

No. 93385-5
SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Zaida Cardenas-Flores,

Petitioner/Appellant.

Clark County Superior Court

Cause No. 14-1-00298-0

The Honorable Judge David E. Gregerson

Petitioner's Supplemental Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

ARGUMENT 5

I. The court’s instructions improperly allowed conviction even absent proof of an assault. 5

A. The court’s instructions did not make manifestly clear the state’s obligation to prove the common-law elements of assault and the two distinct mental states required for conviction of second-degree assault of a child. 5

B. The erroneous instructions create a manifest error affecting Ms. Cardenas-Flores’s constitutional right to proof of every essential element of the charged crime. 12

II. The state’s failure to introduce sufficient independent evidence of the corpus delicti requires reversal of Ms. Cardenas-Flores’s conviction. 13

A. The independent evidence produced at trial was insufficient to establish the corpus delicti of second-degree assault of a child. 13

B. The evidence is insufficient, whether or not the corpus delicti rule requires independent proof of the specific mental state required for conviction. 16

C. The sufficiency of the independent evidence of the corpus delicti may be raised for the first time on review.. 18

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)
..... 5

WASHINGTON CASES

Batten v. Abrams, 28 Wn. App. 737, 626 P.2d 984 (1981) 19

Bennett v. Hardy, 113 Wash.2d 912, 784 P.2d 1258 (1990) 20

Conservation Nw. v. Okanogan Cty., 194 Wn. App. 1034 (2016)
(unpublished) 19

Gross v. City of Lynnwood, 90 Wash.2d 395, 583 P.2d 1197 (1978)..... 20

Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d
207, 45 P.3d 186 (2002), *amended on denial of reconsideration*, 50
P.3d 618 (Wash. 2002) 19

Jones v. Stebbins, 122 Wash.2d 471, 860 P.2d 1009 (1993) 19

Matter of Adoption of T.A.W., ---Wn.2d ---, 383 P.3d 492 (2016) 19

Maynard Inv. Co. v. McCann, 77 Wash.2d 616, 465 P.2d 657 (1970)..... 20

Mitchell v. Doe, 41 Wn. App. 846, 706 P.2d 1100 (1985) 19

New Meadows Holding Co. by Raugust v. Washington Water Power Co.,
102 Wn.2d 495, 687 P.2d 212 (1984)..... 19

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005)..... 19, 20

State v. Angulo, 148 Wn. App. 642, 200 P.3d 752 (2009)..... 17

State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993)..... 7

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996)..... 16

State v. Bluford, 195 Wn. App. 570, 379 P.3d 163 (2016)..... 9

<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006)....	14, 15, 16, 17, 18, 19, 20
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002)	6, 8, 11, 12
<i>State v. C.M.C.</i> , 110 Wn. App. 285, 40 P.3d 690 (2002).....	17
<i>State v. Daniels</i> , 87 Wn. App. 149, 940 P.2d 690 (1997).....	12
<i>State v. Deer</i> , 175 Wn.2d 725, 287 P.3d 539 (2012)	9
<i>State v. Dow</i> , 168 Wn.2d 243, 227 P.3d 1278 (2010).....	14, 18, 19
<i>State v. Eastmond</i> , 129 Wn.2d 497, 919 P.2d 577 (1996)	6, 8, 12, 13
<i>State v. Fisher</i> , 185 Wn.2d 836, 374 P.3d 1185 (2016).....	10
<i>State v. Hahn</i> , 174 Wn.2d 126, 271 P.3d 892 (2012)	9, 11
<i>State v. Hayward</i> , 152 Wn. App. 632, 217 P.3d 354 (2009)	8, 15
<i>State v. Hummel</i> , 165 Wn. App. 749, 266 P.3d 269 (2012).....	17
<i>State v. Kindsvogel</i> , 149 Wn.2d 477, 69 P.3d 870 (2003)	9
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	5, 7, 11
<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014)	12
<i>State v. Mathis</i> , 73 Wn. App. 341, 869 P.2d 106 (1994)	14
<i>State v. McPhee</i> , 156 Wn. App. 44, 230 P.3d 284 (2010)	14
<i>State v. Miller</i> , 131 Wn.2d 78, 929 P.2d 372 (1997), <i>as amended on reconsideration in part</i> (Feb. 7, 1997).....	5, 7, 8
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), <i>as corrected</i> (Jan. 21, 2010)	13
<i>State v. Stevens</i> , 158 Wn.2d 304, 143 P.3d 817 (2006)	9
<i>State v. Wilson</i> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	9
<i>Stedman v. Cooper</i> , 172 Wn. App. 9, 292 P.3d 764 (2012)	19

