

NO. 65353-9-1

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

REC'D  
DEC 15 2010  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

IDRIS TURNER,

Appellant.

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

The Honorable John P. Erlick, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying appellant Idris Turner's motion for mistrial based on the prosecutor's violation of a motion in limine during her opening statement.

2. Several unremedied instances of prosecutorial misconduct deprived Turner of a fair trial.

3. The trial court exceeded its statutory sentencing authority by imposing a community custody condition related to substance abuse because there was no evidence Turner used substances during the charging period or that substance abuse played a role in the commission of the offense.

Issues Pertaining to Assignments of Error

1. In violation of a ruling in limine prohibiting the use of the term "child abuse," the prosecutor declared in opening statement that the state's most impressive expert witness would tell jurors that in his "decades" of experience, Turner's was "one of the worst cases of child abuse that he has ever seen." Did the trial court err by denying Turner's motion for mistrial based on this irregularity?

2. During direct examination, the prosecutor elicited testimony that the child Turner assaulted, P.T., shared characteristics

commonly found in "victims of child torture." And during closing argument, the prosecutor unjustifiably accused the defense of misleading the jury. The trial court overruled objections to both events. In so doing, did the trial court sanction prejudicial prosecutorial misconduct that deprived Turner of his right to a fair trial?

3. Did the trial court err by including as a condition of community custody that Turner undergo a substance abuse evaluation and follow treatment recommendations when there was no evidence substance abuse played a role in commission of the offense?

B. STATEMENT OF THE CASE

1. Procedural facts

The state charged Turner with first degree assault of a child. CP 49-50. A King County jury found him guilty. CP 108. The trial court imposed a 147-month standard range sentence and 24 months to 36 months community custody. CP 213-21.

2. Trial facts

Trina Lynn Washington-Eastland gave birth to a daughter, P.T., in April 2006. 14RP 87-88.<sup>1</sup> P.T. was hospitalized when she was two

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<sup>1</sup> Turner cites to the 20-volume verbatim report of proceedings as follows: 1RP – 2/8/10; 2RP – 2/9/10; 3RP – 2/10/10; 4RP – 2/11/10; 5RP – 2/12/10; 6RP – 2/16/10; 7RP – 2/17/10; 8RP – 2/18/10; 9RP – 2/22/10;

months old because she suffered a seizure. 11RP 35-37. The child also had a constipation problem that medications did not alleviate. 9RP 40-42. Washington-Eastland thus began to spank P.T. to encourage her to move her bowels. 9RP 40-42; 14RP 90-92, 117-18.

Washington-Eastland began dating Turner in July 2007 and they moved in together sometime in August. 14RP 89-90, 115. She gave Turner permission to spank P.T. as well. 14RP 93, 118. Washington-Eastland became pregnant with Turner's child in February 2008. 14RP 117.

Washington-Eastland's pregnancy was risky and required periodic hospital visits. 14RP 96-98. Because of that and a full-time job, Washington-Eastland agreed to allow her former foster mother, Afua Ndiaye, to care for P.T. from April 2008 to September 2008 exclusive of weekends, when Washington-Eastland would care for her daughter. 9RP 8-11, 18-21, 42-44; 14RP 97-98.

In July 2008, Washington-Eastland was at Swedish Hospital and Turner and P.T. were visiting in the room. 8RP 12-16; 14RP 93, 121. A nurse looked in and observed Washington-Eastland holding P.T. by the

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10RP – 2/23/10; 11RP – 2/24/10; 12RP – 3/1/10; 13RP – 3/2/10; 14RP – 3/3/10; 15RP – 3/3/10; 16RP – 3/8/10; 17RP – 3/10/10; 18RP – 3/11/10; 19RP – 3/12/10; 20RP – 4/30/10.

shoulders, shaking her, and telling her to be quiet. 8RP 13-15. The nurse then saw Turner put the child over his knee and spanked her five or six times. 8RP 16-17, 29-30; 14RP 93-94, 122-24. The nurse testified Turner used excessive force, but Washington-Eastland said the spanking was normal. 8RP 17-18, 14RP 123-24.

The nurse contacted Child Protective Services (CPS). 8RP 20. A CPS investigator followed up by meeting with Ndiaye nearly two weeks later. 15RP 13-15. The investigator examined P.T. during the meeting and saw what looked like old and new bruises on the girl's lower back and buttocks. 15RP 17. Ndiaye also recalled seeing black, circular bruises in the same area sometime after P.T. returned to her care following the hospital incident. 9RP 26-28, 47-53. The investigator asked Ndiaye to have P.T. examined at a health clinic, but Ndiaye never followed through. 15RP 19. The investigator also contacted Washington-Eastland about the bruises. They were not able to determine the source of the marks. 14RP 98-99.

Ndiaye returned P.T. to Washington-Eastland's full-time custody in September 2008. 9RP 30; 14RP 99. About one month later, Washington-Eastland was confined to bed rest due to her late stage of pregnancy.

14RP 100-01. Turner assumed primary responsibility for P.T.'s care.  
14RP 99-103.

