IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

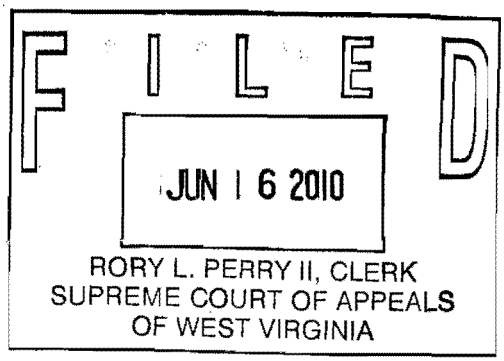
STATE OF WEST VIRGINIA,
Appellee

v.

ELIZABETH DAWN THORNTON,
Appellant

Supreme Court No: 35533

Circuit Court No. 08-F-538
(Kanawha County)



BRIEF OF APPELLANT

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BRIEF OF APPELLANT

INTRODUCTION

The Appellant, Elizabeth Thornton, suffered one of the greatest horrors that a mother can face: the loss of a child, followed by what appears to be the mother's wrongful conviction under the mistaken belief that the cause of death was the mother's delay in seeking medical treatment.

In May 2008, the Appellant's 22-month-old child collapsed as she was trying to feed him. She immediately began administering CPR and cried to her friend to call 911. Paramedics arrived promptly and rushed the child to the hospital where he was diagnosed with a closed head injury. Despite all medical efforts, the child deteriorated during the night and was declared brain dead less than 48 hours later.

Neither the police nor the prosecutors believed that the Appellant inflicted the injuries to her child. Instead, the Appellant was charged with child neglect causing death based on the

belief that the Appellant should have seen symptoms of injury and sought medical treatment sooner.

The Appellant appeals her conviction on the grounds that:

1. The prosecution's medical experts testified only to the *possibility* that a delay in seeking medical treatment may have caused the death of the child. Consequently, the evidence that the Appellant caused the death of the child fell far short of proof beyond a reasonable doubt and the Appellant's motion for a judgment of acquittal should have been granted.

2. The trial court erroneously denied the Appellant's motions for mistrials based on the prosecution's violations of the court's ruling in limine by informing the jury that the Appellant was the subject of child protective services proceedings.

PROCEEDINGS AND RULING BELOW

The Appellant was arrested on May 29, 2008, and charged with child neglect resulting in death, in violation of W.Va. Code § 61-8D-4a. Criminal complaint No. 08-F-1934, Magistrate Court of Kanawha County. The Appellant was subsequently indicted in the September 2008 term of court. Circuit Court of Kanawha County, Indictment No. 08-F-538.

The Appellant's trial began on January 7, 2009. On January 14, 2009, after 10 1/2 hours of deliberation, the jury returned a verdict of guilty.

The Appellant filed a Motion for a New Trial on January 26, 2009. On May 12, 2009, the Appellant's Motion for a New Trial was denied, and she was sentenced to an indeterminate term of not less than three nor more than fifteen years, with credit for time served of 333 days.

On August 17, 2009, in order to renew the appeal period, the Appellant was resentenced to the same term of imprisonment, with credit for time served of 413 days.

The Appellant filed a Notice of Intent to Appeal on September 8, 2009. On December 17, 2009, the Appellant filed her Petition for Appeal, raising five assignments of error.[1]

The Court heard oral presentation of the Petition on March 31, 2010. By Order of March 31, 2010, the Court granted the Petition for Appeal as to assignments of errors Number 2 and 4 only.

On May 17, 2010, the Court notified counsel of the filing of the reproduced record, commencing the thirty-day period for the filing of this Brief of Appellant.

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[1] The five original assignments of error were as follows:

I. The Circuit Court Failed to Perform the Court's Mandatory "Gatekeeper" Function Regarding the Admissibility of Scientific Evidence By Denying a *Daubert* Hearing and Allowing the Medical Examiner to Express Far-Ranging Opinions Regarding the Contested Issues in the Case Without Any Inquiry, Out of the Presence of the Jury, into the Reliability of the Medical Examiner's Opinions. The Circuit Court, in Effect, Erroneously Ruled that Medical Examiners in West Virginia are Exempt from Reliability Assessments.

II. The Prosecution's Medical Experts Testified Only to the *Possibility* that a Delay in Seeking Medical Treatment May Have Caused the Death of the Child. Consequently, the Evidence That the Petitioner Caused the Death of the Child Fell Far Short of Proof Beyond a Reasonable Doubt and the Petitioner's Motion for a Judgment of Acquittal Should Have Been Granted.

III. Because of the Intense Hostility Toward the Petitioner, Hostility that was Deliberately Generated by Law Enforcement Officials, the Circuit Court's Denial of the Petitioner's Motion for a Change of Venue was Erroneous and Should Be Reversed.

