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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 28668-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

OLGA SHVED,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Vic L. VanderSchoor, Judge

BRIEF OF APPELLANT

LENELL NUSSBAUM
Attorney for Olga Shved

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(206) 728-0996

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TABLE OF CONTENTS

A.	<u>ASSIGNMENTS OF ERROR</u>	1
	<u>Issues Pertaining to Assignments of Error</u>	2
B.	<u>STATEMENT OF THE CASE</u>	4
	1. <u>Olga and Boris Shved</u>	4
	2. <u>June 16, 2006</u>	7
	3. <u>CrR 3.5: Questioning at the Hospital</u>	11
	4. <u>Ms. Shved's Statements to Police</u>	17
	5. <u>Family's Response</u>	21
	6. <u>Police Investigation</u>	22
	7. <u>Vadim Dologan</u>	24
	8. <u>Vadim's Testimony</u>	28
	9. <u>Order Limiting Evidence of Third-Party Perpetrator</u>	29
	10. <u>Defense Expert Testimony</u>	31
	a. <u>Dr. Geyer</u>	31
	b. <u>Dr. Lord-Flynn</u>	32
	c. <u>Dr. Mays</u>	36
	11. <u>Olga Shved's Testimony</u>	37
	12. <u>Charge and Instructions</u>	37
	13. <u>Closing Argument</u>	40
	14. <u>Jury Inquiry and Verdict</u>	41
	15. <u>Sentence</u>	42
C.	<u>ARGUMENT</u>	42
	1. THE JURY'S VERDICT WAS BASED ON A CRIME THAT WAS NOT CHARGED.	42
	2. THE COURT'S OTHER INSTRUCTIONS DEFINING THE CRIME AND ASSAULT OMITTED ESSENTIAL ELEMENTS OF THE CHARGED CRIME.	47
	a. <u>Instruction No. 6 Defining the Charge Omitted Intentional Assault.</u>	47
	b. <u>Instruction No. 8 Defining Assault Omitted Intent to Harm or Offend.</u>	48

TABLE OF CONTENTS (cont'd)

i.	<u>Criminal assault requires specific intent.</u>	48
ii.	<u>Assault based on battery</u>	51
3.	THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUPPORT THE CONVICTION IN THIS CASE.	55
4.	THE TRIAL COURT ERRED BY EXCLUDING THE EVIDENCE OF VADIM DOLOGAN'S HISTORY OF VIOLENT AND ASSAULTIVE BEHAVIOR AND HATRED FOR FEMALES. .	60
a.	<u>Other Suspect Evidence</u>	61
b.	<u>Cases of Circumstantial Evidence</u>	62
c.	<u>Evidence in This Case Was Admissible Under ER 404(b).</u> .	68
5.	MS. SHVED WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE PROSECUTOR OBTAINED A PRETRIAL RULING EXCLUDING EVIDENCE OF VADIM'S VIOLENT BEHAVIOR, THEN ARGUED IN CLOSING THAT VADIM WAS "NEVER VIOLENT." . .	73
6.	THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE MS. SHVED'S STATEMENTS TO THE POLICE WHEN THE STATE DID NOT ESTABLISH THE STATEMENTS WERE MADE AFTER AN EFFECTIVE WAIVER OF <u>MIRANDA</u> RIGHTS.	75
a.	<u>The State Bears the Burden of Proving a Defendant's Statements are Admissible.</u> . .	75
b.	<u>The Police Must Advise of Rights Before Eliciting Statements, Not After.</u>	78
c.	<u>The Record Does Not Support a Conclusion that Ms. Shved Understood Her Rights and Gave Statements Freely, Voluntarily, and With Knowledge of the Consequences.</u>	80
d.	<u>Prejudice</u>	81

TABLE OF CONTENTS (cont'd)

7.	THE COURT VIOLATED MS. SHVED'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND RIGHT TO A JURY TRIAL BY PERMITTING EXPERT OPINION ON THE ULTIMATE ISSUE OF WHETHER THE CHILD'S INJURIES WERE "NON- ACCIDENTAL."	82
D.	<u>CONCLUSION</u>	83

TABLE OF AUTHORITIES

WASHINGTON CASES

Garratt v. Dailey,
46 Wn.2d 197, 279 P.2d 1091 (1955) 53

In re Post,
Wn.2d _____, P.3d _____
(No. 83023-1, 10/28/2010) 47

Leonard v. Territory,
2 Wash. Terr. 381, 7 P. 872 (1885) 62, 63

O'Donoghue v. Riggs,
73 Wn.2d 814, 440 P.2d 823 (1968) 52

Seattle v. Taylor,
50 Wn. App. 384, 748 P.2d 693 (1988) 52

State v. Aten,
130 Wn.2d 640, 927 P.2d 210 (1996) 56

State v. Berube,
150 Wn.2d 498, 79 P.3d 1144 (2003) 57

State v. Black,
109 Wn.2d 336, 745 P.2d 12 (1987) 82

State v. Byrd,
125 Wn.2d 707, 887 P.2d 396 (1995) 48-51, 53

State v. Carr,
97 Wn.2d 436, 645 P.2d 1098 (1982) 43

State v. Case,
49 Wn.2d 66, 298 P.2d 500 (1956) 73

State v. Charlton,
90 Wn.2d 657, 585 P.2d 142 (1978) 74

State v. Christopher,
114 Wn. App. 858, 60 P.3d 677 (2003) 82

State v. Clark,
78 Wn. App. 471, 898 P.2d 854,
review denied, 128 Wn.2d 1004 (1995) 61, 65, 66,
69

TABLE OF AUTHORITIES (cont'd)

WASHINGTON CASES (cont'd)

State v. Clausing,
147 Wn.2d 620, 56 P.3d 550 (2002) 82

State v. Condon,
72 Wn. App. 638, 865 P.2d 521 (1993) 61

State v. Creekmore,
55 Wn. App. 852, 783 P.2d 1068 (1989),
review denied, 114 Wn.2d 1020 (1990) 57

State v. D.R.,
84 Wn. App. 832, 930 P.2d 350,
review denied, 132 Wn.2d 1015 (1997) 81

State v. Daniels,
87 Wn. App. 149, 940 P.2d 690 (1997),
review denied, 133 Wn.2d 1031 (1998) 50

State v. Downs,
168 Wash. 664, 13 P.2d 1 (1932) 61

State v. Drummer,
54 Wn. App. 751, 775 P.2d 981 (1989) 61

State v. Eastmond,
129 Wn.2d 497, 919 P.2d 577 (1996) . . . 48-51, 53

State v. Edwards,
92 Wn. App. 156, 961 P.2d 969 (1998) . . . 57, 76

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980) 56

State v. Hudlow,
99 Wn.2d 1, 659 P.2d 514 (1983) 60

State v. Irizarry,
111 Wn.2d 591, 736 P.2d 432 (1988) 43, 45

State v. Jennings,
106 Wn. App. 532, 24 P.3d 430,
review denied, 144 Wn.2d 1020 (2001) 56

TABLE OF AUTHORITIES (cont'd)

WASHINGTON CASES (cont'd)

State v. Kassahun,
78 Wn. App. 938, 900 P.2d 1109 (1995) 74

State v. Kirkman,
159 Wn.2d 918, 155 P.3d 125 (2007) 82

State v. Kiser,
87 Wn. App. 126, 940 P.2d 308 (1997),
review denied, 134 Wn.2d 1002 (1998) 57

State v. Kwan,
174 Wash. 528, 25 P.2d 104 (1933) 61

State v. Lavaris,
99 Wn.2d 851, 664 P.2d 1234 (1983) 78, 79

State v. Madarash,
116 Wn. App. 500, 66 P.3d 682 (2003) 56

State v. Mak,
105 Wn.2d 692, 718 P.2d 047,
cert. denied, 479 U.S. 995 (1986) 61

State v. Markle,
118 Wn.2d 424, 823 P.2d 1101 (1992) 43

State v. Maupin,
128 Wn.2d 918, 913 P.2d 808 (1996) 67, 68

State v. Nason,
96 Wn. App. 686, 981 P.2d 866 (1999),
review denied, 139 Wn.2d 1023 (2000),
cert. denied, 531 U.S. 831 (1999) 58, 81

State v. Norlin,
134 Wn.2d 570, 951 P.2d 1131 (1998) 58, 59

State v. Olds,
39 Wn.2d 258, 235 P.2d 165 (1951) 42-45, 47

State v. Radcliffe,
164 Wn.2d 900, 194 P.3d 250 (2008) 76

TABLE OF AUTHORITIES (cont'd)

WASHINGTON CASES (cont'd)

State v. Rehak,
67 Wn. App. 157, 834 P.2d 651 (1992),
review denied, 120 Wn.2d 1022,
cert. denied, 508 U.S. 953 (1993) 60, 65

State v. Rhinehart,
92 Wn.2d 923, 602 P.2d 1188 (1979) 43

State v. Russell,
69 Wn. App. 237, 848 P.2d 743,
review denied, 122 Wn.2d 1003 (1993) 58

State v. Smith,
2 Wn.2d 118, 98 P.2d 647 (1939) 43, 44

State v. Suttle,
61 Wn. App. 703, 812 P.2d 119 (1991) 70, 71

State v. Venegas,
155 Wn. App. 507, 228 P.3d 813 (2010) 69

OTHER JURISDICTIONS

Berger v. United States,
295 U.S. 78, 79 L. Ed. 1314,
55 S. Ct. 629 (1935) 73

Bruno v. Rushen,
721 F.2d 1193 (9th Cir. 1983),
cert. denied, 469 U.S. 920 (1984) 73

Edwards v. Arizona,
451 U.S. 477, 101 S. Ct. 1880,
68 L. Ed. 2d 378 (1981) *

Jones v. Wood,
114 F.3d 1002 (9th Cir. 1997)
after remand,
207 F.3d 557 (9th Cir. 2000) 63

Jones v. Wood,
207 F.3d 557 (9th Cir. 2000) 62-65, 69

TABLE OF AUTHORITIES (cont'd)

OTHER JURISDICTIONS (cont'd)

Malloy v. Hogan,
378 U.S. 1, 12 L. Ed. 2d 653,
84 S. Ct. 1489 (1964) 75

Miranda v. Arizona,
384 U.S. 436, 86 S. Ct. 1602,
16 L. Ed. 2d 694 (1966) . 12, 13, 15-17, 75, 77-81

Missouri v. Seibert,
542 U.S. 600, 124 S. Ct. 2601,
159 L. Ed. 2d 643 (2004) 75, 78

STATUTES AND OTHER AUTHORITIES

1 Restatement, Torts 52

Black's Law Dictionary (9th ed. 2009) 68

Constitution, art. I, § 3 . 1, 2, 42, 55, 72, 73,
82

Constitution, art. I, § 21 55, 82

Constitution, art. I, § 22 . 1, 42, 44, 55, 72, 82

Criminal Rule 2.1 43

Criminal Rule 3.5 2, 11, 17, 76, 78

Evidence Rule 404(b) 68

RCW 9A.36.120 37, 41, 46, 47, 55

Rule of Appellate Procedure 2.5 48

U.S. Constitution, amend. 5 1, 42, 75

U.S. Constitution, amend. 6 1, 42, 55, 82

U.S. Constitution, amend. 14 . 1, 2, 42, 55, 72,
73, 82

A. ASSIGNMENTS OF ERROR

1. The court erred by instructing the jury on a crime with which the State had not charged the defendant. U.S. Const., amends. 5, 6, 14; Const., art. I, §§ 3, 22.

