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DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM F. WASAGESHIK, V,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 06-1-04487-0

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered Conclusions of Law #3. CP 353.

2. The trial court erred when it entered Conclusions of Law #4. CP 353.

3. The trial court erred when it entered Conclusions of Law #15. CP 353.

4. The trial court erred when it entered Conclusions of Law #16. CP 353.

5. The trial court erred when it entered Conclusions of Law #17. CP 353.

6. The evidence did not support a guilty finding for First Degree Child Assault.

7. The prosecutor improperly vouched for the victim to obtain an exceptional sentence.

8. The trial court erred when it imposed an exceptional sentence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Because the complaint for search warrant lacked probable cause to search Mr. Wasageshik's residence, all evidence found as a result of the search should have been suppressed at trial.

(Assignments of Error 1, 2, 3, 4, 5.)

2. Because the search of the diaper bag left in T.W.'s hospital room was unlawful, it should have been suppressed. (Assignments of Error

1, 2, 3, 4, 5.)

3. Because the evidence presented did not establish a pattern or practice of assault or that the injuries constituted great bodily harm, this court should reverse Mr. Wasageshik's convictions.

(Assignments of Error 6, 8.)

4. Because it was improper for the Court to allow the prosecutor to serve as the victim's proxy during sentencing, Mr. Wasageshik's exceptional sentence was improper, and this court should remand his case for re-sentencing.

(Assignments of Error 7, 8.)

III. STATEMENT OF THE CASE

A. Procedural History

On September 22, 2006, the State filed an Information charging one count of Assault of a Child in the First Degree for conduct occurring on or between July 19, 2006 and September 19, 2006. CP 2. After subsequent amendments, Mr. Wasageshik was ultimately charged with two counts of Assault of a Child in the First Degree with an aggravating factor. CP 10-11, 104-05.

In April and May of 2008, a jury trial was held in the Pierce County Superior Court, the Honorable Susan K. Serko presiding. On May 12, 2008, a jury convicted Mr. Wasageshik of the above charges, CP 232-35, and also found that the victim was particularly vulnerable. CP 234, 237. On June 13, 2008, Judge Serko sentenced Mr. Wasageshik to an exceptional sentence of 300 months within the Department of Corrections. CP 246-61. This appeal was timely filed.

B. Facts

On or about September 9, 2006, William Wasageshik and his wife were visiting their daughter, T.W., at Madigan Army Hospital when they

were contacted by Pierce County Sheriff's Detectives and a Child Protective Services (CPS) Investigator. RP 57 (4/14/08). The detectives were responding to a concern about injuries sustained by T.W. and informed Mr. and Mrs. Wasageshik that they would like to speak to them individually. RP 57 (4/14/08). Mr. Wasageshik agreed to talk to the detectives first, and was led to an empty room in the hospital. RP 58 (4/14/08). Mr. Wasageshik and three detectives were present at the interview, and Mr. Wasageshik gave the detectives a taped statement regarding T.W.'s injuries. RP 58-59 (4/14/08).

On September 20, 2006, Detective Ray Shaviri, a Pierce County Sheriff's Deputy, sought a search warrant to search the Wasageshik residence located at 11222 18th Avenue South, #H104 in Tacoma, Washington. The asserted probable cause to obtain the warrant was set forth in the attached application for search warrant, and a warrant to search the Wasageshik residence was issued. CP 38-44.

During the search of the Wasageshik residence, the affiant reported that Detective

Berg found, in plain view, a pink and white infant sleeper that had apparent blood stains on the front. Based upon this discovery, Detective Shaviri phoned Judge Fleming to ask that this item be included as part of the search, to which Judge Fleming agreed. CP 45-52. The evidence from this search was admitted at trial, over objection. RP 123-123 (04/15/08).

Following the interviews with the detectives and CPS agents on September 19, Mr. and Mrs. Wasageshik were told that T.W. was being placed into protective custody and advised that they should remove any personal items from her hospital room as they were no longer allowed to visit her. RP 63 (4/14/08). During their collection of personal items, Mr. and Mrs. Wasageshik left behind T.W.'s diaper bag. RP 65 (4/14/08).

