No. 46753-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Leonard,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-01192-9

The Honorable Judge Michael H. Evans

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ISSUES AND ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Mr. Leonard under the rule of *corpus delicti.*

2. The state failed to provide independent evidence that Mr. Leonard knew or should have known that C.H. was under the age of eighteen.

3. The court erred by entering finding of fact 8. CP 8.

4. The court erred by entering finding of fact 10. CP 8.

5. The court erred by entering finding of fact 11. CP 8.

6. The court erred by entering finding of fact 50. CP 12.

7. The court erred by entering finding of fact 59. CP 13.

8. The court erred by entering finding of fact 64. CP 13.

9. The court erred by entering conclusion of law 1. CP 14.

> **ISSUE 1:** Under the rule of *corpus delicti*, the state must provide independent evidence to support each element of an offense; the factfinder cannot rely on the statement of the accused alone. Here, there was no evidence – aside from Mr. Leonard's statements – that he knew or should have known that C.H. was under eighteen. Did the state produce insufficient evidence to convict Mr. Leonard of communicating with a minor for immoral purposes?

10. Mr. Leonard was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

11. Defense counsel provided ineffective assistance by failing to object to the admission of Mr. Leonard's statements on *corpus delicti* grounds.

12. Defense counsel unreasonably failed to object to the sufficiency of the independent evidence of the *corpus delicti.*

> **ISSUE 2:** An accused person is denied the effective assistance of counsel if prejudiced by the attorney's deficient

performance. Here, defense counsel failed to raise a *corpus delicti* objection that would have resulted in dismissal of the charge. If the *corpus delicti* issue is not preserved for review, was Mr. Leonard denied her right to the effective assistance of counsel?

13. Defense counsel provided ineffective assistance by failing to conduct necessary investigation.

14. Mr. Leonard was prejudiced by his attorney's deficient performance.

ISSUE 3: Defense counsel provides ineffective assistance by failing to conduct the investigation necessary to properly advise and represent his/her client. Here, defense counsel's theory was that Mr. Leonard had a disability or other impairment that either prevented him from grasping the difference between fiction and reality or otherwise rendered his communications unreliable; but defense counsel did not have any expert evaluate Mr. Leonard to confirm that theory. Was Mr. Leonard denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

15. Mr. Leonard's statements were admitted at trial in violation of his rights under the Fifth and Fourteenth Amendments.

16. Mr. Leonard's statements were admitted at trial in violation of his rights under art. I, § 9 of the Washington constitution.

17. Mr. Leonard did not knowingly, intelligently, and voluntarily waive his *Miranda* rights.

ISSUE 4: The state bears the "heavy burden" of demonstrating that a *Miranda* waiver is the product of an accused person's "free and deliberate choice." Here, the court found that Mr. Leonard may have been "overcome" by his desire to please authority, but still admitted his statements because he was apprised of his *Miranda* rights. Were Mr. Leonard's statements admitted in violation of his rights under the Fifth and Fourteenth Amendments?

18. The court exceeded its authority by ordering Mr. Leonard to pay a jury demand fee following his bench trial.

19. No statute authorizes a court to order a jury demand fee for a bench trial.

> **ISSUE 5:** A court's authority to impose legal financial obligations derives from statute. Here, the court ordered Mr. Leonard to pay a jury demand fee even though he had a bench trial. Did the court exceed its statutory authority by ordering that fee in a case with no jury?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

When Robert Leonard was at the police station, he told two officers that he had had long-term sexual relationships with three boys, each starting when the boy was thirteen years old. RP 300-318. Mr. Leonard was 58. RP 318. He gave the officers the first and last names of each of the boys. RP 308, 313, 327.

One of the "boys" turned out to be middle-aged. RP 325. Another did not actually exist at all. RP 328-29.

Mr. Leonard described how he and the first boy, P.C., met when P.C. was thirteen. RP 309, 312. He said they masturbated together and had oral sex. RP 309. Mr. Leonard explained that P.C. would meet him on the street corner after telling his parents that he was going to a friend's house or the mall. RP 311. He described the apartment building where P.C. had lived. RP 311. He said the relationship had gone on for 5 years and that P.C. now lives with his parents in Virginia. RP 308, 312.