WASHINGTON STATUTES

RCW 9A.36.021..... 8, 15
RCW 9A.36.031..... 7, 8
RCW 9A.36.130..... 8, 15
RCW 9A.36.140..... 7

OTHER AUTHORITIES

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (3d Ed) 6, 7, 10
MedlinePlus, National Library of Medicine (US, 2016) 7
RAP 2.5..... 12, 13, 19

STATEMENT OF FACTS

In December of 2013, Zaida Cardenas-Flores and Carlos Austin brought their infant son, C.A., to the emergency room. RP 63-64. The baby's leg was swollen, and he'd cried uncontrollably during his diaper change. RP 73, 127, 134. Ms. Cardenas-Flores thought she could hear a cracking or popping sound in the leg. RP 73, 134, 187-188, 249, 327-328, 356.

Dr. Cathleen Lang diagnosed a displaced femur fracture. RP 63-64. X-Rays showed that the femur had not started healing, which suggested the fracture was less than a week old. RP 69-71.

Neither parent could pinpoint a single moment that might have caused the injury, other than an earlier incident where the father accidentally rolled onto C.A.'s leg while co-sleeping on the floor. RP 72-73, 81-82, 266-267. Dr. Lang ruled out this incident as the cause of the fracture. RP 75.

Medical staff were highly concerned at the lack of a specific accidental cause for the fracture; however, the injury was not so unusual that they could diagnose "non-accidental trauma." RP 81, 136, 138. When police came, three officers separated Ms. Cardenas-Flores from her husband and questioned her.¹ RP 168, 207-210.

The interrogation started sometime after midnight. It lasted 2½ hours. RP 109, 214, 288. It was not recorded. RP 214, 376. At one point, one of the three officers had to leave the room, explaining that his inter-

¹ Mr. Austin was also questioned. RP 381.

viewing style “can get a little direct,” which “can cause stress for the subject.” RP 380. This officer 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. RP 294. She repeated what she had told Dr. Lang about Mr. Austin rolling onto the child’s leg while co-sleeping. RP 181-184, 187.

The officers told her “multiple times” that the injuries didn’t match her explanation RP 235. At some point, the lead investigator, Detective Deanna Watkins, decided that Ms. Cardenas-Flores was not being honest. RP 222. Watkins told her to “[T]ell us what really happened.” RP 223.

After hearing these repeated objections, Ms. Cardenas-Flores told the police that the injury may have occurred when she’d pulled C.A. from his car seat too quickly. RP 188, 200-201, 234. She said he’d been crying, that she “didn’t like to hear him cry,” and that she was “desperate to get him out.” RP 201. She said that her baby’s leg had been caught in one of the seat’s restraints, and that she’d lifted the whole car seat with him in her rush to get him out.² RP 188, 200-201, 234.

One of the officers told her that the injury could not have happened in that way either. RP 235. It is not clear why the officer thought this explanation inconsistent with the injury.³

² 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.

³ Nothing in the record suggests that the medical experts would have rejected this explanation. *See* RP 51-160.

After police rejected this explanation, Ms. Cardenas-Flores said that she may have put too much pressure on his leg when putting him *into* the car seat. RP 201. The medical evidence was consistent with this account of the injury. RP 79-80.

The officers accepted this explanation, and the mother gave more detail. She told police that her baby's leg was bent and swollen before she put him in the car seat. RP 201-202. She said "she was trying to make [the leg] fit under the strap of the car seat," and so she "pushed [C.A.]'s left leg out and down to straighten it." 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.

The police collected the car seat as evidence, and the state charged Ms. Cardenas-Flores with assault of a child in the second degree. RP 202-203; CP; CP 1-3, 50.

In her trial testimony, Ms. Cardenas-Flores disavowed both alternative explanations involving the car seat. RP 289-290, 291. She told the jury that she'd provided those accounts after the police "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. The father testified that he'd helped his wife put C.A. in the car seat.⁴ RP 219, 353-354, 358-359, 381.

⁴ During his separate police interview, the father did not describe any injury relating to the car seat. RP 219, 381.

At trial, the state presented no evidence proving how C.A.'s leg was actually broken. The state's trial theory was that the mother injured her child by straightening his leg while putting him in his car seat. RP 79-80, 202, 398. The prosecutor characterized the mother's description of the injury as "the one plausible explanation in this entire trial for what happened that day." RR 409.

