

No. 93385-5

No. 46605-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Zaida Cardenas-Flores,

Appellant.

Clark County Superior Court Cause No. 14-1-00298-0

The Honorable Judge David Gregerson

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Cardenas-Flores’s conviction violated her Fourteenth Amendment right to due process.
2. Ms. Cardenas-Flores’s conviction was based on insufficient evidence.
3. The prosecution failed to prove that Ms. Cardenas-Flores intentionally assaulted her infant son.
4. The prosecution failed to prove an unlawful touching with criminal intent, as required to prove assault by means of common law battery.
5. The state’s trial theory—that Ms. Cardenas-Flores accidentally injured her son while removing him from his car seat—did not support a conviction for second-degree assault of a child.
6. The prosecution failed to establish the *corpus delicti* of intentional assault by *prima facie* evidence independent of Ms. Cardenas-Flores’s statements.

ISSUE 1: Was the evidence insufficient to prove intentional assault where it showed (at worst) that Ms. Cardenas-Flores accidentally injured her infant son while placing him in his child seat or removing him from it?

ISSUE 2: Was the state’s trial theory and supporting evidence insufficient for conviction of intentional assault where the evidence consisted of (1) an unexplained injury, (2) an opinion that the force that caused the injury was greater than “everyday” handling, and (3) Ms. Cardenas-Flores’ two alternative explanations outlining the accidental infliction of injury?

ISSUE 3: Was the independent evidence insufficient to *prima facie* establish the *corpus delicti* of intentional assault, where the state had no evidence showing the cause of C.A.’s injury and the medical experts were unable to rule out accidental trauma?

7. If the *corpus delicti* issue is not preserved, Ms. Cardenas-Flores was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.

8. Defense counsel was ineffective for failing to object to the jury's consideration of Ms. Cardenas-Flores's statements under the *corpus delicti* rule.

ISSUE 4: If the *corpus delicti* issue is not preserved for review, was Ms. Cardenas-Flores denied her right to the effective assistance of counsel?

9. The state failed to prove that the offense took place in Washington State.

ISSUE 5: Was the evidence insufficient to prove jurisdiction, where the injury occurred sometime between December 20th and December 23rd, and the child spent December 22nd in Salem, Oregon?

10. The court's instructions relieved the state of its burden to prove the essential elements of second-degree assault of a child.
11. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
12. The court's instructions allowed the jury to convict Ms. Cardenas-Flores based on accidental infliction of harm that did not amount to an intentional assault.
13. The court's instructions permitted conviction if Ms. Cardenas-Flores intentionally touched her son and recklessly caused substantial bodily harm, even if she did not unlawfully touch him with criminal intent.
14. The trial court erred by giving Instruction No. 9.

ISSUE 6: Under the unique facts of this case, did an ambiguity in the trial court's instructions fail to make the relevant legal standard manifestly clear?

ISSUE 7: Under the unique facts of this case, did the court's instructions allow the jury to convict even if Ms. Cardenas-Flores did not intentionally assault her son?

15. Prosecutorial misconduct deprived Ms. Cardenas-Flores of her Sixth and Fourteenth Amendment right to a fair trial.
16. The prosecutor's argument improperly shifted the burden of proof onto Ms. Cardenas-Flores.

17. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by arguing that Ms. Cardenas-Flores bore the burden of explaining her son's injuries.

ISSUE 8: Did the prosecutor commit reversible misconduct by arguing that Ms. Cardenas-Flores could be found guilty because she had not provided a "plausible explanation" for her son's injury?

18. Ms. Cardenas-Flores was denied the effective assistance of counsel by her attorney's failure to consult with a medical expert.
19. Defense counsel provided ineffective assistance by engaging in disastrous cross-examination that elicited highly prejudicial and damaging information.
20. Defense counsel provided ineffective assistance by eliciting information that a non-testifying physician had found unconfirmed signs of numerous fractures.

ISSUE 9: Was Ms. Cardenas-Flores denied the effective assistance of counsel by her attorney's failure to consult with a medical expert prior to trial?

ISSUE 10: Was Ms. Cardenas-Flores denied the effective assistance of counsel by her attorney's unreasonable cross-examination of Dr. Lang, which elicited inadmissible evidence that was highly prejudicial?

21. Defense counsel provided ineffective assistance by failing to object to prosecutorial misconduct in closing.
22. Defense counsel should have objected to the prosecutor's improper burden-shifting argument.
23. Defense counsel unreasonably failed to seek an instruction limiting the jury's consideration of evidence implying that Ms. Cardenas-Flores had the burden of explaining her child's injuries.

ISSUE 11: Was Ms. Cardenas-Flores prejudiced by her attorney's failure to object to prosecutorial misconduct in closing?

ISSUE 12: Was Ms. Cardenas-Flores prejudiced by her attorney's unreasonable failure to request a limiting instruction

regarding testimony that implied she bore the burden of explaining her child's injuries?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

- A. Ms. Cardenas-Flores took her newborn to see a doctor after learning that the baby's father had injured him by rolling over onto his leg while asleep.

Zaida Cardenas-Flores gave birth to her first child, C.A., on November 28, 2013. RP 55-56, 315-316. She enjoyed being a new mom, and had the support of her own mother and the father's family. RP 636, 342. During the first month of her son's life, she brought him to all of his recommended doctor's appointments. RP 93.

On December 18, Ms. Cardenas-Flores brought her baby to the emergency room. RP 58. He was in pain. RP 58. The father, Carlos Austin, had told her that he'd rolled over onto C.A.'s leg while co-sleeping. RP 58-59. Ms. Cardenas-Flores hadn't been in the bedroom when this happened, but she'd heard C.A. crying and had gone to investigate. RP 126-127, 318. At the time, the couple and their child slept together on a thin piece of foam on the carpeted floor of their apartment. RP 266-267.

X-Rays taken on December 18th showed no fracture. RP 59. However, both parents said that C.A. seemed to be in pain when he bent his leg. RP 59. The doctor reassured them that their child was fine, and cautioned that they might see some swelling in the leg. RP 128, 270. The

doctor told Ms. Cardenas-Flores that a warm bath might help with the swelling. RP 184.

B. Two days after the baby's well-child checkup, the family traveled to Salem, Oregon to visit relatives.

Ms. Cardenas-Flores did see swelling off and on over the next few days, and the baby remained fussy. RP 270-271, 273. He seemed most comfortable in his car seat, and he was fussier when he out of the seat. The couple agreed to leave him in the seat most of the time.¹ RP 282.

Ms. Cardenas-Flores brought her baby to the doctor for his two-week well-child check on December 20th. RP 60-61. She was still concerned that he might be in pain. RP 61-62. The doctor told the couple that the leg seemed fine. RP 61-62. Another appointment was set for two weeks later. RP 63.

