, 656.

In February of 2012, M.A. stopped attending school. RP 1319-1323. One of the family cars became un-drivable, and Aimee gave different explanations for M.A.'s absences. RP (4/29/14) 644-647, 654;

¹ Justin Moses and his codefendant Aimee Moses will be referred to by their first names, for the sake of clarity. No disrespect is intended.

² M.A. had been abused and neglected by his mother and in two different foster homes. RP (4/29/14) 630, 676; RP (5/5/14) 1201-1202.

³ The assigned social worker may have seen M.A., appearing healthy, in December. However, she provided inconsistent information on the point. RP (4/30/14) 843, 848-850.

RP (5/5/14) 1167; RP (5/6/14) 1344-1347. She also canceled a home visit. RP (5/5/14) 1169; RP (5/6/14) 1324-1327. The ECEAP teacher contacted the Department of Social and Health Services, who contacted the tribe. RP (5/6/14) 1328-1330.

Eventually, a social worker called the home and spoke with Justin Moses. Justin immediately brought M.A. to see the case worker. She found M.A. to be emaciated. RP (4/30/14) 801-805, 807; RP (5/6/14) 1340-1343. An ambulance took M.A. to the hospital, where doctors determined that he was severely malnourished. RP (4/30/14) 808-819.

Police conducted a joint interview of Justin and Aimee. Aimee did most of the talking. RP (4/29/14) 522; RP (5/5/14) 1171; Ex. 71, 73, 74. During the interview, she made statements inconsistent with prior statements she had made to others. Justin remained quiet, except to say he hadn't noticed any problems. RP (4/29/14) 522; RP (5/5/14) 1171; Ex. 71, 73, 74.

The state charged both Justin and Aimee with second-degree criminal mistreatment. CP 205. Justin asked to have his trial severed from his wife's.⁴ CP 198-199. He argued that Aimee's statements were not admissible against him, that the statements could not be effectively

⁴ In the alternative, he asked that her statements be suppressed. RP (3/14/14) 4-44; RP (4/21/14) 81, 85-95.

redacted to remove references to him, and that introduction of her statements would violate his confrontation right. CP 201-204; RP (3/14/14) 4-44; RP (4/21/14) 81, 85-95.

The trial judge refused to suppress Aimee's statements, and denied the motion to sever the trials. RP (3/14/14) 35-39. Justin renewed the motion to sever during trial. RP (5/7/14) 1549-1550; RP (5/8/14) 1772.

At the joint trial, the prosecutor introduced a redacted version of Aimee's statement (over defense objection). Ex. 71, 74; RP (5/7/14) 1590-1598. The court instructed jurors not to consider her statement against Justin. CP 245; RP (5/7/14) 1595-1596.

In her statement, Aimee frequently used the words "we," "us," and "our" to refer to herself and her husband. Ex. 74; *see e.g.* Ex. 71, pp. 3, 4, 5, 6, 7, 8, 11, 15, 29, 41.⁵ These references were not redacted. Ex. 74.

Aimee claimed she and Justin took steps together to restrict M.A.'s food intake:

[W]e had to work on him with that.^[6] And we got him to count... while he's eating, to put his fork down while he chews. Wait until his mouth is empty...

⁵ The interviewer also asked her questions relating to both parents. Ex. 74; *see e.g.* Ex. 71, p. 5 ("Now are you guys a licensed foster...?"); p. 11 ("[W]ould the whole family eat together?") Throughout the interview, both the officer and Aimee used the word "here" to refer to the family home in a way that implicated Justin. Ex. 74; *see e.g.* Ex. 71 p. 4 ("Q: And how did [M.A. and his sister] come to live here with you? A: Their mom asked ICW to place them here.")

⁶ Referring to M.A.'s problem gorging on anything including chicken bones. Ex. 74; Ex. 71 p. 8.

Ex. 74; Ex. 71, p. 8.

Aimee also claimed that “We all have dinner at the same time.” Ex. 74; Ex. 71, p. 11. When asked if she had any concerns that M.A. was losing “too much weight,” Aimee answered for both of them:

No, 'cause we never noticed it. I mean he was with us all the time.
Ex. 74; Ex. 71, p. 41.

The prosecutor also sought to introduce M.A.’s out-of-court statements under RCW 9A.44.120, the child hearsay statute. CP 176-177. Mr. Moses objected, arguing that the statute applied only to statements describing acts of abuse, and did not apply in cases of neglect. CP 178-181. The trial court overruled the objection, and M.A.’s out-of-court statements were admitted at trial.⁷ RP (5/6/14) 1376-1399; CP 210; Ex 46, 47.

Neither Aimee nor Justin testified. RP (5/12/14) 1886. The jury convicted Mr. Moses of second-degree criminal mistreatment. CP 284.

⁷ M.A. also testified at trial. RP (5/1/14) 978-1028; RP (5/5/14) 1040-1059. He said that he got enough to eat at the Moses home. RP (5/1/14) 998-1004. He also said he was starved at that home, though he stated he didn’t know what “starved” meant and that he’d heard the word from an adult. RP (5/1/14) 1023-1024; RP (5/5/14) 1040, 1044. He testified that he sometimes ate jalapenos and hot sauce at dinner. At one point, he said that he liked them both; at another point, he said he did not like them. RP (5/1/14) 1011-1016; RP (5/5/14) 1047-1049.

By special verdict, the jury indicated that he recklessly caused M.A. substantial bodily harm by withholding the necessities of life. CP 290.⁸

The court found that Mr. Moses had an offender score of zero, and imposed an exceptional sentence of 40 months. CP 294-307, 318-327. Mr. Moses appealed. CP 328.

The Court of Appeals affirmed his conviction and sentence in a published opinion. Opinion, pp. 2, 22.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The admission of Aimee's police interview violated Justin's confrontation right. The Supreme Court should accept review because this significant question of constitutional law is of substantial public interest. RAP 13.4 (b)(3) and (4).

The improper admission of testimonial hearsay violates the confrontation clause.⁹ *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). At its core, testimonial hearsay includes any statement a declarant "would reasonably expect to be used prosecutorially." *State v. Mason*, 160 Wn.2d 910, 918, 162 P.3d 396 (2007) (quoting *Crawford*, 541 U.S. at 51) (internal quotation marks

⁸ The jury also found that M.A. was particularly vulnerable, and that Mr. Moses abused a position of trust, but did not find that he acted with deliberate cruelty. CP 287-289.

⁹ Unless the declarant is unavailable and the accused had a prior opportunity for cross-examination

omitted in *Mason*). Aimee's police interview fit within this core definition.

Id.

