

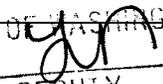
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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY   
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

LEON REYES, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kathryn J. Nelson

No. 06-1-00890-3

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**BRIEF OF RESPONDENT**

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GERALD A. HORNE  
Prosecuting Attorney

By  
MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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

1. When viewed in the light most favorable to the State, was there sufficient evidence for a reasonable jury to find that the defendant committed homicide by abuse when (1) H.K. died from a head injury consistent with shaking, (2) the defendant was the only adult with H.K. at the time of the critical injury, (3) the defendant's explanation of how the injury occurred was inconsistent with medical findings, and (4) the defendant had a pattern of abusing H.K., and (5) the defendant's actions demonstrated an extreme indifference to H.K.'s life? (Appellant's Assignment of Error Nos. 1, 2, 3, and 4).
2. When viewed in the light most favorable to the State, was there sufficient evidence for a jury to find the defendant guilty of murder in the second degree? (Appellant's Assignment of Error No. 5 and 6).
3. Can the defendant meet his burden of demonstrating that he received ineffective assistance of counsel when defense counsel made a legitimate strategic decision in arguing that the defendant should be convicted of manslaughter and not homicide by abuse? (Appellant's Assignment of Error No. 7).

4. Should this court remand to vacate the murder in the second degree conviction pursuant to State v. Womac?

(Appellant's Assignment of Error No. 8).

5. Are the trial court's reasons for imposing an exceptional sentence supported by the record, substantial and compelling, and justify the imposition of a sentence outside the standard range, and was the trial court's sentence excessive? (Appellant's Assignment of Error No. 9, 10, and 11).

B. STATEMENT OF THE CASE.

1. Procedure

On June 14, 2006, LEON LEE REYES, hereinafter "defendant" was charged by amended information with homicide by abuse and murder in the second degree. CP 5-6. On January 24, 2007, both parties appeared for jury trial. RP<sup>1</sup> 94. On February 9, 2007, the defendant was found guilty of homicide by abuse and murder in the second degree. CP 126, 129. The jury also returned special verdicts finding that the victim, H.K., was particularly vulnerable or incapable of resistance due to extreme youth. CP 199-200. On March 30, 2007, the defendant was sentenced to

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<sup>1</sup> The verbatim report of proceedings volumes I through XVI are consecutively numbered and will be referred to as "RP." There are two volumes of verbatim reports of proceedings which are independently numbered. Those volumes are from March 28, 2006, and March 30, 2007. When the respondent references either of those volumes the date will be referenced before the RP citation.

480 months on the homicide by abuse conviction. At sentencing, the State indicated that it was handing up an appendix which was a dismissal of count II, murder in the second degree. RP (3/30/07<sup>2</sup>) 4. The court sentenced the defendant to an exceptional sentence of 480 months based on the aggravating factor that H.K. was particularly vulnerable or incapable of resistance. CP 322-326. The defendant filed a timely notice of appeal. CP 313.

## 2. Facts

On February 20, 2006, Tacoma Police Officer O'Keefe and his partner, Officer Vause, were dispatched to 8833 Yakima Avenue in Tacoma. RP 143, 659. They were told that a child had fallen and had stopped breathing. RP 144. When they arrived at the scene, Officer Vause saw the defendant on the ground over the child, rocking him back and forth, saying that the child was not breathing. Id. The child, H.K., a minor, had a lot of vomit in his mouth, which Officer Vause cleared. Id. She then saw that H.K. took a breath. Id. Officer Vause asked another child who was present, Tristan, what happened, but Tristan indicated that he did not see what happened. RP 661.

John Goddu, a paramedic and firefighter for Tacoma responded to the scene. RP 358-359. Upon preliminary assessment, Goddu determined

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that H.K.'s respiration was low. RP 361. H.K. was taking six breaths a minute. Id. Normal breathing for a child H.K.'s age is 20 to 30 breaths. Id. Goddu noticed a bump above H.K.'s left eyebrow. RP 364. Goddu shined a pen light in H.K.'s eyes and received no response, which caused Goddu to be concerned that there was a traumatic brain injury. RP 366.

Officer Betts was dispatched at 9:10 p.m. RP 99. When Officer Betts arrived at the scene Officer O'Keefe and Specialist Vause were already inside the residence. RP 100. Officer Betts observed a child on the floor in the front room of the residence. Id. The defendant was the only adult present. RP 128, 146.

Officer Betts contacted the defendant, who appeared distraught. RP 102. The defendant told Officer Betts that his other minor children had reported that H.K. had fallen. RP 104. The defendant reported that when he went to check on H.K., he was saying "head, head, head" and pointed to his own head. RP 104, 115. The defendant stated that when he tried to pick H.K. up, H.K. became limp and then became unconscious. RP 104-105. H.K. began to spasm or shake in his hands. RP 115. The defendant stated that he shook H.K. to get him up but that it did not work. RP 115. The defendant indicated he took H.K. into the bathroom and splashed cold water on H.K.'s face to try to resuscitate him. RP 105, 115-116. He stated that H.K. began to vomit and that he called 911. RP 105. Officer Betts saw vomit in the hallway. RP 117.

The defendant reported to Officer Betts that H.K. had been taken to a doctor a few days earlier because H.K. had fallen. RP 105-106. The defendant told Officer Betts that he had been working hard on getting H.K. potty-trained and trying to get him to shower by himself “just like my own kids” but that it was difficult. RP 107. He indicated that H.K. had fallen in the shower and had a big knot on his head. RP 107-108. The defendant stated that H.K. had gotten into the shower, and the defendant had to use the toilet. RP 108. The defendant then left H.K. in the shower and closed the shower door. Id. He reported that H.K. then fell in the shower. Id.

He also stated that H.K. was crawling into the shower and that it was how he scratched his testicles. RP 119. Dr. Duralde indicated that a child’s testicles rubbing against a shower track would not cause trauma, but a direct blow or falling on the shower track would cause such injury. RP 242-243.

The defendant indicated that on a previous occasion H.K. had sustained a fractured elbow. RP 120. He stated that the doctor had referred the case to CPS but that nothing happened because the incident had occurred at day care. RP 121.

