

NO. 31557-2

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

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN ZANE WOMAC, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 02-1-05575-5

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
JOHN M. SHEERAN
Deputy Prosecuting Attorney
WSB # 26050

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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STATE OF WASHINGTON
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C.	<u>ARGUMENT</u>	12
1.	THE TRIAL COURT DID NOT ERR WHEN IT PERMITTED THE STATE TO INTRODUCE EVIDENCE OF PRIOR ASSAULTS BY DEFENDANT ON HIS OTHER CHILDREN.....	12
2.	DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE DOCTRINE OF CUMULATIVE ERROR	24
3.	THE TRIAL COURT DID NOT ERR WHEN IT DETERMINED DEFENDANT’S CONVICTIONS FOR MURDER IN THE SECOND DEGREE AND ASSAULT IN THE FIRST DEGREE ARE VALID CONVICTIONS EVEN THOUGH THE DOUBLE JEOPARDY CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS PROHIBIT ADDITIONAL PUNISHMENT..	38
4.	ANY ERROR IN DEFENDANT'S EXCEPTIONAL SENTENCE WAS HARMLESS.....	42
5.	IF THIS COURT DETERMINES REMAND FOR RESENTENCING IS THE APPROPRIATE REMEDY IT SHOULD NOT DIRECT THE SENTENCING COURT TO IMPOSE A SENTENCE WITHIN THE STANDARD RANGE.	46
D.	<u>CONCLUSION</u>	58

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Did the court err when it permitted the State to introduce evidence of defendant’s assaults on his other children pursuant to ER 404(b)’s intent and absence of mistake exceptions, when he claimed the victim’s injuries were the result of an accidental fall? 1

2. Is defendant entitled to relief under the cumulative error doctrine when there was no error?..... 1

3. Did the trial court err when it determined defendant’s convictions for murder in the second degree and assault of a child in the first degree are valid convictions? 1

4. Does the harmless error doctrine apply to exceptional sentences imposed contrary to the dictates of Blakely v. Washington? 1

5. Is any error in the trial court’s imposition of an exceptional sentence harmless, when there is no question the facts used to support the imposition of the exceptional sentence, particular vulnerability of the victim and abuse of a position of trust, existed?..... 1

6. If the sentencing error was not harmless, should the trial court have the option of empanelling a jury on remand, for the purpose of finding the facts necessary for the imposition of an exceptional sentence? 1

B. STATEMENT OF THE CASE..... 2

1. Procedure 2

2. Facts 3

Table of Authorities

Federal Cases

<u>Abney v. United States</u> , 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed.2d 651 (1977).....	39, 40
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	42, 43, 44, 45, 49, 50, 54, 55
<u>Blakely v. Washington</u> . __ U.S. __, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004)	1, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 58
<u>Brown v. United States</u> , 411 U.S. 223, 232 (1973)	24
<u>Neder v. United States</u> , 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed.2d 35 (1999).....	24, 45, 46
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969).....	38
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).....	45
<u>Rose v. Clark</u> , 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986).....	24
<u>United States v. Ameline</u> , 376 F.3d 967, (9 th Cir. July 21, 2004).....	52, 55, 56
<u>United States v. Buckland</u> , 289 F.3d 558, 568 (9 th Cir. 2002).....	54, 55, 56
<u>United States v. Cernobyl</u> , 255 F.3d 1215 (10 th Cir. 2001).....	55
<u>United States v. Cotton</u> , 535 U.S. 625, 122 S. Ct. 1781, 151 L. Ed.2d 689 (2002).....	44, 45

State Cases

<u>BC Tire Corp. v. GTE Directories Corp.</u> , 46 Wn. App. 351, 355, 730 P.2d 726 (1986), <u>review denied</u> , 108 Wn.2d 1013 (1987).....	34
<u>City of Seattle v. Heatley</u> , 70 Wn. App. 573, 577-80, 854 P.2d 658 (1993), <u>review denied</u> , 123 Wn.2d 1011, 869 P.2d 1085 (1994)	29, 30, 31
<u>Foundation for the Handicapped v. Department of Social and Health Services</u> , 97 Wn.2d 691, 628 P.2d 884 (1982)	52
<u>Grant v. Spellman</u> , 99 Wn.2d 815, 818-19, 664 P.2d 1227 (1983)	57
<u>Hawkins v. Rhay</u> , 78 Wn.2d 389, 474 P.2d 557 (1970)	54
<u>In re Lehman</u> , 93 Wn.2d 25, 27, 604 P.2d 948 (1980)	57
<u>In re Lord</u> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994).....	25
<u>State ex rel. Morgan v. Kinnear</u> , 80 Wn.2d 400, 402, 494 P.2d 1362 (1972).....	57
<u>State v. Allen</u> , 50 Wn. App. 412, 418, 749 P.2d 702 (1988).....	30
<u>State v. Allert</u> , 117 Wn.2d 156, 170, 815 P.2d 752 (1991).....	47
<u>State v. Anderson</u> , No. 75063-7.....	42
<u>State v. Badda</u> , 63 Wn.2d 176, 385 P.2d 859 (1963).....	26
<u>State v. Balisok</u> , 123 Wn.2d 114, 117, 866 P.2d 631 (1994).....	35
<u>State v. Banks</u> , 149 Wn.2d 38, 44, 65 P.3d 1198 (2003).....	45
<u>State v. Barber</u> , 38 Wn. App. 758, 771, 689 P.2d 1099 (1984)	32
<u>State v. Batista</u> , 116 Wn.2d 777, 793-94, 808 P.2d 1141 (1991)	47
<u>State v. Becker</u> , 132 Wn.2d 54, 61, 935 P.2d 1321 (1997).....	54
<u>State v. Bell</u> , 10 Wn. App. 957, 521 P.2d 70, <u>review denied</u> , 84 Wash. 2d 1006 (1974).....	18
<u>State v. Black</u> , 109 Wn.2d 336, 348, 745 P.2d 12 (1987).....	29

<u>State v. Black</u> , 46 Wn. App. 259, 262, 730 P.2d 698 (1986).....	31
<u>State v. Boggs</u> , 80 Wn.2d 427, 433, 495 P.2d 321 (1972).....	23
<u>State v. Boot</u> , 89 Wn. App. 780, 788, 950 P.2d 964 (1998)	15
<u>State v. Bouchard</u> , 31 Wn. App. 381, 385, 639 P.2d 761 (1982)	16
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	21
<u>State v. Brown</u> , 139 Wn.2d 20, 23, 983 P.2d 608 (1999).....	35
<u>State v. Brown</u> , 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002).....	45
<u>State v. Carleton</u> , 82 Wn. App. 680, 686, 919 P.2d 128 (1996)	17
<u>State v. Clark</u> , 143 Wn.2d 731, 24 P.3d 1006 (2001).....	54
<u>State v. Clark</u> , 53 Wn. App. 120, 123, 765 P.2d 916 (1988).....	34
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984)	25, 27
<u>State v. Courser</u> , 199 Wash. 559, 560, 92 P.2d 264 (1939).....	53
<u>State v. Cruz</u> , 77 Wn. App. 811, 814, 894 P.2d 573 (1995)	30
<u>State v. Deal</u> , 128 Wn.2d 693, 703, 911 P.2d 996 (1996)	46
<u>State v. Demery</u> , 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001).....	30-31
<u>State v. Dennison</u> , 115 Wn.2d 609, 628, 801 P.2d 193 (1990).....	15, 23
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	20, 32
<u>State v. Donald</u> , 68 Wn. App. 543, 547, 844 P.2d 447 (1993)	32-33
<u>State v. Farr-Lenzini</u> , 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) ...	30
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999)	54
<u>State v. Fowler</u> , 187 Wash. 450, 60 P.2d 83 (1936)	53
<u>State v. Furth</u> , 5 Wn.2d 1, 104 P.2d 925 (1940)	53
<u>State v. Gocken</u> , 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)	38

<u>State v. Goebel</u> , 40 Wn.2d 18, 21, 240 P.2d 251 (1952)	15
<u>State v. Gogolin</u> , 45 Wn. App. 640, 645-46, 727 P.2d 683 (1986).....	17
<u>State v. Gordon</u> , 663 N.W.2d 765, 776-77 (2003).....	45
<u>State v. Gore</u> , 143 Wn.2d 288, 315, 21 P.3d 262, (2001) <i>overruled on other grounds by Blakely v. Washington</i> , supra.....	50
<u>State v. Guloy</u> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).....	13, 14
<u>State v. Henthorn</u> , 85 Wn. App. 235, 932 P.2d 662 (1997).....	49
<u>State v. Hernandez</u> , 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), review denied, 140 Wn.2d 1015 (2000).....	15, 16
<u>State v. Hess</u> , 86 Wn.2d 51, 52, 541 P.2d 1222 (1975).....	32
<u>State v. Hettich</u> , 70 Wn. App. 586, 592, 854 P.2d 1112 (1993)	14
<u>State v. Hughes</u> , No. 74147-6	42
<u>State v. Jackson</u> , 102 Wn.2d 689, 696, 689 P.2d 76 (1984)	17
<u>State v. Johnson</u> , 113 Wn. App. 482, 487, 54 P.3d 155 (2002), review denied, 149 Wn.2d 1010 (2003).....	41
<u>State v. Johnson</u> , 124 Wn.2d 57, 76, 873 P.2d 514 (1994).....	35
<u>State v. Johnson</u> , 90 Wn. App. 54, 74, 950 P.2d 981 (1998).....	26
<u>State v. Kinard</u> , 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979).....	26
<u>State v. Kitchen</u> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988)	25
<u>State v. Lewis</u> , 130 Wn.2d 700, 707, 927 P.2d 235 (1996).....	35
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995)	15, 17, 21
<u>State v. Manuel</u> , 94 Wn.2d 695, 700, 619 P.2d 977 (1980).....	51-52
<u>State v. Meas</u> , 118 Wn. App. 297, 75 P.3d 998 (2003)	41
<u>State v. Mercer</u> , 34 Wn. App. 654, 660, 663 P.2d 857 (1983)	20

