IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THERESA ANN HUTTON, Appellant.	No. 39293-3-II UNPUBLISHED OPINION

Hunt, J. — Theresa Ann Hutton appeals her conviction for second degree criminal mistreatment of her daughter (KEH[1]) and her exceptional sentence based on the aggravating sentencing factor deliberate cruelty. She argues that (1) the State's plea bargain offer, contingent on Hutton's not interviewing KEH, violated her right to effective assistance of counsel and due process under the Sixth and Fourteenth Amendments to the United States Constitution; (2) the trial court erred in admitting certain evidence; (3) the trial court improperly restricted her cross-examination of a witness; (4) the trial court erred in failing to place KEH's seven-year-old sister, CA, under oath before testifying; (5) the prosecutor committed misconduct in closing argument

[1] It is appropriate to provide some confidentiality in this case. Accordingly, it is hereby ordered that initials will be used in the body of the opinion to identify the juveniles involved.

and her trial counsel rendered ineffective assistance in failing to object to this misconduct; (6) the trial court erred in failing to provide a jury instruction defining "deliberate cruelty"; (7) she received ineffective assistance of counsel when defense counsel failed to present certain evidence; (8) she was entitled to a change of venue because the jurors may have been aware of negative pre-trial publicity about an animal cruelty case involving Hutton; and (9) cumulative error deprived her of her right to a fair trial. We affirm.

FACTS

I. Background

A. KEH's Father's Death; Blocked Relationship with His Family Members

In May 1995, KEH was born to Theresa Hutton and Lee Auman, who never married. Auman and his family provided most of KEH's care; Hutton lived with Auman and KEH only periodically. After Auman died in a car accident in December 2000, Hutton was the parent who provided KEH's care. In September 2001, Hutton gave birth to KEH's sister, CA.

Meanwhile, in January 2001, Auman's mother, Joleen Roy, filed a successful wrongful death action that ultimately resulted in trust accounts of approximately $250,000 for each girl. Roy was also in charge of probating Auman's estate. According to Roy, within two months of Auman's death, Hutton apparently disagreed with Roy's handling of Auman's estate and tried to replace her as the personal representative; Hutton's relationship with Auman's family members, especially Roy, quickly deteriorated.

When CA was about nine months old, Hutton; CA; KEH; and Hutton's new boyfriend, Ernest Oberloh, moved from the Randle area into a fifth wheel trailer on some forested rural

property in or near Toledo in Lewis County. According to Hutton, they lived in this trailer for three or four years. Although they had used a generator to pump well water, there was no electricity. They used a port-a-potty for human waste. And Hutton washed their clothing "[i]n a pan on top of the wood stove." V Verbatim Report of Proceedings (VRP) at 10.

After Hutton, Oberloh, and the two girls moved to Toledo, Auman's family members noticed that KEH was not gaining weight and that she appeared to be underdressed. They tried to take the family food and clothing, but they saw KEH wear the clothing only occasionally. Auman's family members also observed KEH feeding the horses and cleaning manure out of the "barn." II VRP at 127.

Eventually, Hutton obtained money from the girls' guardianship accounts to purchase a double wide mobile home and a car. This new home had running water, electricity, two bathrooms, and a washer and dryer, and the girls had their own rooms. The girls' guardianship accounts paid for many of the ongoing household expenses.

Auman's father, Kenneth Auman, saw his granddaughter KEH fairly regularly until she was 8 or 10 years old, at which time Hutton said he could no longer see KEH.[2] Hutton, however, claimed that her relationship with Auman's family members became hostile because they made "false reports" to Child Protective Services (CPS) and because Roy threatened to "kidnap [KEH] and get custody of her and whatever it took." V VRP at 17. When Hutton refused to allow

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[2] Kenneth Auman had noticed a red, infected cut on KEH's foot when she was visiting him, and he had called Hutton to report it. KEH told him that a horse had stepped on her foot. When he asked KEH to get a washcloth so he could clean the cut, KEH told him, "[N]o, mama won't let me." II VRP at 124.

Auman's family members to have contact with KEH, Roy and Auman's grandfather, Joseph Smathers, attempted to maintain their connection with KEH, often by trying to contact her or by leaving gifts for her at her school. Hutton eventually instructed the school that Auman's family was not to contact KEH, and Hutton refused gifts the Auman family left for KEH at the school.

B. Others' Observations of KEH

1. Neighbors' Observations

Hutton's neighbors Brook Blessum and Tonja Nichols observed that from 2003 or 2004 on, KEH was almost always underdressed for the weather, unkempt, dirty, smelly, and hungry. Nichols, a registered nurse, believed that KEH appeared "malnourished," and she was concerned that KEH was suffering from "failure to thrive."[3] The neighbors often saw KEH doing chores, such as mending fences, hauling large bales of hay,[4] and caring for the family's numerous animals[5] on Hutton's debris-strewn and muddy property. Nichols and Blessum gave the family clothing for KEH. When they never observed KEH wearing any of this clothing, Blessum eventually started to give the clothing to KEH directly, but Blessum never saw KEH wear any of that clothing either.

Blessum and Nichols also observed that Hutton was never affectionate with KEH; that

[3] III VRP at 10.

[4] According to Blessum, if a hay bale was too big for KEH to move, KEH would carefully break down the bale because she would "be in trouble" if she dropped any hay. I VRP at 36.

[5] Blessum also observed that, at one point, Hutton had 23 to 26 horses, more than 75 dogs, and more than 30 cats on the property.

Hutton spoke to KEH in "[a] harsh, reprimanding, scolding tone like she was angry at her"[6]; and would yell at KEH, use inappropriate language, call KEH a "bitch."[7] Although Hutton also yelled at CA, Hutton appeared to be "more protective of" CA and did not appear to require CA to do any chores. I VRP at 40.

CA and KEH stayed at Blessum's house a couple of times. At first when Blessum asked KEH about their home life, KEH "didn't say much, she was pretty closed up."[8] But when KEH was eight or nine years old, she "indicate[d to Blessum] that she was unhappy" because "her mom was really hard on her" and made her "work[] a lot."[9] Blessum, an elementary school teacher, shared her concerns with an administrator at KEH's school, Toledo Elementary School.

2. KEH's Friend Elizabeth and Elizabeth's mother

KEH's second grade classmate and friend Elizabeth[10] noticed that KEH was "always dirty," she sometimes smelled "[l]ike a barn," she was often inappropriately dressed, and she frequently had hay in her hair.[11] Elizabeth let KEH hide food in her lunchbox for the bus ride home; KEH told Elizabeth that she would hide the food in the woods to eat later. KEH also told Elizabeth that Hutton was spending all of the trust account money.

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[6] I VRP at 40.

[7] III VRP at 11.

[8] I VRP at 47.

[9] I VRP at 47, 49.

[10] We refer to Elizabeth by her first name throughout to protect KEH's anonymity, we intend no disrespect.

[11] III VRP at 46, 48.

KEH sometimes told Elizabeth how much she hated Hutton and wanted to run away to live on her own when she turned 16. KEH said that she had to feed and clean up after the family's animals, that she had to sleep outside, and that she was beaten. Elizabeth sometimes saw bruises on KEH's arms and legs. The one time Elizabeth tried to visit KEH at home, (1) Hutton "kicked [Elizabeth] off the property and told [her] never to come back" (2) Hutton "was angry at [KEH]" and was "screaming at" Elizabeth; and (3) Hutton told KEH that she knew better than to bring "strangers onto the property." III VRP at 49-50.

Elizabeth's mother, who was a reading specialist at KEH's school, first observed KEH in the first or second grade when her head had been shaved because of head lice. KEH was "never very clean," she sometimes smelled, she frequently lacked a coat, and she often had visible cuts, scrapes, and bruises. III VRP at 38. Hutton would not allow KEH to attend Elizabeth's birthday party, even when the invitation included Hutton and CA.

C. School

From first through fifth grades, KEH's teachers and the school staff noticed that she was (1) the smallest child in the class; (2) almost always very dirty, often with feces and dirt on her body and hands and dirt in her hair; (3) always wearing ill-fitting or inappropriate clothes, often underdressed for the weather, and often wearing the same clothes several days in a row; and (4) always hungry even though she had breakfast and lunch at school. KEH's teachers and staff frequently gave KEH extra food to take home; they also let her eat during class. People at school gave clothing to KEH's family four or five times a year. At first, Hutton returned the clothing, believing that it had come from Auman's family. But even when Hutton finally allowed KEH to

accept the clothes, KEH rarely wore any of them to school.

1. First grade

When KEH had head lice in first grade, the school sent her home twice before the problem was resolved; and when she eventually returned to class, someone had cut her hair "very short."[12] Leslie Wood, KEH's first grade teacher, noticed that KEH seemed embarrassed by the haircut and that she would not remove her hood until someone eventually brought a hat for her to wear to school. Although Wood sent notes about KEH's cleanliness issues home to Hutton, requesting a response, she never received any response from Hutton. By the fifth grade, some of KEH's teachers and the staff noticed that she reeked so strongly of an "ammonia type smell" that the other children asked to be seated away from her. II VRP at 3.

Around January 10, 2003, when KEH told Wood that Hutton had hit her in anger, Wood noticed that KEH had a bump on her head. Wood did not contact CPS, but she did report the injury to the school's main office. Two months later, Wood noticed that KEH had a "really bad toothache" from March 13 to March 21, which caused her to not eat, rendered her unable to work in school, and substantially affected how she acted throughout the day. II VRP at 161. Wood contacted the school counselor, Paula Warme; together they contacted CPS.

Warme met KEH at the start of first grade. Warme was aware that KEH's father had recently died and that KEH had lived with her father's family before moving to the area with her mother. Warme found KEH to be "incredibly sad and reserved and quiet."[13] Warme first

[12] II VRP at 153.