The court's instructions defined assault to include "an intentional touching... that is harmful." CP 20. In closing, defense counsel focused on his client's mental state, using some form of the word "intent" more than 30 times during his argument. RP 409-422. The prosecutor responded (in part) by telling jurors "This was a deliberate act to pull the leg out and down." RP 423.

The jury voted to convict. RP 428-431; CP 27.

At sentencing, the court acknowledged that the jury "did find the defendant guilty," but expressed doubts about Ms. Cardenas-Flores's culpability. RP 444. While noting C.A. was "significantly injured," the judge did not lecture her or voice outrage. RP 444.

Instead, he characterized her behavior as "recklessness more than anything else." RP 444. He remarked that "[t]he flavor of this case, the Court interprets as somewhat different." RP 444. He went on to say that it didn't "make rational sense that a mother of a newborn would intentionally hurt [her] child." RP 444. He suggested that "mental health issues or lack of parenting skills" may have contributed to her recklessness. RP 444.

In keeping with these remarks, the court imposed the bottom of the standard range. RP 444-445. Ms. Cardenas-Flores timely appealed. CP 41. The Court of Appeals affirmed in a published opinion. Opinion, p. 1.

ARGUMENT

I. THE COURT’S INSTRUCTIONS IMPROPERLY ALLOWED CONVICTION EVEN ABSENT PROOF OF AN ASSAULT.

An infant may be seriously harmed by a parent’s reckless conduct, even without an intentional assault. Here, the evidence suggested that the mother caused substantial bodily harm while trying to put her infant son in his car seat. The court’s instructions required jurors to convict the mother of second-degree assault if she injured him through reckless conduct, even absent an intentional assault. The instructions didn’t make the law manifestly clear. This relieved the state of its burden to prove the essential elements of the charge, and requires reversal of her conviction.

A. The court’s instructions did not make manifestly clear the state’s obligation to prove the common-law elements of assault and the two distinct mental states required for conviction of second-degree assault of a child.

The court’s instructions did not make the law “manifestly apparent to the average juror.” *State v. Kylllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Instead, a “reasonable juror could have interpreted the instruction[s]”⁵ to allow conviction if Ms. Cardenas-Flores accidentally harmed her infant son while trying to place him in his car seat. RP 200-202.⁶

⁵ *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), as amended on reconsideration in part (Feb. 7, 1997) (emphasis added) (citing *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)).

⁶ Indeed, even the Court of Appeals interpreted the instructions this way, finding “sufficient evidence from which the jury could find [she] intentionally did the physical act (forcefully

Her efforts to secure him in his car seat involved intentional touch. RP 200-202. The resulting injury meant she engaged in “an intentional touching... that is harmful,” even if she did not assault her son. CP 20.⁷ Under the court’s instructions, the jury had no choice but to convict. CP 20. This relieved the state of its burden to prove essential elements of the charged crime, and requires reversal of the conviction. *State v. Eastmond*, 129 Wn.2d 497, 503, 919 P.2d 577 (1996); *State v. Brown*, 147 Wn.2d 330, 339, 344, 58 P.3d 889 (2002) (Per Ireland, J., with three Justices concurring and two Justices concurring in result.)

An instruction defining assault to include any “intentional touching... that is harmful”⁸ creates criminal liability for any parent or caretaker whose intentional touch accidentally harms an infant.⁹ This is so even absent any proof suggesting an intentional assault or an unlawful touch.

The problem stems from the extreme fragility of infants and from a parent’s right and duty to engage in intentional touch—including bathing, changing, feeding, or comforting an infant—even when the infant increases the potential for accidental harm by strenuously resisting the parent’s touch. Under the instruction given here any intentional contact, when combined with accidental harm, qualifies as an “intentional touching...

straightening CA’s leg) that resulted in his substantial bodily injury and, thus, constituted an assault by battery.” Opinion, pp. 12-13.

⁷ The court’s instruction was based on the pattern instruction. See 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (3d Ed).

⁸ CP 20.

⁹ In fact, such a parent would be just as guilty as a person who intentionally harms a child.

that is harmful,” even though the harm is accidental. CP 20.¹⁰ Jury instructions must make the relevant legal standard “manifestly apparent to the average juror.” *Kyllo*, 166 Wn.2d at 864. To determine whether an instruction is misleading, courts look at “the way a reasonable juror *could have* interpreted the instruction.” *Miller*, 131 Wn.2d at 90 (emphasis added).

A parent whose lawful intentional touch accidentally injures an infant should not be convicted of assault.¹¹ In cases involving infants and their caretakers, jury instructions must make “manifestly apparent”¹² that conviction requires proof of an intentional assault—that is, an unlawful touching with criminal intent that harms the infant. If any of these pieces are missing, the instructions must require acquittal.