At a joint trial, special rules apply to the admission of a non-testifying codefendant's testimonial statement. The statement must be (1) redacted so it is facially neutral, (2) modified so it is free of obvious deletions, and (3) accompanied by an instruction prohibiting jurors from using it against the defendant. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998).

Here, the trial court did not redact Aimee's statement so that it was facially neutral. Instead, the court admitted excerpts that directly implicated Justin. In numerous passages, Aimee referred to herself and Justin as "we" or "us." Ex. 74; *see e.g.* Ex. 71, pp. 3, 4, 5, 6, 7, 8, 11, 15, 29, 41.¹⁰

Three of these instances were especially incriminating, because they helped establish elements of the offense. First, Aimee claimed she and Justin took steps together to restrict M.A.'s food intake:

¹⁰ She also answered questions that explicitly or implicitly related to both parents. Ex. 74; Ex. 71, p. 5, 6, 9, 11.

[W]e had to work on him with that.^[11] And we got him to count... while he's eating, to put his fork down while he chews. Wait until his mouth is empty...
Ex. 74; Ex. 71, p. 8.

This strongly suggested that the couple worked as a team to limit M.A.'s eating. Justin had no opportunity to cross-examine Aimee regarding his own involvement—or lack thereof—in restricting M.A.'s food.

Second, Aimee claimed that “We all have dinner at the same time.” Ex. 74; Ex. 71, p. 11. This hearsay statement suggested that Justin was aware of how much or how little M.A. ate at mealtimes, and that he could have intervened if she withheld food. He had no opportunity to cross-examine Aimee regarding her assertion.

Third, when asked if she had any concerns that M.A. was losing “too much weight,” Aimee answered for both of them:

No, 'cause we never noticed it. I mean he was with us all the time.
Ex. 74; Ex. 71, p. 41.

These statements went directly to the element of recklessness. RCW 9A.42.030. Justin had no opportunity to cross examine Aimee about these statements.

The “only reasonable inference” jurors could draw from Aimee's statements was that she and Justin shared responsibility for limiting

¹¹ Referring to M.A.'s problem gorging on anything including chicken bones. Ex. 74; Ex. 71 p. 8.

M.A.'s food intake and that both failed to notice M.A.'s dramatic weight loss. *State v. Vincent*, 131 Wn. App. 147, 154, 120 P.3d 120 (2005). In other words, Aimee's police interview amounted to "[s]pecific testimony that 'the defendant helped me commit the crime.'" *Richardson v. Marsh*, 481 U.S. 200, 208, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Any such evidence is "difficult to thrust out of mind." *Id.* The redaction to Aimee's police interview thus "failed in its purpose." *Vincent*, 131 Wn. App. at 154.

It is irrelevant that Aimee may have intended her statement to be exculpatory. *See, e.g., People v. Johnson*, --- N.E. 3d---, ___, 2016 WL 1190422 (N.Y. Mar. 29, 2016) ("[C]odefendant's statements admitting possession of the robbery proceeds are facially incriminating as to defendant, regardless of codefendant's intention to establish his innocence.") Aimee's police interview incriminated Justin. She specifically referenced his participation when she used the pronouns "we" and "us," and her statements helped establish two elements of the charged crime—recklessness and withholding food. RCW 9A.42.030.

The Court of Appeals took an unreasonably narrow view of *Bruton* by erroneously concluding that Aimee's statements were not inculpatory.

Opinion, p. 13.¹² Although Aimee didn't accuse Justin of criminal activity, her police interview helped establish two elements necessary for conviction: withholding food (RCW 9A.42.030(1)(b)) and recklessness (RCW 9A.42.030). Aimee told police that she and Justin shared responsibility for restricting M.A.'s food intake. Ex. 74; Ex. 71, p. 8. She claimed that he was present for dinners, and thus could have intervened to ensure that M.A. ate enough. Ex. 74; Ex. 71, p. 11. She said that Justin didn't notice M.A.'s dramatic weight loss. Ex. 74; Ex. 71, p. 41.

Each of these statements helped the prosecution establish Justin's guilt at trial. He should have had the opportunity to cross-examine Aimee regarding her assertions.

The trial court erred by admitting Aimee's testimonial hearsay without adequate redactions. Her police interview incriminated Justin. The Court of Appeals erred by failing to recognize the *Bruton* error.

This case raises a significant constitutional question that is of substantial public interest. RAP 13.4(b)(3) and (4). The Supreme Court

¹² Inexplicably, the Court of Appeals found that "Justin only challenged a few specific statements in his brief," and declined to consider "other instances from the interview because he did not properly raise them." Opinion, p. 13. In fact, Justin challenged the admission of the entire recorded interview. See Appellant's Opening Brief, pp. 1 (Assignments of Error Nos. 1-4; Issues Nos. 1-2); 9 (arguing that Aimee's "statements fall within *Crawford*'s core definition of testimonial hearsay," and that "[t]heir admission violated Mr. Moses's confrontation rights"); 10 ("it would be impossible for a reasonable juror to completely ignore Mrs. Moses's statements when considering the prosecution's case against her husband.")

should accept review, reverse Justin's conviction, and remand for a new trial.

- B. The trial judge should have severed Aimee and Justin's trials under CrR 4.4(c). The Supreme Court should accept review because this case presents an issue of substantial public interest. RAP 13.4(b)(4).

The admission of a non-testifying codefendant's statement requires severance of defendants unless "deletion of all references to [the accused] will eliminate *any* prejudice." CrR 4.4(c) (emphasis added). The rule requires the court to eliminate all references to the accused person and to eliminate all prejudice, regardless of whether or not the hearsay statement is facially incriminating. In this case, the plain language of CrR 4.4(c) required severance or exclusion of Aimee's police interview.

First, the redacted statement did not delete "all references" to Mr. Moses. CrR 4.4(c); Ex. 74. Instead, Aimee frequently used the pronouns 'we,' 'us,' and 'our' to refer to Justin and herself. Ex. 74; *see e.g.* Ex. 71, pp. 3, 4, 5, 6, 7, 8, 11, 15, 29, 41. By itself, this error requires reversal of Justin's conviction.

Second, the court failed to eliminate all prejudice to Justin. Aimee told police that Justin shared responsibility for limiting M.A.'s food, that Justin and M.A. ate dinner together, and that Justin failed to notice M.A.'s dramatic weight loss. Ex. 74; Ex. 71, p. 8, 11, 41. This evidence

supported the state's theory that Justin recklessly caused substantial bodily harm by withholding food. RCW 9A.42.030.

Additional prejudice flowed from inconsistencies between Aimee's police interview and other statements she'd made. For example, she during the police interview, she denied having told people to restrict M.A.'s food because he had an esophageal tear. Ex. 74; *see* Ex. 71 p. 18, 27.¹³ She also claimed that M.A.'s changed appearance resulted from a growth spurt where "his cheeks slimmed down," even though his height had not changed significantly. Ex. 74; *see* Ex. 71 pp. 16, 40.