Mr. Leonard also detailed a relationship with a boy named D.R. RP 313-17. He said he met D.R. at a specific park in town. RP 313. Mr. Leonard said D.R. was also thirteen years old at the time. RP 313. He said D.R.'s birthday was in June. RP 316. Mr. Leonard described numerous sex acts with D.R. and said the relationship lasted for three years. RP 314-

15. He said that he had most recently talked to D.R. a few months ago. RP 316.

Mr. Leonard also chronicled a relationship with a boy named C.H. RP 300-307. He said C.H. was also thirteen when they met. RP 305. Mr. Leonard said that C.H. lived in Pennsylvania but they had an online relationship. RP 300. Mr. Leonard said they had sexual conversations online and C.H. sent him pictures of himself. RP 304.

The officers located P.C. who turned out to be 48 or 49 years old. RP 325. He had exactly the same name that Mr. Leonard had given and used to live in the apartment building Mr. Leonard had described. RP 328. At first the officers thought there may have been a P.C., Jr., but there wasn't. RP 329.

The officers never found anyone with the name Mr. Leonard had given for D.R. RP 325-326. There were no records of anyone with that name at any schools in the area. RP 326.

No charges were ever filed based on the "admissions" Mr. Leonard had made regarding P.C. and D.R. RP 333.

Like P.C., C.H. was a real person. RP 37-71. C.H. actually lived in Pennsylvania and had met Mr. Leonard online. RP 19. The website on which Mr. Leonard and C.H. met requires users to verify that they are over the age of eighteen. RP 67.

Unlike the other "boys," C.H. really was thirteen when he met Mr. Leonard online. RP 38, 40. Mr. Leonard was called to the police station because C.H.'s mother had found some emails from Mr. Leonard on her son's phone. RP 18-36.

C.H. lied about his age to gain access to the website on which he met Mr. Leonard. RP 67. C.H. never told Mr. Leonard how old he was. RP 66. He sent Mr. Leonard photos he had found online of young men who appeared to be in their late teens or early twenties. Ex. 12, pp. 34-35, 67-70. C.H. said that they were photos of himself. Ex. 12, pp. 34-35, 67-70.

Mr. Leonard did not try to disguise his identity during his online interactions with C.H. *See* Ex 12; Ex 16. He gave C.H his real name, phone number, and email address. RP 39, 50-51. He told C.H. where he lived and about his actual job. RP 39.

None of the communications between Mr. Leonard and C.H. said anything about C.H.'s age. Ex 12; Ex. 16. C.H. alluded to school and "band camp" a few times. Ex. 12, p. 99; Ex. 16, p. 14. He also mentioned that he would need to wait two years until he could come visit Mr. Leonard in person. Ex. 12, p. 55. He did not clarify whether he was in high school or college. *See* Ex. 12; Ex. 16.

The state charged Mr. Leonard with communicating with a minor for immoral purposes. CP 2-3. Mr. Leonard opted to be tried by the bench. RP 5.

Mr. Leonard moved to suppress the statements he had made to the officers. RP 185-254. He acknowledged that he had been given *Miranda* warnings but said that his waiver was not voluntary because of a learning disability. RP 237, 245-247. He said that he was unable to understand that he did not have to answer the officers' questions. RP 246.

On cross examination for the 3.5 hearing, Mr. Leonard answered affirmatively to all of the prosecutor's questions. RP 238-241.

During the suppression argument, defense counsel pointed out that Mr. Leonard answers all leading questions agreeably to the person asking. RP 245. He argued that his *Miranda* waiver was not voluntary because he did not understand the import of what he was saying or that he was not required to answer affirmatively to all of the officers' requests. RP 246.

The court acknowledged that Mr. Leonard appeared to have a demeanor of "kowtowing to authority" and that he may have been "overcome by his desire to be cooperative with the police." RP 251. Still, he found that the statements were admissible because he was given the proper warnings. RP 251-252.

At trial, C.H. acknowledged that he never told Mr. Leonard how old he was. RP 66. He said that the allusion to needing to wait two years to visit was because he would he old enough to drive after two years. RP 66. But he did not spell that out for Mr. Leonard. RP 67.

In his closing argument, defense counsel's theory was that Mr. Leonard's statements to the police were not reliable because he had also "admitted" to two sexual relationships with "minors" who either were actually middle-aged or did not exist at all. RP 361-369. The attorney said that he "didn't feel enough concern to have him evaluated, but [he did] think there is a level of behavioral disorder here that would cause him to answer questions the way he does." RP 362. He speculated that Mr. Leonard either cannot tell the difference between fiction and reality or that he does not understand the importance of communicating only reality. RP 361-369.

The court found Mr. Leonard guilty. RP 381. In its oral ruling, the court acknowledged that the content of the emails was too vague to establish that Mr. Leonard knew C.H. was a minor. RP 379-380. Still, the court found that the charge had been proved beyond a reasonable doubt because Mr. Leonard admitted to the police that C.H. was thirteen when they met. RP 381.