IV. The Trial Court Erroneously Denied the Petitioner's Motions for Mistrials Based on the Prosecution's Violations of the Court's Ruling in Limine By Informing the Jury that the Petitioner Was the Subject of Child Protective Services Proceedings.

V. The Prosecution Impermissibly Violated the Petitioner's Presumption of Innocence By Informing the Jury of the Petitioner's Status as a Prisoner at the Regional Jail.

STATEMENT OF FACTS

On May 29, 2008, the Appellant's 22-month-old child, Constantine Alexander Washburn, collapsed in the Appellant's presence and was rushed to the hospital. Tr. 229-31, 296-98, 658-66. Upon admission to the emergency room, the child was found to have a large bruise on his forehead, and additional minor bruising in numerous locations on his body. Tr. 338, 343, 458-60. The CT scan indicated that the child had received what appeared to be a severe head injury. Tr. 342, 362.

There was no evidence that the Appellant caused any of the child's injuries. Instead, the prosecution theorized that the Appellant did not cause the injuries, but that she must have realized that someone injured the child, and that the child needed medical attention at a time sooner than she obtained it. Tr. 203, 785-86.

The Appellant was interviewed extensively, by hospital officials and by the police, both during the time of the child's hospitalization, Tr. 127-32, 148-49, 172, 372-76, 410-11, 428, 669-70, 685, and again after the child's death, Tr. 135-38, 147-49, 172, 719-23. The Appellant also testified at trial. In each interview and interrogation, the Appellant consistently explained the history of her child's injuries, to the extent that she was able to do so. The Appellant explained that each of her four children had a virus that was currently circulating among children in the neighborhood. Tr. 117, 131, 311, 375, 513, 636-39. She also explained that on Monday, May 26, three days before her son collapsed and was rushed to the hospital, her son had two falls.

The Appellant testified that the first fall occurred when the child was playing and spinning in circles on the living room floor and fell and struck his forehead on the corner of a

coffee table. Tr. 118, 130, 252, 375, 428, 640-41. The second fall occurred when the Appellant was giving the child a bath later that evening, and he fell and struck his chin on the toilet. Tr. 642. The Appellant explained that after each of the falls, the child cried, but soon returned to playing normally. Tr. 641-42.

During the day on Monday, May 26, before the child struck his head on the coffee table, the child had experienced diarrhea and vomiting, consistent with the virus that her other children had experienced. Tr. 131, 311, 375, 640. In the evening, sometime after he struck his head, he vomited again, Tr. 642, but the illness seemed consistent with the previous viral symptoms. Tr. 131, 375.

By Wednesday, May 28, the child appeared to have recovered from the virus and was active and playing normally. Tr. 647-48. The Appellant's neighbors and babysitters confirmed the Appellant's explanation that the child appeared healthy on Wednesday. Tr. 517-19, 537-38.

The child was rushed to the hospital on Thursday, May 29. The Appellant could not state that the fall on the coffee table in fact caused the injuries that were observed upon the admission to the hospital. As the Appellant explained, she worked day shifts, including on Tuesday, May 27, and Wednesday, May 28, while the child was in the care of babysitters. Tr. 643, 647. The child was also in the care of the child's father, rather than the care of the Appellant, during a portion of the day on Thursday, May 29. Tr. 650-54.

Consequently, there were substantial periods of time that the child was with caretakers other than the Appellant. Tr. 650-52. For that reason, the Appellant could only state that she did not injure the child, and that she had no knowledge of injuries to the child other than the two falls on Monday, May 26, Tr. 636, 640-42, and the flu-like symptoms that appeared to be cleared up by Wednesday, May 28, Tr. 647.

The Appellant explained that on Thursday, May 29, the child awoke later than usual and appeared lethargic, with little appetite, during the day. Tr. 129-30, 376, 648-50, 653-56. At about 6:00 pm, while the Appellant was trying to feed him, the child's breathing became labored, his eyes appeared to roll back in his head, and he collapsed. Tr. 117, 130, 234-35, 376, 658-59.

The Appellant immediately began administering CPR and called to her friend, Christina Carnell, to call 911. Tr. 130, 376, 659-63. In her initial statements to the police, Ms. Carnell concurred with the Appellant's description of events, explaining that she was present when the child collapsed. Tr. 303-04. When the police misinformed her that, if she was present when the child collapsed, she could be jailed for conspiracy to commit murder of the child, Ms. Carnell then altered her account and insisted that she was not present when the child collapsed, but instead arrived shortly afterward. Tr. 304-09. In all accounts, however, Ms. Carnell acknowledged that she saw the Appellant -- not neglecting the needs of the child -- but desperately administering CPR and crying out "Tina, thank God you're here . . . Call 911." Tr. 296, 313.

At trial, paramedic Albert Larue initially testified to the opposite -- that the child was laying on the couch, and was not receiving CPR from the Appellant when the ambulance arrived at the Appellant's home. Tr. 240-41, 247. On cross-examination, however, when confronted with a recording of his own contemporaneous statements, he conceded that the Appellant's account was correct and that she was, in fact, administering CPR at the time the paramedics arrived. Tr. 247-49.

