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NO. 33878-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TYRAN SMITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 04-1-03910-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

On August 10, 2004, the State charged TYRAN SMITH, with homicide by abuse and alleged four aggravating factors.¹ CP 1-4. On October 10, 2004, the State amended the information adding second degree murder (Count II) and alleged the same four aggravating factors charged in Count I.² CP 5-6.

On June 5, 2005, pre-trial motions and trial commenced before the Honorable Stephanie Arend. On July 28, 2005, the jury returned verdicts of guilty to both homicide by abuse and second degree murder. The jury found the state proved the aggravating factors beyond a reasonable doubt. CP 174-176.

On September 23, 2005, the court imposed an exceptional sentence of 600 months incarceration. CP 231-45. Defendant's standard range sentence is 250 to 333 months. CP 231-45.

On October 24, 2005, the court entered findings of fact and conclusions of law. CP 258-64. The court concluded that the jury findings on the aggravating factors satisfied defendant's Sixth Amendment rights under Blakely. CP 263. The court further concluded that each

¹ RCW 9A.32.055, RCW 9.94A.535.

² RCW 9.94A.36.011(1)(c), RCW 9A.36.021, RCW 9A.42.020, 9A.32.050(1)(b) and RCW 9.94A.535.

aggravating factor standing alone is a substantial and compelling reason justifying an exceptional sentence outside the standard range. CP 263. The court found it would impose the same sentence irrespective of the defendant's criminal history or offender score and would impose the same sentence if only one of the aggravating circumstances existed. CP 263.

2. Facts

On July 30, 2004, police and emergency medical personnel were dispatched to a call of a "child down" at 250 44th in Pierce County. RP 531-32. The dispatch further informed these responders that the child was not breathing or moving and that the child was probably a victim of abuse. RP 532.³ When the medical unit arrived they found a female child lying unconscious, unresponsive on the kitchen floor. RP 555. The child was not breathing and had no pulse. RP 558. Numerous bruises in various stages of healing covered the child's body. RP 538, 587-88.

The child's father, the defendant, made contact with the paramedics and directed them to T.S.,⁴ his daughter, before they entered the residence. RP 554. The defendant told the paramedics that he and his

³ A female caller reported to the 911 operator that the child was not breathing, that CPR was in progress, and that she suspected abuse after she observed bruising on the child's body after a babysitter had left the home the night before. RP 599. The recording of the 911 call was played for the jury at trial. RP 529, State's Exhibit 4-A.

⁴ As a measure of respect for the deceased victim toddler, the State will refer to her by her initials.

girlfriend had just gotten back from a camping trip,⁵ a babysitter was with T.S. while they were gone, that when they returned T.S. would not eat or drink, and that they tried to feed T.S. before her eyes rolled back and she slumped unconscious in her highchair. RP 536-37, 556-57. Defendant also mentioned that T.S. may have fallen a day or two before the incident. RP 537. Defendant said he called 911 and attempted CPR before the paramedics arrived. RP 557. Believing a short time had expired between the incident and their arrival, the paramedics tried several resuscitation efforts. RP 557, 566. All attempts to revive the child failed. RP 558-67. The child's body temperature was cool and inconsistent with what defendant had indicated the probable "downtime" had been.⁶ RP 568. There were no items commonly associated with camping in defendant's car of home. RP 589-91.

T.S. was dead upon arrival at Mary Bridge Children's Hospital. RP 838. Pediatrician and emergency room physician, Dr. Chalett, had treated hundreds of abused children. RP 836. Dr. Chalett determined T.S.'s death was due to non-accidental trauma. RP 839. Dr. Chalett observed a significant number of bruises on T.S.'s body that he believed

⁵ Defendant added that they had been on a camping trip for a couple of days before returning home for one day only to leave on this trip for another day and returning the day T.S. died. RP 538, 589. Defendant and Tierce said T.S. was not acting right the day before leaving the second time, but later clarified that this occurred the day T.S. died. RP 539, 542.

⁶ One paramedic explained that the body temperature would be cool if there was an extended downtime or there was trauma involved before cardiac arrest. RP 582.

could not be explained by normal childhood activity. RP 839. A contusion in the shape of an adult size handprint was located on the one of the child arms. RP 571. Using photographs, Dr. Chalett described to the jury T.S.'s extensive bruising, which covered her buttocks, labia, legs, arms, left hand, and face. RP 840-44. State's Exhibits 23-35. Dr. Chalett noted a fresh bruise above the left eye, a suspicious bruise along the aspect of one ear, bruising behind the other ear, and a linear bruise around T.S.'s cheekbone. RP 843-44.

Jeremy Spram lived near the defendant. RP 757-60. Spram heard a child crying at defendant's home the night before the ambulance and fire department arrived. RP 760. Spram recalled hearing the child crying after 11:00 p.m. RP 761. Spram was outside his residence when he "overheard domestic violence." RP 762. Spram could hear a man and women involved in an "aggressive" argument with a child crying in the background. RP 763. The argument was about the child not eating dinner. RP 763. Spram recalled the argument lasted 20 to 40 minutes. RP 765. The child's voice turned into a high-pitched yelling cry, which lasted a couple of seconds before there was silence. RP 765-67. Spram compared the high pitched cry to his childhood experience and stated it was like a cry where a child is "whipped with a spoon" or "whipped with a coat hanger." RP 766. The argument started up again but without the child's cry. RP 768. Spram estimated that he would hear the man and women argue about two evenings a week. RP 768.

Another neighbor, Sharon Webb, testified that a week before the homicide, she heard a young child crying while she was outside cleaning her pool. RP 818, 824, 827.⁷ Webb testified that the screaming began around 10:00 a.m., described the screaming as “horrible,” and estimated that the screaming lasted over five hours. RP 823,25. Webb testified that the horrible screaming was loud at the beginning, than not as loud, then silence. RP 825. Webb also heard a male voice say, “That’s what you get.” RP 826. Earlier that morning, Webb had seen a black male driving a white car to the mobile home where the child was crying. RP 822, 826, 830. He was still there when Webb heard the screams. RP 826.

Maichellele Sweeten is L.C. and T.S. Smith’s biological mother. RP 786. T.S. was two years old at the time of her death. RP 785. Defendant’s relationship with Sweeten ended about a year after T.S. was born. RP 785. L.C. and T.S. moved in with the defendant in June of 2004. RP 786. Sweeten was unaware of defendant’s relationship with Tierce. RP 786. Sweeten had no difficulty getting T.S. to eat or drink as she loved food. RP 787. Sweeten was unaware of T.S.’s death until defendant telephoned Sweeten two days after T.S.’s death. RP 788. Defendant told Sweeten that she made things difficult and that is why T.S. is dead. RP 788. Defendant had terminated his pager number, which was

⁷ Defense investigator, Durkee, testified that Webb told her this occurred at least two days before the homicide. RP 1122.

the method Sweeten used to contact him. RP 789. The number was 903-0099.

Defendant told Pierce County Sheriff's Detective Shaviri that the baby sitter's name was Jennifer Johnson, that she arrived at his home in a black Courier pickup driven by "Tom", and that he met Johnson at Walmart the first or second week of July 2004. RP 638-42. Defendant's camping story varied from what he told the paramedics. RP 642-645. He said he had returned for only a half day and picked up his infant girl. RP 642-645. On his second return, defendant noticed a few bruises on T.S.'s face. Defendant said the babysitter told him T.S. had fallen and hit in the driveway. RP 645. Defendant said he went back about 9:15 the evening before T.S. died and that T.S. was sleeping when he arrived home. RP 649. On the day she died, he and T.S. woke up about noon. RP 650-51. He heard T.S. tell Tierce she wanted milk instead of water and wanted some yogurt. RP 652-54. While defendant was watching a DVD, Tierce came into the bedroom and told him T.S. was making a gurgling. RP 653-54. Tierce took T.S. out of her highchair and brought her into the bedroom where defendant attempted CPR. RP 653-546. Defendant said T.S. spit something up and he thought she was breathing but got no response as he continued with CPR. RP 656.

On August 2, 2006, Detective Shaviri contacted Jennifer Johnson and learned that she did not know the defendant or Tierce and was in Arizona at the time of the homicide. RP 780. On that same date, Shavari

contacted the defendant and Tierce. In describing Jennifer Johnson, defendant provided a generic description of a white women wearing jeans. RP 782. Shavari also searched the defendant's vehicle and did not find anything associated with camping. RP 781.

Pierce County Sheriff's Detective Wood obtained a video tape from defendant's residence that the State showed the jury.⁸ RP 813, 816. Detectives were unable to determine the specific date or time the video was made because the video camera was not in time stamp mode. RP 990. The video depicts T.S. dancing and singing on the first portion of the tape. State's Exhibit 12. The second portion of the tape depicts a very distressed T.S. struggling to keep her head raised above her shoulders. State's Exhibit 12. In the audio portion of the tape, Tierce can be heard mocking T.S., commanding T.S. to keep her head up, and threatening that defendant will use a belt on T.S. if she lies down on the carpet. State's Exhibit 12.

Detective Wood presented a photo montage containing a photo of Jennifer Johnson to defendant who was unable to identify her from the montage. RP 938-29. Defendant provided detectives with a Lakewood apartment address for Johnson. RP 930. The detectives contacted the apartment manager and learned that a Jennifer Johnson has not lived there.

⁸ Defendant stipulated that T.S. is depicted in the video that was taken at his home. CP 108, RP 808-0814.

RP 931. When detectives re-interviewed defendant and Tierce, they maintained that they were camping and that the babysitter was responsible for T.S.'s death. RP 937-40. When confronted with the fact that the detectives no longer believed defendant's camping story, that T.S. was murdered, defendant's demeanor drastically changed from emotional and soft spoken to "hard core" and defensive. RP 991, 1543. When asked who killed T.S., defendant repeatedly said "Christine didn't do this." RP 939-41, 992. Defendant also did not say Jennifer Johnson was responsible. RP 940, 992.