That same day, the couple drove with their baby to Quincy, a small town east of Wenatchee, to pick up Mr. Austin's son and two daughters. RP 273. Ms. Cardenas-Flores cared for the girls when they were in Mr. Austin's custody. She considered them like her own children. RP 339-340.

¹ Mr. Austin also had the idea of wrapping the leg with a gauze bandage. He had Ms. Cardenas-Flores buy some, and over the next few days he would put the bandage on and take it off. RP 278-279.

After picking up the kids, the whole family drove back from Quincy. RP 275-276. They arrived home in the afternoon on Saturday, December 21, stopped briefly at their apartment, and then took the girls for a haircut. RP 275-276. Everywhere they went, C.A. remained in his car seat, except when Ms. Cardenas-Flores took him out to breastfeed or to change his diaper. RP 276, 277.

On Sunday morning, December 22, Ms. Cardenas-Flores noticed some swelling and gave C.A. a short bath. RP 184, 281. His leg had continued swelling off and on, as the ER doctor had said it would. RP 281. C.A. was still fussy and whiny. RP 184, 281.

The family drove to Salem, where Mr. Austin's mother lives.² RP 272, 283. The couple has attended church in Salem for as long as they have been together. They know the pastor and most of the congregation. RP 280-281.

They attended the service that Sunday, with the baby in his car seat. RP 281. He slept during the service, and "everybody saw [him]." RP 281-282. After church, they went to the grandmother's house, and spent the rest of the day there. RP 283. C.A. remained in his car seat for most of the visit, except for feeding and changing. RP 283. Ms.

² Salem is approximately an hour south of the family's home in Vancouver. RP 325.

Cardenas-Flores “[wasn’t] allowing people to pick him up because the leg had been hurting him.” RP 73.

C. The day after returning from Oregon, the mother brought her child to the emergency room because his condition had worsened.

The next day, C.A. was fussier, and Ms. Cardenas-Flores thought she could hear a cracking or popping sound in the leg. RP 73, 134, 187-188, 249, 327-328, 356. That evening, when she took her baby’s onesie off, his leg was more swollen. He cried uncontrollably during his diaper change. RP 73, 127, 134.

She again brought him to the emergency room. The baby was seen by Dr. Cathleen Lang, who diagnosed a displaced femur fracture. RP 63-64. According to Dr. Lang, the rollover incident could not have caused the fracture. RP 75. X-Rays showed that the femur had not started healing, which suggested the fracture was less than a week old.³ RP 69-71.

Dr. Lang met separately with each parent. Both Ms. Cardenas-Flores and Mr. Austin outlined the same history: that Mr. Austin had rolled onto the infant the morning of December 18th, that the baby had started crying, that they had taken him to the ER and later to his well-child checkup, and that his symptoms had worsened on Sunday or Monday. RP 72-73.

³ Dr. Lang testified that signs of healing typically develop within seven to ten days. RP 69.

Neither parent could pinpoint a single moment after the rollover incident that might have caused his symptoms to worsen. RP 81-82. This lack of specificity was highly concerning to medical staff; however, they did not diagnose “non-accidental trauma.” RP 81, 136, 138.

D. Three police officers subjected the mother to a 2 ½ hour interrogation, during which they repeatedly told her that her account didn’t match her child’s injuries.

Hospital staff called the police, even though they could not rule out accidental trauma. Three officers separated Ms. Cardenas-Flores from Mr. Austin and questioned her in a conference room at the hospital.⁴ RP 168, 207-210.

The interrogation started sometime after midnight. It lasted 2 ½ hours. RP 109, 214, 288. It was not tape recorded.⁵ RP 214, 376.

At one point, one of the three officers had to leave the room, explaining that his interviewing style “can get a little direct,” which “can cause stress for the subject.” RP 380. He thought that his demeanor may have added to the stress of the interrogation. RP 380, 383.

Ms. Cardenas-Flores cooperated with the police. RP 180, 258, 294. She did not ask permission to leave the conference room. RP 294.

⁴ Mr. Austin was questioned separately. RP 381.

⁵ After the first 2 ½ hours of interrogation, police asked for permission to record. At that point, Ms. Cardenas-Flores declined. RP 214.

During the interrogation, she recounted the events leading up to that day. RP 181-184, 187. Her account was consistent with what she'd said during the December 18th emergency room visit, the December 20th well-child checkup, and her interview with Dr. Lang earlier that night. RP 58, 59-63, 72-74, 181-184, 187.

At some point, the lead investigator, Detective Deanna Watkins, decided that she was not being honest. RP 222. The officers told Ms. Cardenas-Flores that the injury couldn't have happened when Mr. Austin rolled onto the child. RP 222.

They also told her that the X-Ray from December 18th (after the rollover incident) hadn't shown a femur fracture. RP 223. Watkins told her to "[T]ell us what really happened." RP 223.

The officers told her "multiple times" that the injuries didn't match her explanation. RP 235. In response, she outlined a new possibility. She claimed that on Monday night, after returning from the store, her baby woke up in the car seat, crying. She said that she didn't like to hear him cry, felt desperate to get him out, and as a result had pulled him from the car seat too quickly. She told the officers that her baby's leg had been

caught in one of the seat's restraints, and that she'd actually lifted the whole car seat with him.⁶ RP 188, 201, 234.

One of the officers told her that the injury could not have happened in that way either.⁷ RP 235. She then retracted the explanation, and suggested that she may have put too much pressure on his leg when putting him into the car seat before she went to the store. RP 201.

The officers apparently accepted this explanation, and she gave more detail, telling them that her baby's leg was bent and swollen, that she needed it straight to get him into the car seat, and that she'd pushed hard enough to straighten his leg. RP 202. When the officers asked if she knew she'd broken his leg, she said "I knew I did something." RP 202. She went on to say that her baby cried, that the cry was different than his normal cry, and that when told his leg was broken, she knew that it was from that incident. RP 202.

⁶ She later explained that she'd given this explanation because she felt pressure to give a version of events that matched the injuries, and wanted to tell the officers what they wanted to hear. RP 288-290, 291.

⁷ It is not clear why the officer thought this explanation inconsistent with the injury. Nothing suggests the medical experts would have rejected this explanation. *See* RP 51-160.

The officers then seized the car seat as evidence, and the state charged Ms. Cardenas-Flores with assault of a child in the second degree. RP 202-203; Information, Supp. CP; CP 1-3.⁸

E. At trial, the state's theory rested on the mother's statement that she'd accidentally injured her son while putting him in his child seat.

At trial, the state presented no evidence showing how C.A.'s femur was actually broken. *See RP generally.* The prosecutor repeatedly implied that Ms. Cardenas-Flores became frustrated, but the state did not present any testimony that she ever became frustrated with or angry towards her infant son. Except for the normal stress that can come with having a newborn, both Ms. Cardenas-Flores and the father averred that she never became stressed or frustrated. RP 56, 57-58, 63, 201, 247, 329, 340-341, 349, 352, 357.