[13] III VRP at 74.

contacted CPS when KEH was in first grade, when Warme became aware of KEH's living conditions after taking her home ill from school. Warme felt that CPS staff was dismissive of her call when they suggested that perhaps she just needed to "be supportive" of Hutton.[14] Warme also helped Wood contact CPS about KEH'S tooth problem during KEH's first grade year. Afterwards, Hutton agreed to let KEH participate in a school "friendship group."[15]

2. Second grade

Deborah Taylor, KEH's second grade teacher, shared Wood's concerns and took notes about KEH's condition. Fearing Hutton "would take [KEH] out of the classroom" and remove KEH from school if Hutton found out that Taylor's husband and Roy were first cousins, Taylor avoided asking KEH about her home life. II VRP at 176. At her school conference with Taylor, Hutton "seemed supportive of [KEH] and concerned about [KEH]." II VRP at 179. Taylor did not broach the "cleanliness" issues with Hutton, but Taylor did express her concerns about KEH to the principal and to the school counselors. II VRP at 180.

On December 8, 2003, KEH came to school with "a swollen face" and told Taylor that Hutton had set up a dentist appointment for her for the first day of Christmas vacation. II VRP at 177. Believing that KEH needed immediate attention, Taylor took KEH to the principal, who took KEH home. KEH went to the dentist "soon after."[16]

3. Third grade

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[14] III VRP at 79.

[15] III VRP at 80.

[16] II VRP at 177.

When KEH was in third grade, Hutton make it clear that she did not want Warme anywhere near KEH and wrote a note to the school principal asserting that Warme was frightening KEH by stalking and staring at her. Although Warme had seen very little of KEH at that time, Warme acknowledged that when she saw KEH, KEH "clearly was scared of [her], turned way, acted like she was going to hide under the table, go under the desk." III VRP at 81. Warme attempted to stay away from KEH.

4. Third through fifth grades

Teacher's aide Teri Nowlen befriended KEH from third through fifth grades. KEH would not say much about her home life, but she told Nowlen that she did "a lot of chores," got herself up for school, had to care for the horses and dogs before school, and also did chores in the evening. III VRP at 104. Having observed that KEH went for long periods without bathing, Nowlen occasionally tracked KEH's bathing habits, noting one point when it appeared that KEH went eight weeks without bathing. Nowlen also observed that (1) KEH often had hay sticking out of her hair, (2) KEH "would put hay in her shoes to keep her feet warm," (3) KEH often had bruises on her arms and legs, and (4) KEH's hands were once bright red and sore. III VRP at 104. When Nowlen asked KEH what was wrong with her hands, KEH replied that she had had to clean "diseased dog cages the night before with bleach" without gloves.[17]

Kim Satcher, the school secretary, also tried to talk to KEH about her home life, but KEH was "pretty guarded."[18] KEH eventually told Satcher that she scrubbed and cleaned the dog pens

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[17] III VRP at 107.

[18] II VRP at 15.

and fed the dogs before she left for school, that sometimes her chores caused her to miss the school bus, that she had to care for the animals when she got home, and that she was not allowed to eat "unless the pens were clean and the animals were fed."[19] When KEH was in third or fourth grade, Satcher saw KEH's family in the local Wal Mart parking lot; KEH, who was not wearing a coat, stood "shivering" in the cold selling puppies while the rest of the family remained in the running truck.[20] Satcher believed that KEH was outside in the cold weather for at least 45 minutes to an hour.

Catherine DeFord, the school cook, also befriended KEH. When DeFord noticed that KEH's hands had "lots of warts on them, they were beet red sometimes," KEH would explain that her hands were red because "she had to clean out the kennels with Purex." II VRP at 184. DeFord allowed KEH to work with her in the kitchen and found KEH to be a shy but loving child who wanted attention. DeFord once gave KEH a CD player for her birthday, which KEH later said Hutton had thrown away. DeFord also saw KEH in a store parking lot sitting on the hood of a car and holding some puppies when it was "[n]asty" outside.[21] II VRP at 190.

To Randall Thomas Apperson, KEH's fifth grade teacher, KEH, the smallest student in the class, appeared underweight and exhibited "bad sign[s] of neglect."[22] When he asked how she got so dirty, KEH replied that she would get up "maybe five in the morning to feed" the family's

[19] II VRP at 16.
[20] II VRP at 11.

[21] DeFord never contacted CPS. But she did share her concerns about KEH with "teachers and the office." II VRP at 187.

[22] II VRP at 2.

"50 to 100" animals.[23] Apperson became so concerned about KEH's condition that he contacted CPS during the third quarter of the 2006 to 2007 school year.

[23] II VRP at 4.

D. CPS and Social Worker Contacts

From 2001 through June 2007, based on reports from the Aumans, the school, and neighbors, CPS sent investigators to the Hutton property many times. Hutton, however, told the children to stay away from CPS employees and the social workers.[24]

The CPS workers and other advocates often found Hutton's home cluttered, dirty, and smelling strongly of urine or ammonia; and they saw KEH outside doing chores. They did not attempt to remove the children, however, because there was adequate food and shelter, and there were no reports of physical abuse. CPS employees and social workers frequently offered services to Hutton, who rarely accepted any and was sometimes openly hostile, particularly if the social worker had reported anything to CPS. During one visit by Lewis County Sheriff's Office Chief Civil Deputy Stacy Brown, Hutton admitted that "she felt she bonded more to [CA], but she felt her bond with [KEH] was sufficient enough." III VRP at 65.

Also during one of CPS Investigator Jeffrey Copeland's nine visits in late spring of 2007, he asked Hutton to take the girls to a medical appointment, which she did. Copeland's only concern was that the doctor commented about KEH's "small . . . stature."[25] Copeland observed that Hutton's interactions with the girls at the doctor's office seemed appropriate and that the girls did not seem fearful. When Copeland talked to KEH at the appointment, she did not want to talk to him, seemed irritated, and denied any abuse or neglect.

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[24] When CPS staff, law enforcement, or social workers tried to talk to KEH at school, KEH seemed angry or upset and was usually uncooperative and unwilling to talk to them. The adults found it unusually difficult to build a rapport with her.

[25] III VRP at 153.

E. KEH Runs Away

Eventually KEH ran away from home. At 3:48 pm, on July 1, 2007, Hutton called 911 to report KEH missing. One of the responding deputies, Lewis County Sheriff's Office Deputy Christopher Rubin, observed that, for the most part, Hutton seemed "casual and calm"[26] when law enforcement arrived. That day and the next, Hutton's neighbors and the investigating officers noticed that Hutton did not appear particularly upset by KEH's absence, displayed a "flat" or unaffected affect, and became upset only when investigators mentioned taking CA into protective custody.[27] Hutton told Rubin that while KEH had been doing chores the night before, she was "being bratty," they argued, and KEH "stomped off to her room" when Hutton refused to let her sleep outside that night. III VRP at 133-34. Rubin questioned Hutton, but many of her answers were "vague," and Hutton could not tell him KEH's size, height, weight, or what KEH might have been wearing when she disappeared. III VRP at 134.

Several county sheriff deputies, including Rubin, Detective David Neiser, and Chief Civil Deputy Stacy Brown, investigated the Hutton home environment. Inside the home, they encountered an overwhelming ammonia/urine smell,[28] saw numerous loose and caged animals, observed feces and unclean animal cages throughout the house, and concluded that the home was not safe for children. When Copeland (CPS) re-investigated Hutton's home on July 2, he

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[26] III VRP at 132.

[27] III VRP at 66.

[28] Rubin noted that, although he had encountered many bad odors inside homes during the course of his job, this was by far "the worst [he had] been in as far as smell and odor." III VRP at 137.

determined that the conditions had "degenerated a whole lot" since his June 18 visit and that it was no longer a safe environment for children. III VRP at 147. While KEH was still missing, Hutton "signed a voluntary placement agreement" allowing CPS to place CA with her (Hutton's) sister. III VRP at 147.

Also on July 2, Detective Bruce Kimsey searched a wooded area near KEH's school bus stop, where someone had told him that KEH "hid food, clothing, [and] her bicycle."[29] There was a "little trail" leading to a "hiding spot" in the thick brush, where Kimsey found jeans, a sweatshirt, a pencil, plastic grocery store bags, a water bottle, a doll, and other "miscellaneous items."[30]

A search and rescue team finally located KEH "just down the creek" from her neighbor Blessum's house and took KEH to Blessum's, where there were indications that KEH had been while Blessum had been away on a camping trip. I VRP at 41. Having apparently moved and played in Blessum's sprinkler, KEH appeared to be a bit cleaner than usual. Nevertheless, KEH looked dirty and scared. And Blessum observed that KEH was "[e]xtremely small" for her age.[31]

CPS placed then 12-year-old KEH and CA with their paternal aunt, Merry Auman-Music. When KEH first arrived at her aunt's home, she weighed only 58 pounds, would eat until she was sick, hid food in her room, did not know how to operate the shower, avoided physical contact, reacted strongly to the smell of bleach, and occasionally howled like a dog.

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[29] III VRP at 3.

[30] III VRP at 3-4.

[31] I VRP at 43.

F. Medical Examinations

Endocrinologist Dr. Robert J. Newman, M.D., first examined 12-year-old KEH in July 2007 to evaluate her "for her stunted growth"[32]; he met with her a total of three times in approximately six-month intervals. When they first met, KEH looked like she was about eight years old, "[s]he cowered in [a] corner, she would not let [him] near her, she did not communicate, she growled at [him], [and] she was ruminating."[33] Dr. Newman characterized their interaction as "fairly bizarre"[34] and noted that these behaviors were consistent with psychosocial dwarfism, "a condition in which a child fails to grow as a result of emotional abuse and deprivation."[35] KEH was well below the normal growth curve, and Dr. Newman concluded that she was permanently affected by the psychosocial dwarfism and would never grow to her otherwise normal height.

