

NO. 42176-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB MEJIA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-00974-9

BRIEF OF RESPONDENT

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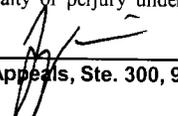
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED April 25, 2012, Port Orchard, WA 
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim of ineffective assistance of counsel must fail when: (1) he cannot show an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; or, (3) that the result of the trial would have been different had the evidence not been admitted?

2. Whether the Defendant's claim of ineffective assistance of counsel must fail when the Defendant cannot show that there were no legitimate strategic or tactical reasons for his counsel's failing to request a limiting instruction?

3. Whether the Defendant's claims of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, the evidence was sufficient to permit a rational trier of fact to find the essential elements of the charged crimes beyond a reasonable doubt?

4. Whether the trial court abused its considerable discretion by imposing an exceptional sentence after the jury had found that a statutory aggravating factor applied to the Defendant's crimes?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Jacob Mejia, was charged by an amended information filed in Kitsap County Superior Court with Assault in the First Degree and Criminal Mistreatment in the Second Degree. CP 5. Both counts involved a domestic violence special allegation and an allegation that the crimes were committed against a particularly vulnerable victim. CP 5-8. A jury found the Defendant guilty of the two charged offenses and found that the special allegation and aggravating factor had been proven. CP 57-61. The trial court then imposed an exceptional sentence. CP 111. This appeal followed.

B. FACTS

The Defendant and Sarah Tate met and began dating while they were in high school. RP 831. After dating for approximately three months, Ms. Tate became pregnant. RP 831. In late October 2008 Ms. Tate moved in with the Defendant, the Defendant's parents, and the Defendant's sister. RP 832. Shortly thereafter, on November 6, 2008, Ms. Tate date gave birth to a son, A.M.M. RP 832.

A.M.M.'s pediatrician testified that A.M.M. was a normal healthy child when he was examined five days after birth. RP 395-96. When A.M.M. was 12 days old, however, he was brought to Harrison Hospital with what turned out to be a fracture of his left humerus. RP 445. A further

skeletal exam and a CT scan showed no further injuries. RP 584. The child was then transferred to Mary Bridge to see a pediatric orthopedic specialist for further treatment. RP 450.

While A.M.M. was at Mary Bridge, Dr. Duralde, the medical director at the Child Abuse Intervention Department at Mary Bridge, met with the Defendant and Ms. Tate about A.M.M.'s injury. RP 275. The Defendant explained that he had been swaddling the child and had been unsure how to do it, and that he had "tucked" A.M.M.'s arm behind his back. RP 277. The Defendant also demonstrated with a doll and explained to Dr. Duralde how he had tucked A.M.M.'s arm. RP 278. Dr. Duralde found that the Defendant's description of the event was consistent with A.M.M.'s injury and, finding no other evidence of abuse, Dr. Duralde concluded that it was an accidental injury. RP 282-83.¹

The Defendant did not have much experience with raising a small child. RP 684, 700. Ms. Tate described that the Defendant was "ignorant" when it came to babies and described that the Defendant would get frustrated with A.M.M. RP 850-51. Ms. Tate also explained that the Defendant did not like it when she told him how to care for A.M.M. RP 853.

¹ Heather Lofgren from Child Protective Services also spoke with the Defendant and wrote up a "safety plan" in which the Defendant and Ms. Tate agreed to take a parenting class and participate in public health nurse services. RP 547. The Defendant and Ms. Tate, however, never took the parenting skills class. RP 547.

Ms. Tate explained that when she woke up on the morning of December 22, 2008 she went out to the living room and remembered “trying to be really nice that day.” RP 834. The Defendant fed A.M.M., and Ms. Tate then went and got a diaper and wipes for the child. RP 834. She explained that A.M.M. had had a bad diaper rash. RP 834.