Pierce County Chief Medical Examiner John Howard conducted T.S.'s autopsy. RP 866. T.S. was 36 and one-half inches tall and weighed 25 pounds. RP 869. Dr. Howard observed bruising on T.S.'s body from her head to her ankles. RP 870. Blunt force trauma caused this bruising. RP 870. Dr. Howard noted bruising to T.S.'s back, ears, forehead, cheekbones, and both sides of her face, left hand, and groin area. RP 877-881. State's Exhibit Nos. 39-44, 47,48, 50. Some of these bruises were several days old. RP 886. Dr. Howard described an injury to T.S.'s left eyelid, left temple area, and cheek as consistent with the edged surface of a belt striking T.S. on the face. RP 876-77, State's Exhibit Nos. 40, 41, 42.

Dr. Howard opined that blunt force trauma caused the brain tissue to shear away from the inside surface of T.S.'s skull creating a subdural

hematoma.⁹ Dr. Howard noted that there was bleeding all around the optic nerve where the nerve attaches to the retina for T.S.'s eyeballs. RP 889-90. This injury is very common in blunt force head injuries which are fatal. RP 891.

Dr. Howard opined that the blunt trauma to T.S.'s head was caused within 24 hours of death. RP 892-96. Dr. Howard further opined that the cause of death was blunt force trauma to T.S.'s head producing damage to her brain function and her heart to stop. RP 898. Multiple contusions and dehydration were contributing factors to her death. RP 898, 900-02.

The blunt force trauma to T.S.'s head was not the type of injury associated with a child's fall to the ground. RP 989. This type of head trauma was comparable to a car striking a pedestrian, or passenger in such an accident, or a fall from a five to seven story building. RP 899.

Dr. Howard opined that the bleeding at several layers of T.S.'s scalp and skull appeared "fresh or very recent" and probably occurred within 24 hours prior to death. RP 892-95. If there was a lapse of time between the infliction of the trauma and time of death, a person could exhibit diminished consciousness, slurred speech, loss of balance and coordination. RP 900. Dr. Howard observed the video of T.S. and opined that the blunt force trauma occurred after the video was recorded. RP 904.

⁹ Dr. Howard defined this term as a collection of blood below the fibrous tissue inside the skull known as the dura. RP 887-888.

The video showed T.S. as extremely weak child, consistent with an advanced stage of dehydration. RP 905-06. T.S.'s skin and abdomen indicated she was dehydrated and there was no liquid in her stomach. RP 870, 881,1563.

Dr. Howard opined that she would have lost her higher functions of her brain well before her heart stopped meaning that T.S. could not respond to questions or have much coordination. RP 1561-62, 1568-69. Dr. Howard testified that generally if a dead body is cool to the touch, than that person had been dead for some hours or has experienced sever circulatory shock. RP 907. It is not uncommon to revive a person who has experience such shock if resuscitation methods are employed within six minutes of occurrence. RP 908.

Dr. Yolanda Duralde, medical director of the Child Abuse Intervention Department at Mary Bridge Children's Hospital, testified regarding shaken baby syndrome and subdural hematoma. RP 973-985. Dr. Duralade testified that "shaken baby" can occur with toddlers. RP 979. Dr. Duralde testified that when retinal hemorrhaging accompanies a subdural hematoma that increases the odds that a child has been shaken. RP 974. This type of injury is not similar to adult brain injuries. RP 977.¹⁰ Dr. Duralde viewed the video tape of T.S. and opined that T.S. had

¹⁰ Dr. Duralde knew of one reported case where an adult man weighing about 100 pounds was shaken to death. RP 979.

not suffered the brain injury that caused her death prior to when the video was made. RP 982-83. Though exhibiting signs of severe dehydration, T.S. was cognitively alert, which indicated she had not yet suffered brain trauma. RP 983-84. Dr. Duralde noted that the video showed T.S. had bruising to the right side of T.S.'s face but not the left. RP 984.

L.C., 11 years of age, lived in defendant's home at the time of T.S.'s death. RP 704-06. Defendant forced L.C. to play basketball, which she did not like. RP 708-09. L.C. described T.S. as cheerful girl who liked to dance and was not a picky eater. RP 705. Defendant would yell at T.S. when she wet her diaper and was the one who most often spanked T.S. RP 711. Defendant sometimes struck T.S. with his belt often leaving bruises. RP 711-12. L.C. recalled an incident in July when T.S. acted as if she was "handicapped." T.S. observed bruises on T.S. and worried about this behavior. RP 714. This behavior had not occurred before they moved in with defendant. RP 715. L.C. observed the video of T.S. and thought the bruising caused T.S. to not keep her head up. RP 717. L.C. had to carry T.S. to the bathroom because she could not walk and thought T.S. needed medical attention. RP 818-91.

L.C. recalls the defendant and Tierce yelling at T.S. to eat her chicken sandwich and drink water as she sat in her highchair.¹¹ RP 716-17. At one point, Tierce “smacked” T.S. on her head causing T.S. to cry. RP 716. T.S. was still in the highchair when L.C. went to bed. RP 721. She did not know how long T.S. was in her highchair. RP 722-23. Defendant and Tierce told L.C. to lie to the police about the camping story. RP 723. L.C. was afraid to “speak up” because she was afraid of defendant. RP 731-32.

Defendant presented several witnesses in his defense. Hazem El-Sherif testified that the defendant was at his Arco store on at about 11:13 a.m. on July 30, 2004. RP 1028. According to El-Sherif, this event was video recorded onto a computer disc, which he reviewed with defendant’s investigator. RP 1027-29. Under cross-examination, El-Sherif said that because the surveillance system automatically erases its recordings after three months it could not be viewed at trial. RP 1032.

Michael Cooper, an acquaintance of the defendant’s for seven years, recalls defendant bringing a Ford Bronco into Lenny’s Tires on the morning of July 30, 2006. RP 1039-40. Cooper patched a tire on the Bronco to allow defendant to leave with the Bronco and return with

¹¹ The rule of the house was that the children had to eat before they were allowed to drink. RP 733.

money to pay for a tire replacement. RP 1049. Cooper thought he met defendant's investigator on July 30, 2004, but later changed his testimony to reflect an early August meeting. RP 1052, 1056. Cooper was not unable to provide a receipt of the transaction nor did defendant's investigator present defendant's copy of the receipt to Cooper to help him locate the business copy. RP 1053.

Marti Bennet, defendant's good friend, testified that she owned the Blue Ford Bronco and drove defendant to get the tire fixed. RP 1060-64, 1073-74. She recalled stopping at an Arco Station but could not recall what time that occurred on July 30. RP 1064, 1075.

Under cross-examination, Bennet testified that he had difficulty with her memory because her husband "just died" but later admitted he died two years ago. RP 1067. Bennett said she was at Lenny's Tire shop for about three hours in the morning of July 30, 2006. RP 1075. She testified that after her tire was replaced, she returned later that afternoon or the next day because the tire was too "wobbly." RP 1077. Bennett wrote the date of the tire repair on her calendar but was unable to give the calendar to defendant's investigator because it was stolen or lost. RP

1081. Bennett was previously convicted of making a false statement to a public servant, forgery, and possession of stolen property. RP 1071-72.¹²

Defendant's friends Anthony and Ryan Teeter testified that during the month of July, defendant was often at their residence playing video games or watching movies. RP 1099-99, 1110. Both were aware defendant was having car trouble and they provided him transportation. RP 1101, 1110.

Christina Tierce had dated defendant for about four years. RP 1147, 1198. They lived together for over three years at different locations. RP 1148. Tierce testified that on July 23, 2004, T.S. fell while walking and hit her head on cement. RP 1153-54. T.S. did not bleed but a bruise formed where the injury occurred. RP 1155. During the week before T.S.'s death, defendant left the residence on quick trips to deal drugs, including methamphetamine to Marti Bennett. RP 1160-61. According to Tierce, defendant did not spend that week playing videos with the Teeter brothers. RP 1160. Tierce was unaware that defendant helped Bennett fix her tires. RP 1161. Tierce testified that she never used a belt on T.S. and would spank T.S. over her diaper and clothes. RP 1164.

¹² On direct examination, Bennett testified she had never been in a courtroom. RP 1063. On cross-examination, she acknowledged that her forgery conviction was out of Pierce County Superior Court. RP 1072. She also testified that she used methamphetamine from the time she was twelve up to about October of 2004. RP 1069.

Around dinner time on the day before the homicide, Tierce made T.S. a chicken sandwich. RP 1188. T.S. was in her highchair. RP 1191. Tierce recalled the defendant hitting T.S.'s legs with a belt because T.S. was not eating her food. RP 1166, 1168, 1191. T.S. cried and yelled, "Daddy, Stop." "Daddy Stop." When Tierce questioned defendant's behavior, he said, "black people take care of their kids different than white people," and he was going to raise his kids his way and that Tierce could raise her kids her way. RP 1168. Defendant decided where they should live and would not allow people to visit their home. RP 1198-1201.

Defendant left T.S. in her highchair. RP 1168. Tierce eventually put her and her infant sister to bed. RP 1168. Tierce who was four months pregnant (RP 1141), had "morning sickness" and slept often. RP 1168. On the morning of the homicide, they awoke at around 11:00 a.m. RP 1170. After feeding the children breakfast, she went to a couple of drug stores. RP 1171-72. About 45 minutes later, Tierce returned to find T.S. in bed. RP 1172. Defendant told her that T.S. was being disciplined and that when she woke up he wanted Tierce to video record T.S. to show T.S. how she was misbehaving. RP 1172. Tierce recorded T.S. on video as L.C. watched. RP 1173.