<u>State v. Myers</u> , 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).....	32
<u>State v. Norlin</u> , 134 Wn.2d 570, 573, 951 P.2d 1131 (1998)	19, 22
<u>State v. Noyes</u> , 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966)	32
<u>State v. Potter</u> , 31 Wn. App. 883, 886-87, 645 P.2d 60 (1982)	38, 39
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	16, 18
<u>State v. Ramirez</u> , 62 Wn. App. 301, 305, 814 P.2d 227 (1991)	32
<u>State v. Recuenco</u> , No. 74964-7.....	42
<u>State v. Rehak</u> , 67 Wn. App. 157, 162, 834 P.2d 651, <u>review denied</u> , 120 Wn.2d 1022 (1992)	13, 14
<u>State v. Rice</u> , 48 Wn. App. 7, 13, 737 P.2d 726 (1987).....	23
<u>State v. Roberts</u> , 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000)	40, 51
<u>State v. Roybal</u> , 82 Wn.2d 577, 512 P.2d 718 (1973)	38
<u>State v. Russell</u> , 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), <u>cert. denied</u> , 574 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).....	25
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 362, 655 P.2d 697 (1982)	15-16
<u>State v. Sanders</u> , 66 Wn. App. 380, 388, 832 P.2d 1326 (1992)	30
<u>State v. Saunders</u> , 120 Wn. App. 800, 812, 86 P.3d 232 (2004)	30
<u>State v. Smith</u> , 106 Wn.2d 772, 776, 725 P.2d 951 (1986)	15
<u>State v. Smith</u> , 150 Wn.2d 135, 144, 75 P.3d 934 (2003)	53
<u>State v. Stevens</u> , 58 Wn. App. 478, 498, 795 P.2d 38, <u>review denied</u> , 115 Wn.2d 1025, 802 P.2d 38 (1990).....	26, 27
<u>State v. Stewart</u> , 72 Wn. App. 885, 891, 866 P.2d 677 (1994), <u>aff'd</u> , 125 Wn.2d 893, 890 P.2d 457	47
<u>State v. Swan</u> , 114 Wn.2d 613, 658, 700 P.2d 610 (1990)	13

<u>State v. Terry</u> , 10 Wn. App. 874, 883, 520 P.2d 1397 (1974)	18, 20, 22
<u>State v. Thamert</u> , 45 Wn. App. 143, 151-52, 723 P.2d 1204, review denied, 107 Wn.2d 1014 (1986).....	17
<u>State v. Thetford</u> , 109 Wn.2d 392, 397, 745 P.2d 496 (1987).....	14
<u>State v. Thomas</u> , 150 Wn.2d 821, 849-50, 83 P.3d 970 (2004).....	45
<u>State v. Thompson</u> , 47 Wn. App. 1, 733 P.2d 584 (1987).....	16
<u>State v. Toennis</u> , 52 Wn. App. 176, 186, 758 P.2d 539 (1988)	19
<u>State v. Turner</u> , 29 Wn. App. 282, 627 P.2d 1324 (1981)	16, 17
<u>State v. Wall</u> , 52 Wn. App. 665, 679, 763 P.2d 462 (1988)	26
<u>State v. Weber</u> , 99 Wn.2d 158, 166, 659 P.2d 1102 (1983)	35
<u>State v. Whalon</u> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970)	26
<u>State v. Wilber</u> , 55 Wn. App. 294, 298 n.1, 777 P.2d 36 (1989).....	30

Constitutional Provisions

Fifth Amendment, United States Constitution.....	38, 49
Fourteenth Amendment, United States Constitution	50
Sixth Amendment, United States Constitution	43, 44, 45, 52, 57
Article I, section 9, Washington State Constitution.....	38

Statutes

RCW 69.50.435	54
RCW 9.92.030	53
RCW 9.94A.530	56
RCW 9.94A.535	52, 56
RCW 9A.20.020	43

Rules and Regulations

CrR 3.5	2
CrR 6.1(a)	51
CrR 6.16(b)	51
ER 103	13
ER 401	14
ER 403	14, 22
ER 404(b).....	1, 2, 12, 14, 15, 16, 17, 19, 20, 21, 22
ER 702	31
RAP 10.3(a)(5).....	34
RAP 10.3(g)	34

Other Authorities

5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 24 (3d ed. 1989)	32
Black's Law Dictionary 810 (6th rev. ed. 1990)	18
Laws of 1903, ch. 86, §§ 1 and 2	53
Laws of 1909, ch. 249, §§ 34.....	53

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

1. Did the court err when it permitted the State to introduce evidence of defendant's assaults on his other children pursuant to ER 404(b)'s intent and absence of mistake exceptions, when he claimed the victim's injuries were the result of an accidental fall?
2. Is defendant entitled to relief under the cumulative error doctrine when there was no error?
3. Did the trial court err when it determined defendant's convictions for murder in the second degree and assault of a child in the first degree are valid convictions?
4. Does the harmless error doctrine apply to exceptional sentences imposed contrary to the dictates of Blakely v. Washington?
5. Is any error in the trial court's imposition of an exceptional sentence harmless, when there is no question the facts used to support the imposition of the exceptional sentence, particular vulnerability of the victim and abuse of a position of trust, existed?
6. If the sentencing error was not harmless, should the trial court have the option of empanelling a jury on remand, for the purpose of finding the facts necessary for the imposition of an exceptional sentence?

B. STATEMENT OF THE CASE.

1. Procedure

On December 5, 2002, the State of Washington charged Brian Zane Womac, hereinafter defendant, with one count of murder in the second degree, felony murder with the predicate felony of assault of a child, and one count of assault of a child in the first degree. CP 1-4. On July 22, 2003, the State filed an amended information charging defendant with one count of homicide by abuse, one count of murder in the second degree, felony murder with the predicate felony of criminal mistreatment in the first or second degree, and one count of assault of a child in the first degree. CP 5-11; RP 1.

On January 7, 2004, the court heard pre-trial motions. The State moved the court to admit certain evidence, pursuant to ER 404(b), regarding defendant's abuse of the victim and prior abuse of his other children. RP 16-44; CP 49-68. The court excluded some of this evidence and admitted other evidence. RP 67-74; CP 69-72. The same day the court conducted a CrR 3.5 hearing and determined the statements defendant made to law enforcement officers was be admissible. RP 74-101; CP 16-20.

The case proceeded to trial. Before the State rested its case-in-chief, it filed a second amended information, deleting language which had been included in the first amended information by accident. CP 12-13; RP

883-84. Defense counsel did not object to this amended information. RP 884. On January 23, 2004, the jury returned verdicts of guilty on all three counts. CP 14, 15, 46.

At sentencing, held March 19, 2004, the State recommended the court impose an exceptional sentence. The State cited two aggravating circumstances which would warrant an exceptional sentence: (1) extreme youth and vulnerability of the victim, and (2) abuse of a position of trust. CP 73-81. Defendant's standard range was 240 to 320 months. CP 28. The court agreed with the State and imposed an exceptional sentence of 480 months, concluding both of the aggravating factors cited by the State were applicable. CP 39-43.

2. Facts

Christa Owings met the defendant in October 2001, developed a romantic relationship with him shortly thereafter, and became pregnant with his child. RP 249-251. At the time she gave birth they had separated and she was living in Arizona. RP 251-254. Aiden (also know as Anthony) was born on July 8, 2002, about two months premature. RP 251-252. Ms. Owings called defendant after the birth and informed him for the first time that he was the father of her child. RP 254-256. Once Aiden was released from the hospital, defendant drove down to Arizona and brought Ms. Owings and Aiden back to Tacoma where they all lived in defendant's apartment. RP 257. Aiden slept in the bedroom where

defendant and Ms. Owings slept; he would sleep in a bouncer chair placed inside the crib because it was easier for him to breathe in a more upright position. RP 258-261. This bedroom was carpeted. RP 262.

Ms. Owings was a certified nurse's aide and worked for a temporary agency, Emerald City Medical Staffing. She worked twice for them: once in October and once on December 1, 2002. RP 264. Both times she worked, Aiden was left in the care of defendant. RP 264. During the time she was in Washington, from September 5 to December 1, 2002, no one cared for Aiden other than her or the defendant; Ms. Owings was the primary caregiver. RP 265-266. Ms. Owings testified that she never did anything to Aiden to hurt or injure him other than causing a bruise. RP 265-266, 301. At the time of his death, Aiden was less than five months old, and unable to walk, crawl, roll over, or sit up on his own. RP 266-267.

On December 1, 2002, Ms. Owings woke up around 4:00 a.m. because Aiden was crying. RP 269-270. She fed him, changed him and he fell back asleep. RP 270. She and the baby got up again at 5:00 a.m. and took a bath together. RP 270. Aiden seemed fine during this time and was not acting unusual in any way. RP 271. Around 5:30-5:40 a.m., Ms. Owings, defendant, defendant's two young children, and Aiden all left in defendant's car to take Ms. Owings to work at a nursing home across the street from the hospital in Olympia. RP 268, 271-272. The plan was that defendant would return to pick her up when she got off work at 3:00 p.m.

