

No. 48092-1-II

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

STATE OF WASHINGTON, RESPONDENT

V.

CHAD TIBBITS, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Amber L. Finlay, Judge

No. 14-1-00199-1

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**BRIEF OF RESPONDENT**

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A. STATE'S COUNTER-STATEMENTS OF ISSUES  
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court did not err by admitting Katarina's recorded statement into evidence at the joint trial of Katarina and Chad. The statement was not directly inculpatory of Chad, Chad himself gave a statement that was substantively identical to Katarina's statement, and if any error did occur, it was harmless.
2. Sufficient evidence supports Chad's convictions.
3. Because there was sufficient evidence under all three of the alternative means of committing assault of a child in the first degree, no error occurred where the jury was instructed in regard to all three prongs.
4. The prosecutor did not commit misconduct in this case.
5. Chad Tibbits's trial counsel was not ineffective.
6. The mandatory minimum sentence must be stricken from the judgment and sentence because the judge rather than the jury made the finding necessary for imposing the mandatory minimum, but the trial court did not err by imposing an exceptional sentence above the standard range.
7. Because the trial court did not find that Tibbits has the ability to pay legal financial obligations, the State is not seeking appeal costs even in the event that the State is the substantially prevailing party on appeal.

B. FACTS AND STATEMENT OF THE CASE

In the months leading up to February of 2014, Chad Tibbits<sup>1</sup> and Katarina Shivers were boyfriend and girlfriend and conceived a child together. RP 43, 77, 385-86. On February 22, 2014, the child, A.T., was born. RP 43, 344, 386. They lived together in a room in the home of Chad's parents, Penny and Lester Tibbits. RP 43, 79, 386.

Lester testified that at some point prior to April 28, he had seen a bruise on A.T.'s eye. RP 69. He said that when he asked Chad about it, Chad said that A.T. must have hit his necklaces. RP 70.

Katarina's mother, Lauritte McClure, testified that she had seen A.T. on only about three separate occasions prior to April 28. RP 228-29. On one of these three occasions, about a week before April 28, Ms. McClure said she saw a bruise near A.T.'s temple, and that when she asked about it, Katarina said that Chad's necklace had hit the baby. RP 229-30.

McClure testified that her daughter, Katarina, was evasive and that Katarina avoided changing or checking A.T.'s diaper while McClure was present. RP 234. McClure testified that Chad and Katarina kept A.T. fully clothed, in pants and a "onesie," with a hat covering her forehead, and mittens and a blanket. RP 233. Besides avoiding changing A.T.

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<sup>1</sup> The defendant-appellant Chad Tibbits is referred to in this brief sometimes as Chad and at other times as Tibbits. Penny and Lester Tibbits are referred to always by their first names. Chad Tibbits's codefendant, Katarina Shivers, is referred to as Katarina.

herself on these visits, Katarina also stopped her mother from checking or changing A.T.'s diaper. RP 234-36.

Chad, too, stopped McClure from changing or checking A.T.'s diaper. RP 236. Once when McClure was about to attempt to change A.T.'s diaper Chad yelled out and alerted Katarina. RP 236. Chad became agitated, took A.T., and carried her to Katarina in the back bedroom. RP 236.

Katarina's sister, Trina Rouska, visited A.T. and Katarina three times. RP 246, 248. Each time, A.T. was covered up with a hat, gloves, onesie, pants, shirt, and blanket. RP 249. Rouska saw a bruise on A.T.'s eye. RP 251. When she asked Katarina about it, Katarina said that A.T. was swinging her arms and accidentally hit herself in the face. RP 251.

Chad's mother, Penny, testified that Chad was a night owl who stayed up until 6:00 or 7:00 in the morning. RP 96. Penny said that Chad and Katarina had a rocker-glider in their room because they wanted Chad to use a bottle and to feed A.T. at night so he could bond with her. RP 82. Penny testified that Katarina took care of A.T. during the day and that Chad took care of her in the evening. RP 88. Chad told a Mason County detective that he and Katarina were with A.T. 24 hours a day, seven days a week, and that they chose not to have jobs so they could be with A.T. RP 197-98. Chad told Detective Dracobly that he frequently changed and

dressed A.T. RP 197. Chad also gave a recorded statement on April 29 that indirectly showed that Chad was actively involved with A.T.'s care. Ex. 32.

In the recorded statement, Chad said that he helps to change A.T.'s diapers. Ex. 32 at p.24. Chad explained his method of holding A.T. "so she couldn't bang her head on [him] like she *usually* does." Ex. 32 at p.7 (emphasis added). Chad told how he had cut A.T.'s fingernails. Ex. 32 at p.11. Chad knew A.T.'s feeding schedule and knew the time of her last feeding. Ex. 32 at p.13. He sometimes used the word "we" when explaining A.T.'s care, such as when describing A.T.'s baby swing and saying "we always buckle her in." Ex. 32 at p.14. Other examples include where Chad said "we take her downstairs" and where he said "we watch her..." Ex. 32 at p. 22.

The evidence shows that at almost midnight on April 28, 2014, Chad was with A.T. in the bedroom when A.T. stopped breathing. Ex. 32 at pp. 5-7. The crisis came to light when Katarina entered Penny and Lester's bedroom and told them that something was wrong with A.T. RP 45, 48, 79. Penny and Lester went down the hall to Chad's room, opened the door, and saw Chad in his chair, holding A.T., and trying to do mouth-to-mouth resuscitation on her. RP 48, 79, 82.

Lester called 911. RP 47, 50-51. Penny began breathing for A.T. RP 81, 83. Medics began arriving at the Tibbits' home. RP 101. The first to arrive was a volunteer fireman, LT Chris DeCapua. RP 100. LT DeCapua arrived to find A.T. on the kitchen table, with Penny crying and screaming hysterically. RP 103. A.T. was breathing. RP 103. She had a large bruise with swelling over her left eye and had bruises on her ankle, her leg, and her arms. RP 103. A.T.'s breathing was uneven. RP 104. Her chest wasn't rising and falling equally, and she was breathing about 40 times a minute, which LT DeCapua knew to be pretty fast, indicating that something was seriously wrong. RP 104. LT DeCapua saw more bruising and more swelling, along with some older bruising on the back of A.T.'s leg and inside her diaper. RP 104. A.T.'s pulse was 200 per minute, indicating compensation shock. RP 104-05.

The next to arrive was LT Cody Daggett, who immediately noticed trauma and saw bruising all over A.T. RP 114, 116. He noticed that Chad was very calm, very non-expressive, and seemed not to want the medics to be there. RP 112. LT Daggett described Chad as not caring about the baby, what condition she was in or what was going on. RP 12-13. Instead, Chad persisted in giving explanations about what had happened. RP 118. Chad said the baby was rocking back and forth as he was holding it, and that it sustained injuries from Chad's necklace. RP 118.

LT Spencer testified that Chad was offering excuses and giving his side of the story as soon as LT Spencer walked into the house. RP 123. But Chad's demeanor was very, very calm, with no heightened, elevated emotion. RP 123. LT Spencer didn't ask Chad any questions. RP 124. Instead, Chad just began to immediately offer explanations and to explain himself to LT Spencer. RP 124. Chad's first statement was that A.T. had sustained head injuries, the injury to her eye socket, and the bruising and all that by hitting her head on Chad's necklace. RP 124.

