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Division III  
State of Washington

NO. 33743-0-III  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**KELLI ANNE JACOBSEN,**

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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## **ASSIGNMENTS OF ERROR**

1. Ms. Jacobsen did not receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22 when her second attorney:

- a) Did not renew a motion to exclude ER 404(b) testimony and did not object to testimony concerning prior acts of alleged misconduct not introduced at her first trial;
- b) Failed to object to a lack of foundation concerning testimony amounting to expert opinion by Gabriel Simms, RN;
- c) Failed to request a jury instruction based on WPIC 25.02; and
- d) Failed to challenge the imposition of discretionary legal financial obligations (LFOs);

2. The trial court:

- a) Improperly commented upon the evidence based upon a combination of Jury Instructions 9, 12 and 15 in violation of Const. art. IV, § 16. (Appendix “A”; Appendix “B”; Appendix “C”)
- b) Ruling on ER 404(b) prior misconduct evidence does not meet the necessary criteria for determining the admissibility

of that evidence and lacked the necessary nexus to attribute the prior misconduct to Ms. Jacobsen.

- c) Committed instructional error by omitting WPIC 25.02 defining proximate cause.
- d) Improperly imposed discretionary LFOs without conducting the appropriate colloquy concerning Ms. Jacobsen's ability to pay as required under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

3. Prosecutorial misconduct deprived Kelli Anne Jacobsen of a fair and impartial trial under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

4. Cumulative error requires a new trial.

#### **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

- 1. Was defense counsel ineffective when he:
  - a) Failed to challenge ER 404(b) evidence not introduced at the first trial;
  - b) Failed to object to an expert opinion from RN Simms which lacked a sufficient foundation;
  - c) Failed to request a jury instruction based on WPIC 25.02; and

d) Failed to challenge the discretionary LFOs imposed on Ms. Jacobsen?

2. Did Instructions 9, 12 and 15 constitute a judicial comment on the evidence in contravention of Const. art. IV, § 16?

3. Was it evidentiary error to allow introduction of other misconduct evidence when the trial court failed to make an appropriate record concerning its probative value versus its prejudicial effect, and without a sufficient nexus that Ms. Jacobsen committed the act(s)?

4. Was the trial court required to include in its jury instructions WPIC 25.02?

5. Should the discretionary LFO's contained in the Judgment and Sentence be stricken; or, alternatively, should a hearing be held to determine Ms. Jacobsen's ability to pay per RCW 10.01.160(3)?

6. Did prosecutorial misconduct occur when the prosecuting attorney:

- a) Repeatedly endeared himself to witnesses;
- b) Allowed witnesses to embellish their testimony from Ms. Jacobsen's first trial;
- c) Placed the prestige of his office into the evidentiary mix;
- d) Commented on witness credibility or had witnesses comment on credibility; and

e) Urged the jury in closing argument to see that justice was done for Ryder?

7. Does cumulative error require a new trial?

### **STATEMENT OF THE CASE**

Ryder Joseph Morrison was born on June 21, 2010 the son of Spencer Morrison and Tawney Johnson. (Adams RP 504, ll. 13-19; RP 812, ll. 11-15)

Shortly after Ryder's birth Ms. Johnson began to look for a babysitter so that she could return to work. She and her mother conducted on-line research, as well as personal interviews. (King RP 494, ll. 11-14; RP 497, ll. 4-15; ll. 20-22)

Ms. Johnson and her mother selected Kelli Anne Jacobsen as the prospective babysitter. They had Ms. Jacobsen get to know Ryder prior to making a solid commitment. They wanted to observe her interaction with Ryder. (King RP 498, ll. 7-16; Adams RP 452, ll. 2-12)<sup>1</sup>

Eventually, after babysitting for a number of weeks, Ms. Johnson had Ms. Jacobsen move into the home as a nanny. Ms. Jacobsen lacked transportation at that time. (King RP 499, l. 14 to RP 500, l. 14; Adams RP 507, ll. 10-15; RP 509, ll. 6-11)

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<sup>1</sup> King RP (1<sup>st</sup> Trial)  
Adams RP (2<sup>nd</sup> Trial)

Ms. Jacobsen's best friend is Amy Graves. Ms. Graves was a regular visitor at the Johnson home. Ms. Johnson provided a key to the residence to Ms. Graves. (King RP 1141, l. 22 to RP 1142, l. 9; Adams RP 1155, ll. 16-20; RP 1161, ll. 7-24; RP 1169, ll. 17-19)

Ms. Johnson's parents, Carey Gavaert and Derek Johnson were also regular visitors in the home. (King RP 456, ll. 4-7; RP 481, ll. 21-23; RP 482, ll. 2-6; Adams RP 447, ll. 24-25; RP 495, ll. 3-4)

Ms. Jacobsen often sent texts to Ms. Johnson when she was at work to keep her updated on Ryder's day. The texts varied from minor bumps and bruises to fussiness to the need for additional baby food. (Adams RP 582, ll. 7-12; RP 584, ll. 11-21)

The weekend prior to Ryder's first birthday Ms. Johnson, Ms. Jacobsen, and Ms. Graves organized a birthday party for him. Ryder had not yet started walking. He would "cruise" by holding onto the furniture. He would also scoot/crawl while playing with many of his toys. (King RP 488, ll. 17-19; RP 518, ll. 22-24; RP 520, ll. 5-7; RP 1268, ll. 14-24; Adams RP 1179, ll. 1-8)

After work on June 21, 2011 (Ryder's first birthday) Ms. Johnson took Ryder to the skate park in Richland. She met John Roberts and T.J. Simon at the park. Mr. Roberts was her current boyfriend. (King RP 531,

ll. 10-20; RP 911, ll. 3-22; RP 916, l. 3 to RP 917, l. 4; Adams RP 545, ll. 1-7; RP 547, ll. 21-25)

Ryder became fussy while lying on the grass at the skate park. Ms. Johnson returned home and Ryder continued to be extremely fussy and would not go to sleep. Ms. Johnson was becoming irritated with Ryder by the time Ms. Jacobsen and Ms. Graves returned home. (King RP 532, l. 22 to RP 534, l. 4; RP 1149, ll. 16-18; RP 1151, ll. 9-18; RP 1277, ll. 10-24; Adams RP 548, ll. 5-21; RP 554, ll. 2-8; RP 555, ll. 9-14; RP 556, ll. 6-13; RP 1184, l. 21 to RP 1185, l. 1; RP 1186, ll. 20-23; RP 1187, ll. 14-25; RP 1189, ll. 3-18)

After Ryder finally went to sleep on June 21 Ms. Johnson left to spend the evening with Mr. Roberts. She did not return until between 2:00 and 3:00 a.m. on June 22<sup>nd</sup>. (Adams RP 1190, ll. 8-10; RP 1191, ll. 12-14)

Ms. Johnson left for work the morning of June 22 before Ryder awoke. When he did finally wake up he woke up screaming. He appeared listless and lethargic according to Ms. Graves. Ms. Graves had stayed overnight at Ms. Johnson's. Ryder continued to cry, was whimpering and could hardly keep his eyes open. (King RP 1157, ll. 11-19; RP 1157, l. 21 to RP 1158, l. 2; Adams RP 1194, ll. 23-25; RP 1195, ll. 4-14; ll. 17-21; RP 1196, ll. 1-5; RP 1197, ll. 2-11)

Ms. Johnson returned home on June 22 to burn a CD for a co-worker. Ryder was awake at that time. He was crawling around and interacting with her while she burned the CD. (King RP 541, ll. 6-25; Adams RP 567, l. 24 to RP 568, l. 1; RP 569, ll. 9-14; RP 569, ll. 5-14)

Ms. Johnson left the house after burning the CD at approximately 11:49 a.m. At approximately 12:14 p.m. paramedics were dispatched to the Johnson residence. They arrived at 12:17 p.m. (King RP 285, ll. 7-12; RP 287, ll. 10-15; RP 289, l. 18; Adams RP 290, ll. 19-20; RP 295, ll. 4-7; RP 651, l. 22 to PR 652, l. 10)

