NO. 46605-8-II

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

STATE OF WASHINGTON, Respondent

v.

ZAIDA YESENIA CARDENAS FLORES, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00298-0

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

A. ANSWERS TO ASSIGNMENTS OF ERROR

I. MS. CARDENAS-FLORES'S CONVICTION DID NOT VIOLATE HER RIGHT TO DUE PROCESS.

II. MS. CARDENAS-FLORES'S CONVICTION WAS BASED ON SUFFICIENT EVIDENCE.

III. THE STATE PROVED THAT MS. CARDENAS-FLORES INTENTIONALLY ASSAULTED HER SON.

IV. THE STATE PROVED ALL THE ESSENTIAL ELEMENTS OF ASSAULT.

V. THE STATE'S TRIAL THEORY—THAT MS. CARDENAS-FLORES INTENTIONALLY ASSAULTED HER SON AND THEREBY RECKLESSLY CAUSED SUBSTANTIAL BODILY HARM—SUPPORTED A CONVICTION FOR ASSAULT OF A CHILD IN THE SECOND DEGREE.

VI. THIS ASSIGNMENT OF ERROR WAS WAIVED AND THIS COURT SHOULD NOT CONSIDER IT.

VII. MS. CARDENAS-FLORES WAS NOT DENIED HER RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

VIII. MS. CARDENAS-FLORES WAS NOT DENIED HER RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

IX. THE STATE PROVED THAT THE OFFENSE TOOK PLACE IN WASHINGTON.

X. THIS ASSIGNMENT OF ERROR WAS WAIVED AND THIS COURT SHOULD NOT CONSIDER IT.

XI. THIS ASSIGNMENT OF ERROR WAS WAIVED AND THIS COURT SHOULD NOT CONSIDER IT.

XII. THIS ASSIGNMENT OF ERROR WAS WAIVED AND THIS COURT SHOULD NOT CONSIDER IT.

XIII. THIS ASSIGNMENT OF ERROR WAS WAIVED AND THIS COURT SHOULD NOT CONSIDER IT.

XIV. THIS ASSIGNMENT OF ERROR WAS WAIVED AND THIS COURT SHOULD NOT CONSIDER IT.

XV. THE PROSECUTOR DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT.

XVI. THE PROSECUTOR'S ARGUMENT DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF.

XVII. THE PROSECUTOR'S ARGUMENT DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF.

XVIII. THIS ASSIGNMENT OF ERROR REQUIRES EVIDENCE OUTSIDE THE RECORD AND CANNOT BE REVIEWED BY THIS COURT.

XIX. DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY WAY OF HIS TRIAL STRATEGY AND/OR TACTICS.

XX. DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY WAY OF HIS TRIAL STRATEGY AND/OR TACTICS.

XXI. DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE CORRECTLY DID NOT OBJECT DURING THE PROSECUTOR'S CLOSING ARGUMENT.

XXII. DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE CORRECTLY DID NOT OBJECT DURING THE PROSECUTOR'S CLOSING ARGUMENT.

XXIII. **DEFENSE COUNSEL DID NOT PROVIDE. INEFFECTIVE ASSISTANCE OF COUNSEL BY WAY OF HIS TRIAL STRATEGY AND/OR TACTICS WHEN HE CHOSE NOT TO REQUEST LIMITING INSTRUCTIONS.**

B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Zaida Cardenas-Flores was charged by amended information with Assault of a Child in the Second Degree for an incident that happened on or about and between December 20, 2013, through December 23, 2013. CP 3. The case proceeded to trial before The Honorable David Gregerson which commenced on August 18, 2014, and concluded on August 20, 2014, with the jury's verdict. RP 51-429.

The jury found Ms. Cardenas-Flores guilty as charged and the trial court sentenced her to a standard range sentence of 31 months. RP 429-430, 445; CP 27-37. Ms. Cardenas-Flores filed a timely notice of appeal. CP 41.

II. STATEMENT OF FACTS

a. Medical exams and Emergency room visits

On November 28, 2013, Ms. Cardenas-Flores gave birth to a baby boy, herein referred to as C.A. RP 55-56, 316, 348. Carlos Austin was the boy's father and the two parents lived together. CP 316-17, 348. On

December 3, 2013, baby C.A. was taken to the doctor for his first regular check-up visit. RP 56, 91. Everything was normal with C.A.'s health, but Ms. Cardenas-Flores reported a lot of stress in coping with the new baby because there was not a lot of support for her in the Vancouver area and because Mr. Austin was often at work. RP 56-58.

On December 18, 2013, Ms. Cardenas-Flores brought C.A. to the emergency room. RP 58. The parents reported that C.A. was pain as a result of Mr. Austin rolling onto C.A.'s leg while they were co-sleeping. RP 58-59, 152-53. Dr. Jonathan Stein examined the baby and ordered x-rays from the hip down to the foot. RP 151, 155. Dr. Stein did not notice anything alarming, but remarked that C.A. seemed a bit tender on the lower half of his left leg. In examining C.A. and the x-rays, Dr. Stein concluded that there were no fractures or abnormalities and that baby's leg was normal. RP 59, 93, 153-56.

On December 20, 2013, Ms. Cardenas-Flores and C.A. returned to their doctor's office for another regular check-up visit. RP 59-61. The treating doctor was told about the December 18 incident, and the doctor examined C.A. and reviewed the x-rays that were taken on the 18th. RP 61-62. That doctor likewise concluded that the x-rays were negative for a fracture and noticed, at most, some mild swelling on the top of the left foot. RP 62. Essentially, everything was considered okay with C.A.'s legs.

RP 61-63. Additionally, the parents reported that though Ms. Cardenas-Flores had a hard transition and some family stressors still existed, things had improved a lot because there was now more family support. RP 63.

On December 23, 2013, the family was back at the emergency room with C.A. RP 63. This time, the chief complaint was swelling of the upper left leg. RP 63-64. C.A. was noted to be in moderate distress and irritable, and C.A.'s left thigh appeared swollen and tender. RP 64. An x-ray of the left leg disclosed a displaced femur fracture which means a "large fracture" and a fracture where "it's not a bone with a line through it where the bone's [sic] still together . . . [but] the two pieces of bones are apart." RP 64. Furthermore, this injury was in a different area compared to where swelling was reported on December 18 and December 20, i.e., the lower leg and foot respectively. RP 65. In sum, "[t]his was a very different type of injury than anything that was seen on the 18th or 20th." RP 66.

