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Court of Appeals of Washington,
Division 3.

# STATE of Washington, Respondent,

# v.

# Avery Emerson SAM, Appellant.

No. 26934-5-III.
Oct. 20, 2009.

Appeal from Spokane Superior Court; Hon. Allen C. Nielson, J.
William D. Edelblute, Attorney at Law, Spokane Valley, WA, for Appellant.

Mark Erik Lindsey, Spokane County Prosecuting Attorneys, Spokane, WA, for Respondent.

## UNPUBLISHED OPINION

## BROWN, J.

*1 Avery Emerson Sam appeals his convictions for second degree felony murder and first degree manslaughter of his foster child, D.M. He contends the trial court erred in ruling his incriminating statements were voluntary and in not allowing his expert to opine on that subject. We disagree. We also reject Mr. Sam's prosecutorial misconduct and evidence insufficiency claims. Accordingly, we affirm.

## FACTS

After Mr. Sam was charged with the second degree felony murder and first degree manslaughter of his 20-month-old foster child, D.M., the court conducted a CrR 3.5 statement-voluntariness hearing. Spokane Police Detective Timothy Madsen related that he met with Mr. Sam and his wife, Angelique Sam, on the afternoon of August 5, 2006 at Sacred Heart Medical Center (Sacred Heart) in Spokane. Detective Madsen wanted to establish a timeline of the events surrounding D.M.'s illness. He informed Mr. Sam the interview was voluntary, and that he was not under arrest or in custody. Mr. Sam told Detective Madsen he understood and agreed to speak with him. Mr. Sam recounted the following events to Detective Madsen.

On Wednesday, August 2, 2006, Mr. Sam took D.M. to the doctor for shots. They were accompanied by Mrs. Sam and her son, G.T, and another foster child, J.Q., a six-month-old infant. Later, the family went out for lunch. After lunch, D.M. became ill with vomiting and diarrhea. Once home, they prepared to bathe D.M. and J.Q. When Mrs. Sam left D.M. alone for a moment, he fell and hit his head on the bathtub. Mr. Sam towel-dried D.M. and did not see any marks from the fall, except some redness around his ear. After Mrs. Sam left home for her night-shift, Mr. Sam put D.M. to bed. D.M. vomited in bed once, but otherwise slept through the night to after 9:00 a.m., on Thursday, August 3.

On August 3, D.M. ate a normal breakfast, but he felt hot, was lethargic, and vomited during the day. The mark by D.M.'s ear was more pronounced. Mrs. Sam came home from work at about 10:00 p.m. to take D.M. to Holy Family Hospital (Holy Family). Mr. Sam remained at home to care for the other children. The couple was concerned that D .M. had suffered a head injury from the fall in the bathtub. Mrs. Sam and D.M. were at the hospital until 4:00 a.m. on Friday, August 4.

On August 4, D.M. again slept past 9:00 a.m. Although lethargic, D.M. was not vomiting. His temperature was normal. After Mrs. Sam left for work, Mr. Sam related D.M. got sick around 6:00 p.m. in the car, and continued to vomit and have diarrhea the rest of the evening at home. Once, Mr. Sam heard noise coming from the master bedroom and checked on the children. He found D.M. standing in J.Q.'s crib, holding onto the railings with his hands. Mr. Sam told the children to settle down and got them something to drink. G.T. later came out and indicated D.M. needed a drink. When Mr. Sam responded, he saw D.M. lying face down in the crib, with his hands fisted, apparently having a seizure. He rolled D.M. over and saw blood and saliva coming from his mouth. Mr. Sam took D.M. to the kitchen, where he ran water over his head trying to revive him. He called Mrs. Sam and told her he was going to take D.M. to the hospital.

*2 After listening to these events, Detective Madsen told Mr. Sam that the doctors believed D.M. had suffered a head injury. He asked Mr. Sam how such an injury could have occurred. Mr. Sam suggested that G.T. was prone to get rough with horseplay. When asked if that happened on the date of D.M.'s injury, Mr. Sam did not answer. Detective Madsen told Mr. Sam that he thought the events described would not account for D.M.'s injury. Mr. Sam then stated that when he was trying to revive D.M. in the kitchen, he held him under the arms, and shook him back and forth four or five times, causing his head to wobble back and forth.

