

NO. 46311-3-II

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

---

STATE OF WASHINGTON, Respondent

v.

BERNARDO MARCO MONCADA, Appellant

---

FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-02065-3

---

BRIEF OF RESPONDENT

---

Attorneys for Respondent:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

ANNE M. CRUSER, WSBA #27944  
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

**TABLE OF CONTENTS**

A. RESPONSE TO ASSIGNMENTS OF ERROR..... 1

    I. THE TRIAL COURT PROPERLY ADMITTED R.B.’S  
HEARSAY STATEMENTS. .... 1

    II. MONCADA IS NOT ENTITLED TO A NEW TRIAL BASED  
ON PROSECUTORIAL MISCONDUCT. .... 1

    III. MONCADA’S JUDGMENT AND SENTENCE WILL BE  
AMENDED TO CORRECT HIS TERM OF COMMUNITY  
CUSTODY. .... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT ..... 4

    I. THE TRIAL COURT PROPERLY ADMITTED R.B.’S  
HEARSAY STATEMENTS. .... 4

    II. MONCADA IS NOT ENTITLED TO A NEW TRIAL BASED  
ON PROSECUTORIAL MISCONDUCT. .... 12

    III. MONCADA’S JUDGMENT AND SENTENCE WILL BE  
AMENDED TO CORRECT HIS TERM OF COMMUNITY  
CUSTODY. .... 25

D. CONCLUSION ..... 26

## TABLE OF AUTHORITIES

### Cases

<i>State v. Ashcraft</i> , 71 Wn.App. 444, 859 P.2d 60 (1993).....	5, 6, 7
<i>State v. Beadle</i> , 173 Wn.2d 97, 265 P.3d 863 (2011).....	5, 11
<i>State v. Borboa</i> , 157 Wn.2d 108, 135 P.3d 469 (2006).....	5
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	8
<i>State v. C.J.</i> , 148 Wn.2d 672, 63 P.3d 765 (2003).....	5
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	19, 22, 25
<i>State v. Hovig</i> , 149 Wn.App. 1, 202 P.3d 318 (2009) .....	6
<i>State v. Johnson</i> , 158 Wn.App. 243 P.3d 936 (2010).....	21
<i>State v. Magers</i> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	17
<i>State v. McKague</i> , 172 Wn.2d 802, 262 P.3d 1225 (2011).....	6
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2005) .....	16
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	21, 22, 25
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	13
<i>State v. Smith</i> , 189 Wash.2d 422, 65 P.2d 1075 (1937).....	17
<i>State v. Stith</i> , 71 Wn.App. 14, 856 P.2d 415 (1993).....	17, 18
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990), <i>cert. denied</i> , 498 U.S. 1046 (1991).....	5, 16
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004) .....	8
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011) .....	13, 17
<i>State v. Vasquez</i> , 178 Wn.2d 1, 309 P.3d 318 (2013).....	24
<i>State v. Woods</i> , 63 Wn.App. 588, 821 P.2d 1235 (1991) .....	24

### Statutes

RCW 9.94A.650(3).....	25
RCW 9A.04.110.....	5
RCW 9A.16.100.....	18
RCW 9A.44.120.....	5, 8

### Rules

ER 404(b).....	18
----------------	----

A. **RESPONSE TO ASSIGNMENTS OF ERROR**

I. **THE TRIAL COURT PROPERLY ADMITTED R.B.'S HEARSAY STATEMENTS.**

II. **MONCADA IS NOT ENTITLED TO A NEW TRIAL BASED ON PROSECUTORIAL MISCONDUCT.**

III. **MONCADA'S JUDGMENT AND SENTENCE WILL BE AMENDED TO CORRECT HIS TERM OF COMMUNITY CUSTODY.**

B. **STATEMENT OF THE CASE**

On President's Day weekend of 2013, Jessica Baughman took her eight year-old son R.B. to his father's (the defendant's) house to let him stay the weekend. RP 134, 136-37. R.B. and Moncada had had limited contact up until that point. RP 135. Jessica was using the weekend as a test run to see if R.B. could spend Spring break with Moncada. RP 137. Up to that point, Moncada had sometimes disagreed with Jessica's parenting style. RP 228-30, Exhibit 8. Moncada, when asked if he felt that Jessica was "too soft" with R.B. or backs down too much, said "I think she's a prisoner to him." RP 230-31. Moncada also wanted R.B. to spend the summer with him (Moncada) so that Moncada could "straighten and strengthen him." RP 232. Moncada had a very distinct idea about how his boy should be disciplined. RP 232.