When the paramedics arrived, they noticed that Ryder appeared limp. His pupils were equal and reactive at that time. No apparent physical trauma was observed. However, during transport, Ryder began “posturing” and one of his pupils became enlarged. The paramedics arrived at the hospital at 12:24 p.m. (King RP 289, l. 24 to RP 290, l. 8; RP 291, ll. 12-20; ll. 23-25; Adams RP 297, ll. 1-16; RP 298, ll. 23-24)

Doctors Marsh, Later, and Upadhyaya began caring for Ryder upon his arrival. A number of other medical personnel, including nurses and staff were also involved. (Adams RP 329, ll. 10-14; RP 352, ll. 22-23; RP 372, ll. 10-11; RP 431, ll. 21-22; RP 432, ll. 10-14; RP 635, ll. 24-25; RP 1107, ll. 20-21; RP 1126, ll. 18-21; RP 1327, ll. 4-12)

Dr. Later's initial observations of Ryder were that his eyes were open, there was no spontaneous, purposeful movement, and he had gurgling respirations. He ordered a CT scan. (King RP 363, ll. 8-17; Adams RP 379, ll. 9-12; RP 383, ll. 6-13)

Dr. Later did not observe any visible head trauma. He did not observe any bruises, abrasions, scrapes, contusions or any other markings on Ryder's body. (King RP 374, ll. 1-4; Adams RP: 393, ll. 18-21)

Dr. Marsh observed that Ryder had asymmetric pupils indicative of pressure on the brain. He did not observe any other indication of head trauma. (Adams RP 639, ll. 4-8; RP 640, ll. 17-19)

The CT scan indicated that there was a left side subdural hematoma causing the brain to be pushed to the right. Ryder was immediately taken to surgery where Dr. Upadhyaya attempted to relieve the pressure on Ryder's brain. Once Ryder's brain was exposed Dr. Upadhyaya observed a six to seven millimeter thick subdural hematoma. Blood was forcefully ejected when the doctor cut into the dura. Ryder's vital signs fluctuated and eventually he died. Resuscitation efforts were unsuccessful. (King RP 1091, ll. 18-23; RP 1093, ll. 10-12; RP 1096, ll. 7-11; ll. 15-17; RP 1098, ll. 1-15; Adams RP 1111, ll. 6-9; RP 1113, ll. 5-8; RP 1116, ll. 20-22; RP 1118, ll. 12-22)

Multiple autopsies were conducted on Ryder by Dr. Selove, a forensic pathologist. The multiple autopsies were the direct result of continuing questions from the Richland Police Department. (King RP 565, ll. 16-20; RP 570, ll. 14-15; Adams RP 722, ll. 16-17; RP 726, ll. 2-7)

The findings of the various autopsies included multiple bruises (both external and internal), prior fractures, abrasions, retinal hemorrhages, as well as the injuries from the medical intervention. (King RP 583, ll. 6-17; RP 584, ll. 4-16; RP 584, l. 19 to RP 585, l. 6; RP 590, ll. 1-9; RP 592, l. 23 to RP 593, l. 4; RP 600, ll. 11-21; RP 601, ll. 13-25; RP 603, ll. 19-21; RP 604, ll. 8-9; RP 612, ll. 12-14; ll. 19-24; RP 622, ll. 5-14; RP 623, ll. 4-15; Adams RP 733, ll. 3-4; RP 734, ll. 14-17; RP 735, ll. 2-4; l. 6; ll. 8-14; RP 737, l. 22 to RP 738, l. 1; RP 739, ll. 20-23; RP 744, ll. 9-10; ll. 22-25; RP 746, ll. 22-25; RP 748, ll. 4-10; RP 749, ll. 1-5; ll. 12-13; RP 759, ll. 18-24; RP 764, ll. 7-8; RP 771, ll. 1-3)

Dr. Selove assigned abusive head trauma as the cause of death. (King RP 623, ll. 9-12; Adams RP 771, ll. 20-24; RP 774, l. 10 to RP 775, l. 7)

Dr. Gormley, a radiologist, conducted a skeletal survey of Ryder and located several fractures. Dr. Simms acted as a consultant concerning those fractures. The two (2) doctors determined that the fractures were nonaccidental. They were only a few days old. (King RP 418, ll. 1-2; RP

422, ll. 19-21; RP 428, ll. 3-13; RP 429, ll. 14-19; Adams RP 416, ll. 1-7; RP 419, ll. 7-19; RP 421, ll. 15-17; RP 422, ll. 1-21; RP 426, ll. 16-18; RP 910, ll. 14-17)

An Information was filed on October 27, 2011 charging Ms. Jacobsen with first degree manslaughter. Aggravating factors were included. (CP 1)

A number of continuances were granted due to a multitude of different reasons. (CP 6; CP 7; CP 8; CP 9; CP 10; CP 11; CP 16; CP 17; CP 18)

Prior to the commencement of the first trial the trial court was presented with a defense motion to exclude prior misconduct evidence under ER 404(b). (CP 105)

The trial court ruled that prior misconduct evidence was admissible. The prior misconduct evidence was not specifically identified by the Court. (King RP 195, l. 17 to RP 198, l. 7)

Ms. Jacobsen's first trial ended in a mistrial. (CP 225)

Ms. Jacobsen's attorney at the first trial was allowed to withdraw due to a potential conflict of interest. (CP 232; 10/29/14 RP 17, ll. 12-13; RP 32, ll. 5-16)

The first attorney's withdrawal, along with the need for a second attorney to get up to speed, resulted in numerous waivers and continuances

prior to the second trial. (CP 226; CP 227; CP 228; CP 229; CP 230; CP 231; CP 235; CP 236; CP 237)

Ms. Jacobsen was found guilty of second degree manslaughter following her second trial. The jury found that both aggravating factors were committed. (CP 266; CP 267)

Judgment and Sentence was entered on September 3, 2015. An exceptional sentence of fifty-four (54) months was imposed based upon the aggravators. The trial court imposed legal financial obligations totaling \$121,569.95. The legal financial obligations included restitution in the amount of \$5,237.92. (CP 268)

A Cost Bill was entered on September 3, 2015. It listed the following legal financial obligations:

Attorney fees	\$67,329.15
Witness fees	\$870.48
Special costs	\$46,832.40

(CP 278)

Ms. Jacobsen filed her Notice of Appeal on September 3, 2015. (CP 280)

The trial court entered Findings of Fact and Conclusions of Law relating to the exceptional sentence on October 8, 2015. (CP 294)

## SUMMARY OF ARGUMENT

Defense counsel's representation of Ms. Jacobsen fell below an objective standard of reasonableness when he failed to challenge ER 404(b) evidence of alleged prior misconduct and a lack of foundation concerning an alleged expert opinion.

In addition, defense counsel's failure to request WPIC 25.02, pertaining to probable cause, denied Ms. Jacobsen a complete statement of the law for the jury's consideration.

Defense counsel's failure to challenge the imposition of discretionary LFOs was unreasonable in light of *State v. Blazina, supra*.

As a result of defense counsel's deficient performance Ms. Jacobsen was denied her constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution and Const. art, I, §§ 3 and 22.

Instructions 9, 12 and 15 constituted a comment on the evidence by the trial court in violation of Const. art. IV, § 16.

The trial court failed to conduct an appropriate analysis of the alleged prior misconduct evidence under ER 404(b).

Additionally, the trial court's limited colloquy as to LFOs fails to satisfy the mandate of *State v. Blazina, supra*.

Prosecutorial misconduct deprived Ms. Jacobsen of a fair and impartial trial pursuant to the Fourteenth Amendment and Const. art. I, § 3.

Finally, cumulative error requires a new trial.

### **ARGUMENT**

A child has died!

Someone is responsible!

Is it the mother?

Is it the nanny?