Mr. Leonard had no prior criminal history. CP 15. The court sentenced him within the standard range. CP 21. The court also ordered him to pay a $250 jury demand fee. CP 19.

This timely appeal follows. CP 31.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE UNDER THE RULE OF *CORPUS DELICTI* TO CONVICT MR. LEONARD WHEN THE STATE DID NOT PRODUCE ANY INDEPENDENT EVIDENCE THAT HE KNEW OR SHOULD HAVE KNOWN THAT C.H. WAS A MINOR.

1. The state failed to produce independent evidence that Mr. Leonard knew or had reason to know that C.H. was a minor.

Mr. Leonard met C.H. on a website restricted to users over the age of eighteen. RP 67. C.H. sent Mr. Leonard photos of young men who did not appear to be minors. Ex. 12, pp. 34-35, 67-70. C.H. testified that he never told Mr. Leonard his true age. RP 66.

Still, the court found that the state had proved that Mr. Leonard knew C.H. was underage because he told the police that he was thirteen years old. RP 381. But Mr. Leonard also told the police that a middle-aged man and an imaginary person were thirteen. RP 313-318, 325, 328-329. Mr. Leonard's statements, alone, cannot support his conviction. Absent independent evidence that Mr. Leonard knew or should have

known that C.H. was a minor, there was insufficient evidence to convict him under the rule of *corpus delicti*.

A factfinder may not consider an accused person's statements unless the prosecution *prima facie* establishes the *corpus delicti* of the charged crime by evidence independent of those statements. *State v. Dow*, 168 Wn.2d 243, 255, 227 P.3d 1278 (2010); *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006).

Under the *corpus delicti* rule, the independent evidence must corroborate "*the specific crime* with which the defendant has been charged." *Brockob,* 159 Wn.2d at 329 (emphasis in original). In other words, it must *prima facie* establish each element of the charged crime.[1] *Dow,* 168 Wn.2d at 251, 254. Here, the independent evidence was completely insufficient to prove that Mr. Leonard knew that C.H. was a minor.

Absent Mr. Leonard's statements, the only potential evidence that he knew C.H. was underage were in the form of vague email references to school, to "band camp," and to needing to wait two years to come live in Washington.[2] Ex. 12, pp. 55, 99; Ex. 16, p. 14. None of those references

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[1] Under cases that predate *Brockob* and *Dow,* the independent evidence need not establish "the degree of the generic crime charged." *State v. Mason*, 31 Wn. App. 41, 48, 639 P.2d 800 (1982). This rule does not survive *Brockob* and *Dow.*

[2] The court's findings indicate that the emails also discussed C.H.'s "relative age" and "how long it would be before C.H. could actually drive." CP 8, 11. The court also found that C.H.

establish *prima facie* that Mr. Leonard knew or should have known that C.G. was a minor.

Indeed, college students refer to "school" and may attend "band camp." A college student may also need to wait two years until graduation to move to a different state. The same is true for a high school student who is over the age of eighteen.[3]

To prove a *prima facie* case, the state's independent evidence of the *corpus delicti* must be consistent with guilt and inconsistent with a hypothesis of innocence. *Brockob,* 159 Wn.2d at 329. If the independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Id., at* 329-330.

The independent evidence cannot establish the *corpus delicti* of Mr. Leonard's offense because it is consistent with innocence. C.H. could be in school, band, and need to wait two years to move to Washington

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told Mr. Leonard that he was a minor. CP 8. But there was no evidence of any emails discussing age. *See* Ex. 12; Ex 16. In fact, C.H. testified that he never told Mr. Leonard his age or date of birth. RP 66. Likewise, while C.H. did say that he would not be able to move to Washington for two years, he did not tell Mr. Leonard that was because he would not be able to drive until that time had passed. RP 66-67. The court's findings 10 and 11 must be vacated.

[3] The trial court entered a finding of fact based on Mr. Leonard's supposed knowledge that C.H. was having trouble in his relationship with his stepfather. CP 13. First, neither C.H. nor his mother testified about his relationship with his stepfather. RP 18-71. The court's finding is not supported by the evidence and must be vacated.