Dr. Newman and Dr. Deborah Hall, M.D., diagnosed KEH with "psychosocial dwarfism" stemming from "abuse and neglect."[36] "Psychosocial dwarfism" is believed to be caused by a reduction in the child's growth hormone level and, importantly, "emotional neglect and abuse"; emotional stress and trauma from physical abuse can also contribute to the condition.[37]

[32] III VRP at 23.

[33] III VRP at 24-25. "Ruminating" means to vomit and then to swallow the vomit.

[34] III VRP at 25.

[35] II VRP 132. "Psychosocial dwarfism" is also known as "emotional deprivation syndrome, maternal deprivation syndrome, hospitalism, [and] institutionalism." III VRP at 19.

[36] II VRP at 137-38.

[37] II VRP at 133.

Symptoms include failure to grow normally (with height often more affected than weight) and behavioral issues, such as eating disorders, hoarding food, abnormal eating behaviors, and eating abnormal food.

In 2008, Dr. Robert A. Reiswig, M.D., reviewed X-ray films of KEH taken on May 25, 2007, and determined that KEH's "skeletal age" was approximately 8 years 10 months of age, even though these X-rays had been taken just a few days before her twelfth birthday. Dr. Reiswig also examined a July 21, 2008 hand X-ray, taken a couple of months after KEH's thirteenth birthday, and determined that her "bone age was consistent with the 11-year[-old] standard."[38] II VRP at 108. In reviewing KEH's medical records, the doctors found that, although KEH had always been small, (1) her ranking on the growth curve had flattened out dramatically and had continued to decline in the years after her father's death when she was five and a half; (2) she had grown very little since she was six years old; and (3) she remained well below the lowest percentile of the growth curve such that when she was about 12, she was more than four inches below the bottom of the growth curve.

After CPS placed KEH with her aunt, however, her growth improved. By the time of trial in April 2009, KEH was growing and developing very quickly, she was "almost on the normal height curve," and her puberty was progressing properly.[39] Her increase in growth was beyond

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[38] Bone age is a method of estimating the maturity level of a person's bones by examining the growth plates and other bone characteristics in relation to her chronological age; the relative size of the person does not influence this determination. It appears that "bone age" and "skeletal age" mean the same thing.

[39] III VRP at 25.

what would normally be seen in a "late bloomer," as opposed to someone suffering from psychosocial dwarfism.[40]

G. Mental Health Counseling

During fall 2007, KEH began seeing licensed mental health counselor Venus H. Masters. This counseling continued until the April 2009 trial, by which point they had had 30 to 40 sessions. Masters diagnosed KEH with post traumatic stress disorder (PTSD), based on KEH's "look of deprivation" when Masters first saw her; KEH's "hypervigilance"; the amount of time it took KEH to trust her (compared to other child clients); KEH's initial flat affect, small stature, and delayed emotional development; and that KEH was comparatively emotionally and intellectually "shut down."[41] Several of KEH's symptoms and behaviors were common for children who had endured prolonged "traumatic" experiences.[42] It appeared that KEH thought she was not entitled to anything good or nice and that she was "fairly uncomfortable having the nice things she had at [her] Aunt Merry's[.]"[43]

Masters observed various signs of neglect or abuse such as "thinness, the inability, even when [KEH did have] food, to enjoy it."[44] Although initially reluctant to talk about her life with Hutton, KEH eventually told Masters about Hutton's "severely disciplin[ing]" if KEH did

[40] III VRP at 26.

[41] I VRP at 59-60.

[42] I VRP at 62.

[43] I VRP at 62.

[44] I VRP at 62.

anything wrong by having her stand for long periods of time in a position they referred to as "cockroach[ ]"[45]—Hutton forced KEH to stand with her legs straight and her hands down to her feet; if KEH fell over, Hutton made her "stand up and do it all over again."[46] KEH also described having to do "all the chores, feeding all the horses, all the dogs"; if she failed to do the chores "just right," Hutton would make her sleep outside and would not give her dinner.[47] KEH showed Masters scars on her arms, from "bucking" or lifting 90 pound bales of hay, and a dent in her forehead, from having been hit in the head.[48] Masters believed that requiring a small child to do so many chores amounted to physical abuse.

KEH also told Masters that (1) if neighbors gave her clothes, Hutton would put them away for CA to wear later; (2) CA "got gifts and pretty things and neat foods, but [KEH] did not"[49]; (3) although she had her own bedroom when she lived with Hutton, KEH frequently slept outside in the hay and, when she slept inside, Hutton "locked [her] in [a] closet" so she "wouldn't steal food"[50]; (4) she had run away because she thought she would die if she remained with Hutton; and (5) when she ran away, she had stashed clothing and some food and had eaten grass when she got hungry. Masters noted that neglected children who do not receive regular meals

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[45] I VRP at 60.

[46] I VRP at 61.

[47] I VRP at 61.

[48] I VRP at 68.

[49] I VRP at 63.

[50] I VRP at 69.

commonly exhibit food hoarding behavior and may hide food.

H. Supervised Visits

Amanda Coday supervised three of Hutton's three-hour visits with her children. Coday observed that (1) KEH was hesitant to attend the first two visits and refused to attend the third; (2) during the first visit, Hutton did not interact with KEH for more than five minutes; (3) during the second visit, Hutton spent only five to ten minutes interacting with KEH; (4) during the first two visits, Hutton was affectionate toward CA, interacted with CA, hugged and kissed CA, and told CA she loved her and missed her, but Hutton was not affectionate toward KEH, did not physically interact with KEH, and did not tell KEH she loved or missed her; and (5) when KEH did not attend the third visit, Hutton did not seem upset.

II. Procedure

The State charged Hutton with second degree criminal mistreatment, with a deliberate cruelty aggravating sentencing factor.

A. Plea Offer and Motion to Dismiss

On September 9, 2008, Hutton's counsel notified the State that he wanted to interview "any witnesses [the State intended] to call." Clerk's Papers (CP) at 79. The next day, the State presented a plea bargain offer that would expire "upon entry of Omnibus order or at time of victim interview, whichever occurs first." CP at 81. The State also advised Hutton that (1) it could revise or revoke the offer at any time without notice; and (2) if she were convicted at trial, the State would seek a 30-month exceptional sentence. The plea offer was open to Hutton until October 15, when the State rescinded it after interviewing KEH and KEH's aunt (KEH's current guardian) and learning more about Hutton's behavior toward KEH.

A month later, Hutton moved to dismiss the case, arguing that the State's conditional plea offer constituted prosecutorial misconduct because it attempted to interfere with defense counsel's ability to investigate the case and it forced Hutton to choose between adequately prepared counsel and a plea bargain.[51] The State argued that Hutton could not establish prejudice because the State had withdrawn the conditional plea offer only after learning more about the case, not because Hutton had asked to interview KEH. The trial court noted the paucity of authority addressing such conditional pleas, the absence of a constitutional right to a plea bargain, and its lower degree of concern about this particular offer because there was no indication that it was the prosecutor's office's blanket policy to withhold plea offers from defendants who interview a witness. The trial court then ruled that Hutton had not established prosecutorial misconduct justifying dismissing the case, and it denied her motion.

B. Trial Testimony

1. Venus Masters

In addition to testifying about her counseling relationship with KEH, Masters testified that she had started counseling with CA in February 2008. When the State asked if Masters had seen any indications that CA also had suffered "traumatic events" while living with Hutton, Hutton objected, arguing that what had happened to CA was irrelevant.[52] The State responded that whether Masters had observed any signs or symptoms consistent with CA's having endured

[51] In support, Hutton cited *State v. Zhao*, 157 Wn.2d 188, 137 P.3d 835 (2006). When the State noted that Hutton was citing the *Zhao* concurrence, not the majority opinion, Hutton acknowledged the error.

[52] I VRP at 70.

traumatic events was relevant because it could corroborate CA's having witnessed Hutton's physical abuse and mistreatment of KEH. When the trial court allowed the State to ask Masters if CA had exhibited "signs and symptoms consistent with having endured a prolonged traumatic event," Masters responded, "Yes." I VRP at 79.

Masters had first diagnosed CA with "an adjustment disorder" but had later changed her diagnosis to PTSD[53] after CA was able to talk about the specific things she had witnessed while living with Hutton. I VRP at 79-80. CA had told Masters that she had witnessed KEH not having enough food and that Hutton had forced her (CA) to participate in physically disciplining KEH by having CA hit KEH with a spatula. Masters opined that CA was also emotionally and cognitively delayed, to which trauma, fear, and a sense of helplessness could have contributed.

Hutton sought to introduce evidence that Masters had asked Detective Neiser for help with the resume she was going to submit for trial and for advice about how to prepare to ensure that she could testify about KEH's and CA's disclosures and diagnoses. Masters responded that she had updated her resume before she contacted Neiser. The State objected to this line of questioning as irrelevant. Outside the jury's presence, the State submitted an offer of proof that Masters had expressed concern to Neiser about not being "qualified as an expert to give expert testimony in court" and had asked Neiser "what she might have to do to be qualified as one"[54]; the State further asserted that this contact was not relevant. Hutton (1) countered that this query demonstrated that Neiser had helped Masters and the children prepare for their trial testimony; (2)

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[53] Hutton did not object to Masters' opinion that CA suffered from PTSD.

[54] I VRP at 84.

clarified that she was not trying to say that Masters had lied on her resume or about her qualifications; and (3) wanted to show "[t]he extra length [Masters] went through to get ready for today's trial" in seeking help from others "to make sure that she would be given credit as an expert here today."[55]

The trial court sustained the State's objection. Masters clarified that she did not talk to the children about what to say if they testified and that she had simply encouraged them "to be courageous and strong and tell what they knew, what they remembered."[56] Hutton did not object to this testimony.