Is it the nanny's best friend?

### **OR**

Was it an accident?

#### **I. INEFFECTIVE ASSISTANCE OF COUNSEL**

QUERY: What happened at the skate park on the evening of June 21, 2011? Why didn't Ryder want to go to sleep? Why was he fussing and crying? Why did he wake up screaming the next morning? Why was he fussy and lethargic the next morning? Why did he fall back asleep within forty-five minutes?

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consid-

eration of all of the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1984)). Competency of counsel is determined based upon the entire record below. [Citations omitted.]

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Ms. Jacobsen contends that she did not receive effective assistance of counsel under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

Const. art. I, § 22 provides, in part: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel ...."

Ms. Jacobsen maintains that her attorney was ineffective in the following particulars:

1. Failure to challenge ER 404(b) prior misconduct evidence;
2. Failure to object to an expert opinion lacking any foundation;

3. Failure to recognize the need for inclusion of WPIC 25.02, the proximate cause instruction; and
4. Failure to challenge the discretionary LFOs imposed at the time of the judgment and sentence.

As argued elsewhere in this brief, the trial court ruled that prior assault evidence involving Ryder was admissible under ER 404(b). *See:* II.B. However, it is critical to note that not only did the trial court fail to conduct the appropriate weighing of probative value versus prejudicial impact; but that little, if any, prior misconduct evidence was introduced at the first trial.

Defense counsel at the second trial failed to renew a challenge to ER 404(b) evidence. Ms. Jacobsen contends that there was an absence of the necessary nexus between prior injuries to Ryder and acts on her part. Counsel did not object to the ER 404(b) evidence introduced at the second trial.

The ER 404(b) evidence introduced at the second trial was speculative at best. Even if it had marginal probative value, the failure to object still constitutes ineffective assistance of counsel. *See: State v. Dawkins*, 71 Wn. App. 902, 863 P.2d 124 (1993).

The second instance of ineffective assistance of counsel relates to so-called expert testimony.

Defense counsel failed to object to testimony from Gabriel Simms, a registered nurse who was working in the Kadlec Emergency Room on the date that Ryder arrived. Nurse Simms gave an opinion that a six (6) to twelve (12) inch fall would not account for Ryder's condition. No foundation was laid. Nurse Simms was not qualified as an expert witness to provide the scientific basis for the opinion given. The opinion was improper as both a lay and expert opinion. (Adams RP 431, ll. 21-2; RP 432, ll. 10-14; RP 435, l. 19 to RP 436, l. 9). *See*: ER 701 and 702.

The prosecuting attorney further compounded this improper opinion testimony, and defense counsel again failed to object, when he asked for an opinion on how many other children would have the same result as Ryder. (Adams RP 436, ll. 10-15)

The next instance of ineffective assistance of counsel pertains to the failure to recognize and request the need for WPIC 25.02 as a critical jury instruction. In *Personal Restraint of Cross*, 180 Wn.2d 664, 718, 327 P.3d 660 (2014) the Court considered the question of whether or not failure to request an instruction constituted ineffective assistance of counsel and held:

In order to find that Cross received ineffective assistance of counsel based on trial counsel's failure to request a jury instruction, this court must find that Cross was entitled to the instruction, that counsel's per-

formance was deficient in failing to request the instruction, and that the failure to request the instruction prejudiced Cross. *See: State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

The fact that Ms. Jacobsen was entitled to the instruction is argued in a separate section of this brief. *See: II.C.* If the Court determines that she was entitled to WPIC 25.02 as a part of the jury instructions given by the trial court, then the next question becomes whether defense counsel's performance was deficient.

When proposing jury instructions for the trial court to consider, whether it is the prosecuting attorney or the defense attorney, a careful evaluation of the applicable WPICs is required. Any attorney worth his/her salt will make every effort to ascertain whether an instruction is applicable under the facts and circumstances of the case.

The main issue involving Ryder's death was not the cause of death; but who inflicted the injuries that resulted in death.

Defense counsel was confronted with ER 404(b) evidence which he did not challenge.

Defense counsel was confronted with proposed jury instructions that amounted to a comment on the evidence to which he did not object.

The combination of the ER 404(b) evidence, inappropriate jury instructions which commented upon the evidence, and the lack of WPIC 25.02, were highly prejudicial to Ms. Jacobsen's case.

Ms. Jacobsen cannot conceive of any strategic or tactical reason for not requesting WPIC 25.02 when the **NOTES ON USE** to WPICs 28.02 and 28.06 say to include it.

Finally, defense counsel's failure to actively represent Ms. Jacobsen at the sentencing hearing in connection with the discretionary LFOs can be considered nothing but ineffective assistance of counsel.

As stated in *State v. Lyle*, 188 Wn. App. 848, 853, 355 P.3d 327 (2015):

Lyle is correct that defense counsel did not challenge the LFOs based on Lyle's current or future ability to pay. Because the sentencing hearing was after we issued our opinion in *Blazina*, counsel should have been aware that to preserve any issue related to the LFOs he was required to object. Thus, Lyle has arguably shown deficient performance, and we must next examine whether this deficient performance was prejudicial.

Ms. Jacobsen was sentenced after the *Blazina* opinion was published. Defense counsel should have been aware of it. The lack of any significant colloquy at the time of sentencing by the trial court did not meet the *Blazina* requirements.

A nanny required to pay LFOs in excess of \$100,000.00 is ludicrous. There can be no question that Ms. Jacobsen was prejudiced by defense counsel's performance.

## **II. TRIAL COURT ERROR**

### **A. CONST. ART. IV, § 16**

Const. art. IV, § 16 states: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Ms. Jacobsen contends that the trial court violated Const. art. IV, § 16 when it instructed the jury. The combination of Instructions 9, 12 and 15 constitute a comment on the evidence, as well as including matters of fact.

Instruction No. 12 is the to-convict instruction for first degree manslaughter.

Instruction No. 15 is the to-convict instruction for second degree manslaughter.

Even though Ms. Jacobsen was not found guilty of first degree manslaughter, the language of the respective instructions included factual matters which were for the jury's determination. The particular language is "inflicted trauma or injury to Ryder J. Morrison's head." The trial court should not have instructed the jury on that fact.

Instructions 12 and 15 vary from the WPIC instructions. Neither WPIC 28.02 nor WPIC 28.06 contain any factual predicates directing the jury toward a specific end. (Appendix “D”; Appendix “E”)

Not only did Instructions 12 and 15 declare a factual issue as established; but Instruction 9, when read with Instructions 12 and 15, further compounded the trial court’s comment on the evidence. The wording of Instruction 9 essentially tells the jury that Ms. Jacobsen committed prior assaults against Ryder. Again, there was no nexus established between any prior acts and prior injuries to Ryder. It was mere speculation.

A judicial comment on the evidence in a jury instruction is presumed prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). The State makes this showing when, without the erroneous comment, no one could realistically conclude that the element was not met.

*State v. Boss*, 167 Wn.2d 710, 721, 223 P.3d 506 (2009).

When Instructions 9, 12 and 15 are considered in the light of the omission of WPIC 25.02, it becomes apparent that the jury was directed to return a guilty verdict based not only upon the factual predicates contained in the instructions, but also a lack of sufficient direction to establish the critical nexus.

The determination of whether a comment on the evidence is improper depends on the facts and circumstances in each case. *State v. Painter*, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980). A judge cannot instruct a jury that matters of fact have been established as a matter of law. *State v. Primrose*, 32 Wn. App. 1, 3, 645 P.2d 714 (1982).

*State v. Eaker*, 113 Wn. App. 111, 118, 53 P.3d 37 (2002).

Finally, Ms. Jacobsen points out that “the harmless error analysis ... does not apply to judicial comment claims.” *State v. Boss*, *supra*, 721.

#### **B. ER 404(b)**

ER 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The trial court ruled on the motions in limine regarding alleged prior misconduct evidence prior to the first trial. Its decision was based upon the briefing. There was no oral argument. The ruling follows:

... with regard to the -- this is the defense motion to exclude prior bad acts.