Here, the instructions were not manifestly clear. Instead, the trial court defined assault to include any “intentional touching... that is harmful.” CP 20. The instruction required conviction even if the touching was lawful, performed without criminal intent, and resulted only in accidental harm. CP 20.

¹⁰ This means that under the court’s instructions, a parent could be convicted of second-degree assault of a child for lifting a baby by the arms and accidentally causing “nursemaid’s elbow” (also known as radial head dislocation). See *MedlinePlus*, National Library of Medicine (US, 2016), available at <https://www.nlm.nih.gov/medlineplus/ency/article/000983.htm> (updated 11/20/2014, accessed June 21, 2016). Similarly, a parent could be convicted of second-degree assault of a child for gently swinging a baby and accidentally hitting a piece of furniture, causing a bruise. See *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (bruises qualify as substantial bodily harm). Both examples involve “intentional touching... that is harmful.” Neither should result in conviction for second-degree assault of a child, even if a jury believed the parents’ actions reckless.

¹¹ An exception would be for the negligent infliction of harm that is “accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” See RCW 9A.36.031(1)(f); RCW 9A.36.140.

¹² *Kyllo*, 166 Wn.2d at 864.

This relieved the state of its burden to prove an intentional assault, and requires reversal of Ms. Cardenas-Flores’s conviction. *Brown*, 147 Wn.2d at 339, 344; *Eastmond*, 129 Wn.2d at 503.

1. The court’s instructions relieved the state of its burden to prove the two distinct mental states required for conviction of second-degree assault of a child.

The court’s instructions effectively conflated two elements of second-degree assault of a child. Conviction requires proof of an intentional assault accompanied by the reckless infliction of substantial bodily harm. RCW 9A.36.021(1)(a); RCW 9A.36.130. The two elements are distinct. *See State v. Hayward*, 152 Wn. App. 632, 645, 217 P.3d 354 (2009).

However, under the court’s instructions, conviction followed proof of the mere reckless infliction of substantial bodily harm, even absent proof of an intentional assault. CP 18-20.¹³ This so because the court’s definition of assault allowed conviction based on any intentional touch that caused harm. A reasonable juror “could have interpreted the instructions” to relieve the state of its burden to prove an intentional assault. *Miller*, 131 Wn.2d at 90. If the mother intentionally touched her child (by putting him in his car seat) and recklessly caused substantial bodily harm, the jury had no choice but to convict. CP 20.

The error went to the very heart of the case. Defense counsel spent

¹³ The unintentional infliction of harm may qualify as a Class C felony (if accomplished through use of a weapon, or “accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.”) RCW 9A.36.031(1)(d) and (f). This reflects the legislature’s judgment that a person who accidentally inflicts harm is less culpable than one who does so intentionally. RCW 9A.36.031(2); cf RCW 9A.36.021(2).

his entire closing argument focused on the issue of intent. RP 409-422. Because the court’s instructions allowed conviction based on any “intentional touching... that is harmful,”¹⁴ defense counsel had no hope of persuading the jury to acquit, even if jurors believed the mother did not intentionally assault her child.

The court’s instructions relieved the state of its burden to prove the two distinct mental states of the charged crime. The conviction must be reversed, and the case remanded for a new trial with proper instructions. *Brown*, 147 Wn.2d at 339, 342, 343, 344.

2. The court’s instructions relieved the state of its burden to prove two common-law elements required for conviction.

The common-law definition of assault requires proof of an “unlawful[] touching... with criminal intent.” *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012).¹⁵ These two elements form the core of any assault; they are the “two parts” that make up a crime: the *mens rea* (criminal intent) and *actus reas* (unlawful force). See *State v. Deer*, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). Including these common-law elements in the definition of assault might cure the problem where a parent is accused of harming an infant.

The phrase “with unlawful force” is bracketed in the pattern instruction, but was omitted from the court’s instructions in this case. CP 20;

¹⁴ CP 20.

¹⁵ See also, e.g., *State v. Bluford*, 195 Wn. App. 570, 584, 379 P.3d 163 (2016); *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006); *State v. Kindsvogel*, 149 Wn.2d 477, 483, 69 P.3d 870 (2003); *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

see WPIC 35.50. The court could have instructed jurors that “An assault is an intentional touching of another person, *with unlawful force*, that is harmful...” WPIC 35.50 (certain bracketed material omitted) (emphasis added). Such an instruction would have alerted jurors to the state’s obligation to prove the unlawful use of force. Applied to this case, jurors may well have concluded that Ms. Cardenas-Flores used lawful force when she attempted to put her child in his car seat. Finding this, jurors would then have acquitted her of the charged crime.