After Tierce stopped recording T.S., Tierce tried to feed T.S. yogurt and milk, but T.S. wanted only water. RP 1180. Later, Tierce

heard T.S. making gurgling sounds. RP 1182. Tierce held T.S. against her shoulder and patted T.S.'s back, but she did not respond. RP 1182. Tierce attempted CPR. RP 1183. Defendant continued CPR when Tierce got sick. RP 1183. When Tierce told defendant she wanted to call the police, defendant panicked and started making up the camping trip story. RP 1184. Defendant continued telling Tierce this story while she is on the phone with the 911 operator. RP 1184. By this time, defendant had stopped CPR. RP 1184. According to Tierce, Fire personnel arrived while she was still on the phone. RP 1186.

While T.S. received medical attention, defendant told L.C. that a babysitter watched T.S. and that they had gone camping. RP 1186. Concerned about the police interviewing L.C., defendant told Tierce to speak with Kisha about the babysitter/camping story before L.C. spoke to police. RP 1193. Defendant wanted Tierce to continue to go along with this story because he did not want them to go to jail. RP 1195. Tierce kept to this story with police until August 5, 2004, out of fear for her own life. RP 1194. Tierce was afraid of defendant based on his past threatening behavior and his actions with T.S.¹³ RP 1196.

¹³ When pressed by defense counsel, Tierce said "Obviously, he did something to [T.S.]. We were the only two in the house." (Referring to time of the homicide). RP 1196.

While in jail, Tierce and the defendant wrote letters to each other contrary to a no contact order. RP 1203. Defendant wrote Tierce telling her he wanted Tierce to take the best plea offered her and exonerate defendant at his trial. RP 1205. Defendant also wrote Tierce that the State could not prove its case if they did not “snitch” on each other. RP 1206. Defendant told Tierce to have her attorney suppress the video and provided her with cases names to research to support this endeavor. RP 1206-08.

When T.S. moved into defendant’s home in June, Tierce recalled T.S. ate and drank without problems. RP 1209. Later, Tierce noticed T.S. was eating less and discussed this with defendant. RP 1210. Defendant “blew it off.” RP 1210. Tierce noticed a big decrease in T.S.’s eating during the last week of July. RP 1230. That same week, Tierce recalls a time when T.S. acted “stupid” or “handicapped.” RP 1211.¹⁴ During this time, defendant acted more irritable than normal. RP 1126. Tierce could not explain why T.S. was wearing different clothes in the video than the clothes the paramedics took off her. RP 1219-23. Contrary to her testimony on direct, Tierce admitted that the video could have been

¹⁴ During the video, Tierce calls T.S. stupid and handicapped as T.S. struggles to obey Tierce’s commands to keep her head up and to not lie down. States’ Ex. 12.

recorded a day or two before T.S.'s death. RP 1223. She pleaded guilty to second degree murder. RP 1142.

Defendant testified in his own defense. RP 1251-1271, 1299-1371. Defendant claimed he punished and corrected T.S. only two or three times during the two months she stayed with him. RP 1265. He testified he "swatted her bottom through her diaper" during a potty training incident. RP 1265. He also slapped her hands when she tried to put her hands into an electrical outlet. RP 1267. Defendant testified he only used a belt on T.S. on one occasion giving her a "few swats" on the side of her leg while she sat in her highchair. RP 1268. This occurred because T.S. was not eating her food. RP 1269. Defendant admitted he lied to Detective Wood when he said he never spanked T.S. because he did not want the police to get the wrong impression of the two bruises she had on her head. RP 1268. For most of the month of July, defendant said he was away from home hanging out with his friends and fixing cars. RP 1305, 1489. Defendant testified that two days before T.S. died, Tierce called him complaining about how it was not her job to care and discipline his children. RP 1306.

According to defendant, T.S. fell and hit her head twice on July 23, 2004. RP 1307-09. During the last week of July, defendant claimed to have been away from home most every day. 1313-1330. Defendant

testified that he watched a movie with L.S. until midnight on Thursday, the day before the homicide. RP 1331. He left the next morning before his family awoke and did not return until about 1:30 p.m. RP 1336. At that time, T.S. and his infant daughter were sleeping. RP 1336. He stayed at home while Tierce got him ibuprofen for his toothache. RP 1337. Defendant claims that he awoke to the sound of Tierce having difficulty putting T.S. into her highchair. RP 1338. Before falling asleep, defendant saw Tierce give T.S. a cup of juice. RP 1339. When defendant awoke, he heard Tierce yelling that something was wrong with T.S. RP 1340. T.S. was making a gurgling sound before defendant attempted CPR. RP 1340.

During this time, defendant claims Tierce concocted the babysitter story. RP 1341. Defendant said Tierce told the camping story to the 911 operator. RP 1342-43. Defendant claimed Tierce was worried about getting in trouble for the bruises on T.S.'s head, the ones she sustained when she fell down. RP 1341. Defendant did not notice any other bruises on T.S. when he administered CPR to T.S.¹⁵ RP 1341. Defendant momentarily stopped CPR to retrieve a phone number for Tierce that was supposed to be the babysitters' phone number. RP 1342. According to

¹⁵ Defendant's testimony that he was only aware of the bruises on T.S.'s head was inconsistent with his interview with detectives where he mentioned other bruises all over her back and bottom. RP 1410-14.

defendant, he did not stop CPR until the fire department and ambulance arrived. RP 1343.

Defendant said he later lied to police about the babysitter/camping story to protect Tierce. RP 1351. Defendant learned from the medical examiner that his daughter died of blunt force trauma. RP 1354. At that time, defendant claims he thought T.S.'s fall caused her death. RP 1354. Defendant testified he was unaware of the video Tierce recorded of T.S. when the detectives requested his permission to take it. RP 1357.¹⁶

Under cross-examination, defendant stated he never bathed T.S. and seldom changed her diapers. RP 1374. Defendant said it was Tierce's responsibility to potty train T.S. RP 1488. Defendant acknowledged telling the police that T.S. had fallen while chasing a neighbor's dog when she hit her head on a rock. RP 1390. Defendant admitted the story about T.S. hitting her head on cement was not true. RP 1401. Defendant admitted that the camping/baby sitter story was a lie and that he "just kept adding to it." RP 1392-1400, 1428. Defendant acknowledged he lied about facts that did not matter just to tell the lie. RP 1409. He explained he lied to the police because he was just going along with the story Tierce had told him. RP 1408. Defendant claimed to not know how T.S. died but admitted he was not helping detectives find the truth during his

interviews with detectives. RP 1416-1420, 1424. Defendant acknowledged the babysitter's pager number he gave police was actually his old pager number. RP 1422. Defendant acknowledged that his testimony about not being home the morning of the homicide was contrary to what he told detectives. RP 1429. Defendant said he hit T.S. once on the hand and three times with a belt in one episode about two weeks before her death.¹⁷ RP 1268, 1485-87. Defendant acknowledged a belt hung from a door handle outside of the camera view on the video and that T.S. was looking in that direction as Tierce told her that T.S. should do what Tierce tells her or "Daddy will come in with the belt." RP 1491. State's Exhibit 12. Defendant could not explain the belt mark on T.S.'s face at the time of her death. RP 1494. Defendant said the last time he saw T.S. was the Friday a week before her death. RP 1499. Defendant testified that he did not know about the extensive bruising to T.S.'s body until June 17, 2005 even though he appeared for arraignment on before that date and that information was contained in the information. RP 1511. In all defendant's correspondence with Tierce while he was in jail, he never asked her whether she killed T.S. RP 1539.

¹⁶ This is contrary to what he told detectives that day. RP 1429-39, 1458.

¹⁷ Using a belt, defendant showed the jury how hard he hit T.S. RP 1493. In redirect, defendant stated he did not hit T.S. hard enough to leave a bruise. RP 1526.

C. ARGUMENT.

1. THE LEGISLATURE'S 2005 AMENDMENTS TO THE SRA TO BRING IT INTO CONFORMITY WITH THE PROCEDURAL REQUIREMENTS OF BLAKELY SHOULD APPLY RETROACTIVELY TO THIS CASE; THE EXCEPTIONAL SENTENCE IMPOSED BELOW CONFORMED WITH THE REQUIREMENTS OF RCW 9.94A.536.

Generally, statutes are presumed to apply prospectively, unless the enactment is remedial in nature. Miebach v. Cloasurdo, 102 Wn.2d 170, 180-181, 685 P.2d 1074 (1984); Johnston v. Beneficial Management, 85 Wn.2d 637, 641, 538 P.2d 510 (1975). "A remedial change is one that relates to practice, procedures, or remedies and does not affect a substantial or vested right." State v. Smith, 144 Wn.2d 665, 674, 30 P.3d 1245 (2002).

There is no constitutional impediment to giving procedural changes retroactive application in criminal cases. In Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977), the United States Supreme Court considered whether a change in the Florida death penalty statute subjected defendant to trial under an *ex post facto* law. Under the statute in effect at the time Dobbert committed his crime, a recommendation of mercy by the jury was not reviewable by the judge. Dobbert, 432 U.S. at 288, n. 3. Under the statute in effect at the time of Dobbert's trial, however, the jury could render an advisory opinion only. Id. at 291. Dobbert's jury recommended a life sentence, but the trial judge

overruled the recommendation and sentenced Dobbert to death. Id. at 287.

On appeal, the United States Supreme Court concluded that the application of the new law to Dobbert's sentencing was not an *ex post facto* violation; the Court emphasized the procedural nature of the change:

It is ...well settled, however, that “[t]he inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed.” ... “[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation ... and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.” ... Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*. ... In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.

Dobbert v. Florida, 432 U.S. at 293-294. (citations omitted).