On the night of the incident the defendant was interviewed by Detective Devault and Detective Graham. RP 196-197, 694. The defendant stated that while he was washing dishes, he heard “the boys” fighting and making a lot of noise and later heard crying. RP 202. He

stated that he saw H.K. coming out of the eldest boy's room holding his head and complaining that his head hurt. RP 202. The defendant claimed that the two other boys had told him that H.K. had fallen off the top of the bunk bed. RP 203. The defendant stated that when he picked up H.K., H.K. "spazzed out" and went stiff. RP 203. He said that H.K.'s lips were turning blue and that he thought H.K. was dead. RP 204. The defendant stated that he held H.K. tight around the waist, almost to where his fingers could touch. RP 212. He stated that H.K. bent completely backwards and that his stomach was big. RP 212.

He stated that he took H.K. into the bathroom and splashed cold water on his face. RP 204. The defendant stated that he hit H.K.'s head on the sink several times. RP 212. The defendant said that H.K. may have been injured when he tried to splash cold water on H.K.'s face because he had bumped H.K.'s head into the sink. RP 211. He saw blood coming from H.K.'s mouth and mucous coming from H.K.'s nose. RP 204-205. He said he did not think H.K. was breathing and he called 911. RP 205-206. He stated that he began performing CPR on H.K. and said that he continued doing so until the paramedics arrived. RP 206.

The defendant told detectives that H.K. had a bruise under his ribs, and that he had been having diarrhea and a stomach ache. RP 207. The defendant said that had been working to get H.K. potty-trained. RP 208. He reported that H.K. had wet his pants earlier that evening when a friend of the defendant's was present. Id. The defendant had made H.K. take off

his pants, change his diaper, and put the diaper into the trash when he was done. RP 208. The defendant stated that “I had to jump his butt.” RP 208.

H.K.’s mother and the defendant’s wife, Laura Reyes<sup>3</sup>, indicated that the defendant would say that H.K. needed to “grow up” when H.K. would have accidents. RP 704. She indicated that the defendant “didn’t like it” when H.K. had accidents, particularly accidental bowel movements. RP 704-705. H.K. had been having diarrhea, but the defendant was upset that H.K. had accidents that were diarrhea. RP 704-705. While Laura did not think that H.K. should be punished for having an accident, the defendant did not feel the same way. RP 705.

H.K. was transported to Mary Bridge Children’s Hospital. RP 162, 168. When Dr. Paschall saw H.K., he already had a breathing tube inserted and was being given assisted ventilation. RP 169. H.K.’s color and circulation were very poor. RP 169. H.K. was also very cold. RP 169. H.K.’s abdomen was swollen. RP 169-170. Dr. Paschall was able to determine that H.K. was in critical condition. RP 170.

Once stabilized, H.K. was taken for a CAT scan of his head. RP 173. While being taken to the CAT scan machine, H.K.’s heart stopped and had to be restarted. RP 174. The CAT scan revealed that H.K. did

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<sup>3</sup> Because the victim’s mother and the defendant have the same last name, the respondent will refer to Laura Reyes by first name to eliminate confusion.

not have a skull fracture but there was a large collection of blood under the skull, which was pushing the brain to the left. RP 175-177. Dr. Paschall indicated that the injury was probably related to an acceleration/deceleration injury or a shaking-type injury. RP 177.

H.K. was then taken to the operating room to drain the collection of blood around his brain and to relieve the pressure on his brain. RP 179. Once a piece of H.K.'s skull was removed, Dr. Paschall could see that the dura, one of the coverings of the brain, was bulging with blood underneath it. RP 181. The dura was cut in order to drain the blood, and a large amount of blood came out once it was opened. RP 182. H.K.'s brain began to swell and doctors were unable to push it back into place because it was swelling out of the hole in the bone that had been made for the surgery. RP 183. The surgeon had to cut off part of H.K.'s brain tissue in order to get the remaining brain back into H.K.'s skull. RP 183.

After his operation H.K. was taken to the intensive care unit. RP 318. At that time, he was in a deep state of coma and had very temporary respiratory effort. RP 319. Within 12 hours, H.K. had no brain function. RP 319. A blood flow study was performed on H.K., in which it can be determined if blood is flowing to the brain. RP 187. It was determined that H.K. did not have blood flow to his brain and he was declared brain dead. RP 187-188, 319. A pronouncement of an individual being brain dead is a declaration of death. RP 190. On September 22, 2006, H.K. was taken off of life support. RP 190.

Dr. Paschall testified that he was able to make a determination, to a reasonable degree of medical certainty, that H.K.'s injuries were non-accidental in nature. RP 191. Dr. Paschall's conclusion was based on the fact that the severity of H.K.'s head injury was not consistent with the report of how H.K. sustained it, the CT scan revealed both the acute injury and previous injury, there were retinal hemorrhages and abdominal injuries, and there was evidence of multiple injuries that did not fit the story that he fell from a bunk bed. RP 191. Retinal hemorrhaging is found in blunt trauma and shaking-type injuries. RP 302. Dr. Duralde examined the medical records and autopsy reports of H.K. RP 234. She stated that she could see with a "pretty high degree of medical certainty" that the injuries were not accidental. RP 234.

Dr. Duralde reviewed prior injuries of H.K. RP 238. In March of 2005, H.K. was treated for an infected finger. RP 238. In April of 2005, H.K. was treated for an ankle sprain that was described as a "twist injury." RP 239. Records indicated that the injury had been noticed when H.K. began to limp. RP 239. The defendant told Child Protective Services (CPS) that he caused the ankle injury. RP 374. The defendant indicated that he was holding H.K. and dropped his keys. Id. The defendant stated that when he bent over to pick up the keys H.K.'s leg got stuck between the defendant's legs. Id. Laura testified that she saw the injury to H.K.'s ankle occur. RP 565-566. She stated that the defendant dropped his keys

when he bent down to pick them up H.K.'s foot got entangled and twisted.  
RP 565.

In June of 2005, H.K. was treated for an elbow fracture. RP 240. The defendant indicated that the injury occurred while H.K. was at daycare. RP 240. H.K.'s arm was placed in a cast. RP 269. As a result of that injury, CPS was notified. RP 370-371. The referral came from the daycare provider. RP 371. Sarah Birnel, the defendant's ex-sister-in-law and next door neighbor, saw H.K.'s arm in a cast. RP 542. The defendant told Sarah Birnel that the injury had happened at daycare. Id. The defendant then stated that he may have caused the injury and that it might have happened with H.K. had been choking and he bent H.K.'s arm. Id.