2. CA

When seven-year-old CA took the witness stand, the trial court did not require her to take an oath or to make any affirmation at the start of her testimony; nor did it explain her responsibility to tell the truth. Hutton did not object to the trial court's failure to administer an oath to CA or ask for an affirmation. On direct examination, however, the State questioned CA about whether she understood the difference between a lie and the truth, the consequences of lying, and the obligation to tell the truth. When the State then asked CA if she "promise[d] to tell the truth about everything," CA responded, "Yes."[57]

CA testified that Hutton (1) was "mean" to KEH, (2) made KEH stand for long periods of time with her legs straight and her hands touching her toes, (3) gave KEH less food than she gave

[55] I VRP at 85.

[56] I VRP at 98.

[57] I RP at 106.

CA, and (4) made her hit KEH with a spatula almost every day. I VRP at 106. KEH sometimes slept in her own room and sometimes slept outside. KEH also had to care for "a lot" of dogs and horses that the family owned, cleaned the horse stalls, and watered and fed the dogs and horses, often without any assistance. CA did not help KEH with any chores. I VRP at 109-10.

After cross-examining CA and after the trial court had dismissed the jury for the day, Hutton asked the trial court to strike CA's testimony because "she was never sworn." I VRP at 113. The following colloquy ensued:

> THE COURT: An oath is not required. And usually, before we get started, I'm asked to make a finding of competence, I don't know why you didn't interrupt. I wouldn't have allowed you to interrupt anyhow because there was no way she was going to not—that I was going to interrupt . . . her to do a technical thing like that. If I thought there was a question as to competence I would have stopped it, but to my mind she was clearly competent. She had the mental understanding and obligation to speak the truth on the witness stand. That was clear from the responses to [the State's] questions. Her mental capacity at the time of the event in question to receive an accurate impression of the events, that's always a little difficult because you never really know, but based on the testimony I have heard, plus her responses that fills that category, her memory was sufficient to maintain an independent recollection of the event and any inconsistencies go to the weight, and she does have the capacity to express in words her memory of the events and she also had the capacity to understand simple questions about the events. Had I been asked at the time, I would have said, no, I'll deal with it later. I wasn't—I'll now deal with it, *she was clearly competent.*
>
> [DEFENSE COUNSEL]: *I would agree,* I had a moment where we saw each other (sic), I didn't think it would be appropriate to interrupt.
>
> THE COURT: I am glad you didn't. I would have had to stop you and that could have made it worse.
>
> [DEFENSE COUNSEL]: I simply wanted to make my record, thank you.

I VRP at 113-14 (emphasis added).

3. KEH

Almost 14 years old and in seventh grade, KEH testified that when her father was alive, she was treated well. But after his death, the family lived in a dirty, smelly trailer with a lot of cats and no electricity for about a year. They had to use the woods for the bathroom, but Hutton would not give KEH toilet paper even though the others in the family had access to it. When she lived with Hutton, KEH's chores included feeding the horses and a "lot" of dogs; "cleaning up after the dogs"[58]; watering the horses using 25 gallon buckets; stacking 60 to 70 pound hay bales, which was painful and caused scars; and cleaning stalls. Bleach would get on her skin when she cleaned big dog crates. If she did not finish feeding the horses in the morning, KEH would miss the bus and "have to stay and do a bunch of work."[59] Once, Hutton also made her dig a hole in which to bury a dead horse and made her cover the dead horse with a tarp and leaves so CPS employees would not see it.

If KEH got in trouble or did not complete her chores, Hutton would make her do the "cockroach" for hours, which was painful. When KEH was in "cockroach," Hutton would sometimes make CA hit her (KEH) on the back with a spatula or hairbrush. II VRP at 25-26. Hutton also sometimes forced KEH to sleep outside if she did not complete her chores. Hutton once threw a shoe at KEH, which hit her in the lip and left a scar. Hutton hit KEH with her hands and with sticks and sometimes threw rocks at KEH, once hitting her in the forehead and leaving a mark. Hutton's punishments sometimes caused bruising. But KEH explained that her clothing covered most of the bruises and, if she did not manage to hide the bruises, she would be in

[58] II VRP at 25.

[59] II VRP at 27.

"trouble" with Hutton.[60] Hutton also threatened to tie a brick to KEH's leg and throw her in the pond. But Hutton did not discipline or treat CA the same way.

KEH slept outside in the hay most nights, regardless of the weather, without blankets or a coat, staying warm by pulling the hay over her. When Hutton allowed KEH to sleep inside, she made KEH sleep in a closet.[61] Although the closet did not lock, KEH knew that if she left the closet, Hutton would hit her with a spatula or make her stand in "cockroach."[62] Hutton, however, always allowed CA to sleep in the house.

KEH had to bathe with a hose, without soap, shampoo, or wash cloth. She was not allowed to use the bathrooms in the new house because they were always full of animals, which deposited "a lot" of urine and feces in the bathrooms and throughout the house. II VRP at 85. CA and her mother, however, used one of the bathrooms.

Hutton rarely gave KEH clothing and would not give her a jacket, an umbrella, hat, gloves, boots, or socks. KEH wore the same clothes to school every day. If people at school gave KEH or the family clothing, Hutton would not let KEH wear it and would save it instead for CA. Sometimes KEH hid clothing in a tree.

Hutton did not talk about Auman and generally did not allow KEH to talk about Auman; when Hutton did allow KEH to speak about her father, Hutton made KEH call him by his first name, rather than "[D]ad." II VRP at 38. Hutton did not allow KEH to see any of Auman's

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[60] II VRP at 32.

[61] Hutton did not allow KEH to sleep in her own bedroom, which had no bed.

[62] II VRP at 33.

family. And if anyone from Auman's family tried to give them anything, Hutton would throw the gifts into the woods. Although they had once had a Christmas tree, KEH did not normally receive any Christmas presents. Nor did Hutton give KEH any birthday presents, even though Hutton gave birthday presents to CA.

Hutton never hugged KEH, never told her that she loved her, and never kissed her. But Hutton hugged CA and told CA that she loved her. Hutton also called CA "[p]rincess [and] angel," but she called KEH only "bad words," such as "[b]itch, it, [and] cunt." II VRP at 44.

Although there was always food in the house, Hutton rarely fed KEH; if KEH tried to go inside to get food, she "would get more cockroach."[63] And if Hutton did give KEH something to eat, it was generally rotten zucchini. Although Hutton fed herself and CA dinner, she did not feed KEH. Hutton sometimes brought home food from the casinos to share with CA, but Hutton did not share the food with KEH. Oberloh, Hutton's boyfriend, however, sometimes gave KEH food from the casinos, and CA sometimes brought KEH food. If she got hungry, KEH sometimes ate dog food and clover. If she went long enough without eating, KEH would eventually not feel hungry; but she never felt satiated. On school days, KEH did not eat breakfast or lunch at home, although she often watched Hutton and CA eating cereal for breakfast while KEH was doing chores. KEH ate breakfast at school, but her teachers and other children would give her extra food that she would take home and hide in a tree at the end of the driveway.[64]

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[63] II VRP at 42.

[64] Except for feeding some of the milk to wild kittens, KEH denied taking any food home to feed the animals because, as she explained, "the animals got fed" even if she did not. II VRP at 53.

Although some of KEH's teachers had occasionally asked about her home life, she did not tell them anything because Hutton had told her not to tell people what happened at home and she knew that Hutton would punish her if she said anything. Hutton had also told KEH not to talk to Warme at school because Warme had called CPS.

KEH testified that she ran away on July 1, 2007, because she thought she "would probably end up dying" if she stayed with Hutton. II VRP at 55. The first night, she slept in a box outside Blessum's house and ate some green beans from Blessum's garden. KEH admitted that she had read the book, *A Child Called "It*,"[65] which she asserted Hutton had given to her to read. She acknowledged that the book described a child being treated in ways similar to how she described Hutton's treatment of her; but she asserted that the child in the book was treated "worse" than she had been treated by Hutton. II VRP at 71.

According to KEH, Hutton treated her "like she [Hutton] was a normal mother" if CPS or certain other adults were present.[66] And if Hutton knew that CPS was coming, she would clean the house. Otherwise, if Hutton was not forewarned, the house was "messy." II VRP at 87.

4. Joleen Roy

Roy testified that, before Auman's death, she saw KEH once a week at her (Roy's) parents' house and that she had frequently seen KEH and Auman interact. When the State asked Roy how Auman and KEH had interacted, Hutton objected on relevance grounds. When the trial court overruled the objection, Roy responded, "They had a beautiful relationship"; Auman was a

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[65] Dave Pelzer, A Child Called "It" (1995).

[66] II VRP at 37.

very loving father, who provided most of KEH's care from the time she was an infant until his death.[67]

[67] IV VRP at 38.

5. Theresa Hutton and Ernie Oberloh

Although Oberloh had not been living with Hutton's family during the eight months before KEH ran away, he and Hutton denied KEH's allegations of abuse and neglect; they also contested the observations of Hutton's neighbors and the school's teachers and staff.[68] Instead, they asserted that (1) KEH was a tomboy who spent her time outside and liked to play in the hay; (2) although KEH would sometimes fall asleep in her hay forts while reading, she was not allowed to sleep outside; (3) KEH would frequently ask to be allowed to sleep outside, but Hutton would not let her; (4) KEH was not required to "buck" hay but would sometimes try to lift hay bales to show off if others were present[69]; (5) although KEH would sometimes try to help with other chores, her only assigned chores were watering the horses (using a hose to fill the trough) after school and keeping her room clean; (6) KEH's only punishments were extra chores like vacuuming or sweeping or, if she refused to do these chores, writing essays; and (7) KEH always wanted her own way, needed a lot of attention, and "would make up stuff"[70] to get attention or make people feel sorry for her.[71] Hutton further testified that, during the last year KEH was living at home,

[68] Oberloh admitted that he had discussed with Hutton what he would say in court. But he asserted that their romantic relationship did not affect his testimony.

[69] IV VRP at 84.

