

**FILED**  
DEC 07 2009

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON



NO. 83169-6

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MARILEA ROSE MITCHELL,

Petitioner,

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SUPPLEMENTAL BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

I. ISSUES..... 1

II. STATEMENT OF THE CASE ..... 1

III. ARGUMENT ..... 3

    A. THE EVIDENCE WAS SUFFICIENT TO FIND S.A. WAS A  
    DEPENDANT PERSON WITHIN THE MEANING OF THE  
    STATUTE. .... 3

        1. Persons Under The Age Of 18 Can Be Dependat Persons. .... 3

        2. The Evidence Was Sufficient To Establish S.A. Was A  
        Dependant Person..... 12

IV. CONCLUSION..... 13

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>Berger v. Sonneland</u> , 144 Wn.2d 91, 206 P.3d 257 (2001)), <u>review denied</u> , 150 Wn.2d 1006, 77 P.3d 651 (2003) .....	6
<u>State v. Argueta</u> , 107 Wn. App. 532, 27 P.3d 242 (2001) .....	8
<u>State v. Delgado</u> , 148 Wn.2d 723, 63 P.3d 792 (2003) .....	3
<u>State v. Flores</u> , 164 Wn.2d 1, 186 P.3d 1038 (2008) .....	7
<u>State v. J. P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003) .....	3
<u>State v. Kazeck</u> , 90 Wn. App. 380, 953 P.2d 832, <u>review denied</u> , 136 Wn.2d 1018, 966 P.2d 1277 (1998) .....	10
<u>State v. Masangkay</u> , 121 Wn. App. 904, 91 P.3d 140 (2004) .....	6
<u>State v. Merritt</u> , 91 Wn. App. 969, 961 P.2d 958 (1998) .....	8
<u>State v. Mitchell</u> , 149 Wn. App. 716, 205 P.3d 920 (2009) .....	2
<u>State v. Riles</u> , 135 Wn.2d 326, 956 P.2d 655 (1998) .....	3
<u>State v. Swanson</u> , 116 Wn. App. 67, 65 P.3d 343 (2003) .....	6, 9, 10
<u>Washington Natural Gas Co. v. PUD No. 1</u> , 77 Wn.2d 94, 459 P.2d 633 (1969) .....	9

### WASHINGTON STATUTES

RCW 18.51.010 .....	4, 7
RCW 18.51.010(1) .....	8
RCW 19.51.010 .....	8
RCW 69.50.101(q) .....	10
RCW 70 128.010 .....	4
RCW 74.34.020(13) .....	4
RCW 9.41.040 .....	9
RCW 9.41.040(4) .....	10
RCW 9A.42.005 .....	4, 12
RCW 9A.42.010(3) .....	5
RCW 9A.42.010(4) .....	3, 4, 12, 13
RCW 9A.42.020 .....	2

### OTHER AUTHORITIES

<u>Black's Law Dictionary</u> , 8 <sup>th</sup> Ed., p. 1163 (Garner 2004) .....	8
<u>Webster's Third New International Dictionary</u> , p. 1706 (2002) .....	13
<u>Webster's Third New International Dictionary</u> , p. 642 (2002) .....	13

## I. ISSUES

1. When the evidence showed S.A. was so physically compromised due to lack of food that he was unable to stand or walk on his own, was the evidence sufficient to show that he was a “dependant person” within the meaning of the criminal mistreatment statute?

## II. STATEMENT OF THE CASE

The defendant was charged with criminal mistreatment. The Information alleged that the defendant was a “person who assumed the responsibility to provide to a dependant person the basic necessities of life...” 1 CP 26. The trial court found the defendant was guilty of the charge noting S.A. was emaciated, and his condition was life threatening.

He had a core body temperature of 87 degree, his heart rate was down to 30, he had swollen feet, and an open sore on his left foot. He was metabolically unstable and couldn't walk. He suffered from muscle wasting. In other words, his body had eaten up his muscle tissue merely to survive. He had begun to demineralize his bones also to survive. He told the aid crew he was hungry on the way to the hospital. It was noted at the hospital that his digestive system could no longer process food.