Due to A.T.'s ambulance trip and emergency treatment that night, medical personnel discovered many additional injuries, including some that were preexisting. RP 153.

The State charged both Chad Tibbits and Katarina Shivers jointly with the crimes of assault of a child in the first degree and criminal mistreatment of a child in the second degree. CP 80-82. After a joint trial, the jury found Katarina guilty of criminal mistreatment of a child in the second degree and found Tibbits guilty of both charges. CP 76-79. The jury found three aggravating factors for each defendant. CP 73-75.

C. ARGUMENT

- 1. The trial court did not err by admitting Katarina's recorded statement into evidence at the joint trial of Katarina and Chad. The statement was not directly inculpatory of Chad, Chad himself gave a statement that**

**was substantively identical to Katarina's statement, and if any error did occur, it was harmless.**

Tibbits asserts that his U.S. Constitutional right to confront witnesses against him was violated because the State introduced Katarina's recorded statement into evidence even though she did not testify at their joint trial. Br. of Appellant at 13-17. Tibbits identifies only one statement to which he raises a challenge on appeal, as follows:

"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." Br. of Appellant at 16 (citing RP 176-78; Ex. 33). This Court need not consider any other statements because Tibbits has not properly raised any other statements. *State v. Moses*, 46357-1-II, 2016 WL 1458352, at \*7 (Apr. 12, 2016)(citing RAP 10.3(a)(6)). Alleged violations of the Confrontation Clause are reviewed de novo on appeal. *Id.*

The statement to which Tibbits alleges error first occurred when Deputy Nault of the Mason County Sheriff's Office responded to the initial 911 call. RP 176-77. Deputy Nault testified that upon arrival at the Tibbits residence, he...

contacted the mother, who stated that she had to use the bathroom so she handed over [A.T.], which is the baby, to the father, Chad. And when Katarina came back in the room Chad had told her that the baby had stopped breathing, and from her explanation he was very calm in explaining this to her and just patting the baby on the butt. Katarina then went into the grandmother's bedroom, told her about the situation, that [A.T.] wasn't breathing, at which time the grandmother

advised that her husband called 911 while she administered CPR on the infant.

RP 176-77. A few hours later, at 2:50 a.m. on April 29 (Ex. 33, p.2), Katarina then made a similar statement during a recorded interview. Ex. 33 at pp. 6-7, 26-28. An audio recording of Katarina's statement was admitted into evidence and was played for the jury. Ex. 34; RP 208. A written transcript was of the recording was provided to the jury but was not admitted into evidence. Ex. 33; RP 208.

At 2:09 a.m. on April 29 (Ex. 32, p.2), immediately before Katarina gave her recorded statement, Chad also gave a recorded statement. Ex. 34. The audio recording of Chad's statement was admitted into evidence and published to the jury. Ex. 34; RP 208. A transcript of the recorded statement was provided to the jury but was not admitted into evidence. Ex. 32; RP 208-09. At pages 6-9 and 13 of the transcript of his recorded statement, Chad gave statements that are substantively identical Katarina's statement, which he now challenges. Ex. 32, p. 6-9, 13. In other words, Chad told detectives that Katarina had to go to the bathroom, so she handed A.T. to him and left the room to go to the bathroom, and that while Katarina was gone, A.T. began to have trouble breathing. Ex. 32, p. 6-9, 13.

In summary, Katarina and Chad both gave substantively identical statements that agreed that Katarina handed A.T. to Chad when Katarina went to the bathroom and that when she returned, A.T. was not breathing. RP 217-

18. Katarina's statement was not offered as evidence against Chad; instead, the jury was specifically instructed that it "may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant." CP 139 (Jury Instruction No. 7). Additionally, the challenged statement neither directly nor indirectly implicates Chad. Ex. 33. Katarina did not allege that any assault or any crime had occurred, and it is only with linkage to other evidence that it becomes apparent that a crime had occurred. Ex. 33. Still more, Katarina's statement does not contradict the possibility that A.T. was injured before Katarina handed her to Chad. Ex. 33.

It was not until after both Katarina's and Chad's statements had been played to the jury, without objection, that Chad then took the stand and testified in his own behalf. RP 385-445. In his testimony to the jury, Chad then contradicted his and Katarina's recorded statements. RP 390-91. In his testimony to the jury, Chad said that he was downstairs doing chores and that when he returned to the bedroom upstairs, Katarina was in the hall on her way to the bathroom. RP 390-91, 398, 409. Chad said that when he entered the bedroom, A.T. was on the bed, crying, and that he picked her up from the bed and discovered that she was not breathing. RP 398, 400, 411, 424 ("From when I walked into the room, yes, [A.T.] was crying"), 445. Chad testified that he had lied in his statements to officers because he and Katarina had collaborated to come up with a false story to protect Katarina. RP 392.

Where a nontestifying codefendant's confession incriminating a defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the defendant's own confession is admitted against him. *Cruz v. New York*, 481 U.S. 186, 193, 107 S. Ct. 1714, 1719, 95 L. Ed. 2d 162 (1987). Even where the statement is deemed reliable, testimonial, out-of-court statements of nontestifying witnesses are barred by the Confrontation Clause unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 54-69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

In the instant case, however, Katarina's statement was not admitted against Chad. CP 139 (Jury Instruction No. 7). Still more, the statement was not inculpatory of Chad and was, therefore, not prejudicial. Ex. 33. Here, the statement was not redacted to omit any reference to Chad, as required by *Richardson v. Marsh*, 481 U.S. 200, 208, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), but any such redaction would have been futile because Chad's own statement clearly identified Chad as the person to whom Katarina handed A.T. Ex. 32. But still more, the mere assertion that Katarina handed A.T. to Chad before A.T. stopped breathing was "not incriminating on its face." *State v. Moses*, 46357-1-II, 2016 WL 1458352, at \*7 (Apr. 12, 2016), quoting *Richardson v. Marsh* at 208.

In the instant case, although any reference to Chad was not deleted from Katarina's statement, the State contends that the reasoning of *Marsh* and *Moses* should apply to the instant case, because even without redactions, Katarina's statement was "not incriminating on its face" because it was facially neutral and became incriminating, if ever, only after it was linked to other evidence at trial. *Id.*

But even if this court were to find error from the admission of Katarina's statement at trial, the State contends that the error, if any, was harmless beyond a reasonable doubt. A defendant's confession may be considered on appeal for whether any alleged confrontation clause violation was harmless. *Cruz v. New York*, 481 U.S. 186, 193-94, 107 S.Ct. 1714, 1719, 95 L. Ed. 2d 162 (1987); *State v. Rice*, 120 Wn.2d 549, 569-70, 844 P.2d 416 (1993).