On October 2, 2006, the detectives learned that the diaper bag had been left behind, and although they were aware that Mrs. Wasageshik had called the hospital seeking the bag's return, Detective Anderson searched the bag. RP 67 (4/14/08). Evidence of the search was admitted at trial, over objection.

Mr. Wasageshik was charged with two counts of assault in the first degree. The first count alleged that Mr. Wasageshik engaged in a pattern or practice of assaults. Count II alleged that Mr. Wasageshik assaulted T.W. and caused "great" bodily harm to her.

The State attempted to prove that Mr. Wasageshik assaulted T.W. on September 11th, and asserted that the medical records indicated he had assaulted her on previous occasions. The evidence, however, suggested that T.W. was a happy and healthy baby up until September 11th, 2006, and that she fully recovered from any injuries she received that day. RP (4/22/08) at 437-38; RP (4/21/2008) at 296.

During trial, the State presented no direct evidence of instances of abuse other than what allegedly happened when T.W. was with Mr. Wasageshik on September 11th. In fact, the evidence suggested that T.W. was a perfectly healthy and happy baby up until that day. RP (4/22/08) at 437-38. During trial, the Wasageshik's daycare provider, Julissa Maldonado, testified that she watched T.W. for five

consecutive days during the week of September 4th and that she didn't notice anything wrong with her (September 4th - 8th). RP (4/22/2008) at 437-438.

In its effort to show a pattern of abuse, the State attempted to prove that some of T.W.'s injuries had been healing for a period of time such that they must have occurred before September 11th. RP (5/7/2008) at 1296. However, at most, the doctors could only speculate that the injuries had occurred before that date. The State's radiologist, Dr. Yost, was asked about his ability to date injuries:

Q. Thank you. Are you able at all to date fractures?

A. Not precisely. We can talk about range of dates. I can tell a fracture that's been present for at least in a child three to seven days versus one that's been less than that amount of time. What we do is we look at the relative progress of healing that happens in a relatively stereotyped way and takes time for certain changes to develop, but I can't tell you one fracture occurred at a specific date and time, I can just give you a range of time.

Q. And that way of dating fractures and the range of time, that's acceptable within the medical field?

A. Yes, it is.

RP (4/24/2008) 632.

Dr. Feldman, also testified that there was little evidence indicating past fractures that were in the process of healing or had healed:

Q. Okay. Are you able to tell us at all regarding the two fractures on each side of the scapulas of [T.W.] if there is any significance in the timing?

MR. PURTZER: Same objection, Your Honor.

THE COURT: Overruled. You can answer the question.

A. There was no evidence of healing of those fractures. Although the patterns of healing can be very subtle, the suggestion from the findings would be that they were fairly acute at the time she came to care.

Q. And what do you mean when you say fairly acute?

A. Generally, if healing becomes evident, we see evidence of it in about - some were [sic] a week-and-a-half to two weeks after injury. Some of these two-month olds, they heal a little more rapidly so it could be as short as a week after injury.

RP (5/7/2008) at 1296.

Dr. Feldman's testified that the majority of T.W.'s injuries likely occurred on September 11th.

RP (5/7/2008) at 1313-16. He speculated that

T.W.'s concussion and her rib fractures may have occurred before that date. RP (5/7/08) at 1315.

However, the fact that T.W.'s mother was vitamin D

deficient - and there was evidence that T.W. was also Vitamin D deficient - suggested that the healing process might be slowed such that determination of the dates T.W. obtained the concussion and rib fractures was difficult to establish. RP (5/7/2008) at 1368. Dr. Keller, testified that T.W. exhibited clear evidence of Vitamin D deficiency. RP (5/1/08) at 831. Dr. Keller further testified that it is impossible to determine the date that a skull was fractured. RP (5/1/2008) at 832.

At Mr. Wasageshik's sentencing, the prosecutor acted as a proxy for T.W. RP 1651 (6/13/08). The prosecutor stated:

We don't even know what type of pain she was in, we don't know how she expressed that, we don't know how difficult that was for her because of the timing of it. At least with the latter assault, the one that resulted in the brain stem injury, we know that she struggled for three days. She struggled to breathe, she came in with congested breathing, she struggled to swallow as evidenced by the fact that she wasn't feeding as well and she was having difficulty taking the bottle. How many times do you think she tried to swallow during those 72 hours? Something as involuntary as breathing and swallowing was difficult for her.