12-19-07 RP 416.

The defendant challenged the conviction on the basis that the evidence was insufficient to find her guilty. She initially argued

that under RCW 9A.42.020 if the victim of the offense met the statutory definition of “child” he could not also meet the definition of “dependant person”. Alternatively the defendant argued the evidence did not support a finding that S.A. was a dependant person.

The Court of Appeals affirmed the defendant’s conviction. It held that there was nothing in the statute that precluded a victim from being both a child and a dependant person under the criminal mistreatment statute. State v. Mitchell, 149 Wn. App. 716, 723, 205 P.3d 920 (2009). It then held S.A. met the definition of a dependant person because he was “physically incapable of getting food for himself because he was too weak to walk. He depended on Mitchell to provide him with the basic necessities of life.” Id. at 724.

The defendant sought review of the Court of Appeals decision on this issue and on a sentencing issue. This Court accepted review “only on the issues of whether or not the child was a ‘dependant person’ within the meaning of the statute.

The underlying facts of the case have been adequately outlined in the State’s response brief, and the decision of the Court of Appeals. They are incorporated herein by reference.

### III. ARGUMENT

#### A. THE EVIDENCE WAS SUFFICIENT TO FIND S.A. WAS A DEPENDANT PERSON WITHIN THE MEANING OF THE STATUTE.

##### 1. Persons Under The Age Of 18 Can Be Dependant Persons.

Whether S.A. was a dependant person within the meaning of the statute requires a determination of what the Legislature meant when it defined “dependant person” in RCW 9A.42.010(4). The Court’s primary duty in interpreting a statute is to discern and implement the intent of the legislature. State v. J. P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When construing a statute the Court must avoid a strained or absurd interpretation. State v. Riles, 135 Wn.2d 326, 340, 956 P.2d 655 (1998). When the statutory language is unambiguous the Court looks only to that language to determine the legislative intent. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). “We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” Id. at 727.

The Legislature has designated four categories of persons who have a fiduciary duty to provide the basic necessities of life; (1) parents, (2) persons entrusted with the physical custody of another, (3) persons who have assumed the responsibility to provide the

basic necessities of life to another, and (4) persons employed to provide another with the basic necessities of life. The Legislature has designated two categories of persons who are owed that fiduciary duty; (1) dependent persons, and (2) children. Children are owed that duty by three of the four categories of persons. Children are not owed a duty of care from persons who have assumed the responsibility to provide the basic necessities of life. That category is reserved only for dependant persons. The legislative intent spelled out in RCW 9A.42.005 highlights a desire to protect societies' most vulnerable citizens.

For the purposes of the Criminal Mistreatment statute the Legislature defined dependant person as:

A person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life. A resident of a nursing home, as defined in RCW 18.51.010, a resident of an adult family home, as defined in RCW 70 128.010, and a frail elder or vulnerable adult, as defined in RCW 74.34.020(13) is presumed to be a dependent person for purposes of this chapter.

RCW 9A.42.010(4).

The defendant interprets the criminal mistreatment statute to preclude children who also qualify as dependant persons from the definition of dependant persons. She does so not because children

could never qualify under that definition, but solely because children are elsewhere defined. The defendant's interpretation is at odds with the Legislative intent to protect those most in need of protection, and leads to an absurd result.

A person whose duty only arises because she has assumed the duty to provide the basic necessities of life would have no duty of care towards the person to whom that duty is owed if that person was a child who met the definition of dependant persons. Of all of the potential victims contemplated by the criminal mistreatment statute, children who also have physical or mental disabilities which cause them to be dependant on others to provide the basic necessities of life are the most in need of the statute's protection. Under the defendant's interpretation these persons would have no protection. The Court should avoid this absurd result and reject the defendant's argument.

