

NO. 46357-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN MOSES and AIMEE MOSES, APPELLANT

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

No. 12-1-03277-9 and 12-1-03276-1

Brief of Respondent

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

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8. Did the trial court comment upon the defendants' right to the presumption of innocence when the court correctly sustained an objection?

B. STATEMENT OF THE CASE.

1. Procedure

On August 29, 2012, the Pierce County Prosecuting Attorney (State) filed an Information charging both Aimee and Justin Moses with one count of criminal mistreatment in the second degree. CP 1. The case went to trial on an amended Information which charged alternative means of criminal mistreatment in the second degree and alleged sentencing aggravating circumstances of abuse of trust, deliberate cruelty, and that the victim was particularly vulnerable. CP 20-21, 206-206.

The case was assigned to Hon. Stephanie Arend for trial. 2/24/2014 RP 4¹. Trial began on February 24, 2014, with motions in *limine* and a hearing under CrR 3.5. *Id.* After hearing all the evidence, the jury found the defendants guilty as charged. CP 116, 284. The jury also found the aggravating factors of abuse of trust, deliberate cruelty, and that the victim was particularly vulnerable. CP 119-122, 288-290.

¹ The Verbatim Report of Proceedings has two Volumes 1-3. The first set begins on February 24 and ends April 4, 2014. These RPs include the CrR3.5 hearing and other motions. The second Volumes 1-3 begins April 21, 2014 and runs consecutively through the end of trial in Volume 14. These include trial testimony, motions, and arguments. The State will refer to the first set of Vol. 1-3 by date, and the second set by volume number.

The court sentenced the defendants on May 23, 2014. The defendants filed timely notices of appeal. CP 158, 328.

2. Facts

Five year old MA and his seven year old sister, VA, are members of the Muckleshoot Indian Tribe. 5 RP 699, 6 RP 786. Their mother is an enrolled member. *Id.* They are both in foster care with the Tribe. *Id.* On September 16, 2011, Indian Child Welfare (ICW) social worker Debbie Guerrero delivered MA and VA into the custody and care of Aimee and Justin Moses. 6 RP 792.

MA was a student in ECEAP, an early childhood education program at an elementary school in Sumner. 5 RP 624, 9 RP 1307. Vicki Jones was his teacher. *Id.* As part of the tracking general student progress, the ECEAP staff periodically measure student height and weight. 5 RP 621. Student attendance is closely monitored. 5 RP 631, 9 RP 1310.

After the 2010 Christmas Break, Ms. Jones and other staff became concerned about MA. 9 RP 1321. He appeared thinner. 5 RP 640. Ms. Jones weighed him and found that he had lost eight pounds; currently weighing 37.8 pounds. 5 RP 643. Not long after that, his attendance declined. He did not attend school after January 11, 2011. 5 RP 646. Ms. Jones called to check on MA's welfare. 5 RP 647.

Claire O'Brien and Ms. Jones reported their concerns to State Child Protective Services (CPS) and to Ms. Guerreo, the ICW social worker. 6 RP 800, 9 RP 1328. Ms. Guerrero phoned Ms. Moses to request that she bring MA and VA to the ICW office, so that Guerrero could see them. 6 RP 801. Mr. Moses brought the children to the ICW office on February 27. 6 RP 802.

MA was so emaciated that the staff at the ICW office was shocked; they almost did not recognize him. 5 RP 702, 6 RP 803. Medical aid and the police were summoned. 6 RP 804.

Ms. Moses came to the ICW office. She explained that, despite her efforts, MA was not eating properly. 5 RP 524. She said that she served MA and all her kids healthy food. 5 RP 543. Ms. Moses claimed that she had tried to get MA medical attention, but she was unable to get an appointment. 5 RP 524, 530.

MA was taken to Mary Bridge Children's Hospital (MBCH). 7 RP 922. Medical staff there found MA to be severely malnourished. 7 RP 924, 967. He weighed only 33 pounds. 7 RP 934. Due to the malnourishment, he was very weak. 7 RP 933-934, 8 RP 1112. He was admitted to the hospital. 7 RP 922.

