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STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in his opening brief.

ARGUMENT

- A. The issue of whether Mr. Wasageshik 'abandoned' the diaper bag is properly before the court.

The State contends that this issue isn't properly before the Court, however, the State makes no analytical claims or arguments as to why this Court shouldn't continue its long-held practice of de novo review of constitutional issues. Brief of Respondent, 17-18. In his original brief, Mr. Wasageshik assigned error to "Conclusions of Law #16," which states "The court finds the search of the diaper bag at the hospital was lawful, as the diaper bag was abandoned when left at the hospital on the 19th of September, 2006." Because the issue of whether property was "abandoned" - in the context of a constitutional challenge to the search of the property - is a matter of law, the issue is properly before the Court. See United States v. Burnette, 698 F.2d 1038, 1048 n.19 (9th Cir. 1983) (stating that "[t]he majority of previous cases in which the

Courts have upheld a finding of abandonment have involved both a denial of ownership or interest in the property and a physical relinquishment of the property"); State v. Dugas, 109 Wn.App. 592, 595, 36 P.3d 577 (2001) (holding that defendant did not voluntarily abandon his jacket by placing it on the hood of his car after being arrested).

Because this issue is "a matter of law" and has been properly appealed, this Court should reject the State's contention to the contrary and apply de novo review.

B. The trial court erred when it held that the diaper bag was abandoned and that Mr. Wasageshik had no reasonable expectation of privacy in it.

In his original brief, Mr. Wasageshik assigned error to "Conclusions of Law #17" which states:

The court finds the defendant did not have a reasonable expectation of privacy in the diaper bag, as evidenced by several medical staff having access to and utilizing the diaper bag during the period from the 19th of September, 2006 through the 2nd of October, 2006.

CP 350-367. The State contends that the bag was abandoned and that, because the medical personal had access to the bag, Mr. Wasageshik did not have

a reasonable expectation of privacy. See Brief of Respondent at 19. The State argues that "neither defendant nor Ms. Wasageshik were forced out of the hospital, making them leave the diaper bag involuntarily ... defendant had an opportunity to say good-bye to T.W. and to retrieve items from her hospital room after his interview [with police]." See Brief of Respondent at 22.

The State ignores the immense pressure the defendant and his wife were under, and that in a situation where a person is confronted by police and CPS workers, knowing that they may never see their child again - in addition to possibly facing serious charges - it is reasonable that someone might overlook their property. The fact that the Wasageshik's were not legally allowed to return, but that Ms. Wasageshik later called the hospital and asked about retrieving the bag is more than sufficient evidence to show that (1) they did not legally abandon the property, and (2) they still had a reasonable expectation of privacy in the bag.

C. The evidence obtained by way of the illegal search of the diaper bag did not constitute "harmless error."

As this Court is aware, an error of constitutional magnitude is harmless, only if the State can prove beyond a reasonable doubt that the error did not contribute to the guilty verdict or that the untainted evidence is so overwhelming it necessarily leads to guilt. State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984).

In this case, the evidence obtained from the illegal search of the diaper bag was very damaging to Mr. Wasageshik. Inside the bag, the police obtained a report from Ms. Maldonado describing that Ms. Maldonado had to take T.W.'s temperature twice, that she had to give T.W. Tylenol, that T.W. slept more than usual and an instance where T.W. was eating less. See Brief of Respondent at 28. When testifying, Ms. Maldonado used the report to refresh her recollection as to T.W.'s exact temperature, and the report was ultimately admitted into evidence and presented to the jury as evidence of the "pattern of abuse" inflicted upon T.W. by Mr. Wasageshik. While this evidence was benign in the sense that Ms. Maldonado described T.W. as a happy and healthy baby, surely the jurors who recognized that the "pattern of

abuse" evidence was scarce (as outlined in Mr. Wasageshik's opening brief) used this evidence as a means to overcome their concerns. Thus, this unlawfully obtained report served as highly damaging evidence against Mr. Wasageshik and the State cannot prove that it was "harmless" beyond a reasonable doubt.

D. The State still cannot show a "pattern or practice" of assault.

The State argues that "although no one directly witnessed defendant assaulting T.W., the circumstantial evidence in this case supports a conclusion that defendant assaulted T.W. on more than one occasion." See Brief of Respondent at 32. However, the respondent's brief fails to address any of Ms. Maldonado's testimony.

As stated, the only direct evidence of an assault concerned an alleged incident on September 11th. The Wasageshik's daycare provide, Julissa Maldonado, testified that she watched T.W. for five consecutive days during the week of September 4th - 8th and didn't notice anything wrong with her. In fact, Ms. Maldonado described T.W. as great, smiley, upbeat, free of bruises, healthy

and fully mobile - moving her arms and legs "like a normal baby." RP 437-38 (04/22/08).

This testimony directly contradicted the State's contention that, during her short life with the Wasageshik's, T.W. had been subjected to a "pattern" of first degree assaults causing bodily harm greater than transient physical pain or minor temporary marks. The fact that this evidence came from somebody who spent more than 40 hours with T.W., just before the September 11th incident proves that the evidence presented at trial was insufficient to show a pattern of abuse. As mentioned, the State did not address this testimony at all in its brief.

Additionally, in respondent's brief, the State did not acknowledge the prosecutor's statement in closing argument that "We know that on September 11th when they picked up [T.W.] from the day care, she was perfectly fine, perfectly fine. Everyone agrees she was perfectly fine." RP 1555 (05/12/08). Because Ms. Maldonado, and even the prosecutor, agreed that T.W. was "perfectly fine" up until September 11th, there was clearly insufficient evidence to support the

first degree assault of a child verdict relating to a "pattern or practice" of abuse.

It is likely, based upon the jury's verdict, that the jury held great contempt for Mr. Wasageshik and his alleged action on September 11th. Unfortunately, this contempt caused them to overlook the necessary elements of this particular count of assault of a child based on a pattern of abuse. Because it is the Court's role to set aside personal feelings about a defendant, and guarantee that he/she is only convicted when the State meets its burden of proving each element beyond a reasonable doubt, respectfully, this Court must find that the evidence was insufficient and reverse the conviction.

E. The State acted improperly when it acted as T.W.'s proxy.

The issue before the Court is not, as the State contends, whether the trial court was within its authority to impose an exceptional sentence. Rather, the issue is whether the State "has a right to speak on the victim's behalf at sentencing." Because the Court in State v. Carreno-Moldenado, 135 Wn.App. 77, 143 P.3d 343 (2006) held that the State does not have that

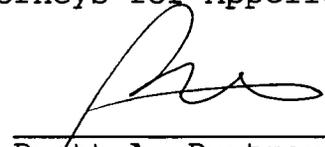
right, and because the prosecutor spoke for T.W. (rather than have a guardian ad litem speak), this Court should remand Mr. Wasageshik's case for re-sentencing.

CONCLUSION

Based on the case law and analysis set forth herein, as well as Mr. Wasageshik's opening brief, respectfully, this court should grant Mr. Wasageshik the appropriate relief as it pertains to the above issues.

RESPECTFULLY SUBMITTED this 14th day of August, 2009.

HESTER LAW GROUP, INC. P.S.
Attorneys for Appellant

By: 

Brett A. Purtzer
WSB #17283

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor
Deputy Prosecuting Attorney
930 Tacoma Avenue South, #946
Tacoma, WA 98402

William F. Wasageshik, V
DOC #319528
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Signed at Tacoma, Washington this 14th day
of August, 2009.


Lee Ann Mathews

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