The defendant's argument should also fail because her interpretation would in effect add language to the definition of dependant person. The statutory definition only states "a person." Children are persons. The Legislature recognized as such when it defined "child" as "a person under the age of 18." RCW 9A.42.010(3) (emphasis added). To limit the definition of

dependant person only to adult persons would require the Court to add language to the definition so that it reads “a person, who is 18 years of age or older.” Because the Court does not add language to statutes when interpreting them the definition of “a person” must necessarily include children.

The defendant has argued that two doctrines of statutory construction result in finding persons under the age of 18 are excluded from the definition of dependant persons. However, the Court only employs rules of statutory construction when a statute is ambiguous. Only when the legislature’s intent is not clear from the face of the statute may the court resort to tools of statutory construction in determining which interpretation best advances the legislature’s intent. State v. Masangkay, 121 Wn. App. 904, 907, 91 P.3d 140 (2004), review dismissed. “A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable.” State v. Swanson, 116 Wn. App. 67, 70, 65 P.3d 343 (2003),(quoting, Berger v. Sonneland, 144 Wn.2d 91, 105, 206 P.3d 257 (2001)), review denied, 150 Wn.2d 1006, 77 P.3d 651 (2003).

The statute is not ambiguous. It clearly states the qualifications for a person to be a “dependant person.” None of the qualifications are age based. The legislature’s decision to create a separate class of victims who are defined by age does not create any ambiguity in the qualifications for membership in the “dependant persons” class of victim.

Even if the Court were to apply the rules of statutory construction argued by the defendant, the outcome would be the same. The defendant first argues that the doctrine of ejusdem generis supports the conclusion that children are not included in the definition of dependant persons. The doctrine states that specific words modify and restrict the meaning of general words when they occur in a sequence. State v. Flores, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008). The defendant argued that the statute defines only adults as presumptively dependant persons. Thus “person” only means adults under the statute defining dependant person. That argument fails because the statutory presumptions are not limited to adults only.

Persons who reside in a nursing home as defined in RCW 18.51.010 are presumptively dependant persons. That statute defines a nursing home as:

any home, place or institution which operates or maintains facilities providing convalescent or chronic care, or both, for a period in excess of twenty-four consecutive hours for three or more patients not related by blood or marriage to the operator, who by reason of illness or infirmity, are unable properly to care for themselves. Convalescent and chronic care may include but not be limited to any or all procedures commonly employed in waiting on the sick, such as administration of medicines, preparation of special diets, giving of bedside nursing care, application of dressings and bandages, and carrying out of treatment prescribed by a duly licensed practitioner of the healing arts. It may also include care of mentally incompetent persons. It may also include community-based care.

RCW 18.51.010(1).

Patient is not defined by the statute. When statutory terms are undefined the court will give them their common and ordinary meaning. State v. Argueta, 107 Wn. App. 532, 536, 27 P.3d 242 (2001). The Court may resort to a dictionary to determine the common and ordinary meaning. State v. Merritt, 91 Wn. App. 969, 974, 961 P.2d 958 (1998). "Patient" is defined as a person under medical or psychiatric treatment or care. Black's Law Dictionary, 8<sup>th</sup> Ed., p. 1163 (Garner 2004). Persons under the age of 18 can be under medical or psychiatric treatment or care. Thus they can be residents of nursing homes as defined by RCW 19.51.010. There are several in this state that specialize in child care including

Ashley House and Children's County Home<sup>1</sup> Since children can be patients in nursing homes, the doctrine of eiusdem generis does not limit the term "person" in the definition of dependant person to persons over the age of 18.