In December of 2005, H.K. was seen for vomiting, which he had been doing from one to four times a day for a week. RP 264. At that time it was reported that H.K. had fallen on a toilet and hit the right side of his head. RP 264. There was redness and swelling around H.K.'s right eye. RP 264. In February of 2006, three days before the trauma that caused his death, H.K. was seen for watery eyes and vomiting. RP 241. An abdominal injury could cause vomiting. RP 244. Shaking, but not to a severe degree, could also cause vomiting. RP 245. It was also reported that H.K. had diarrhea. RP 241.

Patty Richards, the girlfriend of H.K.'s grandfather, testified that she has known H.K. since his birth. RP 386. Richards watched H.K. occasionally. RP 389. Once Laura married the defendant, Richards

noticed more marks and bruises on H.K. RP 422. Richards felt that it seemed unusual for a child of H.K.'s age to get certain bruises or injuries. RP 426. Boyd Kostelecky, H.K.'s grandfather, indicated that a lot of times H.K. would be afraid of the defendant. RP 430, 437. When H.K. was a year and a half old, Richards observed a bruise on H.K.'s nose. RP 393. Laura had indicated that H.K. had fallen into something. Id. In April of 2005, Richards noticed an injury to H.K and she saw that H.K. was limping. RP 393-394. She had been told that the defendant was carrying H.K. and bent over, causing H.K.'s foot to get stuck between the defendant's legs. Id. Laura had told Richards in December of 2005 that H.K. was complaining that his head hurt and he had vomited. RP 405.

In January of 2006, Richards observed a bruise on H.K.'s back and legs. RP 401. Richards was told that H.K. was sitting on the toilet and the defendant had forgotten about him. Id. H.K. then had fallen asleep and fell into the toilet. Id. Laura stated that they only made H.K. sit on the toilet for five minutes. RP 469-470. Sarah Birnel testified that the children would come to her home to play and that she was at the defendant's house on a daily basis. RP 531, 533. She saw that H.K. was being potty-trained, and that H.K. would sometimes have to sit on the toilet for 10 to 20 minutes. RP 533. H.K. would cry, wanting to get up. Id. Charlene Birnel, the defendant's ex-wife, testified that H.K. would have to sit on the toilet for 20 minutes or more. RP 546. She once told the defendant that it was too long and she did not understand why H.K. had to

sit backwards on the toilet. RP 546. The defendant told her that it was none of her business. Id.

Also in January of 2006, Richards had put H.K. in the bathtub and noticed that his entire scrotal area was black and blue. RP 402-403. She was told that the defendant had told her that victim had fallen getting out of the shower. RP 403. Richards also observed a cut on H.K.'s penis, which H.K. complained about. RP 404-405. When Richards asked Laura about the cut, she did not know about it. RP 405. On the day before the incident Richards noticed a faded bruise on H.K.'s forehead. RP 417. At one point, Boyd Kostecky noticed a bruise on H.K.'s back. RP 443. It appeared to Kostecky to be a big thumbprint. Id.

Possibly one to two weeks before the incident, Laura noticed some marks on H.K.'s stomach that she believed were the tread marks of a shoe. RP 576. Laura questioned the defendant about the mark. RP 578. The suspected shoe mark concerned Laura. Id. The defendant appeared shocked when Laura questioned him about the mark. Id. Laura checked all of the shoes in the house while the defendant was at work, but did not find any shoe that matched the mark. Id. However, she did not check the shoes that the defendant had worn to work. Id.

Detective Graham collected the defendant's shoes. RP 714. He took photographs of the tread pattern on the defendant's shoes. RP 714-715. The jurors were shown a drawing of the shoe pattern that Laura

observed on H.K. and the photograph of the defendant's shoe pattern. RP 717.

Linda Merritt, is owner, provider, director, and president of "Kreative Kidz," the day care that H.K. attended. RP 603, 626. The day care kept records of each child. RP 626. Merritt observed that H.K. came into the day care limping. RP 626. Merritt was concerned because she had never seen an 18 month old limping as they are very pliable. Id. The limping went on for a week or more. RP 626-627. The day care would not let H.K. return to the day care until they had a doctor's note. RP 627. The day care insisted that H.K. be seen by a doctor when Laura tried to leave him at the day care. RP 633. Laura was mad that the day care would not take H.K. RP 649. H.K. appeared to be in pain. RP 627. Merritt had no documentation that H.K. ever injured his arm at the day care. Id. The defendant told Merritt that he had been roughhousing with H.K. and that it was an accident. RP 629. On the occasions when the defendant would pick H.K. up from day care, H.K. did not want to go with him, would cry and cling to the teacher. RP 639. In January of 2006, Laura brought H.K. and her new baby into the day care so that the employees could see the baby. RP 639-640. Sophia Storaaski, a day care employee, observed that H.K. "didn't look right" and that his head was oddly shaped. RP 640. She noted that H.K. did not look well, was pale and quiet. RP 640.

H.K.'s teacher and program supervisor at Kreative Kidz, Katherine Miller, testified that when H.K. first began attending the day care, he was an outgoing and happy child. RP 645-646. At one point, H.K. came to the day care with his foot injured, and the defendant had reported that H.K. had maybe fallen off of the bunk bed. RP 650.

Richards indicated that the day before the incident, H.K. was crying and cranky, which was different behavior for H.K. RP 406. He was slightly paler in color than normal. RP 424. He wanted to be with Laura. Id. H.K. pushed Richards away and really wanted to be with Laura. RP 407. Richards asked H.K. if he wanted to stay with her, and H.K. indicated that he did. RP 407. H.K., Laura, and Richards went to Dairy Queen and H.K. got a drink. RP 407. Usually H.K. drank a lot, but he only had four or five sips of the drink. RP 407.

While at Richards' home that evening, H.K. took a bath and loved taking baths. RP 408. On the night before the incident, however, H.K. was in the bath for ten minutes before he drained the bath himself until all of the water was gone, and he began to shiver. RP 408-409. H.K. wanted Richards to hold him. RP 409. When Richards was giving H.K. his bath she noticed that his stomach appeared slightly larger and harder than normal. RP 410-411.

The next morning H.K. hardly ate or drank anything. RP 413. He had a bit more energy than the night before, but still wanted to lay around and be near Richards. Id. The week prior to being critically injured, H.K.

was not feeling well. RP 574. H.K. was complaining that his head was hurting and he had vomited three to four times that week. RP 574-575. He also complained that his stomach was hurting. RP 575.

