IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM F. WASAGESHIK V. Appellant.	No. 37916-3-II UNPUBLISHED OPINION

Armstrong, J. — Two-month-old T.W. sustained multiple injuries, and doctors diagnosed her with shaken-baby syndrome. A jury convicted her father, William Francis Wasageshik V, of two counts of first degree assault of a child, and the trial court imposed an exceptional sentence. On appeal, Wasageshik argues (1) the trial court should have suppressed evidence obtained from his residence and from T.W.'s diaper bag, (2) the State produced insufficient evidence to support his convictions, and (3) the court erred by imposing an exceptional sentence after the State improperly spoke on the victim's behalf at the sentencing hearing. In a statement of additional grounds, Wasageshik also argues (1) he was not permitted to enter his residence while officers executed the search warrant, (2) evidence seized from his kitchen trash can was not in plain view, and (3) his defense was prejudiced because the doctors never tested T.W. for bone diseases. Finding no reversible error, we affirm.

FACTS

On September 15, 2006, Letitia Wasageshik[1] brought her two-month-old daughter, T.W., to the Madigan Army Medical Center. Letitia told the doctors that T.W. had been running a fever

[1] We refer to Letitia by her first name because she and the defendant share the same surname.

for three days, refused to eat, and was not moving her arms. When Dr. Pamela Moore examined T.W., she was extremely ill, lethargic, "limp as a rag doll," and "one of the sickest children I've ever seen." 6 Report of Proceedings (RP) at 277, 284, 287.

The doctors performed extensive tests on T.W., including blood cultures, a spinal tap, a chest x-ray, two skeletal surveys, a computed tomography (CT) scan, and a magnetic resonance imaging (MRI) scan. These tests revealed multiple fractures in T.W.'s ribs, skull, right arm, both legs, and spine. T.W. also suffered from a subdural hematoma (internal bleeding) between her skull and brain, and a hemorrhage in her upper spinal cord and brain stem. The spinal cord injury interfered with her ability to use her arms. The doctors determined that T.W.'s injuries were consistent with shaken-baby syndrome, diagnosed her as the victim of nonaccidental trauma, and alerted Child Protective Services.

On September 19, 2006, three detectives contacted William and Letitia Wasageshik at the hospital to discuss their daughter's injuries. Wasageshik explained that T.W. fell off the bed and the couch on two separate occasions while he was caring for her. After interviewing both parents, the detectives informed them that T.W. was going to be taken into protective custody. Letitia had the opportunity to say good-bye to T.W. and remove personal items from the hospital room. She removed several items but left behind a diaper bag.

On September 20, 2006, Detective Ray Shaviri obtained a search warrant for the Wasageshiks' residence to measure and photograph the bed and couch that T.W. allegedly fell from. At the apartment, Detective Sergeant Teresa Berg saw a pink and white infant sleeper in plain view in the kitchen trash can. The sleeper appeared to have bloodstains on it. Detective

Shaviri telephoned the Pierce County Superior Court to request an addendum to the search warrant. The court granted the request and the officers seized the sleeper.

On October 2, 2006, the detectives visited T.W. at the hospital and saw the diaper bag the Wasageshiks had left behind. The bag was open and contained clothes and toys that the medical staff had purchased for T.W. That same day, Letitia called the hospital and asked to retrieve the diaper bag. Before returning the bag, the detectives documented the items in it and removed the items that the medical staff had purchased. They discovered an "Infant Daily Report" by T.W.'s daycare provider. The report recorded T.W.'s food intake and temperature on September 14, 2006, the day before she was admitted to the hospital. The detectives took the report as evidence.

The State charged Wasageshik with two counts of first degree assault of a child. At trial, he moved to suppress the infant sleeper seized from his apartment, arguing that the search warrant lacked probable cause. He also moved to suppress the report that the detectives seized from the diaper bag, arguing the warrantless search was unconstitutional because he had not abandoned the bag. The court denied both motions.

A jury found Wasageshik guilty on both counts and found in a special verdict that T.W. was a particularly vulnerable victim due to her extreme youth. The court sentenced Wasageshik to an exceptional sentence of 300 months for each count, to be served concurrently.

ANALYSIS

I. Search Warrant

Wasageshik first assigns error to the trial court's conclusion that the law enforcement

officers lawfully searched his residence, contending the search warrant was not supported by

probable cause.[2]

A. Standard of Review

A search warrant application must state the underlying facts supporting it. *State v. Nusbaum*, 126 Wn. App. 160, 166, 107 P.3d 768 (2005). Whether these facts are sufficient to establish probable cause is a legal determination that we review de novo. *Nusbaum*, 126 Wn. App. at 166-67 (citing *In re Det. of Peterson*, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002)). We defer to the issuing judge's probable cause determination by resolving any doubts in favor of the warrant's validity. *See State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004).