The defendant also relied on the doctrine of expressio unius est exclusion alterius to support her conclusion that persons who are defined as children by the statute cannot also be included in the definition of "dependant persons". The doctrine provides "where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature." Swanson, 116 Wn. App. at 75, quoting, Washington Natural Gas Co. v. PUD No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

In Swanson the Court considered RCW 9.41.040 which it said was "not a model of clarity." Id. at 70. The Court was asked to decide whether the trial court had discretion to restore firearms rights based on proof the defendant was safe to own and posses a firearm. It employed the doctrine of expressio unius est exclusion

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<sup>1</sup> Ashley House operates five facilities in the Puget Sound Region; two in Tacoma, Olympia, Kent, Enumclaw. See [www.ashleyhousekids.com](http://www.ashleyhousekids.com). Children's County Home operates in Woodinville. See [www.childrencountryhome.org](http://www.childrencountryhome.org).

alterius to conclude that RCW 9.41.040(4) set out three requirements for restoration. Since proof the defendant was safe to own a firearm was not one of them the trial court could not base a decision to deny a petition for that reason. Id. at 76-77.

Similarly the Court applied that doctrine to the statutory definition of marijuana in State v. Kazeck, 90 Wn. App. 380, 953 P.2d 832, review denied, 136 Wn.2d 1018, 966 P.2d 1277 (1998). There marijuana seized from the defendant weighed more than 40 grams at the time of the defendant's arrest, but less than 40 grams at the time of trial due to evaporation. The defendant argued water was an exception to the definition of marijuana, and therefore did not count toward the weight of the controlled substance. The definition of marijuana includes a list of exceptions to the definition. RCW 69.50.101(q). Because water was not listed as one of the exceptions to the definition of marijuana the Court found that it was not an exception. Id. at 834.

The statutes in issue in Swanson and Kazeck are different from the statutes in question here. In both Swanson and Kazeck the statutory terms were completely different from the terms sought to be included in the statutes. Unlike those cases the term "dependant person" is not completely different from the term "child."

A child could be physically or mentally disabled to the point that he is dependant on others to provide him with the basic necessities of life. A child could be confined to a nursing home. Thus, "dependant person" defines a broader category of persons that includes persons under 18 years old. The doctrine of expressio unius est exclusion alterius is therefore inapplicable to this statute.

Finally, it is true that there are children under a certain age who would be dependant on another person to provide the basic necessities of life whether or not they were physically or mentally disabled. Infants would fall within that category.

However other children would not necessarily be dependant on another but for a physical or mental disability. Certainly S.A. was such a child. He was capable of getting food for himself that was available to him in the home, at least until the point that he was too weak to get out of bed to get it. Older children, such as adolescents, are not necessarily dependant on another person to provide the basic necessities of life.

To exclude all children from the definition of dependant person because some children are dependant due to age alone would not further the Legislative intent. The intent of the Legislature is to protect certain vulnerable persons from abuse and neglect.

RCW 9A.42.005. A child who also has physical or mental disabilities is the most vulnerable kind of person. To exclude that most vulnerable kind of person from the statute's protection simply because that person is a child and the person responsible for providing the basic necessities of life has assumed the responsibility to do so would not give effect to the Legislature's intent.

**2. The Evidence Was Sufficient To Establish S.A. Was A Dependant Person.**

RCW 9A.42.010(4) defines a dependant person as one who, because of physical or mental disability, or because of extreme advanced age, is dependant upon another person to provide the basic necessities of life. The terms physical or mental disability is not defined by the statute.

"Disability" is defined as (1) the inability to do something, (2) the condition of being disabled; the deprivation or lack especially of physical, intellectual, or emotional capacity or fitness; also an instance of such condition, (3) the inability to pursue an occupation or perform services for wages because of physical or mental impairment, (4) a physical or mental illness, injury, or condition, that incapacitates in any way. Webster's Third New International

Dictionary, p. 642 (2002). "Physical" is defined as of or relating to the body. Webster's Third New International Dictionary, p. 1706 (2002).

Under these definitions S.A. was suffering from a physical disability. His body was so compromised from lack of food that he was unable to walk, or even stand without help. The evidence was sufficient to prove that S.A. was a dependant person as defined by statute.

#### **IV. CONCLUSION**

For the forgoing reasons, and the reasons stated in the State's response brief, the State requests that the Court find S.A. was a dependant person as defined in RCW 9A.42.010(4) and affirm the defendant's conviction.

Respectfully submitted on December 2, 2009.

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