The state's theory at trial was that the mother accidentally injured her child while putting him in his child seat. RP 79-80, 202, 398. In closing, the prosecutor asked jurors to presume an intentional assault from the nature of the injuries, even though Dr. Lang couldn't rule out accidental trauma. RP 81; RP 136, 138, 398, 400-404. He suggested that Ms. Cardenas-Flores must have been frustrated while straightening the

⁸ The state filed a motion seeking permission to amend the Information, changing only the charging dates. CP 1-3. It does not appear that the court granted permission, or that Ms. Cardenas-Flores was ever arraigned on the Amended Information. *See CP, RP generally.*

child's leg so she could properly restrain him in his car seat. RP 398, 401-404.

Ms. Cardenas-Flores testified to the events leading up to the discovery of the femur fracture. Her testimony was consistent with the information she'd provided at the ER on December 18th, to her primary care physician at the December 20th appointment, to Dr. Lang on December 23rd, and to Detective Watkins during the first part of the police interview. RP 58, 59-63, 72-74, 181-184, 187, 266-345.

She disavowed the alternative explanations she'd given to the police toward the end of the 2 ½ hour unrecorded interview. RP 289-290, 291. She explained that she told Watkins what had happened, but that "it wasn't what she wanted to hear," and that Watkins "kept saying that's not how it would happen[;] [t]hat's not how the baby could get hurt, how my son could get hurt." RP 288-289.

After the police repeatedly told her "that's not what the doctors are saying," she gave the two different explanations she thought the officers wanted to hear.⁹ RP 289, 291. At trial, she told the jury that she'd lied to the police under duress. RP 289-291. During closing arguments, the

⁹ It was only then that she was then provided a statement form. However, upon reading that she would be required to sign it under penalty of perjury, she declined to make a written statement, since the explanation the police had accepted was not the truth. RP 291-292.

prosecutor ridiculed the idea that anyone would falsely confess under duress.¹⁰ RP 409.

F. Defense counsel did not consult with a medical expert, and his cross-examination of Dr. Lang brought out highly prejudicial information that damaged the defense theory.

The state presented expert testimony from two doctors: Dr. Stein and Dr. Lang. RP 51-160. Defense counsel did not consult with a medical expert in preparation for trial.¹¹

Defense counsel knew that the case would likely involve significant medical testimony. Detective Watkins' declaration of probable cause included a summary of Dr. Lang's expert opinion: that the injury probably happened on December 23rd, that it would result in immediate pain and swelling, that it would "not be caused from being rolled on but from a twisting, bending grabbing, jerking, or flinging of the leg," and that it "would require multiple forces." Affidavit/Declaration of Probable

¹⁰ Defense counsel did not object to this argument, despite the growing body of literature showing that false confessions contribute to a significant proportion of wrongful convictions. RP 409.

¹¹ Because Ms. Cardenas-Flores was indigent, the court appointed counsel to represent her. Order Appointing Attorney, Supp. CP. Her attorney sought and obtained public funds to hire a transcriptionist and an investigator, but neither sought nor obtained funding to consult with any kind of expert. Request for Defense Services (4/30/14); Authorization for Appointment (5/1/2014); Request for Defense Services (5/27/14); Authorization for Appointment (5/27/14); Request for Services (6/4/14); Authorization for Appointment (6/5/14); Request For Additional Services (6/16/14); Authorization for Appointment (6/17/14); Supp. CP.

Cause, Supp. CP.¹² In addition, the state's various witness lists named a total of nine different medical doctors: Dr. Clinton, Dr. Lang, Dr. Stein, Dr. Gilmore, Dr. Shanks, Dr. Benziger, Dr. Dunn, Dr. Huynh, Dr. Rosenfeld. State's Witness Lists (filed 7/24, 8/5, and 8/15 of 2014) Supp. CP.

Dr. Stein testified that he examined C.A. at the ER on December 18th, and that he saw no fracture on that date. RP 151-160. Dr. Lang opined that the fracture occurred after the baby's December 20th well-child checkup and before the emergency room visit on December 23rd. RP 74-75. She didn't think the fracture could have happened when Mr. Austin rolled onto his son because "with rollovers... the bed will typically absorb most of the energy." RP 75. When asked about the force necessary to break an infant's femur, she opined that the fracture involved "more force than what's going to be going on in normal everyday life." RP 80. She also believed the fracture resulted from twisting and bending.¹³ RP 75-76.

On cross-examination, defense counsel did not ask about Dr. Lang's inability to rule out accidental trauma. RP 92-133. Instead, that

¹² Detective Watkins' declaration erroneously indicated a diagnosis of non-accidental trauma, which conflicted with Dr. Lang's testimony. Affidavit/Declaration of Probable Cause, Supp. CP; *Cf.* RP 81, 136, 138.

¹³ Such fractures are common in three-year-olds, who might fall while twisting. RP 78.

fact was brought out—apparently inadvertently—during the state’s redirect examination.¹⁴ RP 136.

Instead of asking about Dr. Lang’s inability to diagnose non-accidental trauma, defense counsel asked about a report written by Dr. Rebecca Clinton, a pediatric orthopedic doctor¹⁵ who’d seen C.A.’s full skeletal X-rays. RP 98. Dr. Clinton was not on the state’s final witness list, and the prosecuting attorney asked no questions about her findings. RP 51-91; State’s Witness List (filed 8/15/14) Supp. CP.

Defense counsel’s cross-examination included the following question:

[Y]ou’re aware that Dr. Clinton, the orthopedic doctor, upon the first skeletal survey said that the child had a left femoral shaft fracture, an old right tibia fracture, possible right femur fracture, left femur and left tibia metaphyseal corner fractures.
RP 98.

Dr. Lang was apparently well aware of Dr. Clinton’s findings. She explained that Dr. Clinton’s focus was to “make sure that the bones are healthy and that they’re healing well,” while she herself applied a more rigorous standard to ensure that her conclusions were solid enough for court. RP 98-99, 101. She said her office was concerned about “multiple

¹⁴ Defense counsel did ask Dr. Lang to reconfirm this on re-cross examination. RP 138.

¹⁵ In counsel’s words, “she specializes in bones and stuff”. RP 97.

other lower extremity fractures,” but that she “only had the one confirmed fracture” for forensic purposes. RP 100.

Defense counsel’s cross-examination also revealed Dr. Lang’s concern that these other fractures may have “been caused from a separate event.” RP 105. She affirmed that she was concerned that C.A. had been injured multiple times. RP 105, 107-108. In the end, she was “willing to say... that we had concerns that they were there, but we never confirmed them. But I can’t say that they were definitely not there...” RP 108.

The prosecutor had not brought out any of this information in its examination of Dr. Lang.¹⁶ Nor had the state even mentioned Dr. Clinton or her reports. RP 51-92.

