

NO. 33743-0-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

KELLI ANNE JACOBSEN,

Defendant/Appellant.

REPLY BRIEF

Dennis W. Morgan WSBA #5286
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ARGUMENT

I. WPIC 25.02

The State's analysis of whether or not defense counsel should have requested the trial court to instruct the jury on probable cause is flawed.

This is not a "but for" case.

The State argues at p.22 of its brief that, defense counsel

“... also had a theory of the case as explained in his opening statement that the mother's behavior created a reasonable doubt that someone other than the defendant inflicted the abusive head trauma.”

The State then argues at pp.25-26 as follows:

In the present case, there was no issue between the defendant's act and the death of R.J.M. Dr. Selove testified that the infliction of the injury that lead to the death likely occurred between 10:45 am and 12:15 pm and is not a comment on the evidence but rather is used to clarify.

What the State ignores is that during the critical time period both Ms. Jacobsen and Ms. Johnson were present in the home with the child. Defense counsel, in cross examination of the State's expert witnesses, raised the matter of a "lucid interval." It is the question of a "lucid interval" that dictates the need for WPIC 25.02 (Adams RP 853 l. 13 to RP 854 l. 10; RP 865, ll. 11-15; RP 865, l. 24 to RP 866, l. 3; RP 866, ll. 17-20; RP 870; ll. 9-21; RP 1119, ll. 7-17; RP 1124; ll. 6-23; RP 1196 ll. 1-5)

The inconsistencies between the statements of the mother, Ms. Jacobsen, and Ms. Graves clearly focuses on the need for the particular instruction.

II. LFOS

The State's argument concerning Ms. Jacobsen's ability to make payment of excessive discretionary LFOs is ludicrous. The income of a nanny, if Ms. Jacobsen will ever be able to be a nanny again, would never amount to a sufficient income for payment of the LFOs.

The trial court's inquiry at sentencing totally ignored the necessity for gathering detailed information about a person's ability to make payment of discretionary LFOs.

The State's claim that the bulk of the LFOs is restitution (State's brief, p. 31) cannot be substantiated under the facts and circumstances of the case. The bulk of the LFOs are discretionary costs including expert witness fees and attorney fees.

Ms. Jacobsen did not challenge the imposition of the mandatory LFOs or the \$5,237.92 in restitution.

III. ER 404 (b)

The trial court, at Ms. Jacobsen's first trial, did not specifically identify any of the prior misconduct evidence that it ruled admissible. (King RP 195, l. 17 to RP 198 l. 7).

Little if any misconduct evidence was entered at the first trial. Experts did testify to prior injuries to the child. (King RP 423, l. 21 to RP

424, l. 2; RP 424, l. 16 to RP 425, l. 13; RP 426; ll. 2-8; RP 583, ll. 6-17; RP 584, ll. 4-16; RP 592, ll. 23 to RP 593, ll. 4).

Few, if any, of the text messages admitted at the second trial were introduced at the first trial.

Defense counsel's stipulation to admissibility of this additional information was highly prejudicial to Ms. Jacobsen's defense. It allowed the State to argue a continuing pattern of abuse almost from the inception of Ms. Jacobsen's employment as a nanny.

Moreover, it negated the defense theory of the case. The ER 404 (b) motion should have been renewed seeking specific identification of particular statements, text messages, and/or other documentation of prior injuries to the child. The complete lack of trial court identification of that documentation, combined with defense counsel's failure to challenge it, undermined what defense Ms. Jacobsen had.

Ms. Jacobsen otherwise relies upon the argument contained in her original brief with regard to all other aspects of the State's argument.

DATED this 31st day of July, 2017.

Respectfully submitted,

s/ Dennis W. Morgan

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DIVISION III

STATE OF WASHINGTON

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|----------------------|---|-------------------------------|
| STATE OF WASHINGTON, |) | |
| |) | BENTON COUNTY |
| Plaintiff, |) | NO. 11 1 01250 0 |
| Respondent, |) | |
| |) | |
| v. |) | CERTIFICATE OF SERVICE |
| |) | |
| KELLI ANNE JACOBSEN, |) | |
| |) | |
| Defendant, |) | |
| Appellant. |) | |
| _____ |) | |

I certify under penalty of perjury under the laws of the State of Washington that on this 31st day of July, 2017, I caused a true and correct copy of the *REPLY BRIEF* to be served on:

COURT OF APPEALS, DIVISION III
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E-FILE

CERTIFICATE OF SERVICE

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July 31, 2017 - 9:54 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 33743-0
Appellate Court Case Title: State of Washington v. Kelli Anne Jacobsen
Superior Court Case Number: 11-1-01250-0

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