When R.B. arrived at Moncada's house he had already eaten a Happy Meal and was not hungry. RP 118. Moncada insisted that R.B. eat macaroni, but R.B. did not want to. RP 119. Because he evidently viewed this as an act of disrespect as opposed to not liking macaroni or not being hungry, Moncada took R.B. into the bathroom and whipped him with a belt on his bare buttocks. RP 119, 183-84. Moncada held R.B. down with one hand over the bathtub so he could not get away during the whipping. RP 119. R.B. wanted to cry because Moncada was hitting him so hard. RP 120. According to Moncada, R.B. was screaming. RP 184. Moncada took R.B. back to the table and again insisted he eat macaroni. RP 121. Moncada tried to force it into R.B.'s mouth. RP 121. Although R.B. swallowed it, Moncada again took him to the bathroom and whipped him with the belt in the same manner as before. RP 121. Moncada tried to force R.B. to eat a third time, this time putting his hand over his mouth to prevent R.B. from expelling the food. RP 122. R.B. cried because it hurt. RP 123. Moncada dismissed R.B.'s crying as "crocodile tears." RP 184. Moncada admitted that R.B.'s buttocks began to turn red from the first whip. RP 189.

When Jessica brought R.B. home after the three day weekend, she gave him a bath. RP 141. When R.B. removed his underwear, she had a strong reaction. RP 141-42. She asked him "what happened?" R.B. told

her “Daddy hit me.” RP 141-42. R.B. said he had been hit with a belt. RP 142. Jessica saw red marks and bruising on R.B.’s buttocks. RP 142. The bruising lasted a full week, despite having been inflicted a full three days before R.B. came home. RP 151, 163. Jessica was so upset at what she saw that she wanted to drive back up to Vancouver and confront Moncada. RP 142. Jessica is not opposed to spanking and had allowed Moncada to spank R.B. in the past with his hand. RP 157. Jessica felt compelled to call R.B.’s doctor, who told her that there was nothing to be done but wait for the bruises to heal. RP 143. After calming down, Jessica began exchanging text messages with Moncada about what happened. RP 150, exhibit 8. She told Moncada that R.B. was “black and blue on both sides” and would not be allowed at Moncada’s home by himself again. RP 151. Moncada expressed surprise, saying “That happened the first day.” RP 151. He also called it the issue “ridiculous,” and said R.B. would “learn to move on,” and said “[i]t’s not the end of the world.” RP 231-33. R.B. and Jessica talked about the incident again about a month later and R.B. cried, worried that his mother was upset with him.

Moncada admitted to Detective Hafer that he spanked R.B. over the course of seven whipping sessions, with 3 lashes per session, on his bare butt with his belt. RP 184-85. Moncada expressed surprise that R.B.’s bruising lasted for seven days after he returned home (meaning, a full ten

days after the beating). RP 188. Moncada said the bruises were “obviously” caused by getting whipped in the same spot. RP 235. When asked about the line between too much spanking and not enough spanking, Moncada said “I’ll be honest, I’ve never had to go that many rounds. But I don’t--I don’t--I don’t give in, either.” RP 188. When Moncada first led R.B. into the bathroom he didn’t cry or resist because, according to Moncada’s wife, he didn’t know what was coming. RP 214. But on the subsequent trips to the bathroom Moncada had to physically force R.B. into the bathroom. RP 214. No one but R.B. and Moncada witnessed the actual assault. RP 185, 214. Moncada admitted to putting his hand over R.B.’s mouth, but denied force feeding him. RP 237.

Moncada was charged with second degree assault of a child. CP 59. The jury returned a verdict of guilty on the lesser charge of assault of a child in the third degree and acquitted him of assault of a child in the second degree. RP 62, 63. This timely appeal followed. CP 82.