Ms. Tate explained that she was somewhat reluctant to give the Defendant direction as there had been tension between she and the Defendant regarding how to care for the child, and there was tension on December 22 about this issue. RP 835, 853. Ms. Tate was going to tell the Defendant to change A.M.M.’s diaper, but she knew the Defendant did not like being told what to do. RP 834. So before she told him to change the diaper, Ms. Tate went to get the diaper and wipes so that when she told him to change the diaper “it would be kind of, a softer thing.” RP 834. Ms. Tate also explained that she and the Defendant “were having a lot of problems then.” RP 485.

Ms. Tate gave the Defendant the diaper and told him to change A.M.M.’s diaper, and Ms. Tate said that this annoyed the Defendant. RP 854. This made Ms. Tate mad, but she didn’t want to argue so she went to take a shower and stayed in the shower for approximately 10 to 15 minutes until the hot water ran out. RP 835, 854. While she was in the shower Ms.

Tate “heard a little crying.” RP 838.

After the shower Ms. Tate went to the computer and played a game for approximately 10 minutes. RP 854. Ms. Tate thus explained that there was a 20-25 minute period where the Defendant was alone with A.M.M. RP 855. The Defendant acknowledged that he was alone with A.M.M. for 20 -25 minutes. RP 891.

The Defendant explained the events that occurred during those 20-25 minutes to several people and said that he sat on a couch or loveseat with A.M.M. and changed the child’s diaper. RP 423. He then put the child in the center of the loveseat and went into the kitchen to make a cup of coffee. RP 423. He then heard a “thump” and looked in to the living room and saw A.M.M. on the floor and A.M.M. started to cry. RP 424. The Defendant also said that he saw the family dog jump off of the loveseat. RP 424-25. The Defendant and Ms Tate (who was still on the computer)² then came into the room and the Defendant picked up the child. RP 425-26, 839.

A.M.M. continued to cry for 20 minutes and would not open his eyes. RP 427. Ms. Tate described that A.M.M. was making “really, really soft cries” and did not seem right. RP 841-42. Ms. Tate then took A.M.M. and

² Ms. Tate had not seen A.M.M. during the 20-25 minutes that the child was alone with the Defendant, and the first time she had seen A.M.M. since her shower was when she came into the living room with the Defendant. RP 838.

blew in A.M.M.'s face in an attempt to get him to keep his eyes open, and she kept talking to him trying to keep him awake. RP 842.

Ms. Tate told the Defendant that she wanted to take A.M.M. to the hospital, but the Defendant disagreed. RP 842. Ultimately A.M.M. was not taken to the hospital until approximately 12 hours later when the child began to have seizures. RP 456, 845-47.

Upon arrival at the Harrison Hospital emergency room, A.M.M. was treated by Dr. Valrey. RP 201, 205. Dr. Valrey observed A.M.M. having a seizure, and testing revealed that A.M.M. had a skull fracture, a left frontal subdural hematoma, and a second subdural on the right side of the brain. RP 216-19, 227. A.M.M. was then airlifted to Mary Bridge Hospital in Tacoma, which had the pediatric ICU, neurologists, and neurosurgeons needed to treat A.M.M. RP 224-26.

Several doctors at Mary Bridge treated A.M.M., performed various tests on the child, and found numerous injuries. Specifically, the doctors found that A.M.M. had a skull fracture, two subdural hematomas, multiple rib fractures, a fractured left clavicle, and a fractured right humerus. RP 181, 297-98, 535-36. The subdural hematomas were considered "life threatening" and indicated that a severe trauma had taken place. RP 537. A.M.M. also suffered a "global" or "diffuse" brain injury and testing showed that lot's of

A.M.M.'s brain tissue had been damaged and destroyed. RP 164, 180, 301-02. Some of this damage was directly caused by whatever impact had occurred and other damage was caused by the hematomas and the swelling of A.M.M.'s brain. RP 183-85, 311.

Law enforcement was notified of A.M.M.'s injuries and Detective Lori Blankenship from the Kitsap County Sheriff's Office responded to investigate. RP 409. Detective Blankenship spoke to the doctors the Defendant, and the Defendant told her that he had placed A.M.M. on a couch while he went to the kitchen and that he had heard a thump and then saw A.M.M. on the floor. RP 414-16, RP 423-24. Detective Blankenship asked the Defendant if it seemed feasible that a six-week-old baby would sustain such serious injuries from the events he described, and the Defendant responded that he would have a hard time believing this himself and that he didn't expect people to believe what had happened. RP 499-500. The Defendant also admitted to CPS that he wasn't the best caretaker for his child and that he needed parenting classes. RP 551-52.