Jurors likely considered these inconsistencies as proof of Justin's guilt. Any juror who believed that Aimee lied to police to hide her guilt would have held Justin accountable as well, since Aimee spoke of parenting as a team with her husband. Ex. 74; *see e.g.* Ex. 71, pp. 3, 4, 5, 6, 7, 8, 11, 15, 29, 41.

Severance should have been granted under CrR 4.4(c). The court's order denying severance prejudiced Mr. Moses. The court failed to redact Aimee's statement to remove "all references" to Justin, and failed to eliminate prejudice. CrR 4.4(c).

¹³ *See* RP (4/29/14) 565-566, 567, 577, 578, 585, 586, 589, 592, 593, 596, 598, 645, 654, 655; RP (5/7/14) 1620.

This case presents an issue of substantial public interest. The Supreme Court should accept review, reverse Justin's conviction, and remand the case for a new trial. RAP 13.4(b)(4).

- C. The child hearsay statute only allows admission of a statement that describes an "act of physical abuse;" it does not apply to cases involving chronic neglect. The Supreme Court should accept review because this case presents an issue of substantial public interest. RAP 13.4(b)(4).

The child hearsay statute allows introduction of a child's statement "describing... any act of physical abuse of the child by another that results in substantial bodily harm." RCW 9A.44.120. By its plain terms, the statute applies to "any act of physical abuse." RCW 9A.44.120. It does not apply to chronic neglect. The trial court erred by admitting M.A.'s hearsay statements in this case.

In interpreting a statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789 (2004). Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 202, 172 P.3d 329 (2007). Courts must read

statutory provisions in their entirety, examining them as a whole, rather than piecemeal. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 439-40, 275 P.3d 1119 (2012).

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009); *see also State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) (“Plain language does not require construction.”). A court “will not engage in judicial interpretation of an unambiguous statute.” *State v. Davis*, 160 Wn. App. 471, 477, 248 P.3d 121 (2011). Nor may a reviewing court “add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

If a statute is “susceptible to two or more reasonable interpretations, it is ambiguous,” and courts “may turn to additional tools of statutory construction in determining the meaning of the statute.” *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010).

Statutes that are in derogation of the common law must be strictly construed. *See, e.g., Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012); *Potter v. Washington State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008).

When a provision is ambiguous, a court may “compare the wording of statutes that ‘relate to the same person or thing, or the same class of persons or things.’” *State v. Reeves*, 336 P.3d 105, 108 (Wash. Ct. App. 2014). Where the same word appears in different statutes governing the same subject matter, the word is given the same meaning, unless the context dictates otherwise. *In re Farina*, 94 Wn. App. 441, 450, 972 P.2d 531 (1999), *as amended on reconsideration* (Apr. 13, 1999). Furthermore, Under the *maxim expressio unius est exclusio alterius*, any omissions from a statute are presumed intentional. *Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014).

RCW 9A.44.120 is unambiguous, and its plain language indicates the legislature’s intent to limit applicability to abusive acts.¹⁴ Even if the statute were considered ambiguous, the rules of statutory construction favor limiting its reach to statements involving specific harmful acts.

First, no child hearsay rule existed at common law. *State v. O’Cain*, 169 Wn. App. 228, 258, 279 P.3d 926 (2012). Accordingly, the statute must be strictly construed. *Fellows*, 175 Wn.2d at 649; *Potter*, 165 Wn.2d at 77.

¹⁴ This can also be seen when the phrase “any act of physical abuse” is taken in conjunction with the phrases “any act of sexual contact” and “any attempted act of sexual contact,” which are also used in the statute RCW 9A.44.120. All three phrases reflect the legislative purpose: to allow the introduction of testimony regarding specific harmful acts. This reinforces the legislative intent to limit the statute’s reach. *Bunch*, 174 Wn.2d at 439-40.

Second, the statute does not mention “neglect.” RCW 9A.44.120. Under the *maxim expressio unius est exclusio alterius*, the omission of the word “neglect” is presumed intentional. *Ellensburg Cement*, 179 Wn.2d at 750. This shows that the legislature did not intend the statute to apply where the child’s statement describes neglect rather than abuse.

Third, the legislature often uses the word “abuse” to describe harmful acts perpetrated against children or other vulnerable people.¹⁵ When used in this way, the word almost invariably appears in the phrase “abuse or neglect.”¹⁶ This suggests that “abuse” has a different meaning from “neglect.” *Farina*, 94 Wn. App. at 450.¹⁷

Here, the trial court admitted M.A.’s statements under RCW 9A.44.120 even though the child did not describe “any act of physical abuse.” RCW 9A.44.120; CP 189. This was error.

The Court of Appeals misinterpreted RCW 9A.44.120 and failed to adequately address appellant’s argument. Opinion, pp. 17-18. According

¹⁵ The statute does not define the term “abuse” or the phrase “act of physical abuse.” Nor are these terms defined elsewhere in RCW Title 9, 9A, or 10.

¹⁶ *See, e.g.*, RCW 9.94A.655 (parenting sentencing alternative), Chapter 9A.72 RCW (addressing interference with official proceedings), Chapter 13.32A RCW (Family Reconciliation Act), Chapter 13.34 RCW (Dependency and Termination of Parent Child Relationship), Title 26 RCW (domestic relations).

¹⁷ Indeed, one statute defines “[a]buse or neglect” in a manner suggesting that abuse means “sexual abuse, sexual exploitation, or injury,” while neglect means “negligent treatment or maltreatment.” RCW 26.44.020(1).

to the Court of Appeals, the word “act” means “act or omission.”

Opinion, p. 18 (citing RCW 9A.04.110(1)).

This is incorrect. Although the legislature defined the words “acted” and “actor” to encompass omissions, it did not similarly extend the definition of “act.” RCW 9A.04.110(1) and (2). This difference is presumed to be intentional. *Ellensburg Cement*, 179 Wn.2d at 750. The word “act” cannot be interpreted to mean “act or omission.” *Id.* Had the legislature intended “act” to mean “act or omission,” it would have defined the word “act” (in addition to the words “acted” and “actor”) to make its intent clear. *Id.*

M.A.’s hearsay statement should not have been admitted under RCW 9A.44.120. The error requires reversal because there is a reasonable probability that it materially affected the outcome of trial. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). The hearsay statements improperly bolstered M.A.’s testimony: by showing that M.A. made similar statements on more than one occasion, the state was able to

imply that he spoke truthfully.¹⁸ But repetition is not generally a valid test for veracity. *State v. Thomas*, 150 Wn.2d 821, 867, 83 P.3d 970 (2004).¹⁹

The Supreme Court should accept review and determine whether or not RCW 9A.44.120 applies to statements relating to chronic neglect. This case presents an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(4).