A confrontation clause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that the reviewing court is persuaded beyond a reasonable doubt that the violation did not affect the verdict. *State v. Vincent*, 131 Wn. App. 147, 154-55, 120 P.3d 120 (2005). Here, the evidence to support the jury's verdicts is discussed throughout the State's brief. Also, Katarina's statement – that she handed A.T. to Chad and that when she returned from the bathroom A.T. was not breathing – is cumulative of Chad's own statement, which

was substantively identical to Katarina's. Ex. 32. Still more, the statement is not inculpatory, and it potentially becomes inculpatory only when linked to other evidence. Ex. 33. But any inculpatory potential of the statement, which would be inculpatory only because it might establish Chad's presence and opportunity to commit the crime, is cumulative of other properly admitted evidence, such as Chad's own statement, his testimony, the testimony of Penny and Lester, and the testimony of police officers, paramedics, and firemen who responded to the crime scene. Ex. 32; RP (Vol. I) 39-100; RP (Vol. I) 100-140; RP (Vol. II) 175-222; RP (Vol. IV) 384-444.

Thus, on these facts the State contends that even if admission of Katarina's statement was error, it was harmless beyond a reasonable doubt. *State v. Vincent*, 131 Wn. App. 147, 154-55, 120 P.3d 120 (2005).

## **2. Sufficient evidence supports Chad's convictions.**

Tibbits contends that the evidence at trial was insufficient to sustain the jury's verdicts finding him guilty of assault of a child in the first degree (CP 64) and criminal mistreatment in the second degree (CP 77). Br. of Appellant at 17-22.

"A claim of insufficiency 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), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt; the reviewing court need only find that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Specific criminal intent can be inferred from conduct that plainly indicates such intent as a matter of logical probability. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Abuan*, 161 Wn. App. 135, 155, 257 P.3d 1 (2011).

With regard to his conviction for the crime of assault of a child in the first degree, Tibbits's only challenge to the sufficiency of the evidence is in regards to the three alternatives itemized in Jury Instruction No. 11. Br. of Appellant at 18-21. These three alternatives are set forth in the *to-convict* jury instruction as follows:

That on or about April 28, 2014, the defendant:

- (a) intentionally assaulted [A.T.] with intent to inflict great bodily harm and inflicted great bodily harm; or
- (b) intentionally assaulted [A.T.] and recklessly inflicted great bodily harm; or
- (c) intentionally assaulted [A.T.] and caused substantial bodily harm, and the defendant had previously engaged in a pattern or practice of assaulting [A.T.] which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks, or causing [A.T.] physical pain or agony that was equivalent to that produced by torture[.]

CP 150 (Jury Instruction No. 18). Tibbits also challenges the sufficiency of the evidence to sustain his conviction as an accomplice. Br. of Appellant at 19. With regard to accomplice liability, Tibbits's challenge relates only to the following language from the accomplice liability jury instruction:

A person is an accomplice in the commission of a crime if, with knowledge that it would promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or

committing the crime.

CP 141 (Jury Instruction No. 9, para. 2).

Relevant to each of the three alternatives, above, the jury received evidence that A.T. suffered severe injuries on April 28, which included severe head trauma with resulting brain injury. RP 103-05, 137-38, 144-61. Given the nature and severity of this injury, it was within the province of the jury to find that these injuries were due to an intentional act, or specifically, an intentional assault. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Abuan*, 161 Wn. App. 135, 155, 257 P.3d 1 (2011). Still more, the jury received evidence that 65-day old A.T. had suffered numerous other injuries over a period of time leading up to April 28 and that some of these injuries were in a state of healing on April 28. RP 141-61. The nature and severity of these injuries, combined with the frequency of them and the fact that A.T. lacked the strength to inflict these injuries upon herself, was sufficient proof for the jury to find that these injuries were intentionally inflicted by a human being. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Abuan*, 161 Wn. App. 135, 155, 257 P.3d 1 (2011).

Additionally, the jury received evidence that during the 65 days of A.T.'s life leading up to April 28, Chad Tibbits actively collaborated with

Katarina Shivers to conceal the injuries that A.T. had suffered at their hands. RP 221-53. Chad and Katarina kept A.T. completely covered in mittens, a hat, pants, shirt, and a “onesie.” RP 58, 233, 249. They would not let anyone else try to change A.T. RP 234-36, 244. They stayed home with A.T. almost constantly. RP 60-61, 68, 72, 87, 94. It was within the province of the jury to find that Chad and Katarina actively and deliberately kept A.T. away from others because they had inflicted injury upon her and did not want anyone to see the injuries. *State v. Pennewell*, 23 Wn. App. 777, 782, 598 P.2d 748 (1979). The injuries to A.T. were repetitive and occurred over a period of time. RP 292, 301, 302, 309, 311-12, 328, 329, 335, 340, 341, 343, 344. By actively working together to cover up the injuries, to prevent the discovery of A.T.’s injuries and thereby preventing intervention and rescue of A.T., both Katarina and Chad worked together and aided the other to commit further injury, culminating with the head trauma that almost took A.T.’s life on April 28.

Tibbits cites *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59 (2006), to support his contention that the evidence is insufficient because, he contends, “[t]o prove even a *prima facie* case, the state’s evidence must be consistent with guilt and inconsistent with a hypothesis of innocence.” Br. of Appellant at 18. Tibbits contends that the evidence against him is consistent with a hypothesis of innocence because, he contends, it could

have been Penny or Lester who assaulted A.T., or it could have been Katarina. *Id.* But the reasoning of our Supreme Court should be applicable here. In *State v. Montgomery*, our Supreme Court cited *Brockob* and attached a parenthetical explanation that “when evidence supports both innocent and criminal explanation, [the] jury is entitled to infer guilt[.]” *State v. Montgomery*, 163 Wn.2d 577, 587, 183 P.3d 267, 272 (2008), citing *Brockob* at 340-41. Further, the *Montgomery* Court reasoned that “innocent explanations” are “appropriate jury arguments, but the jury [is] not required to believe them.” *Id.*

However, seemingly in support of Tibbits’s contention, 40 years before *Montgomery* our Supreme Court wrote in regard to sufficiency of the evidence that “[t]he circumstances proved by the state must not only be consistent with the guilt of the accused, but must also be inconsistent with any reasonable hypothesis or theory which would tend to establish his innocence.” *State v. Lynn*, 73 Wn.2d 117, 122, 436 P.2d 463 (1968)(citations omitted). The facts of *Lynn* are similar to those of the instant case, in that *Lynn* involved a case of child abuse that resulted in the death of a five-year old child. *Id.* However, the facts of *Lynn* are distinguishable from the instant case because in *Lynn*, despite evidence of past abuse, the evidence was insufficient to sustain a finding that the injury that killed the child was indeed an assault rather than a self-inflicted

accident. *Id.* at 121-22. Additionally, in *Lynn* the evidence showed that the head injury that caused the child's death could have occurred two weeks before discovery of the injury. *Id.* at 119. In the instant case, however, the evidence shows that, as an infant, 65-day old A.T. was too weak to have accidentally self-inflicted the severe injury that she suffered, and the evidence showed that the critical injury occurred within two minutes, rather than two weeks, of the time that Chad was known to have been alone with her. RP 331-32, 335-37, 340-41.

