

No. 48092-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Chad Tibbits,**

Appellant.

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Mason County Superior Court Cause No. 14-1-00199-1

The Honorable Judge Amber Finlay

**Appellant's Opening Brief**

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## ISSUES AND ASSIGNMENTS OF ERROR

1. Chad Tibbits's convictions violated his Sixth and Fourteenth Amendment right to confront witnesses.
2. The trial court erred by admitting testimonial hearsay.

**ISSUE 1:** The confrontation clause prohibits admission of testimonial hearsay unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. Did the admission of testimonial hearsay violate Chad's Sixth Amendment right to confront the witnesses against him?

3. Chad's assault conviction violated due process because the evidence was insufficient for conviction.
4. The state failed to prove that Chad intentionally assaulted A.T. and inflicted substantial or great bodily harm.
5. The state failed to prove that Chad acted with intent to inflict great bodily harm.
6. The state failed to prove that Chad previously engaged in a pattern or practice of assaulting A.T.
7. The state failed to prove that Chad previously engaged in a pattern or practice of causing A.T. physical pain or agony equivalent to that produced by torture.

**ISSUE 2:** Evidence is insufficient for conviction if it is consistent with a reasonable hypothesis of innocence. Did the state fail to prove that Chad assaulted his daughter, where no direct evidence implicated him and where he did not have exclusive custody when the injuries were inflicted?

**ISSUE 3:** Conviction of first-degree assault of a child requires proof of an intentional assault. Was the evidence insufficient to prove that Chad assaulted A.T., either as principal or accomplice?

**ISSUE 4:** Under the third alternative means charged, the state was required to prove that Chad had previously engaged in a pattern or practice of assault or torture. Was the evidence

insufficient to prove that Chad engaged in any pattern or practice of harming his daughter?

8. Chad's criminal mistreatment conviction violated due process because the evidence was insufficient for conviction.
9. The state failed to prove that Chad recklessly harmed A.T. or created a risk of harm.
10. The state failed to prove that Chad withheld any of the basic necessities of life from A.T.

**ISSUE 5:** Conviction of criminal mistreatment required proof that Chad withheld basic necessities of life from his daughter. Was the evidence insufficient to prove criminal mistreatment, where the mother Ms. Shivers was responsible for breastfeeding A.T., and Chad did not interfere with her doing so?

**ISSUE 6:** The state was obligated to prove that Chad recklessly harmed A.T. or recklessly created an imminent and substantial risk of harm. Was the evidence insufficient to prove recklessness, where medical experts testified that a naïve parent might not realize that A.T. was at risk of malnourishment?

11. The court violated Chad's Wash. Const. art. I, § 21 right to a unanimous verdict by failing to instruct the jury that it had to unanimously agree on the means by which Chad committed first-degree assault of a child.
12. The state failed to prove that Chad intended to inflict great bodily harm, one of the alternative means of committing first-degree assault of a child.
13. The state failed to prove that Chad engaged in a pattern or practice of harming his child, one of the alternative means of committing first-degree assault of a child.

**ISSUE 7:** The state constitution requires juror unanimity as to the means by which an offense was committed. Did conviction on count one violate Chad's right to unanimity, given the absence of proof on two of the alternative means submitted to the jury?

14. Prosecutorial misconduct deprived Chad of his Sixth and Fourteenth Amendment right to a fair trial by an impartial jury.
15. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by "testifying" to "facts" not in evidence during closing argument.
16. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by appealing to passion and prejudice.
17. The prosecutor committed misconduct by telling jurors "[s]ome of us have shed tears over this case."

**ISSUE 8:** A prosecutor commits misconduct by "testifying" to "facts" not in evidence. Must the convictions here be reversed because of the prosecutor's "testimony" that he'd "shed tears over this case?"

**ISSUE 9:** A prosecutor may not seek conviction based on appeals to passion and prejudice. Did the prosecutor improperly appeal to passion and prejudice by telling jurors that he'd "shed tears over this case" and predicting that they might shed tears as well?

18. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by disparaging the role of defense counsel.
19. The prosecutor committed misconduct by implying that defense counsel didn't see the child as a human being.

**ISSUE 10:** A prosecutor may not disparage the role of defense counsel or seek to draw a cloak of righteousness around himself. Did the prosecutor commit misconduct by implying that defense counsel didn't see the child as a human being?

20. Defense counsel deprived Chad of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

21. Defense counsel provided ineffective assistance by failing to object to cross-examination asking Chad if there was a reason his mother would lie to the jury.
22. Defense counsel provided ineffective assistance by failing to object to cross-examination asking Chad if his mother “just got that wrong,” referring to a disagreement in the testimony.
23. Defense counsel provided ineffective assistance by failing to object to cross-examination asking Chad if there was a reason his father would lie to the jury.

**ISSUE 11:** An unreasonable failure to object to prejudicial and inadmissible evidence deprives an accused person of the effective assistance of counsel. Was Chad prejudiced by defense counsel’s unreasonable failure to object when opposing counsel asked on cross-examination if his parents were lying?

24. Defense counsel provided ineffective assistance by failing to object to questions implying a history of domestic violence.

**ISSUE 12:** Defense counsel should object to inadmissible and prejudicial allegations of domestic violence. Did defense counsel’s unreasonable failure to object to domestic violence insinuations violate Chad’s right to the effective assistance of counsel?

25. Defense counsel provided ineffective assistance by failing to object to prosecutorial misconduct.

**ISSUE 13:** Failure to object to prosecutorial misconduct waives the issue for appeal unless the misconduct is flagrant and ill-intentioned. Did defense counsel provide ineffective assistance by failing to object to several instances of misconduct?

26. Defense counsel provided ineffective assistance by failing to move to sever Chad’s case from his codefendant’s.

**ISSUE 14:** A motion to sever codefendants must be granted where defenses are irreconcilable and mutually exclusive, or where the prosecution introduces testimonial hearsay from a nontestifying codefendant that implicates the accused person.

Was Chad prejudiced by his attorney's unreasonable failure to seek severance from his codefendant's trial?

27. The trial court infringed Chad's Sixth and Fourteenth Amendment right to a jury trial by imposing a sentence based on judicial factfinding.
28. The trial court infringed Chad's Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a sentence based on judicial factfinding.
29. In the absence of a special verdict, the trial court erred by adopting Finding of Fact No. 2.1 of the Judgment and Sentence (relating to the offender's use of force likely to result in death and/or the offender's intent to kill).