Dr. Cathleen Lang, who examined and treated C.A. on December 23 (or early December 24), testified about the injuries C.A. sustained and what information the injuries told her about what had happened to C.A. RP 63-138. Dr. Lang testified that the x-rays showed a displaced, oblique fracture and that the fracture was a new fracture. RP 69. With this type of fracture "any time the diaper's [sic] changed, the leg's moved, it's going to be excruciating pain for the child." RP 69-71, 74-75, 122. Dr. Lang

stated that "this type of fracture is immediately obvious, immediately symptomatic. It causes immediate pain and swelling." RP 72, 74-75, 122.

Dr. Lang testified that in her expert opinion the explanation for how C.A.'s injury on the December 18 occurred, Mr. Austin rolling onto C.A., could not have caused the injury with which C.A. was presenting on December 23. RP 75, 110. She reached this conclusion in part based on the previous x-rays and examinations that took place after the co-sleeping incident and the mechanism required to create the new injury, i.e., the oblique fracture. RP 75, 110. As Dr. Lang explained, typically an oblique fracture is created when there is "a compression and also a torsion or twist." RP 76. As an example, she explained that "we actually see them commonly in the three-year-old population that are running and falling and doing different things because as they go down, they tend to turn their legs or turn their feet and then they also, as they go down, will have the compression force with it." RP 79.

For an infant to suffer this type of injury, however, "if the body was stabilized and someone were [sic] to grab and either yank on the leg as they're turning the leg, that would be one potential way of doing it. Basically, anything where you exert that force where you're compressing and then also twisting will do it." RP 79, 117-18. Moreover, this type of fracture when it occurs in a femur, one of the strongest bones in the body,

requires a great amount of force and "more force than what's going to be going on in normal everyday life." RP 80, 117.

Based on her examination and speaking with the parents, Dr. Lang opined that "the injury we saw on [C.A.] is highly concerning for nonaccidental trauma. Because we have an unexplained fracture in a very young infant." RP 80-81, 86, 136. Thus, while Dr. Lang would not rule out that accidental trauma caused the injury, she did confirm that an oblique fracture of this type is typically nonaccidental. RP 91, 138. Dr. Lang also noted that, other than the December 18 incident, no other history of trauma was offered that could have explained this injury. RP 81, 125.

b. Events between the regular check-up on December 20 and C.A. arriving at the Emergency room on December 23

On December 20, 2013, after the regularly scheduled visit to the doctor's office for a check-up, the family, including C.A., drove in the middle of the night to Quincy, Washington, to pick up Mr. Austin's three other children. RP 123, 183, 322-24. One-way the drive is about four hours. RP 123, 183, 322-24. After picking up the children, they drove straight back to Vancouver. RP 123, 183, 322-24. Ms. Cardenas-Flores did the driving because Mr. Austin did not have a license. RP 322-34. That night, and the following day, Saturday, December 21, 2013, C.A. seemed

fine except that he might have been a little bit whiny or fussy. RP 123, 125, 184.

Sometime on Sunday, December 22, 2013, the family drove down to Salem, Oregon, to attend church service. RP 184-185. On that day, overall, aside from potentially being fussy and having some minor swelling, C.A. was okay as nobody was allowed to pick him up and play with him and he slept during his bath that day and through the Sunday service. RP 73, 123-25, 184, 280-83, 325-26. After church, the family went C.A.'s grandmother's house and they were there until they returned home to Washington that night. RP 194, 283.

The next day, on Monday, December 23, 2013, Ms. Cardenas-Flores heard cracking coming from the baby's leg, she noticed his crying was different and uncontrollable, she noticed his leg was swollen and it had a lump, and she brought C.A. into the emergency room. RP 73-74, 127, 134, 186-88, 249, 327-28, 356-57.

c. Confession

Detective Deanna Watkins met with and spoke to Ms. Cardenas-Flores in the early morning hours of December 24, 2013. RP 180-81. Ms. Cardenas-Flores accompanied Detective Watkins down the hall to a conference room in which Sergeant Barb Kipp and Detective Brendan McCarthy were already present. RP 180-81, 207-08. Ms. Cardenas-Flores

provided the officers the chronology of what had happened from December 18, 2013, until she brought C.A. to the hospital. RP 181-87, 231-33. When asked what happened to C.A.'s leg on December 23 that could have caused his injury, Ms. Cardenas-Flores said that she did not know and that he could not have fallen and nobody could have stepped on him because he was always in her sight. RP 188. She indicated she would have noticed if something had happened. RP 188.

At first, Ms. Cardenas-Flores told Detective Watkins that maybe C.A. being in the car seat too long caused the injury or maybe she tried to get him out of the car seat faster than she should have. RP 188, 233. The detectives told Ms. Cardenas-Flores that C.A.'s injuries did not match her explanations and could not have been caused by the co-sleeping incident. RP 222-24, 235. Detective Watkins asked Ms. Cardenas-Flores to tell the group what really happened. RP 223. At some point, Ms. Cardenas-Flores said she believed in God and did not want to lie, and that she would not be a good parent if she lied. RP 200, 333-34, 342-43. She continued by stating that she wanted to believe the car seat caused C.A.'s injury but that was not what caused it. RP 200. Consequently, Ms. Cardenas-Flores told the detectives that she was desperate to get C.A. out of the car seat because he was crying and when she attempted to quickly pull him out his left leg got caught on a strap that was not undone. RP 200-01.

Finally, however, Ms. Cardenas-Flores's demeanor changed, she stood up from her chair, stood behind it, took a long pause and a deep breath, and said that prior to going to the store on Monday when she put C.A. in the car seat that she may have put too much pressure on his leg trying to get him into it. RP 201, 246, 248, 259, 377. She admitted that she was trying to make C.A.'s leg fit under the strap of the car seat and was having difficulties accomplishing this task so she pushed his left leg out and down to straighten it. RP 201-202, 231, 244-45, 253, 377. This was her explanation as to how the injury was inflicted and not suggested by the police. RP 345, 377. Ms. Cardenas-Flores also demonstrated to the detectives how she did this by using her hands. RP 253, 336, 345. When asked if she knew she broke his leg when she handled his leg in this manner she stated "I knew I did something." RP 202, 249. In response to her actions, she said that C.A. cried and that it was different from his normal cry. RP 202, 249. She admitted when she was told that his leg was broken she knew it was from the incident when she pushed his leg down. RP 202, 258. When asked about her previous explanation that C.A. may have been injured when she tried to get him out of his car seat, she confessed that the incident did not actually happen. CP 201, 235, 245-48.