Similarly, after Arizona's capital sentencing scheme was found to be in violation of the Sixth Amendment in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Arizona Legislature amended the relevant laws to bring them into compliance. The Arizona Supreme Court rejected the claim that re-sentencing under the amended laws violated the *ex post facto* clause.

Under the holding of Dobbert, Arizona's change in the statutory method for imposing capital punishment is clearly procedural: The new sentencing statutes alter the method used to determine whether the death penalty will be

imposed but make no change to the punishment attached to first degree murder.

State v. Ring, 65 P.2d 915, 928 (Ariz. 2003); see also, Helsley v. State, 809 N.E.2d 292, 296-301 (Ind. 2004)(post-Ring change to death penalty statute, changing the respective roles of the judge and jury, did not violate *ex post facto* clause).

Washington courts have repeatedly recognized that a remedial statute should be applied retroactively when doing so would further its remedial purpose. In re F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992); Marine Power & Equipment Co. v. Washington State Human Rights Com'n Hearing Tribunal, 39 Wn. App. 609, 616-17, 694 P.2d 697 (1985). In State v. Hennings, 129 Wn.2d 512, 919 P.2d 580 (1996), this Court held that an amendment extending the time within which to enter restitution orders was a procedural change that applied retroactively. See also, State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997) (holding statute authorizing recoupment of appellate costs was procedural and retroactive); State v. Rodriguez, 61 Wn. App. 812, 815, 812 P.2d 868 (1991) (Rule of Appellate Procedure authorizing State's appeal was retroactive because procedural in nature). It is not necessary that the legislature expressly indicate that a procedural statute is to be given retroactive application as long as the legislative intent can be determined from the purpose of the statute. Scarsella Bros., Inc. v. State Dept. of Licensing, 53 Wn. App. 882, 771 P.2d 760 (1989).

On April 14, 2005, the same day that the Washington Supreme court issued its opinion in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), the Legislature passed laws amending the SRA which were designed to “create a new criminal procedure for imposing greater punishment than the standard range” in an effort to “restore the judicial discretion that has been limited as a result of the Blakely decision.” Laws of 2005, c. 68, §1. The law went into effect the next day with the Governor’s signature.

The rule set forth in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), was new constitutional rule of criminal procedure. See, Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 2523-24, 159 L. Ed. 2d 442 (2004), Guzman v. United States, 404 F.3d 139 (2nd Cir. 2005); United States v. Price, 400 F.3d 844, 845 (10th Cir. 2005); McReynolds v. United States, 397 F.3d 479, 480-481 (7th Cir. 2005). The 2005 amendments to the SRA simply implemented procedures to comply with Blakely. The new legislation amended RCW 9.94A.535 and created a new statute, codified as RCW 9.94A.537¹⁸, setting forth procedures to use to have the factual support for aggravating circumstances properly determined. These recent amendments are similar to those at issue in Dobbert and State v. Ring. They did not increase the punishment; rather they enacted procedural changes. As such the

¹⁸ Laws of 2005 c § 68 4.

amendments do not violate the *ex post facto* clause and are presumed to apply retroactively.

In this case, defendant committed his crimes before the decision in Blakely issued. CP 21-26. However, his trial occurred after the legislative fix to Blakely went into effect. Laws of 2005, c. 68; RP 20. Because this new legislation was remedial and procedural, it may be properly applied to his case. The prosecution below complied with the new procedures.

RCW 9.94A.537(1) requires that “prior to trial or entry of guilty plea...the state may give notice that it is seeking a sentence above the standard sentencing range” and that the notice “shall state aggravating circumstances upon which the requested sentence will be based.” The State gave defendant notice of its intention to seek a sentence above the standard range based upon the aggravating circumstances of deliberate cruelty, particularly vulnerable victim, and abuse of a positions of trust as found in former RCW 9.94A.535(2) (recodified as RCW 9.94A.535(3)¹⁹), of the current offense was. CP 1-6. Secondly, RCW 9.94A.537(2) requires:

The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be

¹⁹ Laws of 2005 c 68 § 3.

to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

Here, the jury was given special verdict forms and instructed that if it found defendant guilty of homicide by abuse and/or second degree murder predicated on second degree assault or criminal mistreatment, that it was to answer the questions in the interrogatories it was further instructed that it had to be unanimously satisfied beyond a reasonable doubt to answer the question “yes.” CP 174-75. The jury returned a special verdict finding the factual basis supporting these aggravating circumstances (1) abuse of a position of trust, (2) vulnerability T.S, and (3) and deliberate cruelty. CP 174-75. Based upon these findings, the court imposed an exceptional sentence on Count I, homicide by abuse.²⁰ CP 232-45, 258-64.

In a single paragraph, defendant dismisses the application of the new legislation to this case, claiming that to apply it would violate the *ex post facto* clause. Brief of Appellant at p.16. The only support or analysis for this claim is a citation to In re PRP of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). The reliance is misplaced however, because the amendment at issue in Hinton was not procedural:

The amendment added assault to the category of felonies that can serve as predicate felonies for second degree

²⁰ The court did not sentence defendant for count II as convictions for both counts would violated double jeopardy. RP 217-18. The issue of the validity of the jury’s guilty verdict in this circumstance is present in State v. Womac under Supreme Court Case, No. 78166-4. The court heard oral argument on October 26, 2006.

felony murder. The amendment was clearly substantive, and it increased criminal liability for those committing an assault that unintentionally led to death.

In re PRP of Hinton, 152 Wn.2d at 861 (2004). Hinton is not relevant to the case before the court.

The Washington Supreme Court currently has pending before it the issue of whether the 2005 Legislative amendments aimed at bringing the SRA into compliance with the decision in Blakely should be applied retroactively. This issue is present in State v. Base, Supreme Court Case No. 76081-1 and State v. Metcalf, Supreme Court Case No. 76077-2, two of the four cases consolidated under Supreme Court Case No. 75984-7 (State v. Pillatos). After the original oral argument in these consolidated cases, the Supreme Court asked for supplemental briefing on the retroactivity of the new legislation and the matter was reargued on October 25, 2005. This case could be stayed pending the Supreme Court's decision on this issue.

If the court does not stay this matter, it should find that the legislative amendments are retroactive and applicable to this case. As the prosecution below complied with the requirements of RCW 9.94A.537, the court should uphold the jury's determination of an aggravating circumstance and the court's imposition of an exceptional sentence.

2. WHEN IMPOSING DEFENDANT'S EXCEPTIONAL SENTENCE, THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S SIXTH AMENDMENT RIGHT UNDER HUGHES AND DID NOT EXCEED IT STATUTORY AUTHORITY TO IMPANEL A JURY TO DETERMINE THE EXISTENCE OF THE AGGRAVATING CIRCUMSTANCES.
 - a. The procedure used below did not violate the holding in Hughes.

The Washington Supreme Court held recently held that the exceptional sentence provisions of the SRA are facially valid in the wake of Blakely. State v. Hughes, 154 Wn.2d 118, 126, 110 P.3d 192 (2005). Hughes was a consolidated appeal of three defendants who received exceptional sentences based on aggravating factors not submitted to a jury in violation of Blakely. With no indication as to how the legislature might change the sentencing procedures in response to Blakely, the court had to decide what remedy was available for judicial fact-finding in violation of Blakely, the Hughes court concluded that a jury could not be empanelled on remand to find aggravating factors warranting an enhanced sentence because the SRA did not provide such a mechanism; the court opted not to create a procedure out of "whole cloth." Id. at 151. Hughes held that the proper remedy in this circumstance is vacation of the sentence and remand for imposition of a standard range sentence. Id. at 126, 154. Hughes specifically declined to decide the issue presented here: "...whether juries

may be given special verdict forms or interrogatories to determine aggravating factors at trial.” Hughes, 154 Wn.2d at 149-50.

Against this backdrop, the defendant argues that the trial court exceeded its authority by creating a sentencing method not authorized under State v. Hughes, 154 Wn. 2d 118, 110 P.3d 192, 208 (2005). The defendant’s reliance on Hughes is misplaced. Hughes is not the absolute prohibition on judicially implied procedures for imposing sentence enhancements that defendant claims. In Hughes, the court considered the statutory procedure for imposition of exceptional sentences. The legislature had not failed to provide a procedure; it had instead specifically provided that a judge, not a jury, must find the facts to impose such a sentence. Hughes, 154 Wn.2d at 148-49, 151. When it declared the legislature's specified procedure unconstitutional because a jury must instead find those facts, the court was unwilling to create a procedure completely opposite from that created by the legislature. Hughes, 154 Wn.2d at 150, 151-52.

Here, defendant’s situation is different. He does not claim that the legislature created a system inconsistent with that used by the trial court in his case. When “a statute merely is silent or ambiguous” a court may “imply a necessary procedure.” Hughes, 154 Wn.2d at 151. Moreover, Hughes is even narrower, because the court emphasized the limited nature of its holding: “We are presented only with the question of the appropriate remedy on remand—we do not decide here whether juries may

be given special verdict forms or interrogatories to determine aggravating factors at trial.” Hughes, 154 Wn.2d at 149.

The Hughes case involved a completed trial where a jury had already determined defendants’ guilt. Allowing the trial court to impanel a sentencing jury on remand created many obstacles for the Supreme Court to tackle. Such a remedy on remand required the court to authorize trial courts to use a sentencing procedure directly in conflict with that provided in the SRA at that time. Id. at 151-52. Additionally, such a remedy would require the court to authorize trial courts to submit technical and legalistic aggravating factors to the jury when it was “different to conceive that the legislature would intend to desire for lay juries to apply them.” Id. at 151. Finally, such a remedy raises numerous logistical questions including whether the same jury is required, whether these jurors can be located, and whether these jurors have been tainted by outside information or conversations about the case. These factors are not present in this case.