C. **ARGUMENT**

I. **THE TRIAL COURT PROPERLY ADMITTED R.B.’S HEARSAY STATEMENTS.**

The trial court did not abuse its discretion in admitting R.B.’s statements to his mother and to the forensic interviewer, Amanda Kauffman.

Under RCW 9A.44.120, the trial court may admit evidence of a child hearsay statements when made by a child under the age of ten and describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110. Under RCW 9A.04.110, substantial bodily harm is defined as bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part. The trial court's decision to admit such evidence is reviewed for abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 667, 790 P.2d 610 (1990), *State v. Beadle*, 173 Wn.2d 97, 112, 265 P.3d 863 (2011). "A trial court abuses its discretion 'only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.'" *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006), quoting *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

Bruises, depending on their seriousness and duration, can constitute substantial bodily harm. In *State v. Ashcraft*, 71 Wn.App. 444, 449, 455, 859 P.2d 60 (1993), the Court of Appeals held that there was sufficient evidence of substantial bodily harm where the child victim had bruises on her body that were over three days old and bite marks consistent with the size of an adult mouth. Additionally, bruises were

found that were consistent with being hit by a shoe with a rigid sole. The Court held that a rational trier of fact could find substantial bodily harm based upon these injuries. *Id.* In *State v. Hovig*, 149 Wn.App. 1, 5-6, 14, 202 P.3d 318 (2009), the Court of Appeals found sufficient evidence upon which a rational trier of fact could find substantial bodily harm where the infant victim sustained a human bite mark (that failed to break the skin) on a large portion of his cheek. Citing *Ashcraft* with approval, the *Hovig* Court noted that substantial bodily harm can be found where the state produces evidence of *serious* bruising that causes a temporary but substantial disfigurement. *Hovig* at 13 (emphasis added). In *State v. McKague*, 172 Wn.2d 802, 262 P.3d 1225 (2011) the Supreme Court clarified that “substantial,” for purposes of “substantial bodily harm” means something that is “considerable in amount, value or worth.” The Court went on to cite both *Ashcraft* and *Hovig* with approval. *McKague* at 806.

Moncada complains that when taken out of context, the holding in *Ashcraft* could be construed as holding that any bruising of any kind, size, or duration constitutes substantial bodily injury. Yet the only one who has taken the language of *Ashcraft* out of context is Moncada. Judge Lewis certainly did not, nor did the Supreme Court when it cited *Ashcraft* with approval in *McKague*. Moncada asserts that Judge Lewis held that the

mere presence of bruise marks proves temporary but substantial disfigurement. See Brief of Appellant at 16. This is a fairly glaring mischaracterization of the court's ruling. Judge Lewis, citing *Ashcraft*, ruled that “*serious bruising* can rise to the level of substantial bodily injury if the State produces sufficient evidence of temporary, but substantial disfigurement.” RP 173 (emphasis added). Judge Lewis then held that based on the evidence submitted for his consideration in this case (via photographs and testimony), he was convinced by a preponderance of the evidence that the State had shown temporary but substantial disfigurement. RP 173. The court did *not* hold that the mere presence of bruising satisfies this showing, as Moncada claims, and did not misapply *Ashcraft*.

To the extent that Moncada believes that the jury's ultimate verdict on assault of a child in the second degree somehow conclusively shows that the trial court abused its discretion, Moncada's argument is meritless. The question before the trial court is different from the question that was posed to the jury, as Judge Lewis noted in his ruling. Moncada does not dispute the trial court's holding below that it need not be convinced beyond a reasonable doubt that substantial bodily harm was inflicted, or that the trial court's burden was to merely find “a sufficient basis so that a reasonable person could find that under the law, the bruising that's

described here on the buttocks of R.B. would be--could be characterized as substantial bodily harm.” RP 172. Here, given the redness that lasted for a full five days on R.B.’s buttocks, as well as bruising that lasted seven days from the time that R.B. was returned to his mother, having been inflicted a full three days before that, the trial court did not abuse its discretion in finding that a reasonable person could conclude that R.B.’s injuries constituted serious bruising that caused resulted in temporary but substantial disfigurement. Judge Lewis noted, and Moncada does not disagree, that the disfigurement need not be of a body part that is regularly visible to others. Jessica Baughman’s very strong and immediate reaction to the bruising, coupled with her call to the doctor, attest to the temporary but substantially disfiguring nature of the marks on R.B.’s buttocks. The trial court did not abuse its discretion in admitting R.B.’s hearsay under RCW 9A.44.120.

