IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint Petition of	)	**No. 29030-1-III**
MARIBEL GOMEZ,	)	**Division Three**
Petitioner.	)	**UNPUBLISHED OPINION**

Sweeney, J. — It would be very difficult for any lawyer to try a factually complicated and emotionally charged case such as this. It is, however, easy to second guess decisions that a lawyer made and the strategies he employed many years after the fact, six years to be exact. It is for that reason that we are deferential to the decisions of counsel. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Here, Maribel Gomez's suggestion in her personal restraint petition (PRP) that other approaches might have brought a different result clearly ignores the overwhelming evidence.

A Grant County Superior Court Judge concluded that Ms. Gomez killed her two-

year-old son, Rafael:

> [*T*]*he defendant was virtually the sole caretaker of Rafael when she had custody of him. During those periods of time when he lived with the Defendant, from age 10 to 16 months and again from age 19 months to 25 months, Rafael suffered three skull fractures prior to the incident which caused his death, a broken femur, a broken tibia, two shoulder fractures, a wound to the back of his head, a gouge or bruise to his right ear, burns to his hand, and lacerated nipples.*
>
> 2.50 *No similar injuries were sustained while he was in foster care from birth to 10 months and from 16 to 19 months.*

Br. of Pet'r, App. 1 (Findings of Fact and Conclusions of Law on Non-Jury Trial, Findings (FF) 2.49, 2.50) (emphasis added).

Ms. Gomez now contends, by way of this PRP, that she may not have been convicted of the crime had her lawyer done a better job. We have carefully reviewed this record and it is clear that the court's findings are easily supported by the evidence and, ultimately, the court's conclusion that Ms. Gomez killed her son is easily supported by the findings.

FACTS

Ms. Gomez appealed her convictions of homicide by abuse and first-degree manslaughter that followed for the September 2003 death of her two-year-old son, Rafael. *State v. Gomez*, noted at 147 Wn. App. 1003 (No. 26090-9-III, filed Oct. 14, 2008). The factual backdrop for the convictions is set out in our earlier opinion and need not be repeated here other than to note that we

affirmed the homicide by abuse conviction and vacated the manslaughter conviction. Ms. Gomez now complains that she was not well served by her trial counsel.

In January 2004, the court appointed Robert Moser to represent José Arechiga, Rafael's biological father and now Ms. Gomez's husband, in dependency proceedings regarding Edgar, his other biological child with Ms. Gomez. The Department of Social and Health Services removed the other children from the home and placed them in foster care after the death of Rafael. The court appointed Douglas G. Anderson to represent Ms. Gomez in the proceedings. Both parents argued that there was no abuse in the home. The court ultimately found Edgar a dependent child. Mr. Moser continued to represent Mr. Arechiga on appeal and through the final termination of his parental rights. Mr. Moser also represented Mr. Arechiga in the dependency proceedings of Jacqueline, his biological daughter with Ms. Gomez; she was born after Rafael's death.

The State charged Ms. Gomez with manslaughter following Rafael's death in May 2004. The State later added the homicide by abuse charge. Ms. Gomez asked Mr. Moser to represent her. Mr. Moser agreed to take her case. He was already very familiar with the facts of the case because of his efforts in the dependency proceedings. Mr. Moser was a former deputy prosecutor who went into private practice in June 2003. He spent up to 500 hours on Ms. Gomez's case over the three years prior to trial. Ms. Gomez paid

Mr. Moser a few hundred dollars for his appearance at her arraignment.

Mr. Moser and Ms. Gomez discussed whether to try her case to a jury. Ms. Gomez did not want a jury because of the press the case received in the local news. The two then decided to try the case to the judge sitting without a jury. Mr. Moser selected 13 witnesses, including Ms. Gomez, to testify. He chose many of the witnesses based on what he had heard during the dependency hearing. Mr. Moser declined to call several of Ms. Gomez's friends as character witnesses because he knew, again from the dependency hearing, that they could not testify to specific facts surrounding Rafael's death. Mr. Moser also did not think that Ms. Gomez's claims that Rafael caused these horrific injuries to himself provided much of a basis for a successful defense because no in-home service workers had ever witnessed him doing anything to himself.