[70] IV VRP at 79.

[71] According to Hutton, she had once caught KEH changing out of her nice clothes into some dirty play clothes between the time KEH left the house for the school bus and arriving at the bus stop. But Hutton admitted that when they lived in the fifth-wheel trailer, she had to wash the family's clothes in a pan on the stove and, although she believed the clothes were "[c]lean enough according to us," they were probably not clean enough "according to regular people." V VRP at 10.

(1) she and KEH had a lot of disagreements; (2) KEH "would lie to [her (Hutton)] all the time about things, tell [her] stories"[72]; (3) KEH "was always really headstrong," which "got way worse as she got older"[73]; (4) KEH was not affectionate in a "kissy-huggy sort of way"[74] and did not hug Hutton often; and (5) Hutton was not "overly affectionate with [KEH]."[75] Nevertheless, Hutton asserted that KEH wrote notes, drew pictures, and left them around for her (Hutton) to find; that she loved KEH; that she had bonded with KEH; that her bond with KEH was the same as her bond with CA; that she believed she had cared for KEH and her needs; and that she did not physically, emotionally, or psychologically abuse KEH. Hutton admitted that she sometimes yelled at KEH when they had disagreements, but she denied calling KEH some of the names KEH claimed she had called her.

Hutton testified that (1) during the last six months KEH was living at home, KEH had frequently threatened to run away and had told Hutton that she "knew exactly what to say so she would never be forced to go back home"[76]; and (2) many of KEH's allegations were based on the events described in *A Child Called "It,"* a book about a severely abused child, which KEH had read several times.[77] In addition to denying the abuse and neglect allegations, Hutton asserted

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[72] IV VRP at 199.

[73] IV VRP at 200.

[74] V VRP at 2.

[75] V VRP at 37.

[76] V VRP at 23.

[77] KEH had also read other books in the series. Hutton said KEH had commented that this book, however, was her favorite in the series because it contained more abusive situations. Hutton also

that KEH had run away from home because she was angry about Oberloh's being gone, she was upset about a cousin's moving away, and she was mad at Hutton for not allowing her to purchase a goat from a neighbor.

Hutton also admitted that her relationship with KEH's school was strained because she did not like the school's calling CPS about issues with KEH rather than contacting her directly. Specifically, Hutton referred to Warme's having called CPS "about [KEH's] tooth or something," which Hutton asserted was a "gum" problem rather than a "tooth" problem.[78] According to Hutton, KEH had not told her that she had a problem before the school contacted Hutton.

Hutton further claimed that no doctor had expressed any concern about KEH's small size until the last doctor visit when she took KEH (at Copeland's request), that she (Hutton) had made a follow-up appointment with a specialist, and that KEH had run away before this up appointment. Hutton acknowledged she was aware that KEH did not grow very much while living in Hutton's home and that KEH was short for her age. But Hutton asserted that KEH "was always very small," that Hutton was also small, and that, therefore, she was not concerned. V VRP at 41.

C. Jury Instructions, Verdict, and Sentencing

The trial court instructed the jury on second degree criminal mistreatment and the lesser degree offense of third degree criminal mistreatment. The trial court also provided the jury with a special verdict form for the "deliberate cruelty" aggravating sentencing factor, which read: "Did the conduct of the defendant, THERESA ANN HUTTON, manifest deliberate cruelty to [KEH]

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had read all of the books in this series.

[78] IV VRP at 201.

during the commission of the crime of Criminal Mistreatment in the Second Degree as charged?" CP at 25. The parties did not request, nor did the trial court provide, an instruction defining "deliberate cruelty."

Following closing arguments,[79] the jury found Hutton guilty of second degree criminal mistreatment. The jury returned the special verdict, finding the aggravating factor of deliberate cruelty. The standard range sentence for Hutton's offense was 0 to 365 days of confinement; the trial court imposed a 48-month exceptional sentence.

Hutton appeals both her conviction and her exceptional sentence.

ANALYSIS

I. Contingent Plea Offer Issue Moot

Hutton first argues that the State engaged in "misconduct" that violated her rights to effective assistance of counsel and due process under the Sixth and Fourteenth Amendments of the United States Constitution when it conditioned its plea bargain offer on her agreement not to interview KEH. Br. of Appellant at 23. The State responds that the issue is "moot" because the State withdrew the plea offer for other reasons before Hutton's defense team interviewed KEH. Br. of Resp't at 14. The record shows that the State is correct.

A case is moot if we can no longer provide effective relief. *State v. Pierce*, 155 Wn. App. 701, 715 n.13, 230 P.3d 237 (2010) (quoting *In re Matter of Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983)). The State presented its deputy prosecutor's affidavit to show that it withdrew

[79] Hutton periodically objected to some, but not all, of the prosecutor's argument. We provide more detailed facts about the State's closing argument and any objections later in the Analysis section on prosecutorial misconduct.

its conditional plea offer after it obtained additional information about Hutton's extreme, long-term mistreatment of KEH, not because Hutton interviewed, or was planning to interview, KEH. This affidavit is unrefuted in the record. Because the State withdrew its plea bargain offer on grounds other than Hutton's interviewing KEH, we hold that the issue Hutton now raises is clearly moot and, therefore, we decline to address it further.

II. Evidentiary Rulings

Hutton next challenges the admission of various witnesses' testimonies. We review a trial court's admission of evidence for abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). A trial court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *State v. Stenson*, 132 Wn.2d 668, 7010, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1989).

Hutton first argues that the trial court erred when it allowed Elizabeth to testify that KEH "had never lied to her." Br. of Appellant at 35 (citing III VRP at 53-54). But nowhere in the record did Elizabeth testify that KEH never lied to her. Instead, the portion of the record Hutton cites reflects the State's asking Elizabeth whether KEH had "ever told [Elizabeth] to say anything that wasn't true?" III VRP at 53. Accordingly, this argument fails.

Hutton next argues that the trial court erred when it allowed Masters "to testify that [CA] suffered from PTSD." Br. of Appellant at 35 (citing II VRP at 70-82). Hutton asserts that this evidence had no probative value and was unduly prejudicial because it was likely to "inflame" the jury. Masters' testimony about CA's PTSD was relevant to corroborate CA's later testimony about what she had witnessed when the girls lived with Hutton. Therefore, the trial court did not

abuse its discretion in admitting this testimony.

Hutton also challenges Roy's testimony "that [KEH] had a 'beautiful relationship' with her father." Br. of Appellant at 36 (quoting IV VRP at 38). Although Roy's characterization of KEH's relationship with her father as "beautiful" was poetic, there is other significant evidence in the record showing that KEH and her father had a good relationship and that he was her primary caretaker when he was alive.[80] This brief reference was effectively cumulative, not prejudicial; therefore, error, if any, was harmless.

Hutton further argues that the trial court should not have allowed "the social worker to provide profile testimony (that it is common for abused children to deny abuse)." Br. of Appellant at 36. But Hutton neither cites the record nor specifies which "social worker's" testimony she wants us to review, as RAP 10.3(a)(6) requires. Therefore, we do not further review this insufficiently specific argument.

III. Limiting Cross Examination of Masters

Hutton next argues that the trial court violated her right to confront witnesses by limiting her cross-examination of Masters to establish bias and to show that Masters was "more than just a neutral witness, but rather was an advocate with an agenda." Br. of Appellant at 39. This argument fails.

The Sixth Amendment of the United States Constitution and article I, section 22 of the

[80] For example, in addition to testifying that Auman loved KEH and provided most of her care, Auman-Music also testified that she saw KEH often until KEH was about six years old and that KEH was a "very loved" and outgoing child. III VRP at 174. KEH also testified that when her father was alive, he "treated [her (KEH)] good," and she was fed and had a bed to sleep in. II VRP at 44.

Washington Constitution afford a defendant the right to confront and to cross-examine fully the witnesses testifying against her. *State v. Clark*, 139 Wn.2d 152, 157-58, 985 P.2d 377 (1999). But the scope of cross-examination is a matter within the trial court's sound discretion. *State v. King*, 113 Wn. App. 243, 289, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1015 (2003). A trial court "may reject lines of questions that only remotely tend to show bias or prejudice." *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288 (2002). The trial court abuses its discretion if the decision is based on untenable grounds or untenable reasons. *State v. Gallagher*, 112 Wn. App. 601, 609, 51 P.3d 100 (2002), *review denied*, 148 Wn.2d 1023 (2003). We find no such abuse of discretion here.

Hutton sought to elicit testimony showing that Masters had contacted Detective Neiser for advice about what information she needed to include in her resume and how to approach the case to ensure that she would be able to testify about her interactions with KEH and CA. The trial court ruled that any connection between Masters' asking for advice, to ensure she could testify about her contacts with KEH and CA, and any potential advocacy or improper coaching was "way to[o] attenuated" to establish that Masters took unusual steps to prepare for trial. I VRP at 85. We agree.

A counselor asking for advice about what to include in a resume to ensure that she will be able to testify at a trial involving her client does not necessarily show bias. This is particularly true where, as here, there is no suggestion that the counselor misrepresented anything on her resume, somehow coached her clients to present false evidence, or offered false testimony. The counselor's actions here could show that she simply wished to be adequately prepared for trial.

Furthermore, as demonstrated by defense counsel's difficulty explaining his strategy to the trial court, his argument could easily confuse a jury. We hold, therefore, that the trial court did not abuse its discretion when it limited Hutton's ability to elicit this testimony.

IV. Failure to Place CA Under Oath

Hutton next argues that the trial court violated her Sixth and Fourteenth Amendment rights to confront CA when it failed to place CA under oath. The State responds that the trial court did not err because the State's questioning of CA established that CA intended to testify truthfully.