Defense counsel did not use any of this information during his examination of any other witnesses. Nor did counsel make any legal arguments to the court based on this information. *See RP generally.* Nor did counsel refer to the information in closing arguments. RP 409-423.

G. The court defined assault as any “intentional touching... that is harmful,” and the prosecutor faulted the mother for her alleged failure to provide a “plausible explanation” for her son’s injury.

The prosecutor proposed and the court adopted the pattern instructions for second-degree assault.¹⁷ Plaintiff’s Proposed Instructions

¹⁶ The prosecutor did very briefly review one aspect of defense counsel’s cross-examination regarding why the hospital used follow-up X-rays to detect injuries that might not have been visible during the initial scan. RP 135-136.

(filed 8/14 and 8/18, 2014), Supp. CP. Defense counsel did not propose any instructions.

The court told jurors that a person commits second-degree assault when she “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” CP 19. The court defined assault as follows:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or is [sic] offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
CP 20.

In closing, defense counsel focused on the state’s failure to prove an intentional assault, using some form of the word “intent” more than 30 times during his argument. RP 409-422.¹⁷ The prosecutor argued that the state had proved intent by showing that “she grabbed that leg.” RP 400. He concluded his discussion about intent by equating intentional assault with actions that are “not understandable” or “not reasonable.” RP 402.

The prosecutor surmised that Ms. Cardenas-Flores must have been under stress and that she must have become so frustrated that she “yank[ed] that kid’s leg hard enough to break the femur.” RP 400-402.

¹⁷ The “to convict” required jurors to find that “the defendant committed the crime of assault in the second degree...” CP 18.

¹⁸ By contrast, the prosecutor used such words only 9 times in the first part of his argument and 3 times in rebuttal. RP 398-409, 423-425.

He did not address the absence of evidence showing anger or frustration on her part. RP 398-409, 423-425.

The prosecuting attorney also argued that Ms. Cardenas-Flores “never gave a plausible explanation for how this kid broke his femur.” RP 405. Defense counsel did not object. RP 405.

H. The judge sentenced Ms. Cardenas-Flores to the low end of her range, and remarked that the case seemed to involve “lack of parenting skills and recklessness more than anything else.”

The jury voted to convict Ms. Cardenas-Flores. RP 428-431; CP 27. Because she had no criminal history whatsoever, her standard range was 31-41 months. RP 441. Defense counsel noted that Ms. Cardenas-Flores would likely be deported after serving her sentence, and that she might never see her son again. RP 443.

When afforded her right of allocution, Ms. Cardenas-Flores reiterated that she had not assaulted her son. She told the court she wished to appeal. RP 443-444.

The court imposed the low end as requested by the defense, rejecting the prosecutor’s argument for top of the range. RP 441-445. In reaching this decision, the sentencing judge made the following remarks:

The flavor of this case, the Court interprets as somewhat different in that it doesn’t make rational sense that a mother of a newborn would intentionally hurt the child, but this seems to be an issue of some mental health issues or lack of parenting skills and recklessness more than anything else. It’s hard to know from the

evidence... except that the child was significantly injured with a broken femur... [A] 31-month sentence is appropriate under the circumstances.
RP 444-445.

Following sentencing, Ms. Cardenas-Flores timely appealed. CP

41.

ARGUMENT

I. THE STATE DIDN'T PROVE THAT MS. CARDENAS-FLORES INTENTIONALLY ASSAULTED HER INFANT SON.

A. The state's trial theory involved accidental injury rather than intentional assault.

Conviction required proof of an intentional assault. RCW

9A.36.021(1)(a). The state did not prove that Ms. Cardenas-Flores intentionally assaulted her newborn.

The evidence did not show how or when or under what circumstances the baby was injured.¹⁹ *See RP generally.* The state's expert, Dr. Lang, could not rule out accidental trauma as the cause of injury. RP 81, 136, 138.

Although the prosecution sought to imply that Ms. Cardenas-Flores became frustrated or angry with her son, it presented no evidence

¹⁹ Having failed to prove how the injury occurred, the prosecutor resorted to a burden-shifting argument, blaming the mother for not providing "a plausible explanation for how this kid broke his femur." RP 405.

supporting this idea. The only relevant information was the mother's own report regarding the normal stress of having a newborn. RP 56, 57-58, 63.

The state's theory rested on the mother's own statements²⁰ describing accidental trauma: that she unintentionally caused the injury when she straightened her son's leg while placing him in the car seat. RP 79-80, 202, 398.

Furthermore, as Dr. Lang testified, the medical evidence was consistent with the accidental trauma described by Ms. Cardenas-Flores. RP 79-80. No expert testimony undermined the state's theory – that Ms. Cardenas-Flores accidentally injured her son while placing him in the car seat or removing him from it. *See RP generally.*

Due process requires the state to prove every element of an offense beyond a reasonable doubt.²¹ U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Here, the state did not prove that Ms. Cardenas-Flores intentionally assaulted C.A., as required for a conviction under RCW 9A.36.021(1)(a).

²⁰ Which she subsequently repudiated. RP 289-291.

²¹ The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The court may not remand for entry of conviction on a lesser offense unless the court actually submitted that offense to the jury at trial. *In re Heidari*, 174 Wn.2d 288, 274 P.3d 366 (2012).

To be sufficient, evidence must be more than substantial. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). The evidence here was insubstantial. The state had no more than an unexplained injury, an opinion that the force applied was greater than an “everyday” amount, and statements suggesting possible accidental causes. This evidence does not establish an intentional assault.

On review, inferences drawn in favor of the prosecution may not rest on evidence that is “patently equivocal.” *Id.*, at 8. The evidence here was even less than equivocal: no one suggested that the force required, although greater than would normally occur in “everyday life,” was so extraordinary that it could only be explained by an intentional assault. *See RP, generally.*

To establish even a *prima facie* case, the prosecution must present evidence that is consistent with guilt and inconsistent with a hypothesis of ‘innocence.’²² *State v. Brockob*, 159 Wn.2d 311, 328-29, 150 P.3d 59 (2006) (addressing *corpus delicti* rule). The evidence here is consistent with innocence (within the meaning of *Brockob*), because—as Dr. Lang testified—Ms. Cardenas-Flores could have accidentally injured her son

²² In this context, innocence means innocence of the charged crime; it does not mean blamelessness. *Brockob*, 158 Wn.2d 311.

while placing him in or removing him from his car seat.²³ RP 79-80. At worst, injury caused by accident amounts to third-degree assault. RCW 9A.36.031.

Because the state failed to prove the elements of second-degree assault beyond a reasonable doubt, Ms. Cardenas-Flores conviction must be reversed. The charge must be dismissed with prejudice. *Smalis*, 476 U.S. at 144.