RP 1651 (6/13/08). Following these statements by the prosecutor, on behalf of T.W., the judge

sentenced Mr. Wasageshik to the high end of the standard sentence (123 months), and then added another 177 months as an exceptional sentence. RP 1662 (6/13/08).

IV. ARGUMENT

- A. **The evidence obtained from the search of Mr. Wasageshik's residence should have been suppressed.**

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Additionally, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. 1 § 7. See also, State v. Hatchie, 161 Wn.2d 390, 395, 166 P.3d 698 (2007). Washington's State Constitutional equivalent to the Fourth Amendment secures defendant's a higher degree of protection than is provided by the federal constitution by clearly recognizing an individual's right to privacy with no express limitations. State v. Jackson, 102 Wn.2d 432, 688

P.2d 136 (1984); State v. Simpson, 95 Wn.2d 170, 623 P.2d 1199 (1980); State v. Myrick, 102 Wn.2d 506, 688 P.2d 151 (1984).

A search warrant may issue for probable cause when a magistrate can reasonably infer from the facts and circumstances that criminal activity is occurring or that contraband exists in a certain location. State v. McCord, 125 Wn.App. 888, 892, 106 P.3d 832 (2005). "Probable cause exists where the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is *probably* involved in criminal activities and that evidence of the issue may be found at a certain location." State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003) (emphasis added). "The affidavit must be based upon more than mere suspicion or personal believe that evidence of the crime will be found at the place to be searched." Id. at 265.

Here, nothing aside from mere generalizations were set forth to suggest that evidence of criminal activity existed within the Wasageshik residence. Further, nothing within the statements

of either Mr. or Mrs. Wasageshik suggested that evidence of a criminal nature would be found within their home. As our Supreme Court has stated, "generalizations do not establish probable cause for issuance of a search warrant ... since a finding of probable cause must be grounded in fact." State v. Thein, 138 Wn.2d 133, 146-47, 977 P.2d 582 (1999).

Aside from referencing what Mr. and Mrs. Wasageshik told the detectives during their statements at the hospital, there is nothing, from a medical standpoint, that suggests the cause of T.W.'s injuries was something different than what they said. Rather, the warrant was issued upon the basis of conclusory statements such as - that the child's injuries "appeared" to be non-accidental. A warrant based upon such statements and "evidence" is completely contrary to the spirit of both the federal and state constitutional guarantees regarding illegal searches, and as such, all evidence obtained during the unlawful search should have been suppressed.

B. The evidence obtained from the search of the diaper bag left in T.W.'s hospital room should have been suppressed.

"A warrantless search is per se unreasonable under both the Fourth Amendment to the United States Constitution and Article 1 § 7 of the Washington State Constitution unless it falls within a specifically established and well-delineated exception." State v. Ross, 141 Wn.2d 304, 313, 4 P.3d 130 (2000). These exceptions include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry investigative stops. State v. Evans, 159 Wn.2d 402, 407-08 fn. 3, 150 P.3d 105 (2007). Additionally, if property is voluntarily abandoned it is no longer subject to the warrant requirement. State v. Reynolds, 144 Wn.2d 282, 287, 27 P.3d 200 (2001). In Evans, the Court outlined procedure for determining if property was voluntarily abandoned and thus, not protected by the warrant requirement. The Court stated that making such a determination was based upon a review of "act and intent." Evans 159 Wn.2d at 408. "Intent may be inferred from words spoken, acts done, and other objective facts, and

all the relevant circumstances at the time of the alleged abandonment should be considered." State v. Dugas, 109 Wn.App. 592, 595, 36 P.3d 577 (2001). The Evans court stated that the primary issue is not abandonment in the same sense as strict property rights, but rather a determination of whether the defendant, in leaving the property, "has relinquished her reasonable expectation of privacy so that the search and seizure is valid." Evans 159 Wn.2d at 408 (quoting United States v. Hoey, 983 F.2d 890, 892-93 (8th Cir. 1993)); see also United States v. Nordling, 804 F.2d 1466 (9th Cir. 1986). Establishment of one's reasonable expectation of privacy requires satisfaction of a two-part test: (1) did the defendant have an actual (subjective) expectation of privacy?, and (2) is that expectation of privacy objectively reasonable? State v. Kealey, 80 Wn.App.162, 168, 907 P.2d 319 (1995).