Even if the trial court’s ruling was erroneous, the admission of R.B.’s out of court statements to his mother and to Ms. Kauffman was harmless. An appellate court will not reverse a trial court due to an error in admitting evidence that does not result in prejudice to the defendant. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004), citing *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, the admission of R.B.'s out-of-court statements to his mother and to Ms. Kauffman were of minor significance in light of the evidence as a whole. R.B. testified at trial and asserted the same basic facts about what occurred during the beating from his father that he gave his mother and Ms. Kauffman. Indeed, R.B.'s statements to his mother were of almost no value to the jury as they merely reiterated that Moncada whipped R.B. for not eating his macaroni--which was exactly what R.B. testified to. Moncada admitted that he was the person who inflicted the injuries on R.B. Moncada's defense at trial was that he did not inflict substantial bodily harm (a proposition with which the jury agreed), and that his actions constituted reasonable parental discipline (a proposition with which the jury disagreed). Moncada confirmed the salient facts, both through his statements to Detective Hafer and his testimony, on which the jury could rest its verdict of guilty of assault of a child in the third degree: That he inflicted as many as twenty-one whips to the bare buttocks of R.B., using a belt. Twenty-one blows inflicted on the bare buttocks of a child with a belt is excessive and vicious, far beyond what would be reasonable to discipline a child for not liking macaroni. Moncada confirmed that he held R.B. down over the bathtub, that R.B. was screaming, and that he force fed R.B. and put his hand over R.B.'s mouth to keep him from spitting out the macaroni. Moncada confirmed that

R.B.'s buttocks were turning red after the first blow. Moncada testified that he wouldn't back down, wouldn't let R.B. win the argument. His text message exchanges with Jessica Baughman showed the jury that Moncada was intent on teaching both Jessica and R.B. a thing or two about discipline and that he wanted to set R.B. straight about who was in charge. He made his intent to assault R.B. and inflict bodily harm plain through his own words and admitted actions.

The remainder of the evidence on which the jury could rest its verdict of assault of a child in the third degree came from the in-court testimony of Jessica Baughman, R.B.'s mother, and R.B. Jessica Baughman testified that when R.B. returned from his first weekend alone with his father, he had significant bruising and redness on his buttocks, bruising that prompted her to call R.B.'s doctor and that lasted for a full week. RP 163. R.B.'s testified that the defendant took him to the bathroom and held him over the bathtub, holding him down so he could not get up. RP 119. He testified that the defendant whacked him in several whipping sessions on his bare butt with a belt. RP 119-20. R.B. testified "I felt like I was going to cry...[b]ecause it was so hard." RP 120. R.B. testified that the defendant tried to force macaroni into his mouth. RP 121. After a second whipping session on his bare butt, the defendant forced macaroni into

R.B.'s mouth and held his hand over R.B.'s mouth to force him to swallow. RP 122. He said he cried because it hurt, and that it hurt for a long time. RP 123.

In *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011), the Supreme Court, even under the more stringent constitutional harmless error standard not applicable here, found the error in admitting child hearsay statements harmless where the hearsay statements were nearly identical to the statements introduced through testimony at trial. The Court held the statements had little independent value and were not "more incriminating" than the evidence admitted through other means. *Id.* Finally, the Court held that State did not solely rely on the hearsay statements and the other evidence supporting the defendant's guilt was overwhelming. Such is the case here.