On the day of the incident, James Baldwin, a friend of the defendant's, was at the defendant's home. RP 201, 444. At approximately 4:00 p.m. Baldwin was at the defendant's home. RP 446, 447. While Baldwin was present, H.K. was eating and appeared to be fine. RP 447. H.K. was not vomiting while Baldwin was present. Id. During that time, the defendant asked the two eldest boys to take baths, but they had taken a shower but did not use soap. RP 448-449. This made the defendant angry. RP 449.

Laura testified that she married the defendant on November 19, 2005. RP 455. She lived with the defendant, his two sons, and her son. Id. Laura indicated that while she was at work, the defendant would care for the four children—the defendant's two sons, H.K., and a baby that Laura and the defendant had in common. RP 454, 458. On February 20, H.K. was acting "clingy" to Laura. RP 460. She indicated that he had not been feeling well. Id. She stated that H.K. regressed in his potty training after she had delivered her next child, and that this upset the defendant. RP 466-467. The defendant would raise his voice at H.K. when H.K. had accidents. RP 467. The defendant was also upset that, a week prior to the incident, H.K. had been having diarrhea. RP 467-468.

The defendant would yell at H.K. and treat him differently, like he was not his own child. RP 535. The defendant would take his two children fishing, but H.K. was not allowed to go. RP 536. The defendant would play with his children, but not with H.K. RP 536. Sarah Birnel observed the defendant strike H.K. RP 540-541. When she saw the defendant strike H.K. it was always with an open hand. RP 541.

Dr. Duralde saw H.K. at the hospital and photographed his body. RP 247. She observed bruising to H.K.'s forearm and upper aspect of the arm. RP 250. She observed red linear marks on H.K.'s leg and bruising on his upper thigh. RP 250. Dr. Duralde indicated that the bruise to H.K.'s legs may have been caused by a belt. RP 251. She also observed red marks on the front side of the leg, and a bruise on the back side of the leg. RP 253. There was also a bruise on H.K.'s forehead. RP 253. Once H.K.'s scalp was lifted, a bruise was observed underneath the scalp. RP 254. Dr. Duralde's analysis was that there were elements of the injuries that were consistent with shaking with probable impact. RP 257.

Dr. Ramoso, an associate medical examiner for Pierce County, performed the autopsy on H.K. RP 272-273, 276. Dr. Ramoso observed the bruise on H.K.'s forehead. RP 278. Dr. Ramoso estimated that the bruise on H.K.'s forehead occurred a few days to a week before H.K. was taken to the hospital. RP 283. He found that the bleeding in the brain area, especially the subdural hemorrhage, is almost always traumatic. RP 281. The subarachnoid hemorrhage can also be traumatic. RP 281. Dr.

Ramoso also found that one of H.K.'s ribs had been freshly fractured. RP 284. He found that H.K.'s spleen was lacerated, and that the injury was a week to two weeks old. RP 288-289. Similar to Dr. Duralde's examination, Dr. Ramoso inspected H.K. for bruises. RP 290. He observed bruises on H.K.'s thighs and knees. RP 290. H.K.'s eyes showed hemorrhages in the optic nerve and retina. RP 291. Dr. Ramoso was able to conclude, to a reasonable degree of medical certainty, that H.K. died as the result of a blunt head trauma. RP 291. Dr. Ramoso found that the injuries to H.K.'s liver and spleen were several days old. RP 298-299. Dr. Ramoso indicated that H.K.'s injuries were consistent with shaken baby syndrome and with an impact to the head. RP 302-303.

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FOR A REASONABLE JURY TO FIND THAT THE DEFENDANT COMMITTED HOMICIDE BY ABUSE WHEN (1) H.K. DIED FROM A HEAD INJURY CONSISTENT WITH SHAKING, (2) THE DEFENDANT WAS THE ONLY ADULT WITH H.K. AT THE TIME OF THE CRITICAL INJURY, (3) THE DEFENDANT'S EXPLANATION OF HOW THE INJURY OCCURRED WAS INCONSISTENT WITH MEDICAL FINDINGS, (4) THE DEFENDANT HAD A PATTERN OF ABUSING H.K., AND (5) THE DEFENDANT'S ACTIONS DEMONSTRATED AN EXTREME INDIFFERENCE TO H.K.'S LIFE.<sup>4</sup>

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also, Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the

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<sup>4</sup> It was undisputed below, and is undisputed on appeal, that the victim was two years old at the time of his death, and that the critical injury occurred at the victim's home in the State of Washington so the State does not present argument on those elements.

truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Anderson, 72 Wn. App. 453, 458, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). This is because the written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations. The trier of fact, who is best able to observe the witnesses and evaluate their testimony, should make these determinations. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial courts factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld.

In order to convict the defendant of homicide by abuse, the State had to prove the following elements: (1) That on or about the 20<sup>th</sup> day of February, 2006, the defendant engaged in conduct resulting in the death of H.K., (2) that the defendant acted under circumstances manifesting an extreme indifference to human life, (3) that H.K. was a child under 16 years of age, (4) that the defendant previously engaged in a pattern or practice of assault or torture of H.K., and (5) that the acts occurred in the State of Washington. CP 149-187.

- a. When viewed in the light most favorable to the State, the evidence established that on or about February 20, 2006, the defendant engaged in conduct resulting in H.K.'s death.

The defendant was the only adult present when medical aid arrived at the scene on February 20, 2006. RP 128, 146. When aid arrived, H.K. was on the floor with the defendant. RP 144. The defendant reported that H.K., who was approximately two years old at the time, had fallen from a bunk bed while with the other two children. RP 198, 203. Even though the defendant said H.K. was with the other two children, when the eldest child, Tristan, was asked by Officer Betts at the scene what had happened, Tristan indicated that he did not see what had happened. RP 104, 661.

Dr. Paschall, who treated H.K. on February 20<sup>th</sup>, was able to conclude to a reasonable degree of medical certainty, that H.K.'s injuries were not accidental. RP 191. H.K.'s injury was not consistent with a fall from a bunk bed. RP 191. There was evidence that the injury was probably related to an acceleration/deceleration or shaking-type injury. RP 177. Dr. Paschall determined that the injuries were not accidental based on the severity of H.K.'s head injury, and the injury was not consistent with a fall. RP 191. The injury to H.K.'s head was so severe that doctors immediately performed surgery to try to alleviate pressure on the brain. RP 179. During that surgery there was so much blood that came out of the cavity that it caused H.K. to become unstable due to the change in pressure. RP 182. The doctor had to actually cut a piece of H.K.'s brain away because the swelling was so severe. RP 183.