The doctors at MBCH ran numerous tests on MA. They discovered that there was no medical cause for MA's weight loss. 8 RP 1117-118. The only cause of his condition was lack of food; MA was literally

starving. 10 RP 1500, 11 RP 1711. After a course of supervised feeding and medical care, MA weighed 40 pounds when he was released. 8 RP 1081. MA was released to a new foster family, where he continued to gain weight. 8 RP 1230.

C. ARGUMENT.

1. THE DEFENDANTS' RIGHTS TO CONFRONT WITNESSES WERE NOT VIOLATED AS CO-DEFENDANT'S STATEMENTS TO POLICE WERE PROPERLY REDACTED AND THE JURY WAS PROPERLY INSTRUCTED.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The primary right of the confrontation clause is the right to effect cross-examination of the adverse witness. The standard of review on a confrontation clause challenge is *de novo*. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

- a. Redaction of the statements was unnecessary where they were not inculpatory or incriminating.

A defendant's right to confront witnesses is violated if he is incriminated by a pretrial statement of a non-testifying codefendant. *State*

v. *Hoffman*, 116 Wn.2d 51, 75, 804 P.2d 577 (1991) (citing *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)).

In order for *Bruton* to apply, the extrajudicial statements must “expressly implicat[e]” the objecting defendant. *Richardson v. Marsh*, 481 U.S. 200, 208, 107 S.Ct. 1702, 95 L. Ed. 2d 176 (1987). “[O]nly those statements that “clearly inculcate” the defendant or are “powerfully incriminating implicate the *Bruton* rule.” *Id.*

In contrast to the facts in *Bruton* and *Richardson*, where the co-defendants admitted committing their respective robberies, and, in *Richardson*, complicity in murder; in the present case, the statements are not facially incriminating. It is inaccurate to term them “confessions”, in that they confess nothing. Mr. and Ms. Moses’ respective statements say that he or she gave proper care to MA. They each denied any wrongdoing, or even knowledge of improper care. Ms. Moses describes MA as a healthy child, who was thin when he was delivered to their care. Exh. 74²: 15:20-29, 20:40. She describes nutritious meals that she served. Exh. 74: 8:12-20, 9:09, 9:30, 15:50. She disputes that MA had an extreme weight loss in their care. Exh. 74: 21:19, 22:30, 22:57, 24:57. She stated that MA always had plenty of food and that they never restricted his diet. Exh. 74: 14:24-50, 23:28.

² Exh. 74 is the redacted recording of Ms. Moses’ interview with Det. Catey.

Mr. Moses states that he was at work and got home late. Exh. 73³: 0:31-47. (Presumably the argument could be that he did not know what Ms. Moses was doing or not doing to, or with, MA.) Mr. Moses had no knowledge or explanation of what happened to MA. Exh. 73: 2:09, 4:12, 5:10,6:33. He said that they never denied MA food. Exh. 73: 6:42-47. Ms. Moses' statement neither states nor implies that Mr. Moses was present at all times and knew what was going on.

Nothing in the statements "incriminates" or even refers to the other person. *See*, Exh. 71⁴. There was no dispute that the defendants were married, living together, and both caregivers of MA, VA, and the Moses' other children.

In *Bruton, Richardson*, and *State v. Larry*, 108 Wn. App. 894, 34 P. 3d 241 (2001), the co-defendants committed specific one-incident crimes together. From the circumstances, the danger was that the jury would conclude that the other person referred to in the statement was the co-defendant. In contrast, the current crime is alleged to have occurred over a period of weeks or months where there was no dispute and no need to conceal the fact that that the defendants lived together.

In *Richardson*, the danger of implication arose where the evidence showed that the defendant, Marsh, must have been present when the two co-defendants were discussing the robbery and the likelihood that

³ Exh. 73 is the redacted recording of Mr. Moses' interview with Det. Catey.

⁴ Exh. 71 is the transcript of the interviews with Det. Catey.

the victims would have to be killed. See *Richardson*, 481 U.S. at 215, Stevens, J, dissenting. Here, in contrast, neither defendant admits to wrongful behavior and there is no implication that the other person was there when it happened.

- b. Even though redaction was unnecessary, the trial court properly redacted the statements to omit references specific to each codefendant, and gave a proper limiting instruction.