D. Mr. Moses adopts and incorporates any issues raised by Aimee Moses in her Petition for Review.

Justin Moses joins in the Petition filed by his codefendant Aimee Moses, regarding the violation of his presumption of innocence under the Fourteenth Amendment's due process clause. He adopts the arguments made by Aimee Moses pursuant to RAP 1.2 and RAP 10.1(g).

CONCLUSION

The Supreme Court should accept review and reverse Justin Moses's conviction. The case must be remanded for a new trial with

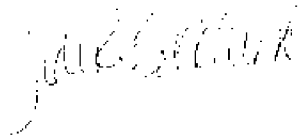
¹⁸ In addition, the forensic interviewer repeatedly characterized M.A.'s hearsay statements as "disclosures," implying that they were truthful and established neglect. RP (5/6/14) 1386-1406; RP (5/7/14) 1418-1486. She even testified that M.A. was "credible." RP (5/7/14) 1481.

¹⁹ The hearsay statements might have been admissible to rebut a claim of recent fabrication or improper motive. *Id.*: ER 801(d)(1)(ii). Here, Mr. Moses did not make a claim of recent fabrication or improper motive. Furthermore, he might have chosen to limit cross examination of M.A. had the statements been excluded, in order to minimize the risk that they'd be admitted under ER 801(d)(1)(ii).

instructions to exclude Aimee's police interview and M.A.'s hearsay statements.

Respectfully submitted May 5, 2016.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review,
postage pre-paid, to:

Justin Moses, DOC #374786
Airway Heights Corrections Center
PO Box 1899
Airway Heights, WA 99001

and I sent an electronic copy to

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

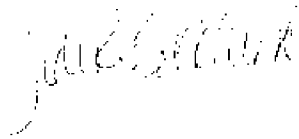
Jennifer Winkler
winklerj@nwattorney.net

through the Court's online filing system, with the permission of the
recipient(s).

In addition, I electronically filed the original with the Court of
Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE
LAWS OF THE STATE OF WASHINGTON THAT THE
FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 5, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

April 12, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JUSTIN PURNELL MOSES, Appellant.	No. 46357-1-II consolidated with
STATE OF WASHINGTON, Respondent, v. AIMEE MAXINE MOSES, Appellant.	No. 46377-6-II PUBLISHED OPINION

MELNICK, J. — Justin Purnell Moses and Aimee Maxine Moses¹ appeal their convictions of criminal mistreatment in the second degree² for causing substantial bodily harm by withholding the basic necessities of life from M.A.

Justin argues the trial court erred when it (1) admitted redacted versions of Aimee’s interview with Detective Thomas Catey in violation of his Sixth and Fourteenth Amendment rights to confront witnesses, (2) denied his motion to sever, (3) applied the wrong legal standard in admitting the child hearsay statements under RCW 9A.44.120, (4) instructed the jurors on the

¹ To avoid confusion, we refer to Justin and Aimee by their first names. We intend no disrespect.

² RCW 9A.42.030(1)(a), or (b).

abuse of trust and particularly vulnerable victim aggravating factors and imposed an exceptional sentence on that basis. He also argues that the cumulative effect of these errors requires reversal.

Aimee joins all of Justin's arguments with the exception of issues 1 and 2. She further argues that the trial court erred when it sustained the State's objection in closing argument regarding the presumption of innocence. Justin joins Aimee's argument. We affirm.

FACTS

The State, by amended information, charged Aimee and Justin with criminal mistreatment in the second degree. The State alleged they recklessly created an imminent and substantial risk of death or great bodily harm to M.A., or in the alternative, recklessly caused substantial bodily harm by withholding the basic necessities of life from M.A., during the period between December 1, 2011 and February 27, 2012. The State charged both Aimee and Justin with three aggravating factors, including using their

position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, and/or . . . [their] conduct during the commission of the current offense manifested deliberate cruelty to the victim, and/or . . . [they] knew or should have known that the victim . . . was particularly vulnerable or incapable of resistance.

Clerk's Papers (Aimee) (CP A) at 20, 21; Clerk's Papers (Justin) (CP J) at 205, 206.³

I. OVERVIEW

M.A., born in 2007, had issues with overeating. M.A.'s mother is related to Justin and a member of the Muckleshoot Tribe. In September 2011, the Muckleshoot Tribe's Indian Child Welfare program (ICW) removed M.A. and his sister, V.A., from their foster home and placed

³ Appellants' designated separate clerk's papers (CP) to this court. We reference Aimee's designated CPs as CP A and Justin's designated CPs as CP J.

them with Justin and Aimee because they were family. M.A. and V.A. lived with Justin, Aimee, and their two children.

In late September 2011, M.A. enrolled in Daffodil Elementary School's Early Childhood Education and Assistance Program. Aimee told the school's family support specialist, Vicki Jones, that they were addressing M.A.'s eating issues, which included him eating chicken bones. Aimee told Jones that she was trying to get M.A. a medical appointment for a well-child exam with the tribe. In early October, the school completed M.A.'s health screening.

After Christmas break, M.A. stopped attending school. The school called Aimee, who said she sprained her foot and was unable to take M.A. to school. When M.A. returned to school on January 9, 2012, he appeared thinner to school employees. They weighed him and he was 8 pounds lighter than his initial weigh-in approximately 3 months earlier. Concerned, the school called Aimee. She said that M.A. was sick the week before, but she fed him PediaSure® to make sure he received proper nutrition.

A few days later, Aimee told Jones that M.A. should only eat one serving of food and only drink half a cup of water at each meal because he had a tear in his esophagus that existed before he came to live with them. M.A. did not attend school again. On January 23, 2012, Jones called Aimee again regarding M.A.'s attendance; Aimee said they were having transportation problems. The school continued to call the Moseses and leave messages inquiring about M.A.

On February 27, 2012, M.A.'s case worker, Debbie Guerrero, called Claire O'Brien, M.A.'s teacher. After the conversation, Guerrero called the Moseses and asked Justin to bring M.A. to the ICW office for a visit. Later that day, Justin brought M.A. into the office. The staff was shocked at M.A.'s emaciated appearance. Justin seemed unfazed and did not react to the

concerns the staff expressed; he did not have answers to any questions the staff asked about MA's health.

The ICW staff called an ambulance to transport M.A. to Mary Bridge Children's Hospital for treatment. Mary Bridge admitted M.A. for severe malnourishment. M.A.'s tribal case workers told one of M.A.'s doctors that they did not recognize M.A. because he had such a drastic weight loss.