At the time of the autopsy, there was bruising to H.K.'s forehead which had been caused a few days to a week before he was admitted into the hospital. RP 283. There was a fresh, very recent fracture to H.K.'s 9<sup>th</sup> rib. RP 284. Usually when a shaking occurs, the child is held either by his arms or around the rib cage, so a rib fracture can be part of a shaking. RP 231. The injury to H.K.'s spleen, which had been lacerated, was five to seven days old. RP 289. Dr. Ramoso concluded that cause of death was a blunt-force trauma. RP 291. Dr. Duralde examined H.K.'s records and determined that the injuries were not accidental. RP 234.

H.K. had retinal hemorrhages in both eyes, or bilateral retinal hemorrhages. RP 257-258. Except for high-speed motor vehicle accidents, bilateral retinal hemorrhage is rarely seen outside of shaking cases. RP 235. H.K. also had a subdural hemotoma, which is a symptom of shaking. RP 228.

When taken in the light most favorable to the State, there was sufficient evidence presented that the defendant's actions caused H.K.'s death. The defendant's explanation that H.K. fell off of the bunk bed was refuted by medical testimony. The defendant was the only adult present at the residence at the time H.K. became incapacitated. RP 101. Dr. Ramoso stated that the hemorrhage on the top of H.K.'s head was fresh and very recent. RP 283-284. Dr. Ramoso indicated that the bruising on the top of H.K.'s head was consistent with the injury occurring on February 20, 2006. RP 303. The rib fracture and the subdural hematoma were also very recent. RP 284, 305. The medical testimony supports that this was a blunt force trauma or shaking. The defendant's explanation that H.K. fell, an explanation that he had used to explain previous injuries, was not consistent with H.K.'s injuries. The medical testimony was that the injuries sustained by H.K. were not accidental. There was sufficient evidence that it was the defendant, not anyone else, who caused H.K.'s death.

As discussed below, the defendant showed little concern for the victim after being told of the seriousness of the injuries. Rather, he

focused on the fact that he was under stress and concerned about his unborn biological child.

- b. When viewed in the light most favorable to the State, the evidence established that the defendant previously engaged in a pattern or practice of assault or torture.

In addition to being the only adult present when H.K. became fatally injured, the defendant was the primary caregiver for H.K. while Laura worked. RP 201, 454, 458. H.K. was afraid of the defendant, and the defendant was seen striking H.K. RP 437, 442, 540, 708. The defendant met Laura in November of 2004. RP 199. H.K. had many injuries after the defendant married Laura in 2005. *Id.* Once married, H.K. was seen with more bruises and marks than he had previously. RP 422.

H.K. sustained numerous specific injuries prior to February 20, 2006:

1. H.K. arrived at the daycare with an injured foot and the defendant indicated that he may have fallen off of the bunk bed. RP 650;
2. Richards noticed that H.K. had a cut on his penis. RP 403-404;
3. Boyd Kostelecky saw what he believed to be a thumbprint on H.K.'s back. RP 443;
4. Sarah Birnel had seen the defendant actually strike H.K. in the past. RP 540-541;
5. In approximately March of 2005, Richards observed a bruise on his nose. RP 385, 393.

6. In April of 2005, H.K. was seen limping and the defendant admitted that he might have caused the injury. RP 393-394;
7. In June of 2005, H.K. sustained a fractured elbow and defendant again admitted he may have caused the injury after first indicating that the injury occurred at daycare. RP 240, 542;
8. In December of 2005, H.K. experienced vomiting, which can be caused by shaking, and had a red and swollen right eye. RP 245, 264. It was reported to doctors at that time that H.K. had fallen off of the toilet and hit his head. RP 264;
9. January of 2006, H.K. had extremely swollen and bruised testicles. RP 402-403. The defendant reported that H.K. tried to get out of the shower and fell. RP 108.
10. In January of 2006, Richards observed bruising H.K.'s legs and back. RP 401. The defendant said that he had forgotten about H.K. while H.K. was on the toilet, and H.K. had fallen off. Id.;
11. Two weeks before the critical injury, Laura saw what she believed to be shoe tread marks on H.K.'s stomach. RP 576. There were many similarities between the tread marks that Laura drew and the tread marks on the defendant's shoes. CP 96-100 (exhibits 1 and 2);
12. A week before the critical injury, H.K. was vomiting again, a sign of shaking. RP 245, 574-575. He also complained that his head and stomach were hurting. RP 574-575;
13. A day before the critical injury, Richards observed that H.K.'s stomach was larger and harder than normal, and that he had no appetite. RP 410-411, 413.

The evidence clearly establishes a pattern of abuse. The medical opinions also confirm a pattern of abuse. At the hospital, Dr. Duralde saw that H.K. had what she believed to be belt marks on his legs. Dr. Ramoso also discovered old injuries when performing the autopsy of H.K. There was a bruise on H.K.'s forehead that was sustained a few days to a week before February 20<sup>th</sup>. RP 281, 283. There was a "healing laceration" to H.K.'s spleen. RP 286. Dr. Ramoso indicated that the spleen injury was five to six days old. RP 288-289. There was older, brown bruising to H.K.'s left thigh. RP 290.

Whenever questioned about H.K.'s injuries, the defendant provided similar explanations. Most of the explanations involved H.K. falling. The defendant even provided the explanation that H.K. had perhaps fallen off of the bunk bed with respect to a different injury. RP 650. As the State asserted below, two of H.K.'s more serious injuries were to the more sensitive areas of H.K.'s body—the scrotal area and the stomach. Both injuries clearly were intentional acts on the part of the defendant.

The defendant asserts that no one, except for a daycare employee, became concerned about H.K.'s safety. Brief of Appellant at page 29. Such argument, however, assumes that everyone who saw H.K. during each separate injury knew of all prior injuries. It did not appear that any one person knew about all of H.K.'s injuries collectively. The State agrees that each injury, when viewed alone, likely does not establish a

pattern or practice of abuse. When viewed as a whole, however, a pattern of abuse is clear.

- c. When viewed in the light most favorable to the State, the evidence established that the defendant acted under circumstances manifesting an extreme indifference to human life.

In addition to the pattern of abuse that was inflicted on H.K. by the defendant, as discussed above, the severity of H.K.'s injuries also evidence an extreme indifference to human life. Dr. Paschall testified that the swelling to H.K.'s brain was the most severe case he had seen in 20 years of practicing medicine. RP 185. With respect to the fatal injury sustained by H.K., the amount of force needed to inflict such an injury was extreme. Dr. Duralde indicated that such injuries are usually seen in high-speed car crashes. RP 235. For the defendant to have shaken H.K. with that amount of force, it is clear that he acted with extreme indifference for H.K.'s life.