RP 273. At the point that she got out of the car, Aiden was sleeping and was fine. RP 273-274.

Ms. Owings called defendant around 1:50 p.m. to tell him that she would be getting off early at 2:25 p.m. RP 274. Defendant told her that the baby had been fussy and had diarrhea, so he had given him a bath. RP 274. He did not mention that the baby had been injured. RP 274. Ms. Owings got off work and went outside to wait for defendant. RP 275. In about five minutes, defendant arrived and parked nearby; Ms. Owings walked over to the car.

On December 1, 2002, Monte Deeds took his mother to visit a friend at Mother Joseph's Center in Olympia, Washington. RP 129. Around 2:15 p.m, he sat parked near the front entrance, waiting for his mother to return; he noticed a woman, possibly an employee, waiting out front as if waiting for a ride. RP 129-133. The woman was wearing scrubs and a dark parka with a fur collar. RP 133. Mr. Deeds then observed a car enter the area but it did not go up to the area where people were waiting; instead the car parked with its rear end butted up against the rear end of Mr. Deeds's car. RP 134. The other car was a dark gray, older model, four door sedan with a license plate of 912 FUM. RP 138, 145-146. A male got out of the car and pulled a 2 to 6 month old infant out of the back seat. RP 135, 138-139. The man looked like the defendant, although Mr. Deeds could not make a positive identification in court. RP 136-137. The woman that had been waiting in front of the building

walked over to this car. RP 135. When she arrived at the car the man was holding the baby in his arms, looking concerned. RP 139. The woman put her hand on the infant's stomach and gently shook it as if trying to wake it up. RP 139. Mr. Deeds saw no reaction from the baby. RP 139.

The man held the baby up, its head was back, the neck limp. RP 140. The woman lifted the baby's head to look at the back of the head. RP 140. The man then put the child back into the back seat and the woman went around the car and got in. RP 141. The woman then got out, opened up the back door and brought the baby out again; she blew in the baby's face then lifted an eyelid of the child. RP 142-143. She put the child back into the car, both the man and woman got into the car and it drove off in the direction of St. Peter's Hospital which was just up the road. RP 143, 154. Mr. Deeds could not say whether there were any other children in the car. RP 143. When asked if he saw any movement or reaction from the infant, Mr. Deeds stated the he possibly saw movement of the infant's head when the woman blew in the its face. RP 144-145.

Elizabeth Huston was on duty as a family liaison in the emergency room at St Peter's Hospital in Olympia, on December 1, 2002. RP 153-157. She was at the registration desk when a man, woman, two small children and an infant presented themselves. RP 157-158. The man was the defendant. RP 159-160. Defendant indicated that something was wrong with the baby. RP 161. Ms. Huston looked at the baby saw that it was a grayish blue color and that there was no movement. RP 161. She

called for the triage nurse, who came and rapidly took the baby away for treatment. RP 162-163.

During the next few hours, Ms. Huston had many brief contacts with the defendant. RP 164-168. Defendant had a cell phone and stepped outside to make a call several times. RP 164. Ms. Huston testified that at some point during these interactions, defendant said that he had driven down from Tacoma to meet his wife, and then they came to the emergency room. RP 166. She remembered that defendant said something happened when removing the infant from a car seat but could not remember the details. RP 167. She did not recall defendant saying anything about stopping at other hospitals or about dropping the baby onto the floor, or the baby falling backwards and hitting a cement floor. RP 167-168. The baby was eventually airlifted to Harborview Medical Center. RP 168. Ms. Huston did not confront defendant about child abuse and she did not hear anyone else confront defendant on this topic. RP 168.

Trudy Bateman was the triage nurse on duty when defendant brought Anthony into the emergency room at St. Peter's Hospital. RP 228-231. She was working on another patient when she heard a man say "My baby fell backward and landed on cement." RP 231. She came out and saw the infant looking very poorly - oddly colored, limp and unresponsive. RP 232. Seeing that the infant needed immediate care she called for the doctor and an emergency room nurse to begin treating the baby. RP 233-234.

There were several hospitals within ten miles of defendant's Tacoma apartment, but he did not take the child to any of them. Instead, defendant drove all the way to Olympia to pickup his girlfriend at work, and only took the child to the hospital after she observed the child. RP 441-49. The hospital he finally took the baby to was 21.8 miles from his apartment.

Dr. Stephen West, a doctor with 22 years of experience in emergency medicine, treated Anthony while he was at St. Peters Hospital in Olympia on December 1, 2002. RP 183-186. When he first saw Anthony, the child was unconscious and unresponsive; his left arm and leg were extended, his pupils were fixed and dilated, and his left eye was deviated to the left. RP 187. These symptoms are indicative of seizure activity or that the brain was herniating – that is swelling so as to push its way into the spaces of the spinal column. RP 188. The deviation of the eye to the left is indicative of a brain injury on the left side of the head. RP 189-190. Initially, Anthony's vital signs were normal, which is not necessarily inconsistent with brain injury. RP 190-192. There was no visible bleeding or blood behind the eardrums, nor petechial hemorrhaging, but there was swelling of the optic disk, which is symptomatic of swelling of the brain. RP 192. About five minutes into this examination, Anthony's vital signs deteriorated; his pulse rate dropped and he required intubation for assisted breathing. RP 194. A CT scan revealed that Anthony had fractures to the left posterior aspect of his

skull and a subdural hematoma with edema, or swelling, on the left side of the brain. RP 197-198.

Over the course of his career, Dr. West has treated many children who had fallen out of two story buildings onto dirt or concrete that were substantially uninjured other than a few abrasions. RP 200. He noted that the same fall could well be fatal for an adult. Id. He testified that it takes a great deal of force to break a child's bone and even more to break the bone of an infant. RP 200-202. He testified that it would take a substantial amount of force to cause the injuries that he saw in Anthony. RP 205. Anthony's injuries were inconsistent with a simple drop or even with being thrown down; he testified that within reasonable medical certainty that the injuries were consistent with Anthony being swung so that his head hit against something solid. RP 205. It was apparent from the CT scans that the injuries to Anthony's brain were inflicted at about 12:00 noon that day. RP 405-06.

Dr. West spoke with Anthony's father, defendant, at the hospital. RP 206. Defendant told him that Anthony awoke crying from his nap at approximately two o'clock and that Anthony fell out of his arms and onto the floor and was rendered unconscious. RP 206. Defendant told the doctor that he picked Anthony up, put him in his car seat and drove from Tacoma to Olympia to pick up his wife from work. RP 206. Defendant went on to state that when his wife saw the child was unconscious, they drove to the emergency department. RP 207. While defendant and the

baby's mother were driving to Seattle to be with their child at Harborview, defendant would not talk about how the baby was injured. RP 325.

Because the injuries to Anthony were inconsistent with this explanation, Dr. West classified it as non-accidental trauma - this triggers a reporting requirement to Child Protective Services. RP 207-208.

Because St. Peter's Hospital is not equipped to perform pediatric neurosurgery, Anthony was flown to Harborview Hospital for further treatment.

When Anthony arrived at Harborview Hospital he was treated by Doctor Gavin Britz. RP 491. Doctor Britz conducted the operation on Anthony. RP 492. The injuries to Anthony had created a subdural hematoma and a skull fracture. RP 493-503. The doctor observed evidence of both the recent trauma, and evidence of a prior subdural injury. RP 506-10. When the doctor removed a portion of Anthony's skull to remove the subdural, the extreme pressure cause Anthony's brain to fall out of his head. RP 491-92, 505-12. Anthony died at 1:20 in the morning on December 2nd. RP 516. The death was the result of the head injuries, and those injuries were not consistent with a fall from three or four feet. RP 514-18.

On December 4, 2002, Robert Creek, a forensic specialist with the Tacoma Police Department, responded to defendant's apartment at 7324 South Wilkeson to photograph it and take measurements for diagrams. RP 108-110. The apartment was in a two level, multi-unit apartment

complex. RP 110. Creek identified Exhibits 2 through 37 as accurate depictions of what the interior of the apartment looked like on that day. RP 111-115. He also identified Exhibit 52 as being the diagram he generated using the measurements he obtained in the apartment that day. RP 119-120. Creek testified that he returned to the apartment on May 30, 2003 with Detective Ihlen. At that time he took a few more pictures, Exhibits 38 through 46, and took a sample of the carpet and pad in the master bedroom, Exhibit 50. RP 121-122. The bedroom floor was carpeted at the time of the incident. RP 423.

Ms. Michelle Womac was defendant's ex-wife, and explained to the jury that defendant disciplined their children by spanking them. RP 333-35. In April of 2001, defendant hit his three year old son on the leg hard enough to create a large round bruise which exhibited blood up through the pores to the top of the child's skin. RP 331-32. A few weeks before defendant killed Aiden, Michelle noticed a bruise on Aiden's right cheek. Aiden's mother told Michelle that defendant bruised the baby's face when he pinched him while he was crying. RP 338. Defendant also disciplined his other child by spanking him when he was only six to eight weeks old. RP 355. While on a camping trip, defendant hit and yelled at his 18 month old son when the boy cried because he could not sleep in the tent. RP 358.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR WHEN IT PERMITTED THE STATE TO INTRODUCE EVIDENCE OF PRIOR ASSAULTS BY DEFENDANT ON HIS OTHER CHILDREN.

Prior to trial the court determined that three specific instances of defendant's disciplining his children would be admissible. The court listed these three incidents in its order regarding admissibility pursuant to ER 404(b). CP 69-72. The first incident involved defendant spanking his son Brandon on a number of occasions when the boy was six to eight weeks old. The court observed that defendant was told by the child's mother that the child was too young to be spanked. The second incident involved the defendant hitting his 18 month old son several times when the child was fussy and crying while the family tried to sleep in a tent. The third incident was when defendant struck his three year old son and left a four inch by four inch bruise on the boy's thigh. CP 69-72. In its ruling that these three incidents would be admissible, the court also found inadmissible five other incidents.