Unbeknownst to Washington-Eastland, Turner began a relationship with Courtney Douglas in late summer 2008. Within a week, they were living together in Douglas's Bell-town apartment. 10RP 24-26. About one week after Turner moved in, he introduced Douglas to his friend, Joy Brannon. Brannon quickly moved into Douglas's apartment as well. 10RP 27; 11RP 99-100.

At about the time Brannon moved in, Douglas met P.T., whom Turner called his step-daughter. 10RP 30. P.T. stayed with Turner in the apartment about two or three times a week. 10RP 31; 11RP 100. The three adults lived there about three weeks, at which time Douglas was evicted. They moved to a Renton condominium and were joined full-time by P.T. 10RP 29, 32-33; 11RP 102-03, 123.

Douglas frequently observed Turner "lecturing" the child about using the toilet. 10RP 34-36, 46; 11RP 113-17. When P.T. would look away from Turner during the lectures, he would put his hand under her chin and jaw and turn her head back toward his. 11RP 42-43. Douglas said Turner did this enough times to cause bruises to P.T.'s jaw area.

10RP 43. Douglas tried to intervene but Turner rejected her suggestions.  
10RP 43-44.

Turner also lectured P.T. as she sat on the toilet. 10RP 35, 38-42, 46-48, 60-62. During one such incident, Douglas heard two "smacks." 10RP 46, 49-50, 11RP 118. She opened the bathroom door and saw P.T. lying on the floor and Turner poised to hit her with a belt. 10RP 50-55; 11RP 117-18. Douglas asked Turner what he was doing, at which point he hit her with the belt. 10RP 55-57; 11RP 118. Turner then went back to P.T. and hit her with the belt several times. 10RP 56-57; 11RP 118-22. Douglas did not see whether P.T. was injured and did not call police because she was frightened. 10RP 57-59.

Shortly after this incident, on November 21, Douglas returned to her Bell-town apartment building because a former neighbor told her there were people inside her old apartment. 10RP 62-63; 11RP 123-25. As she walked down the hallway toward her apartment, Douglas saw a "frantic" Brannon and the apartment manager. 10RP 63; 11RP 125. Brannon pleaded with Douglas to let her into the apartment, but Douglas no longer had a key. 10RP 63; 11RP 125. About then Turner, who was inside the apartment with P.T., cracked the door open and Brannon broke it down. 10RP 63-64; 11RP 125-28; 12RP 11.

Brannon stormed into the apartment when Turner was picking up P.T. and trying to leave. 10RP 64-65; 12RP 11-13. Brannon accused Turner of stealing her money and pushed him back onto a bed while he held P.T. in his arms. 10RP 65; 12RP 13-14. Brannon picked up a metal compact disk (CD) rack that was in the apartment and hit Turner at least four times with it. 10RP 65-66; 12RP 14-16. Douglas testified Brannon must have hit P.T. as well because Turner held the child in his arms in front of him. 10RP 65-67; 12RP 14-15. The attack ended because Douglas managed to grab the CD rack and take it away from Brannon. 10RP 66.

Turner left P.T. on the bed and as he headed for the door, Brannon grabbed a knife and tried to stab him. 10RP 66-67; 12RP 16. Turner managed to escape, at which point Brannon tried to keep Douglas – who now held P.T. – inside the apartment. 10RP 67-68; 12RP 16-17. Douglas pushed past Brannon, left the apartment, and walked down the hall. 10RP 67-68; 12RP 16-18. Brannon ran up behind Douglas and pushed her from behind, causing P.T. to fly from Douglas's arms. 10RP 67-68; 12RP 18-20. Douglas heard the sound of P.T. hitting her head against the floor and a railing. Douglas picked her up and fled. 10RP 68-69; 12RP 20-21.

Douglas and P.T. took a bus to Myel Jewell's apartment in West Seattle. 10RP 68-69; 12RP 20-22. Douglas had cared for Jewell's son in a day care facility several years earlier and they had become friends. 13RP 46-48. She told Jewell everything that happened at the Bell-town apartment. 10RP 69; 12RP 21-24; 13RP 57-61, 139-45. Later that evening Turner arrived at Jewell's apartment. Turner, Douglas and P.T. ended up moving in with Jewell. 10RP 70-71, 75; 12RP 24-34, 147-49; 13RP 62-64.

Douglas testified P.T. acted normally in the following days. 10RP 74-76; 12RP 34. In her statement to police, however, Douglas said P.T.'s "health and everything just went down so quickly right in front of our eyes, like it went down. Her health went down." 12RP 35.

A few days after Brannon's CD rack attack, Douglas and Jewell heard Turner lecturing P.T. in Jewell's bathroom. 10RP 76-77; 13RP 69-72. Jewell testified Turner "was telling her she should not be playing a game with him that you know he was trying to potty train her, that he was . . . lecturing her to me as if she was a teenager." 13RP 70.

At Jewell's insistence, Douglas went into the bathroom to see what was going on. 10RP 77; 13RP 72-74. Douglas saw Turner spraying water in P.T.'s face as she sat in the bathtub. 10RP 76-77; 12RP 36-38; 13RP

152-53. P.T. gasped for air and was crying. 10RP 77-82; 12RP 37-38; 13RP 152-54. Turner stopped spraying P.T. after a couple moments, took the child to her room, and dressed her. 10RP 81-82; 12RP 38. Neither Douglas nor Jewell saw any injuries on P.T. after this session. 10RP 82; 13RP 76-77.