According to the Court of Appeals, the instruction defining assault should only include the “unlawful force” element if the accused person admits to causing the injury and testifies that she used lawful force. Opinion, p. 15. This is incorrect: “[b]ecause the defendant is entitled to the benefit of all the evidence, her defense may be based on facts inconsistent with her own testimony.” *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016) (citations omitted). Ms. Cardenas-Flores was entitled to the benefit of all the evidence, including evidence that she accidentally caused her son’s injury while (lawfully) trying to get him into his car seat. *Id.*

The phrase “with criminal intent” does not appear in the pattern instruction. WPIC 35.50. Nonetheless, the court could have instructed jurors that “An assault is an intentional touching of another person, with [criminal intent], that is harmful...” WPIC 35.50 (modified, certain bracketed material omitted). This definition of assault would likewise have alerted jurors to the state’s obligation to prove more than just an “intentional touching... that is harmful.” CP 20. Applied to this case, jurors may well

have concluded that Ms. Cardenas-Flores lacked criminal intent when she straightened her baby's leg while putting him in his car seat.¹⁶

As given, the court's instructions relieved the state of its burden to prove an unlawful touching with criminal intent. *Hahn*, 174 Wn.2d at 129. This requires reversal and remand for a new trial with proper instructions. *Brown*, 147 Wn.2d at 339, 342, 343, 344.

3. The court's instruction defining second-degree assault did not cure the problem.

The instruction defining second-degree assault did not cure the problem created by the instruction defining assault. CP 19-20. Although the court outlined the state's burden to prove that the defendant "intentionally assault[ed] another and thereby recklessly inflict[ed] substantial bodily harm," the apparent clarity of that instruction was undermined by the definition of assault provided in the very next instruction. CP 19-20.

Combining the two instructions does not make the standard "manifestly apparent." *Kyllo*, 166 Wn.2d at 864. The combined language would require proof that the defendant "intentionally [committed] an intentional touching... that is harmful... and thereby recklessly inflict[ed] substantial bodily harm." CP 19-20 (combined).

This reading cannot be described as "manifestly" clear. *Kyllo*, 166 Wn.2d at 864. It is not apparent what an intentional intentional touching

¹⁶ The Court of Appeals failed to address this issue, instead characterizing the mother's argument. Opinion, pp. 14-15 ("Cardenas-Flores argues that the assault instruction was inadequate because it did not require the jury to find... a specific intent to inflict substantial bodily injury.") Petitioner never suggested that conviction required proof that she intended to inflict substantial bodily harm.

is, yet that is exactly the problem posed to the jury by a combined reading of the instruction. CP 19-20. A reasonable juror might interpret the pair of instructions together to mean that Ms. Cardenas-Flores was guilty if she intentionally tried to put her son in his car seat and recklessly caused substantial bodily harm.

The instruction defining second-degree assault did not cure the problem created by the court's definition of assault. When read in combination, the two instructions permitted conviction based on the reckless infliction of substantial bodily harm, even if caused by an intentional touching that was not an assault.¹⁷ CP 19-20.

The court's instructions relieved the state of its burden to prove the essential elements of the crime. *Brown*, 147 Wn.2d at 339, 344; *Eastmond*, 129 Wn.2d at 503. The conviction must be reversed and the case remanded for a new trial with proper instructions. *Brown*, 147 Wn.2d at 339, 342, 343, 344.

B. The erroneous instructions create a manifest error affecting Ms. Cardenas-Flores's constitutional right to proof of every essential element of the charged crime.

The Court of Appeals "assum[ed] without deciding that the issue [was] properly before [it] under RAP 2.5(a)(3)." Opinion, p. 14. That rule requires only "a plausible showing that the error... had practical and identifiable consequences in the trial," meaning "the court could have corrected the error," given what it knew at the time. *State v. O'Hara*, 167 Wn.2d

¹⁷ Cf. *State v. Daniels*, 87 Wn. App. 149, 940 P.2d 690 (1997). The *Daniels* court upheld a conviction for second-degree assault despite the absence of an instruction defining "assault."

91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010); *see also State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

Here, the trial judge heard all the evidence when he instructed the jury. Given what he knew at the time, he could have corrected the error.

A misstatement in an instruction defining assault qualifies as manifest error affecting a constitutional right, and thus may be reviewed for the first time on appeal. *Eastmond*, 129 Wn.2d at 502. The error here may be addressed for the first time on review. *Id.*; RAP 2.5(a)(3).