**ISSUE 15:** A sentencing court may not rely on judicial factfinding to determine the mandatory minimum sentence for a conviction. In the absence of a special jury verdict, did the trial court err by adopting a special finding that Chad "used force or means likely to result in death or intended to kill the victim?"

30. The trial judge miscalculated the standard range.
31. The trial judge erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence (relating to the "Total Standard Range.")
32. The exceptional sentence was based on a miscalculation of the standard range and on improper judicial factfinding relating to an inapplicable mandatory minimum sentence.

**ISSUE 16:** When a sentencing court miscalculates the standard, the Court of Appeals must reverse an offender's exceptional sentence unless the record clearly indicates the sentencing court would have imposed the same sentence. Must Chad's exceptional sentence be reversed, given the sentencing court's miscalculation of the standard range and erroneous belief that a mandatory minimum applied?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Chad Tibbits was 22 years old, and had a baby with his 19-year-old girlfriend Katarina Shivers. RP 40, 178. They lived with Chad's parents, Penny and Lester Tibbits.<sup>1</sup> RP 42, 76.

Chad worked for his grandfather a few days per week, and Katarina took care of the baby. RP 55, 56, 61, 88. Katarina breastfed her child. RP 88.

Neither Penny nor Katarina worked outside of the house, so both were home together most every day. RP 94. Katarina and Penny weren't on good terms, and by the time A.T. was born, they barely spoke to each other. RP 92. Despite this, Penny watched A.T., changed the baby's diapers, and provided other care. RP 91, 93, 94; Ex. 33, Supp. CP.<sup>2</sup>

In April of 2014, A.T. was two months old and suffered a serious injury. RP 43, 45. The injury occurred between 10 and 12 that evening.<sup>3</sup> RP 80. Chad tried to give A.T. mouth-to-mouth. RP 48, 80. Penny came and immediately took the baby from him. RP 49, 80. Penny shook the

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<sup>1</sup> First names are used in this brief to avoid confusion. No disrespect is intended.

<sup>2</sup> Exhibit 33 is a transcript of Katarina's recorded statement. The transcript was provided to jurors as the prosecutor played the recorded statement; however, the transcript itself was not admitted into evidence.

<sup>3</sup> Claims about who was with A.T. when the injury was sustained were conflicting. Katarina claimed Chad was alone with the baby, Chad testified that Katarina was. RP 390-391; Ex 33. Lester was likely in bed, and Penny had perhaps just gone to bed. RP 45, 79-80.

baby, who she later claimed started crying. RP 80-81. But all of the medics who eventually came described A.T. as having difficulty breathing and not crying. RP 104, 118, 126-128, 134.

At first, just one medic arrived. Lt. DeCapua described A.T. as breathing with difficulty. RP 100-103. He noted several bruises on the baby. RP 104. He also said that Lester stood blocking the door with his arms crossed, which caused DeCapua concern. RP 103, 110. Additional medics and police also came. RP 107-108.

A.T. was later found to have multiple broken bones, as well as bruises all over her face and head. One eye was swollen shut. RP 145-146, 292. The broken bones in her ribs and legs were already healing when discovered that night by the emergency room doctor. Experts concluded that these breaks occurred well before the incident that brought A.T. to the hospital. RP 151-153, 308-313, 329. Some of the bruises were also from earlier trauma. RP 157-158. Doctors discovered a skull fracture, along with bleeding around the brain. RP 302-303. In addition, A.T. was malnourished and dehydrated. RP 145-146, 292.

The state charged both parents together. Both faced one count of assault of a child in the first degree and criminal mistreatment in the second degree. CP 80. Each count came with enhancements alleging

deliberate cruelty, a particularly vulnerable victim, and abuse of a position of trust. CP 80-82. The assault charge averred that the defendant

With intent to inflict great bodily harm, did assault a child... and did inflict great bodily harm... and/or ... did intentionally assault a child ... and did recklessly inflict great bodily harm, and/or ... did intentionally assault a child... and did cause substantial bodily harm, having previously engaged in a pattern or practice of (A) assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, or (B) causing the child physical pain or agony that is equivalent to that produced by torture....  
CP 81.

Neither defense attorney asked the court to sever the defendants, and the cases were tried together.

At trial, Penny claimed that she hadn't seen A.T. that whole day. RP 85. She said that Katarina and A.T. usually stayed in their room all day long. RP 87. When she was asked if Chad and Katarina were always with A.T. "twenty-four/seven with [A.T. from the time she was born," Penny replied "I plead the Fifth." RP 90.

The state introduced into evidence the unredacted recorded statement of Katarina, as well as unrecorded statements she'd made to a sheriff's deputy.<sup>4</sup> In her statements, she claimed that she gave the baby to Chad while she went to the bathroom, and that when she came out, A.T.

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<sup>4</sup> A portion of it was also videotaped. RP 16-177.

wasn't breathing. RP 176; Ex. 33, Supp. CP.<sup>5</sup> Her statements came in without objection from the defense. RP 166-178.

Katarina's recorded statement was 36 minutes long. Throughout the statement, she repeated multiple times that she handed the baby to Chad and left the room, and that when she came back, A.T. was not breathing.<sup>6</sup> Ex. 33. Katarina also told police that A.T. had caused the injuries to herself, by rubbing her eyes and hitting herself. RP 177. The defense did not seek to redact this statement to remove references to Chad.

The officer who took recorded statements from both Katarina and Chad was named Sergeant Jason Dracobly. On cross-examination, Katarina's attorney asked Sgt. Dracobly about domestic violence, despite the absence of any testimony on the subject:

Q. Okay. Sergeant Dracobly, do you have any training and experience with regards to domestic violence?

A. Yes.

Q. Are you familiar with how a domestic violence victim acts in - when involved with a situation?

A. That's pretty broad. I'm not sure - I -

A. I mean, I can say yes and I can say no to that, so.

Q. Let me ask something more specific. Is it uncommon for a victim of domestic violence to cover up for her abuser?

[PROSECUTOR]: Your Honor, I'm going to object to the relevance.

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<sup>5</sup> As noted above. Ex. 33 is the transcript of the recorded statement. It was provided to jurors as a listening aid, but was not introduced into evidence.

<sup>6</sup> The statement also contained Katarina's claim that Chad had two additional children, by two different women. She said that one had been given up for adoption, and that he did not have any contact with either child. Ex 33.