When the child arrived at the hospital, some of the medical staff questioned the Appellant's explanations of the child's injuries, based on the severity of the child's symptoms. Tr. 362-64, 428-29. As explained below, however, the medical staff disagreed among

themselves regarding the critical issue of whether the injuries would be immediately apparent to a caretaker, such that the need for immediate medical attention should have been apparent. The State's medical testimony is also conflicting regarding the age of the injuries, including whether the child exhibited swelling of the brain at the time of admission to the hospital.

With regard to the time that the injury occurred, in related civil abuse and neglect proceedings, Dr. Mouna Chebib, the pediatric critical care doctor, testified that the child arrived at the hospital on May 29 with substantial brain swelling. The brain swelling would ordinarily take 36 to 48 hours to develop and would indicate an injury that was several days old. *In re: H.T., J.A., and K.W.*, No 08-JA-120, 121, 122, Circuit Court of Kanawha County, Oct. 16, 2008, at 19. By contrast, at trial in this matter, Dr. Chebib testified to the opposite of her earlier testimony, stating at trial that the child arrived at the hospital with no brain swelling, indicating an injury that had just recently occurred. Tr. 428, 429, 434-35, 443-45.

Despite Dr. Chebib's conflicting testimony regarding when the brain swelling began, there is no dispute that, upon admission to the hospital, swelling increased throughout the night. Tr. 428. Emergency treatment was unsuccessful. On May 31, 2009, less than 48 hours after admission to the hospital, the child was declared brain dead. Tr. 400.

In addition to the contradictory testimony regarding when the brain swelling began, the State's experts also provided contradictory testimony regarding whether the bruising on various portions of the child's body was caused by initial injuries, or was instead caused by resuscitation efforts after the child collapsed. Tr. 234-44, 249-50, 256-57, 267, 288-89, 352-53, 488, 496-97, 527, 642-43. In related civil abuse and neglect proceedings in this case, the treating neurosurgeon, Dr. John Schmidt, also acknowledged the possibility that the contusions on the child's neck and chin could have been caused by medical treatment, rather than by custodial

abuse. *In re: H.T., J.A., and K.W.*, No. 08-JA-120, 121, 122, Circuit Court of Kanawha County, June 6, 2008, hearing, p. 55-56.

Additionally, in the civil abuse and neglect proceedings, Dr. Richard Keith Umstot acknowledged that the child's injuries are potentially consistent with accidental trauma. October 16, 2008, hearing, p. 12. And most significantly, Dr. Mouna Chebib acknowledged that the child's injuries would not necessarily be readily or immediately apparent to the child's caretakers. October 16, 2008, hearing, p. 19-20. Dr. Chebib also acknowledged that the child's symptoms would have been consistent with flu-like symptoms -- exculpatory evidence that is consistent with what the Petitioner described to authorities. October 16, 2008, hearing, p. 24.

At trial, Dr. Chebib also testified that the child's head injury may not be immediately apparent to caretakers, and may take up to 24 hours for the brain swelling to be sufficient to have a noticeable effect on the child's behavior. Tr. 441-42. Additionally, Dr. Chebib acknowledged that the symptoms of the injury, when they appear, could be the flu-like symptoms -- the diarrhea and vomiting -- that the Appellant in fact observed. Tr. 442.

Aside from the issue regarding when the brain swelling began, Dr. Chebib also testified that the injuries would not produce the swelling immediately, but that the swelling, eventually causing the loss of consciousness, could occur over a 24 to 48 hour period. Tr. 429, 432-33. (The medical staff appeared to disbelieve the Appellant's account of the child's falls based at least in part on the misimpression that the child struck his head on the coffee table four days before admission to the emergency room. Tr. 362-63, 428, 432-43. As all of the eyewitnesses testified, the fall on the coffee table actually occurred three days before admission. Tr. 292, 513-14, 640-41. This three-day time period brings the injury closer to the 24 to 48 hour period in which the symptoms would ordinarily become noticeable.)

The autopsy was performed by Dr. James Kaplan, forensic pathologist and chief medical examiner for the State. Because of the ongoing disagreement among leading experts regarding the amount force necessary to sustain head injuries to children, and because of the contradictory expert testimony by the State's experts in the related civil abuse and neglect proceedings in this case, the Petitioner filed two pretrial motions in limine to preclude expert testimony regarding the manner of death unless the testimony is first subjected to a pretrial reliability assessment pursuant to *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), and *Wilt v. Buracker,* 191 W.Va. 39, 443 S.E.2d 196 (1993). The trial court overruled the motions for a *Daubert* hearing and, consequently, Dr. Kaplan was permitted to testify to his opinions without any inquiry into the basis or the reliability of his opinions.