ER 603 requires the trial court to swear or to affirm every witness before testifying. But where the witness is a child, a formal oath is not required.[81] Although the trial court may dispense with formal oaths when dealing with a child witness, it must still question the child to ensure that she will tell the truth. *State v. Avila*, 78 Wn. App. 731, 738, 899 P.2d 11 (1995). A failure to object, however, waives this issue. *State v. Dixon*, 37 Wn. App. 867, 876, 684 P.2d 725 (1984).[82]

Here, the record shows that although defense counsel was aware of this issue, he intentionally refrained from objecting until after CA's testimony was complete and the trial court had sent the jury home for the day. By choosing to wait to object until after CA testified, defense counsel deprived the trial court of any opportunity to correct the error. We hold, therefore, that Hutton effectively waived this issue.[83]

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[81] *State v. Avila*, 78 Wn. App. 731, 737-38, 899 P.2d 11 (1995); *State v. Dixon*, 37 Wn. App. 867, 875, 684 P.2d 725 (1984) (citing *State v. Collier*, 23 Wn.2d 678, 694, 162 P.2d 267 (1945); *State v. Johnson*, 28 Wn. App. 459, 461, 624 P.2d 213 (1981)).

[82] Additionally, such error can be harmless. *Avila*, 78 Wn. App. at 738.

[83] In a footnote in her opening brief, Hutton further argues that if defense counsel's objection was untimely, we should review this issue as a manifest error affecting her constitutional right to confront witnesses under RAP 2.5(a). Given CA's responses to the prosecutor's questioning that she understood and would tell the truth, Hutton does not establish that this was a "manifest" error warranting our addressing the issue despite her failure to preserve it for appeal.

We note other reasons that Hutton cannot show this non-preserved alleged error was

V. Alleged Prosecutorial Misconduct in Closing Argument

Hutton next argues that the prosecutor committed misconduct numerous times in closing argument by (1) expressing personal opinion when commenting on witness credibility and disparaging defense counsel's argument, (2) presenting arguments that were misstatements of law and unsupported by jury instructions, and (3) appealing to the jury's passion and prejudice. She also argues that, to the extent defense counsel failed to object to these arguments, she received ineffective assistance of counsel. These arguments also fail.

"manifest." First, CA's testimony about Hutton's treatment of KEH was not the only evidence of this mistreatment; nor was it the only corroboration of KEH's claims. On the contrary, much of the same evidence came in when Masters testified about what CA had disclosed during counseling sessions. Although CA's testimony was arguably important because it confirmed several of KEH's specific allegations, in light of the other evidence, the admission of this unsworn testimony does not appear to have affected the outcome of the trial and, therefore, was not manifest.

Second, Hutton's case is similar to the situation in *Dixon*, where the trial court did not administer any form of oath or affirmation to a child witness, but the State questioned the child about whether the child understood the difference between the truth and a lie, whether the child understood that it was important to tell the truth, and whether the child would do so. 37 Wn. App. at 875-76. We acknowledge one distinction, however: After the State's direct examination, the trial court asked Dixon's defense counsel if he had any questions about the child's ability to tell the truth, and defense counsel replied that he had no concerns. *Dixon*, 37 Wn. App. at 876. Nevertheless, when Dixon raised the oath issue on appeal, the appellate court held that Dixon's failure to object waived any error, explaining:

> ER 603 states that the purpose of an oath or affirmation is to awaken the witness' conscience and impress his mind with the duty to tell the truth. From our review of the record, we conclude that [the child witness's] conscience was awakened and that his mind was impressed with the duty to tell the truth. *We hold that the requirements of ER 603 are met when a child demonstrates an understanding of the difference between truth and falsity, is adequately apprised of the importance of telling the truth and declares that he will do so.*

Dixon, 37 Wn. App. at 876 (citing *Johnson*, 28 Wn. App. at 461) (emphasis added). Similarly, here, the requirements of ER 603 were met when CA demonstrated an understanding of the difference between truth and falsity, was adequately informed about the importance of telling the truth, and declared that she would do so when specifically questioned by the State during her testimony.

A. Standards of Review

Hutton bears the burden of showing that the prosecuting attorney's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006)); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *Stenson*, 132 Wn.2d 718). "Prejudice occurs where there is a 'substantial likelihood that the misconduct affected the jury's verdict.'" *In re Detention of Sease*, 149 Wn. App. 66, 81, 201 P.3d 1078 (2009) (quoting *State v. Thomas*, 142 Wn. App. 589, 593, 174 P.3d 1264, *review denied*, 164 Wn.2d 1026 (2008)), *review denied*, 166 Wn.2d 1029 (2009).

If Hutton's counsel did not object to the alleged misconduct, then Hutton has waived the issue for appeal unless the prosecutor's misconduct was "'so flagrant and ill-intentioned that it evince[d] an enduring and resulting prejudice'" incurable by a jury instruction. *Gregory*, 158 Wn.2d at 841 (quoting *Stenson*, 132 Wn.2d at 718-19).

Additionally, an appellant claiming ineffective assistance of counsel must show both deficient performance and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting the test from *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability that the outcome would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Hutton fails to meet this burden.

B. Expressing Personal Opinion on Credibility Issues

Hutton first argues that the State engaged in misconduct during closing argument when the deputy prosecutor expressed his "personal opinion" about the credibility of the witnesses by (1) telling the jury that the State's witnesses, "especially [KEH] and [CA]—were 'believable' or 'very believable,' and describ[ing] them as 'incredibly courage[ous]' and 'incredibly brave' for testifying,"[84]; (2) commenting on Oberloh's and Hutton's lack of credibility; and (3) disparaging defense counsel's arguments.

1. Related Closing Argument

In its closing argument, the State first focused on the jury's role in determining credibility and weight issues. Although it emphasized that the jury was the sole judge of witness credibility and evidentiary weight, it argued that (1) the State's witnesses, including law enforcement, teachers, and neighbors, were "believable" because they had no "stake in this" matter and were all "very concerned individuals telling it like they saw it"; (2) CA was "very believable"; (3) Roy and Auman-Music cared for and loved the girls and had "nothing to gain by falsifying the testimony in this case"; (4) Roy and Auman-Music had "done nothing but be honest with us about everything"; (5) KEH was also "believable" because it was unlikely she would want to run away if her life was "really as good as" Hutton had claimed in her testimony; (6) it was very unlikely that KEH or CA were both faking PTSD; and (7) the statements the girls gave to others, including Masters and Elizabeth, were consistent with their trial testimonies. V VRP at 76. Hutton did not object to any of these arguments.

[84] Br. of Appellant at 29 (quoting V VRP at 76, 139).

The State then argued that Hutton's witnesses were "not believable," asserting that defense counsel had somehow signaled to Oberloh during his testimony.[85] V VRP at 76. The trial court overruled Hutton's objection to this assertion. The Stated also asserted that Oberloh was "bending the truth to try to help out" Hutton because of their close relationship and that Hutton's sister was also just trying to help Hutton. V VRP at 77. The State then discussed the evidence supporting the State's witnesses' testimonies that undermined Hutton's evidence. Hutton did not object to any of the rest of this argument.

In her closing, Hutton argued that (1) no one had personally witnessed any "abuse," (2) KEH's allegations against Hutton were "a work of fiction" that KEH had made up because she was mad at Hutton and wanted to live with Auman's family, (3) the criminal charges against Hutton were the culmination of KEH's plan, and (4) KEH was not credible. *See* V VRP at 100, 136-37. In rebuttal, the State characterized Hutton's closing argument as "grasping at straws," stating:

> That's what we just heard, a lot of grasping at straws that was unreasonable and really out there suggestions. And the reason why that is is because defense counsel is doing the best with what he has. He doesn't have a leg to stand on. So we come up with this kind of theory of misdirection, smoke and mirrors. Why don't we have a picture of a cardboard box. In the grand scheme of things, is that really that important. Same thing like [KEH] has been outwitting us as if she is a diabolical, criminal mastermind who just woke up one morning and said, I'm going to do all this and lead us to where we are today. That's ridiculous to think that.
>
> The assertion that I didn't put someone up there to rebut everything that the defense said must mean it is true. That also is ridiculous. One might come to the logical conclusion that perhaps I didn't do that on every point because I didn't

[85] We find nothing in the record suggesting that defense counsel signaled to Oberloh; nor did the State bring any such behavior to the trial court's attention.

> need to. Did I really need to bring [KEH] back up here, [KEH], did you have a snack cupboard at home. She would look at me like I was crazy, no, why would I need to–

V VRP at 137-38. Defense counsel objected only to the State's comment about what KEH would have done if the State had recalled her to rebut the defense evidence. The trial court responded that the jury would determine the facts and that it had been properly instructed.

The State continued:

> Suggesting that [KEH] is trying to outwit us all is really out there. And a lot of defense counsel's arguments are based on what the defendant has told us. I would say credibility of Mr. Oberloh and the defendant is right around zero. Anything they say you need to take with an extremely large grain of salt.

V VRP at 138-39. Defense counsel objected, "[B]ased upon the fact [the State's] alleging my client is creating false accusations simply to save herself." V VRP at 139. The trial court reminded defense counsel that the jury would determine what the facts were and then commented, "I'm not going to comment on the evidence and there was no mention of your client in that remark. It was Mr. Oberloh he was talking about." V VRP at 139. Hutton did not object to the trial court's characterization of the State's argument at this time.

The State further argued:

> [CA] and [KEH] are very believable. It took incredible courage to come in this room face-to-face with her mother and tell the horrible stories and what they had to live through. That was believable and incredibly brave to come into a room of strangers, all of us, and share those horrific details. It doesn't look fun to be in court, questioned by lawyers, doesn't look fun at all and it is not. Why would anyone put themselves through this for years if something terrible hadn't actually happened[?]

V VRP at 139. Defense counsel did not object to this argument. Later, in rebuttal, the State

again noted that Hutton's and Oberloh's testimonies "need[ed] to be taken with a grain of salt," and it reminded the jury that Oberloh had not been around the family during the eight months before KEH ran away. V VRP at 151. Defense counsel did not object to these statements.