B. The state failed to *prima facie* establish the *corpus delicti* of intentional assault.²⁴

1. The independent evidence established no more than accidental harm.

A factfinder may not consider an accused person's statements unless the prosecution *prima facie* establishes the *corpus delicti* of the charged crime by evidence independent of those statements. *State v. Dow*, 168 Wn.2d 243, 255, 227 P.3d 1278 (2010); *Brockob*, 159 Wn.2d at 328. Here, the independent evidence was completely insufficient to prove intentional assault.

²³That is why the doctor was unable to diagnose non-accidental trauma. RP 81, 136, 138.

²⁴The *corpus delicti* rule is both a rule of admissibility and a rule of evidentiary sufficiency. *State v. Dow*, 168 Wn.2d 243, 251, 227 P.3d 1278 (2010). Because evidentiary sufficiency may be raised for the first time on review, an appellant may argue violation of the sufficiency aspect of the *corpus delicti* rule even absent an objection below. *See Fleming*, 155 Wn. App. at 506.

The facts show only an unexplained injury that Dr. Lang could not diagnose as non-accidental trauma. RP 81; RP 136, 138. The state produced no independent explanation of how the injury occurred.²⁵

Under the *corpus delicti* rule, the independent evidence must corroborate “*the specific crime* with which the defendant has been charged.” *Brockob*, 159 Wn.2d at 329 (emphasis in original). In other words, it must *prima facie* establish each element of the charged crime.²⁶ *Dow*, 168 Wn.2d at 251, 254.

Second degree assault requires proof of an intentional assault, accompanied by the reckless infliction of substantial bodily harm. RCW 9A.36.021(1)(a).²⁷ The two elements are distinct: mere reckless infliction of harm without proof of an intentional assault is insufficient.²⁸

To prove a *prima facie* case, the state’s independent evidence of the *corpus delicti* must be consistent with guilt and inconsistent with a hypothesis of innocence. *Brockob*, 159 Wn.2d at 329. If the independent

²⁵ The prosecution could not even fix the timeframe, other than to say that it likely occurred between the afternoon of December 20th when the parents left the doctor’s office and the night of December 23rd when they brought their son to the emergency room. RP 74-75.

²⁶ Under cases that predate *Brockob* and *Dow*, the independent evidence need not establish “the degree of the generic crime charged.” *State v. Mason*, 31 Wn. App. 41, 48, 639 P.2d 800 (1982). This rule does not survive *Brockob* and *Dow*.

²⁷ Second degree assault of a child incorporates these elements. See RCW 9A.36.130.

²⁸ The reckless infliction of harm may be punishable as third-degree assault, assuming the other elements of that offense are established. See RCW 9A.36.031. The third-degree assault statute reflects the legislature’s judgment that a person who accidentally inflicts harm is less culpable than one who does so intentionally.

evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Id.*, at 329-330.

In this case, no independent evidence suggested an intentional assault.²⁹ The state did not show how the injury occurred and Dr. Lang could not rule out accidental trauma. Because of this, the state failed to establish the *corpus delicti*. *Dow*, 168 Wn.2d at 251, 254.

The conviction must be reversed and the case dismissed with prejudice. *Id.*, at 255.

2. If the state's failure to prove the *corpus delicti* by independent evidence is not preserved for review, Ms. Cardenas-Flores received ineffective assistance of counsel.³⁰

As outlined above, the state failed to prove the *corpus delicti* of intentional assault. A successful *corpus delicti* challenge would have resulted in dismissal of the charge. *Dow*, 168 Wn.2d at 255. Accordingly,

²⁹ Indeed, even when Ms. Cardenas-Flores' statements are considered, the evidence does not establish intentional assault. In fact, the state's theory at trial involved the accidental infliction of harm; the state was able to obtain a guilty verdict through misconduct and inadequate instructions, as argued elsewhere in this brief.

Had the prosecutor not engaged in misconduct, it is possible that the jury would have convicted Ms. Cardenas-Flores only of third-degree assault, if properly instructed. *See State v. Henderson*, No. 90154-6, 2015 WL 847427, at *1 (Wash. Feb. 26, 2015) (Instruction on an included offense "is crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free," and in such cases, "'the jury is likely to resolve its doubts in favor of conviction'") (citation omitted, emphasis added by *Henderson* court).

³⁰ Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a). Reversal is required if counsel's deficient performance prejudiced the accused person. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland*, 466 U.S. at 687).

there is a reasonable probability that the error affected the outcome.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). No reasonable strategy could justify counsel’s failure to raise the issue.

If the *corpus delicti* issue may not be raised for the first time on review, Ms. Cardenas-Flores was deprived of the effective assistance of counsel. *State v. Killo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Her conviction must be reversed and the case remanded for a new trial. *Id.*

C. The state did not prove that the offense occurred in Washington state.

Proof of jurisdiction “is an integral component of the State’s burden in every criminal prosecution.” *State v. Norman*, 145 Wn.2d 578, 589, 40 P.3d 1161 (2002). Here, the state failed to prove jurisdiction.

The state must prove jurisdiction beyond a reasonable doubt. *Id.*; *State v. Lane*, 112 Wn.2d 464, 470, 771 P.2d 1150 (1989). Criminal jurisdiction “rests exclusively in the courts of the state in which the crime is committed.” *Id.*³¹

Here, the state produced insufficient evidence to prove beyond a reasonable doubt that any element of the offense occurred in Washington.

³¹ An exception exists for crimes committed “in part” in the state. RCW 9A.04.030(1). This has been interpreted to mean that an essential element has been committed in the state. *Id.*

If Ms. Cardenas-Flores did intentionally assault her baby, she may have done it in Washington or in Oregon. The state didn't prove that C.A.'s injury happened in Washington, or that it did not happen in Oregon.

The court's instructions required the state to prove that "[t]his act [the assault] occurred in the State of Washington." CP 18. Absent proof that Ms. Cardenas-Flores intentionally assaulted C.A. in this state, the evidence was insufficient to prove jurisdiction in Washington.³²

The facts show that the injury could have happened in either state. On December 22nd, C.A. traveled with his family to Salem, Oregon. RP 272, 280-283. This trip occurred within the time frame when the injury may have happened. RP 74-75. No witness sought to narrow the time frame to a definitive period when Ms. Cardenas-Flores and her baby were within Washington State. *See RP generally.*

The state did not present the testimony of anyone³³ who saw the child in Salem.³⁴ *See RP generally.* Nor did the state present testimony

³² This is not a case where the state could obtain a conviction by proving the crime was committed "in part" within the state. RCW 9A.04.030(1). First, the court's instructions required the state to prove that the entire crime occurred within the state. CP 18. Second, the alleged assault and resulting substantial bodily harm were simultaneous; thus, there is no reasonable possibility that one element transpired in Washington and another in Oregon. Accordingly, the offense could not be prosecuted in multiple jurisdictions.