The fact that the jury rejected the charge of assault of a child in the second degree and convicted Moncada of assault of a child in the third degree shows that the jury was not unduly influenced by this evidence. Although Moncada asks this Court to draw the opposite inference, that the jury would have acquitted altogether absent R.B.'s child hearsay statements, the jury's acquittal on the higher charge shows they believed that the State had disproved that the defendant's attack on R.B., which resulted in bodily injury, constituted reasonable parental discipline. The

acts that R.B. complained of were undisputed--Moncada confirmed R.B.'s account of what occurred, right down to holding his hand over R.B.'s mouth so he would be forced to swallow the macaroni. The sole questions before the jury were whether the defendant recklessly inflicted substantial bodily harm, negligently caused bodily harm, or committed an unwanted touching upon another (whether injury was inflicted or not), and whether the defendant's actions nevertheless constituted reasonable and moderate discipline for the purpose of correcting or restraining the child. R.B.'s out of court statements were of little value to these questions, considering that it was his mother who described the injuries for the jury, and both R.B. and Moncada testified about their method of infliction. Any error in admitting R.B.'s cumulative out-of-court statements was harmless.

II. **MONCADA IS NOT ENTITLED TO A NEW TRIAL  
BASED ON PROSECUTORIAL MISCONDUCT.**

The prosecutor's remarks or actions complained of in this appeal, none of which was objected to by Moncada, do not warrant a new trial. The standard for reviewing remarks for which no objection was lodged is well settled: "The 'failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been

neutralized by an admonition to the jury.” *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43, 46-47 (2011), *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). “When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case.” *Thorgerson* at 443. As noted, no objection was made to any of the statements now complained of.

*a. The slipper*

Moncada asserts that the deputy prosecutor committed flagrant and ill-intentioned misconduct when the victim testified about being spanked with a slipper on the same day and during the same overall course of conduct in which he was whipped for not eating macaroni. Moncada claims that the prosecutor violated the court’s pre-trial motion in limine. This is a strained reading of the court’s ruling. The motion in question was Moncada’s motion in limine to preclude the State from introducing evidence of past instances of physical discipline of Moncada’s other children or the victim. RP 15-16. The prosecutor agreed he had no need to delve into past instances of spanking. RP 16. Moncada’s counsel clarified what he sought in his motion:

...I agree with Mr. Robinson that probably in the context of what I’m asking, to present evidence of the *incident itself and the disciplinary issue*, is that, as Your Honor eluded, there may well be some testimony regarding offering lesser degrees of discipline to combat similar behavior in *the past*,

I guess I would suggest that the restriction should prevent the State from eliciting evidence regarding spanking his *other* children. I don't think it's a particularly volatile issue that I've brought up because I don't think--I think, as Mr. Robinson said, there's no allegation of any spanking or discipline in the past that rises to the level of an abuse allegation. And so that would be my concern is that if...anyone were going to testify to that, which nobody has indicated in the police reports that they would, I would ask to exclude that, but just generalized statements regarding disciplining of this child, I don't have any problem with it. I don't think it's an issue.

RP 16-17.

Following Moncada's clarification of what he sought to exclude, the court said, "Okay. I guess you should tell your witnesses that we're not going to get into other discipline," and said that the testimony should be focused on "this one particular issue." RP 17.

When viewed in context, the court's ruling was that the State was precluded from eliciting evidence about past acts of spanking by Moncada against either the victim or other children. The prosecutor's questions to R.B. did not violate the spirit, or even the letter, of this restriction. The exchange in question is found at RP 123-124:

Prosecutor: And do you remember anything else about the bathroom?

R.B.: Yes. I went in there when my brothers were talking to me.

Prosecutor: Do you remember anything else about your dad with the belt?

R.B.: I was one with the belt, one with the slipper, and I can't remember the rest.

Prosecutor: What happened with the slipper?

R.B.: I can't remember, but it was the same with the belt.

Prosecutor: So did he hit you on the butt with the slipper?

R.B.: Yes.

Prosecutor: And was that after the belt?

R.B.: Yes.

Prosecutor: Why did he hit you on the butt with the slipper?

R.B.: Because my brothers were talking when it was bedtime.

Prosecutor: Okay. So that wasn't in the bathroom?

R.B.: Well, yes, it was. But it wasn't--they weren't talking while I was in the bathroom.

Prosecutor: And that was after the macaroni?

R.B.: Yes.

RP 123-24.