The court detailed the reasons for its ruling. The court admitted the prior acts pursuant to ER 404(b): intent and absence of mistake or accident. The court noted:

2. The evidence the court finds admissible is relevant to prove the defendant's intent in striking Aiden Owings and the absence of mistake or accident in the defendant's act of striking Aiden Owings. The fact that the defendant has previously struck each of his male children when they were infants and/or small children tends to prove that it is more likely than not that the injuries suffered by Aiden Owings were the product of an intentional assault and not a mistake or accident.

3. The central issue in the trial was whether the victim Aiden Owings suffered fatal injuries as the result of an intentional assault perpetrated by the defendant, or by an accidental short-fall to a carpeted floor. There were no eyewitnesses to the crime other than the defendant. The evidence was highly probative of the defendant's intent and the absence of mistake or accident. Additionally, the evidence was not unfairly prejudicial. The court only admitted evidence of three prior instances where the defendant is alleged to have intentionally struck his young children, and excluding all other evidence of assaultive/abusive behavior towards children and adults. The probative value of the evidence the court ruled admissible outweighed the danger of unfair prejudice to the defense because the issue of whether the defendant's acts were intentional or accidental was the main issue at trial.

CP 69-72.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure

to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421.

The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

ER 404(b) provides:

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.

The rule's list of purposes for which evidence of other crimes or misconduct may be admitted is not intended to be exclusive. State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

Prior bad acts are admissible only if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. State v. Boot, 89 Wn. App. 780, 788, 950 P.2d 964 (1998)(citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more probable. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

Before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) establish by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. State v. Hernandez, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), review denied, 140 Wn.2d 1015 (2000)(citing State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995)). In determining relevancy, (1) the purpose for which the evidence is offered "must be of consequence to the out-come of the action", and (2) "the evidence must tend to make the existence of the identified fact more . . . probable." State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)(citing State v. Saltarelli, 98 Wn.2d

358, 362, 655 P.2d 697 (1982)).

Prejudice alone cannot be the determinative factor in excluding testimony under ER 404(b). Where the testimony has relevance, the admission of the prejudicial testimony may fall within the discretion of the trial court. The initial inquiry for the trial court is the relevance of the proffered testimony. What is necessary is that the evidence of prior acts have some relevance to the material issues of the crime charged or a claim or defense of the defendant.

State v. Bouchard, 31 Wn. App. 381, 385, 639 P.2d 761 (1982).

Admission of evidence under ER 404(b) is reviewed for abuse of discretion. Hernandez, 99 Wn. App. at 322 (citing State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995)).

In State v. Thompson, 47 Wn. App. 1, 733 P.2d 584 (1987), a murder prosecution, the State was allowed to introduce evidence of other prior incidents where the defendant brandished a gun against persons other than the victims. The court held that such evidence was probative because it tended to contradict the defendant's claim that he acted in self-defense. 47 Wn. App. at 18.

Similarly, in State v. Turner, 29 Wn. App. 282, 627 P.2d 1324 (1981), where the defendant was convicted of three counts of second degree assault and one count of reckless endangerment arising out of a series of Halloween shooting incidents, the court held that the trial court properly admitted evidence of prior rifle-pointing incidents to show the defendant's frame of mind. The appellate court held that "the prior

incidents were relevant and necessary to prove the essential ingredients of the offense." Turner, 29 Wn. App. at 290.

The trial court should weigh the probative value of the evidence against its prejudicial effect prior to admitting the evidence under ER 404(b). Lough, 125 Wn.2d at 852. However, "[a] failure to articulate the balance between probative value and prejudice [in the ER 404(b) context] does not necessarily require reversal." State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996).

The court in Carleton stated that such error is harmless in two circumstances. First, the error is harmless "when the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence." Carleton, 82 Wn. App. at 686 (citing State v. Gogolin, 45 Wn. App. 640, 645-46, 727 P.2d 683 (1986)). Second, the error is also harmless "when, considering the untainted evidence, the appellate court concludes the result would have been the same even if the trial court had not admitted the evidence." Carleton, 82 Wn. App. at 686-87 (citing State v. Jackson, 102 Wn.2d 689, 696, 689 P.2d 76 (1984), and State v. Thamert, 45 Wn. App. 143, 151-52, 723 P.2d 1204, review denied, 107 Wn.2d 1014 (1986)).

ER 404(b) also specifies intent as another purpose for which prior misconduct evidence may be admitted. Black's defines intent as:

Design, resolve, or determination with which [a] person acts. A state of mind in which a person seeks to accomplish a given result through a course of action. . . . A state of mind existing at the time a person commits an offense and may be shown by act, circumstances and inferences deducible therefrom.

. . . .
Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

Black's Law Dictionary 810 (6th rev. ed. 1990)(citations omitted).

State v. Powell, 126 Wn.2d 244, 261, 893 P.2d 615 (1995).

Defendant was charged with homicide by abuse, and intentionally assaulting the child. He contends his defense was general denial and accident. State v. Bell, 10 Wn. App. 957, 521 P.2d 70, review denied, 84 Wash. 2d 1006 (1974), is on point. In that case the child victim died while in the care of the defendant. His defense, as in the instant case, was that the child was injured by falling. This Court held that evidence of prior injuries was admissible to show absence of accident. State v. Bell, 10 Wn. App. at 961. See also State v. Terry, 10 Wn. App. 874, 883, 520 P.2d 1397 (1974)(evidence of victim's bruises admissible on absence of accident or mistake where defendant claimed child fell down the stairs). Accordingly, the evidence is admissible in the instant case to show that the baby's injuries were a result of intentional conduct, not accident.

In a child abuse case, evidence that the defendant has previously mistreated a child may be relevant and necessary to prove that the defendant had the requisite state of mind. State v. Toennis, 52 Wn. App. 176, 186, 758 P.2d 539 (1988). "The probative value of this evidence is especially great in cases in which the best witness, the victim of the current offense, is unable to testify because of his death." Toennis, 52 Wn. App. at 186.

In State v. Norlin, 134 Wn.2d 570, 573, 951 P.2d 1131 (1998), the court held that evidence of the defendant's prior assaults of the child victim were relevant and not overly prejudicial. Norlin told an emergency room physician and a social worker at the hospital that the injury had been caused by a fall from a couch. That defendant had assaulted the victim on prior occasions was relevant to rebut defendant's claim that the current injury was an accident. 134 Wn.2d at 584.

Defendant makes much of the fact that the prior acts did not involve the same victim. The State is unaware of any case which makes this distinction and defendant fails to cite any case which so limits the application of ER 404(b). Nor is there a reason ER 404(b) should be read as to create such a limit. In fact several cases have observed that the use of evidence of prior bad acts is relevant even if it involved a different victim.

In State v. Terry, 10 Wn. App. 874, 883, 520 P.2d 1397 (1974), the trial court permitted testimony regarding defendant's assaultive behavior towards another child. The appellate court approved of this testimony, but overturned Terry's conviction on other grounds. The court in State v. Mercer, a case which involved the defendant's prior assaults against the same victim, recognized that the limits on ER 404(b) evidence were not necessarily related to the identity of the victim. In State v. Mercer, the court observed:

Thus, where, as here, the defendant claims:

that a child has died as a result of an accident in the absence of any intent on his part to harm the child, evidence of prior and subsequent incidents involving the defendant's treatment of children, including the deceased, may be relevant and necessary to prove an essential ingredient of the state's case.

34 Wn. App. 654, 660, 663 P.2d 857 (1983)(quoting State v. Terry, supra).

Washington courts have regularly admitted bad acts evidence against other victims under ER 404(b). In State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003), the State sought admission of evidence that he had been convicted of crimes involving sexual misconduct with adolescent girls in another state. The supreme court held that, to admit evidence of prior bad acts as evidence of a common scheme or plan under ER 404(b), the trial court need only find that the prior bad acts showed a pattern or plan with marked similarities to the facts in the case before it.

Id. at 22. The court then found that the trial court did not abuse its discretion when it admitted the evidence.

In State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), the supreme court held admission of evidence of defendant's assault of another victim "proper under ER 404(b) because it was probative of Appellant's motive, intent, preparation and plan to kidnap, rob, and murder" the victim. Id. at 573.

Under ER 404(b) the State may admit evidence of a common scheme or plan, which may include prior bad acts against victims other than the victim of the charged offense. In State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995), defendant was convicted of attempted rape, indecent liberties, and burglary. Testimony concerning his alleged druggings and rapes of four other women was admitted for the purpose of showing a common scheme or plan to drug and sexually abuse women. In affirming the convictions, the supreme court held that the testimony was admissible under ER 404(b), because it was introduced for the purpose of showing a common plan or scheme in committing crimes, was relevant to prove an element of the crime charged, and the probative value of the evidence outweighed its prejudicial effect. 125 Wn.2d at 860.

There is no reason for this Court to create a new rule that would require ER 404(b) prior bad acts to be committed against the same victim if the evidence is being introduced in child assault or murder case. This is

particularly true in light of State v. Terry, supra, where the court approved of such evidence.

In the present case, the trial court detailed why the evidence was admissible. The evidence was admitted to show that defendant acted intentionally, and to prove the injuries sustained by the victim were not the result of an accident. See State v. Norlin, 134 Wn.2d at 584. The evidence was not admitted, as defendant alleges, to demonstrate defendant was a bad person, nor that he has a propensity for violence against children. The trial court did not abuse its discretion when it determined that the evidence was relevant to show intent and absence of mistake or accident.