A defendant's right to confront witnesses is violated if he is incriminated by a pretrial statement of a non-testifying codefendant. *Hoffman*, 116 Wn.2d at 75 (citing *Bruton*, 391 U.S. 123). But admitting a non-testifying codefendant's confession that is redacted to omit all references to the defendant, coupled with an instruction that the jury can use the confession against only the codefendant, does not violate the confrontation clause. *Richardson*, 481 U.S. 200, 211. This is true even where the codefendant's confession, although not facially incriminating, becomes incriminating when linked with other evidence introduced at trial. *Richardson*, 481 U.S. at 208-09.

The *Richardson* Court noted that “[o]rdinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness ‘against’ a defendant if the jury is instructed to consider that testimony

only against a codefendant.” *Richardson*, 481 U.S. at 206. Redaction of a codefendant’s references to the defendant, coupled with an instruction, creates the same situation with respect to a non-testifying codefendant’s confession. *Richardson*, 481 U.S. at 211. Consistently, Criminal Rule 4.4(c) states:

(1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:

....

(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

Here, despite the fact that the co-defendants’ statements did not incriminate themselves or refer to each other, the State redacted any possible references. 1 RP 25. *See*, Exh. 71. Ms. Moses proposed redactions, as well. 1 RP 85. Mr. Moses requested that the statements be admitted *unredacted*, in order to provide context for his statement. 1 RP 93.

The result was that two recordings were played for the jury; Exh. 73 and 74. 10 RP 1592-1593. These recordings, although edited according to the court’s decision, are seamless audio statements of the respective defendants. They reflect that both defendants asserted proper care of MA

and denied any implication of wrongdoing. There are no gaps, symbols, or problematic pronouns pointing at or implicating the codefendant. *Cf. Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L.Ed.2d 294 (1998). The effect of redaction in the present case was to change the respective statements from “We didn’t do anything wrong” to “I didn’t do anything wrong.”

In addition to the cautious redactions, the court correctly instructed the jury that they could only use the respective statements regarding the defendant who made them. *See*, Instruction #7, CP 245. The court so instructed the jury at the time that the statements were played and at the end of the case. *Id.*, 10 RP 1592. The defendants approved the limiting instruction. 10 RP 1543-1544.

- c. The defendants failed to preserve the issue of admission of the statements where they failed to object below.

Both defendants made pretrial motions to sever. CP 36, 201. But, after the court denied the severance motions, the defendants took different positions regarding the redactions. 1RP 25, 93.

Where both defendants approved of at least a redacted statement, they can hardly assign error to them on appeal. The issue has not been preserved under RAP 2.5. If even error, it is invited. A party may not set

up or participate in an error at trial and then complain of it on appeal *See State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996).

Here, Ms. Moses offered proposed redactions. 1 RP 85-89. With the input of the parties, the court approved the redacted statements. 1 RP 91-92. Ms. Moses was satisfied with the State's proposed redactions. 1 RP 92. Mr. Moses wanted the entire interview admitted, unredacted, so that Mr. Moses' statements would have proper context. 1 RP 93. The court should decline to consider this argument of the defendants.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. MOSES' MOTION TO SEVER.

Separate trials have never been favored in Washington. *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982). The granting or denial of a motion for severance of jointly charged defendants is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Alsup*, 75 Wn. App. 128 876 P.2d 935 (1994). To support a finding that the trial court abused its discretion, the burden is on the defendant to demonstrate facts sufficient to warrant the exercise of discretion in his favor. *Alsup*, 75 Wn. App. at 131. Severance is only proper when the defendant carries the difficult burden of demonstrating undue prejudice from a joint trial. *See State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991); *Grisby*, 97 Wn.2d at 507.

For the same reasons that there was no error in admitting the defendants' statements, there was no error in denying the motions to sever. Severance under CrR 4.4(c) applies only in cases where an out-of-court statement by a codefendant directly or indirectly *incriminates* the defendant. *Grisby*, 97 Wn.2d at 506-507. Where, as here, the statement does not incriminate, but is exculpatory, CrR 4.4 does not apply. See *State v. Grover*, 55 Wn. App. 923, 780 P. 2d 901 (1989). Likewise, where the non-testifying codefendant's statement does not even mention the complaining party, severance is unnecessary. See *State v. Cotten*, 75 Wn. App. 669, 691-692, 879 P. 2d 971 (1994).