Mr. Moser talked to a number of experts about testifying on Ms. Gomez's behalf. He ultimately hired Dr. Janice Ophoven to testify as his primary medical expert on the cause of death. She is a pediatric forensic pathologist. Mr. Moser continued to look for other experts without success. Mr. Moser sent Dr. Ophoven Rafael's complete medical history a year before trial. Dr. Ophoven reviewed the history along with over 100 other documents. She found that Rafael had been abused but concluded he died of asphyxiation rather than head trauma.

The State called five medical experts as witnesses. Dr. Marco Ross, the Spokane County Medical Examiner and a forensic pathologist, concluded that Rafael "died as a result of blunt force injuries to the head." Br. of Pet'r, App. 1 (FF 2.33). And he concluded that "the manner of death was homicide." Br. of Pet'r, App. 1 (FF 2.33). Dr. Kenneth Feldman and Dr. Gina Fino agreed. Dr. Feldman concluded that "'the constellation of findings at his death are specific for abuse.'" Br. of Pet'r, App. 1 (FF 2.34). Dr. Ross, Dr. Feldman, and Dr. Fino agreed that subdural hemorrhaging is not a by-product of asphyxiation or disseminated intravascular coagulation (DIC). Br. of Pet'r, App. 1 (FF 2.41). Dr. Ophoven opined that the cause of death was asphyxiation or DIC and that the manner of death was "undetermined." Report of Proceedings (RP) (No. 26090-9-III) at 2069.

The court concluded that Ms. Gomez caused the death of Rafael and found her guilty of homicide by abuse and first-degree manslaughter. Ms. Gomez appealed the convictions. She did not argue ineffective assistance of counsel. She also did not complain that she could not communicate with her lawyer. We affirmed her conviction of homicide by abuse and vacated her first-degree manslaughter conviction. *State v. Gomez*, noted at 147 Wn. App. 1003 (No. 26090-9-III, filed Oct. 14, 2008). Ms. Gomez now files this PRP.

DISCUSSION

Sixth Amendment Right To Counsel—Conflict of Interest

Ms. Gomez contends that her lawyer had a conflict of interest because he represented her husband in dependency proceedings for their other children at the same time he represented her in this criminal proceeding. This contention presents a question of law that we will review de novo. *State v. Vicuna*, 119 Wn. App. 26, 30, 79 P.3d 1 (2003).

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the assistance of counsel, free from conflict of interest. *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). But the concurrent representation of two defendants does not automatically give rise to a conflict. *See Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). A conflict of interest exists when a defense attorney owes duties to a party (or other client) whose interests are adverse to those of the defendant. *State v. White*, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995). The Washington Rules of Professional Conduct (RPC) also prohibit an attorney from representing a client if the attorney's duties will be directly adverse to another client or materially limit the attorney's representation. RPC 1.7. But the RPCs do not represent the constitutional standard for effective assistance of counsel. *White*, 80 Wn. App. at 412-

13.

Ms. Gomez must show that an actual conflict of interest adversely affected her attorney's performance. *Dhaliwal*, 150 Wn.2d at 571. Simply showing a theoretical division of loyalties is not enough. *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). A conflict adversely affects counsel's performance if "'some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'" *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008) (internal quotation marks omitted) (quoting *United States v. Stantini*, 85 F.3d 9, 16 (2d Cir. 1996)).

Mr. Moser represented Ms. Gomez and Mr. Arechiga during separate but related proceedings. The State started dependency proceedings after Rafael's death out of concerns over the abuse that caused his death. Ms. Gomez had separate counsel during those proceedings. The State charged her with first degree manslaughter and she asked Mr. Moser to represent her. Mr. Moser agreed apparently because of his familiarity with the case. The State later added the homicide by abuse charge. Mr. Moser continued to represent Mr. Arechiga in the dependency matter. Both Ms. Gomez and Mr. Arechiga consistently argued that there was no abuse in the home and Rafael died as a result of his

medical problems caused by his related behavioral problems.

Ms. Gomez now contends that Mr. Moser could not investigate Mr. Arechiga for potential abuse of Rafael. She argues that Mr. Moser improperly relied on the dependency proceedings instead of conducting an independent investigation of Mr. Arechiga on her behalf. Ms. Gomez believes that Mr. Moser would have interviewed key witnesses to bolster her case if he did not represent Mr. Arechiga at the same time. She offers the declarations of two attorneys to support her theory.