H.K. died a very violent death that took a great deal of force to accomplish. The massive amount of damage to H.K.'s brain—more than could have been caused by a fall from a bunk bed, demonstrates an extreme indifference to H.K.'s life. The defendant cites to three cases in support of his argument — State v. Madarash, 116 Wn. App. 500, 66 P.3d 682 (2003), State v. Adams, 138 Wn. App. 36, 155 P.3d 989, review denied, 161 Wn.2d 1006 (2007), and State v. Edwards, 92 Wn. App 156,

961 P.2d 969 (1998). Brief of Appellant at page 27. The appellant attempts to distinguish all three cases, but they are actually analogous to the case at bar.

In Madarash, *supra*, the court found sufficient evidence that the defendant had demonstrated extreme indifference toward the life of the victim. Madarash, 116 Wn. App. 500 at 512. The defendant forced the victim to drink Diet Pepsi until she threw up on herself, then continued to throw cold water in the victim's face and held her face under water. Id. Evidence showed that the victim, a four year old child, struggled against Madarash in the bathtub. Id. Madarash did not call 911 until after the victim collapsed, and then showed no remorse at the hospital. Id.

Similarly, in the case at bar, the defendant also demonstrated an extreme indifference toward the life of his victim. The defendant in the present case shook H.K. so violently that it caused an injury equivalent to a high-speed car crash. RP 235. He shook H.K. so severely that Dr. Pashall had never seen such a serious brain swelling in 20 years of practicing medicine. RP 185. Madarash did not call 911 until after the victim collapsed. Madarash, 116 Wn. App. 500 at 513. In the present case, the defendant waited even longer. After H.K. collapsed and became rigid, the defendant did not call for aid. RP 203. Rather, he took H.K. to the bathroom and splashed water on H.K.'s face. RP 204. When that did not work, the defendant did not call for help, but rather took H.K. into the living room area first. RP 205. It was only then did he call for help.

Finally, like Madarash, the defendant did not show remorse or emotion over H.K.'s injuries. When interviewed by police, the defendant inquired about H.K. only once at the beginning of the interview. RP 211. He did, however, express concern over the welfare of his unborn, biological, child. RP 210. The defendant did not cry over the condition of H.K., and said it was because he was under a lot of stress because his truck had recently been stolen and his wife was pregnant. RP 209-210. Based on the defendant's actions, and his behavior after the incident, it is clear that the defendant, like Madarah, demonstrated extreme indifference toward the life of H.K.

In State v. Adams, *supra*, the defendant head-butted his child and stuffed a pair of socks in his mouth to get him to stop crying. Adams, 92 Wn. App. 156 at 50. While the court did not provide a detailed analysis, it did find that those acts were sufficient to demonstrate an extreme indifference to human life. Id. As argued above, in the present case the act of violently shaking a two-year old to the point of critical injury also demonstrates an extreme indifference toward the life of the victim.

State v. Edwards, *supra*, is analogous factually with the case at bar. In Edwards, the victim, a two year old child, suffered multiple blunt impacts to the head, a subdural hematoma, and a fractured skull. Edwards, 92 Wn. App. 156 at 159. The defendant admitted to shoving the victim off of the couch, causing the victim to hit her head, but the victim's injuries were not consistent with the defendant's story. Id. at 159-160.

The court found that the defendant's actions demonstrated an extreme indifference to her life. Id. at 165.

The present case is similar to the facts of Edwards—each victim died as the result of injuries to the head, and each defendant gave stories about how the injuries were sustained that were inconsistent with the medical findings. The only distinguishing factor in Edwards is that the defendant never sought medical assistance for the victim. Id. at 159. As discussed above, the defendant did not seek immediate assistance either, but rather tried splashing water on H.K.'s face first. While the defendant in the present case did eventually call for medical aid, the fact that he did so after inflicting the critical injury to H.K. did not negate the fact that he acted with extreme indifference toward H.K.'s life at the time he was causing the injuries. The amount of force needed to cause H.K.'s injuries was significant, similar to the amount of force needed to cause the injuries in Edwards. Similar to Edwards, this court should find that the defendant acted with extreme indifferent toward to victim's life.

2. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FOR A REASONABLE JURY TO FIND THE DEFENDANT GUILTY OF MURDER IN THE SECOND DEGREE.<sup>5</sup>

As discussed in section 1(a), when taken in the light most favorable to the State, there was sufficient evidence to find that the defendant caused the death of H.K. There was also sufficient evidence that the defendant committed felony murder in the second degree by intentionally assaulting H.K. and recklessly inflicting substantial bodily harm. Based the severity of the injuries, the amount of force needed to cause such injuries, and the defendant's inconsistent explanation as to how the injuries occurred, there was substantial evidence for a reasonable jury to find the defendant guilty of murder in the second degree.

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<sup>5</sup> As argued below, the court should vacate the defendant's murder in the second degree conviction. In the event that the defendant's homicide by abuse conviction is invalidated or reversed, however, the State may request that the defendant be sentenced on murder in the second degree. See State v. Schwab, 134 Wn. App. 635 (2006), review granted, 160 Wn.2d 1017, 163 P.3d 793 (2007) (The double jeopardy doctrine does not preclude reinstating Schwab's manslaughter conviction because it was vacated solely to prevent double punishment for the same crime, not because the jury's verdict was somehow in error.) Therefore, the State addresses the sufficiency of the murder in the second degree count.

3. THE DEFENDANT CANNOT MEET HIS BURDEN OF DEMONSTRATING THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL MADE A LEGITIMATE STRATEGIC DECISION TO ARGUE THAT THE JURY SHOULD CONVICT ON MANSLAUGHTER AND NOT HOMICIDE BY ABUSE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Const. Article 1, Sec. 22 of the Constitution of the State of Washington. 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 court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “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 rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in Strickland

v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and adopted by the Washington Supreme Court in State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922 (1986).

The test is as follows:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also, State v. Walton, 76 Wn. App. 364, 884 P.2d 1348 (1994), review denied, 126 Wn.2d 1024 (1995); State v. Denison, 78 Wn. App. 566, 897 P.2d 437, review denied, 128 Wn.2d 1006 (1995); State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995); State v. Foster, 81 Wn. App. 508, 915 P.2d 567 (1996), review denied, 130 Wn.2d 100 (1996).