³³ Many people saw C.A. in Salem, including his grandmother, other family members, a pastor, and numerous parishioners of the church the family attended. RP 280-283.

³⁴ There is no indication Detective Watkins even telephoned the grandmother or anyone else who might have seen C.A. that Sunday. *See RP generally.*

describing the baby's condition just prior to his departure to Oregon or immediately following his return to Washington.

Ms. Cardenas-Flores and Mr. Austin provided the only testimony about C.A.'s condition between December 20th and December 23rd. RP 266-359. Both denied that the child had been intentionally assaulted in either state. RP 266-359. Even the mother's out-of-court statements to Detective Watkins described only an accidental injury occurring in Washington. RP 200-202.

Furthermore, no doctor or other expert ruled out the possibility that the child's increasing distress³⁵ resulted from injuries sustained in Salem on Sunday.³⁶ *See* RP *generally*. Because of this, the mother's (subsequently repudiated) statement that she believed she'd accidentally done "something" on Monday night cannot establish that she'd actually caused the fracture at that moment. RP 202.

Accordingly, no evidence in the record shows an intentional assault occurring within Washington State. Ms. Cardenas-Flores'

³⁵ Both parents noticed swelling and believed the leg was causing the baby pain on Sunday while they were in Salem. RP 73. The mother recalled that C.A. was "more fussy" on Monday, told the father that she could hear a cracking or popping sound in the leg, and ultimately noticed even more swelling Monday evening, with the child crying uncontrollably during a diaper change. RP 73, 134.

³⁶ Medical experts testified that the fracture would produce immediate pain. However, neither parent was qualified to say that the pain C.A. experienced throughout Sunday was too mild to be evidence of a fracture, especially after they'd twice been told not to worry about the pain that followed the rollover incident. *See* RP 58-59, 61-62, 69.

convictions must be reversed and the charge dismissed with prejudice.

Smalis, 476 U.S. at 144.

II. THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE ASSAULT.

When applied to a caretaker’s intentional touch of an infant, the standard instruction defining assault relieves the state of its burden. By using the standard instruction in this case, the court relieved the prosecution of its burden to prove that Ms. Cardenas-Flores assaulted her child. CP 20.

Jury instructions must make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864. Here, the court’s instructions did not make manifestly clear what was required for conviction of the charged crime. Instead, the instructions could be construed to relieve the state of its burden to prove the elements.³⁷

Second-degree assault³⁸ requires proof of an intentional assault that recklessly causes harm. RCW 9A.36.021(1)(a). By itself, the reckless

³⁷ Instructions create a manifest error affecting a constitutional right if they can be construed to relieve the state of its burden to prove every element of an offense. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). A manifest error affecting a constitutional right may be addressed for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); see *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

³⁸ Second-degree assault of a child is based on the elements of second-degree assault. RCW 9A.36.130; CP 18.

infliction of harm is not sufficient. When applied to the interactions between a parent and an infant—as in this case—the standard instructions (WPIC 35.50) can conflate the two elements into one.

The court defined “assault” in this case to mean “an intentional touching or striking of another person that is harmful or offensive...” CP 20. The instruction, based on WPIC 35.50, describes a common law battery, which requires proof of an unlawful touching with criminal intent. *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012); *State v. Jarvis*, 160 Wn. App. 111, 117, 246 P.3d 1280 (2011).

There was no allegation that Ms. Cardenas-Flores struck her son, and expert testimony established that an intentional striking would not cause the kind of injury he suffered. RP 76-78. Thus, the jury was constrained to decide the case using the “touching” portion of Instruction No. 9. Therein lies the problem.

WPIC 35.50 was designed for use in cases involving assaults upon autonomous individuals. However, a newborn (such as C.A.) is not a fully autonomous individual. A newborn can’t survive without constant care and attention, which necessarily involves a great deal of intentional touching.

As his mother, Ms. Cardenas-Flores was privileged to touch C.A. in ways that would be offensive to a reasonable adult or a child with some

autonomy. Because C.A. was an infant, the mother could not be faulted for bathing him, changing his diaper, feeding him, or trying to comfort him even if he resisted her touch.³⁹ Thus conviction could not rest on touching that was merely “offensive” within the meaning of Instruction No. 9.⁴⁰

This left the jury with only one option: determining whether or not the injury occurred via “an intentional touching... that is harmful.” CP 20. Under this definition, any intentional touching that causes harm qualifies as an assault, whether or not the parent intended harm.

This instruction does not adequately convey the elements of common-law battery. Nothing in the instruction requires an unlawful touching. Nor does the instruction mention criminal intent. Both unlawful touching and criminal intent are elements of assault when committed by means of battery. *Hahn*, 174 Wn.2d at 129; *Jarvis*, 160 Wn. App. at 117.

Under the court’s instructions, any reckless infliction of substantial bodily harm would automatically be second-degree assault of a child. This might include, for example, lifting a baby by the hands and causing

³⁹ Indeed, had she failed to do these things, she would have been guilty of neglect.

⁴⁰ A touching is offensive if it “would offend an ordinary person who is not unduly sensitive.” CP 20. This definition is meaningless when applied to an infant. Infants are, by definition, “unduly sensitive,” and yet are incapable of feeling offended.

“nursemaid’s elbow” (also known as radial head subluxation or annular ligament displacement). Similarly, a parent could be convicted of second-degree assault of a child for gently swinging a baby around and accidentally hitting a piece of furniture, causing a bruise.⁴¹ Both of these might involve “intentional touching... that is harmful” accompanied by the reckless infliction of substantial bodily harm (assuming the parent didn’t exercise sufficient care).

Another result of applying the standard instructions to parent/infant contact is that a parent who actually intends to harm her infant would be no more culpable than a mother who causes injury by straightening her child’s leg with the sole purpose of making sure the child is properly restrained.

If a jury can construe a court’s instructions to allow conviction without proof of an element, any resulting conviction violates due process. U.S. Cons. Amend. XIV; *Stein*, 144 Wn.2d at 241. The court’s instructions in this case can be construed to allow conviction based on any intentional touching. Because of this, the conviction violates due process. *Id.*

Such an error requires reversal unless the state shows beyond a reasonable doubt that it did not contribute to the verdict. *State v. Brown*,

⁴¹ “The presence of the bruise marks indicates temporary but substantial disfigurement.” *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993).

147 Wn.2d 330, 341, 58 P.3d 889 (2002). This requires proof that the element is supported by uncontroverted evidence. *Id.*

Here, the error went to the very heart of the case. Defense counsel spent his entire closing argument focused on the issue of intent. RP 409-422. Because the court’s instruction allowed conviction based on any “intentional touching... that is harmful,” counsel’s arguments could not dissuade the jury from convicting, even if they believed that the mother acted recklessly but not intentionally.