After the trial court sent out the jury, defense counsel informed the trial court that he wanted to clarify that when he had first objected to the State's "grain of salt" argument, the State had, in fact, been referring to both Oberloh and Hutton, despite what the trial court said in response to his objection. V VRP at 157. Counsel then noted that the State had made the same "grain of salt" argument again later, but he had refrained from objecting because of the trial court's previous response, despite still believing that this was improper argument. V VRP at 157. The trial court confirmed that had defense counsel objected again, it would have overruled the objection and stated that the State could properly argue that "you can take the testimony with a grain of salt." V VRP at 157.

2. No Expression of Personal Opinion

Although the State's arguments may have at times bordered on personal opinion, taken as a whole, the State was arguing that the jury should find credible KEH, CA, and the other witnesses to Hutton's abuse and that it should find Hutton's witnesses not credible because of the witnesses' motives and other evidence that either supported or undermined each witness's credibility. Both the State and Hutton characterized each other's arguments in strong terms, disparagingly responding to the other party's arguments; but these arguments were not improper statements of personal opinions. Accordingly, Hutton's challenge fails.

Furthermore, with respect to the portions of the State's closing argument to which defense

counsel did not object below, given our analysis above, we hold that any such failures did not amount to ineffective assistance of counsel.

C. Arguments Not Supported by Instructions; Misstatements of Law

Hutton next argues that the prosecutor committed misconduct in closing by presenting arguments that the instructions did not support and by misstating the law when he asserted that "'growing is a bodily function,'"[86] and "'nurturing, love, and affection'" are included in the definition of "'medically necessary health care.'"[87] Br. of Appellant at 31 (quoting V VRP at 95-96). Although there was no specific testimony about growth being a "bodily function" and there was no instruction defining "bodily function," Dr. Hall's and Dr. Newman's testimonies clearly demonstrated that a child will normally grow and mature over time and that this growth is a part of a child's normal biological progression. This evidence, plus the jury's common experience,

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[86] In discussing the phrase "substantial bodily harm," the State argued:

> Substantial bodily harm, bodily injury that involves a temporary but substantial loss or impairment of the function of any bodily part or organ. Well, *growing is a bodily function*. And we know that there was a substantial loss or impairment of that function while [KEH] was living with her mom.

V VRP at 95 (emphasis added). Hutton did not object to this statement.

[87] In discussing the "basic necessities of life," the State argued:

> It has to be done by withholding the basic necessities of life, which the instruction tells us is food, water, clothing, shelter, medically necessary health care. Most people think health care is going to the doctor. This is open for your interpretation. Health care can mean anything a human needs to be healthy, being loved and nurtured. *Medically necessary health care, including but not limited to health related treatment or activity. So it's really a very, very broad term. We heard both doctors state that nurturing, love and affection from a parent, they consider that to be (sic) basic necessity of life*. So all these things, food, water, shelter, love, if you don't give those things to a child, it is not going to grow. You don't have to have a Ph.D. to know that.

V VRP at 96 (emphasis added). Again, Hutton did not object.

support this part of the State's argument. Furthermore, because evidence and common sense support this part of the State's argument, any objection would not have been successful; therefore, Hutton cannot establish that her trial counsel was ineffective in failing to object to this part of the State's closing argument.

As for the State's comment that "nurturing, love, and affection" are included in the definition of "[m]edically necessary health care," even assuming, without deciding, that the instructions did not support the argument and that the comment misstated the law, this error was harmless in light of (1) Dr. Newman's testimony and (2) the fact that the phrase "[m]edically necessary health care" is only one factor the jury could examine in determining whether Hutton had withheld any of "the basic necessities of life." V VRP at 96. Dr. Newman testified that "[p]sychosocial dwarfism is a condition which a child fails to grow and mature and developmentally mature due to psychosocially toxic environment." III VRP at 19. He described a "psychosocial toxic environment" as one that is "non-nurturing"; and he asserted that emotional abuse and lack of nurturing, not just physical abuse, can create such an environment. III VRP at 19.

Dr. Newman also testified that (1) how a child is nurtured as he or she grows is "extremely important," (2) the absence of a loving and nurturing environment can result in "neuroendocrine effects" such as failure to grow and lack of brain development and can possibly be life threatening,[88] and (3) parental nurturing is a basic necessity of life for a child. Moreover, any error in describing nurturing, love, and affection as medically necessary health care was not

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[88] III VRP at 19.

prejudicial because medically necessary health care is only one basic necessity of life, and Dr. Newman's testimony established that nurturing is a basic necessity of life for a child that can affect a child's growth, development, and viability. And because this potential error was not prejudicial, Hutton cannot establish that defense counsel's failure to object amounted to ineffective assistance.

D. Passion and Prejudice

Referring only to the State's rebuttal argument, Hutton next argues that the prosecutor committed misconduct by appealing to the jury's passion and prejudice in closing argument. Although acknowledging that the State was responding to "defense counsel's admonition to the jury (not to let the case tug at their heartstrings)," Hutton asserts that the State's response "crossed the line by appealing to the jury's sympathy." Br. of Appellant at 32. We disagree.

1. Related closing argument

During closing argument, defense counsel characterized KEH's accusations against Hutton as a "work of fiction," stating:

> As I told you in the beginning, this is a work of fiction. I told you that you're going to hear some things that you weren't going to like. You're going to hear some things that tug at your heartstrings. That's exactly what you've heard. You have heard some things that absolutely no child should have to endure. No child should have to wonder where their next meal is coming from. No child should be forced to wear dirty clothes. No child should be forced to sleep outside. [KEH] wasn't, she wasn't forced to sleep outside. She wasn't forced to wonder where her next meal was coming from, and she wasn't forced to wear the disgusting clothes.

V VRP at 100. Defense counsel argued that any evidence related to Hutton and KEH's relationship before Auman's death was irrelevant to the charges because that relationship

occurred outside the charging period and this evidence was merely "an attempt by the [S]tate to pull at heartstrings." V VRP at 102. Defense counsel then noted, "I can see it in your eyes. Some of you are feeling it. Don't let it sway you. It doesn't matter to why we are here." V VRP at 102.

In rebuttal, the State argued that it did not have an obligation to rebut all of Hutton's evidence, that the defense theory of the case (that KEH was angry with her mother and had fabricated all this to get away from her mother) did not make sense in light of the evidence, that the defense evidence was not credible in light of all of the evidence, and that the State's evidence was credible in light of all of the evidence. The State also argued that, if there were similarities between KEH's allegations and the book she had read, these similarities could have been because Hutton had also read the book and had used the book as a "parenting manual." V VRP (Apr. 20, 2009) at 152.

The State then argued:

> Counsel said a lot [of things] about heartstrings and don't let this pull your heartstrings. The instructions don't say you have to act like robots. For instance, look at the definition of reckless, it has a reasonable person standard built into it. That means you get to come to the table with your experiences as a person, say, this is what a reasonable human would or wouldn't do. When you look at the case in the eyes of a reasonable human being, you may still be outraged by what you heard. It doesn't mean you're disobeying what the law told you. It does not say you can't have human feeling and emotion when you evaluate the conduct of the defendant, it doesn't say that. You can't decide what a reasonable person would do without using your own emotions and feelings. The instructions do not say you can't be outraged by what we have heard during this trial. And (sic) I argue to you that after hearing all that, we should all be outraged.

V VRP at 153.

Finally, after discussing the cruelty of Hutton's behavior toward KEH and the "deliberate cruelty" aggravating factor, the State argued:

> Like I said, we don't have technology to erase memories, don't have time travel. [KEH] will never be the same. She'll never forget these horrible things. The defendant acted recklessly while committing these crimes, yes, she did all that on purpose.
>
> . . .
>
> If the facts in this case haven't tugged at your heartstrings a little bit, reevaluate the evidence when you go back there. Like I said, the question to answer is does the defendant's conduct amount to Criminal Mistreatment in the Second Degree. We've heard four and a half days of testimony which all tells us the answer is yes.

V VRP at 154-55. Again, defense counsel did not object.

2. No appeal to passion and prejudice

A prosecutor has a duty to ensure that a verdict is free from prejudice and based on reason, not passion. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (quoting *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968)). It is improper for a prosecutor to invite the jury to decide any case based on emotional appeals or their passions and prejudices. *In re Det. of Gaff*, 90 Wn. App. 834, 841, 954 P.2d 943 (1998); *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984).

This argument does not rise to the level of reversible error. The State's rebuttal argument responded to Hutton's closing argument about the "recklessness" mens rea[89] and the "deliberate

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[89] The jury instructions defined "recklessness" as follows:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP at 38.

cruelty" aggravating sentencing factor. Even though the State mentioned that the jury might consider its emotional reaction, it did so in the context of directing the jury to the court's instructions. Furthermore, the trial court instructed the jury:

> As jurors, you are officers of this court. You must not let your emotion overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP at 29-30 (Jury Instruction 1). Nothing in the record overcomes the well-settled presumption that the jury followed the trial court's instructions. *See State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); *State v. Anderson*, 153 Wn. App. 417, 428-29, 432, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). Again, Hutton's challenge fails.

E. Cumulative Prosecutorial Misconduct

Hutton further argues that these multiple instances of prosecutorial misconduct amounted to cumulative error. As we have discussed above, Hutton's claims of prosecutorial misconduct in closing argument fail. Even those with arguable merit, taken together, were not so prejudicial as to deny Hutton a fair trial. According, her cumulative error argument fails.