Dr. Kaplan then testified to opinions that that were contrary to some of the previous testimony of the State's experts, as set forth above. Dr. Kaplan testified to his opinion that the injuries that he observed were not consistent with a child spinning and striking a coffee table, but were consistent with a violent assault. Tr. 464. He disagreed with Dr. Chebib and concluded the injury would have caused an abrupt change in the child's behavior, a change that would have been immediately apparent to a caretaker. Tr. 469-70.

Despite the charge of neglect *causing* death, neither Dr. Kaplan nor anyone else testified that delay in seeking medical treatment, in fact, caused the death. Instead, Dr. Kaplan testified that the cause of death was a violent assault upon the child. As Dr. Kaplan testified, "the injury that caused Alex's death was lacerations of the tissues of Alex's brain." Tr. 468-69. Dr. Kaplan stated, "Alex was fatally assaulted. That's to say somebody fatally did something to Alex to cause his death . . . the injuries to Alex's brain that were the consequence of that assault upon his person, which are termed by medical examiner forensic pathologists in this country as abusive

closed head injury . . . That is certain that is both the cause of and manner of Alex's death." Tr. 482-83. In contrast to the clarity with which Dr. Kaplan described the cause of death -- unrelated to any acts of the Appellant -- Dr. Kaplan could only testify with regard to the Appellant that there was a *possibility* that the child may have survived had medical care been sought sooner. Tr. 470.

The defense called Dr. Harold Buttram, a physician who had devoted the last decade of his practice to the treatment of autistic children and related disorders. Tr. 550. Upon reviewing the child's medical records, Dr. Buttram found a history of developmental delay that coincided with the excessive administration of vaccines during a time when the child was suffering from viral infections, Tr. 582-85. Dr. Buttram also found a history of head-banging, spinning, and other signs of autism. Tr. 586-87. Upon reviewing photographs of the child nine months before his death, in conjunction with a review of the child's medical records, Dr. Buttram concluded that the child appeared to suffer from vaccine-induced encephalitis. Tr. 590-94.

Dr. Buttram disagreed with Dr. Kaplan regarding whether the child's injuries could have been caused by an accidental fall on a coffee table, explaining that the weakened structures in the child's brain would make the child more susceptible to head injuries from minor falls. Tr. 591-94. Dr. Buttram also concluded that the child's medical history over the last days of his life was consistent with the accidental falls that the Appellant described. Tr. 595.

In rebuttal, the State called Det. Ferrell. Det. Ferrell testified to an unrecorded interview with the Appellant during an unsuccessful attempt at plea negotiations. Tr. 715-16. Det. Ferrell testified that in this discussion with the Appellant the prosecutor asked if she was afraid to take the child to the hospital because of the bruise on his head. Det. Ferrell testified that that the Appellant responded answered "Yes," that "she was concerned of what would happen once they

saw the bruise." Tr. 720-22. On cross-examination, however, Det. Ferrell acknowledged that she did not take notes of the Appellant's alleged statement. Tr. 723. Most significantly, she also acknowledged that she did not remember defense counsel's notes of the Appellant's response to the prosecutor, notes that indicated that the Appellant instead answered "Yes, after Monday I thought he had the flu." Tr. 722.

At the conclusion of closing arguments, the jury deliberated from 2:57 pm until 6:34 pm without reaching a verdict. Tr. 796, 799. The following day, the jury deliberated from 8:30 am until 3:27 pm. Tr. 801, 805. After 10 1/2 hours of deliberations, the jury returned a verdict of guilty. Tr. 805.

Upon conviction, the Court sentenced the Appellant to an indefinite term of three to fifteen years in the penitentiary, with 413 days credit for time served. Order Resentencing Defendant, August 17, 2009.

ASSIGNMENTS OF ERROR[2]

I. The Prosecution's Medical Experts Testified Only to the *Possibility* that a Delay in Seeking Medical Treatment May Have Caused the Death of the Child. Consequently, the Evidence That the Appellant Caused the Death of the Child Fell Far Short of Proof Beyond a Reasonable Doubt and the Appellant's Motion for a Judgment of Acquittal Should Have Been Granted.

II. The Trial Court Erroneously Denied the Appellant's Motions for Mistrials Based on the Prosecution's Violations of the Court's Ruling in Limine By Informing the Jury that the Appellant Was the Subject of Child Protective Services Proceedings.

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[2] The Petition in this case raised five assignments of error, set forth in full in footnote one, above. Because the Court granted the Petition as to assignments of error two and four only, this Brief addresses only those two assignments, renumbered as assignments of error one and two.

DISCUSSION OF LAW

I. The Prosecution's Medical Experts Testified Only to the *Possibility* that a Delay in Seeking Medical Treatment May Have Caused the Death of the Child. Consequently, the Evidence That the Appellant Caused the Death of the Child Fell Far Short of Proof Beyond a Reasonable Doubt and the Appellant's Motion for a Judgment of Acquittal Should Have Been Granted.