II. THE STATE’S FAILURE TO INTRODUCE SUFFICIENT INDEPENDENT EVIDENCE OF THE *CORPUS DELICTI* REQUIRES REVERSAL OF MS. CARDENAS-FLORES’S CONVICTION.

The state presented insufficient independent evidence proving the corpus delicti. Neither the medical evidence nor any other testimony established a criminal cause for C.A.’s injury. Even when considered in a light most favorable to the state, the evidence was consistent with accidental trauma. The mother may have caused the injury by lawfully pulling on her child’s leg while trying to place him in his car seat. Because the state failed to independently prove the corpus delicti of second-degree assault of a child, the mother’s statements should not have contributed to the verdict.

A. The independent evidence produced at trial was insufficient to establish the *corpus delicti* of second-degree assault of a child.

Apart from the mother’s statements, the strongest evidence the state presented at trial consisted of Dr. Lang’s testimony that C.A.’s injury was “highly concerning for nonaccidental trauma” and that it would have

involved “more force than what’s going to be going on in normal everyday life.” RP 80. No evidence suggested that this force could only result from an intentional assault, or that it required more than mere recklessness.

The state thus failed to establish a criminal cause for the injury or to disprove a hypothesis of innocence. Because of this, Ms. Cardenas-Flores’s statements should not have contributed to the guilty verdict under the *corpus delicti* rule. *State v. Brockob*, 159 Wn.2d 311, 328-329, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007).

An accused person’s statements do not contribute to a finding of guilt 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 insufficient to establish the *corpus delicti* of second-degree assault of a child.¹⁸

To satisfy the *corpus delicti* rule, the state’s independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *Brockob*, 159 Wn.2d at 329. If the independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Id.*, at 329-330.

The medical professionals who examined C.A. could not diagnose non-accidental trauma. RP 81; RP 136, 138. Although Dr. Lang believed

¹⁸ The independent evidence includes any evidence presented by the accused person. *State v. McPhee*, 156 Wn. App. 44, 60, 230 P.3d 284 (2010). A defendant who testifies and confirms the truth of a prior confession waives any challenge. *See State v. Mathis*, 73 Wn. App. 341, 346, 869 P.2d 106 (1994). Ms. Cardenas-Flores acknowledged making statements to the police, but testified that she’d lied under duress. RP 289-291.

the fracture involved “more force than what’s going to be going on in normal everyday life,” she did not say that such an injury could only result from an intentional assault. RP 80. Nor did she (or anyone else) testify that the injury could not have come about by accident. RP 80.

Dr. Lang compared the necessary force to that generated by a toddler falling while twisting a leg. RP 78. She agreed that the injury could have happened when Ms. Cardenas-Flores straightened C.A.’s leg while putting him in his car seat.¹⁹ RP 79.

The medical testimony and all the other independent evidence introduced at trial proves no more than accidental injury. Ms. Cardenas-Flores may very well have acted recklessly,²⁰ applying too much force when she straightened her infant’s leg putting him in the car seat.

But the “specific crime with which the defendant has been charged”²¹ here required more than recklessness. It also required proof of an intentional assault—not merely the reckless infliction of substantial bodily harm. RCW 9A.36.021(1)(a); RCW 9A.36.130. The two elements are distinct. *See Hayward*, 152 Wn. App. at 645.

The independent evidence here fails the test outlined in *Brockob*. It was consistent with a hypothesis of innocence—that Ms. Cardenas-Flores

¹⁹ Although Dr. Lang imagined a scenario where “the body was stabilized and someone [grabbed and yanked] on the leg as they’re turning the leg,” the laws of physics suggest that the injury could also have happened if the leg were stabilized and the same force were applied by lifting the child. RP 79. Nothing in the record explains why the police rejected this explanation of the injury, which Ms. Cardenas-Flores provided before saying she’d broken her son’s leg putting him into his car seat. RP 188, 200-201, 234.

²⁰ Or negligently.

²¹ *Brockob*, 159 Wn.2d at 329.

accidentally injured her son while putting him in his car seat. *Brockob*, 159 Wn.2d at 329. Even when considered in a light most favorable to the prosecution, the independent evidence supports a reasonable and logical inference that the injury was accidentally inflicted. *Id.*, at 329-330. It does not rule out a hypothesis of innocence.²² *Id.*

Because the state failed to establish the *corpus delicti* of the charged crime, Ms. Cardenas-Flores's conviction must be reversed and the charge dismissed with prejudice. *Brockob*, 159 Wn.2d at 318, 339, 352.