2. Appellant assigns error to the court's instruction No. 6, quoted in full below.

3. Appellant assigns error to the court's instruction No. 7, quoted in full below.

4. Appellant assigns error to the court's instruction No. 8, quoted in full below.

5. The court's instruction omitted an essential element from the definition of the crime.

6. The court's instructions omitted the essential element of specific intent.

7. There was insufficient evidence as a matter of law to support this conviction.

8. The trial court erred by excluding evidence of Vadim Dologan's violent behavior.

9. The prosecutor committed misconduct and denied appellant due process by arguing to the jury there was no evidence that Vadim Dologan was ever violent -- when he successfully persuaded the court

to exclude evidence of his violence. U.S. Const., amend. 14; Const., art. I, § 3.

10. The trial court erred by finding the defendant's statements to the police were admissible.

11. Appellant assigns error to the trial court's Finding of Fact No. 2 pursuant to CrR 3.5, quoted in full below.

12. Appellant assigns error the trial court's Findings of Fact and Conclusions of Law on Hearing Pursuant to CrR 3.5 to the extent the court found its "findings" were "Undisputed Facts." CP 52.

13. Appellant assigns error to the court concluding that Ms. Shved's statements were

made after proper advisement of Miranda rights, and were given freely, voluntarily and with knowledge of the consequences of giving such statements.

CP 52.

Issues Pertaining to Assignments of Error

1. May a jury verdict rest on instructions that permit conviction of a method of committing the charged offense when the State did not charge that method?

2. Where the prosecutor's closing argument emphasized the uncharged elements from the

instructions, and the jury inquired whether it had to be unanimous as to the charged or uncharged elements and was instructed it did not have to be unanimous, do the erroneous instructions require a new trial?

3. Did the court commit constitutional error by omitting an essential element from its instruction defining the charged crime?

4. Does a criminal assault require an intent to inflict pain or offend?

5. Did the trial court err by excluding evidence that another person who had access to the infant had a significant history of violent behavior and hatred of females, including assaults against the infant's mother and grandmother with subsequent confinement, to demonstrate his motive to assault the baby or to lie about having assaulted the baby?

6. Was there sufficient evidence to support the conviction beyond a reasonable doubt?

7. Did the State establish that Ms. Shved's statements to police were made after she was advised of her rights?

8. Did the State establish Ms. Shved understood her constitutional rights and knowingly, voluntarily, and intelligently waived them?

9. Did the court shift to the defendant the burden of proving her statements were made after a knowing and voluntary waiver of rights?

B. STATEMENT OF THE CASE

1. Olga and Boris Shved

Olga Shved was born in the Soviet Union. RP¹ 720-21. When Olga was 14 and her brother Vadim was 10, her mother, Natalya Dologan, married Mecheslav Piskorskiy. The family moved to the United States to escape Soviet persecution for their Pentecostal religion. The couple bore another son, Alexander. Olga helped raise Alexander. RP 188-193, 577-78.

In 2003, Olga married Boris Shved, an immigrant from Ukraine. RP 370-71. The young couple lived with her family for three years, during which they had a son, Ryslan. RP 285. The couple never behaved violently toward one another or to others. RP 188-92.

¹ "RP" indicates the trial proceedings, transcribed in eight volumes, continuously paginated; "VRP" indicates the separate volume labeled "VRP: 3.5 Hearing, motion, verdict and sentencing," from various dates.

Boris worked at TiSport, manufacturing wheelchairs, 5:30 a.m. to 2:30 p.m. He also worked on cars on his own time. Olga was employed 15 hours/week caring for Boris's disabled mother, Julia Shved. She also cleaned houses to supplement the household income. RP 375-76, 723, 440-46, 452-60.

Olga and Boris moved to their own home before their second child was born. RP 343-45. On February 4, 2006, Olga gave birth to their daughter, Ella, two months prematurely. Ella spent several weeks in the Neonatal Intensive Care Unit in Richland. Olga's complications left her hospitalized in Pasco for about a week, then home and in need of significant care.² RP 286-88, 347-48.

Boris cared for Olga at home. She was too sick to care for herself or to visit the baby in the NICU. Boris visited the baby every day. RP 348, 363. Nonetheless, the hospital staff called the police because the mother was not visiting the

² Her thighs swelled two to three times their normal size and she had disabling headaches from the epidural. RP 372.

infant. Boris responded angrily to the staff. RP 362.

Ella was born with a problem with her lip or palate. Boris thought it was the result of Olga having had surgery while pregnant, that the drugs she received caused a birth defect. RP 361.

Once Ella was home, Olga was her primary caregiver. Nurses came to the home for some early check-ups. They said it was normal for the child to be quiet; as a premie, she would need a lot of sleep. Olga and Boris took Ella to Dr. Cayetano for regular well-baby checkups. RP 377-78, 724-25.

Dr. Cayetano saw Ella March 20, April 20, and May 23, 2006. In March, Ella was alert, active, showed no distress. The doctor assured the parents she was "doing good." In April, again the infant was alert and active. She had no signs of pain. She was not fussy. Her musculo-skeletal condition was normal. The doctor declared her normal and healthy. RP 626-32.

At the May check-up, Dr. Cayetano again found the child to be doing well. She only weighed 9 lbs. 7 oz., but this was normal for a premie. He specifically examined Ella's skull. Her

neurological assessment was good, she was not lethargic or fussy. Olga asked about Ella scratching herself in the face with her fingernails. The doctor said it was not unusual. He recommended trimming her nails and putting mittens or socks on her hands. RP 358-60, 633-34, 648-57. Olga tried mittens, but the baby's hands were so small the mittens fell off. She continued scratching herself. RP 753-54.

Olga resumed her part-time work. Olga sometimes took Ryslan with her, but baby Ella was too young. Natalya, who was not working outside her home, took Ella and often Ryslan to her home while Olga worked. RP 195-96, 326, 728-29. There was no other babysitter available. The couple had no money for daycare. RP 329, 733. Natalya cared for Ella 3 to 4 times a week, usually for about 3 hours. RP 289-90.

2. June 16, 2006

On June 16, 2006, Olga Shved called 911, requesting an ambulance for Ella. She had been

giving the baby water with an eyedropper³ when she started choking. Olga gave her CPR until the aid units arrived. Olga accompanied Ella to Kadlec Medical Center in the ambulance. RP 734-35.

The hospital staff found the child had some bruises on her face, and scratches which were covered with powder.⁴ Over the next several hours medical staff conducted numerous examinations of Ella. They eventually found fractures at the following locations:

Skull: the right side and the left top
or back
Humerus: right arm -- almost healed
left arm -- mature healing fracture
Left forearm: corner fracture from
twisting or severe shaking; other
fractures nearly healed
Ribs: posterior rib fractures along
vertebrae
Legs: left thigh showed healed fracture;

³ Olga was not able to breastfeed the baby because of her own health post-partum. The baby was drinking only formula. Olga wanted to get her to accept water as well. RP 734-35. Eyedroppers are used for premature babies, especially with problems latching. RP 70-71. The hospital provided the eyedropper when it released Olga after she was born. RP 755.

⁴ Olga testified that she put powder on scratches to dry and heal them. RP 727-28, 751. Her mother confirmed that was her practice. RP 330. Dr. McLaughlin agreed the child could have caused the scratches herself. RP 248-49, 256.

fractures above and below the left knee;
right leg showed almost healed fracture
mid-thigh

RP 66-69.

Dr. McLaughlin, a pediatric critical care physician from Seattle Children's Hospital, examined Ella at Kadlec that night. RP 223-25, 232-33. Although it can be difficult to assess the age of an infant's fractures, he testified within a reasonable degree of certainty the fractures to Ella's long bones most likely were two to six weeks old. RP 258-59, 282.⁵ He estimated the skull fractures were days to weeks old. He believed they were caused by at least two separate impacts to the head, but agreed one fall in a metal tub could cause both fractures. RP 241-44.

He testified the injuries could have been caused by either a male or female. The amount of force necessary was consistent with a person in an

⁵ Dr. Harper saw the baby June 19. She variously said: she could not date the injuries, one would have to talk to the radiologist; the radiologist described some fractures as "mature," meaning more than ten days, usually 1-2 months old, but admitted she never consulted the radiologist about the age of the injuries or the meaning of his terms; and from her own review of the films, she thought some were ten or so days old and others "certainly older than two weeks." RP 80-85.

angry or violent state handling the child. RP 252-53.

Dr. Harper testified that breaking the bones would feel like breaking chicken bones -- you could hear a crack and feel the pressure. A baby would be quite fussy from the pain. But then she also said babies don't always appear fussy even if they are in pain from broken bones. RP 72-73. One nurse attending the child said she had been calm throughout the evening in the emergency room, not really crying. RP 418. Another said she calmed when Olga held or fed her, RP 515; but when she saw her with her mother, the baby cried inconsolably, RP 503-04.

Dr. Harper testified that even a doctor could not tell by looking at the child in an examination that these fractures existed. RP 73-74. But later she said if the child had these fractures at the time of a well-baby check, the doctor would have seen them. She was not aware this baby had been seen without any sign of abuse. RP 81.

It was possible the skull fractures could be caused by a person putting his palm on the baby's face and shoving the back of her head into the crib

slats. It could also have been caused by slamming the child's head into a wall or onto the floor. If a person had hurt the baby in a crib or dropped her twice, he would not necessarily know the skull was fractured. RP 92-94.

The rib fractures were likely caused by a person with fingers long enough to reach around the baby's rib cage and squeeze the fingers at the baby's spine. A larger person would have an easier time accomplishing this reach. In Dr. Harper's experience, these sorts of injuries were most often caused by a male. RP 77-79, 240. Dr. McLaughlin expected a baby would experience pain and cry immediately after a fracture, but eventually she would settle. RP 270-72.

The injuries were not life-threatening. There was no specific treatment needed to heal the fractures. RP 79-80.

Both doctors testified the injuries were "non-accidental," "not possibly accidental," but the result of child abuse. RP 76, 249-50.

3. CrR 3.5: Questioning at the Hospital

At the hospital, Olga at first held the baby, then accompanied her for x-rays. VRP 741-42.

Later Patrol Officer Cavazos escorted Olga into a room away from where Ella was being examined. He wore his uniform, badge and gun. An interpreter accompanied them. Officer Cavazos said the child was now in protective custody. VRP 7-8, 15. Officer Cavazos did not advise Olga of her Miranda rights. He asked her only background information questions. VRP 10-11.⁶ She responded that "things at home" were "fine," peaceful, life with her husband was normal, she was not abused physically or mentally. Officer Cavazos never told Olga she was free to leave or didn't need to answer questions. VRP 20-23.