THE COURT: Sustained as to foundation.

Q. Is it uncommon for a domestic violence abuser to isolate their victim?

[PROSECUTOR]: Your Honor, same objection --  
RP 201-202.

Defense counsel raised no objection, did not seek to have the jury instructed regarding the questions, and did not move for a mistrial or make a motion to sever.

The state called Lauriette McClure, Katarina's mother. McClure testified that Katarina told her that A.T. had fallen off the bed and was in the hospital. RP 224. When she last saw mother and child together, she thought the baby looked hungry and urged Katarina to feed A.T. RP 230. She said she confronted her daughter about A.T. losing weight. RP 236.

Katarina's sister also testified that Katarina seemed reluctant to feed A.T. She told jurors that she'd asked Katarina about bruises she saw on A.T. RP 250-251. Both Katarina's mother and sister testified that Katarina had explained that A.T. hit herself and caused the bruises. RP 229-230, 251.

The prosecutor also presented the expert testimony of Dr. Feldman, who opined that A.T. had been abused. RP 339. In addition, Dr. Feldman told the jury that a "naïve parent" would not necessarily realize that A.T. was malnourished. RP 350.

Chad Tibbits testified. He admitted that he lied to police when he gave them the same story Katarina had provided in her recorded statement. RP 185, 385-445. He denied injuring his child, and said that he had lied in order to protect Katarina. RP 391, 398.

Chad testified that when he went upstairs that evening, Katarina had been alone with A.T. When Katarina went into the bathroom, he realized that A.T. was not breathing. RP 391, 398.

During cross examination, Katarina's attorney challenged Chad's testimony by asking him about the testimony of his parents:

Q. Okay. Is there a reason that your mother would lie to the jury when she testified that you did [change A.T.'s diapers]?

A. I don't know what my mom would say or why she would lie.

Q. Is there a reason that your father would lie when he testified to the jury that you did [change A.T.'s diapers]?

A. Again, I don't know why.

RP 396.

Q. So your mom just got that wrong?

A. Yeah. I was already started headed down the hallway, down the stairs. Mom met me and grabbed the baby....

RP 399.

Defense counsel did not object. RP 396, 399. The prosecutor picked up the theme:

Q. To the extent that your mother and father weren't telling the truth, they were protecting you, weren't they, not Katarina?

A. I don't have no idea which person my mom and dad are protecting.

RP 415-416.

The prosecutor later asked Chad if the reason his parents were protecting him was because he injured his child. Chad said it was not. RP 433-434. Defense counsel did not object to any of this cross-examination. RP 415-416, 433-434.

Katarina Shivers did not testify.

The court instructed the jury on three alternative means of committing assault of a child in the first degree. Court's Instructions filed 12/22/15, Instructions Nos. 11, 18. Supp. CP. The court did not instruct the jury that it must be unanimous as to the means of commission, and the verdict forms did not include a special verdict on the issue.<sup>7, 8</sup> Court's Instructions filed 12/22/15, Supp. CP.

The prosecutor wondered rhetorically during his rebuttal closing argument if Chad and his attorney even saw A.T. as a human being. RP 610. He also told jurors that "Some of us have shed tears over this case." RP 611. He followed up by telling jurors "[m]any of you have or maybe will [shed tears]" as well. RP 611.

The jury convicted Chad Tibbits as charged, answering "yes" to each of the special verdicts. CP 74, 77, 79. At sentencing, the court also

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<sup>7</sup> In fact, the court's "to convict" instructions specifically told jurors they need not be unanimous as to the means of commission. Instr. No. 18, Supp. CP.

<sup>8</sup> The court also gave an instruction regarding statements of codefendants: "You may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant." Instr. No. 7, Supp. CP.

found that the “offender used force or means likely to result in death or intended to kill the victim”. CP 58. No special verdict supported this finding.

The court determined Chad’s standard range to be 102 months to life (count one) and 12+ - 60 months (count two). CP 59. The court imposed an exceptional sentence, and Chad Tibbits timely appealed. CP 57.

## ARGUMENT

### **I. THE ADMISSION OF TESTIMONIAL HEARSAY VIOLATED CHAD TIBBITS’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.**

A. Testimonial hearsay is inadmissible at trial unless the declarant is unavailable and the accused person had a prior opportunity for confrontation.

The Sixth Amendment to the U.S. Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. Amend. VI.<sup>9</sup> A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

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<sup>9</sup> This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV.

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The core definition of testimonial hearsay includes statements “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford*, 541 U.S. at 52.

Confrontation issues may be raised for the first time on appeal, even absent any objection in the trial court.<sup>10</sup> RAP 2.5(a)(3); *State v. Clark*, 139 Wn.2d 152, 156, 985 P.2d 377 (1999); *see also State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007), *overruled on other grounds by State v. Jasper*, 174 Wn.2d 96, 100, 271 P.3d 876 (2012).

To raise a manifest error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).<sup>11</sup> An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v.*

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<sup>10</sup> In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

<sup>11</sup> The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

*O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Here, the trial judge knew that the prosecution was seeking to admit a nontestifying codefendant's unredacted statements implicating Chad Tibbits. Accordingly, the court "could have corrected" the problem. *Id.* The error can be reviewed for the first time on appeal. *Id.*

B. The admission of Ms. Shivers's testimonial statements to police violated Chad's confrontation rights.

The admission of a non-testifying codefendant's statement violates the confrontation clause unless the statement is (1) redacted so that it is facially neutral, (2) modified so it is free of obvious deletions, and (3) accompanied by an instruction prohibiting jurors from using it against the defendant. *State v. Larry*, 108 Wn. App. 894, 905, 34 P.3d 241 (2001) (citing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), and *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)). Even when all three steps are followed, a redacted statement violates the confrontation right if "the only reasonable inference" drawn from the statement implicates the defendant. *State v. Vincent*, 131 Wn. App. 147, 154, 120 P.3d 120 (2005).<sup>12</sup>

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<sup>12</sup>But see *Larry*, 108 Wn. App. at 906-907. The *Vincent* court made no reference to *Larry*.

In this case, the prosecution introduced Katarina Shivers's unredacted statements. RP 176-178, 206-208; Ex. 33.<sup>13</sup> The statement falls within *Crawford's* core definition of testimonial hearsay, and Chad had no prior opportunity for cross-examination. Its admission violated Chad's confrontation rights under *Vincent*.