In this case, clearly Mr. and Mrs. Wasageshik had a subjective expectation that the diaper bag and its contents were private. It contained personal items of theirs and T.W.'s and it was in the hospital room where T.W. was a patient. Also,

before it was searched by the police, Mrs. Wasageshik called the hospital and asked about retrieving the bag. Additionally, the expectation of privacy was objectively reasonable because "[p]urses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment." Arkansas v. Sanders, 442 U.S. 753, 762, 99 S.Ct. 2586 (1979).

Generally, the Court will determine that a defendant has abandoned his or her privacy interest when he or she *disclaims* ownership. See e.g. Reynolds, 144 Wn.2d 282, 27 P.3d 200 (holding that seizure of a jacket containing contraband found underneath a vehicle stopped for a traffic infraction was reasonable after the defendant denied ownership). In fact, the federal courts have usually required a defendant to disclaim ownership over the property to conclude the property has been abandoned. In United States v. Burnette, 698 F.2d 1038, 1048 n.19 (9th Cir. 1983), the Court stated that "[t]he majority of previous cases in which the Courts have upheld a finding of abandonment have involved both a denial of ownership or interest in the property and a

physical relinquishment of the property." Id. at 1048. Of course, in Washington, protections for privacy interests are higher. In situations where the defendant has not voluntarily abandoned his or her interest, the Courts have held that a privacy interest remains. In Dugas, the Court held that a defendant did not voluntarily abandon his jacket by placing it on the hood of his car after being arrested. Dugas 109 Wn.App. at 596. In State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990), the Court held that garbage in a curbside container is not abandoned, and police therefore needed a warrant to search it.

In Mr. Wasageshik's case, he and his wife were confronted by CPS investigators and police detectives and told that their daughter was being taken into protective custody and that they should gather their things because they wouldn't see her again. Under such extreme circumstances, that the Wasageshik's forgot to remove certain items cannot be considered abandonment. As held in State v. Evans, supra, those alleged to have abandoned property must have *intended* to. Evans, 159 Wn.2d at 408. In this case, Mr. and Mrs. Wasageshik were

under the most stressful of circumstances and could reasonably be expected to overlook some of their belongings. Additionally, that Mrs. Wasageshik called the hospital (she was not allowed to return) and requested the return of the bag indicates that she did not intend to abandon the property. As such, she and Mr. Wasageshik maintained a privacy interest in it. In fact, it would seem that Mr. Wasageshik maintained a significantly greater privacy interest in a bag left in his daughter's hospital room than a resident would maintain in the trash receptacles he or she placed on the curb for pick-up - as was the case in Boland. For these reasons, the evidence found during the unlawful search of T.W.'s diaper bag should have been suppressed.

C. The evidence presented was insufficient to prove that Mr. Wasageshik engaged in a pattern or practice of assaults causing bodily harm or that he caused great bodily harm.

Due process requires the state to prove its case beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). When challenging the sufficiency of evidence, this court must determine:

Whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Weisberg, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). See also, State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

In this case, there were two counts of first degree child assault. Count I alleged a "pattern or practice" of assaults causing bodily harm greater than transient physical pain or minor temporary marks, and Count II alleged one instance of the defendant causing great bodily harm. Because the evidence was insufficient to prove either count, this court should reverse Mr. Wasageshik's convictions.

1. Insufficient evidence existed to support a conviction for a pattern or practice of assault.

The "To convict" jury instruction (number 12) in Mr. Wasageshik's trial read:

To convict the defendant of the crime of assault of a child in the first degree as charged in Count 1, each of the following elements must be proved beyond a reasonable doubt:

- (1) That during the period between the 19th of July, 2006 and the 15th of September, 2006, the defendant

intentionally assaulted T.W. and caused substantial bodily harm;

(2) That the defendant was eighteen years of age or older and T.W. was under the age of thirteen;

(3) That the defendant had previously engaged in a pattern or practice of assaulting T.W. which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks;

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

One [sic] the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 215.

The evidence in Mr. Wasageshik's case was insufficient to prove the third element: That Mr. Wasageshik engaged in a *pattern or practice* of assaulting T.W.