Detective Lee arrived 20-30 minutes after Officer Cavazos. Although Officer Cavazos testified he removed Olga from her daughter's room, Det. Lee testified Olga was still in the room with the child when he entered. He claimed he was the one who directed Olga and the interpreter into another room. VRP 33.

Detective Lee never told Olga she could not leave or had to talk to him. VRP 37. He spoke to

⁶ The defense stipulated that Ms. Shved's answers to Officer Cavazos's "background questions" were admissible. VRP 105-06.

her through interpreter Oksana Rakhmastryuk. VRP 34-35. He began his interview at 1:18 a.m. VRP 58. He took a break, leaving the room only once, from 2:12 to 2:52 a.m. VRP 43-44.

Det. Lee testified that "at some point" he advised Olga of her Miranda rights. VRP 37-38. He had her sign a medical release form sometime before he advised her of any rights. He did not explain that form was for legal purposes only. VRP 52-56.

The detective did not have a form indicating the time he advised her of rights; he did not even have the same card from his police department. VRP 39-40.⁷ He testified he read each right individually, the interpreter translated it, and Olga said she understood each one. He had no form with her initials or signature indicating understanding or waiver. When he asked if she would continue to talk to him, she said "yeah." VRP 39-41.

Although Det. Lee suggested Olga appeared anxious to go home, the doctor told Det. Lee that Olga wanted to go with the child to the Spokane

⁷ The prosecutor acknowledged the detective may have been "unprepared." VRP 100.

hospital. Det. Lee would not permit it. She remained in this room until he walked her to the lobby at 4:58 a.m. Boris picked her up. VRP 44-45, 49; RP 749-50.

Ms. Rakhmastryuk is a professional interpreter. She is certified in Russian for medical and social interpretation, but not legal interpretation. She was called to Kadlec Medical Center about 5:00 or 5:30 p.m. to interpret for Olga Shved. VRP 61-63, 66-68.

As an interpreter, she is permitted to ask the speaker to explain again, or to clarify a point, but she cannot offer her own explanation for things. She began by interpreting the doctors' questions about Ella for Olga, and Olga's responses. VRP 65-66.

When the police arrived,

We were removed from the room where the baby was and we were showed where to go and followed the officer. I don't remember if it was with one officer or two. Possibly just the one officer took us to a room and told us to wait there, closed the door and we were there. I remember that because I wanted to ask if I could leave and then they could call somebody else

VRP 66-67. The police took them to a room "where we were told to wait." VRP 68. "I wanted to

leave, but we assumed since the door was closed we had to stay there" VRP 79.

During the questioning, Ms. Rakhmastryuk understood all the questions being asked, but she noted Olga did not understand.

I think the whole evening there was a lot of blurriness and confusion. So when things were said fast, I interpreted them fast. I couldn't stop and explain what they were even though I knew what they were and since she didn't ask to explain or for me to ask again, I didn't.

Ms. Rakhmastryuk testified Olga did not understand certain things that were being said. VRP 69-70. She interpreted the Miranda rights rapidly, not slowly. She had never interpreted Miranda rights before. Olga asked, "What's going to happen"? VRP 69-71.

Ms. Rakhmastryuk testified it was "afterwards" that the detective read the rights, VRP 73-74; but she also said after he read the rights he began questioning, VRP 77-78. He read all the rights, then asked if Olga understood. Ms. Rakhmastryuk had to translate quickly to keep up with the detective's speech. It was difficult. She had

never interpreted that fast before. VRP 73-75.⁸ Ms. Rakhmastryuk knew there was confusion. Olga asked her questions while the detective was out of the room, but she wasn't able to answer them; she was only the interpreter. VRP 75-77.

Olga testified Russian is her native language. She speaks very little English. When Det. Lee came to question her, she was tired and confused. "They took away my daughter. I couldn't think of what to think." VRP 92-93. Before Det. Lee read the rights, he told her if she didn't answer she would be arrested. He then read the rights very quickly, and Ms. Rakhmastryuk translated quickly. Olga had trouble understanding. She did not know she could remain silent. She told the interpreter she didn't understand what the detective was asking, but the interpreter responded she was only translating. No one ever told her she was free to leave. VRP 94-98.

The court found Det. Lee's interrogation was custodial, but that the detective properly read the Miranda rights and Ms. Shved knowingly and

⁸ Det. Lee's rapid speech required the court at least twice to ask him to slow down during trial. RP 8-9, 50.

intelligently waived them. Thus all subsequent statements were admissible. Although Ms. Shved was confused, the court said it was not clear what she was confused about. VRP 106-07.

Five months later, the court entered written Findings of Fact and Conclusions of Law on Hearing Pursuant to CrR 3.5:

Undisputed Facts

...

2. On June 17, 2006, Detective Chris Lee, of the Pasco Police Department, interviewed the defendant at Kadlec Medical Center. This interview took place after Detective Lee advised the defendant of defendant's Miranda rights. Defendant acknowledged the understanding of these rights and thereafter answered questions propounded by Detective Lee.

CP 53. The court concluded Ms. Shved's statements were made after proper advisement of Miranda rights, and were given freely, voluntarily and with knowledge of the consequences of giving such statements.

CP 52.

4. Ms. Shved's Statements to Police

As the doctors discovered more injuries, they conveyed them to the detective. The nature and time of the injuries varied according to Dr. McLaughlin's reports through the night. RP 39-40.

The detective then questioned Olga how Ella received these injuries. RP 743-44.

Early in the questioning, Olga responded that she had dropped the baby while giving her a bath about a week earlier.⁹ Her soapy hands slipped as she lifted the baby from the infant bathtub, and the baby fell about three feet into the larger, harder bathtub. The baby had cried, but Olga didn't think she was significantly injured. RP 737-40, 757-58.¹⁰

Other than the fall in the tub, Olga could not possibly think of any incident that could have broken the child's bones. RP 740-42. When Detective Lee asked whether she had twisted the baby's arms or legs, or thrown the child, Olga answered no. RP 743-45.

Det. Lee related Olga's description of causing a bruise by bumping the baby's face on the stroller. He noted the bruises on the child were

⁹ She had already explained this incident to the doctor and nurses. RP 50, 254.

¹⁰ The detective testified when he told her the two skull fractures could not have been caused by a single fall, Olga offered that maybe she dropped her twice. RP 15-18, 210-11. Olga testified she told him only once. RP 768.

consistent with this explanation. RP 17-18, 771. She also told him about the baby scratching herself. RP 18-21. Olga told him she had taken the child to the doctor for her check-ups, and there was nothing wrong. He confirmed this information with Dr. Cayetano: there were no signs of abuse when he saw the baby May 23. RP 41-42.

Det. Lee asked if anyone else ever spent time with Ella. Olga answered yes, her mother cared for her several times a week. Olga didn't think her mother would have hurt Ella. RP 745-47.

When he asked who else "had access to" the child, he said Olga "couldn't explain." But he went on to say she told him Boris Shved sometimes handled the child at night, and Olga's mother babysat at times -- he understood about four hours. Olga was the primary caregiver. RP 21-23. Det. Lee didn't know Olga was employed; he didn't ask her. RP 42.

She didn't give the police any other names of people because she didn't know who would have hurt Ella. At one point, she thought maybe the nurses had caused the injuries somehow. RP 774. Olga was in shock at the hospital to learn of the injuries

and to face police questioning and suspicion. She did not cry at the hospital, she remained focused. She cried a great deal later when she was home. RP 744-46.

When asked how the child was hurt, Det. Lee said her "answers varied." At first she denied any knowledge of any injuries, then she went through different explanations¹¹ of how it could have occurred. RP 14. After relating her description of the fall in the bathtub, the prosecutor asked, "Did she stay with that story?" Det. Lee responded, "No, she didn't." RP 14-15.

When Det. Lee accused Olga of causing her infant's injuries, he emphasized she was very unemotional. RP 23-24. Over objection, he said her reaction was not "consistent" with other people whose children have been abused or injured, based on his experience and training.¹² RP 24-25. She

¹¹ Although the detective described her answers this way, her only "explanations" remained the fall in the bathtub, the bumps on the stroller handle, and the baby scratching herself.

¹² Det. Lee's training consisted of the basic Criminal Justice Training Commission, plus a few seminars. He had one psychology class, but little or no training in Russian and Ukrainian culture. RP 32-34. But see testimony of Dr. Lord-Flynn, below.

denied ever twisting the baby's arms or legs, denied slamming her head against a wall, and denied throwing the baby across the room. RP 37-38.

Det. Lee concluded his direct examination by saying, over objection, that Olga "minimized" her daughter's injuries. "She was taking ownership, partially, over what happened; but obviously minimizing the scale of what took place" RP 28-30.

5. Family's Response

After his experience with the hospital calling the police because Olga could not visit newborn Ella in NICU, Boris did not trust hospitals, police, or doctors. He believed the hospital had caused Ella's injuries, because she was fine when they visited the doctor two weeks earlier. It was "unthinkable" that he or Olga could have hurt their daughter or broken her bones. RP 387.

Mecheslav had never been alone with Ella since she was in the hospital when born. He knew his wife cared for the baby sometimes, but it was always while he was at work. He had no reason to believe Olga would have hurt Ella. RP 184-88.

Natalya did not speak English. Detective Lee went to the Dologan home to speak with her, but he did not bring an interpreter. He saw Vadim at the house, walking around. He saw Vadim punch his little brother, Alex, in the chest. The detective tried to question Vadim; he even asked him to interpret for him while he questioned Natalya. He asked Vadim if he had ever been left alone with Ella. Vadim told him he didn't understand the question, to leave him alone. RP 43-45, 615-16.

The detective left the home and did not make any further attempts to interview Natalya. RP 48. He did not investigate Vadim's background. RP 616.

6. Police Investigation

Officer Cavazos visited the Shved home after midnight on June 16-17, to see whether Ryslan was in any danger. Boris admitted him willingly, although he was emotionally exhausted. The home was immaculate, Ryslan was healthy, asleep in bed, with no marks on him. The officer left. Two days later, another officer went to the home. He also found Ryslan was healthy, without marks, and interacted well with his parents. He left without removing the child. RP 381-85.

Nonetheless, CPS obtained a court order and sent two officers back to the home to take Ryslan into protective custody. They placed the child in the back seat of the car, without a car seat, and closed the door. Ryslan cried and screamed in the car, but the officers did not get in with him as they waited for the CPS caseworker to arrive. Finally Olga asked to sit with him. She brought his favorite blanket and sat with him in the car. She calmed him very quickly. RP 385-86, 747-50.

The CPS caseworker testified she tried to get Olga and Boris to explain who hurt the baby, but they "refused." They both said Olga primarily cared for the child. RP 209-10.

The caseworker declined to place the children with their grandparents, Natalya and Mech. She wasn't concerned about Vadim, because they assured her he was never left alone with the infant. But they "refused to entertain any idea that Boris or Olga could be responsible" for Ella's injuries. RP 340-41.

She noted in foster care the infant cried and screamed if she heard loud noises, especially loud male voices. RP 218.

7. Vadim Dologan

Olga's younger brother, Vadim Dologan, suffers from schizophrenia. He was diagnosed in 2000 at age 15. He did not complete high school. Legally disabled, he receives SSI. RP 331.