Chad, by his own admission, was holding A.T. when she stopped breathing. Ex. 32. Chad testified and told the jury that he was lying when he gave police a recorded statement admitting this fact. RP 392-33, 408. Chad testified that he collaborated with Katarina to cover up the assault. RP 392-33, 408. Dr. Feldman testified that the severity of A.T.'s brain injury would have impacted her breathing within two minutes. RP 337, 343. When first responders arrived to rescue A.T., Chad immediately offered unsolicited, self-serving explanations for A.T.'s injuries but seemed disinterested in her welfare. RP 118, 123-24. Katarina was distraught. RP 113, 182. It was within the province of the jury to conclude that Chad inflicted the injuries upon A.T. Given the severity and redundancy of A.T.'s injuries, the jury was entitled to infer that Chad intended to inflict the great bodily harm that he inflicted. Given the

entirety of these circumstances, the jury was entitled to infer that it was Chad who had engaged in a pattern or practice of inflicting torturous injuries against A.T.

“Mere opportunity to commit a criminal act, standing alone, provides no proof that defendant committed the criminal act, but if that opportunity is coupled with other circumstances, the proof may be sufficient to support a finding based upon circumstantial evidence that the accused did commit the act.” *State v. Pennewell*, 23 Wn. App. 777, 782, 598 P.2d 748 (1979), citing *State v. Randecker*, 79 Wn.2d 512, 487 P.2d 1295 (1971).

Here, Chad gave numerous false or impossible explanations to attempt to explain away A.T.’s injuries. RP 118, 123-24. “[A] false or improbable explanation is sufficient evidence of other inculpatory circumstances to sustain a verdict of guilty.” *Pennewell* at 782, citing *State v. Green*, 2 Wn. App. 57, 466 P.2d 193 (1970). Here, Chad had total control of A.T. within two minutes of her head injury, and he gave multiple explanations of accidental injury that were impossible. Ex. 32. In similar circumstances, *Pennewell* held that “the circumstantial evidence was sufficient to enable the jury to find that the child was the victim of a criminal act by the defendant.” *Pennewell* at 782. *Pennewell* further held that “[w]hether the circumstances were clearly inconsistent with any

reasonable hypothesis of innocence, was a question for the trier of the fact.” *Pennewell* at 782, citing *State v. Johnsen*, 76 Wn.2d 755, 458 P.2d 887 (1969).

To prove Tibbits’s culpability under alternative means (a), the evidence must be sufficient to show that he intentionally assaulted A.T., that he intended to inflict great bodily harm against her, and that he did in fact cause great bodily harm. CP 143 (Jury Instruction No. 11). In this context, “great bodily harm means bodily injury that creates a probability of death or that causes significant serious permanent disfigurement or that causes a significant permanent loss or impairment of the function of any bodily part.” CP 147 (Jury Instruction No. 15). “[S]pecific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The State contends that where Tibbits intentionally inflicted injuries with such force and by such means as to inflict great bodily harm, the severity and repetition of the injuries support a jury finding that Tibbits intended the great bodily harm that he inflicted.

To prove Tibbits’s culpability under alternative means (b), the evidence must be sufficient to show that he intentionally assaulted A.T. and that he recklessly inflicted great bodily harm against her. Here, great bodily harm has the meaning as defined in the preceding paragraph. The

State contends that because great bodily harm is proved for the purposes of alternative means (a), it is also proved for the purposes of alternative means (b). Also, “[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.” RCW 9A.08.010 (2). Therefore, The State contends that sufficient evidence supports a jury finding that alternative means (b) is proved.

Finally, to prove Tibbits’s culpability under alternative means (c), the evidence must be sufficient to show that he intentionally assaulted A.T., that he caused her substantial bodily harm, and that he...

had previously engaged in a pattern or practice of assaulting [A.T.] which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks, or causing [A.T.] physical pain or agony that was equivalent to that produced by torture[.]

CP 150 (Jury Instruction No. 18). Relevant to this element,

Substantial bodily harm means bodily harm that involves a temporary but substantial disfigurement or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ or that causes a fracture of any bodily part.

CP 148 (Jury Instruction No. 16). Abundant evidence in the record shows that A.T. had been subjected to a pattern or practice of serious assaults that broke her bones and caused her physical pain and suffering equivalent to torture. RP 140-61, 282-350. Given the totality of the evidence, including

the jury's opportunity to receive Chad's testimony and weigh his credibility, it was within the province of the jury to conclude that it was Chad who inflicted this pattern of abuse. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Pennewell*, 23 Wn. App. 777, 782, 598 P.2d 748 (1979).

Tibbits also challenges the sufficiency of the evidence to sustain the jury's verdict finding him guilty of criminal mistreatment of a child in the second degree. Br. of Appellant at 22-23. Specifically, Tibbits contends that the State was required to prove that he withheld food or medically necessary healthcare from A.T. and that he knew of and disregarded a substantial risk of harm to A.T. Br. of Appellant at 22. Tibbits contends that the prosecution "did not introduce sufficient evidence on either point." *Id.* The State's response is limited to addressing Tibbits's contentions.

To prove the offense of criminal mistreatment of a child in the second degree, the State was required to prove the following:

(1) A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the second degree if he or she recklessly, as defined in RCW 9A.08.010, either (a) creates an imminent and substantial risk of death or great bodily harm, or (b) causes

substantial bodily harm by withholding any of the basic necessities of life.

RCW 9A.42.030. There is no dispute that A.T. is a child or that Chad is the child's father. RP 385-86. Thus, to overcome Tibbits's contentions against the sufficiency of the evidence, the State must point to sufficient evidence in the record to show that, directly or as an accomplice, Chad committed one of the following acts: 1) That he recklessly created an imminent and substantial risk of death or great bodily harm to A.T.; or, 2) That he caused substantial bodily harm to A.T. by withholding any of the basic necessities of life from her. RCW 9A.42.030.

"A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c). In the instant case, the term "wrongful act" was replaced in the jury instructions with the phrase "substantial bodily harm or an imminent and substantial risk of death or great bodily harm." CP 157 (Jury Instruction No. 23).

"'Basic necessities of life' means food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication." RCW

RCW 9A.42.010(1). The statutory definition was incorporated verbatim into Jury Instruction No. 21. CP 155.

“‘Great bodily harm’ means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ.” RCW 9A.42.010(2)(c). The statutory definition was incorporated verbatim into Jury Instruction No. 24. CP 158.

“‘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[.]” RCW 9A.42.010(2)(b). This statutory definition was incorporated into Jury Instruction No. 16. CP 148.

The evidence showed that A.T. was severely malnourished. RP 292, 295, 298, 299-300, 318, 248-49. Tibbits contends that “there is no suggestion that Chad ever prevented [Katarina] from nursing (or that he refused to bottle-feed A.T.)” Br. of Appellant at 22. However, the State is not required to prove that Chad prevented Katarina from nursing; nor is the State required to prove that Chad refused to bottle-feed A.T. Also,

Chad gave conflicting testimony in which he claimed that he never fed A.T. RP 388.

Additionally, Tibbits contends that he and Katarina took A.T. to her doctor's appointments, which included a checkup on April 3 and a visit for routine vaccinations a week before April 28. Br. of Appellant at 22. Based on this assertion, Tibbits then asserts that "Chad did not withhold routine medical care." Br. of Appellant at 22.