Defendant also asserts the admission of this evidence was unfairly prejudicial: “Having been told by the witnesses that Mr. Womac has been assaultive with his children in the past, it would be difficult for the jury to come to an independent conclusion based on the facts proven in this case.” Br. of Appellant, 17. The trial court observed that the evidence “was highly probative of the defendant’s intent and the absence of mistake or accident. “...The probative value of the evidence the court ruled admissible outweighed the danger of unfair prejudice to the defense because the issue of whether the defendant’s acts were intentional or accidental was the main issue at trial.” CP 69-72.

When reviewing the prejudice versus probative prong of the ER 404(b) analysis, ER 403 requires a balancing of probative value against

unfair prejudice. It is important to remember the key is “unfair prejudice.” When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). However, proper evidence will not be excluded because it may also tend to show that the defendant committed another crime unrelated to the one charged. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); State v. Boggs, 80 Wn.2d 427, 433, 495 P.2d 321 (1972).

The court’s ruling regarding the prior assaults was clear. The evidence was admitted simply to show defendant’s intent, and the absence of a mistake or accident. There is no reason to believe that the jury convicted defendant of assaulting the victim in this case simply because he assaulted his other children. The evidence was not likely to stimulate an emotional response rather than a rational decision. Instead it gave the jury evidence that the assault in this case was not an accident. It furthered the truth seeking process by ensuring the jury made a rational decision based on all of the information. Importantly, the prior acts admitted were not so heinous so as to stimulate an emotional response.

Further, the trial court’s limitation on what evidence would be admitted ensured this was the case. The court excluded evidence of defendant’s prior domestic violence assaults against his ex-wives, his throwing of his son into the car seat, his losing his temper in the car, his fantasy about killing his child, and evidence one of his sons had bruises on

the backs of his legs after visiting the defendant. CP 69-72. The court clearly went to great lengths to limit any unfair prejudicial impact this evidence would have. The court properly concluded that the evidence was not unfairly prejudicial, and certainly did not abuse its discretion.

2. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE DOCTRINE OF CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Neder v. United States, 119 S. Ct. 1827, 1838, 144 L.Ed.2d 35 (1999)(internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." Brown v. United States, 411 U.S. 223, 232 (1973)(internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error

doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); State v. Coe, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. See, Id. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. Id. Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the

weight of the untainted evidence can add up to cumulative error. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. See, e.g., State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990)("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error) and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, see, e.g., State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated

witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, see, e.g., State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the case). Finally, as noted, just the accumulation of error will not amount to cumulative error—the errors must be prejudicial errors. See Stevens, 58 Wn. App. at 498.

In the instant case, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant cites three instances of alleged trial court error which combined to deprive him of a fair trial. Defendant has failed to show that there was any prejudicial error, much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

First, defendant asserts the trial court erred when it did not give a limiting instruction after it struck testimony of Dr. West. The testimony was as follows:

Q: Now, based on your examination of Anthony Owings, based on your knowledge and training as an emergency room physician, your experience as such for 21 years, do you have an opinion with reasonable scientific -- reasonable degree of medical certainty about the cause of the injury of Anthony Owings in this case?

A: I am sure, no reasonable doubt, this didn't occur from a ground level fall.

Mr. Sepe: Objection, Your Honor, the term reasonable doubt, ask it be - -

The Court: I will strike the last response. Ask that the question be re-asked and answered.

Mr. Schacht: I will rephrase, Your honor.

The Court: Thank you.

Q (By Mr. Schacht) The question I will put to you is this:
Based on your examination of Anthony Owings, based on your knowledge of anatomy, based on your experience as an emergency room physician, based on having treated the number of infants that you have described, do you have an opinion, to a reasonable degree of medical certainty, as to the cause of the injuries that Anthony Owings sustained?

A: The cause of his - -

Q: Well, let me ask - - I should have added at the end of that: And if you could answer that question, yes or no. In other words, do you have an opinion.

A: Yes, I have an opinion.

Q: Okay. Now what is your opinion, to that degree of certainty?

A: Anthony had his head - - I don't believe Anthony's head was struck by something; I believe he was used and his head was struck against something with sufficient force to cause the injury.

Q: Can you characterize how much force would be required to inflict the injuries that you saw in the emergency room that day?

A: You are talking about a substantial amount of force. You are not talking about a simple drop; you are not talking about somebody being thrown down, you are talking about somebody being swung and being hit hard on the head against something solid.

RP 204-05.

First, the offered testimony was not improper. Generally, no witness, lay or expert, may give an opinion, directly or inferentially, on the defendant's innocence or guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such opinions are unfairly prejudicial because they invade the fact finder's exclusive province. Black, 109 Wn.2d at 348. But if the testimony does not directly comment on the defendant's guilt or veracity, helps the jury, and is based on inferences from the evidence, it is not improper opinion testimony. City of Seattle v. Heatley, 70 Wn. App. 573, 577-80, 854 P.2d 658 (1993) review denied, 123 Wn.2d 1011, 869 P.2d 1085 (1994).

Heatley was on trial for driving while intoxicated (DWI) and reckless driving. An officer testified that Heatley was "obviously intoxicated and affected by the alcoholic drink . . . [and] could not drive a motor vehicle in a safe manner." 70 Wn. App. at 576. Heatley claimed this was improper opinion testimony inferring that he was guilty of the DWI charge. The Court of Appeals disagreed, holding:

Officer Evenson's testimony contained no direct opinion on Heatley's guilt or on the credibility of a witness. The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not

make the testimony an improper opinion on guilt. "[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." More important, Evenson's opinion was based solely on his experience and his observation of Heatley's physical appearance and performance on the field sobriety tests. The evidentiary foundation "directly and logically" supported the officer's conclusion. Under these circumstances, the testimony did not constitute an opinion on guilt.

Heatley, 70 Wn. App. at 579-80 (quoting State v. Wilber, 55 Wn. App. 294, 298 n.1, 777 P.2d 36 (1989); citing State v. Allen, 50 Wn. App. 412, 418, 749 P.2d 702 (1988); State v. Sanders, 66 Wn. App. 380, 388, 832 P.2d 1326 (1992)).

No witness may opine that a defendant is guilty. State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999). Such an opinion invades the jury's independent determination of the facts and violates the defendant's constitutional right to a jury trial. Farr-Lenzini, 93 Wn. App. at 460. But testimony that is based on inferences from the evidence is not improper opinion testimony. State v. Cruz, 77 Wn. App. 811, 814, 894 P.2d 573 (1995). "A witness statement is not impermissible opinion testimony if it is 'based on inferences from the evidence.'" State v. Saunders, 120 Wn. App. 800, 812, 86 P.3d 232 (2004)(quoting Heatley, 70 Wn. App. at 578).

"Opinion testimony" means evidence that is given at trial while the witness is under oath and is based on one's belief or idea rather than on direct knowledge of facts at issue. State v. Demery, 144 Wn.2d 753, 759-

760, 30 P.3d 1278 (2001). Washington courts have “expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” State v. Demery, 144 Wn.2d at 760, quoting Heatley, 70 Wn. App. at 579. In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. Demery, 144 Wn.2d at 758-59.

The admission of expert testimony rests within the sound discretion of the trial court. State v. Black, 46 Wn. App. 259, 262, 730 P.2d 698 (1986).

The doctor was not giving his opinion as to defendant’s guilt; rather he was expressing his opinion as to what caused the injuries. While the use of the term “no reasonable doubt” is unfortunate, the law does not prohibit expert witnesses from using terms to which the law has assigned specific meaning. Evidence Rule 702 specifically permits experts to give opinion testimony. “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ER 702.

The doctor testified that there was no reasonable doubt as to how the injuries occurred. The doctor's opinion as to the cause of the injuries was based on his training, experience and inferences from the evidence before him. The testimony need not have been stricken.

However, even if there was error, the court cured the problem by striking the testimony. Defendant asserts that the trial court should have given a limiting instruction, but the record demonstrates that defense counsel never asked for such an instruction. "When error may be obviated by an instruction to the jury, the error is waived unless an instruction is requested." State v. Ramirez, 62 Wn. App. 301, 305, 814 P.2d 227 (1991) (citing State v. Barber, 38 Wn. App. 758, 771, 689 P.2d 1099 (1984) and 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 24 (3d ed. 1989)(failure to request limiting instruction waives any objection to admission of evidence if instruction would have eliminated any unfair prejudice)). Defendant has failed to cite any authority for the proposition that the trial court should sua sponte give limiting instructions.

In State v. Noyes, the court specifically rejected a claim of error based on a trial court's failure to give a limiting instruction when one was not requested. 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966). "The request for a limiting instruction must be made by the complaining party." State v. DeVincentis, 150 Wn.2d 11, 23, 74 P.3d 119 (2003)(citing State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975)); see State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997); State v. Donald, 68 Wn. App. 543,

547, 844 P.2d 447 (1993). The trial court was not asked to give a limiting instruction, and defendant cannot now complain that the court erred in failing to do so. This claim of error has been waived.

Even if the claim of error was not waived, any error was harmless. The doctor testified moments later as to his opinion of the cause of the injuries. The doctor's testimony made clear that the injuries were the result of Anthony "being swung and being hit hard on the head against something solid." RP 205. There was no objection to this testimony. Defendant has failed to explain how the testimony struck by the trial court was so unfairly prejudicial when the substance of the testimony was properly admitted through the same witness.