B. The evidence is insufficient, whether or not the *corpus delicti* rule requires independent proof of the specific mental state required for conviction.

Even before *Brockob*, the Supreme Court made clear that the state was required to produce independent evidence of the perpetrator's mental state before a statement could be considered. *See, e.g., State v. Aten*, 130 Wn.2d 640, 658, 927 P.2d 210 (1996) (reversing for absence of independent proof of criminal negligence). The *Brockob* court reaffirmed this in ruling that independent evidence must corroborate "not just *a crime* but *the specific crime* with which the defendant has been charged." *Brockob*, 159 Wn.2d at 329.²³

Thus, in *Brockob*, the court reversed the defendant's conviction for possession of pseudoephedrine with intent to manufacture methamphetamine, because the state failed to produce independent evidence corroborat-

²² Even considering Ms. Cardenas-Flores's statements, the evidence was insufficient for conviction. Her "confession" that she straightened her son's leg to fit him into his car seat does not describe an intentional assault. RP 200-202.

²³ The *Brockob* majority criticized the dissent for claiming that the rule only requires "'an inference that *a crime was committed*.'" *Brockob*, 159 Wn.2d at 329 (quoting dissent).

ing the defendant's intent to manufacture. *Id.*, at 331-333. Absent independent evidence of intent, the defendant's statement could not be considered. *Id.*²⁴

Brockob and *Aten* require reversal here. The state failed to provide independent evidence proving that Ms. Cardenas-Flores intended to assault her child, or that the injury could only result from an intentional assault. Because of the state's failure to independently prove an intentional assault, the conviction cannot stand. *Brockob*, 159 Wn.2d at 318, 339, 352.

Furthermore, reversal is required even if the state is not obligated to prove the specific mental state required for conviction.²⁵ The independent evidence is insufficient even under a more general approach to the *corpus delicti* rule.

In its simplest formulation, the *corpus delicti* rule "involves only two elements: (1) an injury or loss (e.g., death or missing property), and (2) someone's criminal act as the cause thereof." *State v. C.M.C.*, 110 Wn. App. 285, 289, 40 P.3d 690 (2002); *see also Brockob*, 159 Wn.2d at 354 (Madsen, J., dissenting).

Under this more general statement of the rule, the state must independently prove a "criminal act." *C.M.C.*, 110 Wn. App. at 289. The state failed here to prove C.A.'s injury could result only from a criminal act.

²⁴ Divisions I and III have ignored this aspect of *Brockob*. *State v. Angulo*, 148 Wn. App. 642, 200 P.3d 752 (2009); *State v. Hummel*, 165 Wn. App. 749, 768, 266 P.3d 269 (2012).

²⁵ Like Division I in *Hummel* and Division III in *Angulo*, the Court of Appeals in this case ignored *Brockob*'s clear requirement that the state provide independent evidence of the mental element required for conviction. Opinion, pp. 20-21.

Dr. Hall described the injury as “highly concerning,” but could not diagnose nonaccidental trauma. RP 81. In other words, she could not say the injury resulted from a criminal act, or rule out a noncriminal cause. The independent evidence thus did not establish the *corpus delicti* even under a relaxed rule requiring only a general criminal cause for the injury.

Indeed, for most crimes, it is meaningless to speak of a “criminal act” without considering a culpable mental state. By itself, the infliction of harm is not a crime.²⁶ It is the actor’s culpable mental state that transforms the infliction of harm into a crime.

Regardless of the state’s obligation to prove a specific mental state, the prosecution failed to independently prove the *corpus delicti* here: the state failed to prove the injury stemmed from any kind of criminal act.

The evidence was therefore insufficient. Ms. Cardenas-Flores’s statement should not have been considered, and her conviction must be reversed and the charge dismissed with prejudice. *Brockob*, 159 Wn.2d at 318, 339, 352.

C. The sufficiency of the independent evidence of the *corpus delicti* may be raised for the first time on review.

The *corpus delicti* rule includes a sufficiency prong and an admissibility prong. *Dow*, 168 Wn.2d at 251. Under the sufficiency prong, a verdict may not rest on an accused person’s confession unless the state introduces independent evidence proving the *corpus delicti* of the specific

²⁶ Indeed, causing another person’s death is not a crime, absent proof of criminal negligence at the least. See RCW 9A.32.070.

crime charged. *Brockob*, 159 Wn.2d at 329.²⁷ Where independent evidence does not support each element, the evidence is insufficient for conviction. *Brockob*, 159 Wn.2d at 338; *Dow*, 168 Wn.2d at 254.