But "routine" medical care, in this context, is irrelevant, because the relevant element of proof here is "medically necessary healthcare." RCW 9A.42.010(1). Here, the evidence shows that A.T. suffered a series of severe injuries between her medical checkup on April 3 and her rescue from the Tibbits home April 28. RP 282-350. The evidence shows that during this time Chad actively collaborated with Katarina to conceal A.T.'s injuries. RP 392-33, 408. Chad stood guard to make sure that no one would discover A.T.'s injuries, and by doing so, he prevented any hope that A.T. would receive necessary medical treatment for her injuries. RP 236, 245. Still more, there is evidence from which the jury could find that on April 28 when A.T. received an imminently life-threatening head injury, rather than to immediately seek life-saving medical care, Chad may have instead spent as much as an hour trying to breath for and revive A.T.

on his own before Katarina finally alerted Penny and Lester and an ambulance was called. RP 408-09.

The evidence showed that Chad spent a great deal of time with A.T. and Katarina in the bedroom that the three of them shared. Ex. 32; RP 67, 198. Given the frequency and severity of the injuries that A.T. suffered, the jury was entitled to conclude that Chad would know about those injuries. Yet Chad did nothing to prevent those injuries or to stop the on-going abuse, and he did not seek medical attention for A.T. In the confines of the bedroom they shared, it would be apparent to Chad that A.T. was not receiving sufficient nutrition. The jury was entitled to infer that Chad knew of a substantial risk of greater and further harm to A.T., yet Chad disregarded the risk, and still more, that he actively sought to cover it up. RP 236, 245, 392-33, 408. The evidence in its entirety is sufficient to sustain the jury's verdict finding Chad guilty of criminal mistreatment of a child in the second degree. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Pennewell*, 23 Wn. App. 777, 782, 598 P.2d 748 (1979).

- 3. Because there was sufficient evidence under all three of the alternative means of committing assault of a child in the first degree, no error occurred where the jury was instructed in regard to all three prongs.**

As discussed above, one of the guilty verdicts the jury returned in this case was the jury's verdict finding Tibbits guilty of the crime of assault of a child in the first degree. CP 79. In the charging document to which this verdict applies, as well as in the related *to-convict* jury instruction, the State alleged each of the three alternative means of committing this offense as provided by RCW 9A.36.120(1). CP 81 (Third Amended Information); CP 150-51 (Jury Instruction No. 18).

Specifically, the trial court instructed the jury on this point as follows:

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

- (1) That on or about April 28<sup>th</sup>, 2014, the defendant:
  - (a) intentionally assaulted [A.T.] with intent to inflict great bodily harm and inflicted great bodily harm; or
  - (b) intentionally assaulted [A.T.] and recklessly inflicted great bodily harm; or
  - (c) intentionally assaulted [A.T.] and caused substantial bodily harm, and the defendant had previously engaged in a pattern or practice of assaulting [A.T.] which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks, or causing [A.T.] physical pain or agony that was equivalent to that produced by torture;
- (2) That the defendant was eighteen years of age or older and [A.T.] was under the age of thirteen; and
- (3) That this act occurred in Mason County, State of Washington.

If you find from the evidence that elements (2) and (3) and any of the alternative elements (1)(a), (1)(b) or (1)(c) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives (1)(a), (1)(b) or (1)(c) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of the elements (1), (2) or (3), then it will be your duty to return a verdict of not guilty.

CP 150-51 (Jury Instruction No. 18).

Here, the State did not allege a multiple acts case; instead, the State alleged one assault, which occurred on April 28, 2014, and was committed by one of three alternative means. CP 81 (Third Amended Information).

Thus, this is an alternative means case rather than a multiple acts case.

*State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988) (explaining the distinction between an alternative means case and a multiple acts case).

Criminal defendants in Washington have a state constitutional right to a unanimous verdict. Wash. Const. art. I, § 21. Tibbits contends that because the State charged him with all three of the alternative means of committing the offense of assault of a child in the first degree, the trial court erred by not *sua sponte* providing a unanimity instruction on the alternative means. Br. of Appellant at 23-26.

The prosecutor in the instant case presented closing argument in support of all three of the alternative means at issue here. RP 583. “In order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented.” *State v. Witherspoon*, 171 Wn. App. 271, 285, 286 P.3d 996 (2012), *aff'd*, 180 Wn.2d 875, 329 P.3d 888 (2014), *as corrected* (Aug. 11, 2014)(citing *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) ((citing *State v. Kitchen*, 110 Wn.2d 403, 410–11, 756 P.2d 105 (1988))). Thus, to sustain Tibbits’s conviction for assault of a child in the first degree in the instant case, this Court must find that substantial evidence supports each of the three alternative means charged. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); *Witherspoon*, 171 Wn. App. at 285.

“When a defendant challenges the sufficiency of the evidence in an alternative means case, appellate review focuses on whether sufficient evidence supports each alternative means.” *State v. Harrington*, 181 Wn. App. 805, 818, 333 P.3d 410 (2014), *review denied*, 337 P.3d 326 (Wash. 2014)(citing *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012); *State v. Kintz*, 169 Wn.2d 537, 552, 238 P.3d 470 (2010)). When determining whether sufficient evidence supports an alternative means, the reviewing court views the evidence in the light most favorable to the State

and determines whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Peterson*, 174 Wn. App. 828, 852-53, 301 P.3d 1060, 1072 (2013)(citing *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)).

As described in the State's brief at section II(a) above in response to Tibbits's challenge to the sufficiency of the evidence, sufficient evidence supports each of the three alternatives provided by Jury Instruction No. 18 (CP 150-51), the information (CP 81), and the controlling statute, RCW 9A.36.120(1).

**4. The prosecutor did not commit misconduct in this case.**

Tibbits contends that the prosecutor committed misconduct during closing argument. Br. of Appellant at 26-29. Tibbits identifies three instances of what he alleges to be misconduct. Br. of Appellant at 27-28. Although in his brief Tibbits slightly misquotes the prosecutor, Tibbits bases his first two allegations of misconduct on a single, two-sentence utterance by the prosecutor (Br. of Appellant at 27). Correctly quoted, the prosecutor's comment reads as follows: "Some of us have shed tears over this case. Many of you have or maybe will." RP 611.

Tibbits bases his third and final allegation of misconduct on his assertion that "[t]he prosecutor improperly suggested that defense counsel

[Mr. Brungardt] didn't see the child as human." Br. of Appellant at 28, citing RP 610. Turning to page 610 of the verbatim report and scouring the page in search of some language that might correspond to Tibbits's citation leads to the following possibility: "Mr. Brungardt referred to [A.T.] as a sixty-two-year-old baby, and we know what he meant, okay. I don't' - that happens." RP 610. The prosecutor made this argument during rebuttal closing argument. To give context to the statement, the entire paragraph is repeated here, as follows:

Now, I'm - forgive me for being nitpicky if I am. I know that sometimes we make mistakes when we speak. I'm sure that I do it as well. Mr. Brungardt referred to [A.T.] as a sixty-two-year-old baby, and we know what he meant, okay. I don't - that happens. But it's interesting to me when we talk about there being four people in that home, because there were five. And when we talk about two of them not having jobs, when there were actually four of them that didn't have jobs, but one of the people and one of the - specifically one of the people without a job was [A.T.], and she a little tiny little baby.