Detective Madsen took Mr. Sam into custody, explaining further questioning was needed concerning his shaking of D.M. Later, Mr. Sam was interviewed at the Spokane County Public Safety Building (Public Safety Building). During this interview, Detective Madsen was joined by Detective Mark Burbridge. Before the interview, Detective Madsen, in the presence of Detective Burbridge, read Mr. Sam the *Miranda*[FN1] warnings from a standard card. Mr. Sam indicated he would waive his rights and answer questions.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Detective Madsen told Mr. Sam that based on what the doctors had said, there was no way that D.M. suffered a seizure prior to Mr. Sam shaking him. Mr. Sam responded, "Okay. I shook him." 1 Report of Proceedings (RP) (July 30, 2007) at 48. Mr. Sam then admitted he had shaken D.M. four or five times when he became frustrated because both J.Q. and D.M. were crying while he was changing D.M.'s diaper. Mr. Sam stated D.M.'s head wobbled forward to back and his eyes widened while being shaken, and he went limp afterward. Mr. Sam recounted getting water for D.M. and discovering D.M. face down in the crib, with his hands fisted. Mr. Sam related that he picked D.M. up, carried him to the kitchen, and again shook him back and forth four or five times, and ran water over his head.

Detective Burbridge then told Mr. Sam he thought he was minimizing, and told him "one of the doctors described [D.M.'s] head injury as fantastically huge." 1 RP (July 30, 2007) at 51. Detective Burbridge asked Mr. Sam how hard he was shaking D.M. Detective Burbridge demonstrated with his hands as he asked, "Was it like this? How hard were you shaking him?" 1 RP (July 30, 2007) at 51. Mr. Sam said it was hard. Detective Burbridge asked Mr. Sam how long he shook D.M., and Mr. Sam stated 5 to 10 seconds, 10 to 15 seconds, up to 30 seconds, and ultimately, "At least a minute ." 1 RP (July 30, 2007) at 52.

Mr. Sam testified he agreed to Detective Madsen's account of the Sacred Heart interview because, "I was just flat tired." 2 RP (July 31, 2007) at 218. Mr. Sam testified he had been awake for 30 hours at the time of the second interview. He further testified he fell asleep on the table waiting for the interview to begin. Mr. Sam denied telling the detectives the specific amount of time he shook D .M.

At the CrR 3.5 hearing, E. Clay Jorgensen, Ph.D., an expert witness hired by the defense to evaluate the voluntariness of Mr. Sam's statements to Detectives Madsen and Burbridge, testified for Mr. Sam. Dr. Jorgensen administered two psychological tests to Mr. Sam, but he was unable to use the results to make a diagnosis. Dr. Jorgensen met with Mr. Sam twice. Based on these interviews, Dr. Jorgensen concluded, with reasonable psychological probability, "Mr. Sam would be predisposed to be heavily influenced by

people in authority, and would be susceptible to agreeing with statements suggested to him, particularly if he felt pressure or felt intimidated." 1 RP (July 30, 2007) at 171. Dr. Jorgensen described this conclusion as a personality trait, and testified it was based upon his experience as a psychologist. Dr. Jorgensen further testified he was unable to make a diagnosis regarding any personality disorder.

*3 The trial court ruled that Mr. Sam's statements to Detectives Madsen and Burbridge would be admitted, concluding the statements were made knowingly and voluntarily. Regarding the interview at Sacred Heart, the trial court concluded "there were no coercive circumstances there. No threat, no promises, there's no indication that Mr. Sam doesn't understand what was being asked of him." 2 RP (Aug. 1, 2007) at 265. Regarding the interview at the Public Safety Building, the trial court concluded:

Mr. Sam's circumstances didn't change; he did acknowledge his rights; he waived his rights; he did answer questions; he did not appear to be impaired. Certainly he had been up, he was tired, but he didn't appear impaired to the point he couldn't answer questions knowingly and voluntarily.

2 RP (Aug. 1, 2007) at 265-66.

Mr. Sam asked that Dr. Jorgensen be permitted to testify at trial regarding the voluntariness of Mr. Sam's statements. The court sustained the State's objection. The court reasoned Mr. Jorgensen did not make a diagnosis, and "testimony about traits is ... disguised character evidence." 2 RP (Aug. 1, 2007) at 278. The court stated, "I have a real problem with whether this is also inappropriate character evidence, disguised character evidence, rather than being something serious that the jury could consider from an expert." *Id*. The court further reasoned, "I do believe that an argument can be made, without an expert, that the jury would understand." *Id*. at 279. Further:

I think you can argue to a jury, "We have an individual who is tired, we have an individual who is under stress, we have an individual who is saying the detectives are, you know, at him and at him and at him. And somebody who just said, you know, I'm tired." Whatever. Whatever you say, okay. I think juries, as a general proposition, can understand that argument.