An essential element of the offense of child neglect resulting in death is that the neglect "cause the death" of the child. W.Va. Code § 61-8D-4a[3] The prosecution called four medical professionals to testify at trial: (1) surgical resident, Jillian McCagg, Tr. 329-55; (2) neurosurgeon, John Schmidt, Tr. 359-71; (3) pediatric critical care physician, Mouna Chebib, Tr. 424-46; and (4) forensic pathologist and chief medical examiner, James Kaplan, Tr. 452-503. Of these four, only Dr. Chebib and Dr. Kaplan testified to the key issue of causation. Dr. Kaplan provided the most extensive testimony regarding causation.

Regarding his opinion of the actual cause of death, Dr. Kaplan was firm: Dr. Kaplan testified that the cause of death was a violent assault upon the child. As Dr. Kaplan testified, "the injury that caused Alex's death was lacerations of the tissues of Alex's brain." Tr. 468-69. Dr. Kaplan stated, "Alex was fatally assaulted. That's to say somebody fatally did something to Alex to cause his death . . . the injuries to Alex's brain that were the consequence of that assault upon his person, which are termed by medical examiner forensic pathologists in this country as

[3] W.Va. Code § 61-8D-4a, in relevant part, states, "(a) If any parent, guardian or custodian shall neglect a child under his or her care, custody or control and by such neglect *cause the death* of said child, then such parent, guardian or custodian shall be guilty of a felony and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than five thousand dollars or committed to the custody of the Division of Corrections for not less than three nor more than fifteen years, or both such fine and imprisonment." [emphasis added]

abusive closed head injury . . . That is certain that is both the cause of and manner of Alex's death." Tr. 482-83.

As explained above, however, neither the police nor the prosecutor believed that the Appellant caused this injury, and consequently there was absolutely no evidence presented at trial supporting the belief that the Appellant caused the injury. In contrast to the clarity with which Dr. Kaplan described the cause of death -- unrelated to any acts of the Appellant -- Dr. Kaplan could only testify with regard to the Appellant that there was a *possibility* that the child may have survived had medical care been sought sooner. Tr. 470. Dr. Kaplan's testimony regarding causation, in its entirety -- at least as it related to the Appellant -- is as follows:

> Q: [by the prosecution] Doctor, in your opinion, if a child suffered such an injury. If Alex suffered such an injury and were immediately taken to the hospital, was there a *chance* that he could have survived?
>
> A: Yes. Although it's my opinion that he probably would never have been a normal child after the assault took place. It's *possible* he could have lived.

Tr. 470. [emphasis added]

On redirect examination, in leading questions, the prosecution once again raised the issue of whether, if medical attention had been sought sooner, the child had *a chance* to live:

> Q: You don't know how long the child laid there limp before someone finally called, do you?
>
> A: That's correct.
>
> Q: You -- but you do know that if someone called immediately upon noticing the

symptoms of the child that you described earlier, then that this child had *a chance to live?*

A: I would say he would have had a *significantly better chance* to live than waiting. The longer you wait, the slimmer the chances of saving the child's life becomes.

Tr. 502-03 [emphasis added]

As brief as this discussion was, referring only to "chances" and possibilities, the testimony of Dr. Chebib, as it related to causation, was even briefer. On direct examination, Dr. Chebib didn't testify to causation at all. Finally, on re-direct, the prosecution asked:

Q: If he had come in earlier, he *could have been* saved?

A: Yes.

Tr. 446. [emphasis added]

This single-word response, in answer to a leading question from the prosecution, addressed only the possibility that the child *could* have been saved -- not that the child *would* have been saved, and certainly not that the child *would have been* saved beyond a reasonable doubt.

In *State v. Thompson*, 220 W.Va. 246, 647 S.E.2d 526 (2007), the Court discussed the sufficiency of the evidence of child neglect causing death, but the discussion focused on the defense of unconsciousness of the defendant, not on the issue of causation. Although this Court does not appear to have discussed the issue of causation in cases of neglect or failure to seek

medical attention causing death, other jurisdictions have consistently required the proof to go far beyond "possibilities" or "chances" that a delay in seeking medical treatment caused the death.

In *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005), for example, the Supreme Court of Nebraska considered a case where the mother of an eight month old was convicted of child abuse resulting in death on the grounds that she "knowingly failed to secure necessary medical care for her daughter." 269 Neb. at 703, 695 N.W. at 425. As in the present case, there was no claim in *Muro* that the mother caused the fatal injuries -- only that she failed to seek prompt medical attention. 269 Neb. at 706, 709, 695 N.W. at 428-29.

In testimony nearly identical, in relevant part, to the testimony in the present case, the medical professionals in Muro stated that, "if treatment was sought earlier, then there would've been a chance of survival," that the child "'might have survived' if treatment was sought earlier," that had treatment been sought earlier, the injury "might have been survivable," and that there was "a reasonable likelihood that [the child] would have survived with early treatment." 269 Neb. at 711-12, 695 N.W. at 431.