RP 610.

These arguments by the prosecutor in rebuttal closing argument were, of course, made after Tibbits's closing argument. During his closing argument, Tibbits's counsel argued, in part, as follows: "Whether you believe in God or Allah; whoever your higher spirit is, we, as human beings, we owe the children of this world nothing but safety." RP 588. Further along in his argument, Tibbits's counsel emphasized that

this is a relatively sensational crime that hits to the gut....” RP 592. One of the points of Tibbits’s closing argument was that only “a monster” could be capable of doing what the prosecution was alleging against Chad and that, therefore, the jury should believe that Katarina is the one who inflicted A.T.’s injuries. RP 589-91. In furtherance of this theme, Tibbits’s counsel argued as follows:

So, the prosecutor wants you to not only assume that my client’s such a monster, but the parents themselves are such monsters as grandparents that if they saw their baby granddaughter, sixty-two years old, bruised and injured, that they didn’t call authorities either.

RP 590.

Thus, it was in this context that the prosecutor continued his argument from RP 610, as quoted above, and argued as follows:

Was it an innocent slip of the tongue, or does it reveal something more about why, at every turn, Chad’s give a damn seems to be broken when he referred to doing CPR on his daughter just like how you would on a human person. [See RP 400-401, where Tibbits, possibly inadvertently, compared A.T. to “a human person”]. Folks, there’s been some eloquent discussions with you. You were - it was talked about how you were, you know, we were all going to cry together. Some of us have shed tears over this case. Many of you have or maybe will.

RP 610-11. It is not in dispute that the victim in this case was particularly vulnerable because she was only two months old and that she suffered unimaginable injuries and immeasurable suffering by physical abuse. But

nothing about the prosecutor's comments here show any attempt to manipulate the jury. Instead, this comment was very brief, was understated, and appeared to be merely acknowledgment of the difficult emotional task the jury faced while relating to what, from the context, seems to have been the juror's individual promises during voir dire to decide the case fairly, on the evidence, rather than passion or prejudice. RP 610-11.

The prosecutor's entire argument to the jury fills about 30 pages of the verbatim reports. RP 566-86, 603-13. But these comments by the prosecutor are composed of only a few lines. Immediately after making the comments, the prosecutor, at RP 611, then segued into a rebuttal argument of Katarina's closing argument, wherein her attorney, at RP 599-600, had argued a defense based on Katarina's "emotional progression" from "hysterics" to "depression."

Then, after only very briefly touching upon these subjects, the prosecutor urged the jury to base its verdicts not on passion or prejudice, but on evidence, as follows:

Now, I am not asking you to convict Chad Tibbits because he didn't know. I'm not asking you to convict Chad Tibbits because he's a man or he's a father or because of anything to do with any kingdom or household. The evidence is what leads you to that conclusion, to that conviction. The evidence is what leads you - should lead you to that conclusion when it comes to Katarina as well....

RP 611-12.

Thus, it is from this context that Tibbits points to a couple of comments from 30 pages of transcript and alleges prosecutorial misconduct. Tibbits did not object at trial to either of the comments that he now alleges to be misconduct. RP 610-11. When not objected to at trial, claims of prosecutorial misconduct are waived unless the defendant “establishes that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice.” *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012), citing *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); (further citation omitted).

The State contends that the prosecutor’s statements at issue in this case were not misconduct, that they were neither flagrant nor ill intentioned, and that any prejudice, if any were possible, could have been cured by an instruction. The *Glasmann* Court reasoned that “the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” *Glasmann* at 707, quoting *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (further citation omitted). Thus, the *Glasmann* Court found error based upon the prosecutor’s “pronounced and persistent misconduct that cumulatively cause[d] prejudice...” *Glasmann* at 710. In the instant case, however, the

challenged comments were not repetitive, and there was, therefore, no possibility of any cumulative effect.

Still more, the State contends that Tibbits has not met his burden of showing that the prosecutor's comments were misconduct and that they were flagrant and ill-intentioned, as required by *Glasmann*. *Id.* at 704. In *Glassman*, when evaluating alleged prosecutorial misconduct the Court explained that “[t]he issue is whether the comments deliberately appealed to the jury’s passion and prejudice and encouraged the jury to base the verdict on the improper argument “rather than properly admitted evidence.”” *Glasmann* at 711, quoting *State v. Furman*, 122 Wn.2d 440, 468-69, 858 P.2d 1092 (1993) (quoting *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). Here, rather than deliberately appeal to their passion, the prosecutor merely reminded the jury of the potential for passion, and the prosecutor urged the jury to base its verdicts on evidence rather than passion. RP 610-11.

Tibbits contends that the prosecutor’s argument here was “reminiscent of the misconduct requiring reversal in *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1994).” Br. of Appellant at 27-28. But in response the State contends that the facts of *Reed* are not at all similar to the facts of the instant case. In *Reed* the Court found that the prosecutor asserted his personal opinion about the credibility of witnesses and about

the guilt of the accused and that “he implied that the defense witnesses should not be believed because they were from out of town and drove fancy cars.” *Id.* at 145-46. The *Reed* Court found that “[t]he prosecutor’s comments struck directly at the evidence which supported the petitioner’s theory by appealing to the hometown instincts of the jury.” *Id.* at 147. In the instant case, however, the prosecutor’s comments were not comparable to the egregious comments in *Reed*, and the prosecutor’s comments here did not employ an improper argument to prejudicially strike directly to any evidence that supported a theory of innocence.

Finally, Tibbits cites *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), to support his contentions that the prosecutor disparaged defense counsel and “invited jurors to stand with the prosecutor beneath a ‘cloak of righteousness.’” Br. of Appellant at 28, citing *Gonzales* at 282. But here again, Tibbits’s citation to legal authority bears little resemblance to the instant case. In *Gonzales*, the prosecutor compared the prosecutor’s role that of the defense attorney and made the following argument to the jury: “I have a very different job than the defense attorney. I do not have a client, and I do not have a responsibility to convict. I have an oath and an obligation to see that justice is served.” *Gonzales* at 283. The defense objected, but the trial court overruled the objection, thus “giving additional credence to the argument and further establishing in the jurors’ minds the

false notion that unlike defense attorneys, prosecutors take an oath to ‘see that justice is served.’” *Id.* at 284. The state contends that nothing comparably egregious happened in the instant case.

In conclusion, the State contends that the challenged comments of the prosecutor in the instant case were suspect only if viewed with an inherent bias. Additionally, the comments were too brief and relatively benign (relative the facts of the case) to have caused any prejudice to Tibbits’s right to a fair trial.

Tibbits did not object to any alleged instance of prosecutorial misconduct at trial. Our Supreme Court has held that where no objection to alleged prosecutorial misconduct is made in the trial court and where there is no request for a curative instruction, the claim “is waived unless the ‘prosecutorial misconduct is so flagrant and ill intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct.’” *State v. Dennison*, 115 Wn.2d 609, 622-23, 801 P.2d 193 (1990), citing *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)) (further citations omitted). “The question to be asked is ‘whether there was a “substantial likelihood” the prosecutor's comments affected the verdict.’” *Dennison* at 623, quoting *Belgarde* at 508 (further citations omitted).