MR. MILLER: Your Honor, we actually did not argue that on Monday. That's my memory.

THE COURT: OK. It's actually a combined motion.

MR. MILLER: Yes.

THE COURT: Prior bad acts. I mean I'm ready to rule on it, but I could certainly.

MR. JOHNSON: I trust Your Honor has read the briefing. I think lawyers think their arguments mean more than they do.

THE COURT: I'm not going to grant either one of your motions completely. **The way I look at it is it's not really prior bad acts, and it's not really child abuse syndrome. It's just relevant evidence, given the facts of this case.** And I don't expect child abuse syndrome to be -- those words to be used at all. **And I also think that the evidence of the prior [injuries] are relevant to this, and they should be before the jury.** The

jury may make what they will of it, but I also think that a limiting instruction is probably appropriate that's been suggested by Mr. Miller, and I guess I'd ask Mr. Johnson if, given my ruling, he thinks that might be appropriate.

(King RP 196, l. 15 to RP 197, l. 6) (Emphasis supplied.)

Ms. Jacobsen contends that the trial court's oral ruling is insufficient to comply with the balancing process required under ER 403 which provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice  
....

The trial court merely determined that it believed the evidence was relevant. It did not conduct the necessary balancing test to determine its prejudicial impact.

As clearly set forth in *State v. Bowen*, 48 Wn. App. 187, 190-91, 738 P.2d 316 (1987):

In determining whether evidence of other crimes, wrongs, or acts was properly admitted under ER 440(b), the court first must analyze whether the evidence is logically relevant to prove an "essential ingredient" of the charged crime rather than simply to show

the defendant had a propensity to act in a certain manner which he followed on that particular occasion. *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). Second, the court must determine whether the evidence of other criminal acts is legally relevant, *i.e.*, whether the probative value of the evidence is substantially outweighed by its prejudicial effect. Third, if the evidence is admitted, the court must limit the purpose for which it may be considered by the jury. *See: State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Whether the proffered evidence meets the above criteria is a discretionary determination made by the trial court; its decision will not be overturned absent a manifest abuse of discretion. *State v. Mak*, 105 W.2d 692, 702-03, 718 P.2d 407, *cert. denied*, 107 S. Ct. 599 (1986); *State v. Robtoy*, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Nonetheless, **“(i)n doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.”** *Smith*, at 776 (quoting *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

(Emphasis supplied.)

Ms. Jacobsen was charged with first degree manslaughter. The mental state is recklessness. Ryder died as a result of abusive head trauma. Ryder’s other injuries could have been inflicted by anyone having contact with him. There is no indication in the record, other than the text messages from Ms. Jacobsen to Ms. Johnson, connecting Ms. Jacobsen to any injury of Ryder.

The injuries referred to in the text messages have nothing to do with abusive head trauma. They have nothing to do with the mental state of recklessness. In fact, they reflect the normal life of a young child incurring bumps and bruises as he/she learns to crawl and cruise.

Secondly the Court is to determine whether the probative value “substantially outweighs” the prejudicial effect. This is to be done on the record. It was not done. Mere relevance is insufficient to meet the test. The trial court did not address any of the exceptions contained in ER 404(b) to justify its ruling.

The trial court did discuss a limiting instruction. A limiting instruction eventually was given in both trials.

The following texts were admitted during the second trial:

- June 1, 2011

Q. What does that state?

A: “Ryder fell and hit head and cheek and

I’m pretty sure he will have a little bruise.”

Period. Frowney face.

Q: How did Ms. Johnson respond?

A: “Okay.” Period. “Did he cry, cry, cry?”

Q: And what did the defendant advise her?

A: "Actually, he cried for a second then stopped. I was pretty surprised. He is so tough."

(Adams RP 672, ll. 4-11; RP 673, ll. 2-16)

- May 19, 2011

Q: And what does she ask?

A: "What happened to Ryder's cheek? There is a bruise?"

Q: How did the defendant respond?

A: "I don't know. He hasn't got hurt at all, except his nose yesterday."

Q: How does Ms. Johnson respond?

A: "Oh, weird."

Q: What does the defendant say next?

A: "Plus, when he gets hurt I tell you immediately, so there are no surprises." And here, there is shorthand -- "THR". .,.,.,.

Q: And Ms. Johnson's response to that?

A: "I know. I just didn't know if he may have bumped his head barely. LOL. Looks like maybe from his book."

Q: And then how does the defendant respond?

A: ...

Q: ...

A: ... “No, he hasn’t gotten hurt at all, except yesterday.”

(Adams RP 673, ll. 17-20; RP 674, l. 11 to RP 675, l. 9)

- May 6, 2011

Q: Okay. And what does Ms. Johnson ask the defendant after that message is received?

A: “Smiley face. LOL. Did he bump his noggin’?” “LOL”

Q: Okay. And what did the defendant respond?

A: “No, he didn’t. Does it look like it?”

Q: And how does Ms. Johnson respond?

A: “Ya. He has a little bruise. I’m sure he hit it on a toy. LOL. His big old head hits everything.”

Q: What does the defendant respond?

A: "LOL. Very true. I have been sheltering him a little more, I think, so he doesn't fall. LOL." ...

Q: How does Ms. Johnson respond?

A: "LOL. It's going to Happen!" ... "It's okay."

Q: Okay. And the defendant's response?

A: ...

Q: ...

A: "I know, but I hate it."

(Adams RP 678, l. 13 to RP 679, l. 7)

- March 30, 2011

Q: What does she say?

A: Okay. ... "He woke up screaming this morning, so I think he had a bad dream or something. But he is okay now. LOL." ... "I love when he has so much food in the cupboard!"

(Adams RP 679, ll. 15-18; RP 680, ll. 8-12)

- March 10, 2011

A: "Did Ryder have Tylenol already?:"

Q: How did Ms. Johnson respond?

A: "No. You can give him "... "4."

Q: And then what did Ms. Johnson say after that?

A: "Is he fussy?"

Q: And how did Ms. Jacobsen respond?

A: "Okay." ...

Q: And then how did she respond -- or how did Ms. Johnson respond after that?

A: "Ya."

Q: What was the defendant's next statement?

A: "Ya. He is being fussy. But not too bad. Maybe he is still tired." ...

Q: What time was that sent at?

A: 7:16 AM

Q: And what about the next message? Who is that from?

A: Kellie, again.

Q: What does she say?

A: "Don't let this ruin your day, but I have to tell you." ... "Ryder just fell and landed on his caterpillar and got his upper thigh and bruised it. He's okay and only cried a minute -- a minute."

Q: What did the defendant say after that?

A: "Put some ice on it, not directly on it, but it's definitely already bruising. But he is fine. He only cried a minute. I just have to tell you when it happens. No surprises."

Q: And then, what did the defendant say?

A: "It's just a little bruise."

Q: And how did Ms. Johnson respond?

A: "Aw, okay." "Thank you for telling me."

Q: And what did the defendant say?

A: "I hate telling you when you're at work, but I just don't want to wait, either. Would you much rather me wait to tell you?"

Q: And how does Ms. Johnson respond?

A: "I'd rather you tell me, like you did."

Q: And how does the defendant respond to that?

A: "I mean, I know he's going to fall a thousand times more and get a lot more and get a lot of scratches and bruises, but that's part of walking and standing, I think."

(Adams RP 681, ll. 13-15; RP 681, l. 25 to RP 683, l. 16)

- March 2, 2011

A: "Ryder just coughed so hard that it made him gag, which made him puke, which made him choke. Poor baby. Then he got his arm stuck in his highchair." ... "Not fun."

Q: How did Ms. Johnson respond?

A: "Oh, man."

Q: What did the defendant say?

A: "Ya." ... "He hurt his little arm. It got really stuck. I mean, he's fine now but he was screaming. It was very stuck." ...