Detective Blankenship later went to the Mejia's residence to look at the couch. RP 502-04. She measured the couch and found that the distance from the top of the couch cushion to the floor was 19 inches, and the flooring was carpeted. RP 509; see also 463-64. There were no coffee tables or other hard objects near the table. RP 504; see also, RP 703.

At trial, several medical experts explained that A.M.M.'s injuries could not have been caused by a fall from the couch to the floor. For instance, Dr. Lupu, an intensive care pediatrician at Mary Bridge explained that a fall from a couch to the floor would not have caused A.M.M.'s injuries. RP 633, 636.

Dr. Duralde, the medical director at the Child Abuse Intervention Department at Mary Bridge, similarly explained that a simple fall from under four feet would not have caused A.M.M.'s injuries. RP 302. Dr. Duralde specifically testified that there would simply not be enough force involved in a fall from a couch to cause the direct and devastating brain injury that A.M.M. had suffered. RP 343, 371-72. Rather, A.M.M.'s injuries were consistent with inflicted trauma. RP 345.

Dr. Sugar, an attending physician at the University of Washington, a clinical professor of pediatrics, and the medical director of the Harborview Center for Sexual Assault and Traumatic Stress, also testified that the severity of A.M.M.'s brain injury and the multitude of fractures were not compatible with a simple fall. RP 982-83. Dr. Sugar also explained that A.M.M.'s arm and rib fractures were not consistent with a fall from a couch. RP 1003-04.

Dr. Hrivnak, a pediatric neurologist at Mary Bridge, also testified that A.M.M. suffered extensive brain damage with lots of damaged tissue and

some shrinkage of his brain, caused by his injuries. RP 179-81. As a result, A.M.M. has cerebral palsy and partial epilepsy. RP 151. In addition, A.M.M.'s brain damage and subsequent shrinkage of the brain caused his head to stop growing for a period of time and he suffers from microcephaly. RP 155-57. Furthermore, A.M.M.'s global brain damage will cause mental retardation and will likely cause delays in all areas of A.M.M.'s development, including his cognitive, social, fine motor, and gross motor development. RP 157. A.M.M. will thus need life-long care and likely will never be able to live independently. RP 167. He will also need a wheelchair and will likely never be able to be toilet trained. RP 167-68. Finally, as a result of his injuries, A.M.M. will always have an intellectual disability and it is unlikely he will ever develop the ability to speak words or eat solid food. RP 166, 169.

III. ARGUMENT

A. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE: (1) HE CANNOT SHOW AN ABSENCE OF LEGITIMATE STRATEGIC OR TACTICAL REASONS SUPPORTING THE CHALLENGED CONDUCT; (2) THAT AN OBJECTION TO THE EVIDENCE WOULD LIKELY HAVE BEEN SUSTAINED; OR, (3) THAT THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT HAD THE EVIDENCE NOT BEEN ADMITTED.

The Defendant argues that he trial counsel provided ineffective assistance of counsel for failing to object to the evidence regarding A.M.M.'s November arm fracture. App.'s Br. at 18. This claim is without merit because the Defendant cannot show that an absence of legitimate strategic or tactical reasons supporting the challenged conduct, that an objection to the evidence would likely have been sustained, or that the result of the trial would have been different had the evidence not been admitted.

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Courts

engage in a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

More specifically, where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. McFarland*, 127 Wn.2d 322, 336-37, 899 P.2d 1251 (1995); *State v. Hendrickson*, 129 Wn.2d 61, 77-80, 917 P.2d 563 (1996); *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

In the present case the Defendant's claim of ineffective assistance of counsel must fail for several reasons. First, the Defendant has failed to show an absence of legitimate strategic or tactical reasons for his counsel's failure to object to the evidence of A.M.M.'s November arm fracture.