Later that day, Douglas heard three "thumps" in the bathroom, which sounded like P.T. may have fallen in the tub. Douglas went into the bathroom and saw P.T. sitting in the tub. Turner said she had fallen down. 10RP 82-85; 12RP 41; 54-55. Only later did Douglas notice P.T.'s lip was red and looked like it had been bleeding. 12RP 41-42, 55, 86.

The next day was Thanksgiving. Douglas described P.T. as "kind of just out of it" and recalled she did not eat much. 10RP 85-86; 12RP 38-39. Jewell observed Turner instruct P.T. to remain standing while she ate. 13RP 65-67. Turner explained the child "thinks that people are her maids. That he needs to teach her that people won't do things for her . . . ." 13RP 66. Jewell found this treatment unacceptable, so she and her son spent the remainder of the evening in their bedroom. 13RP 67-68.

Later that night Jewell heard the sound of water, crying, and "gurgling" coming from the bathroom. 13RP 80-85. She waited a few

minutes and Turner came out, explaining P.T. had fallen in the bathtub but was fine. 13RP 81-82.

The following morning, Douglas was at work and Jewell agreed to stay home with P.T. while Turner was out. 13RP 87, 90-91; 14RP 14-17. Jewell laid P.T. down, and could not awaken the child a few hours later. 13RP 91-94; 14RP 18-19. Jewell observed large bruises on P.T.'s face and a knot on her forehead. 13RP 94-96; 14RP 19-21.

At about that time, Douglas returned from work, followed shortly thereafter by Turner. 10RP 88-91; 12RP 46-47; 13RP 96-97; 14RP 21-23. Turner tried to get P.T. to stand up, but she kept falling down. 10RP 97-100; 13RP 97-100; 14RP 23-25. He cradled the child, who began to have seizures. 10RP 92-94; 12RP 48-49; 13RP 100-03. Jewell and Douglas disrobed P.T. and rubbed ice on her in an attempt to snap her out of the seizures. 10RP 94-98; 12RP 49-51; 13RP 104-111; 14RP 27-29. The child had bruises all over her body. 10RP 94-97; 13RP 105-07. The ice did not work; a series of seizures followed. 10RP 100-02; 12RP 49-50; 13RP 110, 113-15.

Turner did not want to take P.T. to the hospital. 10RP 97; 13RP 111-14. He said he did not want to go to jail or to prison. He also blamed Douglas and Brannon for P.T.'s condition. 10RP 102; 13RP 111-13.

Turner held P.T. in his arms throughout the night. 12RP 50-51. The following morning, Turner took P.T. to see Washington-Eastland, who was still on bed rest after having given birth to Turner's child. 13RP 119-20; 14RP 30-31, 103-07. P.T. was unconscious and they immediately took her to Valley Medical Center (VMC). 14RP 105-08.

P.T. presented to the VMC emergency room (ER) as limp and nonresponsive to stimuli. 9RP 67. She was intubated because of abnormal breathing. A CT scan indicated possible traumatic brain injury. 9RP 74-76. P.T. had bruises in several different stages and swelling on several areas of her body. 9RP 78-90. P.T.'s buttocks were the most dramatically bruised area. 9RP 84-85. There were no fractured bones. 10RP 6. The ER physician opined P.T. was a victim of non-accidental trauma. 9RP 92.

P.T. was transferred to Harborview Medical Center (HMC) nearly two hours after arriving at VMC. 9RP 79. Pediatrician Kenneth Feldman evaluated P.T. at HMC. 10RP 118-19. Dr. Feldman observed bruising over most of P.T.'s body, including areas that are not normally injured by routine child activity. 10RP 119, 121-27, 11RP 15, 21

P.T. also had retinal bleeding, which was commonly caused by inflicted head injury. 11RP 15-16. Very deep brain damage was also

evident. 11RP 15-20. Included was clotting of the veins that drained the brain and tissue damage in the nerve track that joins the two hemispheres of the brain. 11RP 15-16, 19.

Dr. Feldman was certain that the injuries resulted from non-accidental trauma. 11RP 20-21. He said it was unlikely Brannon caused P.T.'s brain injury during her attack on Turner November 21 because P.T. reportedly did not exhibit behavioral changes until Thanksgiving or the day after. 11RP 21-22.

Renton police officers Rutledge and Nguyen were dispatched to VMC and met with Turner in a small room near the ER. 6RP 88-92; 7RP 22-23. Turner told them he had been responsible for P.T. for the previous month while Washington-Eastland was on bed rest. 6RP 96; 7RP 14, 18. During that time Turner frequently left P.T. in Jewell's care. 6RP 96. Rutledge recalled that Turner said he believed P.T. sustained her injuries at Jewell's residence because when he returned there on Thanksgiving Day, he observed a bump on her forehead. 6RP 97; 7RP 5. Turner was gone from Jewell's apartment for about eight hours the following day. When he returned, Jewell told him P.T. had slept all day. Turner observed fluid behind the swelling on P.T.'s forehead, and described her to Rutledge

as "out of it." 7RP 7-8. Nguyen testified Turner mentioned Brannon as a possible suspect as well. 7RP 28-29.