At trial, Ms. Cardenas-Flores disavowed her confession, adhered to her earlier explanation that co-sleeping incident caused the injury, and

explained that she only falsely confessed because the police placed her under duress and would not accept her explanations of how C.A. was hurt. RP 286-290, 292, 299, 332-33. Ms. Cardenas-Flores testified that she did not intentionally hurt her son's leg. RP 299, 345. Mr. Austin also provided testimony. *See* RP 347-359.

C. ARGUMENT

I. SUFFICIENT EVIDENCE

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. W*alton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Furthermore, "specifics regarding date, time, place, and circumstance are factors regarding credibility . . ." and, thus, matters a jury

best resolves. *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788 (1996) *rev. denied* 130 Wn.2d 1013 (1996).

When intent is an element of a crime, it "may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability." *State v. Woods*, 63 Wn.App. 588, 591, 821 P.2d 1235 (1991); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In fact, where "the inferences and underlying evidence are strong enough to permit a rational fact finder to find guilt beyond a reasonable doubt, a conviction may be properly based on pyramiding inferences." *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (quotation omitted). And while inferences may appropriately be drawn from circumstantial evidence—as is often the case when proving intent—intent "may not be inferred form evidence that is 'patently equivocal.'" *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013) (quoting *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985)); *Woods,* 63 Wn.App. at 592. That said, where a "defendant ha[s] total control of the victim at all critical times and g[i]ve[s] two explanations of accidental injury, neither of which were inculpatory per se, but neither of which were possible in view of the medical findings . . . [such] circumstantial evidence [i]s sufficient to enable the jury to find that

the child was the victim of a criminal act by [a] defendant." *State v. Pennewell*, 23 Wn.App. 777, 782, 598 P.2d 748 (1979).

Moreover, when an assault by battery is at issue, the State only need prove the defendant's "intent to do the physical act constituting assault." *State v. Keend*, 140 Wn.App. 858, 867, 166 P.3d 1268 (2007), *rev. denied*, 163 Wn.2d 1041, 187 P.3d 270 (2008); *State v. Hall*, 104 Wn.App. 56, 62, 14 P.3d 884 (2000), *rev. denied*, 143 Wn.2d 1023, 25 P.3d 1020 (2001) (holding that "[a]ssault by battery does not require specific intent to inflict harm or cause apprehension; rather, battery requires intent to do the physical act constituting assault"); *State v. Daniels*, 87 Wn.App. 149, 155, 940 P.2d 690 (1997) ("Assault by battery . . . does not require specific intent to inflict substantial bodily harm or cause apprehension.").

Here, the State presented sufficient evidence to support the conviction.[1] When the evidence is viewed in the light most favorable to the State, Ms. Cardenas-Flores's confession, consistent with the injury suffered by the victim and which included a demonstration of how the she

[1] Ms. Cardenas-Flores suggests that the State's theory of the case was that Ms. Cardenas-Flores simply accidentally injured her baby while putting him in the car seat. Br. of App. at 12, 21. The State's theory of the case was a bit more robust, as, for example, the prosecutor argued: "This was a deliberate act to pull the leg out and down and it caused a fracture. . . .This is a deliberate act to yank that leg. And why she did it, doesn't say in those jury instructions there must be a reason. . . .[W]hen she took that action, that deliberate action to yank the leg, she intended to yank the leg, she intended to pull the leg out and down. And when she did it, she did it hard enough to fracture the leg." RP 423.

injured him, combined with the medical testimony strongly suggesting nonaccidental causation established sufficient evidence of Assault of a Child in the Second Degree. RP 64-66, 72-86, 90-91, 117-19, 122, 134, 136, 138, 187-89, 200-02, 234-36, 244-249, 253, 257-58, 336, 345. Furthermore, when Ms. Cardenas-Flores decided to take the stand and testify (1) to a theory of causation for her child's injury that was completely incompatible with the medical testimony; (2) that despite having constant physical custody of the infant not knowing how else the injury may have occurred and; (3) that she provided a false confession to the police as the result of duress, she put her credibility front and center. RP 66, 72-76, 79-80, 151-59, 286-294, 299, 321, 327-28, 332-36. The jury was free to reject her testimony as not credible, which based on the conviction it necessarily did and, in turn, her lack of credibility bolstered the already strong evidence the State had theretofore elicited.

In addition, Ms. Cardenas-Floras, as the mother and custodial parent of the infant victim, "had special insight into [his] young age and vulnerability." *State v. Hovig*, 149 Wn.App. 1, 9-10, 202 P.3d 318 (2009) (holding that in an Assault of a Child in the Second Degree case "determining whether a defendant acted recklessly depends on what that defendant knew and how a reasonable person would have acted knowing

the same facts"). Moreover, a "reasonable person would also exercise extra caution with [the victim] after recognizing, [and knowing], that he . . . had," to some degree an injured leg. *Id.* at 10. Thus, in total, the State presented sufficient evidence that Ms. Cardenas-Flores "inten[ded] to do the physical act constituting assault" and thereby recklessly inflicted substantial bodily harm. *Keend*, 140 Wn.App. at 867.

a. The Offense Occurred inWashington

In every criminal case the State must prove jurisdiction, i.e., that the crime happened in whole or in part in Washington beyond a reasonable doubt. RCW 9A.04.030(1); *State v. Norman*, 145 Wn.2d 578, 589, 40 P.3d 1161 (2002). Here, the State presented sufficient evidence to establish jurisdiction.

While the charging period in this case was from December 20, 2013, a Friday, to December 23, 2013, a Monday, all the evidence suggested the crime took place in Washington on December 23, 2013. CP 3. While the family was in Oregon for part of Sunday, December 22, 2013, Ms. Cardenas-Flores's confession to Detective Watkins, combined with the couple's statements to treating doctors, established Monday, December 23, 2013, as the date she inflicted the injury on the victim. RP 64, 73-74, 134, 186-88, 200-02, 246. That was the day that she heard the cracking from the baby's leg, the day she noticed his crying was different,

the day she did something that could have caused the injury the victim sustained, and the day that the child was brought into the emergency room. RP 73-74, 127, 134, 186-88, 200-02, 246, 249, 327-28, 356-57. It stands to reason that all of that occurred in Washington on December 23, 2013, because that was the actual place and date of the crime.