Katarina told police that she handed the baby to Chad and left the room, and that A.T. was struggling to breathe when she returned. RP 176-178; Ex. 33. Thus "the only reasonable inference" was that Chad harmed A.T. while she was out of the room.<sup>14</sup> *Vincent*, 131 Wn. App. at 154. Her statement implicated him. *Id.*

The admission of testimonial hearsay violated Chad's Sixth and Fourteenth Amendment right to confront adverse witnesses. *Crawford*, 541 U.S. at 58-59. Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way

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<sup>13</sup> As noted above, Ex. 33 was provided to jurors but was not introduced into evidence.

<sup>14</sup> This does not mean the evidence was sufficient for conviction, however. As argued elsewhere, the facts are consistent with a hypothesis of innocence, and thus do not even amount to *prima facie* proof that Chad Tibbits assaulted A.T. *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006).

affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The state cannot make that showing. No direct evidence showed that Chad harmed his daughter. Through her hearsay statement, Katarina denied hurting A.T. herself, and claimed that Chad was alone with A.T. at a time when she may have been injured. Ex. 33.

Without the evidence, a reasonable juror could have voted to acquit Chad. Accordingly, his conviction must be reversed and the case remanded for a new trial. *Id.*

## **II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT CHAD TIBBITS OF EITHER CHARGE.**

Due process requires the state to prove the elements of a crime beyond a reasonable doubt. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). In challenging the sufficiency of the evidence,<sup>15</sup> the appellant admits the truth of the state's evidence and all reasonable

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<sup>15</sup> A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3).

inferences that can be drawn from it. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

However, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). To prove even a *prima facie* case, the state's evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *Brockob*, 159 Wn.2d at 329 (addressing *prima facie* evidence in the *corpus delicti* context).<sup>16</sup>

A. The state failed to prove that Chad inflicted or helped inflict any of the injuries on A.T.

Evidence showed that Katarina Shivers had primary responsibility for A.T., and that Penny, Lester, and Chad Tibbits all had access and provided at least minimal care. RP 55, 70, 88, 91, 230, 388. No direct evidence implicated any of the four adults.

Katarina Shivers was with A.T. shortly before the baby started having trouble breathing. RP 390. She was either alone with A.T. or had Chad in the room nearby. Ex 33; RP 390. A.T.'s breathing problem started when her mother went into the bathroom.

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<sup>16</sup> In this context, "innocence" does not mean blamelessness; rather, it relates to the defendant's culpability for the *charged* crime. *Id.*

This evidence does not even *prima facie* establish Chad's guilt of the primary assault.<sup>17</sup> *Id.* This is so because the evidence is consistent with a hypothesis of his innocence—that Katarina injured A.T. prior to going to the bathroom. *Id.*

Dr. Feldman testified that the injury to A.T.'s brain would have impacted her breathing within two minutes. RP 337, 343. In other words, Katarina Shivers could have assaulted A.T. and then gone to the bathroom, leaving Chad to deal with the consequences.

No evidence suggests that Chad solicited, commanded, encouraged, or asked Katarina to assault their child. Instruction No. 9, Court's Instructions filed 12/22/15, Supp. CP. Nor did the state present evidence proving that he aided or agreed to aid the mother in planning or committing an assault. Instr. No. 9, Supp. CP. His admission that he lied to protect Katarina<sup>18</sup> would support a charge of rendering criminal assistance;<sup>19</sup> it does not support a conviction for the assault itself.

As to the last assault before the medics were called, the state failed to present evidence consistent with guilt and inconsistent with innocence.

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<sup>17</sup> If display of symptoms were sufficient to establish guilt, then the paramedics could be convicted based on A.T.'s symptoms while being transported by ambulance. *See* RP 143.

<sup>18</sup> RP 392.

<sup>19</sup> *See* RCW 9A.76.050-.090.

Accordingly, conviction cannot stand under the first two alternative means presented to the jury.<sup>20</sup> Instr. No. 11, Supp. CP.

Even less evidence supports the third alternative means.

Nothing in the record showed that Chad was involved in the prior assaults which resulted in extensive bruising and numerous broken bones. Thus the state not only failed to prove an intentional assault causing substantial bodily harm, it also failed to prove that he engaged in the requisite “pattern or practice” of inflicting harm. Instr. No. 11, Supp. CP.

The facts here are reminiscent of those in

This is not a case where Chad had exclusive care of A.T. during the relevant timeframe(s). *Cf. State v. Pennewell*, 23 Wn. App. 777, 598 P.2d 748 (1979). In *Pennewell*, the defendant “had total control of the victim at all critical times.” *Id.*, at 782. This evidence supported the conviction, when combined with the defendant’s untrue explanations of accidental injury. *Id.*

Here, by contrast, Katarina, Penny, and Lester had access to the child and could have inflicted the prior injuries. RP 55, 70, 88, 91, 230, 388. Furthermore, the mother had “total control” over A.T. at a time when the head injury may have been caused. RP 390. The fact that Chad lied to

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<sup>20</sup> The first two alternatives required proof of an intentional assault and the intentional or reckless infliction of great bodily harm. Instr. No. 11, Supp. CP.

protect Katarina (and/or his parents) does not amount to evidence of guilt as in *Pennewell*, since he didn't have "total control of the victim at all critical times." *Id.*, at 782.

This case is more akin to *State v. Harris*, 164 Wn. App. 377, 263 P.3d 1276 (2011). In *Harris*, the state "presented no evidence that [the defendant] was ever observed handling [the victim] inappropriately, nor any evidence that there were concerns about his parenting." *Id.*, at 382. Because of this, the trial court in *Harris* dismissed for insufficient evidence a charge based on a pattern or practice of abuse.<sup>21</sup>

Here, as in *Harris*, the evidence was consistent with a hypothesis of innocence of the charged crime. The state failed to prove even a *prima facie* case. *Brockob*, 159 Wn.2d at 329. Thus, the evidence was insufficient as to count one. The assault conviction must be reversed and the charge dismissed with prejudice. *State v. Mau*, 178 Wn.2d 308, 317, 308 P.3d 629 (2013).

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<sup>21</sup> In the end, the *Harris* court reversed based on instructional error. *Id.*, at 387-388. However, the court criticized defense counsel for failing to seek pretrial dismissal of the "pattern or practice" alternative means, where doing so would have kept the jury from being tainted by evidence of prior abuse. *Id.*, at 388 n. 6.