Cornelia Thomas, a child forensic interviewer, interviewed M.A. in the hospital with Detective Catey and Sergeant Berg present. M.A. told Thomas that he did not go to school. When he did attend, Aimee drove him and he ate lunch at school. M.A. said that Aimee would make dinner, he would eat jalapenos and hot sauce all the time, but he did not like them. He said that he had to eat the jalapenos and hot sauce even though the food would make him cry because Aimee would spank him if he did not eat it. M.A. said Justin and Aimee would tell him to stop crying. He denied that others ate hot sauce or jalapenos, except Justin.

M.A. remained hospitalized for approximately eight days. After his release, ICW placed M.A. in an emergency foster home with his sister.

A few weeks after his release, Thomas interviewed M.A. again. In this interview, M.A. told Thomas he was locked in his room behind a gate. If he got out from behind the gate, Aimee would spank him. M.A. denied sneaking food. He told Thomas that he did eat breakfast at Aimee's house, but not lunch, and only a little food. He said Aimee and Justin gave him the jalapenos and hot sauce. He said he would eat Indian tacos, but only he and Justin ate them with jalapenos. He told Thomas that he did not want the jalapenos, but Justin and Aimee made him eat them.

On May 24, 2012, Detective Catey and Detective Darren Moss interviewed Aimee and Justin in a joint interview at their home. Detective Catey advised them both of their *Miranda*⁴ rights, they each signed a waiver of their rights, and they both answered questions. Aimee spoke throughout most of the interview and Justin's answers were minimal. Aimee told Detective Catey that the school allowed M.A. to eat off the floor. She said M.A. always wanted jalapenos. She denied telling anyone M.A. had an issue with his esophagus. Justin said that when he brought M.A. to ICW he was fine, and he did not notice any significant change. Aimee and Justin both denied restricting M.A.'s food.

II. PROCEDURAL HISTORY

A. Pre-Trial Motions

The State provided notice that it intended to introduce hearsay statements of M.A. at trial. Both Justin and Aimee filed motions to exclude any child hearsay statements because there was no physical abuse or substantial bodily harm present in the case. The trial court heard the motions. The State argued that the statements fell within the child hearsay statute⁵ because withholding food and nutrition from a child that results in substantial bodily harm is an act of physical abuse.

The trial court relied on Black's Law Dictionary for definitions and reasoned that the trial court give words their ordinary and intended meaning. The trial court read the definition for

“abused and neglected children.” And it says, “Those that are suffering serious physical, emotional injury inflicted on them including malnutrition. See abuse, female child or child abuse.” So then that includes malnutrition. Under child abuse it says, “Any form of cruelty to a child's physical, moral or mental well being.”

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁵ RCW 9A.44.120: “A statement made by a child when under the age of ten . . . describing any act of physical abuse of the child by another that results in substantial bodily harm . . . not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings” after a hearing.

Report of Proceedings (RP) (Feb. 24, 2014) at 49. The trial court preliminarily determined that Washington's statute on child hearsay statements applied to the behavior that resulted in M.A.'s malnutrition. However, it reserved making a ruling.

Both Justin and Aimee filed motions to sever their trials based on the marital privilege. They argued that in a joint trial, one spouse could deny the other the right to testify. They also moved to exclude statements they made to the police because the admission of their statements would violate the confrontation clause under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). During a CrR 3.5 hearing, the trial court determined that the statements, with redactions, would be admissible because the interview was not custodial. The court did not rule on the confrontation issue at this time. Subsequently, Justin filed a brief in support of his motion to sever the trial. He argued that Detective Catey's interview of Aimee and Justin could not be redacted in any meaningful way and that Justin's silence should not be considered an adoptive admission.⁶

Aimee made a motion to exclude child hearsay and argued the statements violated the confrontation clause because they were testimonial in nature, even if they were generally admissible under RCW 9A.44.120. After the State provided its proposed redacted transcripts of Aimee and Justin's interview, Aimee renewed her motion to sever. The trial court denied the motions to sever.

The trial court held a hearing on Aimee's and Justin's motions to exclude child hearsay statements. Following its earlier reasoning, the trial court stated that the ordinary meaning of "physical" and "abuse" would include maltreatment that results in malnutrition and the meaning of "physical abuse" encompassed this concept as the term was used in the child hearsay statute.

⁶ ER 801(d)(2)(ii).

The trial court again reserved ruling on the child hearsay issue until trial. But, after hearing M.A.'s testimony, it found that M.A. was competent to testify and the statements would be admissible as long as M.A. testified at trial and was subject to cross-examination.

The trial court analyzed the reliability of the child hearsay statements under the *Ryan*⁷ factors. The trial court found that M.A.'s statements were reliable because he had no motive to lie, the statements were spontaneous because they were not in response to leading questions, the timing of the statements were not too long after the events, M.A. seemed to have a good memory, and the circumstances surrounding the statements were appropriate in that M.A. had the ability to receive information, make a memory of the information, and then relate it later.

B. Trial Testimony

At trial, M.A. testified as follows. He was kept in his room by a baby gate and if he left his room, Justin and Aimee would “whoop” his bottom. RP (May 1, 2014) at 1027. He ate hot sauce and jalapenos for dinner and did not like them. Only Justin and M.A. ate jalapenos. M.A. only drank a little bit of water and did not drink any other beverages. Aimee never took him to the doctor. M.A. said he was skinny “[b]ecause I was starved. . . . I didn’t get any food.” RP (May 1, 2014) at 1023. He did not like living with Aimee and Justin because “[t]hey starved [him].” RP (May 1, 2014) at 1025.

Mary Bridge admitted M.A. for treatment because he was severely malnourished. While in the hospital, M.A.'s weight was around the tenth or fifth percentile, and the hospital ruled out medical causes of the malnourishment. His resident doctor, Dr. Daniel Krebs, described M.A. as having sunken eyes, “you could see his ribs mo[r]e so than you would even on a normally skinny

⁷ *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

child,” and he was unable to hop on one foot; “[h]e seemed weak.”⁸ RP (May 1, 2014) at 933. When he arrived at the hospital, M.A. weighed 33 pounds and was three feet, four inches tall. He had a great deal of lower extremity muscle atrophy, described as cachectic or “wasting away.” RP (May 1, 2014) at 937. His skin was “doughy” and “tented” when pulled which is a sign of dehydration and malnutrition. RP (May 1, 2014) at 937. Dr. Krebs planned to refeed M.A., but he worried that M.A. would be subject to “refeeding syndrome,” where the body has dangerous disturbances in its electrolytes when it finally receives food after a long period of no food. RP (May 1, 2014) at 940-41. Dr. Krebs acknowledged that M.A. had a normal white blood cell count, normal temperature, but low protein and a protuberant belly—other signs of malnutrition.