VI. Exceptional Sentence: "Deliberate Cruelty"

Citing Division One's opinion in *State v. Gordon*, 153 Wn. App. 516, 223 P.3d 519 (2009), *review granted in part denied in part*, 169 Wn.2d 1011 (2010),[90] Hutton challenges her

[90] In *Gordon*, Division One held that the lack of a proper instruction on the "deliberate cruelty" aggravating factor (1) had "practical and identifiable consequences" in that it left the jury "to deliberate with a misleading and incomplete statement of the law" and (2) was a manifest constitutional error that Gordon could raise for the first time on appeal, subject, however, to

exceptional sentence. She argues that the trial court violated her Sixth and Fourteenth Amendment rights to a jury trial when it failed sua sponte to define the phrase "deliberate cruelty" in a jury instruction, which she claims was necessary for the jury to understand the "essential elements of the 'deliberate cruelty' aggravating factor." Br. of Appellant at 45.

The State urges us to hold that Hutton cannot challenge for the first time on appeal the trial court's "failure" to provide the jury with the definition of "deliberate cruelty."[91] Br. of Resp't at 50. We note that Division One has recently questioned *Gordon* in *State v Williams*, 159 Wn. App. 298, 244 P.3d 1018 (2011), *review denied*, ___ Wn.2d ___ (No. 85612-5),[92] and that our Supreme Court recently heard argument in *Gordon*. Rather than staying Hutton's case while the Supreme Court addresses the merits of this unresolved legal issue, we hold, instead, that even if we were to apply *Gordon* here and to assume that the trial court erred in failing to instruct the jury on the definition of "deliberate cruelty," Hutton would not be entitled to relief because any

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harmless error analysis. *Gordon*, 153 Wn. App. at 530, 535. Finding prejudice in *Gordon*, however, Division One went on to note:

> After *Apprendi* and *Ring*, the alleged error here can be fairly characterized as failing to properly instruct on an element of the aggravated crime. We hold that aggravating factors are elements of the crime for purposes of instructing the jury on exceptional sentencing. We further hold that where an appellate court has further defined the legal standard of a statutory aggravating factor yet the jury instruction fails to include the legal standard, an error of constitutional magnitude is present.

Gordon, 153 Wn. App. at 529-30 (footnotes omitted) (citations omitted).

[91] Citing the unpublished portion of our recent decision in *State v. Hylton*, 154 Wn. App. 945, 226 P.3d 246, *review denied*, 169 Wn.2d 1025 (2010), the State asks us to follow the *Hylton*, rationale. But we do not consider unpublished decisions.

[92] In *Williams*, Division One cast doubt on its premise in its earlier *Gordon* case, questioning whether the definition of an "element" may actually contain additional "elements," specifically in the context of aggravating circumstances special verdicts. 159 Wn. App. at 313.

alleged error was harmless. A constitutional error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Such is the case here.

"An exceptional sentence is not justified by mere reference to the very facts which constituted the elements of the offense proven at trial." *State v. Ferguson*, 142 Wn.2d 631, 648, 15 P.3d 1271 (2001). Rather, to justify an exceptional sentence, the deliberate cruelty must be atypical of the crime. *State v. Atkinson*, 113 Wn. App. 661, 671, 54 P.3d 702 (2002), *review denied*, 149 Wn.2d 1013 (2003). Thus, in addition to proving the elements of second degree criminal mistreatment, in order to prove the additional aggravating sentencing factor "deliberate cruelty," the State had to show gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself. *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996). In other words, to justify an exceptional sentence, the State had to prove that Hutton's cruelty exceeded that normally associated with the commission of the charged offense or inherent in the class of crime at issue, here, second degree criminal mistreatment. *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003).

The trial court's "to convict" instruction told the jury that, to establish second degree criminal mistreatment, the State had to prove beyond a reasonable doubt that Hutton (1) recklessly "created an imminent and substantial risk of death or great bodily harm to [KEH] by withholding any of the basic necessities of life"; or (2) recklessly "caused substantial bodily harm to [KEH] by withholding any of the basic necessities of life."[93] CP at 33. The evidence here

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[93] The trial court also provided the jury with the following special verdict form for the "deliberate cruelty" aggravating sentencing factor:

showed that Hutton's actions went well beyond the reckless "withholding of the basic necessities of life" required to prove the underlying charged crime of second degree criminal mistreatment. CP at 33. There was overwhelming evidence that Hutton intentionally abused KEH emotionally and psychologically as an end in itself. In addition to withholding from KEH basic necessities of life: Hutton forced the then eight-to–twelve-year-old KEH to perform difficult, overwhelming chores but never required her sister, CA, to perform similar extremely onerous chores, such as hauling hay bales; caring for as many as 23 to 26 horses, more than 75 dogs, and more than 30 cats; and cleaning out horse stalls and kennels. Hutton also imposed bizarre and humiliating punishments on only KEH, such as forcing her to stand in the "cockroach" position for extended periods of time, frequently requiring CA, whom Hutton never punished in this manner, to hit "cockroached" KEH with a spatula. Hutton forced KEH to sleep outside, without the benefit of blankets or a coat, and shut her in a closet when allowed to sleep inside, while allowing CA always to sleep inside the home. Additionally, Hutton continually withheld food from KEH while supplying CA with ample food, who sometimes would try to sneak food to KEH. Hutton ignored that KEH had not grown while Hutton was caring for her in the years since KEH's father died.[94]

> Did the conduct of the defendant, THERESA ANN HUTTON, manifest deliberate cruelty to [KEH] during the commission of the crime of Criminal Mistreatment in the Second Degree as charged?

CP at 25. As we previously noted, neither party asked the trial court to define "deliberate cruelty" for the jury; and the trial court did not give one sua sponte. We hold, however, that the evidence of Hutton's deliberate cruelty to KEH was so extreme and beyond that required to prove non-aggravated second degree criminal mistreatment that any error in failing to provide an instruction defining "deliberate cruelty" was harmless.

[94] The medical evidence showed that when KEH was 12 years old, she was more than four inches below the bottom of the growth curve and had grown very little since she was six years old. Dr. Newman also testified that when he first met KEH, she looked like an eight-year-old even though

Hutton also ignored that KEH appeared to be malnourished or failing to thrive, despite others, including school personnel, noticing that KEH was unusually small.[95] Instead, Hutton attributed KEH's abnormal psychosocial dwarfism to Hutton's own small stature.

Hutton intentionally isolated KEH from family members, friends, and others who might try to assist her, especially her deceased father's family, with whom KEH had close bonds. Despite other family members and people from school supplying clothing for KEH, who was never warmly or properly dressed, Hutton would not let KEH wear any of this clothing and instead, put it aside for CA. Hutton also required KEH to bathe with a hose, without soap or shampoo, despite adequate bathing facilities inside the home, and sometimes allowed KEH to go without bathing for several weeks. Hutton openly expressed affection toward CA but not KEH, instead using foul language toward KEH. Hutton refused to allow KEH to keep gifts from others and rejected or threw away gifts to KEH from her deceased father's family, even when they left them at school expressly for KEH. According to KEH, Hutton would act like a "normal mother," however, when CPS or others were present, suggesting that Hutton was well aware that her actions toward KEH at other times were overtly abusive and that her behavior toward KEH was intentional, rather than merely reckless. II VRP at 37. In fact, Hutton apparently paid so little attention to KEH that she (Hutton) was unable to answer basic questions about KEH's physical appearance when she ran away and was reported missing.

In addition to creating an imminent and substantial risk of death or great bodily harm or

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she was 12.

[95] When KEH was placed with her aunt, she weighed only 58 pounds.

cause substantial bodily harm to KEH, Hutton's extreme cruelty to KEH spanning several years clearly exhibited deliberate emotional and psychological abuse of KEH as an end in itself, beyond her withholding the basic necessities of life that imperiled KEH physically. In particular, the following facts from the record demonstrate more than Hutton's reckless disregard of harm to KEH such that no reasonable jury would have failed to find that Hutton emotionally and psychologically abused KEH as an end in itself: (1) Hutton's ongoing, overt, preferential treatment of CA in KEH's presence; (2) Hutton's intentional isolation of KEH from others who were attempting to provide her with basic necessities and friendship; (3) Hutton's involving and forcing KEH's sister to inflict humiliating punishment on KEH; and (4) Hutton's rejection of repeated attempts by the school and CPS to intervene on KEH's behalf. Based on this evidence, we hold that the jury's special verdict would have been the same even if the trial court had provided an instruction defining "deliberate cruelty"; therefore, any instructional error was harmless.

VII. SAG

In her pro se Statement of Additional Grounds (SAG),[96] Hutton argues that her trial counsel was ineffective in failing to "use all the evidence [she] provided him with," including some "medical/doctor/WIC records," evidence that KEH had made "false calls" to the police and that she faked various instances of alleged abuse of which the police were aware. SAG. Because there is no evidence in the record regarding the "evidence" Hutton now claims her counsel should have presented, we cannot address this issue. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899

[96] RAP 10.10.

P.2d 1251 (1995).

Hutton next argues that the trial should not have been held in Lewis County because it a small county and the jurors were aware of local news coverage about an animal cruelty case against her. During the course of the trial, (1) the trial court record mentions the animal cruelty case; (2) the parties apparently agreed not to mention the animal cruelty case during voir dire; (3) the trial court limited any mention of the animal cruelty matters during the case; and (4) there was one instance where a witness mentioned "diseased dog[s]" in her testimony. III VRP at 107.

But the record before us on appeal does not include the voir dire. Thus, we cannot determine whether the parties asked the potential jurors if any of them were aware of any other litigation involving Hutton. Nor is there anything in the record establishing what the media coverage disclosed. Accordingly, because the necessary information is not included in the record on appeal, we do not further address this issue. *McFarland*, 127 Wn.2d at 338 n.5.

VIII. Cumulative Error

Finally, Hutton argues that cumulative error deprived her of her right to fair trial. The cumulative error doctrine applies when several errors occurred at the trial court level to deny the defendant a fair trial, even though no single error alone warrants reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Hutton does not show cumulative error.

We affirm.

Hunt, J.

We concur:

Worswick, A.C.J.

Van Deren, J.

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