(Adams RP 684, ll. 14-17; RP 685, ll. 1-14)

A trial court's decision to admit ER 404(b) evidence is reviewed for abuse of discretion. *See: State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

*State ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Ms. Jacobsen asserts that the trial court's failure to adequately address the admissibility of the ER 404(b) evidence was manifestly unreasonable when the sole declared reason for admissibility was relevance. The noted text messages were not introduced at the first trial. They were introduced at the second trial. Defense counsel's failure to object to those text messages further compounded the trial court's error.

As the Court noted in *State v. Bowen, supra*, 195:

... [S]uch evidence is highly prejudicial because the possibility exists that the jury "will vote to convict, not because they find the defendant guilty of the charged crime beyond a reasonable doubt, but because they believe the defendant deserves to be punished for a series of immoral actions." *R. Lempert & S. Saltzburg*, at 218. Second, the jury may place undue weight or "overestimate" the probative value of the prior acts. *R. Lempert & S. Saltzburg*, at 219: Comment, 61 Wash. L. Rev. at 1216-17. Overestimation prob-

lems are especially acute where the prior acts are similar to the charged crime. *State v. Anderson*, 31 Wn. App. 352, 356, 641 P.2d 728, review denied, 97 Wn.2d 1020 (1982) ....

The caution set forth by the *Bowen* Court has been continually recognized in subsequent decisions. In *State v. McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012) the Court stated: “The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response.”

The death of a young child is emotional in and of itself. Speculative evidence that prior injuries to the child were the direct result of prior misconduct by a defendant exacerbates that emotional state. It leads to a consideration of the evidence as propensity evidence as opposed to substantive evidence.

As the *Bowen* Court noted at 196:

... [I]ntroduction of other acts of misconduct inevitably shifts the jury’s attention to the defendant’s general propensity for criminality, the forbidden inference; thus, the normal “presumption of innocence” is stripped away. (quoting *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

Even though it is apparent from the text messages themselves that Ms. Johnson was not overly concerned about the information being provided by Ms. Jacobsen, there is no ability to determine how that influ-

enced the jury in connection with their consideration of the other evidence. Ms. Jacobsen contends that adding the text messages to the mix created an undue emotional atmosphere attacking her character as opposed to providing an opportunity for fair and impartial consideration of the other testimony at trial.

Evidence of prior bad acts is presumptively inadmissible. *See: State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

The reason for the presumption of inadmissibility was explained in *State v. Goebel*, 36 Wn.(2d) 367, 379, 218 P.(2d) 300 (1950):

... [W]e are of the opinion that this class of evidence, where not essential to the establishment of the state's case, should not be admitted, even though falling within the generally recognized exceptions to the rule of exclusion, when the trial court is convinced that its effect would be to generate heat instead of diffusing light, or, as is said in one of the law review articles above referred to, where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it. ... We repeat again a particularly apropos statement from *Shepard v. United States*, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 126 (1933), referring to the rules of evidence: "**When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.**"

(Emphasis supplied.)

Ms. Jacobsen claims that this is exactly what the situation was in her case. The events of June 21 and 22, 2011 were the critical events. The prior events (text messages) were propensity evidence.

Evidence of a defendant's prior bad acts is logically relevant *but legally inadmissible* to show that on the charged occasion, the defendant had and was acting in conformity with criminal propensities. Sometimes, however, the same evidence is logically relevant *and legally admissible* to show a fact other than propensity, "such as ... motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." When evidence is relevant both for the improper purpose of showing propensity and for the proper purpose of showing a fact other than propensity, the trial court must decide, using ER 403, whether the probative value that will result from using the evidence properly will be substantially outweighed by the unfair prejudice that will result from using the evidence improperly. The decision is a discretionary one, and we must uphold it unless it is manifestly unreasonable or untenable.

*State v. Womac*, 130 Wn. App. 450, 456, 123 P.3d 528 (2005).

Ms. Jacobsen contends that the evidence was not even logically relevant. The trial court's failure to expound upon its reasons for introducing the evidence is so minimal as to indicate that the balancing process did not occur.

Even if there is some logical relevance to the evidence, the trial court did not delineate a legally admissible reason for its introduction other than relevancy. Applying ER 403 to ER 404(b), under the facts and circumstances of Ms. Jacobsen's case, signifies that the prejudice of the text messages far outweighed any relevance.

Finally, the text messages, though imputing that Ms. Jacobsen committed an intentional act, do not reflect that Ryder's injuries on those dates were other than accidental. The State may have tried to connect Ms. Jacobsen with those acts; but could not provide any proof that she actually committed them. A logical nexus that Ms. Jacobsen inflicted injuries on Ryder on these prior dates does not exist. *See: State v. Norlin*, 134 Wn.2d 570, 577-81, 951 P.2d 1131 (1998).

### **C. OMITTED INSTRUCTION**

WPIC 28.02 and 28.06 both contain the following language in the **NOTE ON USE**: "If there is an issue of causal connection, use WPIC 25.02 (Homicide-Proximate Cause-Definition)."

Ms. Jacobsen contends that there was an issue as to whether or not she was the individual who committed the act(s) resulting in Ryder's death. Thus, there was an issue of proximate cause. The State was required to establish a nexus between some act of Ms. Jacobsen's and Ryder's death.

When the jury instructions are considered as a whole they misstate the law due to the fact that probable cause between the act and the result has not been included.

... [A] jury instruction that misstates the law such that it relieves the State of its burden to prove every element of the crime charged affects a *constitutional* right and therefore is subject to the rigorous constitutional harmless error standard. *State v. Thomas*, 150 Wn.2d 821, 844-45, 83 P.3d 970 (2004).

*State v. Kindell*, 181 Wn. App. 844, 854, 326 P.3d 876 (2014).

The omitted WPIC instruction on probable cause relieved the State of its burden of proof. The jury was unaware that there had to be the required nexus between the act and the result.

#### **D. LFOs**

The Judgment and Sentence imposes excessive discretionary LFOs on Ms. Jacobsen. The trial court's pitiful colloquy at the time of sentencing does not suffice to meet the criteria under *State v. Blazina, supra*, or RCW 10.01.160(3).

The trial court's colloquy follows:

Mr. Silverthorn, your client is capable of employment; is that correct?

MR. SILVERTHORN: Yes. When she gets out, yes.

THE COURT: Understood. Restitution to crime victim's compensation \$5,237.92; victim assessment \$500.00; total court costs amount to \$115,732.03; felony DNA fee is \$100.00. Total is \$121,569.95.

(Adams RP 1494, ll. 3-10)

As the *Blazina* Court noted at 838-39:

Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. ... [I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Ms. Jacobsen had court-appointed counsel at both trials. It is obvious that she was determined to be indigent at that time. She has been incarcerated since she was sentenced.

Additionally, it should be noted that Ms. Jacobsen's employment history has been solely as a nanny.

The average salary for a nanny in Richland, Washington is \$25,000.00. (Appendix "F")

Moreover, the average salary may decrease if the nanny is being provided room and board. These are factors that were not considered by the trial court when it imposed the discretionary LFOs.

... RCW 10.01.160(3) requires the record to reflect that the sentencing judge make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

*State v. Blazina, supra*, at 839

Ms. Jacobsen does not contest the mandatory LFOs or the restitution. When Ms. Jacobsen is released from prison, the likelihood of her finding employment as a nanny is almost nonexistent. She will find it difficult to make the restitution and mandatory LFO payments.

Ms. Jacobsen requests that the Court direct that the discretionary LFOs be stricken from the Judgment and Sentence.

### **III. PROSECUTORIAL MISCONDUCT**

To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial. A prosecutor commits misconduct by vouching for a witness's credibility. "Vouching may occur in two ways: the prosecutor may place the prestige of the government behind the witness or may indicate that information not presented

to the jury supports the witness's testimony.”

*State v. Robinson*, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015) (quoting *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010) (quoting *United States v. Roberts*, 618 F.2d 530, 533 (9<sup>th</sup> Cir. 1980))).