Second, even if the evidence supported the finding, it would not establish the *corpus delicti* of the offense. A person does not need to be under the age of eighteen to have a contentious relationship with a stepparent. The finding is also consistent with innocence. *Brockob,* 159 Wn.2d at 329-30.

whether he was under or over the age of eighteen. The references to those parts of C.H.'s life in his emails are insufficient to establish the *corpus delicti* of the offense. *Id.*

To convict Mr. Leonard for communication with a minor for immoral purposes, the state was required to prove beyond a reasonable doubt that Mr. Leonard intended his communications to reach a minor. *State v. Aljutily*, 149 Wn. App. 286, 296, 202 P.3d 1004 (2009). Under the rule of *corpus delicti*, the state's proof cannot rest on Mr. Leonard's statements alone. . *Dow*, 168 Wn.2d at 255; *Brockob*, 159 Wn.2d at 328.

Because there was no independent evidence that Mr. Leonard knew or should have known that C.H. was a minor, the state has not established the *corpus delicti* of the element that he intended his communications to reach a minor. Mr. Leonard's conviction must be reversed for insufficient evidence. *Id.*

2. If the state's failure to prove the *corpus delicti* by independent evidence is not preserved for review, Mr. Leonard received ineffective assistance of counsel. [4]

As outlined above, the state failed to prove the *corpus delicti* of communicating with a minor for immoral purposes. A successful *corpus*

[4] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a). Reversal is required if counsel's deficient performance prejudiced the accused person. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland* , 466 U.S. at 687).

delicti challenge would have resulted in dismissal of the charge. *Dow*, 168 Wn.2d at 255. Accordingly, there is a reasonable probability that the error affected the outcome. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). No reasonable strategy could justify counsel's failure to raise the issue.

If the *corpus delicti* issue may not be raised for the first time on review, Mr. Leonard was deprived of the effective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). His conviction must be reversed and the case remanded for a new trial. *Id.*

II. MR. LEONARD'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CONDUCT ANY INVESTIGATION INTO THE THEORY UPON WHICH HE RELIED AT TRIAL.

Defense counsel's theory in closing was that the court should not rely on Mr. Leonard's statements because some kind of disability or disorder caused him to say things to police that were not in line with reality. RP 361-369. But defense counsel to not provide any expert testimony to support that claim. *See* RP *generally*. Indeed, counsel did not even have an expert evaluate Mr. Leonard to determine the nature of his cognitive issues. RP 362. As a result, it was not clear whether Mr. Leonard was unable to determine truth from fiction, unable to understand the import of his statements, both, or neither.

Mr. Leonard's attorney provided ineffective assistance of counsel by failing to conduct adequate investigation. Absent an expert evaluation, counsel was unable to properly advise Mr. Leonard of the consequences of going to trial on his theory regarding the reliability of his statements. Counsel was also unprepared to reasonably advocate for that theory without any evidence to back it up.

Defense counsel provides ineffective assistance if s/he performs deficiently in a way that prejudices the accused. *State v. Fedoruk*, --- Wn. App. ---, 339 P.3d 233, 239 (Dec. 9, 2014) (*citing Strickland* 466 U.S. at 686). Performance is deficient if it falls below an objective standard of reasonableness. *Id.*

Failure to adequately investigate can constitute ineffective assistance. *Id.* at 239-40 (*citing State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010)). Competent investigation includes consultation with necessary experts. *Id.* at 240. Absent information from all necessary experts in a case, defense counsel cannot assist his/her client in making an informed decision about the consequences of going to trial on a given theory. *Id.*

Mr. Leonard's attorney provided ineffective assistance by failing to consult with necessary experts. *Id.* Without a mental and cognitive evaluation of Mr. Leonard, counsel's defense theory regarding the

soundness of his statements to the police was based purely on speculation. Defense counsel could not reasonably have assisted Mr. Leonard in his decision about the consequences of going to trial on that theory with no information whatsoever about its scientific or medical basis. *Id.* Without consulting an expert, Mr. Leonard's attorney was unable to adequately advise or represent his client.

Likewise, tactical considerations can only justify counsel's actions if the strategy employed is reasonable. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

Mr. Leonard's counsel cannot reasonably have expected the court to adopt his defense theory based solely on speculation of some kind of disability or disorder. Absent expert testimony to support it, defense counsel's strategy was not reasonable.

An accused person is prejudiced by counsel's failure to investigate if there is a reasonable probability that the result of the proceeding would have been different. *Fedoruk*, --- Wn. App. at ---, 339 P.3d at 241. The standard does not require a showing that counsel's conduct more likely than not affected the outcome, only "a probability of a more favorable result sufficient to undermine confidence in the outcome actually obtained." *Id.* (internal citation omitted).