B. The evidence was insufficient to show that Chad Tibbits acted recklessly or that he withheld from A.T. the basic necessities of life.

To convict Chad Tibbits of second-degree criminal mistreatment, the state was required to prove that he withheld either food or medically necessary health care.<sup>22</sup> RCW 9A.42.010(1); RCW 9A.42.030; Instruction Nos. 20, 21, 25, Supp. CP. In addition, the prosecution had to show that Chad knew of and disregarded a substantial risk of harm. Instruction No. 23, Supp. CP.

The state did not introduce sufficient evidence on either point.

Katarina Shivers breastfed A.T.<sup>23</sup> RP 88. She was always available to her daughter, and there is no suggestion that Chad ever prevented her from nursing (or that he refused to bottle-feed A.T.). Furthermore, Dr. Feldman testified that a naïve parent might not know that A.T. was undernourished. RP 350.

In addition, the parents brought A.T. to her doctor's appointments for medical care. These appointments included a checkup on April 3, 2014 and another for shots (approximately one week prior to the 911 call). RP 344-345. Thus, Chad did not withhold routine medical care.

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<sup>22</sup> There is no allegation that either parent withheld water, shelter, or clothing.

<sup>23</sup> Lester provided conflicting evidence suggesting the parents sometimes bottle fed A.T. as well. RP 59-60, 71.

Nor did the state prove that Chad knew A.T. needed immediate medical attention. The pain A.T. felt as a result of her injuries would only have made her seem “irritable.” RP 329. Dr. Feldman did not suggest her symptoms should have prompted the adults in the house to insist on taking A.T. back to her doctor’s office. RP 329-330.

The state failed to prove that Chad withheld basic necessities or that he knew of and disregarded a substantial risk of harm. His conviction on count two must be reversed and the charge dismissed with prejudice. *Mau*, 178 Wn.2d at 317.

### **III. CHAD TIBBITS’S CONVICTION FOR FIRST-DEGREE ASSAULT OF A CHILD VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT.**

An accused person has a state constitutional right to a unanimous jury verdict.<sup>24</sup> Art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). This right also includes the right to jury unanimity on the *means* by which the defendant is found to have committed the crime. *State v. Lobe*, 140 Wn. App. 897, 903-905, 167 P.3d 627 (2007); *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). A particularized expression of unanimity (in the form of a special verdict) is required unless there is sufficient evidence to support each alternative means

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<sup>24</sup> The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994).<sup>25</sup>

When the court instructs the jury regarding alternative means but does not require an expression of unanimity, reversal is required if the state fails to produce substantial evidence supporting each alternative means. *State v. Hayes*, 164 Wn. App. 459, 473, 262 P.3d 538 (2011). Such errors can be raised for the first time on review RAP 2.5(a)(3); *State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997).<sup>26</sup>

Here, the court instructed jurors on three alternative means of committing first-degree assault of a child. The first alternative required proof that Chad Tibbits intended to inflict great bodily harm. The third alternative required proof that he engaged in a pattern or practice of abuse. CP 81.

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<sup>25</sup> In light of this, it is absolutely inexplicable that the pattern instruction explicitly relieves the jury of achieving unanimity as to means. *See* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.35 (3d Ed); *see also* Comment to WPIC 4.23 (discussing *Ortega-Martinez*). This case does not provide a vehicle for challenging the pattern instruction, however, because defense counsel invited any error by proposing instructions that included the language approved in that case.

<sup>26</sup> There appears to be a split between Divisions I and II as to whether or not failure to provide a unanimity instruction automatically qualifies as manifest error affecting a constitutional right. *See, e.g., State v. Locke*, 175 Wn. App. 779, 802, 307 P.3d 771 (2013) (requiring appellant to demonstrate practical and identifiable consequences of error); *State v. Knutz*, 161 Wn. App. 395, 406, 253 P.3d 437 (2011) (same). The difference may have little practical effect, however, as Division II will analyze the merits of the claimed error to determine whether or not it qualifies for review.

The state did not produce substantial evidence supporting these two alternative means.<sup>27</sup> Thus, Chad's assault conviction violated his right to a unanimous verdict.<sup>28</sup> *Ortega-Martinez*, 124 Wn.2d at 707-708.

Nothing in the record showed that Chad Tibbits intended to inflict great bodily harm. No direct testimony showed how the assault took place. Nor did any testimony establish that A.T.'s head trauma could only be inflicted by someone intending great bodily harm. In fact, Dr. Feldman testified that the head injury was "on the milder spectrum... of abusive head injury." RP 338.

Similarly, no direct evidence proved that Chad caused any of the bruises or broken bones found when doctors examined A.T. Nor is there evidence that he solicited, commanded, encouraged, or asked any of the other adults to assault his daughter, or that he aided or agreed to aid another person in planning or committing any of the prior assaults. Court's Instructions filed 12/22/15, Instruction No. 9, Supp. CP.

Even if Chad did assault A.T. and inflict great bodily harm, there is no proof that he acted with intent to inflict great bodily harm. Nor is there

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<sup>27</sup> As argued elsewhere, the state did not prove that Chad Tibbits intentionally assaulted A.T. on the night he called 911. However, even if this court decides sufficient evidence establishes his guilt regarding that act, the conviction must still be reversed because it violated his right to juror unanimity.

<sup>28</sup> This creates a manifest error affecting his state constitutional right unanimity. The error can be raised for the first time on review. RAP 2.5(a)(3).

proof that he engaged in a pattern or practice of causing harm, either as principal or accomplice. Since two of the alternative means are unsupported, the conviction must be reversed and the charge remanded for a new trial on the remaining alternative. *Hayes*, 164 Wn. App. at 481.

**IV. THE PROSECUTOR COMMITTED MISCONDUCT BY “TESTIFYING” TO “FACTS” NOT IN EVIDENCE, DISPARAGING DEFENSE COUNSEL, AND APPEALING TO PASSION AND PREJUDICE.**

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. A conviction must be reversed where the misconduct prejudices the accused. *Id.* Even absent objection, reversal is required when misconduct is “so flagrant and ill intentioned that an instruction would not have cured the prejudice.” *Glasmann*, 175 Wn.2d at 704.<sup>29</sup>

Reviewing courts examine the cumulative effect of improper conduct. *Glasmann*, 175 Wn.2d at 707-12. Prosecutorial misconduct may require reversal even where ample evidence supports the jury’s verdict. *Glasmann*, 175 Wn.2d at 711-12. The focus of the reviewing court’s inquiry “must be on the misconduct and its impact, not on the evidence that was properly admitted.” *Glasmann*, 175 Wn.2d at 711.