The trial court admitted M.A.’s statements to Thomas at trial. Over defense objections, the trial court also admitted redacted versions of Aimee’s and Justin’s statements to Detective Catey. The redacted version of the interview included statements by Aimee where she used the words “we” and “us;” references to Justin were replaced with “his.” The trial court instructed the jury not to consider the statements made by Aimee in deciding Justin’s case.

C. Trial Motions, Jury Instructions, Closing Arguments, Verdicts, and Sentencings

Justin and Aimee moved to strike the aggravating factors related to the abuse of a position of trust and the particular vulnerability of the victim because they were already encompassed within the crime of criminal mistreatment. They moved to strike the third aggravating factor based on insufficient evidence to prove deliberate cruelty. The trial court denied the motions.

⁸ M.A.’s doctor also testified that sunken eyes implied a loss of muscle mass in your face and can also be a sign of dehydration. He testified that having a patient hop on one foot was something he learned while working with a pediatrician in Africa with malnourished children; it is a way of assessing normal muscle mass.

After the State rested its case, Aimee and Justin again made severance motions. The trial court denied them. Neither Aimee nor Justin testified at trial.

During closing argument, Justin's counsel argued, "I would contend that being thin is not the same as substantial disfigurement especially when you're told, analyze the evidence while presuming their innocence." RP (May 13, 2014) at 1987. The State objected on the grounds that the argument misstated the law; the trial court sustained the objection. In rebuttal, the State argued that the presumption of innocence means "[t]hey are innocent up to and unless you find that the State has overcome its burden and proven that they are guilty of a crime." RP (May 13, 2014) at 1994.

The trial court instructed the jury on the presumption of innocence: "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." CP A at 73 (Instr. 3); CP J at 241 (Instr. 3). In addition, the trial court instructed the jury:

You may only consider statements made by defendant Aimee Moses as evidence when determining whether the State has proven Aimee Moses committed a crime. You may not consider statements made by defendant Justin Moses when determining whether Aimee Moses committed a crime.

You may only consider statements made by defendant Justin Moses as evidence when determining whether the State has proven Justin Moses committed a crime. You may not consider statements made by Aimee Moses as evidence when determining whether Justin Moses committed a crime.

CP A at 77 (Instr. 7); CP J at 245 (Instr. 7).

The trial court instructed the jury on aggravating factors for both Aimee and Justin. For the particularly vulnerable victim aggravator, the court instructed the jury that "a victim is 'particularly vulnerable' if he or she is more vulnerable to the commission of the crime than the typical victim of criminal mistreatment in the second degree. The victim's vulnerability must also

be a substantial factor in the commission of the crime.” CP A at 106 (Instr. 36); CP J at 274 (Instr.

36). The trial court instructed the jury on the abuse of trust aggravating factor:

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship. A defendant need not personally be present during the commission of the crime, if the defendant used a position of trust to facilitate the commission of the crime by others.

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant’s relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

There need not be a personal relationship of trust between the defendant and the victim. It is sufficient if a relationship of trust existed between the defendant and someone who entrusted the victim to the defendant’s care.

CP A at 107 (Instr. 37); CP J at 275 (Instr. 37).

The jury found both Aimee and Justin guilty of criminal mistreatment in the second degree by causing substantial bodily harm by withholding basic necessities of life. It also found Aimee guilty of all three charged aggravating factors, and Justin guilty of two.

The trial court sentenced Aimee to an exceptional sentence of 60 months of confinement. The trial court entered findings of fact and conclusions of law for Aimee’s exceptional sentence: Aimee’s conduct manifested deliberate cruelty, she knew or should have known M.A. was particularly vulnerable or incapable of resistance, and she used her position of trust or confidence to facilitate the commission of the crime. The trial court found that these substantial and compelling reasons justified the exceptional sentence.

The trial court sentenced Justin to an exceptional sentence of 40 months of confinement. The trial court entered findings of fact and conclusions of law for Justin’s exceptional sentence: Justin knew or should have known M.A. was particularly vulnerable or incapable of resistance,

and he used his position of trust or confidence to facilitate the commission of the crime. The trial court found that these substantial and compelling reasons justified the exceptional sentence.

Aimee and Justin appeal.

ANALYSIS

I. ADMISSION OF REDACTED VERSION OF AIMEE’S INTERVIEW WITH DETECTIVE CATEY

Justin argues that the trial court erred in admitting Aimee’s interview with Detective Catey because the interview contained testimonial hearsay and violated his Sixth and Fourteenth Amendment rights to confront witnesses.⁹ He argues that the statements inculcate him because the use of plural pronouns like “we,” “us,” and “our” refer to him and Aimee and their joint role as M.A.’s caretakers. We disagree.

A. Standard of Review

We review alleged violations of the Confrontation Clause de novo. *United States v. Mayfield*, 189 F.3d 895, 899 (9th Cir. 1999); *United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir. 1993).

The Sixth Amendment to the United States Constitution states: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Under the confrontation clause, out-of-court testimonial statements by witnesses are barred unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the witnesses. *Crawford*, 541 U.S. at 54-55.

⁹ Justin makes no separate legal argument relating to the Fourteenth Amendment; therefore, our analysis is on the Sixth Amendment.

B. No Confrontation Clause Violation

“[T]he United States Supreme Court held that the defendant was deprived of his confrontation rights under the Sixth Amendment when he was incriminated by a pretrial statement of a codefendant who did not take the stand at trial.” *State v. Hoffman*, 116 Wn.2d 51, 75, 804 P.2d 577 (1991) (citing *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d. 476 (1968)). But in *Richardson v. Marsh*, 481 U.S. 200, 208, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), the United States Supreme Court held that a confession redacted to omit all reference to the codefendant fell outside *Bruton*’s prohibition because the statement was “not incriminating on its face” and became incriminating “only when linked with evidence introduced later at trial (the defendant’s own testimony).”

Bruton applies to inculpatory statements. 391 U.S. at 135-36. The *Bruton* Court recognized the “powerfully incriminating” effect of the extrajudicial statements of a codefendant “who stands accused side-by-side with the defendant.” 391 U.S. at 135-36. Not only are the statements “devastating to the defendant, but their credibility is inevitably suspect.” *Bruton*, 391 U.S. at 135-36. Statements that do not incriminate a codefendant are not subject to the *Bruton* rule. *State v. Dent*, 123 Wn.2d 467, 487, 869 P.2d 392 (1994).