Upon review of this testimony, the Supreme Court of Nebraska pointed out that "The burden in a criminal proceeding is on the State to produce proof beyond a reasonable doubt of every element of a charged offense. 269 Neb. at 713, 695 N.W. at 432. Pursuant to this burden the court emphasized that the State must prove, "beyond a reasonable doubt, that but for [the defendant's] delay in seeking medical attention, [the child] *would have survived* her preexisting traumatic head injury." 269 Neb. at 713, 695 N.W. at 432. [emphasis added]

Most significantly, the court held, "Viewing the evidence in this case in the light most favorable to the prosecution, a finder of fact could not reasonably conclude beyond a reasonable doubt that but for [the Defendant's] unlawful conduct, [the child] would have survived.

Accordingly, the evidence is legally insufficient to establish that [the child's] death resulted from the conduct in question." 269 Neb. at 713, 695 N.W. at 432.

Similarly, in *Ex parte Lucas,* 792 So.2d 1169 (Ala. 2000), the Supreme Court of Alabama considered a case where the mother of a two-and-a- half year old child was convicted of intentionally causing the death of her child by failing to seek prompt medical attention for her child. None of the medical professionals testified that the child *would have lived*, or *would have lived longer*, if he had received medical treatment promptly. 792 So.2d at 1171-72. [emphasis added].

Upon reviewing these facts, the court held that *"'Mere possibility, suspicion, or guesswork, no matter how strong, will not overturn the presumption of innocence.'"* 792 So. 2d at 1173. [emphasis in original] The court stated that "Accordingly, the State failed to prove the essential element of causation," and that "Consequently, the trial court erred in denying [the Defendant's] motion for a judgment of acquittal . . . " 792 So.2d at 1173.

Additionally, in *Johnson v. State*, 121 S.W.3d 133 (Tex.App. 2003), the Court of Appeals of Texas considered a case where the mother of a twenty-two month old child was convicted of injury [death] to a child by failing to seek prompt medical attention. At trial, the medical testimony included the assertion that "anyone would have been able to recognize that the child was ill," and that "when a person sees that a child is very ill, it is reasonable to seek medical care." The physician further testified that "the sooner a severely injured person receives medical attention, the better *the chance* of resuscitation, and that time is always a factor." 121 S.W.3d at 136. [emphasis added]

Upon reviewing this testimony, the court concluded that "While the evidence may or may not show that Appellant could have sought medical treatment faster than she did, such evidence

is not sufficient to support a finding that the Appellant either intentionally or knowing *caused* serious bodily injury to the child by any delay in seeking medical treatment." *121 S.W.3d at 136.* [emphasis in original] Consequently, the court held "Because the evidence fails to satisfy the causation element of the offense, the evidence is legally insufficient to support the judgment." 121 S.W.3d at 136.

In all three instances, the Supreme Court of Nebraska, the Supreme Court of Alabama, and the Texas Court of Appeals considered circumstances where, as in the present case, someone other than the mother was suspected of inflicting severe injuries to a child and the mother, who was not believed to have inflicted the injuries, was convicted of causing the death by her delay in seeking medical attention. In all three instances, as in the present case, the medical testimony raised the *possibility*, or the *chance*, or found a "*reasonable likelihood that the child would have survived*" had the mother sought treatment sooner.

In all three instances, the appellate courts reviewed the evidence, as required, in the light most favorable to the prosecution. And in all three instances, the courts held that, as a matter of law, the evidence was insufficient to convict because testimony regarding "possibilities" or "chances" -- testimony of "could" survive rather than "would" survive -- does not rise to the level of proof beyond a reasonable doubt.

For the same reasons, in the present case the evidence that, had the child received more prompt medical attention, the child had a chance or a possibility to survive, falls far short of proof beyond a reasonable doubt that the child would survive. This Court has consistently held that in order to sustain a conviction, the State must present proof beyond a reasonable doubt of *each element* of the offense. *State v. Williams*, 209 W.Va. 25, 30-31, 543 S.E.2d 306, 311-12 (2000); *State v. Guthrie*, 194 W.Va. 657, 667, 461 S.E.2d 163, 173 (1995); *State v. Pendry*, 159

S.E.2d 738, 753-54, 227 S.E.2d 210, 220-21 (1976) ("In a criminal case, the State is required to carry the burden of proving beyond a reasonable doubt every material element of the crime with which the defendant is charged.").

Consequently, the Appellant's motion for a judgment of acquittal should have been granted and her conviction should be reversed.

II. The Trial Court Erroneously Denied the Appellant's Motions for Mistrials Based on the Prosecution's Violations of the Court's Ruling in Limine by Informing the Jury that the Appellant Was the Subject of Child Protective Services Proceedings.