In sum, the passage of the Laws of 2005, Ch. 68 means that the procedures the court would be implementing procedures, under their inherent authority to do so, that would not conflict with existing law. Furthermore, the passage of the Laws of 2005, Ch. 68 expresses the legislature’s intent to instruct juries on the enumerated aggravating factors, answering the court’s concern in Hughes. Finally, because the jury determined the existence of aggravating factors at trial, the logistical

concerns of reconvening a prior jury panel are not present in this case. The trial court's ruling which allowed the jury to decide aggravating factors did not offend Hughes.

b. The trial court did not exceed its statutory authority.

Defendant contends that the trial court exceeded its authority when it gave special interrogatories to the jury regarding three aggravating factors. CP 174-76, Special Verdict Forms A, B, and C. As argued above, the legislature's amendments to the SRA apply retroactively to defendant's case. Even if these amendments do not apply retroactively, the trial court has authority under existing criminal rules to instruct a jury regarding special findings or verdicts. RCW 9.94A.535 provides that whenever an exceptional sentence is imposed, the court must set forth reasons for its decision in written findings of fact and conclusions of law.

RCW 2.28.150 provides that;

When jurisdiction is, by the Constitution of this State, or by statute, conferred on a court or judicial officer all means to carry it into effect are also given; and in the exercise of jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

The criminal rules require the court to provide a jury when the defendant has a right to a jury trial. CrR 6.1(a) ("Cases required to be

tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.”) Under Blakely, defendant has a constitutional right to a jury trial on the aggravating factors. The criminal court rules further allow the court to submit special verdict forms to the jury regarding aggravating circumstances:

Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

CrR 6.16(b). The trial court’s actions were consistent with this statutory authority provided above.

In State v. Davis, 133 Wn. App 415, 138 P.3d 132 (2006), defendant was convicted of harassment, unlawful imprisonment, and several misdemeanors. Id. At trial, the court submitted to the jury a special interrogatory asking whether the defendant knew or should have known the victim was particularly vulnerable. Id. at 420. The jury found this aggravating factor existed. Id. The sentencing court imposed an exceptional sentence based on this aggravating factor. Id.

On appeal, defendant claimed this procedure violated defendant’s Sixth Amendment right under Blakely and Hughes. Id. at 426. Division Three of the Court of Appeals disagreed, concluding that the trial court fashioned a process that conformed to RCW 2.28.150, RCW 9.94A.535, and CrR 6.1(b). Id. at 428. The appellate reasoned that because 1) the

trial court had authority to submit the special interrogatory; 2) a jury found the aggravating factor; and 3) the trial court properly exercised its discretion by imposing an exceptional sentence based on that factor, that there was no Blakely error. Id. This court should follow Davis.

Previous appellate court decisions have required the trial court to submit special findings to the jury in a variety of contexts. See State v. Roberts, 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000) (death penalty case involving accomplice liability issues, jury should be presented with special interrogatories concerning defendant's level of involvement); State v. Manuel, 94 Wn.2d 695, 700, 619 P.2d 977 (1980) (when defendant seeks reimbursement for self-defense, special interrogatories should be submitted to jury). Blakely now requires the court to do so before an exceptional sentence may be imposed.

If the jury finds that the aggravating circumstances exist, the court may impose an exceptional sentence if it finds substantial and compelling reasons to do so. See Blakely, 124 S. Ct. at 2538 n.8; RCW 9.94A.535 (“The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.”)

The United States Supreme Court did not hold the exceptional sentence provisions of the SRA completely void or unenforceable; it simply held that the sentencing procedures used by Blakely's sentencing court did not comply with the Sixth Amendment.

If a statute is constitutional when interpreted in one manner but unconstitutional when interpreted in another, “the legislature will be presumed to have intended a meaning consistent with the constitutionality of its enactment.” State ex rel. Dawes v. Wash. State Highway Comm'n, 63 Wn.2d 34, 38, 385 P.2d 376 (1963).

“A statute held invalid as applied is not void on its face or incapable of valid application in other circumstances.” Foundation for the Handicapped v. Department of Social and Health Services, 97 Wn.2d 691, 628 P.2d 884 (1982) (due process flaw in statute corrected by procedures adopted by DSHS requiring proper notice).

This court can ensure that the sentencing procedures in this case comply with the Sixth Amendment and the SRA, thereby giving effect to the statute, and avoiding a declaration that the SRA is unconstitutional. See United States v. Ameline, 376 F.3d 967, (9th Cir. July 21, 2004) (post-Blakely holding that federal district courts can impanel juries to decide facts concerning sentencing enhancements despite absence of federal sentencing statute explicitly providing for such a procedure).

Moreover, Washington case law recognizes that when a defendant has a constitutional right to a jury, a jury should be impaneled regardless of whether the right to jury has been incorporated into a statute. For example, although Washington’s habitual offender statute, RCW 9.92.030, was amended in 1909 to delete the requirement that a jury decide the defendant’s habitual offender status, trial courts regularly impaneled juries

to make such determinations for over seventy years. See State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003); State v. Courser, 199 Wash. 559, 560, 92 P.2d 264 (1939); State v. Fowler, 187 Wash. 450, 60 P.2d 83 (1936). The statute was still not amended after the Washington Supreme Court held in 1940 that there was a constitutional right to a jury in habitual offender proceedings. State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940), overruled by, State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003). Yet Washington courts continued to recognize that they had the power to impanel juries for habitual offender proceedings. See Smith, 150 Wn.2d at 144.

Similarly, the school zone/bus stop sentencing enhancements set forth in RCW 69.50.435 make no specific provision for impaneling a jury to decide whether the facts support the enhancement. Yet there has been no doubt that Washington courts have the authority to instruct the jury and provide special verdict forms concerning the enhancement. State v. Becker, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997). Certainly, this court has the power to permit trial courts to submit interrogatories concerning exceptional sentence aggravating factors to the jury.

In Haekins v. Rhay, this Court found the improper exclusion of jurors for cause due to their opinions on the death penalty, mandated an new sentencing hearing, but not a new guilt phase. Haekins v. Rhay, 78 Wn.2d 389, 399, 474 P.2d 557 (1970). The court observed that while there was no statutory framework to order a new trial on only the penalty

phase, doing so would satisfy the intent of the legislature. *Id.* at 399-400, citing *State v. Davis*, 6 Wn.2d 696, 108 P.2d 641 (1940); *State v. Todd*, 78 Wn.2d 362, 474 P.2d 542 (1970).

Nothing in the SRA prevents a court from having the jury complete special verdict forms with respect to facts that would support the imposition of an exceptional sentence. The only portion of the SRA that can no longer be applied when a court is considering the imposition of an exceptional sentence above the standard range is part of RCW 9.94A.530(2): “Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence.” (Emphasis added). After *Blakely* these findings must be made beyond a reasonable doubt. The SRA does not mandate that the court be the finder of fact. It simply requires a hearing and findings. In the instant case, the trial court properly submitted interrogatories to the jury under Washington law. The state proved to a jury beyond a reasonable doubt the facts supporting an exceptional sentence. Accordingly, this procedure did not offend *Blakely*.

- c. Defendant has failed to show the existence of an equal protection claim or the infringement on his right to trial.

The equal protection clauses of the Fourteenth Amendment and Washington Const. art. 1, § 12 require that “persons similarly situated

with respect to the legitimate purpose of the law receive like treatment.”” State v. Phelan, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983). Someone who believes that he has been disadvantaged by a legislative enactment that treats similarly situated persons differently may challenge that law on equal protection grounds. Traditionally, two tests have been used to determine whether this right to equal treatment has been violated. Under the rational relationship test, a law is subjected to minimal scrutiny and will be upheld ““unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective.”” Phelan, at 512. Under the strict scrutiny test, a law may be upheld only if it is shown to be necessary to accomplish a compelling state interest. State v. Rice, 98 Wn.2d 384, 399, 655 P.2d 1145 (1982). The strict scrutiny test is used if an allegedly discriminatory statutory classification affects a suspect class or a fundamental right. Phelan, at 512; Rice, at 399. Both the United States Supreme Court and this court have recognized a third test to apply in limited circumstances. Under the “intermediate scrutiny” test, the challenged law must be seen as furthering a substantial interest of the state. Phelan, at 512. The Supreme Court typically applies this test where gender-based classifications are at issue. Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

As far as the State is aware, a court will only consider an equal protection claim when the challenge is based upon a statute or law as enacted by the legislature. The State is unaware of any case, and none are

cited in appellant's brief, where the court has analyzed a statute on equal protection grounds while taking into consideration an overlay of recent case law which affects how the statute is implemented. None of the tests used to assess equal protection claims are appropriate in such circumstances for each looks just to the legislative goals with no consideration of how those goals may have been affected or impacted by recent judicial decisions. Defendant does not challenge any statute as enacted or argue how it creates two classes out of similarly situated persons. Defendant has failed to show that an equal protection claim is cognizable under the circumstances presented here.

3. JURY INSTRUCTIONS WERE PROPER WHERE
AGGRAVATING FACTORS ARE NOT
INHERENT WITHIN THE OFFENSE OF
HOMICIDE BY ABUSE.

Appellate courts review de novo whether a sentencing court has justified an exceptional sentence with a "substantial and compelling" reason. RCW 9.94A.505, State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986). The trial court's reasoning will be upheld unless it is clearly erroneous. Id. If some of the trial court's articulated reasons are invalid, appellate courts may uphold the exceptional sentence only if it can be determined from the record that the trial court would have imposed the same sentence even without the invalid reasons. State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1996).

In the instant case, the jury found three aggravating factors to justify defendant's exceptional sentence: abuse of trust, victim vulnerability, and deliberate cruelty. CP 174-75. Defendant argues that these aggravating factors are inherent in the offense of homicide by abuse and may not be used to justify departing from the standard range. Brief of Appellant at 37. Our Supreme Court has rejected this argument in State v. Berube, 150 Wn.2d 498, 79 P.3d 1144 (2003).