Turner was detained after the conversation and transported to the station. 7RP 23-24; 8RP 42-43. He spoke there with detectives Montemayor and Barfield and was released after the interview. 8RP 47-53; 113-17.

After additional investigation, Turner was arrested and interviewed by detectives Montemayor and Barfield on December 1. 6RP 85; 7RP 110-13; 8RP 54-57, 118-22. He told the officers that when P.T. was away from her mother, she began acting out and disobeying. 12RP 87-89. At one point P.T. "said I am not going to do it. I am not going to do it." 12RP 89. He wanted P.T. to walk and she did not want to walk. He said, "She got attitude . . . and my daughter [P.T.] was fucking regressing . . . ." 12RP 127.

Turner said he sometimes whipped P.T. with a belt during toilet training sessions to encourage her to move her bowels. 12RP 84-86, 102, 107. The whipping caused P.T. to defecate, but it also gave her bruises on her buttocks, back or legs. 12RP 102-04, 108, 130.

Once while giving P.T. a bath, Turner sprayed water in her face and she defecated in the bathtub. 12RP 92-95. At other times, Turner

grabbed P.T.'s arm because she bounced around in the tub. 12RP 96, 130. He also bruised P.T.'s face around her chin from turning her head back to look at him. 12RP 131-32. He did not, however, whip P.T. at all in the last few days before taking her to the hospital. 12RP 113.

Turner told the detectives that when he returned to Jewell's on the day after Thanksgiving, he learned P.T. had slept all day. 12RP 114. She began having seizures during the night as he held her. 12RP 117-18, 121-22. Turner tried to get P.T. to walk and Jewell rubbed her with ice. 12RP 118-19, 129-30; 13RP 8, 11. He did not want to take P.T. to the hospital at that point because he thought she would get better. He also told Jewell he and Washington-Eastland would take P.T. to the hospital together. 12RP 119.

He said the entire situation was his fault and that he did not properly discipline P.T. He emphasized to Detective Barfield, however, that he did not punch her in the face, hit her in the head, cause the knot on her head, or cause her brain damage. 12RP 130-34; 13RP 11-12.

Later that day, Barfield again met with Turner. 13RP 26-28. Turner told him that on the night before Thanksgiving, P.T. fell off the toilet while he was whipping her with a belt. He grabbed her by the arm and continued hitting her with the belt until P.T. defecated on the floor.

He picked her up and put her in the bathtub. At that point, he noticed a bump on P.T.'s forehead and put ice on it. 13RP 28-29. Turner reduced his statement to writing and Barfield read it into the record. 13RP 31-32.

In the months that followed, P.T. walked, but not normally, and had to crawl up and down stairs. She was blind in her left eye. She also lacked normal language skills because of motor problems with her mouth. 11RP 22-23. A pediatric ophthalmologist testified P.T. suffered damage to the retina in each of her eyes. 11RP 79. The structural damage in P.T.'s left eye would remain and she would have no functional vision in that eye. 11RP 89-93. Both P.T.'s retinal damage and brain damage contributed to her lack of vision. 11RP 93.

Neurologist Lily Jung reviewed P.T.'s medical records from VMC, HMC, and Children's Hospital, where the child went after a brief stay at Harborview. 11RP 5-6; 17RP 11-15. Dr. Jung also analyzed a 2006 MRI scan of P.T.'s head. The scan revealed a birth defect - a "partial agenesis" of the "bridge" between the left and right hemispheres of the brain. 17RP 16-20. The defect was commonly seen in people who have seizures. 17RP 17-21. Similar but more developed agenesis was evident in a scan done at HMC after P.T.'s transfer from VMC. 17RP 32-33.

P.T. was also born with sickle cell trait, which can cause clotting of the veins. 17RP 21-22. The CT scans of P.T.'s head done at VMC and HMC after the series of seizures at Jewell's apartment showed a clot in the vein that drains blood out of the brain. 17RP 24-25, 31-32. Because of its location deep inside the brain, Dr. Jung said, the clot could not have been caused by head trauma and more likely occurred because of the sickle cell trait. The clot had been present in P.T.'s brain for some time. 17RP 25, 31-32. It caused increased pressure inside P.T.'s head, which not only contributed to the seizures, but also caused the retinal bleeding that led to her vision loss. 17RP 36-37, 39-41, 47.

The only evidence of inflicted trauma, in Dr. Jung's view, was the bruising and swelling on P.T.'s forehead. Because of its appearance, however, it had been there for at least a few days and up to a week or longer before the scans. 17RP 27-29, 34.

C. ARGUMENT

1. THE PROSECUTOR'S VIOLATION OF A PRETRIAL RULING PROHIBITING REFERENCE TO "CHILD ABUSE" BY THE STATE'S KEY EXPERT WITNESS WARRANTED DECLARATION OF A MISTRIAL.

As an officer of the court, the prosecutor has a duty to see that an accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Where a prosecutor commits misconduct so egregious

that no instruction can alleviate the prejudice, a mistrial has occurred and a new trial is mandatory. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). In opening statement in Turner's trial, the prosecutor violated a ruling in limine and told jurors the state's "child abuse" medical expert considered the case one of the worst child abuse cases he had ever seen. The prosecutor abdicated her duty to try Turner fairly and her remark could not be cured. Turner is thus entitled to a new trial.