Shortly after the Appellant's child was admitted to the hospital, Child Protective Services took custody of the Appellant's other children and placed them in foster care. Upon the Appellant's arrest, despite statutory requirements of confidentiality, the Kanawha County Sheriff's Department immediately announced this information to the media, and added that Child Protective Services had also visited the Appellant's home in the past.

As local television and newspapers reported:

> [Lt.] Crosier said Child Protective Services workers had been called to the home before. He said Thornton has three other children. All are now in state custody.

Cross Lanes Woman Charged in Baby's Death, Charleston Gazette, Friday, June 6, 2008, p. C1. (Attachment B); *Cross Lanes Woman Charged in Neglect, Death of Child,* Charleston Daily Mail, Friday, June 6, 2008 (Motion for a Change of Venue, Attachment C.)

> And police say these aren't the first allegations that have been made against the parents, either. CPS has been involved with the family before.

Tim Irr, News Anchor, WSAZ Evening News, Thursday, June 5, 2008 (Motion for a Change of Venue, Attachment A.)

The prejudicial remarks by law enforcement officers generated a hostile and inflammatory response throughout the community, including discussions on various criminal justice websites and blogs. The response from the community was intense, and involved numerous threats directed toward the Appellant prior to her trial. Such remarks included:

> Dear God in Heaven, We need to license people to have children. They let him lay there for 3 days???!!! How f..king cold and heartless and unfeeling can someone be?! I say people like this need to just be killed and put out of our misery. That poor baby, what must he have been thinking that whole time? My mommy hates me and wants me dead, why did she even have me then?
>
> Stupid fat heartless piece of s..t bitch. Damn it! To lay there suffering for THREE days, and she didn't even care enough to pick up the phone and call for help... She has no soul.
>
> It's always the trashiest useless ones that are the most fertile. Maybe someone in jail who is missing their kid will treat her to a jailhouse tubal ligation. You know, the kind involving no pain meds, some fisting and a shank made from a rusty tin can lid.
>
> How evil. God this makes me want to cry. How long did that little boy lay there suffering? And of course, there were PREVIOUS reports of abuse. Why didn't these kids get taken away from this horrid animal?
>
> I just can't believe that she could first beat her child then leave her son there to die. I agree with everyone else that she is just a cold heartless bitch that deserves the same punishment she gave her son.

http://www.dreamindemon.com/2008/06/06/elizabeth-thornton-charged-in-death-of-son

In addition to being inflammatory and threatening, the weblog remarks are factually erroneous, repeating the false allegation that the child lay unconscious for three days before the Appellant sought medical assistance.

The results of past and present abuse and neglect proceedings were inadmissible at the Appellant's trial for two reasons. First, abuse and neglect proceedings have a different -- and lower -- standard of proof than criminal trials. W.Va. Code § 49-6-2(c). Second, by statute, the

results of abuse and neglect proceedings are required to remain confidential. W.Va. Code § 49-7-1 (making disclosure of abuse and neglect proceedings a misdemeanor, punishable by up to six months in jail).

Because of the prejudicial effect of the illegal disclosure of the abuse and neglect proceedings, the Appellant made extensive efforts to prevent this inadmissible information from reaching the jury. First the Appellant moved for a change of venue. In pretrial proceedings, the trial court deferred a ruling on the Motion for a Change of Venue until the completion of jury voir dire. Tr. 10. At the completion of voir dire, the court denied the motion, presumably on the basis of the ability to empanel of jurors who stated that they had not been exposed to the publicity, including the publicity about the abuse and neglect proceedings.[4] Tr. 113.

Upon the Court's denial of the motion for a change of venue, to ensure that the jury remained untainted, the Appellant then argued a motion in limine to preclude the prosecution from disclosing to the jury both the existence and the results of past and present CPS proceedings. Motion in Limine to Exclude Testimony About Civil Neglect or Abuse Proceedings, filed Dec. 30, 2008; argued Jan. 7, 2009; Tr. 176-78.

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[4]Unfortunately, on the third day of trial, a front page article appeared in the Charleston Daily Mail, bearing the headline "Mom on Trial for Neglecting Toddler," and the sub-headline "Lawyers Say Boy May Have Lived If He Had Been Taken to Hospital Sooner." Charleston Daily Mail, January 9, 2009, p.1. Copies of the newspaper were on display in the snack bar of the courthouse, with the headline "above the crease" so that it was initially visible to all snack bar customers, including jurors. The article repeated the discussions of the sealed CPS records that law enforcement had impermissibly disclosed to the press and that the trial court had ruled to be inadmissible evidence. "There is bruising on his face, neck, head and belly, injuries that spurred an emergency room physician to alert Child Protective Services and police . . . Her other three children are in state custody." The article also disclosed that the Appellant was currently a prisoner -- defeating the purpose of the constitutional right to trial in civilian clothes. As the article explained, "Thornton has been held at South Central Regional Jail since she was arrested in early June, and not long after the child was disconnected from life support."