In Berube, two defendants were convicted for homicide by abuse of a 23 month old boy. Berube, 150 Wn.2d at 501. The judge found three aggravating factors, abuse of trust, victim vulnerability, and deliberate cruelty justified defendants' exceptional sentences. Id. at 512-13. On appeal, the defendants argued that these factors were inherent in the crime of homicide by abuse and could not support an exceptional sentence. Id. at 513. Our Supreme court disagreed finding all three factors were not inherent in the crime. Id. at 513-14.

In regard to extreme youth, the court concluded that this factor was not inherent when the victim's age makes him more vulnerable than other victims. Id. at 513. (Citing State v. Russell, 69 Wn. App. 237, 251-52, 848 P.2d 743 (1993)). The court reasoned that the victim's extreme youth (23 months), complete dependence on the defendant caregivers, and inability to defend himself supported this aggravating factor. Id. at 513.

In regard to abuse of trust, the court concluded that this factor was not inherent in the offense of homicide by abuse because a familial or

household relationship is clearly not an element of the crime (citing Russell, 69 Wn. App at 252-53) and therefore the abuse of family or household members' position over their victims is a valid aggravating factor. Berube, 150 Wn.2d at 513-14 (citing State v. Grewe, 117 Wn.2d 211, 220, 813 P.2d 1238 (1991)). Accordingly, the court found defendants' abuse of their position of trust over the victim was a valid aggravating factor.

Finally, in regard to deliberate cruelty, the court concluded that this factor is valid where evidence supports "gratuitous violence, or other conduct which inflicts physical, psychological or emotional pain as an end in itself." Id. at 514. (Citing State v. Talley, 83 Wn. App 750, 760, 923 P.2d 721 (1996)).

Similarly, this court in State v. Russell, 69 Wn. App 237, 848 P.2d 743 (1993), decided that the aggravating factors of particular vulnerability (extreme youth), abuse of trust, and deliberate cruelty do not inhere in homicide by abuse. Id. at 252-254. This court should reject defendant's claims as they are absolutely contrary to controlling precedent.

Defendant also contends that the jury must decide whether the facts presented in this case distinguish it from other crimes homicides by abuse or second degree murders predicated on assault or criminal mistreatment. Defendant is mistaken. Whether the facts found by a jury are sufficiency substantial and compelling to warrant an exceptional sentence is a legal conclusion left to the judge, not a factual determination

for the jury. Accord State v. Suleiman, No. 76807-2, 2006 LEXIS 732, * 14, n. 3. Here, the jury found the facts supported the aggravating circumstances (CP 174-76) and the court appropriately made the legal conclusion that these circumstances were sufficiently substantial and compelling to warrant an exceptional sentence. CP 238-64.

4. THE COURT'S INSTRUCTIONS WERE PROPER WHEN AGGRAVATING FACTORS OF VULNERABILITY OF VICTIM AND DELIBERATE CRUELTY DO NOT INHERE IN SECOND DEGREE MURDER PREDICATED ON FIRST DEGREE CRIMINAL MISTREATMENT. ABUSE.

Defendant also claims the aggravating factors of victim vulnerability, deliberate cruelty, and abuse of trust inhere in second degree felony murder with the predicate crime of criminal mistreatment. Brief of Appellant 38. This claim should be rejected for several reasons. First, defendant is requesting this court review a potential sentence the court has not imposed. The trial court imposed sentence on Count I only. The court's sentence on the aggravating factors does not implicate Count II. Therefore, should this court vacate the conviction on Count I, remand would be necessary for sentencing on Count II. At re-sentencing, the trial court could impose an exceptional sentence based on one or all of the aggravating factors the jury found in this case. At that time, the issue of whether these aggravating factors inhere to Count II would be ripe for appellate review.

Even if this court reaches the merits of this claim, defendant's claim fails. First, this court in State v. Rotko, 116 Wn. App 230, 242-43, 67 P.3d 1098 (2003), rejected the claim that, as a matter of law, particularly vulnerability inhered in the crime of first degree criminal mistreatment. Id. at 242-43 (citing State v. Bartlett, 74 Wn. App 580, 593, 875 P.2d 651 (1994)). In addition, a victim's age may be an aggravating factor, even when the statute violated applies only to children, if the victim's extreme youth makes the victim more vulnerable than other crimes of the same crime. State v. Russell, 69 Wn. App 237, 251-52, 848 P.3d 743 (1993). In Russell, a 20 month old child was found particularly vulnerable to homicide by abuse – a crime that that encompassed children between the ages of one day and 16 years. Id. at 252. In State v. Barlett, 74 Wn. App. 580, 593, 875 P.2d 651 (1994), aff'd, 128 Wn.2d 323, 907 P.2d 1196 (1995), the appellate court stated that “[a] 3-week-old child is a classic illustration of a vulnerable victim.” The court went on to hold that vulnerability of the victim is not an element of second degree criminal mistreatment. Id. at 593.

Here, defendant challenges victim vulnerability in relation to Count II. The age requirement for a child victim is the same for first, second and third degree criminal mistreatment. RCW 9A.42.010(3), RCW 9A.42.020-035. T.S. was two years and ten months old at the time of her death. RP 784. Accordingly, victim vulnerability does not inhere in second degree murder predicated on first degree criminal mistreatment.

Second, deliberate cruelty does not inhere in the crime of first degree criminal mistreatment where this gratuitous violence is conduct not usually associated with the commission of the offense in question. Rotko, 116 Wn. App at 243-44. The court instructions defined deliberate cruelty as "...violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself is more than is necessary to commit the crime." CP 163, Instruction No. 31. Deliberate cruelty occurs where, as here, the defendant's torture of T.S., water deprivation and belt beatings, occurred over several days and went well beyond typical reckless acts that would cause T.S. great bodily harm. Indeed the medical examiner opined that T.S. suffered head injuries consistent with falling from a five story building. RP 899. Thus, this the trial court properly relied upon the jury's finding on this aggravating factor when it departed from defendant's standard range sentence.

Finally, abuse of trust is the one factor here remotely possible of inhering to Count II.²¹ Abuse of trust is commonly used to justify an exceptional sentence for non-economic offenses where the defendant has taken advantage of a trust relationship where another had relied or

²¹ See generally, State v. Creekmore, 55 Wn. App. 852, 863, 783 P.2d 1068 (1989). Creekmore was convicted of second degree felony murder predicated on second degree assault and second degree criminal mistreatment. Id. at 854. On appeal, he challenged his exceptional sentence, arguing that "abuse of trust" inhered to the crime of criminal mistreatment because the crime presumes a breach of parental trust. Id. Because second degree assault sufficiently established defendant's second degree felony murder conviction, the court did not have to reach the issue presented here. Id.

depended on him. State v. Marcum, 61 Wn. App. 611, 612, 811 P.2d 963 (1991). A reckless abuse of trust may properly justify an enhanced sentence regardless of whether the defendant used a position of trust to facilitate the commission of the crime. State v. Chadderton, 119 Wn.2d 390, 398, 832 P.2d 481 (1992). Here, the jury found defendant used his position of trust over T.S. to facilitate second degree felony murder predicated on second degree assault and criminal mistreatment. CP 176-76. Defendant's reckless abuse of his trust relationship may coincide with his reckless act of withholding the basic necessities of his daughter's life that ultimately lead to her murder. As such, this aggravating factor conceivably inheres in the crime of second degree murder predicated on first degree criminal mistreatment.

However, the trial court determined that defendant's exceptional sentence was justified for any one of the aggravating factors standing alone. CP 258-64. In addition, the jury also found defendant guilty of second degree murder predicted on second degree assault and found beyond a reasonable doubt that defendant facilitated this crime with his abuse of his trust relationship with T.S. CP 175-76.²² Therefore, whether abuse of trust inheres to second degree murder predicated on criminal

²² In Creekmore, the appellate court held abuse of trust did not inhere in the crime of second degree murder predicated on second degree assault, concluding that Creekmore's withholding of medical treatment from his own child did not reduce the seriousness of the crime but his abuse of trust increased his culpability. Creekmore, 55 Wn. App. at 863.

mistreatment would not change the result of defendant's exceptional sentence should the court ever sentence him on Count II.²³

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED DEFENDANT'S CHALLENGE TO JUROR NO. 10 FOR CAUSE.

The defendant cannot establish prejudice regarding the trial court's denial of his challenges for cause because he removed the juror at issue through a peremptory challenge. The defendant challenges the trial court's rulings denying his challenge for cause against Juror Number 10. RP 362. The defendant cannot establish he is entitled to relief on this claim because this juror did not sit on this case. The defendant exercised a peremptory challenge against this juror. See, CP 269.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee every criminal defendant "the right to a fair and impartial jury." State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), conviction vacated on other grounds, 142 Wn.2d 868, 16 P.3d 601(2001) (citing State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987)). To ensure that right, a juror will be excused for cause if his or her views

²³ See, State v. Hughes, 154 Wn.2d 118, 201, 110 P.3d 192 (2005) ("Not every aggravating factor cited must be valid to uphold an exceptional sentence: '[w]here the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing.'" citing State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003)).

would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” State v. Hughes, 106 Wn.2d 176, 181, 721 [*158] P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)). See, RCW 4.44.170(2). The court will reverse a trial court's denial of a challenge for cause only upon finding a manifest abuse of discretion. Rupe, 108 Wn.2d at 748. The trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial. Rupe, 108 Wn.2d at 749.

