NO. 1031432

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DAMIEN CHARLES MCCARTER,
Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION I
Court of Appeals No. 85919-6-I
Kitsap County Superior Court No. 19-1-01614-18

ANSWER TO PETITION FOR REVIEW

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SERVICE		
	Christopher Petroni, WAP 1511 Third Ave., Ste. 610 Seattle, WA 98101 Email: wapofficemail@washapp.org chris@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 3, 2024, Port Orchard, WA **Original e-filed at the Supreme Court; Copy as at left.** **Office ID #91103** kcpa@kitsap.gov

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney JOHN L. CROSS.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals unpublished decision in *State v. McCarter*, No. 85919-6-I filed March 3, 2024.

III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, on the issues here raised, in conformity with well-established principles, held

1. that McCarter failed to preserve his appeal claim that the medical evidence relied upon by the state did not meet the admissibility standards of *Frye v. United States*, 54 U.S. App. D.C. 46, 47, 293 F. 1013 (1923) and that the diagnosis meets the *Frye* standard, following *In re Pers. Restraint of Morris*, 189 Wn. App. 484, 492-93, 355 P.3d 355 (2015).

2. that the same diagnostic testimony of the

physicians was not opinion on McCarter's guilt which invaded the province of the jury. Slip op. at 12.

3. that the trial court's error in improperly restricting the defense closing argument was harmless, concluding "beyond a reasonable doubt that the jury verdict would have been the same without the error." Slip op. at 19.

4. that the exceptional sentence imposed was based on jury-found aggravating circumstances, that proof of those aggravating circumstances was sufficient, and that the trial court properly found that the jury verdicts constituted "substantial and compelling reasons" for the imposition of the exceptional sentence. Slip op. at 28.

The criteria set forth in RAP 13.4(b) are not met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or any published decision of the Court of Appeals;

2. The decision fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and

3. The petition fails to present any issue of substantial public interest that should be determined by this Court.

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Damien McCarter was charged by information with second degree murder with a special allegation of the aggravating circumstance of domestic violence. CP 1-2. Later, a first amended information charged second degree murder, DV, adding aggravating circumstances of particularly vulnerable victim and use of a position of trust. CP 104-05.

McCarter was convicted of second degree murder. CP 487. The jury returned special verdicts finding domestic violence, particularly vulnerable victim, and use of position of trust. CP 488-89.

McCarter's standard range was 123-220 months. CP 522.

The trial court imposed an exceptional sentence of 360 months. CP 525; RP(8/19/22) 24, 26-27. The trial court concluded that the jury's findings of particular vulnerability and abuse of a position of trust warranted additional time above the standard range. RP(8/19/22) 23.

B. FACTS

Below, with word limits firmly in mind, the state briefed 25 pages of facts. A compressed version of the Court of Appeal's findings (also lengthy) is offered here. Reference to the briefing below may assist this Court's understanding of the trial and the issues.

> On December 3, 2019, officers responded to Mary Bridge Hospital and spoke with medical staff regarding a 2-month-old child, AM, who had suffered a decompressed skull fracture and several bilateral rib fractures while in the care of his father, McCarter. AM ultimately succumbed to his injuries and passed away on December 4, 2019.

Slip op. at 2.

> Jennifer McCarter, McCarter's wife and AM's mother, testified that her husband was the only person home with AM at the time of the incident on December 3. In response to an e- mail

> from McCarter that said, "I fell with [AM] going down stairs," Jennifer explained that she immediately left work and drove home where she found McCarter and AM waiting for her. McCarter then told Jennifer that AM "had been dropped in his car seat and that he wasn't responding.

Slip op. 2-3.

> Jennifer drove them to St. Michael's Medical Center. Jennifer testified that due to the extent of the injuries, AM was airlifted to Mary Bridge Medical Center and, shortly after she arrived at Mary Bridge, the doctors there informed her that AM would not survive."

Slip op. at 2-3.

The Court of Appeals found that at least eight medical professionals opined that the injuries to the child were not consistent with McCarter's story or were the result of "nonaccidental trauma" or both. Slip op. at 3-5. The medical examiner concluded that death resulted from "multiple blunt force injuries to the head" these "inflicted injuries rather than injuries sustained in an accident." Slip op. at 5.

> McCarter testified in his own defense and reenacted his version of the incident with AM's car seat at trial. At the time of the incident, according to McCarter, AM was "fully strapped in" to the car seat, which had a five-point harness. Defense

> medical experts provided testimony in support of McCarter's version of events." Slip op. at 5. "A forensic pathologist, testified that AM had "metabolic bone disease" and opined that the car seat fall described by McCarter could result in the injuries to AM.