*Id*.

At trial, the jury heard testimony substantially similar to the testimony presented in the CrR 3.5 hearing. Additionally, noting limitations, the physician's assistant at Holy Family testified that the CT (computed tomography) scan taken to rule out a head injury from the bathtub accident was negative. D.M. was discharged with instructions for the family to keep an eye on him because it was not known what could later develop.

Gary Lee, M.D., a pediatric intensive care physician at Sacred Heart, testified he examined D.M. at approximately 11:30 p.m. on August 4. He noted bruising to the left side of the face, and concluded there were obvious symptoms of severe head trauma, to the point of little or no brain function. Treatment to restore blood flow to D.M.'s brain was unsuccessful, and brain death occurred at 10:52 a.m. on August 6.

Dr. Lee noted the first CT scan taken when D.M. arrived on August 4 had shown brain swelling and a small subdural hemorrhage. He explained that brain swelling can be caused by "trauma of any kind." 2 RP (Aug. 1, 2007) at 354. Dr. Lee testified the swelling on D.M.'s brain was what he would expect to see following a head-on collision on a freeway. D.M. also had retinal bleeding, which is rarely seen other than in suspected abuse cases. Dr. Lee felt the injuries were the result of child abuse or an inflicted injury. He did not have an opinion as to whether the mechanism of the injury would have been by shaking.

*4 Radiologist Terri Lewis, M.D., testified as an expert for the State. She opined, "I do not believe that, given the long time lag between the injury and the first CT scan, that the additional time between the first and second CT scan would have created that dramatic a difference without another event." 2 RP (Aug. 1, 2007) at 398.

Pediatrician Alan Hendrickson, M.D., told the jury he saw D.M. at Sacred Heart when he was already on life support. His physical examination of D.M. revealed a bruise on the left side of the forehead, and retinal hemorrhages. Dr. Hendrickson did not believe that D.M.'s death was related to a fall in the bathtub. He believed that the injuries of bilateral multiple retinal hemorrhages, subdural hematoma, and brain swelling presented a "classic picture" of child abuse. 3 RP (Aug. 2, 2007) at 433.

Spokane County Medical Examiner Marco Ross, M.D., performed an autopsy of D.M. Dr. Ross testified he found that blood covered the left side of the brain, which was the subdural hemorrhage, and swelling of the brain. Dr. Ross believed the areas of hemorrhage on the left side could be attributed to a fall. He noted multiple areas of hemorrhage and other impact sites, on the top of the head, the back of the head, and on the right side. He testified there was more edema on the left side than on the right.

Dr. Ross testified D.M. died "as a result of the swelling of the brain that occurred as a result of blunt force injury to the head." 3 RP (Aug. 2, 2007) at 520. Dr. Ross' written report stated that death was "ultimately due to blunt force impact slash shaken injury ." *Id*. at 522. Shaking was included as an "underlying cause." *Id*. at 537. Dr. Ross acknowledged most reports of "shaken baby syndrome" involved infants, as opposed to older children. *Id*. at 533. Although he could not entirely rule out the fall in the bathtub as the cause of death, Dr. Ross believed that the other injuries he saw in other areas of D.M.'s head, when considering the history provided and the clinical history, were inconsistent with the fall being the cause of death.

Mr. Sam called John Plunkett, M.D., who holds board certifications in anatomic pathology, clinical pathology, and forensic pathology. According to Dr. Plunkett, to injure the brain of a 20-month-old child by shaking, it would require 3,000 to 6,000 pounds of force, which a grown man cannot exert. Dr. Plunkett testified, "I don't know many forensic pathologists today ... who believe that shaking can cause brain damage." 5 RP (Aug. 7, 2007) at 701. When asked if D.M.'s fall in the bathtub could cause death, Dr. Plunkett testified, "if [D.M.]'s climbing in and he's standing on the edge of that tub and then falls, it certainly can." *Id*. at 704. In Dr. Plunkett's opinion, the cause of the death of D.M. was "[b]rain swelling, malignant cerebral edema." *Id*. at 717.