Numerous cases, including *Bruton*, have considered the legal issues surrounding a joint trial of codefendants, one or more of who have made inculpatory statements. CrR 4.4(c)(1)(ii) specifically addresses this situation. As pointed out above, the rule permits a joint trial where the statement(s) have been redacted so that the codefendant is not prejudiced.

An older case, *State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), *review denied*, 78 Wn.2d 996 (1971) stated:

The administration of justice would be greatly burdened if required to accommodate separate trials in all cases where multiple parties have participated in a criminal offense and where one or more have confessed to its commission.

Id., cited in *State v. Samsel*, 39 Wn. App. 564, 694 P.2d 670 (1985).

On appeal, the defendant must be able to point to specific prejudice. *See, State v. Sublett*, 176 Wn. 2d 58, 69, 292 P. 3d 715 (2012).

A defendant can demonstrate specific prejudice by showing:

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995).

Neither defendant can make a case for any of these factors. Their defenses were the same; it did not happen. Their statements were consistent in denial of wrongdoing; and were redacted by the court. The evidence was neither complex nor so massive as to make it difficult to separate one defendant from the other. They were foster parents to a child who was starved in their care. The trial court did not err in denying severance.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING CHILD HEARSAY UNDER RCW 9A.44.120.

RCW 9.44.120 (emphasis added) states:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or

describing *any act of physical abuse* of the child by another *that results in substantial bodily harm* as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

In an early pleading, Mr. Moses argued that RCW 9A.44.120 did not apply because there was no “physical abuse” or “substantial injury”. CP 180-181. After hearing extensive argument from all parties, the court found that the behavior alleged constituted “physical abuse”. 2/24/2014 RP 49-50. The court went on to state that the issue regarding “substantial injury” would depend on the evidence. 2/24/2014 51-52. By the time the court decided to admit the child hearsay, the court had heard the testimony of numerous witnesses in the CrR 3.5 hearing, including CPS investigator Heather Hasse (2/24/2014 RP 130 ff), Laurel Kelly (2/25/2014 RP 199), Deborah Guerrero (2/25/2014 RP 221 ff), and Det. Thomas Catey (2/26/2014 RP 273 ff).

The appellate court reviews a trial court's admission of child hearsay statements for abuse of discretion. *State v. Beadle*, 173 Wn. 2d 97, 112, 265 P. 3d 863 (2011). Here, the court read and applied *Beadle*. In *Beadle*, the trial court found that a 4 year old child victim who refused to even enter the courtroom was “unavailable” to testify under RCW 9A.44.120.

Here, Ms. Moses’ motion to exclude child hearsay argued that MA was not competent to testify (CP 28-30) and then focused on characterizing the nature of the statement as testimonial and applying *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). CP 30-34.

The court correctly ruled on Ms. Moses’ motions. It distinguished that, unlike the child victim in *Beadle*, MA was competent and available to testify. 5 RP 511. The court found that, under *Crawford*, MA’s statements to investigators, such as Cornelia Thomas, would be testimonial (5 RP 509), and to non-investigators, such as the Jansens, non-testimonial. 5 RP 510.

The focus of the discussion moved on to whether the statute applied where the child witness was available to testify. *See* 5 RP 512-515. This discussion was somewhat irrelevant where MA was competent to testify and was planned as a witness. However, as seen in the child victim

in *Beadle*, it can be unwise to assume that a young child will be able to take the stand when it is time to do so.

The court went on to apply the elements of 9A.44.120. Cornelia Thomas' testimony was admissible as child hearsay where MA's condition while hospitalized constituted "substantial bodily harm."

RCW 9A.04.110 states:

(4)(a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;

(b) "Substantial bodily harm" means 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 Supreme Court has described the term "substantial," as used in RCW 9A.36.021(1)(a), "signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." *State v. Mckague*, 172 Wn. 2d 802, 806, 262 P. 3d 1225 (2011). The Court went on to approve the Webster's Dictionary definition of "substantial": "considerable in amount, value, or worth." *Id.*

MA's condition following his removal from the Moses household clearly qualified as "substantial bodily harm." MA experienced temporary but substantial impairment of many different bodily systems, as evidenced by his muscle wasting, dehydration, nutrient imbalances, and risk of heart

failure due to the re-feeding process. The harm included: low zinc levels indicating low food intake or lack of variety in food, weakness indicating the body's digestion of muscle, electrolyte and nutrient imbalance, dehydration with fluid in the peripheral but not circulating tissues, increased heart rate, doughy skin, slight anemia, low white blood cell count, appearance of delayed functioning or brain dysfunction, diarrhea due to electrolyte imbalance, and exhaustion.