The second error defendant contends warrants reversal of his conviction under the cumulative error doctrine is based on the admission of defendant's prior assaults on his children. This assignment of error has been addressed above and the State will not belabor the point. The court properly admitted the evidence.

Defendant's third and final claim under the cumulative error doctrine is based on the trial court's denial of defendant's motion for a mistrial. This is not properly part of a cumulative error argument, because it is a challenge to the court's denial of the motion for a mistrial, not a challenge to the use of the doll as an illustrative exhibit. Defendant has cited no authority for the proposition that the use of the doll was improper, and therefore, this claim of error has been waived. "Appellate courts will

only review a claimed error if it is included in an assignment of error, or clearly disclosed in the associated issue pertaining thereto, and supported by argument and citation to legal authority.” State v. Clark, 53 Wn. App. 120, 123, 765 P.2d 916 (1988)(citing BC Tire Corp. v. GTE Directories Corp., 46 Wn. App. 351, 355, 730 P.2d 726 (1986), review denied, 108 Wn.2d 1013 (1987); RAP 10.3(a)(5), 10.3(g).

Even if defendant has not waived this assignment of error, he has failed to explain how the use of the doll was improper, much less prejudicial. Defendant simply states that the prosecutor’s use of the doll “to reenact its theory graphically by abusing a proxy of the baby is overwhelmingly prejudicial.” Brief of Appellant, at 20. The prosecutor never used the doll to reenact the State’s theory of the how the baby was injured. In fact, the trial court noted such when it made its ruling denying the motion for a mistrial: “It was not offered as a demonstration, the doll’s head was not slammed against the wall.” RP 711. The doll was only used as an illustrative exhibit, not demonstrative evidence as part of a reenactment. There was no error and the use of the doll cannot support defendant’s claim of cumulative error.

Assuming for the sake of argument, however, that defendant is claiming the trial court erred when it did not grant the motion for a mistrial, defendant has again failed to cite any authority and this claim of error should be deemed to have been waived. Even if this Court were to

consider the trial court's denial of the motion for a mistrial, it would not reverse defendant's conviction.

“A trial court's refusal to grant a new trial is reviewed for abuse of discretion.” State v. Brown, 139 Wn.2d 20, 23, 983 P.2d 608 (1999) (citing State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994)).

A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard and the court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). The trial judge is best suited to judge the prejudice of a statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

In the present case, it is clear the deputy prosecutor used the doll as an illustrative exhibit during cross-examination of defense witness Doctor Plunkett. RP 639-41. The doctor testified that the injuries Anthony suffered were consistent with defendant's explanation that the injuries were the result of a short fall, approximately three feet. RP 639. The prosecutor then used the doll to illustrate that there is a distinct difference in the force between the baby falling and the baby being swung or thrown. RP 640. Defense counsel objected, asserting that the doll was not being used as a demonstrative exhibit, but rather to inflame the passions of the jury. RP 639-40. The court overruled the objection, and the doctor explained that he would have expected to see much more severe injuries had the child been swung.

The next day defense counsel moved for a mistrial based on the prosecutor's use of the doll. RP 696-705. The court ruled that there was no error in using the doll as an illustrative exhibit:

I think if there was error in any part of it, it was not getting the doll marked as an exhibit and maintaining it for illustrative purposes, and that needs to be corrected and the doll should be produced and marked so the record is complete on it.

Couple of observations: One, I believe in opening statement there was reference to a motion in which the alleged injuries could have occurred by swinging the child onto a hard surface. There has been discussion over whether these kinds of injuries could have occurred by swinging a child into a hard surface. That evidence is already before the jury.

Many of the jurors had indicated, in fact, during voir dire the question was asked how many of you have held babies, how many of you have had babies jump out of you hands or your arms or try to do that.

These jurors are, I think for the most part, familiar with children and how children are held and the physical attributes of children. I don't think the use of the doll, by making a swinging motion, added anything to the questioning of the doctor in terms of creating any kind of prejudicial effect. It was not offered as a demonstration, the doll's head was not slammed against the wall. There was no noise or I guess desire to cause the jurors to wince by smashing the doll's head against the wall or against the floor or anything, completing the demonstration.

I think it's a far stretch to say there's any prejudice to this jury by what they saw in the movement by the doll and Mr. Schacht's arms during cross-examination of Doctor Plunkett. It's no different than asking the doctor the questions: Could this have been (sic) occurred by swinging the baby onto a hard surface? I think jurors can easily grasp that concept and I don't believe there is any prejudice.

I am willing to give an instruction to the jury to disregard that use of the doll yesterday, if you are asking

that I would do that. I am somewhat apprehensive in that regard in that it wasn't intended as a demonstration, and I don't necessarily want to draw more attention to it by giving it more importance than just simply using it during cross-examination.

But I will allow you, Mr. Sepe, to make that decision. If you want me to instruct the jury they are to disregard the use of the doll or any motions made by the doll yesterday during cross-examination, I am willing to do that.

RP 710-12 (emphasis added). Defense counsel decided it did not want the court to give the limiting instruction the court offered. RP 887.

The trial court observed there was no prejudice to the defendant by the prosecutor's use of the doll. There is nothing in the record to suggest this conclusion was not accurate. There is certainly nothing in the record that would indicate that the trial court abused its discretion in coming to this conclusion. Defendant has not even alleged the trial court abused its discretion when it denied the defense motion for a mistrial.

There was no error in the three instances cited by defendant, therefore, the cumulative error doctrine does not provide defendant with any relief.

3. THE TRIAL COURT DID NOT ERR WHEN IT DETERMINED DEFENDANT'S CONVICTIONS FOR MURDER IN THE SECOND DEGREE AND ASSAULT IN THE FIRST DEGREE ARE VALID CONVICTIONS EVEN THOUGH THE DOUBLE JEOPARDY CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS PROHIBIT ADDITIONAL PUNISHMENT.

Defendant alleges that the trial court erred when it did not dismiss his murder in the second degree and assault in the first degree convictions. Defendant asserts these crimes constituted the same offense as murder in the first degree; the crime for which defendant was sentenced.

The Washington State Constitution, article I, section 9 provides the same protection against double jeopardy as the fifth amendment to the federal constitution. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

The double jeopardy clause of the Fifth Amendment serves three primary purposes. First, it protects against a subsequent prosecution for the same offense after an acquittal. Second, it protects against a subsequent prosecution for the same offense after a conviction. Third, it protects against multiple punishments for the same offense, imposed at a single criminal proceeding. North Carolina v. Pearce, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969); accord, State v. Roybal, 82 Wn.2d 577, 512 P.2d 718 (1973).

State v. Potter, 31 Wn. App. 883, 886-87, 645 P.2d 60 (1982).

Defendant was convicted of three crimes, but only sentenced for one of those offenses. Without authority, defendant asserts that the

“constitution requires dismissal of that conviction.” Brief of Appellant, at 6. A review of the three primary purposes listed by Potter demonstrates why that is not the case. There is no need to dismiss the murder in the second degree and assault first degree convictions to protect against a subsequent prosecution for the same offenses after an acquittal. Nor must they be dismissed to protect against a subsequent prosecution for the same offenses after a conviction. Finally, they need not be dismissed to protect against multiple punishments for the same offenses.

Defendant cites Abney v. United States, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed.2d 651 (1977), for the proposition that a double jeopardy violation occurs at the inception of trial, and the charge must be dismissed pretrial. But Abney dealt with a defendant’s claim that he had already been tried for the crime. The Supreme Court concluded that if Abney had been tried for the same crime in a prior trial, he need not wait until he was convicted after the second trial before he could appeal the trial court’s denial of his double jeopardy claim. That case is not at all on point for the issue at hand. The holding in Abney did not speak to the implications of a situation similar to the one in the present case. The present case involves three crimes charged in a single information, tried at the same time, and verdicts being returned at the same time. Defendant had not been previously tried for any of the crimes for which he was convicted in this

case, much less acquitted. Additionally, there is nothing in Abney that implies that crimes for which punishment is not imposed, must be dismissed after the verdicts are entered.

Not only did the court in this case not punish defendant for the second and third charged offenses, it did not even include them as part of the judgment and sentence. One reason the trial court was proper in not dismissing the charges was the possibility that the murder charge would be overturned on appeal or vacated pursuant to a personal restraint petition. If that occurs, the State would be permitted to have defendant sentenced on one of the other convictions. If the trial court dismissed the two convictions, there would be no valid convictions if defendant had the first degree murder charge vacated.

Remand for sentencing on counts which would otherwise amount to double jeopardy prohibited offenses, is an accepted part of criminal law. For example, in State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000), Roberts was tried, convicted, and sentenced to death for aggravated premeditated first degree murder. Roberts was also convicted of first degree felony murder. Id. at 478. The supreme court vacated Roberts aggravated first degree murder conviction, but affirmed Roberts' first degree felony murder conviction. If the trial court had been required to dismiss the felony murder conviction, as opposed to simply not sentencing

defendant for that conviction, the supreme court would have had no conviction it could have affirmed.

In State v. Meas, 118 Wn. App. 297, 75 P.3d 998 (2003), this Court addressed a similar claim. Meas claimed that he received multiple punishments for the same offense, having been convicted of aggravated first degree murder and felony murder, notwithstanding the fact that the trial court sentenced him only on the aggravated first degree murder conviction. Id. at 304.

The question then is whether Meas received multiple punishments for double jeopardy purposes where the jury convicted him of violating two separate statutory provisions but the trial court ruled that the felony murder conviction "is deemed to have merged" with the intentional murder conviction. Meas claims that he received multiple punishments, but he fails to provide any explanation to support this claim.