Prosecutorial misconduct during argument can be particularly prejudicial. There is a risk that jurors will lend it special weight because of the prestige associated with the prosecutor's office, and also because jurors presume that the state has superior fact-finding capabilities.

*Glasmann*, 175 Wn.2d at 706.

A prosecutor commits misconduct by appealing to passion and prejudice. *Glasmann*, 175 Wn.2d at 704-706. Here, the prosecutor committed several instances of misconduct that improperly appealed to passion and prejudice.

First, the prosecutor improperly "testified" to "facts" outside the record when he told jurors "[s]ome of us have shed tears over this case." RP 611. Nothing in the record supported this assertion. The argument was misconduct. *Id.*

Second, the prosecutor compounded the problem by telling jurors "[m]any of you have or maybe will [shed tears]" as well. RP 611. This was an invitation for jurors to align themselves with the state for reasons unrelated to the evidence of guilt. The argument is reminiscent of the misconduct requiring reversal in *State v. Reed*, 102 Wn.2d 140, 684 P.2d

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<sup>29</sup> Prosecutorial misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time. *Glasmann*, 175 Wn.2d at 707.

699 (1984). In that case, the prosecutor's arguments were improperly "calculated to align the jury with the prosecutor and against the [defendant]." *Id.*

Third, the prosecutor disparaged defense counsel. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002). The prosecutor improperly suggested that defense counsel didn't see the child as human. RP 610. This misconduct was especially egregious because it was juxtaposed with the statement that "[s]ome of us have shed tears over this case" and the improper invitation to jurors to align themselves with the prosecution for reasons unrelated to the evidence. RP 611.

These instances of misconduct invited jurors to stand with the prosecutor beneath a "cloak of righteousness." *Gonzales*, 111 Wn. App. at 282. The prosecutor evoked sympathy for himself, dehumanized defense counsel and Chad, and invited jurors to align themselves with the prosecutor and against the defendant. RP 610-611.

Rather than focusing on the facts of the case, the prosecutor's argument improperly attempted to sway jurors' passions and prejudices. Taken together, the misconduct prejudiced Chad Tibbits. The argument expressly invited jurors to decide the case for irrelevant but emotionally charged reasons. Such improper arguments target the subconscious, and

cannot be cured through instructions directed at the conscious and rational part of the brain. Accordingly, the misconduct requires reversal even absent objection in the trial court. *Glasmann*, 175 Wn.2d at 704.

The prosecutor's improper argument violated Chad Tibbits's due process right to a fair trial by an impartial jury. *Glasmann*, 175 Wn.2d at 703-704. His convictions must be reversed and the case remanded for a new trial. *Id.*

**V. CHAD TIBBITS WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.**

To obtain relief on an ineffective assistance claim,<sup>30</sup> an accused person must show “that (1) his counsel’s performance fell below an objective standard of reasonableness and, if so, (2) that counsel’s poor work prejudiced him.” *A.N.J.*, 168 Wn.2d at 109. Although courts apply “a strong presumption that defense counsel’s conduct is not deficient,” a defendant rebuts that presumption if “no conceivable legitimate tactic explain[s] counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

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<sup>30</sup> Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5 (a). Appellate courts review claims of ineffective assistance of counsel *de novo*. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

The cumulative effect of counsel's errors can deprive a client of a fair trial even when a single error does not. *See, e.g., In re Restraint of Brett*, 142 Wn.2d 868, 882-83, 16 P.3d 601 (2001). That is, "[s]eparate errors by counsel... should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance." *Sanders v. Ryder*, 342 F.3d 991, 1000-01 (9th Cir. 2003).

- A. Defense counsel should have objected when opposing counsel asked Chad if there were a reason his parents were lying, and if his mother "got that wrong" in her testimony.

Chad Tibbits testified in his own defense at trial. RP 385-445.

When his testimony contradicted that of his parents, Katarina Shivers's attorney asked him if there were "a reason that your mother would lie to the jury." RP 396. His attorney did not object. RP 396.

Katarina Shivers's counsel repeated the same question about his father's testimony. RP 396. Again, defense counsel did not object. RP 396. Nor did defense counsel object when the other attorney asked (regarding a conflict in the testimony) "[s]o your mom just got that wrong?" RP 399. Furthermore, counsel failed to object when the prosecutor questioned Chad on the same subject. RP 415-416, 433-434.

It is improper to ask the accused person whether another witness is lying. *State v. Ramos*, 164 Wn. App. 327, 334, 263 P.3d 1268 (2011)

(addressing prosecutorial misconduct). Such questions invade the province of the jury and make it appear that acquittal requires jurors to find that prosecution witnesses are lying. *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991).

Defense counsel should have objected. *Id.* The questions were objectionable and the answers were inadmissible. *Id.* No conceivable tactical consideration explains defense counsel's failure to object. Thus, the failure to object fell below prevailing professional norms. In addition, the trial court would have sustained a timely objection. *Id.*

Furthermore, Chad Tibbits was prejudiced by counsel's deficient performance. An accused person is placed in an untenable position when asked to comment on another witness's truthfulness. Such questions (and answers) invade the province of the jury and imply that acquittal requires the jury to find that prosecution witnesses lied. *Id.*

The state's evidence implicating Chad was weak. No direct evidence proved that he ever injured A.T. Nor was there direct evidence proving that he helped another person injure A.T. Nor did he have exclusive control over the baby during the critical times. *Cf. Pennewell*, 23 Wn. App. 777. His admission that he lied to protect the mother (or his own parents) does not prove that he committed a crime against A.T.

There is a reasonable possibility that his inadmissible answers to the improper questions tipped the jury's decision against him.

Accordingly, he was denied the effective assistance of counsel.

*Reichenbach*, 153 Wn.2d at 130. His convictions must be reversed and the case remanded for a new trial. *Id.*

B. Defense counsel should have objected to questions implying a history of domestic violence.

The court would likely have granted a pretrial motion to exclude any reference to domestic violence. The court would also likely have sustained a timely objection to the codefendant's questions implying a history of domestic violence. RP 201-202. Had the jury not heard about the domestic violence allegation, there is a reasonable probability that Chad Tibbits would have obtained a more favorable result.