A juror is biased if she has a state of mind toward the defendant that prevents her from impartially trying the issue. RCW 4.44.170(2); State v. Noltie, 116 Wn.2d 831, 837, 809 P.2d 190 (1991); State v. Alires, 92 Wn. App. 931, 937, 966 P.2d 935 (1998). “‘Prejudice’ is defined as ‘[a] forejudgment; bias; partiality; preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice.’” Alires, 92 Wn. App. at 937 (quoting BLACK'S LAW DICTIONARY 1061 (6th ed. 1990)). A juror will not be disqualified in a motion to remove for cause if she can set aside her preconceived ideas. Noltie, 116 Wn.2d at 838-40 (finding the trial court did not abuse its discretion in failing to remove a juror for cause when the juror said she would try to be fair, but there was just a possibility that she would start out leaning in favor of the State). State v. Mak, 105 Wn.2d 692, 707, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986). The actual bias of a potential

juror must be established by proof. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). Equivocal answers alone are not cause for dismissal. Rupe, 108 Wn.2d at 749.

In United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), the United States Supreme Court held that when a defendant unsuccessfully challenges a juror for cause and then exercises a peremptory challenge to remove the juror from the panel, the defendant has “cured” any alleged error for Sixth Amendment purposes with regard to the unsuccessful challenge for cause. Martinez-Salazar, 528 U.S. at 316-17; Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988); Rupe, 108 Wn.2d at 749. “So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment [guarantee of a fair and impartial jury] was violated.” Ross, 487 U.S. at 88; see also, Martinez-Salazar, 520 U.S. at 316.

The Washington State Supreme Court has adopted and applied the United States Supreme Court’s holding in Martinez-Salazar in analyzing whether the right to an impartial jury has been violated. State v. Fire, 145 Wn.2d 152, 166, 34 P.3d 1218 (2001). The Fire court concluded that “Washington law does not recognize that article I, section 22 of the Washington State Constitution provides more protection than does the Sixth Amendment to the United States Constitution. Hence, Martinez-Salazar defines the scope of a defendant’s right to an impartial jury in this

situation.” Fire, 145 Wn.2d at 165 (Alexander, C.J., concurring) (“We should . . . adopt the better rule that has been enunciated . . . in United States v. Martinez-Salazar. . . .”) Id. at 167.

In Fire, a trial court denied the defendant’s challenge for cause against a juror, and the defendant then exercised a peremptory challenge against the juror. The defendant subsequently exhausted all six of his peremptory challenges. This Court found the defendant was not entitled to relief under Martinez-Salazar:

[I]f a defendant through the use of a peremptory challenge elects to cure a trial court’s error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted.

Fire, 145 Wn.2d at 166.

The court in Fire also relied on its earlier holding in State v. Roberts, 142 Wn.2d 471, 14 P.3d 714 (2000). In Roberts, the defendant argued his constitutional right to an impartial jury was violated when the trial court denied his challenges for cause against 13 jurors. Four of the 13 jurors actually became seated in the jury box. The defendant then removed each of the four by using peremptory challenges, and none of the 13 jurors sat on his case. The defendant did not exhaust his peremptory challenges because the trial court offered to give the defendant two additional challenges that he ultimately did not use. This Court rejected

the defendant's challenge that his right to an impartial jury was violated: "We hold because Roberts has not demonstrated that jurors who should have been removed for cause actually sat on the panel, his rights were not violated." Roberts, 142 Wn.2d at 518.

Under Martinez-Salazar, Roberts, and Fire, a defendant must demonstrate that a juror who should have been removed actually sat on the panel before he can establish his constitutional right to an impartial jury was violated. Martinez-Salazar, 528 U.S. at 316-17; Roberts, 142 Wn.2d at 518; Fire, 145 Wn.2d at 164.

In the case at bar, the parties decided to exercise their six preemptory challenges during the selection of the 12 jurors and exercise their allotted two remaining preemptory challenges to the two alternative jurors. RP 174.²⁴ Neither party exercised preemptory challenges against the alternative jurors. CP 269.

During voir dire, defense counsel asked the venire whether they had any bias or prejudice against interracial relationships, noting that defendant was involved in an interracial relationship. RP 306. At which time the following exchange took place:

Juror # 10. I don't believe in intermarriage like that.

Mr. Schoenberger: And tell me about this. How long have you felt this way?

²⁴ The parties elected to not have a random draw for the selection of the alternative jurors. RP 174.

Juror #10: I was born and raised that way.

...

Mr. Schoenberger: ...How do you think you formed that view?

Juror #10: I don't know. It's just the way that my family thought. I didn't intermarry or we played with other kids and like that and worked with them. I still, to this day - I mean, I wouldn't marry a black person or an oriental or anything if I was going to get married.

Mr. Schoenberger: Is that going to affect your ability to go into the jury box in neutral?

Juror # 10: No. I think I could be, yeah.

Mr. Schoenberger: You could be?

Juror # 10: I think so.

Mr. Schoenberger: How can you tell me if you could be when you tell me that you are prejudiced against an interracial relationship?

Juror No. 10: Well, that's his choice. That wouldn't be mine. You are asking my choice?

Mr. Schoenberger: Mm-mm. No, what I'm really asking is not about your personal choice, but about your bias and if you can put that aside and go into this jury box in neutral and not hold it against Mr. Smith that he's had a relationship that was interracial. Can you do that?

Juror No. 10: I think so.

Mr. Schoenberger: But you're not sure?

Juror No. 10: Well, I don't know what to tell you.

Mr. Schoenberger: How strongly do you feel about this?

Juror No. 10: I feel strongly about that. I've raised my children the same way.

Mr. Schoenberger: Do you think that based upon these strong feelings that you would be unable to be fair and impartial to Mr. Smith in this case?

Juror No. 10: I think so.

Mr. Schoenberger: But you're not sure? Anybody else? ...

RP 306-08.

The next day, the defendant challenged this juror for cause. RP 357.

The court brought juror No. 10 out to be questioned outside the presence of the other jurors. RP 358. Defense counsel again asked Juror No. 10 whether his bias against interracial relationships would interfere with his ability to be fair and impartial. RP 359. Juror No. 10 responded that he could put this "emotional reaction" behind him, that it is the prerogative of other people to do other things, and that he has friends of other races. RP 360. Defense counsel had no further questions. RP 360

The prosecutor followed with this line of questioning:

Prosecutor: Juror No. 10, this is what we need to know. Because the defendant was involved in an interracial relationship, are you going to lower the burden of proof, are you going to say well, the State doesn't have to prove that he's really guilty because he was involved in an interracial relationship; are you going to say that to yourself?

Juror No. 10: No.

Prosecutor: Are you going to say, well, obviously, he must be guilty because he's the type of guy who would be involved in an interracial relationship; are you going to think something like that?

Juror No. 10: No. I don't believe so.

Prosecutor: Right now, you know nothing about the case, you've been told that he was – he had relationships with white women. Does he appear a little bit guilty to you right now even though you have/not heard any evidence because he was involved with white women?

Juror No. 10: No.

Prosecutor: Are you going to be able to separate how you feel about someone having interracial relationships? Are you going to be able to separate that from listening to the evidence and judge the guilt or the innocence of this defendant based only on the evidence? Are you going to be able to separate the two?

Juror No. 10: I think so.

Finding that Juror No. 10 indicated that he did not have a problem with other people engaging in interracial relationships and that the juror had no given any indication that he was going to hold defendant's interracial relationships against defendant, the court properly denied defendant's challenge for cause. RP 362. The defendant thereafter removed juror 10, by using one of his peremptory challenge. CP 269. Having been unsuccessful with this challenge, he cured any potential problems with this juror not being impartial by exercising one of his peremptory challenges.

Defendant suggests that Juror 10's bias toward interracial relationships compelled his removal from the case. Appellant's Brief at 45. Defendant's claim is without merit for several reasons.

First, the State successfully rehabilitated this juror. During this effort, Juror No. 10 said he did not believe defendant was guilty just because he was involved in an interracial relationship, would not lower the State's burden of proof by finding defendant guilty just because he is an interracial relationship, and would be able to separate how he feels about someone having interracial relationships, and judge the guilt or the innocence of defendant based only on the evidence. Juror 10 clearly demonstrated a willingness to set aside his beliefs and decide the case impartially, said he could decide the case based on the law and the facts and could separate his feelings toward interracial relationships from the issues at trial. Certainly, juror's later responses to questioning did not require his removal for cause. The court properly exercised its discretion by denying defendant's challenge for cause.

Second, defendant argues that his relationship with a white woman was central to his case and that this juror was not rehabilitated. Yet his relationship with Tierce, a white woman, was not central to the case for several reasons: 1) Whether defendant dated white women or not had no bearing on any issue at trial, 2) Defendant's daughter, not Tierce, was the victim in this case, 3) Tierce was not the biological mother of the victim, and 4) Tierce was also culpable in T.S.'s murder.

Third, had defendant successfully challenged this juror for cause, Juror 36 would have been eligible for a preemptory as a member of the panel of twelve. (State exercised preemptory challenges against Nos. 31 and 35 and defendant challenged No. 32). Defendant "passes" jurors number 36 and 37. CP 269. Hence, defendant's claim that he was deprived of his right to unfettered enjoyment of his preemptory challenges lacks merit.

Finally, because Juror No. 10 did not sit on his case, defendant cannot show that he was deprived of the right to a fair and impartial jury. His arguments to the contrary should be rejected.

6. DEFENDANT FAILED TO PRESERVE THE ISSUE WHETHER THE PROSECUTOR MADE INAPPROPRIATE REMARKS IN CLOSING ARGUMENT, AND FAILS TO MEET HIS BURDEN OF PROVING IMPROPER CONDUCT THAT WAS PREJUDICIAL.

On this topic, the Washington Supreme Court has stated:

We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting there from so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction. Thus, in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The 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.

Moreover, “[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.”