Although the trial court noted in the judgment and sentence that the jury found Meas guilty of both offenses, it stated in the sentencing portion of the judgment and sentence that "Defendant shall be sentenced only upon the conviction on Count I." CP at 4. This is similar to the situation in State v. Johnson, 113 Wn. App. 482, 487, 54 P.3d 155 (2002), review denied, 149 Wn.2d 1010 (2003), where the reviewing court concluded there was no double jeopardy violation.

State v. Meas, 118 Wn. App. 304-305.

The trial court in this case, while not using the term "merger" in effect, did not sentence defendant on the murder in the second degree and

assault in the first degree convictions. Defendant was not punished for his convictions on counts two and three, and they did not appear on his judgment and sentence. The trial court did not violate the double jeopardy provisions of the state or federal constitutions when it did not dismiss these two counts.

4. ANY ERROR IN DEFENDANT'S
EXCEPTIONAL SENTENCE WAS HARMLESS.¹

After conviction, defendant's standard range sentence was 240 to 320 months in prison. The trial court imposed an exceptional sentence of 480 months. In doing so, the court concluded that such a sentence was appropriate based on two aggravating circumstances: (a) particular vulnerability of the victim due to extreme youth (the victim was only four months old at the time of his death), and (b) defendant's abuse of a position of trust. CP 39-43.

The evidence introduced at trial conclusively showed that the victim was less than five months old at the time of his death, that defendant was his father, and that defendant was the sole adult taking care of the victim at the time of his death. These were the facts upon which the trial court relied when it imposed the exceptional sentence. There can be

¹ The issue of whether Apprendi/Blakely error is subject to harmless error analysis is currently before the Supreme Court of Washington; State v. Hughes, No. 74147-6; State v. Anderson, No. 75063-7; and State v. Recuenco, No. 74964-7.

no question that if the jury had been asked to determine the existence of these facts it would have found these facts existed.

Defendant challenges the court's imposition of the exceptional sentence imposed based on Blakely v. Washington. __ U.S. __, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004). In Blakely the United States Supreme Court held that a defendant has a Sixth Amendment right to have a jury determine, beyond a reasonable doubt, aggravating facts (other than those facts defendant admits or are related to prior criminal history) used to impose an exceptional sentence above the standard range.

Blakely pleaded guilty to second degree kidnapping with a firearm enhancement and faced a standard range of 49-53 months. At sentencing, the judge, *sua sponte*, imposed an exceptional sentence of 90 months based upon the aggravating factor of deliberate cruelty.

At the outset, the United States Supreme Court noted that:

This case requires us to apply the rule we expressed in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

124 S. Ct. at 2536.

The State argued that the relevant statutory maximum for the crime was the ten-year statutory maximum for Class B felonies set forth in RCW 9A.20.020. The United States Supreme Court rejected this argument and

held that the relevant statutory maximum was the top of the standard range, 53 months, and that Apprendi applied to the aggravating facts used to support an exceptional sentence above this range.

In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." ... Our precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*....

The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient....

124 S. Ct. at 2537. The Court concluded that "[b]ecause the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid." Id. at 2538.

The question of whether Blakely v. Washington error can be harmless has yet to be addressed by Washington courts. However, given that Blakely was based on Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), error predicated on Blakely should be subject to the harmless error doctrine if error predicated on Apprendi is subject to the harmless error doctrine.

The United States Supreme Court applied harmless error analysis to Apprendi error in United States v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 151 L. Ed.2d 689 (2002). This is not surprising, in light of the

Court's holding that the omission of an element from the jury instructions is subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed.2d 35 (1999). Washington courts have followed the Supreme Court in this area, adopting the holding of Neder in State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002).² The Supreme Court of Wisconsin summed up the state of the law in 2003:

Neder's harmless error analysis has been applied to Apprendi-type errors in every single federal appellate circuit. In addition, several state appellate courts have also applied Neder to Apprendi-type errors. Contrary to [the defendant's] argument, acceptance of Neder, and its application in the context of Apprendi-type errors, appears to be practically universal.

State v. Gordon, 663 N.W.2d 765, 776-77 (2003)(footnotes containing case lists omitted).

Because defendant alleges a violation of his Sixth Amendment right to a jury trial, the constitutional harmless error standard must be applied. The test to determine whether constitutional error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003)(citing Brown, 147 Wn.2d at 341; Neder, 527

² The Washington Supreme Court, in State v. Thomas, 150 Wn.2d 821, 849-50, 83 P.3d 970 (2004), declined to apply harmless error analysis to Apprendi-type error in a capital case. The court's decision was based on an apparent misunderstanding of federal precedent ("we do not perform a harmless error analysis since to do so would violate the Supreme Court's holdings in Apprendi and Ring"). The court made no mention of the Cotton analysis, nor the federal or state cases applying harmless error analysis to Apprendi-type error.

U.S. at 15). See also State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996)(“A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error.”).

It is certain beyond a reasonable doubt that the error of which defendant complains did not contribute to the sentence imposed by the court. Had the question of whether the victim was particularly vulnerable due to his age, and whether defendant abused a position of trust were put to the jurors, they would have certainly answered in the affirmative. There is no reasonable doubt that this crime was committed against a person who was particularly vulnerable, nor is there any doubt defendant abused a position of trust when he was entrusted with caring for Anthony, and then murdered his own son. Any error was harmless.

5. IF THIS COURT DETERMINES REMAND FOR RESENTENCING IS THE APPROPRIATE REMEDY IT SHOULD NOT DIRECT THE SENTENCING COURT TO IMPOSE A SENTENCE WITHIN THE STANDARD RANGE.

If this Court determines the imposition of an exceptional sentence was not harmless, it should remand the case for sentencing consistent with Blakely v. Washington. The general rule is that if the appellate court determines that all of the factors relied upon by the trial court are insufficient to justify an exceptional sentence, the court will remand for

resentencing within the standard range. State v. Batista, 116 Wn.2d 777, 793-94, 808 P.2d 1141 (1991); State v. Allert, 117 Wn.2d 156, 170, 815 P.2d 752 (1991). However, where the appellate court determines that the trial court misconstrued and misapplied the law, aside from the question of the sufficiency of the reasons given for an exceptional sentence, the court may reverse and remand for resentencing in accord with the legal principles stated in the court's opinion. Batista, 116 Wn.2d at 793-94; State v. Stewart, 72 Wn. App. 885, 891, 866 P.2d 677 (1994), aff'd, 125 Wn.2d 893, 890 P.2d 457.

The aggravating circumstances cited by the trial court in this case justifying the exceptional sentence are valid to the extent that they are not factors considered by the legislature when it determined the standard range sentence. In other words, the factors relied upon by the trial court are sufficient to support an exceptional sentence. The only reason this Court might feel compelled to vacate the sentence is that Blakely v. Washington requires that these findings be made by a jury.

Since defendant was sentenced, the rules by which a convicted felon can receive an exceptional sentence have changed. This type of procedural change is not the type that requires a remand with direction for a sentence within the standard range. As noted above, it is only when the trial court has relied on factors insufficient to justify an exceptional sentence that remand within the standard range is appropriate. There is

nothing in Blakely v. Washington, that mandates the sentence be within the standard range. The Blakely court never ordered a sentence within the standard range. The Blakely court concluded: “The judgment of the Washington Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.” 124 S.Ct. at 2543. The Supreme Court clarified that it did not find that the SRA was unconstitutional. 124 S.Ct. at 2540. Indeed, the Court acknowledged a variety of ways a defendant could receive an exceptional sentence even without a jury determination and noted that a defendant might prefer not to have a jury decide the aggravating factors. 124 S.Ct. at 2541. In its final sentence, the Blakely court simply remanded the case for further proceedings consistent with its opinion. 124 S.Ct. at 2543. The United States Supreme Court did not remand for imposition of a standard range sentence. The sentence to be imposed on remand will be up to the sentencing court, so long as it follows the dictates of Blakely.

There is no case law that requires this Court to instruct the sentencing court to impose a standard range sentence. The State maintains the sentencing court has the authority to sentence defendant consistent with Blakely v. Washington, and the applicable sentencing statutes. This may result in a standard range sentence, or an exceptional sentence.

Post-Blakely, in order for an exceptional sentence to be imposed, several modifications must be made to the usual sentencing procedures. First, a jury must hear evidence of aggravating circumstances. Second, the court should provide instructions and special interrogatories to the jury with respect to the alleged aggravating circumstances. Finally, if the jury finds the existence of the aggravating circumstances, the court must then decide at sentencing whether, given the jury's findings, there are substantial and compelling reasons to impose an exceptional sentence.

- a. The Absence of the Aggravating Factors in the Original Charging Document Does Not Bar the State From Seeking an Exceptional Sentence.

The Court in Blakely did not hold that the State must allege aggravating circumstances in the information or indictment before seeking an exceptional sentence. Blakely did not hold that such notice was required, and such notice is not constitutionally required given that the trial court still has discretion in deciding whether to impose an exceptional sentence. See State v. Henthorn, 85 Wn. App. 235, 932 P.2d 662 (1997). Indeed, Blakely was simply an extension of Apprendi v. New Jersey, where the court noted that the notice requirements of the Fifth Amendment had never been found to apply to the States through the Due

Process Clause of the Fourteenth Amendment. Apprendi v. New Jersey, 530 U.S. at 477 n.3.

There is no federal constitutional provision, state constitutional provision, statute, case law, or court rule that requires the State to include aggravating circumstances in the charging document. In fact, the Supreme Court of Washington specifically held that “the factual basis for an exceptional sentence upward need not be charged.” State v. Gore, 143 Wn.2d 288, 315, 21 P.3d 262, (2001) *overruled on other grounds by* Blakely v. Washington, *supra*.