On the contrary, the testimony regarding Sunday, December 22, 2013, made clear the victim, aside from potentially being fussy and having some minor swelling, was otherwise okay as nobody was allowed to pick him up and play with him that day and he slept during his bath that day and through the Sunday service. RP 73, 123-25, 184, 280-83, 325-26. Based on the medical testimony, the baby's behavior on Sunday, December 22, 2013, was not consistent with how a baby would have acted in response to an oblique fracture of his femur and, according to his parents, nothing occurred on that day consistent with what could have caused the injury he ultimately suffered. RP 66, 69, 72, 75-80, 157-59, *see also generally* RP. Thus, in total, the evidence established beyond a reasonable doubt that the crime occurred in Washington on Monday, December 23, 2013.

II. CORPUS DELICTI

The *corpus delicti* or "body or substance of the crime" rule exists to protect a defendant "from being convicted based solely on a false confession and to protect an accused . . . [from having] confessions secured through police abuse" admitted into evidence. *State v. Mathis*, 73 Wn.App. 341, 345-46, 869 P.2d 106 (1994) (citing *State v. Vangerpen*, 71 Wn.App. 94, 98, 856 P.2d 1106 (1993)); *Bremerton v. Corbett*, 106 Wn.2d 569, 576–77, 723 P.2d 1135 (1986). The rule is thus one of evidentiary sufficiency and of admissibility. *State v. Dow*, 168 Wn.2d 243, 251, 227 P.3d 1278 (2010). At its most basic, the rule requires the State to produce independent evidence that provides "*prima facie* corroboration of the crime. . . ." *State v. McPhee*, 156 Wn.App 44, 60, 230 P.3d 284 (2010) (citation omitted).[2]

a. Waiver

Nonetheless, "Washington's *corpus delicti* rule . . . is judicially created and not constitutionally mandated." *Dow*, 168 Wn.2d at 249-50; *Corbett*, 106 Wn.2d at 576 (noting that the "*corpus delicti* rule does not have a constitutional source"). Accordingly, "because the corpus delicti

[2] In addition, RCW 10.58.035(1) directs trial courts to find admissible a defendant's confession in a criminal proceeding "where independent proof of the *corpus delicti* is absent, and the alleged victim of the crime is dead or incompetent to testify . . . if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant."

rule is purely a rule of evidence, it cannot be raised for the first time on appeal." *State v. Grogan*, 147 Wn.App. 511, 519, 195 P.3d 1017 (2008) (citing *State v. Dodgen*, 81 Wn.App. 487, 492, 915 P.2d 531 (1996)) (holding "[t]he corpus delicti rule is a judicially created rule of evidence . . . and a defendant must make proper objection to the trial court to preserve the issue"); *State v. C.D.W.*, 76 Wn.App. 761, 763-64, 887 P.2d 911 (1995). The failure to object to the admission of a confession or to assert an insufficient evidence claim by way of the *corpus delicti* rule at the trial court "precludes appellate review because '[i]t may well be that proof of the *corpus delicti* was available and at hand during the trial, but that in the absence of [a] specific objection calling for such proof it was omitted.'" *Dodgen*, 81 Wn.App. at 492 (quoting *C.D.W.*, 76 Wn.App. at 763-64).

Here, Ms. Cardenas-Flores failed to raise any *corpus delicti* issues at the trial court level, i.e., she did not object to the admission of her confession or statements on the basis of the *corpus* rule, nor did she move for dismissal of the case on that basis. *See generally* RP. She now argues in a footnote that "[b]ecause evidentiary sufficiency may be raised for the first time on review, an appellant may argue violation of the sufficiency aspect of the *corpus delicti* rule even absent an objection below." Br. of

App. at 23 FN 24.[3] But *Dodgen* has straightforwardly dispatched with that argument stating "[t]he *corpus delicti* rule is a judicially created rule of evidence, *not a constitutional sufficiency of the evidence requirement*, and a defendant must make proper objection to the trial court to preserve the issue." (*Dodgen*, 81 Wn.App. at 492) (emphasis added and citation omitted). She also fails to address RAP 2.5(a) or make an argument that the rule allows her to raise her *corpus* argument for the first time on appeal. *See* Br. of App.; *infra* at 3.a (discussing RAP 2.5 and waiver).

Had Ms. Cardenas-Flores argued that her confession was inadmissible based on the *corpus delicti* rule at the trial level, the State could have availed itself of RCW 10.58.035(1), if necessary, since the victim was incompetent to testify and the trial court would have made the relevant findings regarding admissibility. As a result, raising this issue for the first time on appeal puts the State at a disadvantage. For this reason and the reasons and law above, this Court should decline to review Ms. Cardenas-Flores's assignments of error based on the *corpus delicti* rule and its attendant arguments.

[3] The case Ms. Cardenas-Flores cites for this proposition, *State v. Fleming*, 155 Wn.App. 489, 506, 228 P.3d 804 (2010), provides no support because the case does not address whether a *corpus delicti* sufficiency argument can be raised for the first time on appeal.

b. If this court addresses the merits of Ms. Cardenas-Flores *corpus delicti* argument it should find that the State presented sufficient independent evidence to satisfy the rule

The *corpus delicti* generally consists of "two elements: (1) an injury or loss . . . and (2) someone's criminal act as the cause thereof." *Corbett*, 106 Wn.2d at 573-74. "Proof of the identity of the person who committed the crime is not part of the *corpus delicti*. . . ." *Id.* at 574; *State v. Hummel*, 165 Wn.App. 749, 759, 266 P.3d 269 (2012) (citation omitted). Neither is the State required to establish, as part of a *corpus delicti* challenge, "the appropriate mental state (intent, recklessness, negligence). . . ." *State v. Angulo*, 148 Wn.App. 642, 656, 200 P.3d 752 (2009); *State v. C.M.C.*, 110 Wn.App. 285, 289, 40 P.3d 690 (2002) (holding that "[w]hile the *mens rea* is an essential element of the offense, it is separate and distinct from the initial question of whether the body of the crime has been established") (citing *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996)).