At trial, the Defendant presented expert testimony from Dr. Patrick Barnes, a pediatric radiologist from California. RP 727. Dr. Barnes opined that it was possible that A.M.M. suffered from a pre-existing medical condition that could have predisposed the child to traumatic injury. RP 740. Dr. Barnes, for instance, specifically discussed the possibility of a "fragile

bone disorder,” possibly caused by a Vitamin D deficiency. RP 747, 754, 776-77, 780-81. Given this defense theory, trial counsel had a legitimate strategic or tactical reason for wanting the evidence of the previous fracture to come in, as this evidence could have supported the defense claim that the child could have been predisposed to injury or had fragile bones, and thus could have sustained the serious brain injuries as a result of an accidental injury such as a short fall off of the couch.

The Defendant’s claim of ineffective assistance of counsel is also without merit because the Defendant has failed to show that an objection to the evidence would likely have been sustained.

ER 404(b) prohibits admission of evidence of any act, regardless of whether it is a bad act, used to show the character of a person in conformity with his character on a particular occasion. *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002) (citing *State v. Halstein*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993)). ER 404(b) forbids evidence of prior acts that tend to prove a defendant's propensity to commit a crime. Nevertheless, ER 404(b) allows admission of prior acts for other limited purposes. *State v. Wade*, 98 Wn.App. 328, 333, 989 P.2d 576 (1999). ER 404(b) specifically provides that evidence of other wrongs or act may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In addition, the use of other crimes and acts to rebut a claim of accident or to rebut “any material assertion by a party” is a well-established exception to ER 404(b). *State v. Roth*, 75 Wn.App. 808, 818, 881 P.2d 268 (1994). Furthermore, where the defendant claims the child's injuries are the result of an accident, evidence of prior injuries to the child is admissible to prove the State's case of intentional conduct. *State v. Mercer*, 34 Wn.App. 654, 663 P.2d 857, *review denied*, 100 Wn.2d 1005 (1983) (where defendant is charged with abusing infant, evidence of prior injuries which the defendant claimed were accidental were properly admitted and also holding that State need not even prove that defendant actually caused prior injuries to the infant before evidence concerning them can be admitted into evidence); *State v. Terry*, 10 Wn.App. 874, 520 P.2d 1397 (1974) (holding that in a case where the defendant asserts that a child has died as a result of an accident in the absence of any intent on his part to harm the child, trial court did not abuse its discretion in admitting evidence of prior and subsequent incidents involving the defendant's treatment of children); *State v. Bell*, 10 Wn.App. 957, 960, 521 P.2d 70, *review denied*, 84 Wn.2d 1006 (1974) (evidence of prior injuries suffered by the child victim properly admitted where father claimed child had injured herself by falling from crib).

Given the express language of ER 404(b) and the cases cited above, the Defendant cannot show that the trial court would have excluded the

evidence at issue if the Defendant's trial counsel had objected. Rather, as the Defendant's claim was that A.M.M. was injured as a result of an accident, the evidence of the prior fracture was admissible to rebut this material assertion and to show the absence of accident. Thus, there trial court could have properly admitted the evidence pursuant to *Roth, Mercer, Terry and Bell*. In short, the Defendant cannot show that that an objection to the evidence would likely have been sustained.

Finally, the Defendant's claim of ineffective assistance of counsel must fail because the Defendant cannot show that the result of the trial would have been different had the evidence not been admitted. The uncontested evidence at trial was that the Defendant was alone with A.M.M. for approximately 20-25 minutes after being annoyed with Ms. Tate. In addition, while Ms. Tate was in the shower she heard A.M.M. cry. RP 838. Furthermore, the Defendant's claim that A.M.M.'s injuries were caused by an 18 inch fall from a couch to the floor was contrary to common sense and was absolutely inconsistent with testimony from numerous medical expert's who testified that A.M.M.'s horrific and life-threatening injuries could not have been caused by the fall described by the Defendant. Given all of this evidence, the Defendant cannot show that the outcome of the trial would have been different if the jury had not heard about the November arm fracture.