As an initial matter, the prosecutor did not elicit testimony about the spanking with the slipper. R.B. spontaneously offered it, and Moncada did not object because he obviously did not feel that the testimony exceeded the proper scope outlined during the motion in limine. Defense

counsel's failure to object to the remarks at the time they were made “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. McKenzie*, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2005) quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). It is clear from the exchange that the prosecutor believed R.B. was referring to a spanking (with the slipper) that occurred at the same time as the belt. As the exchange went on, it finally became clear that R.B. was testifying about a spanking that occurred at some point after the belt-whipping sessions had ended. Once that became clear, the prosecutor moved on and asked no further questions about the slipper.

Not only did the prosecutor not elicit this testimony in the first instance, but this testimony involved an act that was part of the same overall course of conduct by Moncada. The State was required to prove that Moncada intentionally assaulted R.B., and testimony about his physical acts against R.B. during this fairly short window of time was relevant for that purpose. Moreover, it is difficult to imagine how Moncada could have been prejudiced by the jury hearing about a singular spank on the buttocks with a slipper when they also heard that Moncada admitted to Detective Hafer that he whipped R.B. as many as twenty-one times over seven sessions with a belt on his bare buttocks. A spank with a

slipper hardly makes Moncada look worse than the conduct to which Moncada readily admitted did. Again, Moncada bears the burden of proving a “substantial likelihood [that] instances of misconduct affected the jury’s verdict.” *Thorgerson* at 443, quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Moncada has failed in his burden.

Moncada relies upon *State v. Smith*, 189 Wash.2d 422, 65 P.2d 1075 (1937) and *State v. Stith*, 71 Wn.App. 14, 22-23, 856 P.2d 415 (1993) for the proposition that his failure to object below should be excused, and he should be relieved of his burden to show that there is a substantial likelihood that the misconduct affected the jury’s verdict. He argues that he is entitled to a presumption of prejudice. But *Smith* is not controlling because it is factually distinguishable. In *Smith*, the prosecutor blatantly violated a very clear order of the trial court not to ask a particular and distinct question that nevertheless proceeded to ask. *Smith* at 428. Moreover, the question *itself* as held to be highly prejudicial, such that an objection and corrective instruction could not have cured the error. *Smith* at 428-29. What occurred here is markedly different than what occurred in *Smith*.

In *State v. Stith*, the Court of Appeals did not apply a presumptive prejudice standard, and required the appellant to show the misconduct was substantially likely to have affected the jury’s verdict and held that the

defendant bore the burden of proof. *Stith* at 418. This case is not helpful to Moncada.

To the extent Moncada engages in an extensive discussion of ER 404(b), he ignores the question before this Court. The question is not whether the slipper testimony would have been admissible under ER 404(b). Rather, the question is whether the prosecutor committed flagrant and ill-intentioned misconduct that could not have been obviated by a curative instruction and was substantially likely to have affected the jury's verdict.

The testimony complained of was not unduly prejudicial, did not violate the court's limine order, and did not tip the scale in favor of conviction such that it was substantially likely to have affected the jury's verdict. Moncada does not show that the error, if any, could not have been obviated by a curative instruction. Moncada's claim fails.

*b. The prosecutor did not impermissibly shift the burden of proof*

RCW 9A.16.100 outlines the permissible use of force on children:

It is the policy of this state to protect children from assault and abuse and to encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children. However, the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child. Any use of force on a child by any

other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child.

The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive.

The State bears the burden of proving the force used was unlawful.

This defense is often called the “reasonable parental discipline” defense.

While it is a defense, the defendant bears no burden to prove the force he used was lawful. The jury was properly instructed that the State bore the burden of proving that the force used by Moncada was not lawful. CP 56.

The jury is presumed to follow the instructions of the court. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012).

Moncada truncates the prosecutor’s remarks in his brief. These are the relevant remarks in full:

[The instruction] says, you may, but are not required to infer that it is unreasonable to do the following act; to correct or restrain a child. Now, the specific definition says, it is unreasonable to do the following act: To restrain a child or to correct a child. Any act that is likely to cause

and that does cause bodily harm greater than transient pain or minor temporary marks. I would argue that the defense cannot assert this defense in this case. It was unreasonable to do this to the child as discipline because he caused these substantial marks on the child.