B. Probable Cause

Probable cause exists if the facts in the affidavit establish a reasonable inference that the defendant is involved in criminal activity and evidence of the crime can be found at the place to be searched. *Nusbaum*, 126 Wn. App. at 166. Here, the affidavit stated: two-month-old T.W. sustained multiple fractures and was diagnosed as a victim of nonaccidental trauma; Wasageshik told the detectives that T.W.'s injuries were caused by falling from the master bed and falling from the couch in the living room; Wasageshik stated her injuries occurred while he was caring for her; Letitia stated that T.W. never rolled off of anything when she was with her mother and the incidents occurred only when T.W. was with her father; Letitia stated that they still owned the furniture that T.W. allegedly fell from.

[2] Wasageshik also assigns error to the trial court's conclusions that Detective Sergeant Berg's and Detective Kern's testimony were credible. Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Wasageshik does not assign error to any of the trial court's findings of fact. We treat unchallenged findings of fact as true on appeal. *See State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

These facts support a reasonable inference that Wasageshik was involved in criminal activity and that evidence of the crime would be found at his residence. First, it was reasonable to infer that T.W. had been assaulted because she was diagnosed as a victim of nonaccidental trauma. Second, it was reasonable to infer that Wasageshik caused T.W.'s injuries because both parents stated her injuries occurred while he was caring for her. Third, it was reasonable to infer that evidence of the crime would be found at their residence because the Wasageshiks still owned the furniture that T.W. allegedly fell from. By measuring the furniture and examining the floor surface, the detectives could establish whether T.W.'s extensive injuries were caused by falling from the bed and couch. The affidavit established probable cause.

II. Warrantless Search

Wasageshik next challenges the trial court's conclusion that because he and his wife had abandoned the diaper bag at the hospital, he had no reasonable expectation of privacy in it. Wasageshik argues that to establish he abandoned the bag, the State had to prove he disclaimed ownership it.

A. Standard of Review

We review challenged conclusions of law de novo. *State v. Evans*, 159 Wn.2d 402, 406, 150 P.3d 105 (2007).

B. Voluntary Abandonment

Law enforcement officers may search voluntarily abandoned property without implicating an individual's rights under article I, section 7 of our state constitution or the Fourth Amendment to the United States Constitution. *See Evans*, 159 Wn.2d at 407-08; *State v. Reynolds*, 144

Wn.2d 282 287, 27 P.3d 200 (2001). The fundamental issue is whether the defendant relinquished his reasonable expectation of privacy by leaving the property. *Evans*, 159 Wn.2d at 408. The defendant bears the burden of showing that he had an actual, subjective expectation of privacy, and that his expectation was objectively reasonable. *Evans*, 159 Wn.2d at 409.

Wasageshik did not demonstrate a subjective expectation of privacy in the diaper bag. In *State v. Kealey*, 80 Wn. App. 162, 907 P.2d 319 (1995), we held that a defendant did not relinquish her expectation of privacy after leaving her purse in a department store because she "'took normal precautions to maintain [the] privacy'" of her purse. *Kealey*, 80 Wn. App. at 165, 168-69. The purse was "zipped shut and closed to public viewing," she returned within minutes to retrieve it, and she "frantically" searched the entire store with the help of the store manager. *Kealey*, 80 Wn. App. at 168-69, 174. In contrast, Wasageshik left the diaper bag at the hospital for two weeks. Wasageshik did not personally attempt to retrieve the bag; Letitia called to claim it. While at the hospital, the bag was open and accessible to all who entered T.W.'s hospital room. And the medical staff used the bag to store clothes and toys that they purchased for T.W. Unlike *Kealey*, Wasageshik did not demonstrate a subjective expectation of privacy by taking normal precautions to preserve the privacy of the diaper bag.

Wasageshik argues that in voluntary abandonment cases, the defendant must generally disclaim ownership before the court will find the item abandoned. Thus, according to Wasageshik, he never abandoned the bag because he never disclaimed ownership. But the test is whether a person has relinquished his expectation of privacy in the property. *See Evans*, 159 Wn.2d at 408. While many voluntary abandonment cases involve a disclaimer of ownership, no

Washington court has held that such a disclaimer is a required element.

III. Sufficiency of the Evidence

A. Standard of Review

Wasageshik also argues that the State failed to prove both counts of first degree assault of a child. Specifically, he argues that the State failed to prove a "pattern . . . of assault" on T.W. under the first count and that T.W.'s injuries constituted "great bodily harm" under the second count. Clerk's Papers (CP) at 215, 222. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

B. Count I

Under the first count, the State had to prove that Wasageshik assaulted T.W., "[c]ause[d] substantial bodily harm," and "ha[d] previously engaged in a pattern or practice of . . . assaulting [T.W.]" CP at 215; RCW 9A.36.120(1)(b)(ii). First, there is sufficient evidence for a rational trier of fact to conclude that Wasageshik assaulted T.W. The doctors testified that T.W.'s injuries were consistent with shaken-baby syndrome, and they diagnosed her as a victim of nonaccidental trauma. And Wasageshik stated that T.W. was injured while he was caring for her (although he attributed the cause to T.W. falling off of the bed and couch). Also, Letitia testified that T.W. cried more when she was with Wasageshik and that he often appeared tense and frustrated when she cried. Letitia sometimes heard a "high scream" when T.W. was with Wasageshik, and she

would run to pick up the baby because "I thought . . . maybe she was hurt or something. I didn't know what was going on, it just scared me[.]" 6 RP at 220.