The State presented no direct evidence of instances of abuse other than what allegedly happened when T.W. was with Mr. Wasageshik on September 11th. In fact, the evidence suggested that T.W. was a perfectly healthy and happy baby

until that day. RP (4/22/08) at 437-38. The Wasageshik's daycare provider, Julissa Maldonado, testified that she watched T.W. for five consecutive days during the week of September 4th and that she didn't notice anything wrong with her (September 4th - 8th). RP (4/22/2008) at 437. During direct testimony, the following exchange occurred:

Q. How would you characterize T.W. as a baby and taking care of her?

A. She was great. She ate every two hours, about every two hours, slept, responded well when spoken to, she liked to watch the kids play.

Q. You say she responded well when spoken to, she's a baby and can't talk back, how would she respond?

A.. With smiles. When you speak to a baby, that's really the only way they respond or, you know, moving their arms. That's the only way you know that they can hear you.

Q. Is she a pretty upbeat child?

A. Yes.

Q. Was she fussy at all in general?

A. No.

Q. During the day - actually, did you take care of her that full week of September 4th?

A. Yes.

Q. During the day did any parent contact you to see how she was doing?

A. The mom.

Q. Did the defendant ever contact you to see how she was doing?

A. No.

Q. Okay. During that first week, did you ever notice that [T.W.] had any marks or bruising?

A. No.

Q. She appeared to be healthy that first week?

A. Right.

Q. How would you describe her mobility?

A. She was fine like a normal baby. She was too small to crawl but she moved her arms and legs.

RP (4/22/08) at 437-38.

This testimony contradicts the State's contention that, during her short life with the Wasageshik's, T.W. had been subjected to a "pattern" of assaults causing bodily harm greater than transient physical pain or minor temporary marks. A baby of less than two months would not be smiling, happy, healthy and fully mobile if she was subjected to a pattern of first degree assaults. This evidence came from T.W.'s babysitter, someone who spent more than 40 hours

with T.W., is indicative of its reliability and establishes that the evidence was insufficient to convict Mr. Wasageshik for assault of a child in the first degree.

To show a pattern of abuse, the State attempted to prove that some of T.W.'s injuries had been healing for a period of time such that they must have occurred before September 11th. RP (5/7/2008) at 1296. However, at most, the doctors could only speculate that the injuries occurred before that date. The State's radiologist, Dr. Yost, was asked about his ability to date injuries:

Q. Thank you. Are you able at all to date fractures?

A. Not precisely. We can talk about range of dates. I can tell a fracture that's been present for at least in a child three to seven days versus one that's been less than that amount of time. What we do is we look at the relative progress of healing that happens in a relatively stereotyped way and takes time for certain changes to develop, but I can't tell you one fracture occurred at a specific date and time, I can just give you a range of time.

Q. And that way of dating fractures and the range of time, that's acceptable within the medical field?

A. Yes, it is.

RP (4/24/2008) 632.

Dr. Feldman, also testified that there was little evidence indicating past fractures that were in the process of healing or had healed:

Q. Okay. Are you able to tell us at all regarding the two fractures on each side of the scapulas of [T.W.] if there is any significance in the timing?

MR. PURTZER: Same objection, Your Honor.

THE COURT: Overruled. You can answer the question.

A. There was no evidence of healing of those fractures. Although the patterns of healing can be very subtle, the suggestion from the findings would be that they were fairly acute at the time she came to care.

Q. And what do you mean when you say fairly acute?

A. Generally, if healing becomes evident, we see evidence of it in about - some were [sic] a week-and-a-half to two weeks after injury. Some of these two-month olds, they heal a little more rapidly so it could be as short as a week after injury.

RP (5/7/2008) at 1296.

Dr. Feldman's testified that the majority of T.W.'s injuries likely occurred on September 11th.

RP (5/7/2008) at 1313-16. He speculated that

T.W.'s concussion and her rib fractures *may* have occurred before that date. RP (5/7/08) at 1315.

However, the fact that T.W.'s mother was vitamin D deficient - and there was evidence that T.W. was also Vitamin D deficient - suggested that the healing process might be slowed such that determination of the dates T.W. obtained the concussion and rib fractures was difficult to establish. RP (5/7/2008) at 1368. Dr. Keller, testified that T.W. exhibited clear evidence of Vitamin D deficiency. RP (5/1/08) at 831. Dr. Keller further testified that it is impossible to determine the date that a skull was fractured. RP (5/1/2008) at 832.