From 2000, Vadim had been in jail about 14 times. RP 484-86. He had been hospitalized three times. CP 60. Vadim did not live with the family for much of the three years that Olga and Boris lived there. He was home from the hospital in 2004 or 2005. He was jailed again in May, 2005, then back to Eastern State Hospital. RP 730-31, 810-11.

Vadim was convicted of assaulting Olga with a weapon in 2003. He assaulted his mother in the spring of 2005. He moved to Cullum House, a group home, where he continued to be assaultive. He was taken from the group home in an incoherent state and committed to Eastern State Hospital. RP 311-12, 335-36. His assessment there included consideration of his violent and assaultive behavior and his history of polysubstance abuse. RP 307.

Eastern State Hospital discharged Vadim nearly a year later, on May 3, 2006. He could not return

to the group home because of his prior assaultive behavior. RP 311-12. Having nowhere else to go, he returned to his family: Natalya Dologan, Mecheslav Piskorskiy, and his younger brother, Alex. RP 194, 291-92, 298.

Vadim was discharged with anti-psychotic medications, but he would not take them reliably. Natalya recognized when he was not taking medications: he would pace, jump, talk to the wall or door, converse with people who were not there. He would punch his fist into the air, sometimes hard. He barely slept at all. RP 323-24, 470-72, 482-84.

In mid-May, Vadim spent ten days in the Franklin County Jail for a probation violation. The jail was not able to obtain the medications he needed while he was there. He also refused some of the medications they had. His condition deteriorated. He was discharged back to his parents' home. RP 311-12, 325, 832-36.

At home, Vadim ran up and down stairs. He screamed and he yelled. He was in very bad condition. RP 293-94. His illness kept him from sitting still: he paced, jumped, moved

continuously. Natalya said he was aggressive. She asked his therapist to return him to the hospital. RP 329. She was told that the State had spent a lot of money in the previous lengthy commitment, they needed to try local treatment. RP 329.

Dr. Geyer, his treating therapist, described Vadim as noncompliant and out of control until his medications were stabilized in mid-July. RP 313.

Vadim thus was in Natalya's home for most of the last six weeks when she cared for Ella. Natalya always told Vadim not to touch Ella or Ryslan. RP 328-29.

Although Natalya watched the children, she occasionally stepped outside the house or away from the baby briefly to do chores, such as emptying the trash or doing the laundry. Ryslan usually followed her around. RP 291-93.

Several times while outside or doing the laundry, she heard Ella cry. When she came back in, she asked Vadim, "Have you touched her?" He would say, "I don't know." Natalya never knew for sure. It was quite feasible. She thought there were five or six times she left the baby; and four of those times, she was crying when she returned.

Natalya would pick her up and walk her; she would cry a bit and then calm. RP 296-98, 317-19.

When Ella slept, Natalya put her in one of the bedrooms upstairs. She left the bedroom door open to listen for her. She recalled four or five times she went outside while the baby was asleep upstairs. She recalled coming in and seeing Vadim leave the bedroom where the baby was. The baby was crying. She asked Vadim what he did to the baby, but he said nothing. Natalya saw he was in a bad condition: walking, talking to people who weren't there. She looked at the baby, but didn't undress her to see if she was hurt. RP 326-28, 488-91. If Natalya went into the bedroom when the baby was crying and Vadim was there, he always left the room. RP 329-30. Although she heard the baby cry, she never actually saw Vadim hurt Ella. RP 488-89.

Natalya was afraid Vadim would hurt Ella. But she only stepped outside for a few minutes. "It was not safe, but I still did it," i.e., left Ella where Vadim could reach her. She also loved her son, and she could not lock an adult into his room. RP 488-95.

Natalya last cared for Ella at her home two to three days before she was taken to the hospital. Vadim was also there. RP 332. Natalya never went away from the home and left the child alone with Vadim. "No, because he's dangerous. How can I leave a child with an ill person?" But there were those four or five times when Natalya stepped out, and the baby and Vadim were in the house. RP 333.

Olga was not comfortable having the children around Vadim, but she had little choice. She trusted Natalya was always there. RP 733.

8. Vadim's Testimony

Vadim testified he got along "good" with his sister, Olga. He agreed he takes pills; his mother knows what kind. He did not remember Dr. Geyer. He has no problems with his mind. He has no mental problem called schizophrenia. His doctors and therapists have not talked to him about problems in his head. His mother did not babysit for baby Ella in May-June, 2006. He was never alone with Ella. He did not harm Ella in 2006. He also did not punch his brother Alex in May-June, 2006. He did not get angry in May-June, 2006. RP 705-15.

9. Order Limiting Evidence of Third-Party Perpetrator

Natalya testified that Vadim physically attacked her in the spring of 2005, before he was committed to Eastern State Hospital. The state sustained the State's objection and granted a motion to strike this testimony. It limited evidence regarding Vadim's behavior to between May 3 and June 16, 2006. RP 335.

The defense proposed the following witnesses to testify as follows:

Jamie Y. Basnillo, MD, Eastern State Hospital (ESH) ... (Admitting Psychiatrist): Will testify that on May 27, 2005, Vadim V. Dologan was admitted to Eastern State Hospital for the third time after engaging in an assault at the Cullum House in Richland, Washington; he was speaking incoherently in the emergency room of Kadlec Medical Center; Vadim Dologan suffered from substance abuse; he had anti-social personality traits; was in a psychotic-type state and had engaged in violent behavior; he had a general hatred of females and engaged in sexually inappropriate behavior such as masturbation in front of various staff members which caused him to be placed in frequent "time outs"; he abused other patients while at ESH; and he was a polysubstance/drug abuser.

Lesley Blake, MD, Eastern State Hospital ... (Discharging Psychiatrist): Will testify that Vadim Dologan was discharged from Eastern State Hospital on May 3, 2006; he still experienced anti-social personality traits and schizophrenia

mental illness; he was violent in nature with a hatred of females; he had engaged in sexually inappropriate behavior including masturbation in front of various staff personnel; on 3/1/06 his mother Natalya Dologan was contacted concerning his release who expressed concern that if Vadim came to live with her in her home he might assault someone and he was prescribed anti-psychotic medication upon his discharge on 5-3-06.

CP 60. The court ruled these witnesses could not testify. RP 406-07.

The court excluded any evidence of Vadim's prior assault against Olga, any of his sexual improprieties, and any violence outside of the dates of May 3-June 13, 2006. RP 303-16, 406-07.

Yet the court further sustained the State's objection when the defense asked Mecheslav Piskorskiy whether Vadim had committed any acts of violence in May or June, 2006. The court ordered no evidence of "specific acts." RP 472-73. It again sustained an objection to Natalya testifying that Vadim had taken a swing at her, had pushed her. RP 492-95.

The court again sustained the State's objection when counsel asked about Vadim's past drug usage. Counsel offered this evidence as part of the foundation for Vadim's diagnosis, and that

it increased his risk to commit acts of child abuse to support Dr. Mays' expert testimony. RP 474-76, 484.

10. Defense Expert Testimony

a. Dr. Geyer

Dr. Geyer treated Vadim from when he was released from Eastern State Hospital May 3, 2006, until October or November. Although Dr. Geyer thought Vadim was taking his medications when he was first released from the hospital, he observed Vadim's jail sentence disrupted his medications. He was psychotic when he went to jail. It took 4 to 6 weeks to stabilize him on his medications after he got out of jail. RP 548-51, 567.

Dr. Geyer testified that between May 3 and June 16, 2006, Vadim was capable of harming an infant if he was alone with one. When he was psychotic, he was not able to think clearly. His brain did not clear until mid-July, 2006. RP 558-59.

During this time, if Vadim picked up an infant and squeezed it, he probably would not know he could hurt the baby, or to stop squeezing. Vadim had very poor impulse control; he heard voices

telling him what to do. He probably would follow these voices' directions even if society viewed it as wrong, even if it was against the law. RP 559-60. He certainly was capable of violence June 6-16, 2006. RP 571.

Vadim denied any mental issues. If he had harmed a child in May or June 2006, and was confronted with that fact, he would not have admitted it. RP 560-61.

When the prosecutor asked if Eastern State Hospital releases "dangerous" people into the community, Dr. Geyer responded cautiously. He noted the general public doesn't understand what the mental health system does about releasing people. There are many issues: the State's financial pressure to put people in the community, patients who want to be released. Most are released to their family's homes. RP 568-69.

b. Dr. Lord-Flynn

Dr. Lord-Flynn is a psychologist at Eastern State Hospital. He has credentials specializing in ethnic minority mental health. He knows Russian immigrants often mistrust governmental agencies. Ms. Shved fit this pattern. RP 582-84.

He evaluated Olga Shved in August, 2007, regarding her competency, sanity, mental state, potential for dangerousness, and likelihood to commit some criminal acts. RP 575-76. He used an interpreter for the interviews. RP 581-82.

Ms. Shved described herself as a loving and appropriate parent. She said both their children were wanted and loved; she and Boris were affectionate with one another. There was no history of anger issues or outbursts of temper. RP 585.

Baby Ella was extra special for Ms. Shved because this was her "little girl," what every mother wants, and because she was premature, so tiny and fragile. Ms. Shved was always attentive to keep her safe. She checked on her multiple times during the night. She kept both her children away from anyone who seemed physically ill. RP 585-86.

Dr. Lord-Flynn testified Ms. Shved was normal, alert, "firmly grounded in reality," no history of mental health problems, no hallucinations, no delusions. She demonstrated a broad range of affect that was both spontaneous and appropriate

for the topics they discussed. When talking of her marriage and wedding, Ms. Shved was upbeat and happy. When talking of her children being taken from her, she was tearful and sad. When talking of her frustration with the government system, there was a bit of fire in her eye. RP 586.

Police had described Ms. Shved as oddly cold and unemotional. Ms. Shved described to Dr. Lord-Flynn that when she dealt with official authority, she became very focused on the topic and tried to deal with them formally. She would save her emotions until she got home. She could exercise a great deal of emotional control -- a common phenomenon for immigrants from Eastern Europe, especially when dealing with authorities. RP 587-89.

Ms. Shved was steadfast in denying she had ever hurt the baby.¹³ During their interviews, she believed the older injuries might be from when Ella was in the neonatal ICU when she could not be with her. She did not believe Boris was capable of hurting the baby. The only temper problems within

¹³ She did relate for him the one time she dropped the baby in the bathtub. RP 590.

her family were from Vadim -- but Ms. Shved did not believe then that he had any opportunity to do so. RP 589-90, 594-95.

Despite the complications at Ella's birth, Ms. Shved and the infant were bonding well after 2-3 weeks. There was no post-partum depression. RP 613-14. Dr. Lord-Flynn concluded Ms. Shved experienced clinical depression after the State took her children from her, but that diagnosis had resolved by the time he saw her, 14 months later. RP 609-11. He determined no other mental disorder, personality disorder, mental disease or defect. RP 591-92.

Ms. Shved had no history of chemical abuse; no arrests or even traffic citations; no rebelliousness. She retained a positive social network of friends, attending church weekly, and engaging in activities with a broader church and Russian immigrant community. RP 609-11, 579-80.