Essentially, the "*corpus delicti* corroboration rule" is focused "on whether a criminal act has been established" and is not served by trying to apply it to the "elements of the crime." *Angulo*, 148 Wn.App at 658-59; *State v. Burnette*, 78 Wn.App. 952, 956, 904 P.2d 776 (1995) (holding that "Washington's corpus delicti rule does not require the State to establish

acts constituting every essential element"). Moreover, as discussed in *Hummel*, nothing in *Aten*, *Dow*, or *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59 (2006) requires the State to present "evidence of the mental state applicable to a specific degree of the alleged crime" in order to establish the *corpus delicti*. *Hummel*, 165 Wn.App. at 763-66; *See also Angulo*, 148 Wn.App. at 656-57 (discussing *Brockob*). Thus, the rule that the "mental element of the felony charged need not be proved by independent evidence prior to trial use of a defendant's confession when that element of the crime charged provides merely the degree of the generic crime charged" remains good law. *State v. Mason*, 31 Wn.App 41, 48, 639 P.2d 800 (1982); *Hummel*, 165 Wn.App. at 763-66; *Angulo*, 148 Wn.App. at 656-57, 59.

The independent evidence used to establish the *corpus delicti* "may be either direct or circumstantial and need not be of such character as would establish the *corpus delicti* beyond a reasonable doubt or even by a preponderance of the evidence." *Hummel*, 165 Wn.App. at 759 (citation omitted). The State can establish the *corpus delicti* so long as the evidence is "of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved." *Id.*; *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995) (holding that the "independent evidence need not have been sufficient to . . . even to send

the case to the jury"). In analyzing whether there is sufficient evidence to support the *corpus delicti* of the crime, reviewing courts "assume[] the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State." *State v. Aten*, 130 Wn.2d at 658.

Furthermore, when a defendant fails to move to dismiss based on a failure of proof the corpus delicti and testifies or introduces substantive evidence on her own behalf, she has "waived [her] challenge to the sufficiency of the evidence as it stood" at the close of the State's case. *Pennewell*, 23 Wn.App. at778 (citing *State v. Smith*, 74 Wn.2d 744, 768, 446 P.2d 571 (1968)). Instead, an "appellate court then may review the evidence as a whole to determine whether there is sufficient independent evidence supporting a logical and reasonable inference that the crime charged occurred," to include the defendant's testimony. *State v. Liles-Heide*, 94 Wn.App. 569, 572, 970 P.2d 349 (1999) (citation omitted); *Mathis*, 73 Wn.App. at 347. Simply put, "once the defendant elects to present evidence and that evidence establishes the corpus delicti, [s]he . . . cannot prevail on appeal." *State v. McPhee*, 156 Wn.App. 44, 60-61, 230 P.3d 284 (2010) (quoting *State v. Pietrzak*, 110 Wn.App. 670, 679, 41 P.3d 1240 (2002)).

Thus, for example, in *Mathis* the defendant testimony's confirming he made the inculpatory statements attributed to him was sufficient, when

combined with the other evidence, to establish the *corpus delicti* of the crime. *Mathis,* 73 Wn.App. at 344, 346-47. Similarly, "pre-crime statements can corroborate post-crime statements for purposes of establishing corpus delicti." *Pietrzak*, 110 Wn.App. at 681.

Moreover, in child abuse cases where a defendant "has sole custody of a victim and there is evidence of other inculpatory circumstances tending to show guilt, the evidence may be sufficient to convict." *Pennewell*, 23 Wn.App. at 782-83 (citing cases). Notably, in such cases a "false or improbable explanation is sufficient evidence of other inculpatory circumstances to sustain a verdict of guilty." *Id.* (citing *State v. Green*, 2 Wn.App. 57, 466 P.2d 193 (1970)). As a result, *Pennewell* held that where a "defendant had total control of the victim at all critical times and gave two explanations of accidental injury, neither of which were inculpatory per se, but neither of which were possible in view of the medical findings . . . that the circumstantial evidence was sufficient to enable the jury to find that the child was the victim of a criminal act by the defendant." *Id.* at 782.

Here, Ms. Cardenas-Flores was the parent who had total control of the victim at all critical times, from December 20 through December 23, and she was the one who changed him, fed him, and would get up with him in the night. RP 329-30. She had total control, in part, because

following December 18, Mr. Austin never did anything with the baby by himself as he was worried about hurting him again. RP 358, 381. This control of the victim, combined with the nature of the injury, i.e., the force needed to create the injury and the mechanism required to cause it, provides sufficient independent evidence to support a logical and reasonable inference that the crime charged occurred, and is more than enough to corroborate Ms. Cardenas-Flores's confession. Moreover, this evidence when combined with Ms. Cardenas-Flores's admission to making the confession described by Detective Watkins and her later explanation of how the injury occurred, which was not possible in view of the medical findings, overwhelmingly "enable[d] the jury to find that the child was the victim of a criminal act by the defendant." *Pennewell*, 23 Wn.App. at 782.

The bottom line is that the state produced "independent evidence that provide[d] *prima facie* corroboration of the crime" and to the extent it was lacking, here "the defendant elect[ed] to present evidence and that evidence establishe[d] the *corpus delicti*, [thus] [s]he . . . cannot prevail on appeal." *McPhee*, 156 Wn.App. at 60-61.

III. INSTRUCTIONS

a. Waiver

Because Ms. Cardenas-Flores did not object to the jury instructions given at trial, she waived the right to challenge them on appeal. The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995)). This "rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted). The theory of issue preservation by timely objection also "facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address." *State v. Lazcano*, --- Wn.App. ----, --- P.3d ----, 2015 WL 3754752, 7 (citing *State v. Strine*, 176 Wn.2d 742, 749-50, 293 P.3d 1177 (2013)).

The rule has additional force when applied to criminal cases in which claimed errors in jury instructions are raised for the first time on appeal because "CrR 6.15(c) *requires* that timely and well stated objections be made to instructions given or refused 'in order that the trial court may have the opportunity to correct any error.'" *Scott*, 110 Wn.2d at 685-86 (emphasis added) (quoting *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). Accordingly, our Supreme Court has "with almost monotonous continuity, recognized this procedural requirement and adhered to the proposition that, absent obvious and manifest injustice, we will not review assignments of error based upon the giving or refusal of instructions to which no timely exceptions were taken." *State v. Louie*, 68 Wn.2d 304, 312, 413 P.2d 7 (1966) (citing cases). Thus, it is unsurprising that "[c]iting this rule or the principles it embodies" our Supreme Court "on many occasions has refused to review asserted instructional errors to which no meaningful exceptions were taken at trial." *Scott*, 110 Wn.2d at 686 (citing cases).