Id.

Other defense experts (a) concurred with the metabolic bone disease diagnosis, some calling it "ricket" and/or (b) sought to establish that McCarter's story about the car seat fall could explain the child's injuries. Slip op. 4-5.

V. ARGUMENT

THIS COURT SHOULD DENY REVIEW BECAUSE THE DECISION BELOW CORRECTLY DECIDED THE ISSUES AND THE CRITERIA FOR REVIEW ARE NOT MET.

1. The Court of Appeals properly found that the trial court's restriction of defense counsel's argument was error but that the error was harmless beyond a reasonable doubt.

McCarter argues error in the Court of Appeals use of the harmless error rule but omitting the overwhelming, untainted evidence aspect of the rule. The proper standard was applied and the Court of Appeals followed directly relevant precedent.

The overwhelming evidence rule is not an essential piece of the harmless beyond a reasonable doubt standard.

First, McCarter admits that even without the overwhelming, untainted evidence principle, the proper standard is that the error was harmless beyond a reasonable doubt. Petition at 8, *citing State v. Frost,* 160 Wn.2d 765, 782, 161 P.3d 361 (2007). The Court of Appeals used the same rule: "In order to hold the error harmless, we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" Slip. Op. at 18, *quoting State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (*quoting Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

The *Brown* Court engaged a harmless error analysis of an erroneous accomplice instruction that was used in two separate trials. *Brown,* 147 Wn.2d 330. The *Brown* Court recited the above rule. 147 Wn.2d at 341. Again, quoting *Neder, supra,* the Court held that an instruction that omits an element is harmless

"if that element is supported by uncontroverted evidence." Id. The question requires that the reviewing court "thoroughly examine the record." Id. It was decided that some applications of the erroneous instruction were harmless and some were not. But the findings of harmless error never required a finding of overwhelming, untainted evidence; that standard is not mentioned in the decision.

Recently, December, 2023, this Court articulated the constitutional harmless error rule in the same manner: "When constitutional harmless error applies, we must reverse unless we are persuaded, beyond a reasonable doubt, that the error did not affect the verdict." *State v. Charlton,* 2 Wn.3d 421, 428-29, 538 P.3d 1289 (2023). The rule was applied to a violation of the right to counsel in a preliminary appearance. Taking no pause to consider the quantum of proof in the case, the Supreme Court found the constitutional error harmless beyond a reasonable doubt primarily because "Nothing in the argument or record before us suggests that counsel's absence affected the verdict in

any way." 2 Wn.3d at 429. McCarter's assertion that constitutional harmless error analysis must include a overwhelming evidence is mistaken.

The *Charlton* Court relied on *State v. Orn,* 197 Wn.2d 343, 482 P.3d 913 (2021). In *Orn,* violations of the constitutional right to present a defense and to confront adverse witnesses were analyzed under the harmless error rule. 197 Wn.2d at 358-59. Again the rule was that

> An error is harmless and not grounds for reversal if the appellate court is assured [by the State] beyond a reasonable doubt that the jury would have reached the same verdict without the error.

197 Wn.2d at 359 (bracket by the court). Never discussing a particular quantum of evidence and notwithstanding the erroneous restriction of impeachment evidence, the court must "find the error harmless if, in light of the entire trial record, we are convinced that the jury would have reached the same verdict absent the error." *Id*. Considerations include the

> properly admitted direct and circumstantial evidence…and the overall significance of the erroneously admitted or excluded evidence in this

> context (e.g., whether it was cumulative or corroborated, or consistent with the defense theory).

Id. Once again, this Court failed to note the overwhelming, untainted evidence aspect of the rule. The evidentiary strength of the case is important in the analysis but, particularly where other circumstances attend, the overwhelming nature is not the *sine qua nom* of constitutional harmless error.

Here, the Court of Appeals followed the harmless error analysis found in a nearly identical case. *State v. Osman,* 192 Wn. App. 355, 366 P.3d 956 (2016). The *Osman* Court, again, made no reference to the overwhelming, untainted evidence standard. That Court followed the command of the Supreme Court and carefully examined the record. Review of the law and the facts under the circumstances of that case led to the conclusion that the error found was harmless beyond a reasonable doubt. The measure of harmlessness was "beyond a reasonable doubt" and no other factual standard was considered.