For all of the above mentioned reasons, the Defendant's claim of ineffective assistance of counsel must fail.

B. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE THE DEFENDANT CANNOT SHOW THAT THERE WERE NO LEGITIMATE STRATEGIC OR TACTICAL REASON FOR HIS COUNSEL'S FAILING TO REQUEST A LIMITING INSTRUCTION.

The Defendant next claims that his trial counsel provided ineffective assistance of counsel by failing to request a limiting instruction regarding the November arm fracture. App.'s Br. at 29. This claim is without merit because defense counsel had several legitimate strategic or tactical reasons for not requesting a limiting instruction. Specifically, trial counsel could have concluded: (1) that a limiting instruction would have hampered his ability to use the evidence to support the defense theory of the case; and, (2) that a limiting instruction could have highlighted the State's purpose in admitting the evidence.

A valid tactical decision cannot form the basis for an ineffective assistance of counsel claim. *State v. Israel*, 113 Wn.App. 243, 270, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1013 (2003). Because of the presumption in favor of effective representation, a defendant must show there was no legitimate strategic or tactical reason for the challenged conduct.

McFarland, 127 Wn.2d at 366.

In the present case, requesting a limiting instruction would have hampered the defense's ability to argue that A.M.M.'s injuries were potentially caused by some pre-existing condition or "fragile bone disorder." As the November arm fracture was potential evidence to support the defense theory that A.M.M.'s was somehow susceptible to injury from an otherwise innocuous event, trial counsel had a reason not to request a limiting instruction. In short, the Defendant's claim of ineffective assistance must fail because he cannot show that counsel had no legitimate strategic or tactical reason for failing to request a limiting instruction.

Furthermore, even if trial counsel's use of the November arm fracture to support its theory were to be ignored, trial counsel still had other legitimate reasons not to request a limiting instruction.

Under Washington law a reviewing court presumes defense counsel's decision not to request a limiting instruction was a tactical decision made to avoid highlighting the evidence. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn.App. 543, 551, 844 P.2d 447 (1993). Washington courts have long held that a failure to request a limiting instruction can be a tactical decision not to emphasize damaging evidence. *See, e.g., State v. Price*, 126 Wn.App. 617, 649, 109 P.3d 27 (2005) (defense

counsel's decision not to request a limiting instruction regarding the use of ER 404(b) evidence of prior bad acts can be characterized as trial strategy or tactics); *State v. Donald*, 68 Wn.App. 543, 551, 844 P.2d 447 (1993); *State v. Barragan*, 102 Wn.App. 754, 762, p P.3d 942 (2000) (can presume counsel decided not to request a limiting instruction regarding the proper use of ER 404(b) evidence because to do so would reemphasize this damaging evidence).

Thus, even ignoring the fact that the November arm fracture potentially supported the defense theory of the case, defense counsel could have legitimately decide not to request a limiting instruction in order not to draw attention to the evidence. This is especially true since the limiting instruction would have directed the jury to the specific purpose that the evidence was admissible pursuant to ER 404(b).

For all of these reasons Defendant's claim of ineffective assistance must fail since counsel's decision not to request a limiting instruction could have been a valid tactical decision, and a valid tactical decision cannot form the basis for an ineffective assistance of counsel claim.

C. THE DEFENDANT'S CLAIMS OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT TO PERMIT A RATIONAL TRIER OF FACT TO FIND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.

The Defendant next claims that the evidence was insufficient to support his conviction. This claim is without merit because, viewing the evidence in a light most favorable to the State, the evidence was sufficient to permit a rational jury to find that the State had proved the essential elements of the crimes of Assault in the First Degree and Criminal Mistreatment in the Second Degree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

In the present case, to prove the charge of Assault in the First Degree the State had to prove that the Defendant, with intent to inflict great bodily harm, assaulted A.M.M. and did in fact inflict great bodily harm. CP 46, 49, RCW 9A.36.011(1).