An exception to this rule exists, however, for manifest errors affecting a defendant's constitutional rights. RAP 2.5(a)(3); *Hayes*, 165 Wn.App. at 514. "In order to benefit from this exception, 'the [defendant] must identify a constitutional error and show how the alleged error actually affected the [defendant]'s rights at trial,'" i.e., show that the error

is manifest. *State v. Grimes*, 165 Wn.App. 172, 180, 267 P.3d 454 (2011) (alterations in original) (quoting *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)) (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Consequently, a defendant cannot meet her burden if she "simply assert[s] that an error occurred at trial and label[s] the error 'constitutional. . . .'" *Grimes*, 165 Wn.App. at 186.

Furthermore, our appellate courts "have repeatedly told parties to make their argument in the body of their brief, not their footnotes." *Tamosaitis v. Bechtel Nat., Inc.* 182 Wn.App. 241, 248 FN 2, 327 P.3d 1309 (2014) (citing cases). This exhortation is not merely perfunctory, however, as arguments in footnotes are inadequate and need not be considered by reviewing courts. *State v. Harris*, 164 Wn.App. 377, 389 FN 7, 263 P.3d 12 (2011); *State v. N.E.*, 70 Wn.App. 602, 606 FN 3, 854 P.2d 672 (1993) (declining to consider appellant's argument made in a footnote); *State v. Johnson*, 69 Wn.App. 189 194 FN 4, 847 P.2d 960 (1993) (same).

Here, because Ms. Cardenas-Flores did not object to the jury instructions given at trial, she has waived the right to challenge them on appeal. Moreover, Ms. Cardenas-Flores fails to "identify a constitutional error and show how the alleged error actually affected her rights at trial" under the rubric of RAP 2.5(a)(3). *Grimes*, 165 Wn.App. at 180. Instead,

she only addresses the issue of whether she can raise the purported instructional error by the use of two footnotes, and in doing so "simply assert[s] that an error occurred . . . and label[s] the error constitutional" because it allegedly affected her right to due process. *Id.* at 186; Br. of App. at 29 FN 37 *and* at 33 FN 42. This is insufficient.

Moreover, the instruction about which Ms. Cardenas-Flores complains, the instruction defining assault, has repeatedly been found to not rise to the level of being a manifest error affecting a constitutional right. *Daniels*, 87 Wn.App. at 151-56, 940 P.2d 690 (1997) (concluding that the definition of battery was not an element of assault by battery, and declining to review the alleged error because it was not a manifest error affecting a constitutional right); *State v. Pawling*, 23 Wn.App. 226, 232-33, 597 P.2d 1367 (1979) (explaining that "[t]he constitutional requirement is only that the jury be instructed as to each element of the offense charged. The failure of the court to define further one of those elements is not within the ambit of the constitutional rule."). Thus, this court should decline to consider Ms. Cardenas-Flores's claim that the purported instructional error can be raised for the first time on appeal and likewise decline to review the instructional error claim on the merits.

b. In the event that this court addresses the instructional claim on the merits the Trial court's instructions to the jury were proper

"Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009) (quoting *State v. Barnes*, 153 Wn.2d. 378, 382, 103 P.3d 1219 (2005)). Juries are presumed to follow the instructions of the court. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) (citing *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976)).

Here, Ms. Cardenas-Flores essentially argues that the court's instruction defining assault violated due process because it allowed for "any intentional touching that causes harm [to] qualif[y] as an assault, whether or not the parent intended harm." Br. of App. 31-34. That instruction, modeled after WPIC 35.50, stated:

> An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

CP 20. This argument has, in all meaningful respects, been dispatched by each division of the Courts of Appeals, which have held, as mentioned above, that assault by battery does not require the State to show specific intent to cause harm. *Keend*, 140 Wn.App. at 867 (stating that "[a]ssault

by battery simply requires intent to do the physical act constituting assault"); *Hall*, 104 Wn.App. at 62 (holding that "[a]ssault by battery does not require specific intent to inflict harm or cause apprehension; rather, battery requires intent to do the physical act constituting assault"); *Daniels*, 87 Wn.App. at 155 ("Assault by battery . . . does not require specific intent to inflict substantial bodily harm or cause apprehension.").

In fact, *Daniels* sustained a conviction for Assault of a Child in the Second Degree against a similar challenge while noting that the jury was properly instructed because the instructions "informed them of all the statutory elements of second degree assault" and included the definitions of "intentionally" and "recklessly." *Daniels*, 87 Wn.App at 153-55; *See also State v. Holzknecht*, 157 Wn.App. 754, 760-66, 238 P.3d 1233 (2010) (rejecting a challenge to the jury instructions in an Assault of a Child in the Second Degree case as the instructions "made clear that a different mental state must be determined for each element: intent as to assault, and recklessness as to infliction of substantial bodily harm."). The jury instructions delivered by the trial court to Ms. Cardenas-Flores's jury were like those in *Daniels* and *Holzknecht* and properly informed them all of the "elements of second degree assault" and appropriately defined "intentionally" and "recklessly." *Daniels*, 87 Wn.App. at 153-55; *Holzknecht*, 157 Wn.App. at 761-62; CP 17-24.

Additionally, Ms. Cardenas-Flores cites no authority for the proposition that instructions modeled on WPIC 35.50 are constitutionally infirm or that they should not be given or given differently when the assault victim is a child or infant.[4] "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)); *State v. Dow*, 162 Wn.App. 324, 331, 253 P.3d 476 (2011). An appellate court need not consider issues unsupported by citation to authority. *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991). In sum, this court should reject Ms. Cardenas-Flores's challenge to the court's jury instructions.

IV. PROSECUTORIAL MISCONDUCT.

At trial, "[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences" in their closing arguments. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument "should be viewed within the context of the prosecutor's entire argument, the issues in the

[4] Ms. Cardenas-Flores also does not propose what she would consider to be an appropriate instruction. Br. of App. at 29-34.

case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

A prosecutor's argument that "[s]hift[s] the burden of proof to the defendant is improper . . . and . . . amounts to flagrant and ill-intentioned misconduct." *In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). Generally, however, a prosecutor's "remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements. . . ." *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1005 (1995) (citing *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994)). Thus, crucially, while defendants:

> are not obligated to produce any evidence, a prosecutor is allowed to comment on a defendant's failure to support her own factual theories: 'When a defendant advances a theory exculpating [her], the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence.'