Mr. Moser agreed to represent Ms. Gomez because he was familiar with the case following the dependency proceedings. This is not a division of loyalty. *Id.* And she makes no showing of adverse interests. Both she and Mr. Arechiga advanced the same theory of the case; they insisted there was no abuse in the home. And Ms. Gomez makes no showing that Mr. Arechiga abused Rafael to death or even that he had the opportunity to. Indeed, Mr. Arechiga was not present during the time of Rafael's death. Maria, Ms. Gomez's daughter, testified that Mr. Arechiga never even disciplined the children. Mr. Arechiga also testified favorably for Ms. Gomez at trial.

There is simply no showing here of abuse by Mr. Arechiga. Indeed, there has never been any suggestion of abuse by him until this petition some six years after the fact. Br. of Pet'r, App. 1 (FF 2.53). Several witnesses were questioned at trial regarding Mr.

Arechiga's conduct and none suggested abuse. Ms. Gomez, then, presents a theoretical division of loyalties and not an actual conflict that adversely affected her attorney's performance. The suggestion that further "conflict-free" inquiry would have showed Mr. Arechiga to be the culprit is pure speculation.

Far from presenting a conflict of interest, Mr. Moser's participation in the dependency proceeding clearly helped him prepare Ms. Gomez's defense. No rational reader of this record can walk away with anything other than the abiding conviction that Ms. Gomez abused her son to death.

Ineffective Assistance of Counsel

Ms. Gomez next says that she was denied her right to effective assistance of counsel because her lawyer did not have enough experience, did not always consult with her through an interpreter, did not prepare her to testify, and did not investigate all available lay and expert witnesses. In support of her arguments, she presents her own declaration; the declaration of her attorney, Mr. Moser; and the declarations of a number of lay and expert witnesses. We review claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

To establish an ineffective assistance of counsel claim, a defendant must prove that (1) counsel's performance was deficient, and (2) the deficient performance

prejudiced the defendant such that there is a reasonable probability that the proceedings would have turned out differently without counsel's errors. *Strickland*, 466 U.S. at 687-95. We strongly presume that counsel's conduct was reasonable, and so the defendant bears the burden of proving that the challenged action was not a legitimate trial strategy. *Id.* at 689; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

Ms. Gomez contends that Mr. Moser lacked experience. She argues that he did not have the knowledge necessary to analyze causation issues or medical expert opinions on child abuse. We begin with the obvious:

> "A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight."

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978) (quoting Finer, *Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077, 1080 (1973)). Ultimately, there are many different ways to approach the same case and so a lawyer is not ineffective because he or she chooses one over another. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). And the fact that the court found Ms. Gomez responsible for her son's death does not mean counsel was ineffective. *Id.*

Mr. Moser "had never defended a

felony case with substantial medical records before Ms. Gomez's case." Br. of Pet'r, App. 4 (Declaration of Robert Moser (Moser) at 4). But Mr. Moser did graduate from law school some six years before Ms. Gomez's case. He had worked for the Grant County Prosecutor's Office and later went into private practice. He had tried criminal, commercial, and tort cases. He had also tried numerous driving under the influence cases in which a breath alcohol concentration technician and a toxicologist appeared as experts. He had represented parents in a number of dependency trials that frequently involved medical experts.

Ms. Gomez must prove that Mr. Moser's performance fell below an objective standard of reasonableness and she was prejudiced as a result. She must point out his specific mistakes. Mr. Moser's defense of this difficult and emotionally charged case appears, from this record, to be highly competent, spirited and, for us, in the finest tradition of trial lawyers.

Ms. Gomez contends that Mr. Moser failed to consult with her through an interpreter and that this hurt her defense. Specifically, she argues that Mr. Moser never informed her of the right to a jury trial or the right not to testify. She further argues that she was not afforded the opportunity to fully explain Rafael's injuries to Mr. Moser.