- a. The prosecutor violated the trial court's order in limine.

Turner moved in limine to exclude testimony from Dr. Feldman that P.T.'s injuries were caused by non-accidental trauma and/or child abuse, contending those were matters for the jury to resolve. CP 39; 5RP 24. The trial court excluded reference to "child abuse," but found testimony that the injuries were caused by non-accidental trauma admissible. CP 96; 5RP 25. The court ruled, "I think child abuse, I think that terminology is not . . . necessary for the doctor's opinion. It may be it is conclusory and the jury will decide under the statute." 5RP 25.

In her opening statement, however, the prosecutor asserted: "Dr. Feldman will tell you that of the number of years, decades that he has been

doing this work, this is one of the worst cases of child abuse that he has ever seen." 6RP 74.<sup>2</sup>

At the next recess, Turner pointed out the trial court's pretrial ruling excluding testimony about "child abuse" and the prosecutor's violation of the ruling. 6RP 76. The trial court found that "given that it is not a direct violation or intentional violation of the Court's Order in Limine, I am going to deny the motion for mistrial, but remind [the prosecutor] that there is to be no testimony with respect to 'child abuse'" 6RP 77.

b. The prosecutor's inflammatory remark warranted a mistrial.

The trial court erred; the prosecutor's remark could not have been more direct and prejudicial. Courts do not look favorably on such obvious violations of orders in limine. See State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937) (prejudice presumed and new trial awarded because prosecutor disregarded trial court's ruling by asking defendant highly prejudicial question); State v. Jungers, 125 Wn. App. 895, 902-06, 106 P.3d 827 (2005) (trial court abused discretion by denying defendant's

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<sup>2</sup> Dr. Feldman testified he became a pediatrician in 1974, had over the years been an invited speaker for many national conferences pertaining to child abuse, and won an award for "lifetime service and contributions to the field of child abuse pediatrics." 10RP 106-10.

motion for mistrial where prosecutor's improper closing argument referred to stricken evidence and trial court did not mitigate improper argument by instructing jury to disregard); State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's violation of order in limine prohibiting any evidence of accused's drug convictions warranted reversal despite timely objection and court's strongly worded curative instruction); State v. Wood, 44 Wn. App. 139, 146, 721 P.2d 541 (1986) (despite affirming conviction, court chastised prosecutor for asking questions and making references that appeared to be intentional violations of order in limine), review denied, 107 Wn.2d 1011 (1986); People v. Crew, 31 Cal.4th 822, 839, 74 P.3d 820, 3 Cal.Rptr.3d 733 (Cal. 2003) (misconduct occurs when prosecutor makes remarks in opening statements or closing arguments that refer to evidence determined to be inadmissible in previous trial court ruling); State v. Massey, 242 Kan. 252, 263-65, 747 P.2d 802 (Kan. 1987) (trial court abused its discretion by denying defendant's motion for mistrial because state elicited prejudicial testimony from detective in violation of motion in limine).

The purpose of a motion in limine is to "avoid the requirement that counsel object to contested evidence when it is offered during trial." State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). That purpose is

frustrated where, as at Turner's trial, the prosecutor ignores the ruling on the motion and refers to inflammatory and inadmissible evidence during opening statements.

Turner's counsel skillfully avoided highlighting the prosecutor's damaging statement by waiting for a recess and then moving for a mistrial in the jury's absence. See State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction regarding ER 404(b) evidence was a tactical decision not to reemphasize damaging evidence). A trial court should grant a mistrial when an irregularity in the trial is so prejudicial that it renders the trial unfair. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). Prosecutorial misconduct is a form of irregularity. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

In determining whether an irregularity deprived the accused of a fair trial, reviewing courts consider

- (1) the seriousness of the irregularity, (2) whether challenged evidence was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

Babcock, 145 Wn. App. at 163. The standard of review is abuse of discretion. State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987).

For several reasons, the prosecutor's statement that a doctor with "decades" of experience with child abuse cases considered Turner's "one of the worst cases of child abuse that he has ever seen" was a serious irregularity. First, "child abuse" is an emotional and "highly inflammatory" subject. Garcia v. Providence Medical Center, 60 Wn. App. 635, 644-45, n.2, 806 P.2d 766, review denied, 117 Wn.2d 1015 (1991); see Valmonte v. Bane, 18 F.3d 992, 1004 (2d Cir. 1994) (determining whether an individual has abused a child is "inherently inflammatory"); Barnett v. State, 178 Ga. App. 685, 686, 344 S.E.2d 665, 667 (Ga. App. 1986) ("caseworker's testimony of unrelated sexual and physical child abuse and neglect was so inflammatory as to guarantee [appellant's] conviction" for assault on peace officer); State v. Dumlao, 3 Conn. App. 607, 612, 491 A.2d 404 (Conn. App. 1985) (trial court did not err by allowing qualified physician's testimony linking child's injuries to diagnosis of battered child syndrome; court "carefully excluded the use of inflammatory terms such as 'child abuse' or 'abused child,' and properly permitted the presentation of battered child syndrome solely as a medical diagnosis.").