In the present case, viewing the evidence in a light most favorable to the State, the evidence showed that on the morning of the assault there had been tension between the Defendant and Ms. Tate about their care of A.M.M. and that the Defendant did not like being told what to do. RP 834-35, 853. Ms. Tate, however, told the Defendant to change A.M.M.'s diaper, and this annoyed the Defendant. RP 854. Ms. Tate then went to take a shower, leaving the Defendant alone with A.M.M. for 20-25 minutes, and while she was in the shower Ms. Tate "heard a little crying." RP 838. Although the Defendant did not ever admit that he had assaulted A.M.M., the Defendant's claim that A.M.M.'s injuries must have been caused by the child falling off the couch was, simply put, not credible. Rather the nature and severity and of

A.M.M.'s injuries were consistent with an inflicted injury and were inconsistent with a fall from a couch. In addition, given the nature and severity of the injuries, a reasonable juror could have concluded that the Defendant assaulted A.M.M. and that the injuries themselves demonstrated that he intended to inflict great bodily harm. Furthermore, the evidence clearly established that A.M.M. did indeed suffer great bodily harm.

On appeal, the Defendant argues that the evidence showed that A.M.M.'s injuries could have been caused by an accident as described by the Defendant. App.'s Br. at 31-32. This argument, however, misconstrues the actual evidence at trial and certainly fails to consider the evidence at trial in a light most favorable to the State. The actual testimony at trial from Dr. Duralde clearly demonstrated that there would simply not be enough force involved in a fall from a couch to cause the direct and devastating brain injury that A.M.M. had suffered. RP 343, 371-72. Rather, A.M.M.'s injuries were consistent with inflicted trauma. RP 345. Similarly, Dr. Sugar, testified that the severity of A.M.M.'s brain injury and the multitude of fractures were not compatible with a simple fall. RP 982-83, 1003-04.

Viewing this testimony (and the other evidence concerning A.M.M.'s injuries) in a light most favorable to the State, a rational trier of fact could have found that the Defendant must have assaulted A.M.M. with the intent to inflict great bodily harm. That is all the law requires.

With respect to the charge of Criminal Mistreatment in the Second Degree, the State was required to prove that the Defendant recklessly created an imminent and substantial risk of death or great bodily harm by withholding any of the basic necessities of life from his son. CP 50, 53, RCW 9A.42.030.

As outlined above, a rational jury could have concluded that the Defendant intentionally and violently assaulted A.M.M. In so doing the Defendant would have known that A.M.M. likely needed immediate medical attention, yet the Defendant did not seek such help for the child. Furthermore, when Ms. Tate (who was understandably concerned about A.M.M.'s inability to keep his eyes open and his unusual crying) suggested that they take the child to the hospital, the Defendant suggested otherwise. In addition, the Defendant made no attempt to seek medical assistance for the child for nearly 12 hours. A rational jury could have (and indeed did) find that this action (undertaken after the Defendant had assaulted the child with such force that he caused global brain injuries and numerous fractures), was reckless and created an imminent and substantial risk of death or great bodily harm by the withholding any of the basic necessities of life; specifically "medically necessary health care."³

³ See CP 52; RCW 9A.42.010(1).

In short, having found that the Defendant intentionally and violently assaulted A.M.M. with the force necessary to cause A.M.M.'s numerous and serious injuries, a rational jury could have easily found that the Defendant's lengthy delay in seeking medical treatment for his son constituted Criminal Mistreatment in the Second Degree.

For all of the above stated reasons, the Defendant's claims regarding the sufficiency of the evidence must fail.

D. THE TRIAL COURT DID NOT ABUSE ITS CONSIDERABLE DISCRETION BY IMPOSING AN EXCEPTIONAL SENTENCE AFTER THE JURY HAD FOUND THAT A STATUTORY AGGRAVATING FACTORY APPLIED TO THE DEFENDANT'S CRIMES.

The Defendant next claims that the trial court abused its discretion in imposing an exceptional sentence. This claim is without merit because the jury's finding that the victim was particularly vulnerable authorized the trial court to impose any sentence up the statutory maximum. Furthermore, although the trial court should have entered written findings regarding the exceptional sentence, the trial court's oral ruling demonstrates that the exceptional sentence was based on the jury's finding that the victim was particularly vulnerable. Thus, the record is sufficiently clear to facilitate effective appellate review and any error, therefore, was harmless.