The only factor in Ms. Shved's life that supported any concern that she might pose any danger were the allegations in this charge. All other factors in her history would predict she was not dangerous. RP 612.

c. Dr. Mays

Dr. Mark Mays is a psychologist with a law degree on the University of Washington medical faculty. He is an expert on physical child abuse. He has consulted with DSHS on parental termination and custody matters. RP 669-70.

The primary risk factors for physical abuse of an infant are: male, young (under 35), previous violent behavior, and substance abuse. A history of psychiatric problems or hospitalization, along with violence or anger problems, increases the risk, as does any clinical diagnosis, especially a personality disorder. While one can medicate schizophrenia and some illnesses, personality disorders are more constant. RP 670-76.

Research supports that impulse control problems are a contributing factor in child abuse. RP 677. For shaken babies, only 7% were hurt by their mothers; 70% were hurt by peripheral males. RP 679.

A history of substance abuse can cause long-lasting mental effects, and so increases the risk of violence. RP 690. Schizophrenia is a biological impairment, an inability to filter what

matters from what doesn't, or to filter imagination from reality. It is a much greater risk factor if the person is not on medication. Hyperactivity and impulsivity also are risk factors. RP 694-96.

Dr. Mays estimated that a male, age 21, a former substance abuser, unmedicated and psychotic with schizophrenia and ADHD, would be "far, far, far more at risk than somebody who did not have those circumstances" of committing child abuse. He estimated such a person would have a 60-80% risk of abusing an infant. RP 697.

11. Olga Shved's Testimony

Ms. Shved testified consistent with the defense facts above. She said she never did anything to her infant to cause multiple fractures. RP 720-81.

12. Charge and Instructions

The State charged Ms. Shved by First Amended Information with assault of a child in the first degree as defined in RCW 9A.36.120(1)(b)(ii)(A):

That the said Olga V. Shved in the County of Franklin, State of Washington, during the time intervening between the 4th day of February, 2006, and the 16th day of June, 2006, then and there, being eighteen years of age or older and with intent to assault E.S. (DOB: 02/14/06) [sic], a child under the age of thirteen

did intentionally assault the child and cause substantial bodily harm, and has previously engaged in a pattern or practice of assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks.

CP 79-80.

The court instructed the jury:

INSTRUCTION NO. 6

A person commits the crime of assault of a child in the first degree if the person is eighteen years of age or older and the child is under the age of thirteen and the person: causes substantial bodily harm, and the person has previously engaged in a pattern or practice either of assaulting the child which has resulted in bodily harm that is greater than transient physical pain or minor temporary marks, **or causing the child physical pain or agony that is equivalent to that produced by torture.**

INSTRUCTION NO. 7

To convict the defendant of the crime of assault of a child in the first degree, each of the following four elements must be proved beyond a reasonable doubt:

- (1) That between the dates of February 4th, 2006 and June 16, 2006, the defendant intentionally assaulted E.S. (DOB: 02/04/06) [sic] and caused substantial bodily harm;
- (2) That the defendant was eighteen years of age or older and E.S. (DOB: 02/06/06) [sic] was under the age of thirteen);
- (3) That the defendant had previously engaged in a pattern or practice of

(a) assaulting E.S. (DOB: 02/06/06) [sic] which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks; or

(b) causing E.S. (DOB: 02/06/06) [sic] physical pain or agony that was equivalent to that produced by torture;
and

(4) That all of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), and (4), **and either alternative element (3)(a) or (3)(b)**, 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 alternatives (3)(a) or (3)(b) has been proved** beyond a reasonable doubt, as long as each juror finds that at least one of the alternatives 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 elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

CP 33-36 (emphases added); RP 845-46. The court did not give an instruction defining lawful or unlawful force. CP 25-46.

13. Closing Argument

During closing, the prosecutor projected elements from the instructions in his PowerPoint presentation. RP 850; CP 129-37.

He argued Dr. Geyer testified after Vadim got out of jail, he became "agitated."

No other change, he was just agitated. He never saw Vadim being physically violent. We had no testimony to that effect.

RP 859. His PowerPoint projected for the jury:

- **Vadim was never physically violent.**
- ...
- Anger does not = violence. Vadim was occasionally angry **but not violent.**
- ESH does not release unstable patients.

CP 127, 140 (emphases added).¹⁴

He projected the definition of the charge as set out in Instruction No. 6 (quoted above). It

¹⁴ Defense counsel did not object at this time; his prior objection to the prosecutor misstating the evidence was overruled, the court saying it was for the jury to determine. RP 857.

Although appellant does not believe it makes a difference, she notes the PowerPoint slides in the record are out of order from what the state originally provided: CP 128-39 should follow 159.

included the uncharged element about "torture;" it did not include the element that the person intentionally assaulted a child. CP 129-30; RP 869.

He then projected the elements as stated in Instruction No. 7 (quoted above). He included the uncharged element about "torture." CP 136.

He specifically argued to the jury about the element of "torture":

Consider the amount of fractures in the baby's body when you consider what's torture. Consider the amount of pain that would cause.

RP 870-71.

14. Jury Inquiry and Verdict

During deliberations, the jury sent the following inquiry to the court:

#3 of instructions for 1st degree - Do we have to choose "A" or "B"?

The court responded:

A careful reading of instruction #7 should provide your answer.

CP 22.

The jury found Ms. Shved guilty. The verdict form did not specify whether the verdict was based on one or both prongs of RCW 9A.36.120(1)(b)(ii)(A) and (B). CP 21.

15. Sentence

Within a standard range of 93-123 months, the court sentenced Olga Shved to 120 months, or ten years, in prison. CP 5-20.

C. ARGUMENT

1. THE JURY'S VERDICT WAS BASED ON A CRIME THAT WAS NOT CHARGED.

In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation

U.S. Const., amend. 6 (applicable to the states by U.S. Const., amend. 14).

Rights of Accused Persons. In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel, **to demand the nature and cause of the accusation against him, [and] to have a copy thereof**

Const., art. I, § 22 (emphasis added).

This makes it mandatory that defendants in criminal cases must be convicted of the offenses charged, and guilt of other offenses will not suffice.

State v. Olds, 39 Wn.2d 258, 261, 235 P.2d 165 (1951).

This most basic and fundamental right is within the constitutional guarantee of due process. U.S. Const., amends. 5, 14; Const., art. I, § 3.

It is fundamental that under our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged.

State v. Markle, 118 Wn.2d 424, 432, 823 P.2d 1101 (1992); State v. Irizarry, 111 Wn.2d 591, 592, 736 P.2d 432 (1988); State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); State v. Rhinehart, 92 Wn.2d 923, 928, 602 P.2d 1188 (1979); State v. Smith, 2 Wn.2d 118, 98 P.2d 647 (1939). Toward this end, CrR 2.1(a)(1) provides:

(1) *Nature*. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. ... The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. ...

In State v. Olds, supra, the State charged the defendants with larceny. The statute defining the crime provided:

Every person who, with intent to deprive or defraud the owner thereof --

(1) Shall take, lead or drive away the property of another; or ...

(4) Having received any property by reason of a mistake, shall with knowledge of such mistake secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; ...

Steals such property and shall be guilty of larceny.

Olds, 39 Wn.2d at 260. The State charged the defendants only under paragraph (1) of this statute. Nonetheless, the court instructed the jury under both paragraphs (1) and (4). Id.

The Supreme Court observed the error.

It will be noted that this instruction includes the crimes defined in both subd. (1) and subd. (4), so that the jury was authorized to convict appellants, even though it was not satisfied as to the proof required under subd. (1), provided it was satisfied as to the crime defined in subd. (4), notwithstanding the appellants were not charged under subd. (4).

Id. The Court held that instructions permitting a verdict on a crime that was not charged required reversal.

It is obvious that the crime defined in Rem. Rev. Stat., § 2601, subd. (4), was not charged substantially or at all, nor will the rule bear an interpretation that a new count charging a different crime can be encompassed with a mere amendment to an existing count. Such an intention, in any event, would contravene Art. I, § 22, of the state constitution.

Id. at 261. See also State v. Smith, supra (individual charged with larceny as theft by taking could not be convicted of embezzlement).

Similarly, in State v. Irizarry, supra, the State charged the defendant with aggravated premeditated murder. The trial court also instructed the jury on first degree felony murder. The jury returned a verdict on the lesser charge. The Supreme Court reversed. It noted a defendant can be convicted of a lesser included offense of the charged crime. It held premeditated murder is a lesser included offense of aggravated first degree murder, but felony murder is not. The conviction of felony murder therefore violated Art. I, § 22's right to be tried only on the offense charged.¹⁵

This case is indistinguishable from Olds.

The statute provides in relevant part:

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the first degree if the child is under the age of thirteen and the person:

...

(b) Intentionally assaults the child and

...

¹⁵ Accord: State v. Markle, supra (reversing convictions for indecent liberties when defendant charged with rape of a child). See also State v Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987) (State may not amend criminal charge after it has rested its case in chief unless it amends to a lesser included offense).

(ii) Causes substantial bodily harm, and the person has previously engaged in a pattern or practice either 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 the equivalent to that produced by torture.

RCW 9A.36.120(1)(b)(ii)(A) & (B).

The State charged Ms. Shved specifically under RCW 9A.36.120(1)(b)(ii)(A). It did not charge RCW 9A.36.120(1)(b)(ii)(B). CP 79-80.

The State explicitly alleged the elements of the former statutory provision, and obviously did not allege the elements provided in the latter: "causing the child physical pain or agony that is the equivalent to that produced by torture." CP 79-80. Yet the court instructed the jury on the latter. CP 33-35.

The prosecutor reinforced these instructions in his closing argument. He further emphasized the "torture" element in his Power Point presentation. RP 859, 869-71; CP 130, 136.

The verdict does not specify whether it was based on one or both prongs. CP 21.

This error was not harmless. The jury was confused. It sent an inquiry asking whether it had

to be unanimous as to one of the two alternatives. The court referred it back to its instructions, which clearly did not require unanimity. This inquiry and response strongly suggest the jury considered, and the verdict turned at least in part, on the portion of the statute that the State never charged. See In re Post, ___ Wn.2d ___ (No. 83023-1, 10/28/2010; Slip Op. at 13) (jury's questions regarding improper evidence is "objective example" of error's harm).

Under Olds and the other authority cited above, this Court must vacate Ms. Shved's conviction and remand for a new trial, with instructions limited to the crime actually charged.

2. THE COURT'S OTHER INSTRUCTIONS DEFINING THE CRIME AND ASSAULT OMITTED ESSENTIAL ELEMENTS OF THE CHARGED CRIME.

a. Instruction No. 6 Defining the Charge Omitted Intentional Assault.

Instruction No. 6, quoted in full above, omitted an essential element of the charge: that the defendant "intentionally assaulted" the child. CP 33. Compare: RCW 9A.36.120(1)(b) (quoted above). Although Instruction No. 7 included this element, CP 34, this definitional instruction

clearly was erroneous and likely caused the jury additional confusion.¹⁶

Nor was this error harmless. If the jury relied on this instruction's definition, it could have found Ms. Shved guilty of the crime even if it believed she caused a fracture accidentally when she dropped the baby in the tub.

b. Instruction No. 8 Defining Assault Omitted Intent to Harm or Offend.