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960); State v. Atkinson, 19 Wn. App. 107, 111, 575 P.2d 240, review denied, 90 Wn.2d 1013 (1978))
[footnotes omitted] [emphasis added].

A trial court’s rulings based on allegations of prosecutorial misconduct are reviewed under the abuse of discretion standard. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The defendant bears the burden of establishing both the impropriety of the prosecutor’s remarks and their prejudicial effect. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the

argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) “remarks must be read in context”. State v. Pastrana, 94 Wn. App. 463, 479, 972 P.2d 557 (1999) (citing State v. Greer, 62 Wn. App. 779, 792-93, 815 P.2d 295 (1991)).

Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict. Finch, 137 Wn.2d 792 at 839. The trial court is best suited to evaluate the prejudice of the statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). If the error could have been obviated by a curative instruction and the defendant failed to request one, reversal is not required. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so “flagrant and ill intentioned” that no curative instruction would have obviated the prejudice it engendered. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

In this case, defendant argues that the prosecutor made numerous improper statements during closing argument, and that the cumulative effect of these statements denied him a fair trial. Appellant’s brief at pp.62-67. This court should reject these claims because defendant did not object to this at the time, he did not seek a curative instruction, nor did he move for a mistrial on this ground. By not sufficiently objecting to the

statements or requesting curative instructions at trial, defendant waived the alleged errors and thereby failed to preserve the issue of prosecutorial misconduct for appeal. Even if the issue was preserved, the defendant has not met his heavy burden of showing that the prosecutor's comments were flagrant and ill-intentioned, and further that there is an resulting prejudice. The State will address each of the alleged improper statements in turn.

Defendant first claims that the prosecutor committed prejudicial misconduct when he compared defendant to Tierce, who pleaded guilty to second degree murder, and thus prompted the jury to fault defendant for exercising his right to trial. Defendant failed to object to this comment below.

Evidence established that T.S.'s death was not instantaneous but resulted from a pattern of abuse days before her murder. RP 760-68, 818-30. For example, the evidence showed T.S. had been severely beaten, which bruised most of her small body, (State's Exhibit Nos. 27, 33-35) had been denied sufficient water or medical care necessary to hydrate her body after these beatings, RP 711-117, RP 905-06, 1663, State's Exhibit 12, and ultimately suffered blunt force trauma that hastened her death. RP 898-99, 974. Using this evidence in closing argument, the prosecutor exposed defendant's testimony as not credible. RP 1637-1641.

During the trial, defendant maintained he was not home during the relevant time period before the homicide and that Tierce was responsible

for his daughter's death. RP 1305-38.²⁵ The challenged comment followed the prosecutor's reference to the fact that Tierce was defendant's witness. RP 1644. In closing argument, the prosecutor pointed to defendant's culpability by using defendant's witnesses' testimony against defendant. RP 1644. The prosecutor then weaved this argument into the State's accomplice liability theory by stating the following:

A moment ago, I said let's face it, defendant's running this show, but does it really matter? Does it really matter whose story this is? They're both culpable in her death. They're both responsible for T.S. being beat to death, they were both there, they both participated in it and [L.S.] said they both hit her (T.S.). This isn't a question of somebody having no idea of what was going on. They're both responsible. The difference is Christina admitted it and the defendant didn't.

RP 1646-47.

The jury was instructed on accomplice liability. CP 138, Instruction No. 8. This comparison illustrated that while defendant was pointing at Tierce as the perpetrator, the evidence pointed to the defendant as the primary actor or at least an accomplice in this heinous crime. The prosecutor's comment was not ill-intentioned or flagrant misconduct. Having not raised an objection below, defendant has waived this claim.

²⁵ This is contrary to his statement to police that Tierce did not commit the crime. RP 939-41, 991.

Defendant next contends the prosecutor twice misstated the law in rebuttal closing argument by: 1) arguing defendant's mere presence at the home was enough to establish accomplice liability and 2) that the jury had to believe defendant to acquit him. Brief of Appellant at 63. Defendant has taken the prosecutor's rebuttal comments out of context. In rebuttal argument, the prosecutor made the following remarks:

Counsel said there are three possibilities. Three possibilities. Okay. You know what, let's write down the three possibilities. The defendant did it alone. They both beat T.S. She beat T.S. There's something that counsel left out. Counsel stopped here, but he failed to tell you, ladies and gentlemen, is that if she beat T.S., and he was in that house and he encouraged or aided her in any way, if he was an accomplice to her crime, then he is guilty, guilty, guilty. Any one of those scenarios, he's guilty. The only way he is not guilty is if she, in fact, did it all by herself and he was never in that house. If you believe that, you believe that; he walks out that door a free man.

RP 1731.

This record does not support defendant's claims. The prosecutor was simply responding to remarks trial counsel made in closing argument. The prosecutor's remarks explored the weaknesses in defendant's theory that Tierce was solely responsible for T.S.'s death. In explaining accomplice liability, the prosecutor argued the evidence that indicated defendant not only was present at the time he claimed to have been absent

from the home, but contributed to his daughter's demise by beating T.S. with a belt. RP 1719-1721, 1731-135.

Even improper remarks are not grounds for reversal if they are a pertinent reply to defense acts and statements. State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). Moreover, the prosecutor properly argued inferences drawn from the evidence, properly stated defendant's role under accomplice liability as that concept was instructed to the jury. The jury in this case was instructed to disregard any remarks by the attorneys not supported by the law as stated by the court. CP 133, Instruction No. 1. The jurors were instructed that they were to apply the law as given by the court. CP 134, Instruction No. 1. Jurors are presumed to follow the instructions given to them by the court. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). As such, the prosecutor's remarks in this case were not so flagrant or ill-intentioned to require reversal.

Finally defendant claims the prosecutor improperly appealed to the juror's emotions by giving the "how dare they" speech in rebuttal closing argument. As a final punctuation to the State's closing argument, the prosecutor sated,

....T.S. loved to sing, loved to dance, loved food, was not a character from a story. Her life is now gone, and they were both responsible, culpable, and how dare they – how dare they –he does not get off. He cannot get off because the State allowed her to plead to murder 2. Unjust. Can't happen.

Ladies and gentlemen, I ask you to find the truth, recognize what is the truth and what is not and recognize it

using your life experience, all the things that you've heard and seen in your own life, that's how you evaluate credibility, believability, truthfulness. I ask you to return a verdict that is just and that is right, the only verdict that is possible and meaningful in this case. Thank you.

RP 1734-35.

Relying on State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991)

Defendant contends that these remarks amounted to an improper “send a message” argument. In Powell, the prosecutor's argument that to acquit the defendant, accused of child molesting, would have the effect of “declaring open season on children” warranted reversal. Id. at 918-19.

Contrary to defendant's claim, these remarks did not ask jurors to send a message to the community or to consider any factor other than Tierce's culpability and defendant's guilt. Defendant called Tierce as a witness ostensibly to take full responsibility for his daughter's murder.

Defendant's lack of credibility was abundantly clear, which exposed his culpability. The prosecutor appropriately argued that defendant is no less culpable for his actions merely because Tierce pleaded guilty to murder.

Even if any of these comments were misconduct, the evidence was so overwhelming that the outcome of the trial could not have been affected by the prosecutor's comments. Prosecutorial misconduct does not necessarily require reversal. “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the

error”’. State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988) (quoting State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986)). In spite of the alleged improper argument, the evidence of guilt is so overwhelming that this court should find the improper argument did not affect the jury verdict and was therefore harmless beyond a reasonable doubt.

As stated above, in order to prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. at 820. This is not the closing argument of prosecutors who are acting in bad faith or whose remarks are flagrant and ill-intentioned. Defendant has failed to meet his burden of showing that remarks were improper or that defendant was prejudiced thereby. Defendant’s claim fails.

7. DEFENDANT FAILS TO DEMONSTRATE HIS
COUNSEL WAS CONSTITUTIONALLY
INEFFECTIVE.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id.

“The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show counsel’s deficient performance prejudiced the defendant, i.e., that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The competency of counsel is determined from a review of the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Courts engage in a strong presumption that counsel’s representation was effective. McFarland, 127 Wn.2d at 335.

Defendant claims that his trial counsel was ineffective for not objecting to any of the alleged improper remarks the prosecutors made in closing argument. As argued above, neither prosecutor engaged in

misconduct during closing argument. Thus, trial counsel cannot be faulted for not objecting to the challenged remarks. Moreover, viewing the entire record this court should find counsel competent. He brought appropriate suppression motions,²⁶ motions in limine,²⁷ “half-time” motions,²⁸ thoroughly questioned jurors during voir dire,²⁹ challenged several jury instructions,³⁰ successfully proposed jury instructions,³¹ made appropriate objections at trial,³² presented several witnesses on the defendant’s behalf, and challenged the sentencing procedure.³³ Even if this court construes some of the prosecutors’ remarks as improper, defendant has not demonstrated the outcome of his trial would have been different absent these remarks in light of the overwhelming evidence of defendant’s guilt. Accordingly defendant had not met either Strickland prong and his claims should be rejected.

²⁶ RP 27-131. Counsel prepared memoranda in support of these motions. RP 8, 129, 130, 136.

²⁷ RP 131-147.

²⁸ RP 1000-10001, 1248-51.

²⁹ RP 305-318, 402-412

³⁰ RP 1448-49, 1572-1578-83.

³¹ RP 1442, 1546, 1555, 1595

³² E.g., RP 906, 1388, 1372, 1723

³³ RP 1749

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm defendant's convictions and deny defendant's

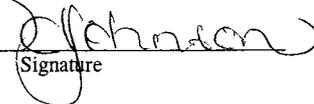
DATED: NOVEMBER 16, 2006

GERALD A. HORNE
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Deputy Prosecuting Attorney
WSB # 21457

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/16/06 
Date Signature