Second, the broad and incendiary subject of "child abuse" encompasses the charge of "assault of a child." By sharing with the jury

Dr. Feldman's view of the case, the prosecutor notified jurors the doctor believed the charged crime had been committed. Such opinions on guilt, offered either by direct statement or inference, are not admissible. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). An opinion on guilt invades the jury's exclusive determination of the facts and violates the defendant's constitutional right to a fair jury trial. State v. Farr-Lenzini, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). Courts therefore presume the errors are prejudicial and the state must show beyond a reasonable doubt that any reasonable jury would have reached the same result without the opinion. State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009). For these reasons, the irregularity in Turner's case was very serious.

The second factor in assessing the trial court's denial of the motion for mistrial, whether the challenged evidence was cumulative of other properly admitted evidence, also weighs in Turner's favor. Neither Feldman nor any other witness testified the "child abuse" was some of the worst ever seen.

Finally, the seriousness of the irregularity could not be cured by an instruction. An instruction to disregard is futile "where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." State v. Mack, 80

Wn.2d 19, 24, 490 P.2d 1303 (1971). It is nearly a cliché to say that some bells, once rung, cannot be unring. See State v. Easter, 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996) ("A bell once rung cannot be unring.") (quoting State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)).

Such was the case with the prosecutor's remark about Dr. Feldman's characterization of Turner's case. As courts have recognized, expert opinions carry special weight with jurors. Courts "should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert." Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (quoting Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569, review denied, 106 Wn.2d 1009 (1986)); see State v. Walters, 120 Idaho 46, 56-57, 813 P.2d 857 (ID 1990) ("When an arson expert declares that it was the defendant who set the fire in the house, there can be little doubt that the jury was impressed and influenced by the authoritative statement.").

Dr. Feldman had impressive credentials. He had won numerous awards related to pediatrics and child abuse. He was one of only ten Washington doctors who belonged to the state Child Abuse Consultation Network. 10RP 110-11. And he authored about 50 articles and 20 book chapters on the subject of childhood injuries. 10RP 113. Jurors heard

about these qualifications and more during Dr. Feldman's testimony. His opinion was therefore extremely persuasive, so much so that an instruction to disregard the prosecutor's remark would not have been successful. For all these reasons, the trial court erred by denying Turner's motion for a mistrial.

2. PROSECUTORIAL MISCONDUCT DEPRIVED  
TURNER OF HIS RIGHT TO A FAIR TRIAL.

A criminal appellant seeking reversal based on prosecutorial misconduct must show improper conduct and resulting prejudice. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); Jungers, 125 Wn. App. at 901. A prosecutor's comments or other misconduct are prejudicial when they are substantially likely to affect the jury's verdict. McKenzie, 157 Wn.2d at 52. The touchstone of a prosecutorial misconduct analysis is the fairness of the trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

a. The prosecutor deprived Turner of a fair trial during direct examination and closing argument.

At the time of his testimony, Dr. Feldman was researching "child torture" with several other doctors around the country. 10RP 114. The prosecutor asked Dr. Feldman whether he "reached any findings with

regard to commonalities in the victims of child torture[.]” 10RP 114.

Feldman replied that

we have found that it is very common for the victim child to be scapegoated and if the child is attributed with being willful or stubborn or having problems with eating or having problems with urine or bowel movements and these attributions in turn allow the abuser and often many of the other household members [--]

10RP 114. Turner's counsel objected at this point and moved to strike based on a “[p]retrial ruling.” 10RP 114-15. An unreported side bar followed, after which the prosecutor moved on to a different subject. 10RP 114. The trial court did not strike Dr. Feldman's answer or otherwise instruct the jury. 10RP 115.

A trial court's ruling on a general objection to admission of evidence will be reviewed on appeal if the specific basis for the objection was apparent from the context. State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (citing ER 103(a)(1)).<sup>3</sup> It is apparent from the context of the objection that the “pretrial ruling” to which counsel referred was the trial court's preclusion of the conclusory term “child abuse” described

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<sup>3</sup> ER 103(a)(1) provides:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

above. 5RP 24-25. After all, the prosecutor sought information about common characteristics of "child torture" victims, and Dr. Feldman responded that certain victim children are commonly "scapegoated" by their "abuser."

The prosecutor caused Dr. Feldman to violate the ruling in limine. The trial court should thus have granted Turner's objection and stricken the answer. As the record stood, jurors heard that common characteristics of child torture victims were perceived willfulness or stubbornness and "a problem[] with urine or bowel movements." 10RP 114.

This was devastating for the defense, given Turner's evident obsession with P.T.'s inability to use the toilet and his perception that she was manipulating and ignoring him. This Court found admission of similar "profile" evidence reversible error in State v. Maule, 35 Wn. App. 287, 293, 667 P.2d 96 (1983). In that case, an expert testified the majority of child sexual abuse cases involve a male parent-figure. Maule, 35 Wn. App. at 289. The court found that in a prosecution of a defendant who was the father figure to one alleged victim and the father of the other,

[s]uch evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child sexual abuse, it is more likely the defendant committed the crime.