We have stated that a non-testifying codefendant’s statement violates the confrontation clause unless certain criteria are met when redacting the statement. *State v. Larry*, 108 Wn. App. 894, 905, 34 P.3d 241 (2001). To fall outside the prohibition, “[r]edacted statements must be (1) facially neutral, i.e., not identify the nontestifying defendant by name (*Bruton*[, 391 U.S. 123]); (2) free of obvious deletions such as ‘blanks’ or ‘X’ (*Gray v. Maryland*, 523 U.S. 185, 118 S. Ct.1151, 140 L. Ed. 2d 294 (1998)); and (3) accompanied by a limiting instruction (*Richardson*[, 481 U.S. 200]).” *Larry*, 108 Wn. App. at 905.

Justin only challenged a few specific statements in his brief. We need not consider the other instances from the interview because he did not properly raise them. RAP 10.3(a)(6).¹⁰ In reviewing the specific instances Justin cited in his brief, the use of the plural pronouns does not involve inculpatory statements. For instance, Justin referenced a question by Detective Catey that referred to both Justin and Aimee: ““And when were they placed here with you?”” Br. of Appellant at 9 (quoting Ex. 74). This question would not and did not provoke an incriminating response. Many instances of the plural pronouns did not just refer to Justin and Aimee, but to the family as a whole. For instance, another question by Detective Catey referred to the entire family and not just Justin and Aimee: ““Would the whole family eat together?”” Br. of Appellant at 9 (quoting Ex. 74). Again, this question did not produce any inculpatory statements: Aimee responded “Um-hm.” Ex. 74. Another example: “We all have dinner at the same time” and “when he moved in with us, he was eating healthier.” Ex. 74. Eating together as a family is not inculpatory. Justin also challenged both Detective Catey’s and Aimee’s use of the word “here” to refer to the Moses’s household. Br. of Appellant at 10. Again, this information is not inculpatory and not prejudicial.

¹⁰ Justin generally argues that throughout the interview, the plural pronouns used, e.g. “we,” “us,” and “our” refer to him and Aimee. Except for a few examples, he does not cite to the specific parts of the record he challenges. It is Justin’s obligation to point to the specific parts of the record he claims constitutes error. RAP 10.3(a)(6). “Without adequate, cogent argument and briefing, [we will] not consider an issue on appeal.” *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990). Although appellate courts are not in business of searching the record to discover the alleged deficiencies to which challenger may be referring, we have reviewed the entire transcript. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). Because our independent review of the record shows that not all of the plural pronouns specified by Justin refer only to him and Aimee, we confine our decision to those few examples Justin raised that cite to the record.

Here, the redacted statements met the three criteria to fall outside the prohibition. First, these statements were facially neutral in that none referred to Justin by name, and the plural pronouns used in context could have referred to other members of the Moses family. Second, the redactions did not leave obvious deletions. Third, the jury was instructed only to use Aimee's interview statements when considering the evidence against her, not against Justin. The trial court specifically instructed the jury before the audio of the interview was played and again in instructing the jury that they were "only [to] consider statements made by a defendant when evaluating the evidence against that individual defendant." RP (May 7, 2014) at 1595.

This case is analogous to *Richardson*, 481 U.S. 200, because the jury could likely surmise that certain parts of Aimee's interview referenced Justin when combined with other evidence introduced at trial, particularly that they were a married couple on trial as codefendants. We hold that the statements made by Aimee were not facially incriminating of Justin because her statements were a general denial of the abuse, and therefore, redactions of the statements were proper and alleviated any confrontation clause issues.

The admission of Aimee's redacted statement did not violate Justin's Sixth or Fourteenth Amendment rights under the confrontation clause because the statements were not inculpatory, they were properly redacted, and the trial court instructed the jury not to consider Aimee's statements when considering Justin's charges.

II. MOTIONS TO SEVER

Justin argues that the trial court erred in denying his motions to sever because redacting Aimee's portion of their joint interview with Detective Catey did not eliminate all prejudice to him when it was admitted at trial against Aimee. We disagree.

A. Standard of Review

Separate trials are not favored in this State. *Dent*, 123 Wn.2d at 484; *State v. Campbell*, 78 Wn. App. 813, 819, 901 P.2d 1050 (1995). “Severance of trials is also discretionary with the trial court.” *Larry*, 108 Wn. App. at 911. We review a trial court’s decision on a motion for severance under CrR 4.4(c) for a manifest abuse of discretion. *State v. Rodriguez*, 163 Wn. App. 215, 228, 259 P.3d 1145 (2011). The defendant “must be able to point to specific prejudice” to support a claim that the trial court abused its discretion.¹¹ *State v. Wood*, 94 Wn. App. 94 Wn. App. 636, 641, 972 P.2d 552 (1999). “Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.” *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Severance and joinder are analyzed in the same manner. *State v. Embry*, 171 Wn. App. 714, 731, 287 P.3d 648 (2012).

Specific prejudice may be demonstrated by showing:

“(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant’s innocence or guilt; (3) a co-defendant’s statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.”

State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985)) (citations omitted).

¹¹ In so far as Justin is arguing the failure to sever violated his right to confront witnesses, we have addressed that issue in a previous section.

B. The Trial Court Did Not Abuse Its Discretion

“[A] motion to sever under CrR 4.4(b) addresses the issue of prejudice to the defendant notwithstanding proper joinder.” *State v. Gataliski*, 40 Wn. App. 601, 606, 699 P.2d 804 (1985) (footnote omitted). CrR 4.4(c), states in pertinent part:

(1) A defendant’s motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless: . . .

(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

Defendants may be joined for trial, “[w]hen each of the defendants is charged with accountability for each offense included.” CrR 4.3(b)(1). Here, the charges against Justin and Aimee were connected in time, place, and occasion. The cross-admissibility of the evidence supports their joint trial.

When Justin made his motions to sever, the trial court properly analyzed the issues, took appropriate steps to ensure fairness at trial, and instructed the jury to not consider Aimee’s statements against Justin. Justin has failed to demonstrate any specific prejudice. The trial court did not abuse its discretion in denying the motion to sever.

III. ADMISSION OF CHILD HEARSAY

Justin and Aimee argue that the trial court erred by admitting child hearsay because the legislature did not intend RCW 9A.44.120 to apply to this type of criminal mistreatment case. We disagree.

A. Standard of Review

“Statutory interpretation involves questions of law that we review de novo.” *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). “In construing a statute, the court’s objective is to determine the legislature’s intent.” *Jacobs*, 154 Wn.2d at 600. “[I]f the statute’s meaning is

plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Jacobs*, 154 Wn.2d at 600 (quoting *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). “[W]e may discern the plain meaning of nontechnical statutory terms from their dictionary definitions.” *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010) (quoting *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006)). We review the trial court’s decision to admit child hearsay evidence for an abuse of discretion. *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006). “A trial court abuses its discretion ‘only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.’” *Borboa*, 157 Wn.2d at 121 (quoting *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003)).