1. The court would likely have excluded references to domestic violence had defense counsel asked it to do so.

There is no indication that Chad Tibbits and Katarina Shivers had a relationship characterized by domestic violence. Nor would evidence of domestic violence have any bearing on the charges Chad faced. Any evidence of domestic violence should have been excluded under ER 401 and ER 402.

Even if the evidence had been relevant, the trial court would have sustained a timely objection under ER 403. The potential for unfair prejudice substantially outweighed whatever minimal probative value it may have had in Chad's case.<sup>31</sup> See *State v. Saltarelli*, 98 Wn. 2d 358, 362, 655 P.2d 697 (1982); see also *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994).

Furthermore, the evidence should have been excluded under ER 404(b). That rule generally prohibits evidence of prior misconduct. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

Courts must use special care before admitting domestic violence allegations in a trial on other charges. This is so because "the risk of unfair prejudice is very high." *State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). The proponent of domestic violence evidence must establish "overriding probative value." *Id.* at 925.

The codefendant's questions implied that Chad is a domestic violence perpetrator who isolated Katarina and forced her to cover up for him. RP 201-202. This tended to make Chad appear contemptible to the jury. Furthermore, because counsel failed to object, no limiting or curative

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<sup>31</sup> If evidence of domestic violence were admissible in the codefendant's case, defense counsel should have objected and sought a limiting instruction. Furthermore, the possible existence and admissibility of domestic violence evidence in the codefendant's case provides an additional reason that counsel should have sought to sever Chad's trial from his codefendant's.

instruction was given. This permitted the jury to use any implication of domestic violence as propensity evidence. *See, e.g., State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (absent a limiting instruction, evidence may be used for any purpose). That is, jurors likely made the understandable but legally impermissible inference that, if Chad assaulted Katarina, then he probably also assaulted his daughter. *See Saltarelli*, 98 Wn.2d at 363; *State v. Fuller*, 169 Wn. App. 797, 830-31, 282 P.3d 126 (2012); *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986); *See also United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985).

There was no evidence of domestic violence between A.T.'s parents in this case. Any domestic violence was irrelevant to the charged offense, and the risk of unfair prejudice outweighed any minimal probative value in Chad's case. The court would have granted a pretrial motion to exclude any reference to it, and sustained a timely objection when the codefendant asked questions implying that Chad had abused Katarina.

2. Absent the irrelevant and unfairly prejudicial insinuations of domestic violence, Chad Tibbits would likely have obtained a more favorable trial outcome.

Chad's defense hinged on whether the jury believed his denials over those of his codefendant.<sup>32</sup> The questions implying domestic violence gave them a reason to do the opposite. Jurors likely assumed from the questions that Chad Tibbits abused his girlfriend, isolated her, and compelled her to cover up for him. Jurors also likely accepted any history of domestic violence against Katarina as propensity evidence, proving that Chad also assaulted his infant daughter. The questions undermined the defense theory.

The domestic violence "evidence" also tended to make Chad appear contemptible to the jury, undermining his credibility. Because the defense theory relied on his testimony, this also undercut his chances of acquittal.

Thus, as in *Gunderson*, "it is reasonably probable that absent the highly prejudicial [insinuations of past domestic violence,] the jury would have reached a different verdict." 181 Wn.2d at 926. No direct evidence implicated Chad. The circumstantial evidence was consistent with a hypothesis of innocence: that Katarina or Chad's parents abused the child, and that he did no more than lie to authorities to protect them. The jury could have had reasonable doubt as to his guilt.

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<sup>32</sup> Because of this, the two cases should have been severed, as argued elsewhere in this brief.

The probability of a better outcome absent the domestic violence “evidence” is high enough to undermine confidence in the result. Accordingly, Chad’s convictions must be reversed and the case remanded for a new trial. *Reichenbach*, 153 Wn.2d at 137.

C. Defense counsel unreasonably failed to object to the highly prejudicial prosecutorial misconduct.

Chad’s trial attorney also deprived him of the right to effective assistance of counsel by failing to object to the prosecutor’s improper and inflammatory closing argument. Although the prosecutor’s misconduct itself merits reversal in this case, defense counsel’s failure to object also supports an ineffective assistance claim, providing an independent basis for reversal. *See State v. Gasteazoro-Paniagua*, 173 Wn. App. 751, 760, 294 P.3d 857, *review denied sub nom. State v. Gasteazor-Paniagua*, 178 Wn.2d 1019, 312 P.3d 651 (2013); *State v. Dickerson*, 69 Wn. App. 744, 748, 850 P.2d 1366 (1993).

Counsel’s failure to object likely affected the verdict. No direct evidence proved that Chad assaulted his daughter. The indirect evidence was equivocal, and established (at most) that Chad could have been the perpetrator.

Furthermore, Chad's attorney had no conceivable tactical reason to refrain from objecting to the prosecutor's inflammatory argument. The argument invited jurors to convict based on irrelevant considerations.

Counsel should have objected. His failure to do so prejudiced Chad. The convictions must be reversed and the case remanded for a new trial. *Reichenbach*, 153 Wn.2d at 137.

D. Defense counsel should have moved to sever Chad Tibbits's trial from his codefendant's.

Throughout the joint trial, the codefendant blamed Chad for A.T.'s injuries.<sup>33</sup> RP 129-130, 182, 200-202, 237, 244, 366, 396-404, 600; Ex 33.

The attorney for the mother conducted cross examination aimed at inculcating Chad while exculpating the mother. RP 396-404.

Furthermore, in closing, the codefendant's attorney told the jury "[Y]ou should absolutely convict Chad," and listed all the evidence against Chad and his parents.<sup>34</sup> RP 594, 597-600, 602.

Defense counsel should have moved for severance. His failure to do so deprived Chad of the effective assistance of counsel.

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<sup>33</sup> Her attorney also insinuated that Chad Tibbits was a controlling domestic violence perpetrator. RP 201-202.

<sup>34</sup> Similarly, Chad's theory was that Katarina abused A.T. without his knowledge, and that he did no more than cover for her when the police became involved. RP 587-593.

To prevail on an ineffective assistance claim based on failure to seek severance of codefendants, an appellant “must show that a competent attorney would have moved for severance, that the motion likely would have been granted, and that if he were tried separately there was a reasonable probability he would have been acquitted.” *In re Davis*, 152 Wn.2d 647, 711-13, 101 P.3d 1 (2004).

All three conditions are met here.