Ms. Jacobsen's concern with regard to prosecutorial misconduct has multiple facets to it. Initially, the differences in the testimony of several witnesses between the respective trials. In effect, the testimony at the second trial embellished, enhanced and expanded upon the witnesses' prior testimony.

Danielle Sundwall (fka Crawford) was a next-door neighbor who arrived at the house following Ryder's injury and after Ms. Jacobsen sent her daughter to get her. Her testimony from the respective trials follows:

**Trial One:**

Ms. Jacobsen was on the phone when she arrived at the house and Ms. Jacobsen handed her Ryder. (King RP 755, l. 22 to RP 756, l. 6)

**Trial Two:**

Ms. Jacobsen was on the phone when she arrived at the house but she did not see Ryder until Ms. Jacobsen tossed him to her. (Adams RP 268, ll. 5-23)

**Trial One:**

Ms. Jacobsen was acting almost normal and may have been in shock. (King RP 757, ll. 21-25; RP 766, ll. 4-17)

**Trial Two:**

The atmosphere in the house was wrong.  
(Adams RP 270, ll. 16-23)

Christopher Thelwell is another neighbor. His testimony at the first trial was very limited. However, at the second trial he testified that Ms. Jacobsen appeared emotionless with a blank look on her face as she stood on the front porch. (King RP 718, ll. 10-19; Adams RP 320, ll. 14-18; RP 323, ll. 5-17)

Tawney Johnson testified as follows at the second trial (no testimony occurred at the first trial as to the highlighted portion):

Q: And when you got to work, did you get a text from the defendant saying that Ryder woke up?

A: Yes.

Q: And did she say anything during that time period about how Ryder was acting?

A: Yes.

Q: What did she say?

A: That he was fussy.

Q: Was this the first time that the defendant had texted you and said that Ryder was fussy?

A: No.

Q: About how many times before? Is this the second time she had texted you and said Ryder was fussy?

A: No.

Q: Do you have any idea how many times the defendant had texted you saying Ryder is fussy?

A: No.

**Q: What would you do sometimes in the past when she texted you and said Ryder was fussy?**

**A: It got to a point where I asked her if Ryder was too much for her to handle.**

**Q: What did she say to that?**

**A: She got a little defensive about it and said, no. There was more, too, but I just don't remember.**

(Adams RP 560, l. 17 to RP 561, l. 15)

Ms. Johnson's testimony at the second trial included exaggerated testimony not introduced at the first trial in connection with Ryder being taken to the operating room. She indicated that medical personnel tried to keep her from seeing Ryder. She also stated that one of the nurses ripped her off of Ryder when she laid her head next to him in order to kiss him.

(Adams RP 575, ll. 5-14)

Ms. Jacobsen takes the position that the new testimony presented during the second trial was gratuitous and aimed at eliciting the sympathy of the jury on behalf of the State's case.

This gratuitous testimony, in conjunction with the prosecutor's questions eliciting comments on the credibility of witnesses, impacted Ms. Jacobsen's right to a fair and impartial trial.

The credibility issues arose during questioning of various witnesses.

Steve Waite, the ambulance driver, over defense counsel's objection, was allowed to testify that he did not believe Ms. Jacobsen's statement of what occurred. (Adams RP 286, l. 18 to RP 287, l. 1)

The comment on credibility was given additional reinforcement by the prosecuting attorney when he continued in the same vein:

Q: And so you found -- Tell me if I'm repeating things wrongly, but you found her answer incredulous based upon your training and as the father of four children?

A: Right. Children don't fall down and become unresponsive. That just doesn't happen.

Q: After you found her statement not being credible, did you ask her anything else? Or did you ask her again?

(Adams RP 287, ll. 3-9)

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant “because it ‘invad[ed] the exclusive province of the [jury].’” *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)) ....

*State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

The issue of credibility also arises in connection with the prosecuting attorney’s examination of Dr. Jones following cross-examination by the defense attorney:

Q: ... In previous interviews, did you discuss whether you can quantify how much time it takes?

A: I did testify on that last time we were here. I said minutes to hours. And the previous attorney pushed that issue.

I don’t think that’s in my realm. You know, I think I can give, you know, a vague estimate; but I think that that should come from the pathologist and the neurosurgeon.

Q: And in the defense interview, you said maybe hours to as much as a day?

A: Yeah, but I think that you're pushing that. I would be the wrong person to talk to. I think that I would defer to the neurosurgeon and the pathologist for the timing of that.

(Adams RP 413, l. 18 to RP 414, l. 7)

**MR. MILLER:**

Q: And you and I actually discussed that when we met a couple of weeks ago. Is that correct?

A: Yes.

Q: And we agreed and decided I would not even ask you that question; is that correct?

A: Yes.

Q: Did I keep my word?

A: Thank you.

(Adams RP 414, l. 23 to RP 415, l. 5)

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. “A “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the

prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.””

*State v. Hecht*, 179 Wn. App. 497, 503, 319 P.3d 836 (2014) (quoting *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011)).

Ms. Jacobsen also contends that the prosecuting attorney’s redirect examination of Dr. Selove amounted to commenting on the evidence and establishing the prosecuting attorney’s own credibility.

Q: And did you actually have any conversations with me during that time period?

A: I had multiple conversations with you and the Coroner’s office and Richland Police Department, and e-mails were included, and with Dr. Feldman. I just can’t recall the specific dates and contents of some of the individual exchanges.

Q: And if this isn’t a fair question just tell me, but was the tone of the question, Dr. Selove, we want more information? Or was the tone, Dr. Selove, we want your opinion to be this because this fits our theory of the case?

MR. SILVERTHORN: Objection. That's a comment on my defense. I think that is inappropriate.

MR. MILLER: Your Honor, he opened the door.

THE COURT: I'll let him ask the question. You can answer the question.

MR. SILVERTHORN: Okay. Well, I'll ask it back.

A: Including a conference at my house at Everett, that the defense attorney previously on this case, as yourself, Mr. Miller, it was the tone throughout we want more information, if there is any more you can tell us.

It wasn't in steering my opinion to fit a theory, it was asking what was my opinion. How much could I learn from my examination of Ryder to tell them.

They asked some questions that I might not have included answers for in the report, as here today. So the tone was, what do you

know? What can you tell us? What have you figured out?

(Adams RP 805, l. 11 to RP 806, l. 19)

It is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant. [Citations omitted.] It constitutes misconduct ... and violates the advocate-witness rule, which “prohibits an attorney from appearing both as a witness and as an advocate in the same litigation.”

*State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014), quoting *United States v. Prantil*, 764 F.2d 548, 552-53 (9<sup>th</sup> Cir. 1985).

During his cross-examination of Amy Graves the prosecuting attorney again aligned himself with the jury by soliciting a sense of trust and honesty. The exchange occurred on two (2) different occasions and was totally unnecessary to any issue in the case:

Q: Mr. Silverthorn asked you about the proceeding in Judge’s chambers with Judge Mitchell, the court reporter, and myself?

A: Uh-huh.

Q: And you’ve been asked how you would characterize how you were treated during that court hearing?

A: I was treated well, fairly.

Q: And you actually testified at the last trial and thought you were treated well; is that right?

A: Yes.

Q: And you actually, also, testified that you thought the detective who interviewed you had treated you professionally?

A: Yes.

Q: It's hard all around. Hard for the detectives to ask you questions, but it's emotional for you to answer some of these questions.

A: Okay.

Q: Is that right?

A: Yes.

Q: But, basically, you've been treated well by the Richland Police Department. You've been treated well by the Richland Police Department and by the prosecutor's office; is that correct?

A: Yes.

(Adams RP 1221, l. 19 to RP 1222, l. 18)

Q: Ms. Graves, I understand. I'm trying not to be rude and trying not to be like a lawyer or whatever, but do you see why I might be asking myself? You certainly seemed to be sure of things this morning. And now, when you're being pinned down on how many nights, it's like all of the sudden your memory goes and you don't remember if it's once or twice.