The error was particularly prejudicial because the state had little if any evidence of an intentional assault. The prosecutor’s closing argument reflects this: the state relied on the mother’s intentional touch to prove the assault. RP 400. The prosecutor took advantage of the court’s instructions, which changed the focus from an intentional assault to any intentional touch, something that is an integral part of every parent/infant interaction.

The court’s instructions failed to make the relevant standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.⁴² This

⁴² This created a manifest error affecting Ms. Cardenas-Flores’s right to due process. The issue can be addressed for the first time on review. RAP 2.5(a)(3). The court should review the error even if it does not qualify under RAP 2.5(a)(3). *Russell*, 171 Wn.2d at 122. The Rules of Appellate procedure require courts to decide cases on their merits “except in compelling circumstances where justice demands...” RAP 1.2(a). A decision on the merits here would promote justice; there is no compelling basis to refuse review on the merits. RAP 1.2(a).

relieved the state of its burden to prove an intentional assault. The conviction must be reversed and the case remanded for a new trial with proper instructions. *Id.*

III. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT BY IMPROPERLY SHIFTING THE BURDEN OF PROOF.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Here, during closing arguments, the prosecuting attorney faulted Ms. Cardenas-Flores because she “never gave a plausible explanation” for her child’s injuries. RP 405. This argument improperly shifted the burden of proof and prejudiced Ms. Cardenas-Flores.

Prosecutorial misconduct during argument can be particularly prejudicial.⁴³ *Glasmann*, 175 Wn.2d at 706. The misconduct here came during the prosecutor’s closing argument. RP 405.

Because the accused has no duty to present evidence, a prosecutor generally cannot comment on the lack of defense evidence. *State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011). The prosecutor’s improper argument here suggested that Ms. Cardenas-Flores had the burden of explaining to the jury how her child’s injuries occurred.

⁴³ Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 704. A reviewing court analyzes the prosecutor’s statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

In fact, the state bore the burden of proving how the child's injuries occurred. The state had no evidence establishing how the child was injured. Even the state's expert was unable to rule out accidental trauma. RP 81, 136, 138. Because of this, the prosecutor's attempt to shift the burden onto Ms. Cardenas-Flores was particularly prejudicial.

Prosecutorial misconduct requires reversal if there is a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. Here, the misconduct was especially prejudicial because it echoed a theme that ran throughout the case. There is a substantial likelihood that the misconduct affected the verdict. *Id.*

First, Dr. Lang testified that the absence of an explanation raised concerns regarding non-accidental trauma. RP 81, 136, 138. Although she could not rule out accidental trauma, her testimony provided an evidentiary basis for the prosecutor's improper burden-shifting argument.

Second, the interrogating officers repeatedly asserted to Ms. Cardenas-Flores that her explanations did not match the injury. These repeated assertions were admitted without any limiting instruction.⁴⁴ RP 222-223, 225. The officers' statements to the mother suggested that law

⁴⁴ Defense counsel clearly had a good reason to introduce these statements, to help show why his client gave her "confession." However, the jury should have been instructed to consider the evidence only for this limited purpose. Counsel had no good reason to decline a limiting instruction, as any such instruction would have supported his theory.

enforcement considered it her job to explain how her child got injured. Like Dr. Lang's testimony, the officers' repeated assertions provided a foundation that bolstered the prosecutor's attempt to place the burden on Ms. Cardenas-Flores.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct. By improperly shifting the burden of proof, the prosecutor created a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. Ms. Cardenas-Flores' conviction must be reversed and the charge remanded for a new trial.

IV. MS. CARDENAS-FLORES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.⁴⁵

A. Defense counsel's failure to consult with a medical expert resulted in disastrous cross-examination that suggested to the jury that Ms. Cardenas-Flores regularly broke her child's bones.

Defense counsel unreasonably failed to consult with a medical expert, despite the complex medical issues posed by the case. As a result, defense counsel's cross-examination suggested to the jury that Ms. Cardenas-Flores might have repeatedly broken her baby's bones in many different places during the few weeks after his birth.

⁴⁵ The Sixth Amendment right to the effective assistance of counsel is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. VI and XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

A conviction must be reversed for ineffective assistance if counsel's deficient performance at trial prejudiced the accused person. *Strickland* 466 U.S. 668. Ms. Cardenas-Flores' conviction must be reversed because she was prejudiced by her attorney's failure to consult with a medical expert, and by the related problem of his unreasonable cross-examination of Dr. Lang.

To be effective, defense counsel must undertake a reasonable investigation (or make a reasonable decision that particular investigations are unnecessary). *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008). Any decision not to investigate must be directly assessed for reasonableness.⁴⁶ *Id.* In appropriate cases, a reasonable investigation must include "consulting with a qualified expert." *State v. Fedoruk*, --- Wn.App. ---, ___, 339 P.3d 233, 239 (Wash. Ct. App. 2014).

Defense counsel should have consulted with a medical expert in preparation for trial. First, it should have been obvious from the outset that the case would turn largely on the conclusions of medical experts.⁴⁷ *See, e.g., Affidavit/Declaration of Probable Cause*,⁴⁸ Supp. CP. Second, each of the

⁴⁶ Furthermore, strategic choices made after less than complete investigation are only reasonable to the extent that professional judgment supports the limitations on investigation. *Foust v. Houk*, 655 F.3d 524, 538 (6th Cir. 2011).

⁴⁷ A defense expert might have been able to testify even more clearly than Dr. Lang that the injury could have resulted from accidental trauma. *See* RP 81, 136, 138.

⁴⁸ The probable cause declaration indicated a diagnosis of non-accidental trauma; however, Dr. Lang did not make this diagnosis. *Affidavit/Declaration of Probable Cause*, Supp. CP; *Cf.* RP 81; RP 136, 138.

state's witness lists included multiple physicians. *See* State's Witness Lists (filed 7/24, 8/5, and 8/15 of 2014) Supp. CP.

Having failed to adequately investigate the case, counsel was in no position to properly assess Ms. Cardenas-Flores's chances at trial, to advise her regarding any plea offers, or to properly represent her at trial. *State v. A.N.J.*, 168 Wn.2d 91, 111-112, 225 P.3d 956 (2010); *Ornoski*, 528 F.3d 1222. Although the decision to enter a plea of not guilty was personal to Ms. Cardenas-Flores, she could not make a knowing, intelligent, and voluntary decision if her attorney failed to adequately investigate the most important issues in the case. Nor could counsel reasonably recommend a strategy to pursue at trial, advise his client whether or not to testify, or properly decide to pursue an all-or-nothing strategy.⁴⁹

Counsel's failure to properly investigate also had concrete consequences at trial, most obvious in his disastrous cross-examination of Dr. Lang. Defense counsel should not have asked Dr. Lang about Dr. Clinton's interpretation of the child's X-rays. RP 98. Had he consulted with an expert (or asked Dr. Lang about the contradictions prior to trial), he would not have pursued this line of questioning.