The factual standard in consideration of the harmless error question is beyond a reasonable doubt. A finding of overwhelming, untainted evidence may be sufficient to support the conclusion of harmless error, but it is not a necessary component of that conclusion. The cases show that a thorough review of the record may lead to a conclusion of harmlessness beyond a reasonable doubt without reference to that standard. There was no error and this issue should not be reviewed.

2. The Court of Appeals followed precedent in deciding that the diagnostic impressions of the various physicians did not constitute opinions as to guilt or invade the province of the jury.

McCarter claims the Court of Appeals erred by holding that the diagnostic impressions of the medical professionals did not constitute improper opinions as to McCarter's guilt or invade the province of the jury.

Here, the Court of Appeals relied on this Court's precedent, primarily *State v. Kirkman,* 159 Wn.2d 918, 155 P.3d 125 (2007), in rejecting McCarter's claim. The controlling rule from *Kirkman* being "an expert may express an "opinion

on a proper subject even though [they] thereby express[] an opinion on the ultimate fact to be found by the trier of fact." Slip op. at 10, *quoting Kirkman*, 159 Wn.2d at 929. More, "if the testimony does not directly comment on the defendant's guilt or veracity, helps the jury, and is based on inferences from the evidence, it is not improper opinion testimony." Slip op. at 9-10, *quoting State v. Johnson*, 152 Wn. App. 924, 930-31, 219 P.3d 958 (2009).

The Court rejected McCarter's reliance there, as here, on *State v. Florczak,* 76 Wn. App. 55, 72, 882 P.2d 199 (1994). Slip op. at 10-11. There, the expert testimony that addressed an ultimate issue exclusively implicated the defendants while in the present case none of the testimony directly implicated McCarter. *Id*. Moreover,

> the physical evidence of AM's injuries was overwhelming and the expert testimony characterizing those injuries as resulting from "abusive head trauma" and "nonaccidental trauma" did not take away the jury's role in finding whether the injuries occurred by outside force at all, as opposed to a bone disease, or who was responsible for them.

Slip op. at 11. In sum,

> No expert witness directly commented on McCarter's guilt or otherwise testified that McCarter intentionally harmed AM, and no expert witness offered an opinion as to the specific mechanism that caused AM's injuries.

Slip op. at 12.

Prior authority, *In re Morris, supra,* has held the diagnoses advanced to be admissible; not tainted. The medical testimony did not cross the line from admissible diagnosis to opinion on guilt. The decision below is consistent with the authority cited and need not be reviewed.

3. The Court of Appeals correctly found sufficient evidence to support the jury's finding that beyond a reasonable doubt McCarter preyed upon a particularly vulnerable victim and abused his position of trust over the victim.

McCarter claims the court below erred by finding that sufficient facts supported the jury's verdicts on two aggravating circumstances. Particular vulnerability is not shown because McCarter's intentional murder of the child was not committed "*because"* of the child's vulnerability. Petition at 22, 23.

McCarter admits that the Court of Appeals followed this Court's precedent but disagrees with the application of that precedent. Pet. at 23-24. Similarly, McCarter complains that abuse of a position of trust is not shown because he did not "use" or "exploit" that obviously existing position to facilitate his crime. Petition at 27-28.

First, McCarter presents the standard of review as including that the evidence be "viewed favorably to the prosecution." Pet. at 18. The court below properly viewed the evidence "in the light *most favorable* to the State" drawing all reasonable inferences "in favor of the State and interpreted most strongly against the defendant." Slip op. at 21. These analytical rules followed from both published Court of Appeals precedent and this Court's precedent: *State v. Chanthabouly*, 164 Wn. App. 104, 143, 262 P.3d 144 (2011) and *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The Court of Appeals accepted McCarter's concession that the child was particularly vulnerable and that McCarter

knew it. Slip op. at 22. The Court considered the remaining question of whether the vulnerability was a "substantial factor" in the crime. Id. Here, the Court turned to the case McCarter dislikes, *State v. Berube,* 150 Wn.2d 498, 513, 79 P.3d 1144 (2003), a case factually very similar to the present case.

In *Berube*, this Court held that "Extreme youth is a valid factor when considering the vulnerability of a victim." Slip op. at 23. The homicide victim was a 23-month-old, Kyle, who had been repeatedly abused by his father and step-parent. 150 Wn.2d at 513. The Court held that extreme youth alone can establish the vulnerability aggravator. Id. The child there was "completely dependent' on the defendants and unable to defend himself. *Id*.