Hearsay statements of a child under the age of ten are admissible in a criminal case when the statements describe sexual or physical abuse of the child, the court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability, and the child testifies at the proceedings. RCW 9A.44.120. When determining the reliability of child hearsay, the trial court considers nine factors. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

B. The Trial Court Properly Interpreted RCW 9A.44.120

After a hearing, the trial court admitted the child hearsay evidence on tenable grounds. It properly applied the *Ryan* factors. Nobody contests this aspect. Rather, Justin and Aimee contest whether the statute permits the admission of child hearsay in this type of criminal mistreatment case.

RCW 9A.44.120 provides in pertinent part:

A statement made by a child when under the age of ten . . . *describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110*, not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings.

(Emphasis added.)

RCW 9A.44.120 allows for the admission of statements that describe physical abuse. The issue in this case is whether the neglect of a child by withholding food and through other means constitutes an “act of physical abuse.” *See* RCW 9A.44.120. Our legislature has defined “acted” to include “omitted to act.” RCW 9A.04.110(1). It further defined an “omission” as a “failure to act.” RCW 9A.04.110(14) In addition, Black’s Law Dictionary defines “abuse” as “physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury.” BLACK’S LAW DICTIONARY 12 (10th ed. 2014).

The legislature did not require an “affirmative” act, just any act that would cause substantial bodily harm. *See* RCW 9A.04.110(1), (4)(b). An act of maltreatment that leads to malnourishment, like the withholding of food, could satisfy the requirement because it is a physical omission. These definitions clearly demonstrate that the failure to provide food, sustenance, and care to a child are acts of physical abuse. Because these acts fall within the meaning of RCW 9A.44.120, the trial court properly interpreted the statute and did not abuse its discretion by admitting the child hearsay statements.

IV. SUSTAINING STATE’S OBJECTION REGARDING THE PRESUMPTION OF INNOCENCE

Justin and Aimee argue that the trial court violated their right to the presumption of innocence when it sustained the State’s objection during closing arguments to defense counsel’s presumption of innocence argument. We disagree.

A ruling on an objection during closing argument is an instructional error based on a legal ruling that we review de novo. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). Jurors are presumed to follow the court’s instructions. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). “Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d

303, 307, 165 P.3d 1241 (2007). “[J]ury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof.” *Bennett*, 161 Wn.2d at 307.

The presumption of innocence is the “bedrock upon which the criminal justice system stands.” *Bennett*, 161 Wn.2d at 315. “The presumption of innocence does not stop at the beginning of deliberations; rather, it persists until the jury, after considering all the evidence and the instructions, is satisfied the State has proved the charged crime beyond a reasonable doubt.” *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011).

Aimee and Justin argue that when the trial court sustained the prosecution’s objection in the following exchange, it violated their presumption of innocence.

[DEFENSE COUNSEL]: So then you next come to was there substantial bodily harm, and “substantial bodily harm” is defined in Instruction No. 26 and talks about substantial disfigurement, and I would contend that being thin is not the same as substantial disfigurement especially when you’re told, analyze the evidence while presuming their innocence. So take the assumption that thin and—

[THE STATE]: Objection. That’s a misstatement of the law.

[THE COURT]: Sustained.

RP (May 13, 2014) at 1987.

The State argues that the presumption of innocence has no bearing on the legal or factual issue of what constitutes “substantial disfigurement.” Br. of Resp’t at 22. We agree. The trial court’s legal ruling on the objection did not violate the presumption of innocence.

We also note that the court’s instructions to the jury correctly instructed it on the presumption of innocence: “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.” CP A at 73 (Instr. 3); CP J at 241 (Instr. 3).

The trial court did not err.

V. AGGRAVATING FACTORS

The jury found beyond a reasonable doubt that both Aimee and Justin knew or should have known that M.A. was particularly vulnerable or incapable of resistance. Justin and Aimee argue that insufficient evidence existed to support this finding. We disagree.

A. Standard of Review

Washington courts may impose exceptional sentences outside the standard range if “there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. Whenever an exceptional sentence is imposed, the court must state its reasons in written findings of fact and conclusions of law. RCW 9.94A.535.

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

Where the reviewing court is satisfied that the trial court would have imposed the same sentence based upon one valid factor, it may uphold the exceptional sentence rather than remanding for resentencing. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). This rule is particularly appropriate when the trial court expressly states that the same exceptional sentence would be imposed based on any one of the aggravating factors standing alone. *See State v. Nysta*, 168 Wn. App. 30, 54, 275 P.3d 1162 (2012).

The trial court’s written findings from Aimee and Justin’s sentencing stated that it would have sentenced them both the same way even if the jury had only found one of the aggravating factors. Therefore, we need only determine if substantial evidence supports one of the factors and whether it justifies a sentence outside the standard range. *Jackson*, 150 Wn.2d at 276.

B. Sufficient Evidence Supports Aggravating Factor of Particularly Vulnerable Victim

The facts supporting an aggravating factor must be proved to a jury beyond a reasonable doubt. We use the same standard of review for the sufficiency of the evidence of an aggravating factor as we do for the sufficiency of the evidence of the elements of a crime. Under this standard, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt.

State v. Zigan, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012) (statute omitted) (citation omitted).

“In order for the victim’s vulnerability to justify an exceptional sentence, the State must show (1) that the defendant knew or should have known (2) of the victim’s *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime.”

State v. Suleiman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006) (emphasis in original).

M.A. was a five-year-old boy, who was completely dependent upon Aimee and Justin to care for him, feed him, and assist in his education and growth. He could not attend school if not taken there. M.A. went to live with Aimee and Justin after begin removed from a prior foster placement. He could not live on his own. He was particularly vulnerable because of his needs. A reasonable jury, when viewing the evidence in the light most favorable to the State, could find beyond a reasonable doubt the aggravating factor of particular vulnerability.¹²

VI. CUMULATIVE EFFECT OF ERRORS

Justin and Aimee argue that the combined effect of errors at trial was prejudicial, and therefore, requires a new trial. We disagree.

¹² Because of this decision, we need not address the other aggravating factors. The trial court found it would have imposed the same sentence even if only one aggravating factor existed.

The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). Aimee and Justin's claim of cumulative error fails.

VII. APPELLATE COSTS


Aimee and Justin have filed a supplemental brief raising the issue of whether or not they should be held responsible for paying appellate costs. Because the State's time for filing a cost bill with us and serving a copy on the parties has not passed pursuant to RAP 14.4, we decline to decide this issue at this time. If the State does request appellate costs, we will address the issue after that occurs.

We affirm.



Melnick, J.

We concur:



Bjorge, C.J.



Maxa, J.

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