Mr. Sam testified generally that the accounts he gave the detectives were simply agreements given because he was tired. Mr. Sam admitted shaking D.M. During re-cross-examination, the State asked Mr. Sam, "So Mr. Sam, it's your testimony and position today, that the reason you admitted to assaulting and injuring a child that you loved, to the detectives, is because you felt pressure." 6 RP (Aug. 8, 2007) at 897. Defense counsel objected to this question, arguing it "highly mischaracterizes the testimony." *Id*. The trial court sustained the objection, stating, "It's an argumentative question." *Id*. Later, the State asked Mr. Sam, "And as I understand it, you're telling us that the reason that you agreed to assaulting [D.M.], and the reason that you agreed that you had harmed him, was because you felt pressure." *Id*. at 898. Defense counsel successfully objected to this question on argumentative grounds.

*5 The jury found Mr. Sam guilty as charged with an aggravating factor on each count that Mr. Sam knew or should have known that D.M. was particularly vulnerable or incapable of resistance. The court merged the two counts and sentenced Mr. Sam to 294 months' confinement on the second degree felony murder count. Mr. Sam appeals.

# ANALYSIS

## A. Voluntariness of Statements

The issue is whether the trial court erred in admitting Mr. Sam's statements to Detectives Madsen and Burbridge. Mr. Sam contends the trial court erred at the CrR 3.5 hearing by concluding his statements were voluntary.

"[T]he rule to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged; and, if challenged, they are verities if supported by substantial evidence in the record." *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-

minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)). The reviewing court also determines whether the trial court derived proper conclusions of law from its findings of fact. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). The trial court's conclusions of law are reviewed de novo. *Id*.

Here, the trial court did not enter written findings of fact and conclusions of law despite the rule requiring it to do so. *See* CrR 3.5(c) (requiring the trial court make written findings of fact and conclusions of law). Mr. Sam does not assign error to the trial court's failure to enter findings of fact and conclusions of law. The failure to comply with the rule is harmless if the court's oral findings are sufficient to permit appellate review. *State v. Cunningham*, 116 Wn.App. 219, 226, 65 P.3d 325 (2003). The trial court gave detailed oral findings, which were transcribed to 10 written pages. Accordingly, the trial court's oral ruling is sufficiently detailed to permit review.

Mr. Sam twice made admissions: first, during his interview with Detective Madsen at Sacred Heart, and second, during his interview with Detectives Madsen and Burbridge at the Public Safety Building. Mr. Sam challenges solely the voluntariness of his statements, arguing they were the product of coercion, physical and mental exhaustion, and stress. He argues he had not slept for 30 hours and was holding vigil for a dying child, while the detectives were telling him what an autopsy would show, and that they lied to him about the extent of D.M.'s injuries and the size of the subdural hematoma.

"A trial court's determination of voluntariness will not be disturbed on appeal if there is substantial evidence in the record from which the trial court could have found by a preponderance of the evidence that the confession was voluntary." *State v. Cushing*, 68 Wn.App. 388, 393, 842 P.2d 1035 (1993). To determine whether a confession was voluntary, "the inquiry is whether, under the totality of the circumstances, the confession was coerced." *Broadaway*, 133 Wn.2d at 132. "A confession is coerced ... if based on the totality of the circumstances the defendant's will was overborne." *State v. Burkins*, 94 Wn.App. 677, 694, 973 P.2d 15 (1999) (citing *Broadaway*, 133 Wn.2d at 132). The court may consider a number of factors in the totality test including the defendant's physical condition, age, mental abilities, and physical experience. *Id*. (citing *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996)). In addition, "In assessing the totality of the circumstances, a court must consider any promises or misrepresentations made by the interrogating officers." *Broadaway*, 133 Wn.2d at 132.

*6 At Mr. Sam's interview at Sacred Heart, Detective Madsen told Mr. Sam it was voluntary. Mr. Sam told Detective Madsen he understood and agreed to speak with him. Nothing in the record suggests coercion. Detective Madsen did not make any promises or misrepresentations. *See Broadaway*, 133 Wn.2d at 132. Thus, substantial evidence in the record supports the trial court's voluntariness conclusion.