Below, the Court followed this authority: "The reasoning set out in *Berube* applies here. Not only was AM, like Kyle, the child of the defendant, but AM was 21 months younger than Kyle." Slip op. at 23. Extreme youth means the victim, AM, depended on McCarter for "care and survival." Id. AM could

not communicate or defend himself. Id. From this evidence, taken in the light most favorable to the state, "a rational trier of fact could have found AM to be a particularly vulnerable victim based on extreme youth, which was a substantial factor as it enabled McCarter to inflict injuries as severe as those identified in AM by the various medical experts." *Id*.

The Court of Appeals also followed *Berube* in deciding that sufficient evidence supports the jury's verdict on abuse of a position of trust. Slip op. at 24. Following this Court's authority, the Court of Appeals considered the duration and degree of the relationship as-well-as this court's holding that "[o]ne aspect of children's extreme vulnerability is their tendency to trust." Slip op. at 24, quoting *State v. Grewe*, 117 Wn.2d 211, 221, 813 P.2d 1238 (1991).

The Supreme Court also sustained the abuse of trust aggravator by the following facts

> The fact that Berube was Kyle's parent and Nielsen was a parent-figure gave them unmonitored access to Kyle. Both individuals abused their positions by

> repeatedly assaulting Kyle until the injuries finally killed him.

150 Wn.2d at 513. The Court of Appeals found that the circumstances of relationship in the present case were "just like the circumstances in *Berube.*" Slip op. at 25. McCarter did the same as Berube with an even more vulnerable two-month-old child. In a light most favorable to the state, "the evidence is sufficient for a reasonable juror to conclude that McCarter abused his position of trust to facilitate this crime."

A properly instructed jury could easily find that an infant victim of homicide by a parent was particularly vulnerable and had no choice but to trust his care giver/assailant. The strikingly similar facts and circumstances found in *State v. Berube* provide authority that the two aggravators here found were appropriately supported by the evidence. There was no error and this issue need not be reviewed.

4. The Court of Appeals properly found that the jury's affirmative verdicts on the aggravating circumstances constituted substantial and compelling reasons as a matter of law for the imposition of an exceptional sentence.

McCarter claims that the Court of Appeals erred by sustaining the trial court conclusion of law that the jury's verdicts on the aggravating circumstances provided "substantial and compelling" reasons to impose an exceptional sentence. He claims that the "substantial and compelling" question must be determined by a jury beyond a reasonable doubt.

The Court of Appeals moved directly to controlling precedent, saying "this court has already considered and rejected the arguments McCarter now presents." Slip op. at 26, *citing State v. Sage*, 1 Wn. App. 2d 685, 407 P.3d 359 (2017). The holding in *Sage* was

> Washington cases recognize that once the jury by special verdict makes the factual determination whether aggravating circumstances have been proved beyond a reasonable doubt, 'the trial judge is left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence.'"

Sage at 708, *quoting State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006). Moreover, the driver of McCarter's argument, the holding in *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), was distinguished in that there a jury gave merely an advisory verdict on the facts allowing the judge the ultimate decision and in Washington "the jury exclusively resolves the factual question whether the aggravating circumstances have been proven beyond a reasonable doubt." Slip op. at 27-28, *quoting Sage*, 1 Wn. App. 2d at 710.

The United States Supreme Court recently decided another issue under the *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) line of cases. In *Erlinger v. U.S.*, __U.S.__, 2024 WL 3074427 (June 21, 2024) the Supreme Court decided whether, when a sentence is automatically increased based on findings that the defendant has been previously convicted of specified crimes, a judge or jury must find those crimes. The answer is the jury: "Presented

with evidence about the times, locations, purpose, and character of those crimes, a jury might have concluded that some or all occurred on different occasions. Or it might not have done so."

Although *Erlinger* decides a different question, some language there supports the Court of Appeals in this matter. The Court noted that the Fifth and Sixth Amendments promises that "a judge's power to punish would "deriv[e] wholly" from, and remain always "control[led]" by, the jury and its verdict." Id. at *6. Thus, a judge could not "'swell the penalty above what the law ... provided for the acts'" found by a jury of the defendant's peers." *Id*.

In the present case, it is the jury's verdicts on the established aggravating circumstances that controlled the trial court's discretion in sentencing. The judge could not have imposed an exceptional sentence without those verdicts. The verdicts themselves are the "substantial and compelling reasons" for the imposition of the upward departure. It was not error to so find.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny McCarter's petition for review.

VII. CERTIFICATION

This document contains 3379 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED July 3, 2024.

Respectfully submitted,

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