The trial court also defined "assault" in Instruction No. 8 (quoted above). CP 36.

This instruction relieved the State of its burden to prove that Ms. Shved intended to harm or offend her daughter when she intentionally touched her. Without finding this specific intent, the jury may have convicted her for innocent behavior.

i. Criminal assault requires specific intent.

"Assault" is not defined in the Revised Code of Washington. Courts resort to the common law for definitions. State v. Byrd, 125 Wn.2d 707, 712,

¹⁶ Omitting an essential element of the crime is a manifest error affecting a constitutional right; it can be raised for the first time on appeal even if no exception was taken below. RAP 2.5(a)(3); State v. Eastmond, 129 Wn.2d 497, 502-03, 919 P.2d 577 (1996).

887 P.2d 396 (1995); State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996).

In Byrd, the State accused Mr. Byrd of drawing a gun and pointing it at the complaining witness, who was frightened. The defendant testified he merely displayed the gun, but did not aim it. The Supreme Court held that assault by pointing a weapon and frightening the person required the specific intent to harm, or to cause fear of harm, as an essential element of criminal assault.

It is not enough to instruct a jury that an assault requires an intentional unlawful act because, given the circumstances, Byrd's act of drawing a gun could be found to be an unlawful intentional act. Even where an act is done unlawfully and the result is reasonable apprehension in another, it still is not sufficient to convict because the act must be accompanied by an actual intent to cause that apprehension. This is the required element about which the jury was never told.

Byrd at 715-16.

In Eastmond, the State accused Mr. Eastmond of pointing his gun at a cashier; he said he was trying to check his weapon by handing her the butt of the gun. 129 Wn.2d at 499. The court reconfirmed Byrd that failing to instruct on

specific intent to cause bodily injury or fear was constitutional error requiring reversal.

By omitting an element of the crime of assault, the trial court here committed an error of constitutional magnitude. ... We reject the State's characterization of the disputed error as located in the definition of assault and thereby falling short of the manifest error standard. ... As we settled in Byrd, specific intent represents an "essential element" and its omission results in manifest error.¹⁷ ...

Nor do the instructions viewed as a whole cure the deficiency. ... Contrary to the State's assertions, Instruction 6, requiring a finding "the defendant intentionally assault," and Instruction 8, defining "intent," afford no further indication of the essential specific intent element. ...

... By relieving the State of its burden of proving every essential element beyond a reasonable doubt, the omission of an element of the crime produces such a fatal error.

Eastmond, 129 Wn.2d at 502-03. The court also held this constitutional issue could be raised for the first time on appeal. Id.

The gravamen of Byrd and Eastmond is that whether an assault is a crime turns not merely on

¹⁷ In State v. Daniels, 87 Wn. App. 149, 940 P.2d 690 (1997), review denied, 133 Wn.2d 1031 (1998), the court rejected a similar issue raised for the first time on appeal, concluding that the specific intent was merely a "definition" and not an "essential element" of assault by battery. 87 Wn. App. at 155-56. This conclusion was directly rejected by Eastmond.

the perception of the complaining witness, but on the intent of the accused. This requirement is consistent with the way people interact in our society.

It makes no sense **not** to require an intent to harm or offend, or to cause fear of harm or offense, when the assault consists of an actual touching. There are countless ways in society that we innocently touch one another: a hand on a shoulder, an impulsive embrace, a touch to one's hand or arm to get one's attention. A person can intentionally touch another, perhaps not knowing the other person has an injury in that particular spot, and so unintentionally cause pain, harm or offense. But if the contact was intended for perfectly innocent purposes, it cannot be considered a crime because it was received as an offense.

ii. Assault based on battery

In this case, unlike Byrd and Eastmond, the State claimed assault based on actual battery, not merely an attempt. The same specific intent, however, must be found, or innocent actions are made a crime.

Court decisions have incorporated the civil battery definition into the criminal definition of assault. Seattle v. Taylor, 50 Wn. App. 384, 388, 748 P.2d 693 (1988). Those civil cases, however, are clear that battery requires the intent to harm or offend.

An act cannot, however, be considered a battery unless the actor intended to cause a harmful or offensive contact with another person.

O'Donoghue v. Riggs, 73 Wn.2d 814, 820, 440 P.2d 823 (1968). Causing an injury without this specific intent creates a cause of action in negligence, but not battery. But negligence cannot be an intentional assault.

The rule that determines liability for battery is given in 1 Restatement, Torts, 29, § 13, as:

"An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if

"(a) **the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof** to the other or a third person, and

"(b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and

"(c) the contact is not otherwise privileged."

Garratt v. Dailey, 46 Wn.2d 197, 200-01, 279 P.2d 1091 (1955) (emphasis added).

If intent to cause offense or harm is an element of civil battery, there is no legitimate reason not to require such an element for a crime based on the same act. Indeed, it would make all three of our criminal definitions of assault consistent with one another and with the civil definitions.

In both Byrd and Eastmond, the instructions as applied to the specific acts would have permitted the jury to convict although they believed the defense theory of the case. This case presents the same dilemma. Without the element of specific intent to harm or offend, an intentional touching, even if it does inadvertently harm or offend, cannot be a crime.

Given the particular evidence and defense theory of this case, Instruction No. 8 required conviction even if the jury believed Ms. Shved accidentally dropped her daughter the previous week in the bathtub, perhaps causing a fracture, even if it believed Mr. Dologan had caused the other injuries to the child. Clearly Ms. Shved

"intentionally touched" her daughter as she bathed her. If that intentional touching caused a fracture, these instructions permit the jury to find element (1) satisfied.

The jury further could find element (3) satisfied if it found Mr. Dologan had abused the baby and caused her many fractures; but also found Ms. Shved had engaged in a pattern or practice of "intentionally touching" her daughter causing her more than transient pain.¹⁸ The evidence here supported finding that if Ms. Shved had handled her daughter after Mr. Dologan had caused various fractures, the pain the child experienced from the touch because of the pre-existing fractures would satisfy this element of the crime.

With this definition, the medical staff at the hospital also could be guilty of criminal assault for intentionally touching the baby and causing her harm or offense (pain) from her existing injuries.

This application of these instructions to these facts demonstrates the constitutional error

¹⁸ At sentencing, the foster father who cared for Ella one month after she was taken to the hospital said the broken bones made her cry out if he even touched her there. VRP 118.

of omitting an essential element: the intent to harm or offend by intentionally touching.

Due process requires the court to instruct the jury on every element of the charged crime. The right to a jury trial requires the jury to consider each of the legal elements. By omitting this element of specific intent, the court denied Ms. Shved these constitutional rights. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 21, 22.

3. THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUPPORT THE CONVICTION IN THIS CASE.

As noted above, the elements of this charge required the State to prove Ms. Shved:

(b) Intentionally assault[ed] the child and ...

(ii) Cause[d] substantial bodily harm, and the person ha[d] 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

RCW 9A.36.120(b)(ii)(A).

In reviewing the sufficiency of evidence in a criminal case, the question is whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State.

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996);
State v. Green, 94 Wn.2d 216, 220, 616 P.2d 628
(1980).

In this case there was no direct evidence that Ms. Shved ever intentionally harmed her child. No one ever saw or heard any behavior to suggest any violence, anger, frustration, or abuse. She took her to regular doctor's check-ups -- not something a parent would do if trying to conceal broken bones. The doctor confirmed the child was doing well three weeks before the fractures were discovered. There was no evidence that Ms. Shved had any motive to harm her daughter. There was no evidence that the child was afraid of Ms. Shved. There was no confession of abusive behavior.

Contrast: State v. Madarash, 116 Wn. App. 500, 66 P.3d 682 (2003) (defendant admitted she forced 4-year-old to drink 48-ounce soda as punishment, pushed her fully clothed into a cold bath, continually and forcefully threw water into her mouth, pulled her under the water face down in the tub; "numerous witnesses" testified about prior abusive treatment); State v. Jennings, 106 Wn. App. 532, 536, 24 P.3d 430, review denied, 144 Wn.2d

1020 (2001) (defendant admitted he hit infant on head and in stomach, picked her up by leg and threw her, used plastic spoon to stab into vagina and rectum, and injected lamp oil into her IV shunt); State v. Creekmore, 55 Wn. App. 852, 856-58, 783 P.2d 1068 (1989), review denied, 114 Wn.2d 1020 (1990) (child reported defendant kicked him in stomach; witness overheard beatings from next room; bowel ruptured by blunt trauma more consistent with kick than a punch; defendant admitted beating with yardstick, said child deserved injuries for defying him by messing his pants); State v. Berube, 150 Wn.2d 498, 79 P.3d 1144 (2003) ("numerous witnesses" observed parents' abusive treatment of 23-month-old; others overheard beating with a belt, screaming and crying; parents admitted difficulty "disciplining" child, spanking didn't work); State v. Kiser, 87 Wn. App. 126, 940 P.2d 308 (1997), review denied, 134 Wn.2d 1002 (1998) (multiple fractures, blunt trauma to liver, bite marks matching father's teeth on 4-month-old; mother overheard "thumping sounds" when father in next room with child); State v. Edwards, 92 Wn. App. 156, 961 P.2d 969 (1998) (2-year-old had bruises

over most of body in different stages of healing; blunt traumas to head, fractured skull; defendant admitted he grabbed her and shoved to floor where she hit head, picked her up by hair pulling out clumps of hair, and caused deep bruises on stomach and bottom "for being bad"); State v. Nason, 96 Wn. App. 686, 981 P.2d 866 (1999), review denied, 139 Wn.2d 1023 (2000), cert. denied, 531 U.S. 831 (1999) (multiple witnesses connected defendant to burning and assorted bruising; defendant admitted biting child as part of game); State v. Russell, 69 Wn. App. 237, 848 P.2d 743, review denied, 122 Wn.2d 1003 (1993) (severe blow to 20-month-old's abdomen, rupturing liver, left marks matching defendant's brass knuckles; defendant admitted causing death and two previous assaults).

The evidence of Vadim Dologan's access to the baby and motive to hurt her in this case distinguishes it from State v. Norlin, 134 Wn.2d 570, 951 P.2d 1131 (1998). In Norlin, doctors discovered 3-month-old Nicholas with a severe head injury. The defendant said it was caused by a fall from a couch. X-rays, however, revealed fractures in an arm, ankle, and two ribs, all occurring

within a 3-week period before the x-rays. A doctor testified this "constellation" of injuries was "difficult to explain in any way other than maltreatment or abuse." 134 Wn.2d at 574.

Although up to seven other people had cared for the baby at various times before the head injury, Mr. Norlin provided a major portion of his care. The defendant admitted causing a bruise on his back and a red mark over his eye, and that the child had fallen and injured himself at least four times while in his care. 134 Wn.2d at 575.

Furthermore, there was no evidence at trial that any other person had been alone with Nicholas when these incidents occurred. Neither was there evidence of any other incidents that could have caused the arm, ankle, and rib injuries testified to by the physicians.