I would also argue they can't use the defense because the discipline used here was not reasonable and it was not moderate. It's not moderate to hit a kid with a belt 15 times. I would argue that based on this case, based on the evidence you heard, the defense cannot assert that. The end of the--or the middle part of the definition also says you can consider the age, size and condition of the child when making your determination about whether this was reasonable and moderate.

Well, think about the age and size of this child. We've already got into evidence that he was skinny, little kid. You saw him up here. He's not the biggest kid in the world. You also--we got into evidence that he was eight years old. Going after a kid that's eight years old this many times, that's not reasonable. That's not moderate.

RP 270-71.

Moncada did not object to these remarks. The prosecutor's remarks were inartful. It makes no sense grammatically, for example, to say that a defendant cannot "assert" a defense that he has clearly already asserted--as evidenced by the court's instruction to the jury. Taken in context, what the prosecutor argued to the jury is that Moncada should not be acquitted on the basis of lawful use of force--which the State had proven beyond a reasonable doubt that the force used was not lawful. Stated another way, the prosecutor was saying Moncada should not prevail, i.e. be acquitted,

because the State proved the force was not moderate and reasonable, and that Moncada inflicted substantial bodily harm. He was not truly suggesting that Moncada was precluded from having the jury *consider* the defense or from making an argument in support of it. The argument, viewed in its entirety, did not lessen the State's burden of proof. Moncada's counsel, who was well aware of the burden of proof, did not view these remarks as improper. The cases on which Moncada relies are inapposite. In *State v. Johnson*, 158 Wn.App. 677, 243 P.3d 936 (2010), the State impermissibly told the jury, by its argument, that a defendant is not presumed innocent. By telling the jury they needed to fill in a blank (with their reason to doubt) as a precondition to a not guilty verdict, the State told the jury that defendants are presumed *guilty* unless the evidence overcomes that presumption. *Johnson* at 684-85. (This argument is also, frankly, coercive. It might suggest to a juror that he or she will be called upon to answer to the court for his or her verdict). What occurred in *Johnson* is inapposite to the error claimed in this case. The prosecutor in *Johnson* entirely removed the bedrock presumption of innocence with his argument. That hardly compares to the inartful and grammatically senseless use of the term "assert" by the prosecutor here. In the infamous *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984), the State committed very serious and repeated acts of misconduct such as telling the jury that

in the prosecutor's personal opinion, the defendant was clearly a "murder two," and telling the jury they should hold it against the defendant because his lawyer and his expert witnesses were from the "city," as opposed to cozy Pacific County, and drove fancy cars. The impropriety of these remarks was so pervasive that there was no question they were substantially likely to have affected the jury's verdict. *Reed* is wholly inapposite the prosecutor's remarks here about the parental discipline defense.

Even if the remarks in question were improper, Moncada must show that they were flagrant and ill-intentioned, could not have been obviated by a curative instruction, and were substantially likely to have affected the jury's verdict. *Emery*, supra, at 757-58. "[J]urors are directed to disregard any argument that is not supported by the law and the court's instructions..." *Emery* at 759. Here, had Moncada objected and requested a curative instruction, the court would have reminded the jury about that which they had already been instructed--that the State bore the burden of proving the force used was not lawful. This would have easily fixed any perceived problem generated by the remarks. Moreover, Moncada's counsel twice reminded the jury that it was the State who bore the burden of proving the absence of this defense. RP 283-84. There is no reason to believe that the jury listens only to the arguments of the prosecutor and not

to those of defense counsel. Moncada has not shown that these remarks were flagrant and ill-intentioned, that they could not have been cured, and they were substantially likely to have affected the jury's verdict (wherein they rejected the highest charge and convicted on a lesser included offense). This claim fails.