State v. Vassar, --- Wn.App. ----, --- P.3d ----, 2015 WL 3603748, 4 (alteration in original) (quoting *State v. Contreras*, 57 Wn.App. 471, 476,

788 P.2d 1114 (1990)). Accordingly, a prosecutor may properly "question a defendant's failure to provide corroborative evidence if the defendant testified about an exculpatory theory that could have been corroborated by an available witness." *State v. Barrow*, 60 Wn.App. 869, 872, 809 P.2d 209 (1991); *State v. Blair*, 117 Wn.2d 479, 491-92, 816 P.2d 718 (1991).

If the defendant can establish that misconduct occurred, the determination of whether the defendant was prejudiced is subject to one of the two standards of review: "[i]f the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citations omitted).

Simply put, a defendant must first establish a prosecutor engaged in misconduct and then, when failing to object at trial, that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *Id.* at 760-61 (citation omitted); *Glasmann*, 175 Wn.2d at 704. Under the heightened standard, "[r]eviewing courts should

focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

Here, Ms. Cardenas-Flores did not object a single time during the State's closing to the argument that she now asserts is misconduct. RP 398-409, 423-425. Consequently, Ms. Cardenas-Flores must first establish the State engaged in misconduct and then that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." She cannot meet her burden.

Ms. Cardenas-Flores claims that prosecutor committed misconduct by improperly shifting the burden of proof during his closing argument when he noted that she "never gave a plausible explanation" for the victim's injuries. Br. of App. at 34; RP 405. In context, the prosecutor stated the following:

> Now, defendant got up there, Carlos got up there, they never gave a plausible explanation for how this kid broke his femur. And it seems like this entire time, Carlos and the defendant were the ones around the kid. Seems like they would have an idea of how a femur gets broken. And Dr. Stein and Dr. Lang said it would be immediately obvious when this injury happens. The kid would be crying differently than normal, the kid would be acting differently.

RP 405. As stated in *Vassar*, "a prosecutor is allowed to comment on a defendant's failure to support her own factual theories: When a defendant advances a theory exculpating [her], the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *Vassar*, --- Wn.App. ----, --- P.3d ----, 2015 WL 3603748, 4. Here, the prosecutor's argument was a permissible attack on the credibility of Ms. Cardenas-Flores's and Mr. Austin's testimony and their exculpatory theory that nothing happened to the victim aside from the accidental rollover on December 18.

Even if this one comment nestled in an otherwise proper closing argument amounted to misconduct, Ms. Cardenas-Flores cannot show that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *Emery*, 174 Wn.2d at 760-61. She cannot meet this burden because the jury was properly instructed that

"[t]he State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists." CP 14. The jury was also properly instructed that "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits." CP 11. Moreover, a curative instruction, if requested, could have obviated any prejudicial effect the singular statement had by restating or emphasizing for the jury that the State had the burden of proof. Consequently, Ms. Cardenas-Flores's prosecutorial misconduct argument must fail.

V. INEFFECTIVE ASSISTANCE

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71

Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

a. Deficient Performance

The analysis of whether a defendant's counsel's performance was deficient starts from the "strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) ("Judicial scrutiny of counsel's performance must be highly deferential.") (quotation and citation omitted). Thus, "given the deference afforded to decisions of defense counsel in the course of representation" the "threshold for the deficient performance prong is high." *Grier*, 171 Wn.2d at 33. This threshold is especially high when assessing a counsel's trial performance because "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* (quoting *Kyllo*, 166 Wn.2d at 863); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ("[T]his court will not find ineffective assistance of counsel if the actions of counsel complained of go to the theory of the case

or to trial tactics." (internal quotation omitted)). On the other hand, a defendant "can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's'" decision. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

1. Consultation with a medical expert

The effective assistance of counsel often requires a reasonable investigation and may include consulting with a qualified expert in order to "test and evaluate the evidence against a defendant." *State v. A.N.J.*, 168 Wn.2d 91, 111-12, 225 P.3d 956 (2010); *State v. Fedoruk*, 184 Wn.App. 866, 880-81, 339 P.3d 233 (2014) (noting that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). When a defendant's claim of ineffective assistance of counsel, however, "rests on 'evidence or facts not in the existing trial record,' filing a personal restraint petition is the appropriate step." *In re Hutchinson*, 147 Wn.2d 197, 206-07, 53 P.3d 17 (2002) (quoting *McFarland*, 127 Wn.2d at 335). In other words, the "proper avenue for bringing claims based on evidence outside the record is through a personal restraint petition, not an appeal." *State v. We*, 138 Wn.App. 716, 729, 158 P.3d 1238 (2007) (citation omitted). Thus, on

direct appeal a reviewing court "will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent." *State v. Jasper*, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012) (quoting *Barker v. Weeks*, 182 Wn. 384, 391, 47 P.2d 1 (1935)).

Here, Ms. Cardenas-Flores complains that her trial attorney did not consult with a medical expert. Br. of App. at 36-41. In fact, however, in referencing the admission of x-rays into evidence, Ms. Cardenas-Flores's trial attorney comments: "I have looked at it, Your Honor, as well as my expert." RP 66-67. The record is otherwise silent as to whether a medical expert was consulted by her trial attorney. *See generally* RP. On the other hand, the record is clear that Ms. Cardenas-Flores's trial attorney did utilize an investigator to prepare for trial and conducted a number of interviews that he then had transcribed. CP 51-62. That said, given the overall silence of the record on the issue upon which Ms. Cardenas-Flores complains and the need to go outside of the record to determine the truth of the assertion—that a medical expert was not consulted—this claim should not be resolved by this court, but instead through a personal restraint petition.

2. Cross examination

Cross-examination is an area of trial strategy or trial tactics that reviewing courts are loath to second guess because "[t]he extent of cross-examination is something a lawyer must decide quickly and in the heat of the conflict." *In re Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004) (quoting *State v. Stockman*, 70 Wn.2d 941, 945, 425 P.2d 898 (1967)). Unsurprisingly then, our Supreme Court has held that "even a lame cross-examination will seldom, if ever, amount to a Sixth Amendment violation." *In re Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998) (citation omitted). Thus, courts generally "entrust cross-examination techniques . . . to the professional discretion of counsel." *Davis*, 152 Wn.2d at 720.

Here, on direct examination, Dr. Lang testified that in most of her cases when she has a patient with fractures or broken bones she will do a skeletal survey to rule out additional fractures. RP 82. She further testified that in this case a skeletal survey was performed on the victim and there were "concerns that there may been additional fractures. . . ." RP 84. Dr. Lang elaborated that she saw signs on "the ends of both femurs and then also near the knee on the tibia" and had concerns about something called a corner fracture. RP 84. She concluded by stating that ultimately, following a second skeletal survey, she would not call those things fractures but just irregularities. RP 84.