134 Wn.2d at 583.

Unlike Norlin, here the defense presented significant evidence that Vadim Dologan was alone with the baby during the time period when these injuries are believed to have occurred. Of course, Natalya Dologan also was alone with her for significant time. But Vadim had the motive to assault this baby that no one else had. This evidence precluded a reasonable juror from finding

the State had proven beyond a reasonable doubt that Ms. Shved was the only person who could have hurt the baby.

4. THE TRIAL COURT ERRED BY EXCLUDING THE EVIDENCE OF VADIM DOLOGAN'S HISTORY OF VIOLENT AND ASSAULTIVE BEHAVIOR AND HATRED FOR FEMALES.

"A criminal defendant has a constitutional right to present all admissible evidence in his defense." State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). If the evidence is of even minimum relevancy, the court may exclude it only if the State has a compelling interest in doing so. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

Defense evidence is relevant if it meets or overcomes any of the State's evidence. One can view it by each piece of evidence: e.g., if the State presents a confession, the defense may present any evidence tending to contradict that confession, or that someone else confessed. Or one can compare it to the State's larger theory of the case: if the defense evidence makes that theory or a supporting inference less likely, it is admissible.

a. Other Suspect Evidence

Historically, courts of this State have required a minimal foundation for evidence of another suspect where there is direct evidence of the defendant's guilt.

Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.

State v. Mak, 105 Wn.2d 692, 716, 718 P.2d 047, cert. denied, 479 U.S. 995 (1986); State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932); State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933); State v. Drummer, 54 Wn. App. 751, 775 P.2d 981 (1989); State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993).

However, courts apply a lesser foundational requirement to cases in which the State presents only circumstantial proof of the crime:

[I]f the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient **evidence of the same character** tending to identify some other person as the perpetrator of the crime.

State v. Clark, 78 Wn. App. 471, 478-49, 898 P.2d 854, review denied, 128 Wn.2d 1004 (1995) (emphasis

added); Jones v. Wood, 207 F.3d 557, 562 (9th Cir. 2000); Leonard v. Territory, 2 Wash. Terr. 381, 396, 7 P. 872 (1885).

The court here found the defense met this foundation. It permitted evidence that Vadim had the opportunity to hurt this baby. But by excluding evidence of Vadim's violent and assaultive history, it denied the right to present a defense of circumstantial evidence to rebut the State's circumstantial case against Ms. Shved.

b. Cases of Circumstantial Evidence

When, as here, the State has only a circumstantial case, the crux is the interpretation of that evidence, the inferences to be drawn, the gaps the jury must fill. In circumstantial cases, the defense evidence "meets" and "neutralizes" the State's evidence by contradicting the evidence or the inferences, or by showing the same or similar evidence equally implicates another person.

One main question on the trial was, Who killed the deceased? Addressed to this, the evidence for the prosecution was wholly circumstantial; and some of it, tending to identify the defendant as the slayer, was of a like description to that proposed to be obtained from this witness. Defendant, therefore, had a right to meet and neutralize or overcome the evidence of the prosecution, tending

to identify himself as the guilty party, by evidence of the same nature tending to identify some other person as the perpetrator of the crime.

Leonard v. Territory, supra, 2 Wash. Terr. at 396.

In addition, ... the prosecution theory was that there was no other person who could have committed the crime - a theory that [the defense] was entitled to rebut once the prosecution relied upon it.

Jones v. Wood, supra, 207 F.3d at 562.

In Jones v. Wood, Mr. Jones was in the bedroom and his wife was bathing when he heard her scream. In the hallway he saw a man with a knife come out of the bathroom. He swung his hand toward the knife, cutting his hand. The intruder pushed him and he hit his head against the wall. Upon recovering, he went into the bathroom where his wife was bleeding profusely. The murder weapon was on the floor near the tub. Neither Mr. Jones nor his daughters had ever seen the knife before.

The State charged Mr. Jones with murder because he was in the house when she was killed between 9:30-10:00 p.m., his head showed no sign of trauma, and the police found no evidence that anyone else had done it. Jones v. Wood, 114 F.3d 1002, 1004-06 (9th Cir. 1997), after remand, 207 F.3d 557, 559-60 (9th Cir. 2000).

The Ninth Circuit granted a writ of habeas corpus based on post-conviction investigation that trial counsel had failed to conduct, although he was directed to do so. The investigation showed Busby, a young neighbor infatuated with the Jones daughter, was blocked by Mr. and Mrs. Jones from contacting her. He usually met her secretly at her home, at 9:30-10:00 on Friday or Saturday when her parents were out. She had told him that morning she'd be home and her parents out. But they had changed their plans and she hadn't told him of the change. Although he and his mother told police he'd been home the entire night of the murder, his sister and a friend testified differently. Jones, 207 F.3d at 560-62.

The only issue on appeal after remand was whether Jones was able to lay a foundation under Washington law to admit the evidence implicating Busby. The Ninth Circuit held it was admissible.

If the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.

... The prosecution's case was almost entirely circumstantial. Thus, under Clark, Jones was entitled to offer "evidence of the same character tending to identify some other person as the perpetrator of the crime."

Jones v. Wood, 207 F.3d at 562-63, quoting State v. Clark, supra.

As in Jones v. Wood, the State's evidence against Ms. Shved was entirely circumstantial and relatively weak: Ms. Shved was primarily responsible for the care of her infant daughter. As in Jones, the State argued that no other person could have committed these crimes.

In State v. Rehak, supra, the victim's wife called the police saying she'd found him dead. She said she walked to the barn at 11:00 a.m. and returned at 11:30 to find him shot. But fresh snow fell the night before. There were no tracks to the barn or at the entry of their rural property before emergency vehicles arrived.

The defense offered evidence that the victim's son could have killed him, based on a history of quarreling and financial benefit if the wife were convicted. He also knew where the murder weapon was kept and had no alibi for the relevant time.

The court affirmed the exclusion of this evidence. The son lived in Snohomish County; there was no evidence he was anywhere near the victim's Clark County residence. Thus the proposed motive evidence did nothing to meet or overcome the wife's presence and opportunity.

In State v. Clark, supra, the defendant was convicted of first degree arson for a fire at his office discovered at 11:30 p.m. He had been at the office earlier that evening. He was fully insured. He filed a claim for the loss. He was divorced, his credit cards were "maxed out" and business was slow. Id., 78 Wn. App. at 475-76.

Clark offered evidence that his girlfriend's ex-husband, Arrington, had set the fire:

Arrington's **alleged motive was revenge** against Clark for having an affair with his wife and, Arrington believed, molesting his daughter. Arrington had the opportunity to set the fire because his vehicle was seen near the house prior to the fire and because, although he had a similar alibi to Clark's, he nonetheless may have had time to drive to his meeting after setting the fire. Clark also sought to offer evidence that Arrington **had previously threatened to set his former wife's house afire** and that he had told her he knew how to commit arson without being detected.

Clark, 78 Wn. App. at 479-80 (emphases added).

The trial court excluded all evidence about Arrington. The Court of Appeals reversed.

[T]he evidence against Clark was entirely circumstantial. ... While this evidence is not insufficient to support a conviction, **no evidence linked Clark directly to the fire.**

Similar evidence indicates that Arrington had the motive, opportunity, and ability to commit the arson. ... Like Clark, while no evidence directly linked Arrington to the fire, this evidence nonetheless provides a trail of evidence sufficiently strong to allow its admission at trial.

Clark, 78 Wn. App. at 479-80.

In State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996), a child was abducted from her home the night of January 24-25. Her body was found six months later. The State argued the defendant killed her the same night he abducted her. The defense offered a witness who had seen the child alive with another man later on the 25th or the next day. The trial court excluded this evidence.

The Supreme Court reversed and remanded for a third trial.

Although the State correctly notes this testimony would not necessarily have exculpated Maupin, as he may have been acting in concert with the persons Brittain claimed to have seen, **it at least would have brought into question the State's version of the events of the kidnapping.** An eyewitness account of the

kidnapped girl in the company of someone other than Maupin after the time of the kidnapping certainly does point directly to someone else as the guilty party

Maupin, 128 Wn.2d at 928 (emphasis added).

"Either way, Brittain's story directly contradicts, or at least raises considerable doubt about, the State's claim that the murder occurred right after the kidnapping on January 25." Id.

In the same respect, the full evidence about Vadim at least raises considerable doubt about the State's claim that Ms. Shved had to have committed this crime.

c. Evidence in This Case Was Admissible Under ER 404(b).

ER 404(b) provides:

(b) Other Crimes, Wrongs, or Acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b) permits evidence of prior bad acts if admitted to prove motive and identity.

"Motive is '[s]omething, esp[ecially] willful desire, that leads one to act.'" Black's Law Dictionary 1110 (9th ed. 2009), quoted with

approval in State v. Venegas, 155 Wn. App. 507, 526, 228 P.3d 813 (2010).

The State's theory was that Ms. Shved must have caused her daughter's injuries because she was the primary caregiver, she gave no other explanation for how they occurred prior to trial, and the doctors said the injuries could not be accidental. As in Clark, however, the State had no direct evidence that Ms. Shved injured her baby.

The defense theory was that Ms. Shved did not assault her daughter. Yet there was no dispute the baby was injured. By implication, someone else had to have done it. Only in preparation for the criminal trial¹⁹ did the family consider that her psychotic brother could have done it. The court properly permitted evidence that Vadim had the opportunity.

But Ms. Shved had no **motive** to assault the child. As in Clark, supra, the defense wanted to prove Vadim had a **motive** to hurt the child. He previously had assaulted his own mother and his sister. His prior assaultive behavior led to him

¹⁹ The defense thus discovered and attempted to present the evidence earlier than occurred in Jones, supra.

being jailed, hospitalized, and disciplined within the hospital. These prior assaults and resulting confinement gave him a motive for revenge against his sister and/or his mother. He knew the newborn daughter was precious to them. These prior assault were at least as relevant as Arrington's prior threats to set his wife's house afire was in that arson case. Clark, supra, 78 Wn. App. at 479-80.

These prior assaults and resulting confinement also gave him a **motive to lie** about assaulting the baby. If he truthfully said he had assaulted her, he would be returned to the hospital and/or jail.

He had an ongoing hatred of females, documented during his hospitalization and part of his diagnosis and prognosis. This hatred provided yet another **motive** to hurt this female baby.

This evidence also was admissible to prove the **identity** of the person who hurt the baby. By presenting circumstantial evidence that Vadim had a motive to hurt the baby when Ms. Shved had no such motive, this evidence became relevant to show identity.

In State v. Suttle, 61 Wn. App. 703, 812 P.2d 119 (1991), the trial court admitted evidence that

Suttle escaped from jail to support the State's theory that he participated in a robbery. The appellate court held the escape status became admissible once the defense presented evidence that another person, Hunter, committed the robbery instead of Mr. Suttle.