Maule, 35 Wn. App. at 293. See also State v. Petrich, 101 Wn.2d 566, 576, 683 P.2d 173 (1984) (potential for prejudice caused by expert's testimony that in "eighty-five to ninety percent of our cases, the child is molested by someone they already know," significant compared to minimal probative value); State v. Braham, 67 Wn. App. 930, 938-39, 841 P.2d 785 (testimony on SVP "grooming" behaviors similar to conduct of defendant inadmissible under ER 403); State v. Steward, 34 Wn. App. 221, 223-24, 660 P.2d 278 (1983) (court disallowed expert testimony regarding alleged propensity of babysitting boyfriends to inflict child abuse).

Further, because P.T. fit within Dr. Feldman's profile, the testimony amounted to an opinion on guilt. Such testimony invades the province of the jury and violates the constitutional right to a jury trial. They are presumed prejudicial and the state bears the burden of proving otherwise beyond a reasonable doubt. The state cannot meet its burden here. Not when two of the "commonalities" Dr. Feldman identified applied to the "child torture victim," P.T.

To make matters worse, the prosecutor highlighted this portion of the evidence during closing argument. The prosecutor declared that Turner was the "kind of person" who could inflict such damage to a two-

year-old child because he told police P.T. was "manipulative" and acted injured when she really was not. 18RP 37. In other words, Turner attributed P.T.'s behavior to willfulness or stubbornness, as "abusers" commonly did.

For these reasons, the trial court should have sustained Turner's objection and stricken Dr. Feldman's answer. The prosecutor committed misconduct that prejudiced Turner's right to a fair trial. Reversal is warranted.

b. The prosecutor unfairly attacked defense counsel and his strategy.

After discussing why the lesser-included offenses did not apply, the prosecutor declared, "The defense has done a good job of raising self-willed red herrings to distract your attention from the real issue." 18RP 39. Turner promptly objected, contending the prosecutor improperly disparaged the defense. The court overruled the objection. 18RP 39.

The trial court erred. It is serious misconduct to personally attack defense counsel, impugn counsel's character, or disparage defense lawyers generally as a means of convincing jurors to convict the defendant. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984); State v. Negrete, 72 Wn. App.

62, 66-67, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030 (1994); Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984); United States v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980). Comments that permit the jury "to nurture suspicions about defense counsel's integrity" can deny a defendant's right to effective representation. State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988).

The prosecutor in Turner's case used the "red herring" image to impart deliberate misdirection by defense counsel. This indicated to jurors that in the absence of a legitimate defense, counsel was improperly misleading them in the hope his client could escape the law. Review of the evidence, however, suggests it was the prosecutor who was doing the misleading. Turner presented neurologist Dr. Jung -- whose qualifications the state wisely did not question -- who testified P.T.'s birth defect predisposed the child to seizures and could alone cause them. 17RP 18-21. As well, Dr. Jung said P.T. suffered a blood clot in a critical vein likely because of her sickle cell trait, and that the clot was found too deep in the brain to have been caused by trauma. 17RP 23-26, 31-34. This combination of factors, Dr. Jung explained, caused swelling of P.T.'s

optic nerve, which in turn caused retinal hemorrhages and loss of vision.  
17RP 36-37.

If the prosecutor thought Dr. Jung was wrong, she could have called an expert in rebuttal to call the testimony into question. The prosecutor did not do this, and instead relied on the testimony of a pediatrician to explain complex brain problems. That was a matter of strategy, just as was Turner's decision to rely on a neurologist to show why P.T. suffered seizures and brain damage.

Turner did not "mislead" the jury by choosing this reasonable tactic and certainly did not raise "self-willed red herrings." The prosecutor's unsupported statement unfairly disparaged Turner's counsel and miscast his defense as an attempt to trick jurors. This was prejudicial misconduct.

The trial court exacerbated the prejudice by overruling defense counsel's objection. Not only did the court do nothing to mitigate the prejudicial effect, it essentially put its imprimatur on the prosecutor's statement. Jurors were effectively told that the prosecutor's assertions of misdirection were not unreasonable, which lent an aura of legitimacy to the misconduct. See State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (prejudice from prosecutor's misconduct "exacerbated" by trial court's failure to promptly give curative instruction); State v. Perez-

Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) ("The trial court, at best, failed to cure the prejudicial impact of the improper argument. At worst, the trial court augmented the argument's prejudicial impact by lending its imprimatur to the remarks.").

The trial court erred by allowing the prosecutor's improper comment to stand. The comment violated Turner's right to a fair trial. Reversal is warranted.

Finally, in determining whether prosecutorial misconduct causes reversal, a court considers its prejudicial nature and its cumulative effect on the jury. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996). Courts do not consider prosecutorial misconduct in isolation. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Even assuming, arguendo, no individual act of misconduct warranted reversal in Turner's case, this Court cannot ignore the cumulative effects of all the acts. For this reason as well, this Court should reverse Turner's conviction.

3. THE TRIAL COURT ACTED OUTSIDE ITS STATUTORY AUTHORITY BY IMPOSING A COMMUNITY CUSTODY CONDITION THAT WAS NOT REASONABLY RELATED TO THE CIRCUMSTANCES OF THE OFFENSE.