- b. The Revised Code of Washington, the Washington Court Rules, and Blakely v. Washington, Allow the Sentencing Procedure Requested by the State in this Case.

The demands of Blakely v. Washington are easily implemented under existing Washington court rules and statutes. On remand, the sentencing court should be permitted to convene a panel of jurors and seat a jury to hear evidence. The court should submit instructions and interrogatories (or special verdict forms) to the jury regarding the existence of alleged aggravating circumstances. Finally, if the jury finds the existence of the aggravating factors, the court must then decide at

sentencing whether, given the jury's findings, there are substantial and compelling reasons to impose an exceptional sentence.

Under existing criminal rules, the sentencing court has authority to do all of the above. First, the criminal rules require the court to provide a jury when the defendant has a right to a jury trial. CrR 6.1(a) ("Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court."). If this Court does not determine that the sentence imposed by the trial court was harmless, then, under Blakely, defendant has a constitutional right to a jury trial on the aggravating factors on remand.

The criminal court rules further allow the court to submit special verdict forms to the jury regarding aggravating circumstances:

Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

CrR 6.16(b). Previous appellate court decisions have required the trial court to submit special findings to the jury in a variety of contexts. See State v. Roberts, 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000)(death penalty case involving accomplice liability issues, jury should be presented with special interrogatories concerning defendant's level of involvement); State v. Manuel, 94 Wn.2d 695, 700, 619 P.2d 977

(1980)(when defendant seeks reimbursement for self-defense, special interrogatories should be submitted to jury). Blakely now requires the court to do so before an exceptional sentence may be imposed in this case.

If the jury finds that the aggravating circumstances exist, the court may impose an exceptional sentence if it finds substantial and compelling reasons to do so. See Blakely, 124 S.Ct. at 2538 n.8; RCW 9.94A.535.

(“The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.”)

The United States Supreme Court did not hold the exceptional sentence provisions of the SRA completely void or unenforceable; it simply held that *the sentencing procedures* in Blakely’s case did not comply with the Sixth Amendment. “A statute held invalid as applied is not void on its face or incapable of valid application in other circumstances.” Foundation for the Handicapped v. Department of Social and Health Services, 97 Wn.2d 691, 628 P.2d 884 (1982)(due process flaw in statute corrected by procedures adopted by DSHS requiring proper notice). This Court can ensure that the sentencing procedures in this case comply with the Sixth Amendment and the SRA. See United States v. Ameline, 376 F.3d 967, (9th Cir. July 21, 2004)(post-Blakely holding that federal district courts can impanel juries to decide facts concerning

sentencing enhancements despite absence of federal sentencing statute explicitly providing for such a procedure).

Washington case law recognizes that when a defendant has a constitutional right to a jury, a jury should be impaneled regardless of whether the right to jury has been incorporated into a statute. For example, although Washington's habitual offender statute, RCW 9.92.030, was amended in 1909 to delete the requirement that a jury decide the defendant's habitual offender status, trial courts regularly impaneled juries to make such determinations for over seventy years.³ See State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003); State v. Courser, 199 Wash. 559, 560, 92 P.2d 264 (1939); State v. Fowler, 187 Wash. 450, 60 P.2d 83 (1936). The statute was still not amended after the Washington Supreme Court held in 1940 that there was a constitutional right to a jury in habitual offender proceedings. State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940). Yet Washington courts continued to recognize that they had the power to impanel juries for habitual offender proceedings. See State v. Smith, 150 Wn.2d 135, 144, 75 P.3d 934 (2003).

³ When the habitual offender statute was first enacted in 1903, it specifically provided that the court should impanel a jury to decide whether the defendant was a habitual offender. Laws of 1903, ch. 86, §§ 1 and 2. Six years later, the Legislature amended the statute and deleted all references to a right to jury. Laws of 1909, ch. 249, §§ 34.

Similarly, the school zone/bus stop sentencing enhancements set forth in RCW 69.50.435 make no specific provision for impaneling a jury to decide whether the facts support the enhancement. Yet there has been no doubt that Washington courts have the authority to instruct the jury and provide special verdict forms concerning the enhancement. State v. Becker, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997).

It has long been the practice of the courts in this state that when a sentencing court imposed a sentence in error, the case is to be remanded for re-sentencing, and when appropriate, hold an evidentiary hearing. See State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)(ordering a sentencing evidentiary hearing when the defendant failed to put the court on notice of potential defects in his criminal history); State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001)(ordering a new death penalty sentencing proceeding when State improperly elicited excessive testimony regarding a prior conviction); Hawkins v. Rhay, 78 Wn.2d 389, 474 P.2d 557 (1970)(ordering a new death penalty phase when the prospective jurors improperly dismissed, but upholding conviction).

Other courts, faced with Apprendi/Blakely challenges to sentencing statutes, have interpreted the applicable statutes to allow for a jury role rather than invalidate the entire sentencing provision. In United States v. Buckland, 289 F.3d 558 (9th Cir. 2002), the Ninth Circuit held that a “drug amount” enhancement was subject to the jury trial

requirements of Apprendi. The court rejected the defense argument that the enhancement statute was unconstitutional on its face and could not be applied through impaneling a jury. The court noted that, despite the years of federal court practice of submitting the issue to the judge at sentencing, the statute could be read as silent on the issue of whom was to decide the existence of the enhancement. The court concluded:

Our aim remains to give effect to Congress's intent. That intent is apparent: to ramp up the punishment for controlled substance offenders based on the type and amount of illegal substance involved in the crime. We honor the intent of Congress and the requirements of due process by treating drug quantity and type, which fix the maximum sentence for a conviction, as we would any other material fact in a criminal prosecution: it must be charged in the indictment, submitted to the jury, subject to the rules of evidence, and proved beyond a reasonable doubt.

United States v. Buckland, 289 F.3d 558, 568 (9th Cir. 2002); see also

United States v. Cernobyl, 255 F.3d 1215 (10th Cir. 2001).

In United States v. Ameline, the defendant received an enhanced penalty without a jury determination of the facts supporting the sentencing enhancement. 376 F.3d 967 (9th Cir., Slip Op. 02-30326, July 21, 2004). The Ameline court found that the finding of the facts necessary to impose the sentencing enhancement were done in violation of the requirements set forth in Blakely and Apprendi. Id. Ameline argued that on remand the trial court could not impose an exceptional sentence because the federal

sentencing guidelines, like Washington's SRA, contained no provisions for jury trials on sentencing enhancements. Id. The Ninth Circuit Court of Appeals rejected this argument, noting that Blakely did not hold determinate sentencing schemes or the federal sentencing guidelines unconstitutional. Id. at 982. ("Indeed, Blakely seems to contemplate that its holding can apply to determinate sentencing schemes without wholesale invalidation"). The Ameline court further noted that it was clearly the intent of Congress to allow federal district court judges to enhance penalties for drug offenses based on the quantity of the drug. Id. at 981. The court rejected the defendant's arguments, holding that the trial court could hold a jury trial on the sentencing enhancement on remand. Id. at 983.

Here, like the federal sentencing scheme in Buckland and Ameline, the exceptional sentence statute in Washington (RCW 9.94A.535) can be read as silent on the issue of whether a jury determination is required for aggravating circumstances. The statute provides a list of factors that the court may consider in deciding whether to impose an exceptional sentence without specifying how such facts must be proven. RCW 9.94A.530, in turn, allows the court, when imposing a sentence, to consider information "proven in a trial..." In short, nothing in the SRA prohibits this Court

from permitting the trial court to follow the procedures described in this brief.

It is the duty of this Court to ascertain and give effect to the intent and purpose of the Legislature, as expressed in the act. In re Lehman, 93 Wn.2d 25, 27, 604 P.2d 948 (1980). If, among alternative constructions, one or more would involve serious constitutional difficulties, the court, without doing violence to the legislative purpose, should reject those interpretations in favor of a construction that will sustain the constitutionality of the statute. State ex rel. Morgan v. Kinnear, 80 Wn.2d 400, 402, 494 P.2d 1362 (1972); Grant v. Spellman, 99 Wn.2d 815, 818-19, 664 P.2d 1227 (1983).

Here, there can be no doubt that the Legislature intended that certain defendants receive sentences exceeding the high-end of the standard range. Implementing the procedures described above will result in a sentence that comports with both the requirements of the Sixth Amendment and the legislative purpose behind the SRA's exceptional sentence provisions. Currently, there is no authority in the State of Washington which would prohibit the sentencing court from impaneling a jury and letting it determine if the State had proven the existence of the aggravating factors. There is nothing in this appeal which would require this Court to order the sentencing court to impose a standard range

sentence. This Court would further the legislative intent by permitting the sentencing court to implement the State's proposed sentencing procedures on remand.

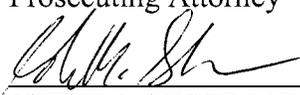
If this Court does not find the post-Blakely sentencing error harmless in this case, the remedy is to remand this case for further proceedings consistent with Blakely v. Washington.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that this Court affirm the defendant's conviction and sentence.

DATED: JANUARY 10, 2005

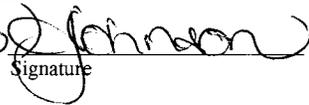
GERALD A. HORNE
Pierce County
Prosecuting Attorney


JOHN M. SHEERAN
Deputy Prosecuting Attorney
WSB # 26050

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STATE OF WASHINGTON
BY 

Certificate of Service:

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

1/10/05 
Date Signature