*c. The prosecutor did not ask the jury to fear what the defendant might have done.*

Moncada complains that the prosecutor asked the jury to convict him based on an inflammatory appeal to their fear. This is a mischaracterization of the prosecutor's argument. The State was required to prove that Moncada intentionally assaulted R.B., and that the force used was not reasonable or moderate. In arguing that Moncada was not using reasonable and moderate force, and that he had the intent to commit the crime, the prosecutor argued:

There's a million other things he could have done. Could have sat there, made Robert wait him out, stare him down, do whatever. A lot of those options don't involve physically assaulting him until he is forced, until he eats, until he backs down. The defendant said, I wasn't going to back down. What happens if Robert never eats that food? What happens if defendant is not going to back down? Is it the kid that has to back down? The kid that has to give in? A kid who had spent five days with his dad total, hours with his dad before this, a few visitations.

RP 274-75.

These remarks are not improper, nor did Moncada view them as improper given his lack of objection. These remarks go to the heart of the State's burden of proving intent. Because prosecutors cannot bring in post-hoc mind readers who will testify about a defendant's state of mind, they must argue intent as an inference from the evidence. "When intent is an element of the crime, 'intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.'" *State v. Vasquez*, 178 Wn.2d 1, 309 P.3d 318 (2013), quoting *State v. Woods*, 63 Wn.App. 588, 591, 821 P.2d 1235 (1991). This portion of the prosecutor's argument was derived entirely from the defendant's own statements to the police and his text messages to Jessica Baughman. His statements suggesting that he would have stopped at nothing to win the ludicrous macaroni battle with an eight year-old child were properly before the jury. This argument was not improper or inflammatory.

Even assuming the argument was improper, it was of minor moment in the overall trial. Because the jury already heard testimony about the defendant's steadfast position that he was going to win the battle with R.B. come Hell or high water, it is difficult to imagine how the prosecutor's remarks about Moncada's intent and lack of reasonableness prejudiced him any further than his own words. Thus, Moncada cannot

show that these remarks were substantially likely to have affected the jury's verdict beyond the evidence they already received on this point from the defendant's own mouth. This claim fails.

Moncada's claim of cumulative error, brought as a way of stacking up otherwise fleeting and un-momentous remarks that could not have prejudiced him, likewise fails. There was no combined prejudicial effect of misconduct here, as there was in *Reed* or *Emery*, supra. Only one of the three arguments complained of was even arguably improper. With only one arguably improper argument, there is no cumulative effect on which to base a claim of prejudice. Moncada's conviction should be affirmed.

III. **MONCADA'S JUDGMENT AND SENTENCE WILL BE AMENDED TO CORRECT HIS TERM OF COMMUNITY CUSTODY.**

Moncada argues that the term of community custody to which he was sentenced is incorrect, and that the parenting classes he was ordered to attend do not constitute "treatment" under the SRA. The State concedes error as to the first argument, but not as to the second. Moncada is correct that under the first offender option, Moncada's term of community custody, if parenting classes constitute treatment, may include up to the period of treatment, but shall last no longer than twelve months. See RCW 9.94A.650(3). Moncada has finished his parenting classes and is entitled to immediate removal from community custody. The State and Moncada

have agreed to present a joint motion to the Clark County Superior Court amending the judgment and sentence to reflect a period of community custody up to and no later than the completion of his parenting classes. Because he has received his certificate of completion, this will result in his immediate removal from community custody. For that reason, the State offers no briefing on these two assignments of error. The State will be filing a motion under RAP 7.2(e) next week asking this Court to permit the superior court to enter the order described above.

D. **CONCLUSION**

Moncada's conviction should be affirmed.

DATED this 30<sup>th</sup> day of January, 2015.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:   
ANNE M. CRUSER, WSBA #27944  
Deputy Prosecuting Attorney

# CLARK COUNTY PROSECUTOR

**January 30, 2015 - 3:55 PM**

## Transmittal Letter

Document Uploaded: 2-463113-Respondent's Brief.pdf

Case Name: State v. Bernardo Moncada

Court of Appeals Case Number: 46311-3

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Abby Rowland - Email: [abby.rowland@clark.wa.gov](mailto:abby.rowland@clark.wa.gov)

A copy of this document has been emailed to the following addresses:

[nielsene@nwattorney.net](mailto:nielsene@nwattorney.net)

[swiftm@nwattorney.net](mailto:swiftm@nwattorney.net)

[sloanej@nwattorney.net](mailto:sloanej@nwattorney.net)