There is also sufficient evidence for a rational trier of fact to conclude that T.W. suffered substantial bodily harm. Substantial bodily harm is "bodily injury which . . . causes a fracture of any bodily part." RCW 9A.04.110(4)(b). Doctors testified that T.W. suffered multiple fractures in her ribs, skull, arms, legs, and spine.

Finally, there is sufficient evidence for a rational trier of fact to find that Wasageshik engaged in a pattern or practice of assault. A practice is "a frequent or usual action; habit; usage." *State v. Madarash*, 116 Wn. App. 500, 514, 66 P.3d 682 (2003). Doctors testified that one of T.W.'s skull fractures still exhibited swelling when she was hospitalized, indicating it occurred more recently than the other skull fracture; the MRI of her subdural hematoma showed older bleeding in the same area as more recent bleeding, indicating two separate injuries occurred; her rib and arm fractures were in various stages of healing and had occurred within two to four weeks of hospitalization, while her spinal fracture was very recent and had occurred within a few days of hospitalization. It is reasonable to infer from this testimony that T.W.'s injuries were caused by multiple assaults. *See Salinas*, 119 Wn.2d at 201. Considering T.W. was only two months old, this evidence is sufficient to establish that she was subject to "a frequent or usual action [or] habit" of assault. *Madarash*, 116 Wn. App. at 514.

C. Count II

Under the second count of first degree assault of a child, the State had to prove that Wasageshik "intentionally assaulted T.W. and recklessly inflicted great bodily harm." CP at 222;

RCW 9A.36.120(b)(i). Great bodily harm is "bodily injury that creates a probability of death." CP at 221; RCW 9A.04.110(4)(c). When viewed in the light most favorable to the State, the evidence supports the conclusion that T.W.'s brain and spine injuries created a probability of death and therefore constituted great bodily harm.

Doctor's testified that when T.W. was admitted to the hospital, she was having trouble eating and breathing. Dr. Feldman testified that, due to her spinal injury, T.W. "basically had paralysis because the nerves serving the motor function of the arms, causing the arms to move, were injured." 12 RP at 1303. He also testified, "[T]he spinal injury has a potential of causing permanent disability. It has a potential of causing death. Fortunately [T.W.] got by without either of those complications." 12 RP at 1303. When asked about the expected prognosis for a child in T.W.'s condition who does not receive medical care, Dr. Done testified, "With [a] central cord injury and with the brain stem injury, she would be at risk for aspiration events, she could be at risk for—in other words she could have choked on food or saliva . . . . [s]he could have underventilated, she could possibly have died." 9 RP at 974. Dr. Newman also testified that children with spinal cord injuries and fractures as extensive as T.W.'s "usually die at home" if they do not receive treatment. 7 RP at 367-68. A rational trier of fact could reasonably infer from this evidence that T.W.'s brain and spinal injuries created a probability of death. *See Salinas*, 199 Wn.2d at 201.

IV. Exceptional Sentence

Wasageshik also asks us to remand for resentencing, arguing that the prosecutor improperly spoke on behalf of the victim at the sentencing hearing. He did not object to the

prosecutor's statements at the sentencing hearing, and he does not claim constitutional error. We generally will not consider issues for the first time on appeal unless the defendant can show manifest error affecting a constitutional right. RAP 2.5; *State v. Munguia*, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001).

V. Statement of Additional Grounds

Wasageshik argues in a statement of additional grounds (SAG) that the diaper bag was not abandoned at the hospital; T.W. was not subjected to a pattern or practice of assault; and T.W.'s injuries did not create a probability of death or serious permanent disfigurement. We have already addressed these issues.

Wasageshik also argues that he was not permitted to enter his residence while officers executed the search warrant. To ensure officer safety and an orderly search, an officer may briefly detain occupants while executing a warrant. *See State v. Smith*, 145 Wn. App. 268, 275, 187 P.3d 768 (2008).

Wasageshik also argues that the infant sleeper seized from his kitchen trash can was not in plain view, because the trash can was covered with a lid. Nothing in our record shows whether the trash can had a lid, and we cannot address matters outside the record on direct appeal. *See State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

Lastly, Wasageshik argues that his defense was prejudiced because the doctors never tested T.W. for bone diseases, such as rickets, as a possible cause of her fractures. But defense counsel thoroughly explored this theory at trial by calling an expert witness, Dr. Kathy Keller, who reviewed T.W.'s x-rays and medical charts and testified that her injuries were caused by a

vitamin D deficiency and rickets. Wasageshik was able to present his theory of the case, and his defense was not prejudiced.

Affirmed.

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.

Armstrong, J.

We concur:

Van Deren, C.J.

Penoyar, J.