At Mr. Sam's interview at the Public Safety Building, Detective Madsen, in the presence of Detective Burbridge, read Mr. Sam the *Miranda* warnings from a standard card. Mr. Sam indicated he would waive his rights and answer questions. Mr. Sam testified, as Detective Madsen told Detective Burbridge what he said during the Sacred Heart interview, he was agreeing because he "was just flat tired." 2 RP (July 31, 2007) at 218. Mr. Sam testified he had been awake for 30 hours, and he had fallen asleep waiting for the interview to begin. Even so, Mr. Sam was responsive to the questioning, and did not ask to discontinue the interview. No evidence shows that Mr. Sam was unable to answer questions or incapacitated. And, no evidence shows either Detective Madsen or Detective Burbridge made any promises to Mr. Sam.

Regarding the size of the subdural hematoma, "Deception alone does not make a statement inadmissible as a matter of law; rather, the inquiry is whether the deception made the waiver of constitutional rights involuntary." *Burkins*, 94 Wn.App. at 695. When faced with such a claim, we examine whether the law enforcement officer's behavior overrode the petitioner's will to resist and brought about a confession that was not freely self-determined. *State v. Braun*, 82 Wn.2d 157, 161-62, 509 P.2d 742 (1973).

Even if Detective Burbridge's statement was deceptive, it is not the type of deception which has been held to overbear a defendant's will to resist. Specifically, "Confessions have been held to be involuntary when the police have misrepresented that the accused's wife would be taken into custody if he did not confess, or that a friend would lose his job if the accused did not confess, or when a confession was

obtained while the accused was under hypnosis." *Id.* at 162 (internal citations omitted). Our facts do not rise to this level. We cannot say the alleged deception was coercion overriding Mr. Sam's free will and rendering his confession involuntary. The trial court did not err in admitting Mr. Sam's statements to Detectives Madsen and Burbridge.

## B. Exclusion of Expert Testimony

The issue is whether the trial court erred in excluding Dr. Jorgensen's opinion bearing on the voluntariness of Mr. Sam's statements. Mr. Sam contends the court should have allowed evidence of his personality trait predisposing him to be led by the detectives. He argues his exhaustion created pressure to agree with the detectives.

We review the exclusion of expert testimony for an abuse of discretion. *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

*7 The admission of expert testimony is governed by ER 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony is admissible under ER 702 if " '(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.' " *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990) (quoting *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984)). And, "expert psychological testimony may be admitted to assist juries in understanding phenomena not within the competence of the ordinary lay juror." *State v. Cheatam*, 150 Wn.2d 626, 646, 81 P.3d 830 (2003).

Mr. Sam asked that Dr. Jorgensen be allowed to testify about the voluntariness of his statements. At the CrR 3.5 hearing, Dr. Jorgensen opined, based on his interviews with Mr. Sam, that "[he] would be predisposed to be heavily influenced by people in authority, and would be susceptible to agreeing with statements suggested to him, particularly if he felt pressure or felt intimidated." 1 RP (July 30, 2007) at 171.

The trial court partly ruled Dr. Jorgensen's proposed testimony was "disguised character evidence." 2 RP (Aug. 1, 2007) at 278. The admissibility of character evidence offered by a defendant as to his or her own character is governed by ER 404(a)(1). Under this rule, a defendant may present character evidence of a pertinent character trait. ER 404(a)(1). "Through the use of character evidence, 'the defendant generally seeks to have the jury conclude that one of such character would not have committed the crime charged.' " *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000) (quoting *State v. Kelly*, 102 Wn.2d 188, 195, 685 P.2d 564 (1984)). Here, Dr. Jorgensen's opinion is not admissible character evidence. And, "Washington's evidentiary rules do not permit proof of character by opinion testimony." *Kelly*, 102 Wn .2d at 195.

Moreover, the trial court properly ruled under the third admissibility prong for expert testimony that the jury could understand Mr. Sam's voluntariness argument without Dr. Jorgensen's testimony. The subject was well within the understanding of the jury and unnecessary under ER 702. *See Swan*, 114 Wn.2d at 655 (to be admissible, expert testimony must be " 'helpful to the trier of fact' " (quoting *Allery*, 101 Wn.2d at 596)). The factual issue was well developed at trial by both parties and properly left to the jury to resolve. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P .2d 850 (1990) (stating that "[c]redibility determinations are for the trier of fact"); *see also Cheatam*, 150 Wn.2d at 649 n. 5 (stating that "an expert has no legitimate role in assessing the credibility of a witness").