(Adams RP 1242, l. 20 to RP 1243, L. 1)

A prosecutor does not commit misconduct anytime he mentions credibility. ... It is improper for a prosecutor to make comments that express a personal opinion of witness veracity ... but, a prosecutor may comment on a witness's veracity as long as a personal opinion is not expressed and as long as the comments are not intended to incite the passion of the jury.

*State v. Edvalds*, 157 Wn. App. 517, 525, 237 P.3d 368 (2010).

Defense counsel did not always object to prosecutorial editorializing and pandering to the jury. However, when he did object he was generally overruled by the trial court.

If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *Thorgerson* [*State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011)] at 455.

*State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

Finally, during closing argument, the prosecuting attorney made numerous comments on credibility and appealed to the jury's sense of justice and community responsibility.

I want to talk a little bit about Amy Graves.

If there was ever a contest for the most changes in a statement and testimony, Amy Graves would be a good candidate to win the national competition.

(Adams RP 1363, ll. 16-19)

It's almost as if Amy Graves forgot that when you come up here to that witness stand, you take an oath to tell the truth. A

somewhat cavalier attitude of changing stories and changing testimonies.

(Adams RP 1368, ll. 2-5)

And you can bet you can take Tawney's statement at the hospital, the statement at RPD that night, the statement to the defense attorneys later on, the statement to the police later on, her testimony the first time -- and you can see little omissions of very detailed facts -- but you can bet, you can bet that if there were the kinds of inconsistencies that Amy Graves had again and again and again, that you would have seen the same type of questioning of Tawney Johnson when she was on the stand on cross-examination that I did with Amy Graves. And you know what? You didn't see that. You saw a consistency. And you saw the demeanor of a grieving mother, who was being unfairly attacked in the trial.

But you know what? She has courage. She has the courage to be sitting right there to listen to it. Tawney Johnson. You're going to have to evaluate her credibility on this.

(Adams RP 1373, ll. 1-18)

And what is relevant to that issue of recklessness? That is the prior text from the defendant to Tawney concerning Ryder's injuries. And that tells us two things. One is it shows that all the bruises that people had observed all occurred when the defendant was responsible for Ryder. The bruises that came about during the time period before Ryder died on June 22<sup>nd</sup>. You look to the text messages. They were all the defendant sending Tawney texts saying, trying to account for a bruise, or when Tawney would see a bruise, explain it away.

And that is consistent with the fact that the defendant knew that she was inflicting

trauma, inflicting bruises on Ryder when she shouldn't have, given the nature of the text.

(Adams RP 1377, l. 14 to RP 1378, l. 3)

... When we look at the bruising that was inflicted on Ryder on June 22<sup>nd</sup>, within fifteen hours of Ryder passing away, and we look at the circumstances of death -- is that somebody needs justice. Ryder Morrison needs justice. Our community needs justice. We need a finding of truth. We need a finding of justice.

(Adams RP 1379, ll. 6-8)

In *State v. Lindsay*, *supra*, 436-37

The Court of Appeals held that telling the jury to “find the truth” or “speak the truth” is improper. This court had previously held such statements trivialized by the burden of proof in *Anderson* [*State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009)]: “The prosecutor’s repeated requests that the jury ‘declare the truth,’ however, were improper. A jury’s job is not to ‘solve’ a case .... Rather, the jury’s duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt. 153 Wn. App. at 429.

... [F]ederal courts have found, as a general rule, that “appeals for the jury to act as a conscience of the community are not impermissible, unless specifically designed to inflame the jury.” *United States v. Lester*, 749 F.2d 1288, 1301 (9<sup>th</sup> Cir. 1984); accord *United States v. Bascero*, 742 F.2d 1335, 1354 (11<sup>th</sup> Cir. 1984); *United States v. Kopituk*, 690 F.2d 1289, 1342-43 (11<sup>th</sup> Cir. 1982); *United States v. Lewis*, 547 F.2d 1030, 1036-37 (8<sup>th</sup> Cir. 1976); *United States v. Alloway*, 397 F.2d 105, 113 (6<sup>th</sup> Cir. 1968).

*State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999).

The overall impact of the prosecutor’s questioning and adverse commentary cannot be undervalued when it comes to its prejudicial nature. As recognized in *State v. Emery, supra*, at 762:

Based on these principles, “[m]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom.” *State v. Navone*, 186 Wash. 532, 538, 58 P.2d 1208 (1936). Reviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932).

#### **IV. CUMULATIVE ERROR**

The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

*State v. Moses*, 193 Wn. App. 341, 367 (2016).

The combination of ineffective assistance of counsel, prosecutorial misconduct, and trial court error involving evidentiary issues and commenting on the evidence by means of instructional error, meets the criteria for cumulative error.

#### **CONCLUSION**

The admission of unchallenged, speculative alleged misconduct evidence denied Ms. Jacobsen her constitutional right to a fair and impartial trial. Defense counsel's failure to object to the evidence combined with the trial court's failure to conduct an ER 403 balancing test were crucial factors leading to her conviction.

Instructional error amounts to a comment on the evidence and also precluded the jury from having a clear explication of the law. Again, de-

fense counsel's failure to object to Instruction 9, 12 and 15, as well as his failure to request WPIC 25.02, prejudiced Ms. Jacobsen's right to a fair and impartial trial.

Defense counsel's failure to adequately represent Ms. Jacobsen concerning LFOs and the trial court's lack of compliance with *State v. Blazina, supra*, resulted in the imposition of unconscionably excessive discretionary LFOs.

Defense counsel's performance was deficient under the facts and circumstances of Ms. Jacobsen's case.

The trial court committed obvious error as to its ER 404(b) ruling and instructions.

Prosecutorial misconduct further exacerbated errors committed by defense counsel and the trial court.

Cumulative error requires a new trial.

DATED this 19th day of January, 2017.

Respectfully submitted,

s/ Dennis W. Morgan

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## **APPENDIX “A”**

INSTRUCTION NO. 9

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior assaults against Ryder J. Morrison, and may be considered by you only for the purpose of showing intent, knowledge, recklessness, or criminal negligence by the defendant, as well as absence of mistake or accident. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

## **APPENDIX “B”**

INSTRUCTION NO. 12

To convict the defendant of the crime of manslaughter in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 22, 2011, the defendant engaged in reckless conduct, to-wit: Inflicted trauma or injury to Ryder J. Morrison's head;
- (2) That Ryder J. Morrison died as a result of defendant's reckless acts; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

## **APPENDIX “C”**

INSTRUCTION NO. 15

To convict the defendant of the crime of manslaughter in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 22, 2011, the defendant engaged in conduct of criminal negligence, to-wit: Inflicted trauma or injury to Ryder J. Morrison's head;
- (2) That Ryder J. Morrison died as a result of defendant's negligent acts; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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## APPENDIX “D”

### **WPIC 28.02 Manslaughter—First Degree—Reckless— Elements**

To convict the defendant of the crime of manslaughter in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about(date), the defendant engaged in reckless conduct;**
- (2) That(name of decedent)died as a result of defendant's reckless acts; and**
- (3) That any of these acts occurred in the State of Washington.**

**If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.**

**On the other hand, if after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.**

#### NOTE ON USE

Use this instruction for first degree manslaughter cases in which the issue is recklessly causing the death. This instruction is not applicable to vehicular homicide; use WPIC 90.02 (Vehicular Homicide—Elements). If there is an issue of causal connection, use WPIC 25.02 (Homicide—Proximate Cause—Definition).

With this instruction use WPIC 10.03 (Recklessness—Definition) as modified per the discussion in the Comment below.

For a discussion of the phrase “any of these acts” in element (3), see the Introduction to WPIC 4.20 and the Note on Use to WPIC 4.21 (Elements of the Crime—Form).

#### COMMENT

RCW 9A.32.060(1)(a).