In her closing argument, the prosecutor stated:

We know that on September 11th when they picked up [T.W.] from the day care, she was perfectly fine, perfectly fine. Everyone agrees she was perfectly fine.

RP (5/12/2008) at 1555. This statement by the prosecutor concedes that it was very unlikely that T.W., a baby of less than two months, had been subjected to a "pattern" of first degree assaults. No reasonable juror who understood the difference between a "to convict" instruction for "great bodily harm," and an instruction for "pattern of

abuse," could have found Mr. Wasageshik guilty beyond a reasonable doubt.

Undoubtedly, the jury held great contempt for Mr. Wasageshik and his alleged action on September 11th, and this caused them to overlook the necessary elements of this particular count of assault of a child in the first degree based upon a pattern of abuse. Because the evidence was insufficient beyond a reasonable doubt, this court must overturn Mr. Wasageshik's conviction.

2. Insufficient evidence existed to support a conviction for great bodily harm.

Jury instruction number 19 read as follows:

To convict the defendant of the crime of assault of a child in the first degree as charged in Count II, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about the period between the 9th of September, 2006 and the 15th day of September, 2006, the defendant intentionally assaulted T.W. and recklessly inflicted great bodily harm;

(2) That the defendant was eighteen years of age or older and T.W. was under the age of thirteen; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond

a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 222.

Here, insufficient evidence existed to find Mr. Wasageshik guilty of assault of a child in the first degree as alleged in Count II. Rather, the evidence, when viewed in the light most favorable to the prosecution, supported, at most, a finding of the lesser offense of assault of a child in the second degree.

Jury instruction number 18 defined great bodily harm:

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

CP 221.

In this case, there was insufficient evidence to prove that T.W. (a) faced a probability of death, or (b) was seriously permanently disfigured, or (c) suffered a significant permanent loss or impairment of the function of

any bodily part or organ. Although evidence suggested that T.W. suffered numerous fractures and other ailments, none of the evidence was sufficient to prove child assault in the first degree beyond a reasonable doubt.

a. *Probability of Death*

Dr. Pamela Moore was the first pediatrician to examine T.W. after the Wasageshik's noticed her injuries. When asked if T.W.'s condition would have been better served in an emergency room, Dr. Moore testified:

Q. You said that she was the first appointment for that morning?

A. Yes.

Q. Had you known that that was her condition, would you have told the individual making that appointment to take her to the hospital or would you have kept her at the clinic?

A. I'm sorry, I don't understand.

Q. That's fine, let me repeat the question a little bit better phrased hopefully.

Had you known [T.W.] was in the same condition as when you started treating her when the appointment was made for 8:45 on 9/15, would you have told the mother to bring the child to the hospital or bring her to the clinic?

A. By the hospital, do you mean the emergency room?

Q. Yes, thank you.

A. I don't know that I can answer that because I didn't have any role in having her schedule the appointment. I do believe that a child that is this sick can be taken care of by a pediatrician with the right support, which we did have in the clinic at the time. A child this sick could also be taken care of in an emergency room but wouldn't necessarily be taken care of by a pediatrician. I think both settings are adequate.

RP (4/21/2008) at 288. Clearly, although T.W. may have been injured, her life was not injured to the point where she would die. Surely a doctor would testify that a baby facing such peril should be rushed to an emergency room rather than have the luxury of scheduling an appointment with a pediatrician.

*b. Serious Permanent Disfigurement,
or Significant Permanent Loss or
Impairment of the Function of any
Bodily Part or Organ.*

Dr. Moore testified as follows regarding her October 12th examination of T.W.:

She was discharged from the hospital on the 5th of October to foster care. Foster mom presents with the infant today for follow-up. Per the foster mom, she's been doing well since discharge. She is taking five ounces of formula every four hours and having some spit up after feeding but has not been unhappy. She was seen by the neurosurgeon at Children's Hospital the

day prior to the visit with me and placed in a special immobilization device with a C-Collar, which is something that stabilizes the neck for the fractured vertebrae.