Pursuant to RCW 9.94A.537(6), when an aggravating factor is found by the jury, the trial court is authorized to impose an exceptional sentence up to the statutory maximum sentence. A jury's finding that any single aggravating factor was proved establishes the facts legally essential to expose the defendant to the statutorily-authorized sentence for the crime committed. *State v. Williams*, 159 Wn.App. 298, 316, 244 P.3d 1018 (2011). In addition, once a jury finds that a statutory aggravating factor applies, a trial court is authorized to sentence the defendant to a term of confinement up to the statutory maximum and does not “*need to make any additional findings* in order to constitutionally impose such a sentence.” *Williams*, 159 Wn.App. at 318 (emphasis in original), *citing Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Although a trial court is required to enter written findings regarding an exceptional sentence, this Court has explained that where “the trial court's oral opinion and the hearing record are sufficiently comprehensive and clear that written facts would be a mere formality,” the trial court's failure to enter mandatory written findings and conclusions is harmless. *State v. Bluehorse*, 159 Wn.App. 410, 423, 248 P.3d 537 (2011)(finding that a trial court's oral ruling was sufficiently clear to facilitate effective appellate review because jury had found a statutory aggravating factor which trial court mentioned in sentencing).

In the present case the jury found that the statutory aggravating factor of a particularly vulnerable victim applied. CP 57-61. At sentencing the trial court addressed the Defendant and offered, among other things, the following explanation of her sentence,

[A.M.M.] was born a perfectly healthy little boy as he came into this world. He was a beautiful, defenseless baby, and he had no choice but to trust that he would be protected, nurtured, and cared for. Instead, his own parent let him down, not with neglect, but as the jury has found, with intent, and he has been damaged forever. He had no choice but to trust you. You not only broke that trust, you almost killed him and left him, as I say, a mere shadow of everything that he could have been.

And so it is with great sadness on my part that I am going to go over the standard range. As indicated, the standard range in this case is, on the assault case, 120 to 160 months. I'm going to impose 300 months to be served. That's a total of 25 years on Count I.

RP (May 23, 2011) 47-48.

As the jury found that the statutory aggravating factor applied, the trial court was clearly authorized to impose a sentence up to the statutory maximum. Although the trial court should have entered written findings regarding the exceptional sentence, the trial court's oral ruling in which the court clearly explained that the victim was "defenseless" and particularly vulnerable, was sufficient to facilitate effective appellate review. Any error, therefore, was harmless.

Finally, the Defendant claims that the trial court's exceptional sentence was clearly excessive. App.'s Br. at 37.

The length of an exceptional sentence will not be reversed as clearly excessive absent an abuse of discretion. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995) (citing *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986)). A sentence is clearly excessive if it is based on untenable grounds or untenable reasons, or an action no reasonable judge would have taken. *Oxborrow*, 106 Wn.2d at 531. Stated another way, a sentence is clearly excessive if "no reasonable person would impose it." *State v. Creekmore*, 55 Wn.App. 852, 863, 783 P.2d 1068 (1989), *review denied*, 114 Wn.2d 1020, 792 P.2d 533 (1990); *see also*, *State v. Ross*, 71 Wn.App. 556, 569, 861 P.2d 473 (1993).

In the present cast the Defendant has not cited to any authority that would indicate that the superior court abused its discretion when it entered the exceptional sentence. Furthermore, the record (when viewed as a whole) clearly demonstrates that the trial court did not abuse its considerable discretion by imposing the sentence that it did.

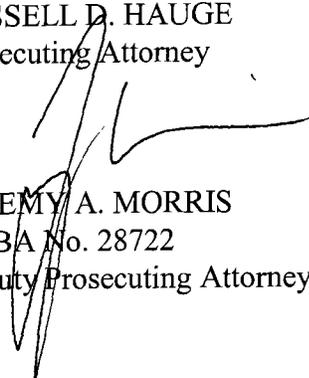
IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED April 25, 2012.

Respectfully submitted,

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