⁴⁹ Given the failure to consult an expert, counsel's decision to forego an inferior degree offense is suspect. RP 300-301; *see State v. Grier*, 171 Wn.2d 17, 30-32, 246 P.3d 1260 (2011).

Counsel's lack of knowledge—due to his failure to consult with a medical expert—resulted in the jury hearing extremely damaging evidence that would not otherwise have been admitted. Counsel asked Dr. Lang about Dr. Clinton's interpretation of the child's X-rays. Dr. Clinton, a pediatric orthopedist saw evidence of “a left femoral shaft fracture, an old right tibia fracture, possible right femur fracture, left femur and left tibia metaphyseal corner fractures.” RP 98. Dr. Lang explained that her forensic findings relied on a higher standard of certainty, but that Dr. Clinton's conclusions might reflect the truth about what had happened to the baby. RP 98-99, 100, 101, 105, 107-108.

Counsel's failure to consult with an expert and his disastrous cross-examination of Dr. Lang “fell below an objective standard of reasonableness.” *A.N.J.*, 168 Wn.2d at 109. There is a reasonable possibility that the verdict might have been more favorable absent counsel's errors. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance.⁵⁰ *Reichenbach*, 153 Wn.2d at 130. Nothing can justify counsel's

⁵⁰ Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel “made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.”). Nothing in

failure to consult with an expert. Counsel should have realized from the moment the court assigned him the case that the outcome would turn on expert medical testimony.

No legitimate strategy supported telling the jury about Dr. Clinton's damaging conclusions. This is especially true since it was based in counsel's own ignorance of the difference between the forensic standard applied by Dr. Lang and the less rigorous standard used by Dr. Clinton. RP 98-99, 101.

Dr. Clinton's name was not on the state's final witness list; in her absence, her observations could not have been admitted as substantive evidence.⁵¹ If counsel somehow hoped to impeach Dr. Lang's conclusions by contrasting them with Dr. Clinton's even more damaging conclusions, that strategy was unreasonable—counsel's questions allowed the jury to consider Dr. Clinton's unchallenged findings as substantive evidence. Her findings implied that Ms. Cardenas-Flores repeatedly broke the bones of her infant son.

There is a reasonable likelihood that the outcome of trial would have differed had counsel consulted with an expert and properly prepared for cross examination of Dr. Lang. *Reichenbach*, 153 Wn.2d at 130.

the record shows that counsel's strategy somehow involved remaining ignorant by not consulting with an expert.

⁵¹ *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 579, 157 P.3d 406 (2007). If reasonably relied upon by Dr. Lang in reaching her own conclusions, Dr. Clinton's opinions might have been admissible for the limited purpose of supporting Dr. Lang's expert opinion. See ER 703.

Accordingly, Ms. Cardenas-Flores was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel. *A.N.J.*, 168 Wn.2d at 111-112. Her conviction must be reversed and the case remanded for a new trial. *A.N.J.*, 168 Wn.2d 91.

B. Defense counsel unreasonably failed to request a limiting instruction and did not object to prosecutorial misconduct; his deficient performance prejudiced Ms. Cardenas-Flores.

1. Counsel failed to object to misconduct in closing.

Defense counsel should have objected when the prosecutor faulted Ms. Cardenas-Flores for her alleged failure to provide a “plausible explanation” for her baby’s injury. RP 405. Counsel’s failure to object prejudiced Ms. Cardenas-Flores. The prosecutor’s improper statement left jurors with the impression that the mother, rather than the state, bore the burden of producing an explanation.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances: “At a minimum, an attorney... should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection.” *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005). Defense counsel did not even take this minimum step. RP 405.

Counsel's failure to object cannot be characterized as a tactical decision. The defense gained no benefit from allowing the prosecution to improperly shift the burden of proof.

At a minimum, the lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.* Defense counsel did neither.

Counsel's deficient performance prejudiced Ms. Cardenas-Flores. The prosecutor's misconduct went directly to the heart of the case. The state bore the burden of proving how C.A. got injured; the prosecutor's argument suggested that it was up to her to provide a plausible explanation. RP 405.

2. Counsel failed to request appropriate limiting instructions.

Counsel's failure to object to the misconduct was especially prejudicial in this case. The prosecutor's closing argument was reinforced by certain evidence, admitted without any limitation, indicating that Ms. Cardenas-Flores bore the burden of producing an explanation.

The jury heard that the health care system and law enforcement both believed Ms. Cardenas-Flores had an obligation to explain the cause of injury. Defense counsel should have requested a limiting instruction regarding this evidence.

Detective Watkins and the other officers who interrogated Ms. Cardenas-Flores repeatedly told her that her account didn't fit the injury. RP 222-223, 225, 288-289, 291. They pressed her multiple times for an explanation that matched their understanding of the injury. RP 222-223, 225, 288-289, 291. Their statements throughout the interrogation showed that law enforcement viewed it as her obligation to provide an explanation.

Similarly, Dr. Lang testified that the parents' lack of an explanation fitting the injury raised concerns of non-accidental trauma. RP 81. Although she couldn't rule out an accidental cause, her testimony suggested that the mother was guilty of assault unless she could provide an explanation.

In the absence of a limiting instruction, jurors were free to consider the evidence for any purpose. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Counsel's failure to seek appropriate limiting instructions permitted jurors to use this evidence as proof that Ms. Cardenas-Flores was guilty unless she explained her baby's injuries.

Counsel should have requested a limiting instruction. ER 105; see *Russell*, 171 Wn.2d at 124. His failure to do so, combined with his failure to object to the prosecutor's improper burden-shifting argument, deprived Ms. Cardenas-Flores of the effective assistance of counsel. *Id.*; *Hodge*, 426 F.3d at 386 There is a reasonable likelihood that these errors affected

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

CONCLUSION

Ms. Cardenas-Flores' conviction for second-degree assault of her child must be reversed and the charge dismissed with prejudice. The state presented insufficient evidence to prove that she intentionally assaulted her son. The prosecution also failed to satisfy the *corpus delicti* rule, and failed to prove that the offense took place within Washington State.

In the alternative, the case must be remanded for a new trial. The court's instructions allowed conviction even absent an intentional assault. Furthermore, the prosecutor committed reversible misconduct and defense counsel's deficient performance prejudiced Ms. Cardenas-Flores.

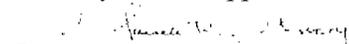
Whether considered individually or cumulatively, these errors require reversal and remand for a new trial. *See State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

Respectfully submitted on March 17, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Zaida Cardenas-Flores, DOC #376856
Washington Corrections Center For Women
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Gig Harbor, WA 98332

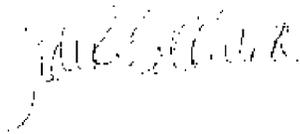
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

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

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

Signed at Olympia, Washington on March 17, 2015.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

March 17, 2015 - 2:45 PM

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