While the escape evidence would not have been admissible in the State's case in chief, **the defense put motive in issue** when their witness, Ron Ivy, testified that it was Hunter rather than Suttle who robbed the store with Ivy. At that point, **the question of which one of them was more likely to have been Ivy's partner in the robbery became the central issue.** Once the defense implicated Hunter in the robbery, Suttle's escape status became relevant to **motive.**

... Here the escape evidence was **relevant to allow the jury to compare the motives of two *known* potential suspects.**

Suttle, 61 Wn. App. at 711-12 & n.9 (bold emphases added, court's italics).

Once the jury heard evidence of Vadim's opportunity to hurt the child, as in Suttle, "the question of which one of them was more likely to have [committed the crime] became the central issue." Thus, as in Suttle, Vadim's motive was essential to let the jury compare the evidence of the two potential suspects.

The State had no evidence of Olga's motive. Unlike other cases of child abuse, there was no suggestion she was angry; that she was "disciplining" the child; that anyone had ever seen or heard anything suggesting she was violent with the baby. Compare cases cited above at 56-59.

Vadim's history of assaultive behavior and resulting confinement also was admissible to rebut the State's argument that Eastern State Hospital would not release a person who might be assaultive or violent. His mother, Natalya, said she warned his therapist he would be assaultive, to please put him back in the hospital. By concealing his violent history from the jury, the court left the jury to believe Natalya was exaggerating or imagining her concerns rather than having them solidly based in prior experience with him.

Ms. Shved had a constitutional right to present this relevant evidence of Vadim's motive to rebut the State's circumstantial evidence implicating her. It was reversible error to exclude it. U.S. Const., amend. 14; Const. art. I, §§ 3, 22.

5. MS. SHVED WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN THE PROSECUTOR OBTAINED A PRETRIAL RULING EXCLUDING EVIDENCE OF VADIM'S VIOLENT BEHAVIOR, THEN ARGUED IN CLOSING THAT VADIM WAS "NEVER VIOLENT."

The prosecutor's duty is to ensure a verdict free of prejudice and based on reason.

The district attorney is a high public officer, representing the state, which seeks equal and impartial justice, and it is as much his duty to see that no innocent man suffers as it is to see that no guilty man escapes. In the discharge of these most important duties he commands the respect of the people of the county and usually exercises a great influence upon jurors. In discussing the evidence he is ... given the widest latitude within the four corners of the evidence by way of comment, denunciation or appeal, but he has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.

State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct can deny due process and a fair trial. U.S. Const., amend. 14; Const., art. 1, § 3; Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935); Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984).

It is improper for a prosecutor, having obtained a court order excluding evidence, to then argue to the jury that such evidence does not

exist. State v. Kassahun, 78 Wn. App. 938, 952, 900 P.2d 1109 (1995). By obtaining a court order excluding Vadim's history of violent behavior, it was dishonest and inherently unfair to then argue to the jury that Vadim was "never violent."

Here the prosecutor moved in limine to exclude any evidence of Vadim's violent behavior. The trial court granted that motion as to any violence outside the period of May 3-June 16, 2006. Having won this exclusion of evidence, the prosecutor nonetheless argued Vadim was "never violent." Arguing facts directly contrary to what he knew was the truth, but the jury could not know because of his successful pretrial motion, was flagrant and ill-intentioned misconduct.²⁰ This improper argument denied Ms. Shved due process.

²⁰ Flagrant and ill-intentioned prosecutorial misconduct is not waived by trial counsel's failure to object. State v. Charlton, 90 Wn.2d 657, 660-61, 585 P.2d 142 (1978) (prosecutor argued in rebuttal defendant's failure to call wife to testify, despite spousal privilege).

6. THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE MS. SHVED'S STATEMENTS TO THE POLICE WHEN THE STATE DID NOT ESTABLISH THE STATEMENTS WERE MADE AFTER AN EFFECTIVE WAIVER OF MIRANDA RIGHTS.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be compelled in any criminal case to be a witness against himself." The Due Process Clause of the Fourteenth Amendment

secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement-- the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence.

Malloy v. Hogan, 378 U.S. 1, 8, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964); Missouri v. Seibert, 542 U.S. 600, 607, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

a. The State Bears the Burden of Proving a Defendant's Statements are Admissible.

The Constitution requires police to advise a suspect of her constitutional rights before questioning her. If the police fail to advise of the rights, the statements made are presumed involuntary and not admissible in court in the State's case in chief. Miranda v. Arizona, 384

U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

To implement these constitutional protections, CrR 3.5 provides for a pretrial hearing on the admissibility of any statements by a defendant.

The government bears the burden of showing, by a preponderance, that the suspect understood his rights and voluntarily waived them.

State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008), citing Edwards v. Arizona, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

In this case, the court improperly placed the burden of proving a voluntary, knowing and intelligent waiver on the defense instead of on the State:

With regard to the statements to Officer Lee, obviously there is a difference of opinion.²¹ I remember Officer Lee indicating that he read them one right at a time and asked each time so there is a difference of opinion on that. The interpreter indicated as I recall her testimony that the defendant was confused when the rights were read. Nothing was ever gone into that with the defendant. While her confusion could have been why I am being read my rights. That could have been the confusion. Given all the testimony that is before me I will find that the interrogation by officer Lee was custodial but the rights were properly read the defendant and the defendant knowingly and intelligently waived

²¹ Obviously the court's findings were not "undisputed facts." CP 52. Defense counsel argued against them. VRP 103-05.

those rights and any statements made thereafter are admissible.

VRP at 106.

Officer Calvazos testified he did not give Ms. Shved Miranda warnings. Detective Lee testified, nearly three years after the interview, that he questioned Ms. Shved over several hours through the night, from 1:00 a.m. to 4:58 a.m., with one break. He testified "at some point" he advised her of her constitutional rights; he never explained at what point that was, or what statements she made before or after he advised her of her rights. He used no form to record the time of advice or her waiver.

Further complicating the facts in this case is the reliance on an interpreter who was not certified for legal interpreting. She expressed concern that the detective spoke too fast when he read the rights. She had never interpreted the rights before, and she had never tried to interpret as fast as he went through these rights that night.

The interpreter acknowledged Ms. Shved was confused about many of the aspects of the questioning that night. Contrary to the court's statement that the defendant did not address any "confusion" about the right, Ms. Shved said she

didn't know she had the right to remain silent.
VRP 95.

b. The Police Must Advise of Rights
Before Eliciting Statements, Not
After.

The evidence at the CrR 3.5 hearing does not support the court's findings and conclusions that Ms. Shved was read her rights before she made statements.

Det. Lee did not testify that he advised Ms. Shved of her rights before questioning her. He said he did so "at some point" in the hours he spent with her in the hospital room. It is crucial to know which statements were made before and which after the advice of rights.

In Seibert, supra, the Supreme Court explicitly rejected a police practice of questioning the suspect without Miranda warnings until she said something incriminating, then advising her of her rights, then repeating the questions asked earlier to obtain the incriminating statements again.

This holding already was the law in Washington. State v. Lavaris, 99 Wn.2d 851, 664 P.2d 1234 (1983).

[A]ny confession obtained in the absence of proper Miranda warnings is by definition "coerced" -- regardless of how "friendly" the actual interrogation. ...
...Unless he understood that the giving of Miranda rights meant that any prior incriminating statements could not be used against him, petitioner's subsequent confession could not have been voluntary. Having "let the cat out of the bag", the psychological damage was done; the subsequent Miranda warnings could not undo that damage. Since the State showed no insulating factor to separate the post-Miranda confession from the pre-Miranda confession, both confessions are inadmissible. We emphasize that in all such cases as this, the State bears the burden of overcoming the presumption of inadmissibility.

Lavaris, 99 Wn.2d at 857, 860. Thus Ms. Shved's statements are presumed inadmissible. The State must prove the advice of rights was before any statements that were admitted into evidence. The timing of the advice of rights is crucial to knowing whether the statements were made before or after the rights.

Without this evidence, the court erred in finding the interview took place after the advice of rights.

c. The Record Does Not Support a Conclusion that Ms. Shved Understood Her Rights and Gave Statements Freely, Voluntarily, and With Knowledge of the Consequences.

Whatever Det. Lee said to Ms. Shved, she heard only through the Russian-language interpreter. The interpreter had no experience with Miranda rights, was not certified for legal interpretation, had never interpreted as fast as she did that night with Det. Lee, and acknowledged Ms. Shved was often confused during the questioning. Ms. Shved specifically testified she did not know she had a right to remain silent. VRP 95.

Det. Lee may have believed that Ms. Shved understood her rights. However, that subjective belief is not adequate when communicating through an interpreter, and the interpreter and the defendant both testify she was confused.

On this record, given the complications of an interpreter, no written advice-of-rights form, no written waiver of rights, it was error for the trial court to conclude that Ms. Shved made a knowing, intelligent, and voluntary waiver of her rights before answering the detective's questions.

d. Prejudice

A court's error in admitting a defendant's statement in violation of Miranda is harmless only "if the untainted evidence alone is so overwhelming that it necessarily leads to a finding of guilt."

State v. Nason, supra, 96 Wn. App. at 695; State v. D.R., 84 Wn. App. 832, 838, 930 P.2d 350, review denied, 132 Wn.2d 1015 (1997).

The evidence in this case was in no way "overwhelming" of guilt. No evidence actually connected Ms. Shved with her daughter's injuries. No one suggested she was ever angry or even impatient with the baby, that she had a reason to hurt her, or that she even had reason to know the child was significantly hurt.

Ms. Shved's statements included admitting she had dropped the baby in the bathtub and had twice bruised her face by bumping it on the plastic stroller handle. The bathtub was unlikely to cause the fractures, but the bruising was consistent with the bump. But Det. Lee didn't merely repeat Ms. Shved's statement; he repeatedly characterized them as "changing her story," "minimizing her child's injuries," "taking some ownership," etc. If her

statements were not admissible, he could not have testified in such a manner.

7. THE COURT VIOLATED MS. SHVED'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND RIGHT TO A JURY TRIAL BY PERMITTING EXPERT OPINION ON THE ULTIMATE ISSUE OF WHETHER THE CHILD'S INJURIES WERE "NON-ACCIDENTAL."

By characterizing the child's injuries as "non-accidental," the expert witnesses in this case were expressing an opinion on an ultimate factual issue: whether the person who caused these injuries acted with intent. This issue is ultimately for the jury to determine.

This testimony violated Ms. Shved's right to have the jury determine this fact, a right guaranteed by due process. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 21, 22. See State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007); State v. Clausing, 147 Wn.2d 620, 56 P.3d 550 (2002); and State v. Christopher, 114 Wn. App. 858, 60 P.3d 677 (2003); State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) (expert's diagnosis that victim had "rape trauma syndrome" improper to prove rape occurred).

D. CONCLUSION

There was insufficient evidence as a matter of law to support the conviction. This Court should reverse and dismiss this case.

There also was constitutional error in permitting a verdict based on a method of committing the crime that was not charged. For this reason, this Court should reverse the conviction and remand for a new trial.

The additional errors require reversal and remand for a new trial where the defense is permitted to present all evidence relevant to its defense, the jury is properly instructed on all elements of the charged crime, the prosecutor does not give an improper argument, and the State's experts do not testify to the ultimate jury issue.

DATED this 8th day of November, 2010.

Respectfully submitted,


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