On the basis of the likelihood that jurors were exposed to inadmissible evidence -- evidence that was impermissibly disclosed by law enforcement officers, the Appellant moved for a mistrial in order to renew the motion for a change of venue. The trial court denied the motion. Tr. 357-58.

The trial court granted the motion in limine. The court ruled that, in the event that there was a need to refer to testimony in the civil proceedings for impeachment purposes, all witnesses were instructed to refer the abuse and neglect proceedings simply as "other proceedings." Tr. 177.

Despite the clarity of this ruling, and the clarity of the admonition from the trial court in this regard, the prosecution violated the ruling and admonition -- and confidentiality statute -- almost immediately, announcing to the jury during opening statements: "You will hear from Dr. McCagg . . . she will tell you she was in the emergency room that evening when little Alex was brought in. She will tell you that she observed the child's body, she observed the bruises and she became angry at what she saw. And asked that CPS be contacted, Child Protective Services, when she saw the child." Tr. 206.

Upon the prosecution's violation of the motion in limine and of the court's admonition, the Appellant promptly asked to approach the bench and moved for a mistrial. Tr. 206-07. The trial court appeared to discount the seriousness of the violation and denied the motion, directing the Appellant's counsel to "sit down, unless there is something egregious." Tr. 209.

Despite the history of violations in this regard (that is, the pretrial disclosure to the media by law enforcement officials, the granting of the Appellant's motion in limine and the Court's admonition, and the prosecution's violation of the motion in limine and admonition by the Court), later in the same day, the State violated the Court's ruling once again. When the very physician that the prosecution described in opening statements actually took the stand, the physician testified to exactly what she had been ordered not to testify about. As Dr. McCagg testified to the jury, "By this point we had already even notified CPS before we even arrived at

the ICU." Tr. 339. The Appellant again moved for a mistrial, pointing out that this was the second time that the prosecution has violated the court's orders in this regard. Tr. 339-40.

The Circuit Court is erroneous in discounting the significance of the prosecution's violation of the Court's rulings in limine and the Court's admonitions in this regard. First, in *Honaker v. Mahon*, 210 W.Va. 53, 552 S.E.2d 788 (2001), this Court emphasized the importance that counsel comply with the trial court's motions in limine. As the Court stated, "*in limine* orders are to be scrupulously honored and obeyed by the litigants, witnesses, and counsel . . . A party who violates a motion *in limine* is subject to all sanctions legally available to a trial court . . . " 210 W.Va. at 59, 552 S.E.2d at 794, *quoting Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 113, 459 S.E.2d 374, 390 (1995).

In *Honaker*, the motion in limine involved the timing of the plaintiff's hiring of a lawyer in a civil suit. 210 W.Va. at 59, 552 S.E.2d at 794. The prejudice stemming from the violation in *Honaker* seems relatively minor compared to the prejudice in the present case (disclosing to the jury the timing of the plaintiff's hiring of counsel, compared to disclosing to the jury the existence of current and previous Child Protective Services proceedings in the present case). Even in light of the relatively minimal prejudice in *Honaker*, however, the Court considered the violation to be severe enough to be "plain error" and require a reversal even in light of the failure of the party to object at trial and preserve the issue on appeal. 210 W.Va. at 60, 552 S.E.2d at 795.

As the Court stated in reversing the verdict in *Honaker*:

> Our review of the record presented indicates that defense counsel, by asking questions regarding the plaintiff's hiring of an attorney, plainly created error in the trial by violating the circuit court's order. Counsel's actions thereby injected prejudicial commentary into the trial which detrimentally affected the substantial rights of the

> plaintiff and was likely to have seriously affected the fairness, integrity, and public reputation of the judicial proceedings.

210 W.Va. at 60, 552 S.E.2d at 795.

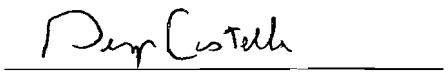
Consequently, the trial court in the present case was erroneous in discounting the seriousness of the State's dual violations of its order and admonition. Even more so than in *Honaker*, the State's violations injected prejudice into the trial which detrimentally affected the substantial rights of the Appellant and seriously affected the fairness of the proceeding.

RELIEF REQUESTED

For the reasons set forth above, the Appellant respectfully requests that her conviction be set aside.

Respectfully submitted,

ELIZABETH DAWN THORNTON,
By counsel



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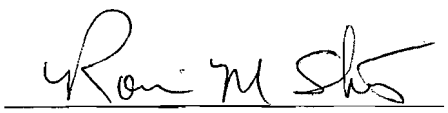

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Certificate of Service

I, George Castelle, do hereby certify that on the 16th day of June, 2010, I delivered a copy of the foregoing Brief of Appellant, by hand, upon:

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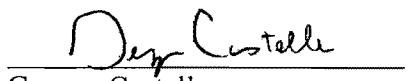

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