Ms. Cardenas-Flores's trial attorney's cross-examination of Dr. Lang, which she asserts constitutes deficient performance, was based on Dr. Lang's above testimony concerning the results of the skeletal survey of the victim. Br. of App. at 38-39. While the introduction of Dr. Clinton's findings might not have been the best strategy to achieve his purpose, Ms. Cardenas-Flores's trial attorney used that information as a jumping off point to establish the degree of certainty that Dr. Lang needed to have in order to opine in court that a fracture existed. RP 99-108. Thus, Dr. Lang stated the following on cross-examination: "my focus is I want to make sure that we're very correct on exactly what we know is there . . . we're here in court, we don't want to say there are additional fractures unless we have those completely confirmed." RP 98

"The other way you get a periosteal reaction[, aside from a fracture,] is in kids between the ages of the one month and five months because they're growing so quickly, you actually have a periosteal reaction from the rapid growth. . . . So there could have been an old fracture there that we just couldn't see, but it's more likely that it could just be the periosteal reaction from his age group." RP 100.

And "We go to court and so when we go to court, we want to make sure that we're only talking about fractures that we have confirmed and that we definitely know exist." RP 101. Ms. Cardenas-Flores's trial

attorney concluded this line of questioning by asking: "So in your medical opinion, then, based on all the reports you reviewed and x-rays, did this child suffer from multiple nonaccidental traumas?" and Dr. Lang answered: "We only have one confirmed fracture." RP 108. Again, while trial counsel's strategy might not have been the most effective—and he never got her to disclaim her "concerns" that were first elicited on direct—he hammered home the fact that any contention that the victim suffered from multiple fractures was not suited for court and not supported by the most qualified of the doctors involved in this case. RP 98-108. The success of his trial strategy and/or tactics is probably best evinced by the fact neither attorney felt the need to address the findings of the skeletal survey in closing arguments. RP 398-425. A fair inference is that he successfully neutered the probative, or prejudicial, value of the evidence. This court should defer to the professional discretion of counsel and not second guess the trial tactics he employed, and, a result, find that Ms. Cardenas-Flore's cannot show his performance was deficient.

3. Corpus Delicti

Ms. Cardenas-Flores cannot show that her trial counsel's performance was deficient because he failed to move to dismiss the case pursuant to the *corpus delicti* rule. As argued above, *supra* 2.b, the State

produced independent evidence that provided "*prima facie* corroboration of the crime, and, consequently, any attempt to dismiss the case by trial counsel pursuant the *corpus* rule would have failed. *McPhee*, 156 Wn.App at 60. As a result, her trial counsel's performance was not deficient when he chose not to bring such a motion.

4. Limiting Instructions

Generally a defense counsel's decision not to request a limiting instruction can reasonably be characterized as trial strategy or tactics because the instruction could reemphasize damaging evidence to the jury or give the evidence undue attention. *State v. Humphries*, 181 Wn.2d 708, 720-21, 336 P.3d 1121 (2014); *State v. Yarbrough*, 151 Wn.App. 66, 90, 210 P.3d 1029 (2009); *State v. Donald*, 68 Wn.App. 543, 551, 844 P.2d 447 (1993). Additionally, officers and medical personal may testify to the interview protocol used to elicit responses, even if those interview questions suggest the defendant's answers are not believed, because said protocol "merely provide[s] the necessary context that enable[s] the jury to assess the reasonableness of the . . . responses." *State v. Kirkman*, 159 Wn.2d 918, 930-933, 155 P.3d 125 (2007) (quotation omitted); *State v. Demery*, 144 Wn.2d 753, 758-765, 30 P.3d 1278 (2001) (holding that

"statements made by police officers during a taped interview accusing the defendant of lying" are not considered opinion evidence).

Here, given the state of the facts, defense counsel may have easily chosen not to highlight or give undue attention to interview techniques in which Ms. Cardenas-Flores was consistently told that her initial versions how the injury occurred were not consistent with the medical information and which inferred she was not being truthful. Moreover, as Ms. Cardenas-Flores acknowledges "[d]efense counsel had a good reason to introduce these statements [(e.g., that Ms. Cardenas-Flores's explanations did not match the injury)], to help show why his client gave her 'confession.'" Br. of App. at 35 FN 44. Notably, Ms. Cardenas-Flores, with the benefit of hindsight, does not offer a proposal of her own as to what a constitutionally sufficient limiting instruction would look like. *See* Br. of App. at 35, 42-44. When combined with the fact that jury was otherwise properly instructed on the law, Ms. Cardenas-Flores cannot establish that her trial counsel's performance was deficient because he did not propose limiting instructions.

b. Prejudice

In order to prove that deficient performance prejudiced the defense, the defendant must show that "counsel's errors were so serious at to deprive [him] of a fair trial. . . ." *State v. Greer*, 171 Wn.2d 17, 33, 246

P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 687). In other words, "the defendant must establish that 'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Id.* at 34 (quoting *Kyllo*, 166 Wn.2d at 862). "In assessing prejudice, 'a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law' and must 'exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.'" *Id.* (quoting *Strickland*, 466 U.S. at 694–95). Moreover, when juries return guilty verdicts reviewing courts "must presume" that those juries actually found the defendants "guilty beyond a reasonable doubt" of those charges. *Id.* at 41.

Even assuming Ms. Cardenas-Flores's trial attorney was deficient in one of the ways she alleges, she cannot meet her burden to show that but for counsel's deficient performance, the outcome of the proceedings would have been different. Here, the medical evidence, Ms. Cardenas-Flores's confession, and her lack of credibility on the stand were together strong evidence of guilt and the proceedings would not have ended differently had her trial counsel used a different cross-examination technique or successfully proposed a limiting instruction.

D. CONCLUSION

For the reasons argued above, Ms. Cardenas-Flores's conviction should be affirmed.

DATED this26th day of June, 2015.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

June 26, 2015 - 11:13 AM

Transmittal Letter

Document Uploaded: 3-466058-Respondent's Brief.pdf

Case Name: State v. Zaida Cardenas-Flores
Court of Appeals Case Number: 46605-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Abby Rowland - Email: abby.rowland@clark.wa.gov

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

backlundmistry@gmail.com