RCW 9A.32.020(2) provides that RCW Chapter 9A.32 does not affect RCW 46.61.520, the statute relating to vehicular homicide.

No instruction has been drafted for first degree manslaughter by the intentional killing of an unborn quick child. The instruction would be simply a statement of the statutory language from RCW 9A.32.060(1)(b) because the concept of recklessness is not involved.

First and second degree manslaughter are lesser included offenses of intentional murder, and instructions should be given to the jury when supported by the facts. *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). First degree manslaughter is likewise a lesser included offense of first degree murder by “extreme indifference.” *State v. Henderson*, 182 Wn.2d 734, 344 P.3d 1207 (2015). Second degree manslaughter is a lesser degree offense of a charge of first degree manslaughter. *State v. Hansen*, 30 Wn.App. 702, 638 P.2d 108 (1981). First degree manslaughter is not a lesser offense of second degree felony murder. *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005) (addressing felony murder with a predicate felony of second degree assault). Similarly, neither first nor second degree manslaughter is a lesser offense of first degree felony murder. *State v. Sublett*, 176 Wn.2d 58, 84, 292 P.3d 715 (2012).

Because manslaughter does not require the specific intent to kill, there can be no attempted manslaughter. *State v. Red*, 105 Wn.App. 62, 18 P.3d 615 (2001).

It is unlikely that a defense of justifiable homicide will apply to a charge of manslaughter. Justifiable homicide requires an intentional killing in self-defense, or under one of the other circumstances described in RCW 9A.16.040 or 9A.16.050. If a person accidentally kills another while engaging in the lawful use of force, the killing is excusable, not justifiable. *State v. Brightman*, 155 Wn.2d 506, 524–26, 122 P.3d 150 (2005).

The statutory definition of recklessness is written in terms of disregarding a substantial risk that a *wrongful act* may occur. See RCW 9A.08.010(1)(c); WPIC 10.03 (Recklessness—Definition). For manslaughter, however, the Supreme Court has held that recklessness involves disregarding a substantial risk that a *death* may occur. See *State v. Gamble*, 154 Wn.2d 457, 467–68, 114 P.3d 646 (2005) (in the context of analyzing whether first degree manslaughter is a lesser included offense of second degree felony murder with assault as the predicate

felony). Accordingly, for a manslaughter case, the definition of recklessness from WPIC 10.03 should be drafted by filling in that instruction's blank line with the word "death" rather than by using the statutory language "wrongful act." For further discussion of *Gamble*, see the Comments to WPIC10.03 and WPIC10.04 10.04 (Criminal Negligence—Definition).

For discussion of the burden of proof on defenses, see WPIC 14.00 (Defenses—Introduction).

*[Current as of December 2015.]*

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11 WAPRAC WPIC 28.02

## APPENDIX “E”

### **WPIC 28.06 Manslaughter—Second Degree—Criminal Negligence—Elements**

To convict the defendant of the crime of manslaughter in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about(date), the defendant engaged in conduct of criminal negligence;**
- (2) That(name of decedent)died as a result of defendant's negligent acts;  
and**
- (3) That any of these acts occurred in the State of Washington.**

**If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.**

**On the other hand, if after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.**

#### NOTE ON USE

With this instruction use WPIC 10.04 (Criminal Negligence—Definition) as modified per the discussion in the Comment below. If there is an issue of causal connection, use WPIC 25.02 (Homicide—Proximate Cause—Definition) with this instruction.

This instruction does not apply to vehicular homicide; use WPIC 90.02 (Vehicular Homicide—Elements).

For a discussion of the phrase “any of these acts” in element (3), see the Introduction to WPIC 4.20 and the Note on Use to WPIC 4.21 (Elements of the Crime—Form).

#### COMMENT

RCW 9A.32.070(1).

RCW 9A.32.020(2) provides that RCW Chapter 9A.32 does not affect RCW 46.61.520, the statute relating to vehicular homicide.

First and second degree manslaughter are lesser included offenses of intentional murder; instructions should be given to the jury when supported by the facts. *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). Second degree manslaughter is a lesser degree offense of a charge of first degree manslaughter. *State v. Hansen*, 30 Wn.App. 702, 638 P.2d 108 (1981).

Second degree manslaughter is not a lesser included offense of first degree felony murder. *State v. Sublett*, 176 Wn.2d 58, 84, 292 P.3d 715 (2012)

The statutory definition of criminal negligence is written in terms of failing to be aware of a substantial risk that a *wrongful act* may occur. See RCW 9A.08.010(1)(d); WPIC 10.03 (Recklessness—Definition). For the crime of manslaughter, however, the Supreme Court's opinion in *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005), suggests the application of a more particularized analysis of criminal negligence. In *Gamble*, the court held that recklessness involves disregarding a substantial risk that a *death* may occur, whereas the usual definition of recklessness involves disregarding a substantial risk that a wrongful act may occur. *State v. Gamble*, 154 Wn.2d at 467–68 (in the context of analyzing whether first degree manslaughter is a lesser included offense of second degree felony murder with assault as the predicate felony). By analogy, criminal negligence for manslaughter would correspondingly involve failure to be aware of a substantial risk that a death may occur. Accordingly, for a manslaughter case, the definition of criminal negligence from WPIC 10.04 should be drafted by filling in that instruction's blank line with “death” rather than by using “wrongful act.” For further discussion of *Gamble*, see the Comments to WPIC 10.03 (Recklessness—Definition) and 10.04 (Criminal Negligence—Definition).

It is unlikely that a defense of justifiable homicide will apply to a charge of manslaughter. Justifiable homicide requires an intentional killing in self-defense, or under one of the other circumstances described in RCW 9A.16.040 or RCW 9A.16.050. If a person accidentally kills another while engaging in the lawful use of force, the killing is excusable, not justifiable. *State v. Brightman*, 155 Wn.2d 506, 524–26, 122 P.3d 150 (2005).

For discussion of the burden of proof on defenses, see WPIC 14.00 (Defenses—Introduction).

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11 WAPRAC WPIC 28.06

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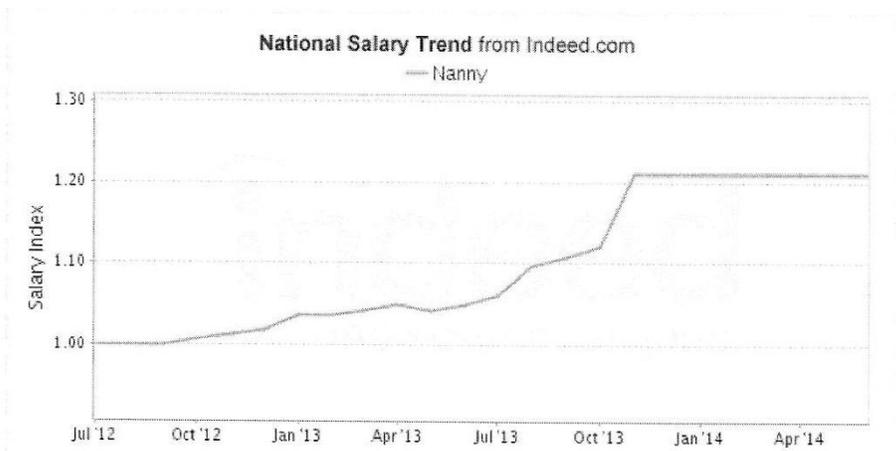
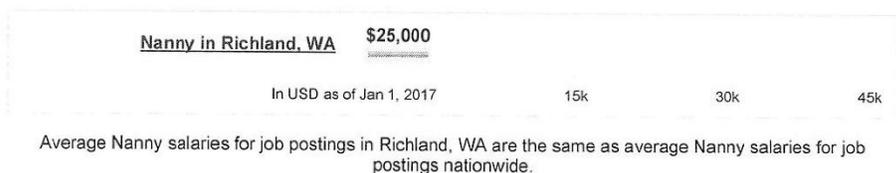
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