The sufficiency prong of the *corpus delicti* rule may be raised at any time. *Brockob*, 159 Wn.2d at 319-320. In *Brockob*, for example, Mr. Brockob raised the *corpus delicti* issue for the first time in a post-trial motion. *Id.* Ms. Cardenas-Flores is therefore not barred from arguing the sufficiency prong of the *corpus delicti* rule for the first time on review. *Id.*

In addition, the Rules of Appellate Procedure permit a party to raise “for the first time in the appellate court... failure to establish facts upon which relief can be granted.” RAP 2.5(a)(2). The core of this provision codifies a common-law rule allowing a party to argue “a new issue... when the question raised affects the right to maintain the action.”²⁸ *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (internal quotation marks omitted).²⁹

²⁷ See also *Dow*, 168 Wn.2d at 254 (the prosecution must “prove every element of the crime charged by evidence independent of the defendant's statement.”).

²⁸ Courts have also extended RAP 2.5(a)(2) beyond this core component to allow parties to raise arguments unrelated to the right to maintain an action. See, e.g., *Stedman v. Cooper*, 172 Wn. App. 9, 24, 292 P.3d 764 (2012); *Batten v. Abrams*, 28 Wn. App. 737, 742, 626 P.2d 984 (1981).

²⁹ Courts have applied this core aspect of the rule (and its common-law predecessor) to allow arguments relating to (1) the applicability of a statute of limitations, see *New Meadows Holding Co. by Raugust v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984); (2) a party's standing to litigate, see *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213 n. 3, 45 P.3d 186 (2002), amended on denial of reconsideration, 50 P.3d 618 (Wash. 2002); see also *Conservation Nw. v. Okanogan Cty.*, 194 Wn. App. 1034 (2016) (unpublished) (citing *Mitchell v. Doe*, 41 Wn. App. 846, 848, 706 P.2d 1100 (1985)); (3) the “scope and availability of [a] cause of action” where such issues were not raised below, see *Roberson*, 156 Wn.2d at 41; (4) the validity of service by mail see *Jones v. Stebbins*, 122 Wash.2d 471, 479-480, 860 P.2d 1009 (1993); (5) the applicability of the “active efforts” requirement of the Indian Child Welfare Act to a non-Indian parent facing termination in a stepparent adoption case, see *Matter of Adoption of T.A.W.*, ---Wn.2d ---, ___ n. 6, 383 P.3d 492 (2016); (5) alternate grounds for a civil claim not presented in the trial

Ms. Cardenas-Flores argues that the state did not present sufficient independent evidence of the *corpus delicti* and thus failed to “establish facts upon which relief can be granted.” RAP 2.5(a)(2). Both RAP 2.5(a)(2) and its common-law predecessor allow her to argue the sufficiency prong of the *corpus delicti* rule despite the lack of objection in the trial court. *Roberson*, 156 Wn.2d at 40; *Gross*, 90 Wash.2d at 400.³⁰

Because the state failed to present sufficient evidence of the *corpus delicti*, the conviction must be reversed. Her case must be dismissed with prejudice. *Brockob*, 159 Wn.2d at 318, 339, 352.

CONCLUSION

Ms. Cardenas-Flores’s conviction must be reversed and the case dismissed with prejudice. In the alternative, the charge must be remanded to the trial court for a new trial with proper instructions.

Respectfully submitted on December 16, 2016.

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court, *see Bennett v. Hardy*, 113 Wash.2d 912, 918, 784 P.2d 1258 (1990); (6) the plaintiff’s lack of membership in a protected class, *see Gross v. City of Lynnwood*, 90 Wash.2d 395, 400, 583 P.2d 1197 (1978); and (7) a statutory basis for reinstating a claim previously dismissed, *see Maynard Inv. Co. v. McCann*, 77 Wash.2d 616, 621, 465 P.2d 657 (1970).

³⁰ The Court of Appeals treated her sufficiency argument as a challenge to the *admission* of her statements and found she had waived the issue by failing to object. Opinion, p. 7 n.3, 10. By contrast, Judge Maxa recognized the argument as one involving sufficiency. Opinion, pp. 23-26 (Maxa, J., concurring).

CERTIFICATE OF SERVICE

I certify that on today's date, I mailed a copy of Petitioner's Supplemental Brief, postage prepaid, to:

Zaida Cardenas-Flores
C/O Tacoma Northwest Detention Center
1623 E J St., Suite 2
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With the permission of the recipient(s), I delivered an electronic version of the brief to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Supplemental Brief electronically with the Supreme Court.

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 December 16, 2016.



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