The Washington Supreme Court, in State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991), cert. denied, 506 U.S. 56 (1992), gave further clarification to the intended application of the Strickland test. The Lord court held the following:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Strickland, at 689-90.

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, at 694. Because [the defendant] must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient. Strickland, at 697, Lord, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. McFarland, 127 Wn.2d at 335 (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), cert. denied, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. State v. Hayes, 81 Wn. App. 425, 442, 914 P.2d 788, review denied, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney’s performance

must be “highly deferential in order to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689.

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 488 U.S. 948 (1988). If defense counsel’s trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. Lord, 117 Wn.2d at 883. Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. McFarland, 127 Wn.2d at 336. Defendant may not supplement the record on direct appeal. Id. Finally, in determining whether trial counsel’s performance was deficient, the actions of counsel are examined based on the entire record. State v. White, 81 Wn.2d 223, 225, 500 P.2d 964 (1993).

In State v. Silva, 106 Wn. App. 586, 24 P.3d 477, review denied, 145 Wn.2d 1012, 37 P.3d 291 (2001), the court held that a concession of guilt is a legitimate tactical decision which can be used to gain credibility and secure an acquittal on more serious charges. Id. at 597-598. See also, U.S. v. Tabares, 951 F.2d 405, 409 (1<sup>st</sup> Cir. 1991)(defense counsel’s concession to the jury that his client was guilty of gun possession charges “was a tactical decision, designed to lead the jury toward leniency on the

other charges.”); U.S. v. Gomes, 177 F.3d 76, 83 (1<sup>st</sup> Cir. 1999), cert. denied, 528 U.S. 941, 120 S. Ct. 352, 145 L. Ed. 2d 275 (1999)(the attorney’s concession of guilt on one of several counts was to preserve “some credibility with the jury for use where it might help.”); McClain v. D.R. Hill, 52 F. Supp. 2d 1133, 1143 (1999)(admission of guilt on burglary charges was not ineffective assistance, but rather “a tactical decision to challenge only the most serious charges against petitioner, thereby supporting petitioner’s credibility.”); Underwood v. Clark, 939 F.2d 473, 474 (7<sup>th</sup> Cir. 1991) (A concession on one count can be a sound tactic when the evidence is overwhelming and there is an advantage to be gained by winning the confidence of the jury.)

The defendant asserts that trial counsel was ineffective in making an argument in favor of a manslaughter conviction, one of the lesser charges the defendant was facing. Brief of Appellant at page 32-33.

Defense counsel stated in closing argument, in part:

There is no question in my mind, [H.K.] died a violent death. There shouldn’t be any question in your mind that it was a violent death. It was from a shaking. It was probably around ten seconds. It doesn’t take very long. It was out of frustration, probably. Probably from potty-training, the lack thereof. But even at that time—but even at that, think, if the discipline went too far, if this effort to potty-train this child went too far, that doesn’t mean that Mr. Reyes acted with extreme indifference, or that it was part of a practice or pattern of abuse. It was just frustration, you know.

You know, when I think of context, I think about this context as well. One last think is how tough it is to be

parents. Maybe that's why we take such pride in our children. We see all of this industry out there to take care of the products of bad parenting, so what comes from that is this: It's tough to be a good parent.

And perhaps, you know, we're not all equipped, but that doesn't mean that you acted with extreme indifference. If Mr. Reyes didn't intend to kill this child, you have Felony Murder. Felony Murder establishes Assault in the Second Degree, and as a result of that, the child dies. To commit Assault in the Second Degree—you have that instruction—one has to intentionally assault, causing substantial bodily harm, and someone does as a result.

Did he intend to assault the child? That's a question. But I suggest to you that this is no more than Manslaughter. The degree of Manslaughter is for you to decide, because he did not act with a pattern of abuse or with extreme indifference to this child.

Going away from the collective guilt and away from the, perhaps, the over reaching argument, this argument that says we have to get even for [H.K.], that's not what we do here in this court, and I've asked you to find him guilty of only Manslaughter in the First Degree.

RP 964-966.

Clearly, defense counsel made a tactical decision to concede that H.K. had been shaken by the defendant. Such a concession was clearly an attempt to secure a conviction on the lesser offense of manslaughter. The evidence that the defendant was the individual who shook H.K. was overwhelming—the defendant's explanation was not supported by the medical findings and H.K. had injuries wholly consistent with a shaking. Similar to the attorneys in Silva, Tabares, Gomes, and Underwood, defense counsel in the present case made a tactical decision to argue, not

for acquittals on all charges, but for conviction of a lesser offense. Such decision is a tactical decision by defense counsel, and does not establish ineffective assistance. While the defendant may now not agree with the decision, that does not establish ineffective assistance. Defense counsel's decision did not fall below an objective standard of reasonableness because he was trying to secure an acquittal on the most serious charges of homicide by abuse and murder in the second degree. The defendant has not established that trial counsel was ineffective.

4. THIS COURT SHOULD REMAND TO VACATE THE MURDER IN THE SECOND DEGREE CONVICTION PURSUANT TO STATE V. WOMAC.

The jury found the defendant guilty of both homicide by abuse and murder in the second degree. CP 126-129. The court sentenced the defendant only on homicide by abuse. CP 239-250. At sentencing, the State indicated that the court should dismiss the murder in the second degree conviction. RP (3/30/07) 4. It appears that there was an error in not including such language in appendix "A" to the judgment and sentence. The State agrees that this court should remand for vacation of the murder in the second degree conviction pursuant to State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007).

5. THE TRIAL COURT'S REASONS FOR IMPOSING AN EXCEPTIONAL SENTENCE, WHICH ARE SUPPORTED BY THE RECORD, ARE SUBSTANTIAL AND COMPELLING, AND JUSTIFY THE IMPOSITION OF A SENTENCE OUTSIDE THE STANDARD RANGE; THE TRIAL COURT'S SENTENCE WAS NOT EXCESSIVE.

- a. The aggravating factor that H.K. was particularly vulnerable and incapable of resistance is supported by the record.