As a condition of community custody, the trial court ordered Turner to participate in a substance abuse evaluation and follow

recommended treatment. CP 221. The trial court exceeded its statutory sentencing authority because there was no evidence indicating substance abuse played a role in Turner's offense.

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001). An offender has standing to challenge conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd., 135 Wn.2d 326, 957 P.2d 655 (1988); see also Bahl, 164 Wn.2d at 750-52 (defendant may bring pre-enforcement challenge to vague sentencing condition).

The jury convicted Turner of first degree assault of a child, which the Sentencing Reform Act (SRA) categorizes as an offense against a person. RCW 9.94A.411(2)(a). At the time Turner committed the offense in November 2008, RCW 9.94A.715(1) authorized a trial court to impose a term of community custody. Here the court imposed a community

custody range of 24 months to 36 months. CP 217, Supp. CP \_\_ sub. no. 147 (Order Correcting Judgment and Sentence, filed 5/17/2010).

Under RCW 9.94A.715(2)(a), unless the court waives a condition, the conditions of community custody shall include those set forth in RCW 9.94A.700(4), and may include those provided for in RCW 9.94A.700(5). In addition, a trial court may order participation in rehabilitative programs or to otherwise perform affirmative conduct “reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community . . . .” RCW 9.94A.715(2)(a).

RCW 9.94A.700(5) provides:

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

The trial court ordered Turner to undergo a "substance abuse evaluation" and follow all treatment recommendations. CP 221. Because this condition is not included within RCW 9.94A.700(5), the trial court

had no authority to impose it unless it reasonably related to the circumstances of the offense. RCW 9.94A.715(2)(a). Under State v. Jones,<sup>4</sup> it does not.

Jones pleaded guilty to first degree burglary and other crimes. During the plea hearing, defense counsel explained Jones was bipolar and not only off of his medication, but also using methamphetamine, at the time of his crimes. Counsel contended this combination caused Jones to offend. Jones, 118 Wn. App. at 202. There was no evidence, however, that alcohol played a role in Jones' crimes.

The court sentenced Jones after accepting his pleas. The sentence included community custody, a condition of which was abstinence from alcohol and participation in alcohol counseling. The court made no finding alcohol contributed to Jones's crimes. Jones, 118 Wn. App. at 202-03.

On appeal, the Jones court held the trial court could not require Jones to participate in alcohol counseling given the lack of evidence alcohol contributed to his crimes. Jones, 118 Wn. App. at 207-08.

In reaching this conclusion, the court first observed RCW 9.94A.700(5)(c) authorizes a trial court to order an offender to "participate

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<sup>4</sup> 118 Wn. App. 199, 76 P.3d 258 (2003).

in crime-related treatment or counseling services." Jones, 118 Wn. App. at 207. The court held because the evidence failed to show alcohol contributed to Jones's offenses or the trial court's alcohol counseling condition was "crime-related," the trial court erred by ordering Jones to participate in alcohol counseling. Jones, 118 Wn. App. at 207-08.

The Court also acknowledged, however, RCW 9.94A.715(2)(a) permitted a trial court to order an offender to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]" Jones, 118 Wn. App. at 208. This condition also applies to Turner.

The Court held:

If reasonably possible, [RCW 9.94A.715(2)(a)] must be harmonized with RCW 9.94A.700(5)(c), so that no part of either statute is rendered superfluous. . . . If we were to characterize alcohol counseling as "affirmative conduct reasonably related to the offender's risk of reoffending, or the safety of the community," with or without evidence that alcohol had contributed to the offense, we would negate and render superfluous RCW 9.94A.700(5)(c)'s requirement that such counseling be "crime-related." Accordingly, we hold that alcohol counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.

Jones, 118 Wn. App. at 208 (footnote omitted).

The same language analyzed in Jones applies to Turner's case. Therefore, the Jones analysis should apply here. Just as there was no evidence alcohol contributed to Jones's offenses, there was likewise no evidence substance abuse contributed to Turner's offense. The only references to abuse of anything appeared in mental health evaluations defense counsel appended to Turner's sentencing memorandum. CP 160-66, 172; see "Appendix C" at 174-77, 180, 182, 189, 202 (alcohol abuse).

Therefore, that portion of the community custody condition requiring Turner to obtain a substance abuse evaluation and follow recommended treatment is too broad and not reasonably related to the circumstances of the offense. See State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and Parramore's conviction for delivering marijuana).

For these reasons, the "substance abuse" community custody condition should be stricken from Turner's judgment and sentence. Jones, 118 Wn. App. at 207-08, 212.

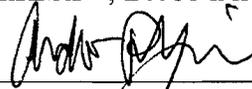
D. CONCLUSION

The trial court erred by denying Turner's motion for a mistrial after the prosecutor violated a ruling in limine precluding use of the term "child abuse." The court also erred by overruling objections to two other instances of prosecutorial misconduct. The result was an unfair trial. This Court should reverse Turner's conviction and remand for a new trial.

DATED this 14 day of December, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65353-9-I
	)	
IDRIS TURNER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 15<sup>TH</sup> DAY OF DECEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] IDRIS TURNER  
DOC NO. 893394  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF DECEMBER, 2010.

x Patrick Mayovsky

2010 DEC 15 PM 4:02