The right to an interpreter at trial stems from the Sixth Amendment. *State v.*

Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999). The appointment of an interpreter is a matter within the discretion of the trial court "to be disturbed only upon a showing of abuse." *State v. Trevino*, 10 Wn. App. 89, 94-95, 516 P.2d 779 (1973). But a defendant's right to an interpreter during communications with counsel, which occur outside the courtroom, is a different matter. That right stems from counsel's duty to consult with the defendant on important decisions. *See Strickland*, 466 U.S. at 688.

Ms. Gomez's native language is Spanish. Mr. Moser does not speak Spanish. Ms. Gomez first used her niece to contact Mr. Moser about taking her case. She recalls only one time prior to trial that Mr. Moser hired an interpreter to go to the hospital and get medical records. She also recalls Mr. Moser using a bilingual friend of hers to explain the added homicide by abuse charge. She remembers numerous times during trial that Mr. Moser used a court interpreter to speak with her, but now claims that the conversations were of little substance.

Mr. Moser's declaration indicates that, for the most part, he cannot remember whether he was using an interpreter while discussing specific issues with Ms. Gomez. He does remember using friends of Ms. Gomez to interpret during several of their meetings outside of the courtroom. He also remembers using the courtroom interpreter during trial. Nonetheless, Ms. Gomez points to three specific issues on which she was not properly

consulted: (1) right to jury trial, (2) right not to testify, and (3) opportunity to explain the abuse.

First, the trial judge discussed Ms. Gomez's decision not to pursue a jury trial. Both Mr. Moser and Ms. Gomez told the court that they had reviewed the decision and agreed not to pursue a jury trial. The court questioned Ms. Gomez directly, and she responded that she had discussed the decision with Mr. Moser and was confident in her decision. Ms. Gomez decided "it was better for one person to make the decision instead of twelve." Br. of Pet'r, App. 3 (Declaration of Maribel Gomez (Gomez) at 12).

Second, Ms. Gomez offers no evidence, other than her self-serving declaration, to show that Mr. Moser failed to inform her of her Fifth Amendment right not to testify. She testified without objection. Mr. Moser stated that he informed Ms. Gomez of her right not to testify but, again, could not remember with certainty whether he used an interpreter. He stated that he generally always has his clients testify in criminal trials as a matter of strategy: "the trier of fact needs to hear some things from the defendant and has difficulty acquitting unless they have those issues resolved." Br. of Pet'r, App. 4 (Moser at 5). It appears from the declarations that Ms. Gomez actually wanted to take the stand in order to bolster her defense that this two-year-old boy killed himself. Br. of Pet'r, App. 3 (Gomez at 4-8).

Third, Ms. Gomez had ample opportunity to discuss Rafael's injuries with Mr. Moser. Interpreters were present both before and during the trial. Mr. Moser chose not to pursue claims that Rafael harmed himself for good reason—there was little or nothing to support the claim. Mr. Moser had listened to lengthy testimony from friends and treatment providers on the supposed causes of Rafael's injuries during the dependency proceedings and "[f]rom the dependency hearing, it did not appear that any [Child Protective Services] worker actually saw him doing anything to himself." Br. of Pet'r, App. 4 (Moser at 7).

Ms. Gomez fails to show that Mr. Moser's communications resulted in deficient performance and that she was prejudiced. Mr. Moser engaged with Ms. Gomez throughout the process and made some legitimate strategy decisions along the way. His performance was reasonable and competent.

Ms. Gomez next contends that Mr. Moser failed to prepare her to testify: "Mr. Moser didn't prepare me for the prosecutor's questions or the way that he asked me the questions. . . . I was never able to express to the court how much I loved Rafita, and how much it hurt me to lose him." Br. of Pet'r, App. 3 (Gomez at 16-17). Of course, Ms. Gomez's inability to say what she wanted on the stand does not establish that Mr. Moser failed to prepare her for trial.

Counsel must "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. Mr. Moser could not remember the specific preparation of Ms. Gomez for her testimony, but he remembered discussing the matter several times:

> I am not able to say if Ms. Gomez's testimony helped her case or not. To some extent, it hurt her case, because that judge found she was not credible. After about three hours of testimony, when she was being cross-examined by the prosecutor, she broke down screaming and crying. The judge did not find fault with the prosecutor's questioning at this point. Ms. Gomez's reaction at this point seemed to figure into his opinion as to her credibility.

Br. of Pet'r, App. 4 (Moser at 5-6).