First, a competent attorney would have brought a motion to sever. Chad Tibbits’s trial theory involved blaming his codefendant for the assaults on A.T. This theory would have been just as viable without Katarina sitting as a codefendant. No strategic benefit accrued to Chad through a joint trial. Instead, Katarina’s presence as a codefendant prejudiced Chad, because she aligned with the prosecutor in emphasizing Chad’s guilt and her own innocence.<sup>35</sup>

Second, the motion likely would have been granted. Codefendant trials must be severed whenever a joint trial would be so manifestly prejudicial as to outweigh concern for judicial economy. *Id.*, at 711-712; *see* CrR 4.4(c)(2)(i). This occurs when mutually antagonistic defenses are irreconcilable and mutually exclusive. *State v. Medina*, 112 Wn. App. 40,

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<sup>35</sup> In addition, Katarina insinuated that Chad is a controlling domestic violence perpetrator. RP 200-202.

52-53, 48 P.3d 1005 (2002), *as modified* (June 27, 2002). Irreconcilable and mutually exclusive defenses warrant severance where one defense must be believed if the other is disbelieved. *Id.* In addition, severance must be granted whenever a nontestifying codefendant's statement will be introduced at trial, unless the prejudice identified in *Bruton* can be eliminated through redaction. CrR 4.4(c)(1); *Larry*, 108 Wn. App. at 905 (citing *Bruton*, 391 U.S. 123).

Here, each defendant claimed innocence and blamed the other for injuring A.T. Jurors had to disbelieve Chad's claim of innocence if they believed Katarina's defense. These were irreconcilable and mutually exclusive defenses. *Medina*, 112 Wn. App. at 52-53.

Furthermore, the prosecution introduced codefendant Katarina's testimonial hearsay at trial. No redactions were made. Accordingly, severance was required under CrR 4.4(c)(1) and *Bruton*. Furthermore, the hearsay statement could not have been redacted to accord with *Vincent*, 131 Wn. App. at 154.

Third, there is at least a reasonable probability he would have been acquitted had he been tried separately. Codefendant's counsel was responsible for planting the idea that Chad was a domestic violence perpetrator. Codefendant's counsel improperly asked Chad if there were reasons why his parents would lie in their testimony, and inappropriately

asked him if his mother “just got that wrong,” referring to a conflict in the testimony. RP 396, 399. Furthermore, her attorney duplicated the prosecutor’s closing by outlining evidence against Chad (and his parents) and inviting jurors to “absolutely” convict him. RP 594, 597-600, 602.

No direct evidence implicated Chad. The circumstantial evidence was equivocal. All four adults had access to A.T. during the weeks leading up to her hospitalization; both he and the mother were with her just before she experienced difficulty breathing. Jurors may have decided that he was the guilty one simply because he’s male and Katarina is female, or they may have given credence to her attorney’s insinuations regarding domestic violence. RP 201-202.

The jury acquitted Katarina on the assault charge, suggesting they believed her defense theory. This required them to disbelieve Chad’s defense theory. The two defenses were irreconcilable and mutually exclusive. *Medina*, 112 Wn. App. at 52-53.

Defense counsel provided ineffective assistance by failing to seek severance. *Davis*, 152 Wn.2d at 711-13. Chad’s convictions must be reversed and the case remanded for a new trial. *Reichenbach*, 153 Wn.2d at 130.

**VI. THE EXCEPTIONAL SENTENCE MUST BE REVERSED AND THE CASE REMANDED FOR A NEW SENTENCING HEARING.**

- A. The trial court infringed Chad Tibbits’s Sixth and Fourteenth Amendment right to a jury determination of all facts supporting his exceptional sentence.

Any fact that increases the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. U.S. Const. Amends. VI, XIV; art. I, §§ 21, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The rule applies to facts necessary to support application of a mandatory minimum sentence. *Alleyne v. United States*, ---U.S.---, \_\_\_\_, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). This is so because “[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime.” *Id.*, at \_\_\_\_.

*Blakely* errors may be raised for the first time on review. RAP 2.5(a)(3); see *State v. O’Connell*, 137 Wn. App. 81, 89, 152 P.3d 349 (2007). In Washington, such errors are not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (citing art. I, § 21).

Here, without benefit of a jury determination, the court found that Chad Tibbits “used force or means likely to result in death or intended to kill the victim.” CP 58. This violated *Blakely*: *Alleyne*, ---U.S. at \_\_\_\_.

B. The exceptional sentence was based on a miscalculated standard range and the erroneous belief that a mandatory minimum sentence applied.

Before imposing an exceptional sentence, a sentencing court must correctly calculate the standard range. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). Failure to do so requires remand “unless the record clearly indicates the sentencing court would have imposed the same sentence anyway.” *Id.*

Here, the trial court incorrectly calculated the standard range. The court also improperly engaged in judicial factfinding to support application of the mandatory minimum term contained in RCW 9.94A.540. Because of these errors, the exceptional sentence must be reversed and the case remanded for a new sentencing hearing. *Id.*

The court determined Chad Tibbits’s standard range to be 102 months to life (count one) and 12+ - 60 months (count two). CP 59. In fact, the correct standard ranges were 102- 136 months (count one) and 12+ - 14 months (count two). See Caseload Forecast Council, 2014 Washington State Adult Sentencing Guidelines Manual, pp. 287, 218.

The error in the standard range and the court's incorrect belief that a mandatory minimum sentence applied requires reversal of the exceptional sentence. *Id.* The case must be remanded for a new sentencing hearing, because the record does not "clearly indicate[ ]" that the court would have imposed the same sentence without these errors. *Id.*

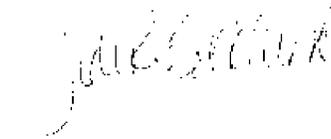
### **CONCLUSION**

For the foregoing reasons, Chad's convictions must be reversed and the charges dismissed with prejudice. In the alternative, the case must be remanded for a new trial. Upon retrial, the jury may only consider alternative means that were supported by the evidence at the first trial.

If the convictions are not reversed, the exceptional sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on February 24, 2016,

**BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
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A handwritten signature in cursive script that reads "Manek R. Mistry".

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Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Chad Tibbits, DOC #385892  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

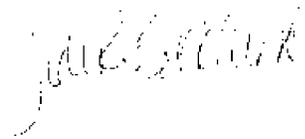
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecuting Attorney  
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 24, 2016.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

## BACKLUND & MISTRY

**February 24, 2016 - 2:30 PM**

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