The foster mom reports that she's moving all her extremities well at that point. At that point she was still like having her hands in fists. The foster mom said that when she's asleep she's able to straighten her hands out, but within a short period of time, they go back to being in fists. Frequently, children who are discharged from the hospital with this situation would be discharged with little splints for the hands to keep them open. But while she was in the hospital, they were causing blisters on her hands so it was felt that she was better off without them.

RP (4/21/2008) at 292.

Dr. Moore testified that she had another follow-up appointment with T.W. in the summer of 2007, wherein she testified that T.W.'s health had significantly improved:

Q. Okay. Did you treat [T.W] at any other time besides the 12th of October?

A. I saw her for another follow-up at some point in the summer of 2007; I don't recall the date but it was much, much later.

Q. Okay. Do you recall how she was at that point?

A. She was significantly improved. I was astonished at how good she looked, she was smiling. I don't remember the specifics of what her hands were doing or not doing but she was a very

different child in comparison to when I treated her in association with her injuries.

Id. at 296-97.

Clearly, based upon the above testimony, there was no evidence, beyond a reasonable doubt, that serious, permanent disfigurement or impairment existed. As such, the evidence does not support the first degree child assault conviction for Count II.

D. It was improper for the prosecutor to serve as the victim's proxy during sentencing.

Pursuant to RCW 7.69.030, crime victims have the opportunity to present a statement in person at the defendant's sentencing hearing and also at any hearing conducted regarding the pardon or commutation of a sentence. See RCW 7.69.030(13), (16). However, when a victim does not speak, the State does not serve as the victim's proxy. See State v. Carreno-Moldenado, 135 Wn.App. 77, 143 P.3d 343 (2006).

In Carreno-Moldenado, the defendant sought to withdraw his guilty plea after the prosecutor argued aggravating factors at sentencing - after having already agreed to recommend a low end

sentence of 240 months for first degree rape convictions. The Court, in assessing the actions of the prosecutor, addressed the defendant's arguments and also the State's argument that "it has a right to speak on the victim's behalf at the sentencing hearing." Carreno-Moldenado 135 Wn.App. at 83-84.

The Court, in reaching its decision, focused on both Article 1 § 35 of the Washington Constitution as well as RCW 7.69.030. In determining the rights of the parties, the Court stated as follows:

Article 1 § 35 and RCW 7.69.030 give the victims the right to speak or not speak on their own behalf. But they do not provide the State with the right to speak for the victims when they have decided not to speak, they have not requested assistance in otherwise communicating with the court, such as by presenting a victim impact statement. Here the victims were present and able to speak or ask for the prosecutor's assistance if they so desired. The record does not show that the victims asked the prosecutor to serve as their proxy, either by speaking on their behalf, by reading a victim impact statement they had prepared or by giving the court specific documents supporting a request for restitution.

Id. at 86.

Because the victims did not request the State to argue on their behalf, the Court found that Mr. Carreno-Moldenado's motion to withdraw his guilty plea should be granted based upon the prosecutor's remarks at sentencing.

In Mr. Wasageshik's case, neither the victim, who could not speak, nor a guardian ad litem for the victim spoke on the victim's behalf. Rather, it was the State that urged the Court to impose an exceptional sentence. Although the Constitutional amendment and the victim's rights' statute were in effect at the time of Mr. Wasageshik's sentencing, there is no evidence that the prosecutor's argument was ratified by the victim or by a guardian ad litem. Accordingly, the Court should remand Mr. Wasageshik's case for re-sentencing.

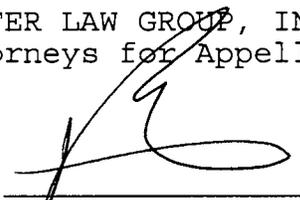
V. CONCLUSION

Because Mr. Wasageshik was overwhelmingly prejudiced at trial by the admission of evidence that should have been legally suppressed, and because the evidence presented does not support the convictions, he respectfully requests that this court reverse his convictions. Alternatively, because the prosecutor acted as the

victim's proxy during sentencing, this court should remand Mr. Wasageshik's case for re-sentencing.

RESPECTFULLY SUBMITTED this 27th day of March, 2009.

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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BY *Lee Ann Mathews*
DEPUTY

Signed at Tacoma, Washington this 27th day
of March, 2009.


Lee Ann Mathews