Mr. Moser knew Ms. Gomez and was familiar with what she would testify to. He knew that she intended to say that Rafael inflicted injuries to himself sufficient to cause his death. He discussed her testimony with her several times. Mr. Moser was certainly not required, and ultimately may well have been unable, to emotionally prepare Ms. Gomez for the aggressive cross-examination by the State. Ms. Gomez, then, fails to show that Mr. Moser's performance in preparing her for testimony was deficient in any way or how she was prejudiced by the performance in any event.

Ms. Gomez contends that Mr. Moser failed to investigate numerous lay and expert witnesses. She contends that Mr. Moser should have interviewed Department of Social and Health Services' workers, friends, and family members who she now claims had valuable information about Rafael's daily

behaviors that might well have resulted in his death. She further contends that Mr. Moser should have better prepared Dr. Ophoven, his sole expert witness. She also believes that Mr. Moser should have investigated and hired other expert witnesses to refute the State's allegations of abuse. To support her claims, Ms. Gomez submitted declarations from each named lay and expert witness, including Dr. Ophoven. Br. of Pet'r, Apps. 3-17, 56-59.

Generally, an attorney's decision to call a witness to testify is a "matter of legitimate trial tactics," which "will not support a claim of ineffective assistance of counsel." *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). But a petitioner can overcome this presumption by showing that his or her counsel failed to adequately investigate or prepare for trial. *Id.* Counsel has a duty to conduct a reasonable investigation. *Strickland*, 466 U.S. at 691. A decision not to investigate must be directly assessed for reasonableness, with again great deference given to counsel's judgments. *Id.*

First, Ms. Gomez asserts that Mr. Moser was ineffective because he failed to interview eight government-employed witnesses. Br. of Pet'r at 32 (Jorge Chacón, Linda Turcotte, Cecilia DeLuna, Gracie Alvarado, Sandra Flores, Audra Turner, Esperanza Pando, and Rosibel Dávila). She believes that each of those witnesses would have testified to her excellent parenting skills and Rafael's propensity to hurt himself.

About 40 witnesses testified at trial. The defense called some 13 of those witnesses. Mr. Moser chose many of his witnesses based on information gathered during the dependency proceedings. Mr. Moser concluded that he could not make a compelling case that Rafael caused these horrific injuries to himself: "I did not think that anyone ever saw Rafael's behaviors other than Ms. Gomez." Br. of Pet'r, App. 4 (Moser at 6).

Nonetheless, Mr. Moser called Ms. Gomez, Maria Gomez, and Mr. Arechiga to testify about Rafael's behavior. Mr. Moser also called Department of Social and Health Services workers Olga Gaxiola and Murray Twelves. Both testified that they did not observe any of the behaviors claimed by Ms. Gomez. Mr. Moser also attempted to contact Child Protective Services worker Gracie Alvarado. He delivered a subpoena for her appearance but the subpoena apparently was not honored. The State called Alicia Estrada, a friend who lived with the Gomez family, to testify that Ms. Gomez once "choked Rafael until he turned blue and on another occasion, [Ms. Gomez] kicked Rafael off the front porch." Br. of Pet'r, App. 1 (FF 2.6).

Again, we make every effort to remove the effects of hindsight when assessing attorney performance. *Strickland*, 466 U.S. at 689. Ms. Gomez would have us do otherwise. She wants us to conclude that the case could have been tried better based on her postconviction investigation. But that is not the standard. She must show that Mr.

Moser's performance fell below an objective standard of reasonableness and that she was prejudiced as a result. Mr. Moser's decision not to call certain government witnesses was reasonable.

Ms. Gomez claims that Mr. Moser was ineffective because he failed to interview four fact witnesses. Br. of Pet'r at 32 (Father Jesus Ramirez, Jennifer Peña, Sergio Peña, and Alicia Garces). She believes that each of those witnesses would have testified to her loving relationship with her children.

Mr. Moser, again, did not think they had much to add based on what he heard during the dependency hearing: "As far as I could tell, these suggestions were all character witnesses and could not testify to specific facts surrounding any of Rafael's injuries or death." Br. of Pet'r, App. 4 (Moser at 6). Mr. Moser's decision not to call certain lay witnesses was appropriate and reasonable.