The State contends that the quality of the misconduct alleged in the instant case is similar in quality to that alleged in *State v. Dennison*, where the Court ruled as follows:

We do not find that the prosecutor's comment, although ill-advised, constituted misconduct. It appears inadvertent and unintentional. In any case Dennison did not object to the prosecutor's comment during the trial, and the comment was not so flagrant or ill intentioned that a curative instruction would have not have cured any prejudicial effect. There was no substantial likelihood the comment affected the verdict. In marked contrast to the *Belgarde* prosecutor's repetitive comments about "butchers" and "deadly madmen," the prosecutor's comments in the instant case were brief and focused on apologizing for mispronouncing the victim's name.

*State v. Dennison*, 115 Wn.2d 609, 623, 801 P.2d 193 (1990). The State contends that the interpretations of the prosecutor's comments in *Dennison* are applicable here, where the prosecutor's comments may have been "ill-advised," but "appear inadvertent and unintentional." Tibbits did not object, and any possible prejudice could have been eliminated by a curative instruction. And even without an objection and curative instruction, there is little likelihood that the prosecutor's comments affected the verdict.

Thus, the State contends that Tibbits's claim of prosecutorial misconduct should be denied.

**5. Chad Tibbits's trial counsel was not ineffective.**

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011).

**(a) Reason to lie questions.**

Chad testified at trial and provided testimony that contradicted his parents' trial testimony when he testified that he had never, not even once, changed A.T. RP 395-96. In response, Katarina's attorney asked Chad whether there was a reason that his mother would lie to the jury when she testified that he did. RP 396. Katarina's attorney then asked whether there was a reason that Chad's father would lie to the jury when he also said that Chad changed diapers. RP 396.

Tibbits contends that these questions were tantamount to asking him for his opinion about whether his parents were lying. Br. of Appellant at 30-32. Tibbits asserts that "[i]t is improper to ask the accused person whether another witness is lying." Br. of Appellant at 30, citing *State v. Ramos*, 164 Wn. App. 327, 334, 263 P.3d 1268 (2011).

But here, Katarina's attorney did not ask Chad whether his parents were lying; instead, the attorney only asked Chad whether his parents had

a reason to lie. RP 396. Chad's parents testified that Chad regularly fed A.T. and changed her diapers. RP 57, 73, 88, 90-91, 96. But Chad testified that he did not feed A.T., with the possible exception of one time, which was before April 3, and that he did not change her diapers. 388, 395-96, 424, 425.

These reason-to-lie questions should be considered in the context of the full trial, wherein Chad had admitted that he had lied repeatedly and had asserted that he had collaborated with Katarina to concoct a false story. RP 392-93, 444. "A defendant may be vigorously cross-examined in the same manner as any other witness if he voluntarily asserts his right to testify." *State v. Graham*, 59 Wn. App. 418, 427, 798 P.2d 314 (1990), citing *State v. Etheridge*, 74 Wn.2d 102, 113, 443 P.2d 536 (1968) (further citations omitted).

In *State v. Graham*, 59 Wn. App. 418, 798 P.2d 314 (1990), the Court of Appeals declined to find error based on a reason-to-lie line of questioning. *Id.* at 427. A later court ruled, however, that "*Graham* does not stand for the proposition that 'whenever credibility is central to the case,' it is proper to question a witness as to whether another witness lied." *State v. Ramos*, 164 Wn. App. 327, 335, 263 P.3d 1268 (2011). But again, in the instant case Katarina's attorney did not ask Chad to give an opinion about whether his parents had lied; instead, the question was

limited to whether his parents had a motive to lie. A motive-to-lie question is different because it does not call for an opinion; instead, it calls for articulable facts. *See, e.g., United States v. Akitoye*, 923 F.2d 221, 223-25 (1<sup>st</sup> Cir. 1991) (reason-to-lie questions appropriate because do not call for opinion on credibility but instead call for articulable facts). The State contends that on the facts of the instant case – where Chad testified that he had lied, where he testified that he had collaborated with Katarina to concoct a false story, and where he now gave testimony that was contradicted by his parents’ testimonies – inquiring whether Chad’s parents had a reason to lie was a legitimate line of inquiry.

But even if the questions were improper, Tibbits cannot show that his attorney was ineffective for failing to object. To prevail on his claim of ineffective assistance of counsel, Tibbits must show that his counsel’s performance was deficient and that he was prejudiced by the deficiency. *State v. Wright*, 76 Wn. App. 811, 823, 888 P.2d 1214 (1995), as amended on reconsideration (Mar. 28, 1995)(citations omitted). As in *Wright*, “[t]he likelihood of prejudice was minimal in this case.” *Id.* Merely asking Tibbits whether his parents had a reason to lie is unlikely to have led to any prejudice at all.

**(b) *Questioning about domestic violence.***

Tibbits points to pages 201-202 of the verbatim report to support his contention that his attorney was ineffective for failing to object to “questions implying a history of domestic violence” between Chad and Katarina. Br. of Appellant at 32. Tibbits’s citation to the record corresponds to the following cross examination of a State’s witness by Katarina’s attorney:

- 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 --
- Q. Okay.
- 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?

MR. DORCY: Your Honor, I’m going to object to the relevance.

THE COURT: Sustained as to foundation.

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

MR. DORCY: Your Honor, same objection --

THE COURT: Can I have counsel --

MR. DORCY: -- to relevance.

THE COURT: Can I have counsel approach please? Mute me.

Sidebar conference off the record.

THE COURT: Continue.

MR. JONES: I have nothing further at this time.

THE COURT: Mr. Dorcy.

MR. DORCY: Nothing.

THE COURT: May this witness be excused?

MR. DORCY: Yes.

THE COURT: You may step down. You are excused. Call your next witness.

RP 201-02. Thus, there is nothing from the testimony that can fairly be said to indicate that there was any kind of domestic violence between Chad and Katarina, because the exchange consisted mostly of unanswered questions, rather than testimony. Still more, Tibbits's attorney had no reason to object, because the prosecutor objected, and the objection was ultimately sustained. By refraining from objecting himself, Tibbits avoided the impression that he had a reason to hide facts from the jury.

Here, Tibbits has not shown that the outcome of the trial likely would have been different had his attorney joined in the prosecutor's objection to questions about domestic violence. If prejudice is not shown, Tibbits's claim of ineffective assistance of counsel must fail. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

**(c) *The prosecutor did not commit misconduct.***

Tibbits contends that his trial attorney was ineffective by "failing to object to the prosecutor's improper and inflammatory closing argument." Br. of Appellant at 36. Tibbits does not specify how it is that the prosecutor committed misconduct or how it is that the prosecutor's argument was "inflammatory"; nor does he provide a citation to the

record. But extrapolating from Tibbits's prior arguments, it appears that he is referring to his prior claim of prosecutorial misconduct, at pages 26-29 of his opening brief.

To rebut Tibbits's claim of prosecutorial misconduct here, the State respectfully refers the Court to the State's prior argument against Tibbits's allegation at Section IV of the State's brief, above.