The injury suffered by MA falls within the definitions of RCW 9A.04.110 and 9A.44.120. During a period of approximately 2 months, MA lost 29% of his body weight. The lack of any medical explanation for this drastic weight loss indicated starvation: the result of low caloric intake. Considering the facts before the trial court: that MA at the time was a 5 year old boy in a foster care situation who could not provide his own food, there was no medical explanation for the drastic weight loss, and the explanation for his weight loss was starvation; the deliberate withholding of food, qualified as physical abuse by his guardians, the defendants.

The trial court did not abuse its discretion in finding that RCW 9A.44.120 applied in this case. CP 48-49, 201-211.

4. THE “ABUSE OF TRUST” AGGRAVATING FACTOR IS APPLICABLE.

The defendants argue that the “abuse of trust” aggravating factor codified in RCW 9.94A.535(3)(n) does not apply to the defendants’ conviction because this factor is limited to “purposeful misconduct.” The defendants cite to *State v. Hylton*, 154 Wn. App. 945, 226 P.3d 246 (2010), for this proposition. Hylton was convicted of rape of a child in the third degree under RCW 9A.44.089. He argued the “abuse of trust” aggravating factor could not be used as a basis for an exceptional sentence for this offense because crime charged had no *mens rea*. The appellate court disagreed and affirmed his sentence. 154 Wn. App. at 946.

The appellants seize upon this passage from *Hylton* for their argument:

The codified abuse of trust factor is, however, slightly narrower in scope than its common law predecessor. *See State v. Chadderton*, 119 Wash.2d 390, 398, 832 P.2d 481 (1992) (reckless abuse of trust may operate as an aggravating factor by analogy, rather than strictly under the statute, which by its literal language applies only to purposeful misconduct). Under the statutory language of the 2005 amendment, the factor applies only to purposeful misconduct. RCW 9.94A.535(n).

154 Wn. App at 953. On its face, this statement does not explain what the court means by “purposeful misconduct.” The defendants construe this section to mean the aggravating factor only applies to crimes with a *mens*

rea of intent, and because their convictions require a lesser *mens rea* the factor is inapplicable.

However, the defendants' interpretation is immediately undermined by the fact that the defendant in *Hylton* was convicted of rape of a child in the third degree, an offense for which there is no *mens rea* requirement. RCW 9A.44.089.

If the defendants' interpretation is correct, the *Hylton* court would not have applied the aggravator factor to his offense, but yet the court affirmed the exceptional sentence. Given this problem, the correct reading of *Hylton* is that this aggravating factor only applies if the defendant used the position of trust to facilitate the commission of the offense. At common law, there was no such requirement. *Chadderton*, 119 Wn.2d at 398; *See also* 11A Washington Practice, WPIC 300.23 (comment recognizing this distinction). RCW 9.94A.535(3)(n) does not at any point limit the application of the enumerated aggravating factors to offenses with any particular *mens rea* or to "purposeful" crimes, whatever those may be. To the extent the *Hylton* opinion can be read as so holding, it is in error. The Court should reject this claim.

The defendants also argue that the aggravating factor for "abuse of trust" set forth in RCW 9.94A.535(3)(n) inheres in the crime of criminal mistreatment in the second degree, RCW 9A.42.030. It is true that factors that are inherent to a particular offense cannot be used as a basis for an

exceptional sentence. *See State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). The rationale behind this rule is that the Legislature has already accounted for inherent factors in computing the presumptive range for the offense. *See State v. Norby*, 106 Wn.2d 514, 723 P.2d 1117 (1986). For instance, the “invasion of privacy” aggravating factor, RCW 9.94A.535(3)(p), cannot be the basis for an exceptional sentence for a rape in the first degree that is predicated on unlawful entry into the victim's residence, as the invasion of privacy is inherent in the offense itself. *See, State v. Harding*, 62 Wn. App. 245, 813 P.2d 1259(1991).

The defendants are incorrect to argue that abuse of trust does not apply to the current case. To the contrary; this case is exactly the circumstance where the aggravator applies.

5. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE THAT THE VICTIM WAS PARTICULARLY VULNERABLE.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt, viewing the trial evidence in the light most favorable to the State. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficiency claim “admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Direct and circumstantial evidence are

equally reliable. *State v. Thomas*, 150 Wn. 2d 821, 874, 83 P. 3d 970 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *Thomas*, at 874-875; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In order for the victim's vulnerability to justify an exceptional sentence, the State must show (1) that the defendant knew or should have known (2) of the victim's particular vulnerability, and (3) that vulnerability must have been a substantial factor in the commission of the crime. *State v. Suleiman*, 158 Wn. 2d 280, 291-292, 143 P. 3d 795 (2006). Under the mistreatment statute, vulnerability of the victim is not an element of the offense. *State v. Bartlett*, 74 Wn. App. 580, 593, 875 P. 2d 651 (1994), *aff'd* 128 Wn. 2d 323, 907 P. 2d 1196 (1995).

Here, the evidence showed that MA was a five year old little boy. He was placed in foster care with the defendants; therefore relying upon them for his needs for survival and proper development. 6 RP 783. The defendants were certainly aware of this, in that MA's mother was Mr. Moses' cousin. 8 RP 1200. Because MA is under tribal jurisdiction, the foster placements were limited to within the tribe. 5 RP 695-697. For some reason, the defendants singled MA out for mistreatment. None of the other children in the house were treated this way. 11 RP 1790, 1794. From all of

this evidence, the jury could certainly conclude that MA was particularly vulnerable.

6. THE TRIAL COURT DID NOT COMMENT UPON THE DEFENDANT'S RIGHT TO THE PRESUMPTION OF INNOCENCE.

Here, when Mr. Moses' counsel was arguing to the jury in closing about "substantial bodily harm", this exchange took place:

[Defense Counsel]: So then you next come to was there substantial bodily harm, and "substantial bodily harm" is defined in Instruction No. 26 and talks about substantial disfigurement, and I would contend that being thin is not the same as substantial disfigurement especially when you're told, analyze the evidence while presuming their innocence. So take the assumption that thin and –

[Prosecuting Attorney]: Objection. That's a misstatement of the law.

THE COURT: Sustained.

Presumption of innocence has no bearing on the legal or factual issue of what constitutes "substantial disfigurement". Counsel was certainly free to argue the law or conclusions from the evidence, such as whether being thin was "substantial disfigurement". Counsel could argue that there was "reasonable doubt" that being thin amounted to "substantial disfigurement".

"Presumption of innocence" and "reasonable doubt" are not the same thing. "Beyond a reasonable doubt" is a quantum or standard of

proof that the State must achieve in order to overcome the presumption of innocence.

However, counsel went beyond that. He was arguing, or at least implying, that the presumption of innocence required the jury to view the evidence in a light favorable to the defendant. That is not the law. In evaluating evidence, the jury is not subject to any mandatory presumptions. *See, State v. Deal*, 128 Wn. 2d 693, 911 P. 2d 996 (1996). Here, the court correctly instructed the jury that: “You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.” *See*, Instruction 1, CP 238. The court correctly sustained the objection.

7. THE TRIAL COURT DID NOT COMMIT CUMULATIVE ERROR.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine, in that the type of error will affect the court’s weighing those errors. *State v. Russell*,

125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

The record of this case, as a whole, shows that the defendants received a fair trial. As argued above, the court correctly admitted evidence, instructed the jury, and applied the law in sentencing. There was no such accumulation of error to deprive the defendants of a fair trial.

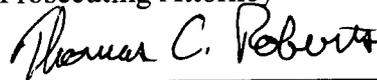
D. CONCLUSION.

Mr. and Ms. Moses received a fair trial where the court properly considered, and ruled upon the admissibility of statements. Severance of the defendants was unnecessary where the codefendants' statements were neither inculpatory, nor cross-referencing. Even so, severance was unnecessary where the statements were redacted and the jury properly instructed.

The trial court did not err in its rulings or abuse its discretion. The State respectfully requests that the convictions be affirmed.

DATED: March 31, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

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

4.1.15 Stephan Kar

Date

Signature

PIERCE COUNTY PROSECUTOR

April 01, 2015 - 9:49 AM

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