Ms. Gomez asserts that Mr. Moser was ineffective because he failed to adequately prepare Dr. Ophoven and failed to call other available expert witnesses. She argues that Mr. Moser was essentially required to search the country for those witnesses. "[T]here is no absolute requirement that defense counsel interview witnesses before trial." *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 488, 965 P.2d 593 (1998).

Mr. Moser made a strategic and tactical decision to call an expert medical witness

to explain the cause of Rafael's death. He eventually selected Dr. Ophoven and sent her a group of documents (including the coroner's report and the police report) for her review. He apparently did not give Dr. Ophoven the neuropathology report until after the trial began. As a result, her opinion as to the cause of death initially matched the State's—blunt force trauma to the head. She later discovered from the neuropathology report that there was no nerve damage in Rafael's brain and the cause of death was actually choking. Dr. Ophoven conceded abuse and opined that the manner of death was "undetermined." RP (No. 26090-9-III) at 2069.

In *In re Personal Restraint of Stenson*, our Supreme Court declined to hold the petitioner's trial counsel ineffective for not personally interviewing the medical examiner before trial, but instead, relied on the investigator's pretrial interview of the witness. 142 Wn.2d 710, 754, 16 P.3d 1 (2001). Similar to what Ms. Gomez points to here, at Mr. Stenson's trial, the medical examiner offered unexpected, damaging testimony. The court stated that Mr. Stenson's attorney's "cross-examination of Brady did not go well because Brady was a difficult witness, not because of deficient preparation." *Id.* at 755.

Dr. Ophoven certainly was a troublesome witness for Ms. Gomez because she conceded abuse and opined that the cause of death was asphyxiation or DIC and that the manner of death was "undetermined." RP (No. 26090-9-III) at 2069. Dr. Ophoven now

declares, some six years later, that she would have reviewed the cause of the prior incidences of abuse if she had been told they were a part of the charges. She declares she did not review them initially because they did not affect the cause of manner of death.

This change of perspective hardly shows ineffective assistance. Dr. Ophoven reviewed over 100 documents in forming her preliminary opinion on the cause of Rafael's death. Br. of Pet'r, App. 19. She reviewed medical records outlining Rafael's history of injuries and the autopsy report following his death. Mr. Moser provided many of those records. In concluding her 10-page report, Dr. Ophoven stated: "It is my opinion that the details of what happened to Rafael cannot be pieced together just from the postmortem examination. There is a history of possible aspiration during feeding. There is evidence of prior abusive injuries to the boy that dates back to 2001." Br. of Pet'r, App. 19. She herself opined that there was evidence of prior abusive injuries to Rafael dated back to 2001. From the record before us, Mr. Moser's preparation of Dr. Ophoven did not fall below the standard discussed in *Stenson*. Ms. Gomez has not met her burden of establishing that trial counsel's performance was deficient based on inadequate witness preparation because Mr. Moser made a strategic tactical decision to call an expert to rebut the State's expert testimony, sent that expert discovery before and during trial, and then the expert volunteered a less-than-perfect opinion from the witness

stand.

In addition to Dr. Ophoven, Mr. Moser contacted multiple experts. He sent medical records and other discovery to those experts for their review. He contacted two experts specifically on the issue of Rafael's potential epilepsy. Both experts returned the discovery and declined the invitation to testify. He is not required to search the entire country for all available expert witnesses. Such a standard would not be reasonable tactically or financially. Mr. Moser's investigation of potential experts was reasonable.

HOLDING

In sum, this is not a case where defense counsel spent only a few hours preparing for trial or made little effort to research the facts or the law. Counsel conducted the appropriate investigations to determine what defenses were available. Ms. Gomez's proposed theory at trial was that this child abused himself to death. There was little to no evidence to support that notion. Her proposed theory here on appeal is now that someone else, maybe Mr. Arechiga, abused this child to death. There is no support for that theory either. On the contrary, the evidence here is that Ms. Gomez abused this child to death. Again, Mr. Moser's defense of this difficult and emotionally charged case appears from this record to be highly competent.

We deny the personal restraint petition.

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

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Sweeney, J.

WE CONCUR:

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Korsmo, A.C.J.

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Brown, J.