*8 Mr. Sam argues this case is like *State v. Taylor,* involving the exclusion of expert testimony regarding the reliability of eyewitness identification. *See* State v. Taylor, 50 Wn.App. 481, 487-90, 749 P.2d 181 (1988). But that case is inapposite, as the issue of reliability of eyewitness identification is not factually comparable to expert testimony regarding voluntariness. Moreover, our Supreme Court declined to adopt the *Taylor* approach to analyzing opinions regarding eyewitness identification. *See* Cheatam, 150 Wn.2d at 647-49. In sum, Mr. Sam fails to show an abuse of discretion in excluding Dr. Jorgensen's testimony.

## C. Prosecutorial Misconduct

The issue is whether the State committed misconduct by giving a personal opinion when questioning Mr. Sam by referring to his conduct as assaults.

"To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct by the prosecutor and prejudicial effect." State v. O'Donnell, 142 Wn.App. 314, 327, 174 P.3d 1205 (2007) (quoting State v. Munguia, 107 Wn.App. 328, 336, 26 P.3d 1017 (2001)). "[T]he defendant bears the burden of proof on both issues." *Id.* at 328 (citing *Munguia*, 107 Wn.App. at 336). Further, "Misconduct is prejudicial when, in context, there is a substantial likelihood that the misconduct affected the jury's verdict." *Id.* (internal quotation marks omitted) (quoting State v. Stith, 71 Wn.App. 14, 19, 856 P.2d 415 (1993)).

Here, as developed in the facts, the trial court sustained two objections to the State's use of assault language in re-cross-examination of Mr. Sam. The court's rulings were proper. It is error for a prosecutor to express a personal opinion about a witness' credibility or about the guilt or innocence of the defendant. State v. Horton, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003). The prosecutor's two questions suggesting admissions were poor choices of wording, given the legal implications of the wording "assaulting" and common usages for that term. Although Mr. Sam admitted to shaking D.M., he did not testify that he "assaulted" D .M.

Even assuming misconduct in the State's two questions, no substantial likelihood exists that the misconduct affected the jury's verdict. *See* O' Donnell, 142 Wn.App. at 328 (citing Stith, 71 Wn.App. at 19). The trial court sustained defense counsel's objections; Mr. Sam did not answer the questions. The two questions were isolated incidents during a six-day jury trial. The trial court defined second degree assault by instruction. Viewing the prosecutor's two questions in the context of the entire record, Mr. Sam has not established prejudicial error from the prosecutor's questioning.

## D. Sufficiency of the Evidence

The issue is whether, considering the medical evidence linking Mr. Sam to D.M.'s injuries, the evidence presented at trial was sufficient to support Mr. Sam's conviction of second degree felony murder.

*9 Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). "[W]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the [S]tate and interpreted most strongly against the defendant." State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Further, "this court will defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom." State v. Bryant, 89 Wn.App. 857, 869, 950 P.2d 1004 (1998) (citing State v. Hayes, 81 Wn.App. 425, 430, 914 P.2d 788 (1996)).

In order to convict Mr. Sam of second degree felony murder, the State had to prove that Mr. Sam committed or attempted to commit the felony of second degree assault, and in the course of and in furtherance of the assault, he caused D.M.'s death. *See* RCW 9A.32.050(1)(b) (second degree felony murder). A defendant is guilty of second degree assault when he or she "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a).

The evidence is sufficient for the jury to have found Mr. Sam committed the crime of second degree felony murder. Considering together Mr. Sam's admissions of conduct related by the detectives and the medical testimony, a rational jury could have found Mr. Sam guilty. The jury could reasonably conclude testimony from Dr. Hendrickson and Dr. Ross linked Mr. Sam's shaking of D.M. with his death. Dr. Hendrickson did not believe that D.M.'s death was related to a fall in the bathtub; rather, he believed the injuries of bilateral multiple retinal hemorrhages, subdural hematoma, and brain swelling presented a "classic picture" of child abuse. 3 RP (Aug. 2, 2007) at 433. Dr. Ross' written report stated that D.M.'s death was "ultimately due to blunt force impact slash shaken injury." *Id*. at 522. Shaking was included as an "underlying cause." *Id*. at 537.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

## I CONCUR: SCHULTHEIS, C.J., and KULIK, J.

Wash.App. Div. 3,2009.
State v. Sam
Not Reported in P.3d, 2009 WL 3353315 (Wash.App. Div. 3)

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