An appellate court will uphold a trial court's reasons for imposing an exceptional sentence so long as the reasons are not clearly erroneous. State v. Vaughn, 83 Wn. App. 669, 675, 924 P.2d 27 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997); State v. Nordby, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986). Thus, the reviewing court will reverse a trial court's findings only if substantial evidence does not support its conclusion. State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991). On the other hand, the appellate court independently determines as a matter of law whether the trial court's reasons justify imposing a sentence outside the standard range. State v. Fisher, 108 Wn.2d 419, 423, 739 P.2d 683 (1987). The sentencing judge's reasons must be substantial and compelling and must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense. Nordby, 106 Wn.2d at 516. A court cannot base an exceptional sentence on a factor that does not distinguish

the defendant's behavior from that inherent in all crimes of that type.

Vaughn, 83 Wn. App. at 675.

Particular vulnerability of the victim is a statutory aggravating factor that may justify an exceptional sentence as well. RCW 9.94A.535(2)(b). The statute includes a list of reasons that a victim may be particularly vulnerable, but the list is not exclusive. State v. Gore, 143 Wn.2d 288, 317, 21 P.3d 262 (2000). The list includes extreme youth, advanced age, disability, or ill health as factors that might make a victim particularly vulnerable.

In this case, defendant was sentenced to 480 months. CP 239-250. The defendant's standard range for homicide by abuse was 261-347 months. CP 239-250. The defendant received an exceptional sentence of an additional 133 months, for a total sentence of 480 months. Id. The factors justifying the exceptional sentence are set out in the Findings of Fact and Conclusions of Law for Exceptional Sentence, filed on June 29, 2007. CP 322-326. The sentencing court indicated that an exceptional sentence was appropriate based on the aggravating factor that the victim was particularly vulnerable or incapable of resistance. Id. These findings, which are supported by the record, justify the imposition of an exceptional sentence. The sentencing court properly sentenced defendant to a sentence outside the standard range.

The defendant asserts that the record did not support the jury and trial court finding that H.K. was particularly vulnerable because H.K. was

over two years old and was not exclusively dependent on the defendant for his care. Brief of Appellant at page 41. The defendant's argument is without merit. The fact that H.K. was somewhat verbal and spent time at a daycare and with other people does not preclude H.K. from being particularly vulnerable. The victim was dependent on the defendant for his care. The defendant was charged with taking care of the victim and the other children while his wife worked. RP 201, 454, 458.

The defendant provides examples of cases in which a victim was younger than H.K. and found to be particularly vulnerable. None of the cases cited by the defendant, however, hold that a two-year old child is not particularly vulnerable. Rather, courts have routinely affirmed the particularly vulnerable aggravator when the victim was older than H.K.

In State v. Fisher, 108 Wn.2d 419, 739 P.2d 683 (1987), the defendant was charged with indecent liberties against a victim that was five and one half years old. Id. at 420. The court upheld the aggravating factor that the victim was particularly vulnerable. Id. at 425. In State v. Quigg, 72 Wn. App. 828, 866 P.2d 655 (1994), the defendant was convicted of rape of a child and child molestation. Id. at 831. The court upheld the use of the vulnerability aggravator based on the victim's age of three to four years old. Id. at 842.

H.K. was particularly vulnerable, not only because he was dependent on the defendant for his care, but because of H.K.'s extreme youth. While H.K. was somewhat verbal, it also appears that he attempted

to communicate his fear of the defendant, because other people noted that he was afraid of the defendant. RP 437, 442, 708. The aggravating factor that H.K. was particularly vulnerable and incapable of resistance is supported by the record.

- b. The trial court properly exercised its discretion in sentencing the defendant and the sentence was not excessive.

The length of an exceptional sentence is reviewed for abuse of discretion. State v. Branch, 129 Wn.2d 635, 649, 919 P.2d 1228 (1996) (citing, State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995)). An exceptional sentence is clearly excessive if (1) it is imposed on untenable grounds or for untenable reasons; (2) or it is an action no reasonable judge would have taken. Branch, 129 Wn.2d at 650. “The practical effect of this standard is to guarantee that an appellate court will ‘rarely, if ever’ overturn an exceptional sentence because of its length.” Id. at 864 (citing, State v. Clinton, 48 Wn. App. 671, 678, 741 P.2d 52 (1987)). The clearly excessive prong gives “courts near plenary discretion to *affirm* the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of sentence. Id. at 864 (*citing* RCW 9.94A.210(4)(b); State v. Oxborrow, 106 Wn.2d 525, 529-30, 723 P.2d 1123 (1986)).

The amendments contained in the Laws of 2005, chapter 68, required the State to provide notice that it would seek a sentence above the standard range and prove facts supporting the aggravating circumstance to a jury beyond a reasonable doubt. Laws of 2005, ch. 68, §4(1), (2). Laws of 2005, chapter 68, section 4(5) authorizes the trial court to impose an exceptional sentence if the jury finds that the State has proved “one or more of the facts alleged . . . in support of an aggravated sentence” and if “the facts found are substantial and compelling reasons justifying an exceptional sentence.” A particularly vulnerable victim is included in a list of factors that support an exceptional sentence under the Laws of 2005, chapter 68, section 3(3)(a), (b), and (n).

A sentence is clearly excessive only if its length, in light of the record, “shocks the conscience.” State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996)(citing, Ritchie, 126 Wn.2d at 392-393). In this case, the trial court’s sentence of 480 months is not clearly excessive. The defendant cites to State v. Madarash, 116 Wn. App. 500, 66 P.3d 682 (2003), State v. Edwards, 92 Wn. App. 156, 961 P.2d 969 (1998), and State v. Adams, 138 Wn. App. 36, 155 P.3d 989 (2007), as cases in which defendants received a lesser sentence than the defendant. Brief of Appellant at page 42-43. In Madarash, Edwards, and Adams, however, it

does not appear that there were any aggravating factors found by a jury or a court.

In State v. Berube, 150 Wn.2d 498, 79 P.3d 1133 (2003), the court did find aggravating factors, finding that the victim was particularly vulnerable, the defendants abused a position of trust, and the acts demonstrated deliberate cruelty. Id. at 512-513. The defendants were sentenced to 640 months. Id. at 501. In the present case, the trial court properly exercised its discretion in sentencing the defendant to 133 months above the standard range, based on the finding by the jury that H.K. was particularly vulnerable or incapable of resistance. The trial court's sentence was not excessive.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that the defendant's conviction and sentence for homicide by abuse be affirmed.

DATED: JANUARY 29, 2008

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

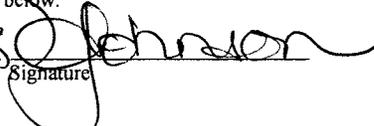
  
MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724

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DIVISION II

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.

1/29/08   
Date Signature