Here, where the argument is couched as one of ineffective assistance of counsel, the State contends that Tibbits's claim should fail because he has not shown, and on the facts of this case cannot show, that the outcome of the trial likely would have been different had his attorney objected to the closing argument as described by Tibbits.

**(d) *The court would have denied a severance motion.***

Tibbits contends that his trial attorney was ineffective for failing to move to sever his trial from Katarina's trial. Br. of Appellant at 37. Tibbits contends that joinder prejudiced him because "[t]hroughout the joint trial, [Katarina] blamed Chad for A.T.'s injuries." *Id.* Tibbits contends that severance was necessary because, he contends, his and Katarina's defenses were mutually antagonistic and were irreconcilable and mutually exclusive. *Id.* at 38.

To support his contention that his and Katarina's "defenses were irreconcilable and mutually exclusive[.]" Tibbits points out that "[t]he jury

acquitted Katarina on the assault charge, suggesting they believed her defense theory” and that “[t]his required them to disbelieve Chad’s defense theory.” Br. of Appellant at 40. In response, the State contends that the only thing that the jury’s verdict shows is that the jury was not convinced beyond a reasonable doubt that the evidence was sufficient to return a guilty verdict against Katarina. The jury’s verdict says nothing about who they believed or did not believe.

To prevail on his ineffective assistance of counsel claim, Tibbits must show that he was prejudiced by his attorney’s failure to move for severance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011). To prove that he was prejudiced, Tibbits must show: that a competent attorney would have moved for severance; that had his attorney moved for severance, the motion would have been granted; and, that if he were tried separately from Katarina, there is a reasonable probability that he would have been acquitted. *In re Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004).

The State contends that Tibbits has made none of the required showings. Counsel is not ineffective for failing to bring a motion that would not have been granted. *In re Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Here, the evidence would have been virtually identical in a

separate trial to what it was in the joint trial. The mere fact of antagonism between defenses or, that one defendant will seek exoneration by blaming the other, is insufficient to compel separate trials. *In re Davis*, 152 Wn.2d 647, 712, 101 P.3d 1 (2004). Separate trials are disfavored in Washington. *Id.* at 711.

“To be entitled to severance because of antagonistic defenses, a defendant must show ‘that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both [defendants] are guilty.’” *Id.* at 712, quoting *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991) (further citation omitted). Given the verdicts and the evidence in the instant case, however, it is apparent that the jury did not conclude that both Katarina and Tibbits were guilty.

Finally, to prevail on his claim of ineffective assistance of counsel in the current context, Tibbits bears the burden of showing “that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy.” *Davis* at 711-12, quoting *Hoffman* at 74. Tibbits cannot show that severance would have been granted in this case; he cannot show that a joint trial was so manifestly prejudicial as to outweigh judicial economy; and, he cannot show that there is a reasonable probability that the outcome of the trial would have been different had he

been charged separately. As such, Tibbits's claim of ineffective assistance of counsel must fail. *In re Davis*, 152 Wn.2d 647, 710-13, 101 P.3d 1 (2004).

6. **The mandatory minimum sentence must be stricken from the judgment and sentence because the judge rather than the jury made the finding necessary for imposing the mandatory minimum, but the trial court did not err by imposing an exceptional sentence above the standard range.**

(a) *Imposition of mandatory minimum was error.*

At sentencing, in the written judgment and sentence the trial court made findings that in committing the crime of assault of a child in the first degree Tibbits used force or means likely to result in death or that he intended to kill the victim. CP 58. Based on this finding, the trial court imposed a mandatory minimum sentence of 5 years under RCW 9.94A.540. CP 58. The total sentence imposed by the court was 420 months confinement; so, the 60 month mandatory minimum is unlikely to have any consequence. CP 60.

However, on August 6, 2015, which was before Tibbits was sentenced on September 29, 2015, the Washington Court of Appeals decided the case of *State v. Dyson*, 189 Wn. App. 215, 360 P.3d 25 (Aug. 6, 2015). The Dyson court held that a mandatory minimum sentence of five years under RCW 9.94A.540, which was based on a judicial finding rather than a jury finding, violated the defendant's right to a jury trial

under *Alleyne v. United States*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

The State respectfully concedes this point and asks that this court remand this case to the trial court for the trial court to strike the finding and the mandatory minimum term of 5 years imprisonment from Tibbits's judgment and sentence.

**(b) Trial court correctly calculated standard range.**

The trial court sentenced Tibbits for two offenses, assault of a child in the first degree and criminal mistreatment of a child in the second degree. CP 58. Current convictions are treated and scored as past convictions. RCW 9.94A.589. Thus, when calculating Tibbits's offender score for his two convictions, each conviction counts as one point toward his other conviction. *Id.*

Assault of a child in the first degree has a seriousness level of XII. RCW 9.94A.515. With one point, the standard range sentence is 102-136 months. RCW 9.94A.510. The standard range sentence is correctly reflected on the judgment and sentence under the heading, "Standard Range (not including enhancements). CP 59.

The jury returned a special verdict finding three aggravating factors under RCW 9.94A.535(3). CP 75. With the jury finding of any one or more of these aggravating factors, the sentencing court had

authority to sentence Tibbits to any term up to the statutory maximum allowed under RCW 9A.20.021. RCW 9.94A.537. The statutory maximum for assault of a child in the first degree, a class A felony, is life imprisonment. RCW 9A.36.120; RCW 9A.20.021(1)(a). The trial court correctly specified the enhanced range of 102 months to life under the caption "Total Standard Range (including enhancements)."

The same reasoning applies to Tibbits's other conviction, for criminal mistreatment of a child in the second degree, which is a class C felony and has a seriousness level of V. RCW 9A.42.030; RCW 9.94A.515. With one point for the other conviction, the standard sentencing range sentence for this offense was 12+ to 14 months. RCW 9.94A.510. With the enhancements, the total standard range is 12+ to 60 months. RCW 9.94A.535(3); RCW 9A.20.021(1)(a).

The trial court did not err by imposing a concurrent sentence of 420 and 60 months, for a total concurrent sentence of 420 months. CP 60.

**7. Because the trial court did not find that Tibbits has the ability to pay legal financial obligations, the State is not seeking appeal costs even in the event that the State is the substantially prevailing party on appeal.**

At sentencing the trial court judge conducted an on-the-record inquiry into Tibbits's ability to pay legal financial obligations. RP 640.

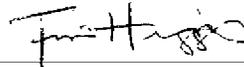
Based on this inquiry the trial court did not impose discretionary costs, and it set the payments for mandatory costs at \$25 per month. RP 640; CP

D. CONCLUSION

For the reasons stated above, the State asks this court affirm Tibbits's convictions but to remand for the trial court to strike the mandatory minimum sentence, leaving in place the exceptional sentence of 420 months incarceration.

DATED: May 31, 2016.

MICHAEL DORCY  
Mason County  
Prosecuting Attorney



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Tim Higgs  
Deputy Prosecuting Attorney  
WSBA #25919

# MASON COUNTY PROSECUTOR

**May 31, 2016 - 4:22 PM**

## Transmittal Letter

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Court of Appeals Case Number: 48092-1

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