Here, there is significant indication that defense counsel was right – that Mr. Leonard did suffer from some disability or impairment that rendered his understanding of events and/or communications unreliable. Indeed, Mr. Leonard "confessed" at length and in detail to two illegal sexual relationships that had never actually occurred. RP 309-310, 325, 328-329.

With expert testimony to support the defense theory, the court would likely have been compelled to disregard Mr. Leonard's statements completely. As outlined above, the evidence was insufficient to convict Mr. Leonard without those statements. Counsel's inadequacies were grave enough to "undermine confidence" in the outcome of Mr. Leonard's trial. *Fedoruk*, --- Wn. App. at ---, 339 P.3d at 241. Mr. Leonard was prejudiced by his attorney's deficient performance. *Id.*

Mr. Leonard's attorney provided ineffective assistance of counsel by failing to do any of the investigation necessary to support his trial theory. *Id.* Mr. Leonard's conviction must be reversed. *Id.*

III. THE STATE FAILED TO ESTABLISH THAT MR. LEONARD MADE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF HIS *MIRANDA* RIGHTS.

Mr. Leonard appears to answer all questions from authority figures in the affirmative regardless of content. RP 238-241. At the suppression hearing, the court acknowledged his demeanor of "kowtowing to

authority." RP 251. The court further recognized that Mr. Leonard may well have been "overcome by his desire to be cooperative with the police" during his interrogation. RP 251.

Still, the court found that Mr. Leonard's statements were admissible because he was given the proper *Miranda* warnings. RP 251-252. But Mr. Leonard's waiver of those rights was not knowing, intelligent, and voluntary because it was not the product of a "free and deliberate choice." Accordingly, his statements to the police were not admissible at trial.

The validity of an accused person's *Miranda* waiver is reviewed *de novo*. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007); *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); U.S. Const Amends. V, XIV; art. I, § 9.

To implement the privilege against self-incrimination and to reduce the risk of coerced confessions, an accused person must be informed of her or his rights prior to custodial interrogation. *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004); *State v. Nelson,* 108 Wn. App. 918, 924, 33 P.3d 419 (2001). The state has the "heavy burden" of demonstrating that the accused understood his/her rights and waived them knowingly and intelligently. *State v. Reuben*, 62 Wn. App. 620, 625, 814 P.2d 1177 (1991).

The question of whether a *Miranda* waiver is valid constitutes a two-part inquiry. *United States v. Sriyuth*, 98 F.3d 739, 749 (3d Cir. 1996) (*citing Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). First, the state must demonstrate that the decision to speak with police was the "product of a free and deliberate choice." *Id.* Second, the court must determine that the waiver was "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* (internal quotation omitted).

The state was unable to make either required showing in Mr. Leonard's case. First, because Mr. Leonard was "overcome" by his suggestibility and desire to be cooperative with authority, his waiver was not the product of "free and deliberate choice." *Id.* Far from making a calculated decision to speak to the police, Mr. Leonard simply did what he always does: said yes.

Second, the state was unable to prove that Mr. Leonard waived *Miranda* with an understanding of the rights he was abandoning and the consequences of doing so. *Id.* By following his typical practice of "kowtowing to authority," Mr. Leonard did not demonstrate such an understanding and rational choice to abandon his rights. The state failed to meet its burden.

The state failed to meet its "heavy burden" of proving that Mr. Leonard knowingly, voluntarily, and intelligently waived his *Miranda* rights. *Reuben*, 62 Wn. App. at 625. The court erred by relying on his statements at trial. *Id.*

IV. THE COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. LEONARD TO PAY A JURY DEMAND FEE FOR HIS BENCH TRIAL

Mr. Leonard chose to be tried by the bench. RP 5. As such, he did not "demand" a jury. Still, the court ordered him to pay a $250 "jury demand fee. CP 19. The court exceeded its authority by requiring Mr. Leonard to pay for a jury when he did not have a jury at his trial.

A court derives the authority to order payment of legal financial obligations (LFOs) from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied,* 172 Wn.2d 1021, 268 P.3d 224 (2011). The legislature has authorized courts to impose a jury demand fee of $250 in cases involving a twelve-person jury. RCW 36.18.016(3)(b).

There was no jury in Mr. Leonard's case, twelve-person or otherwise. RP 5. Accordingly, the court did not have the authority to order payment of a jury demand fee. RCW 36.18.016(3)(b); *Hathaway*, 161 Wn. App. at 651-653.

The court exceeded its authority by ordering Mr. Leonard to pay a jury demand fee following his bench trial. *Id.* That order must be vacated. *Id.*

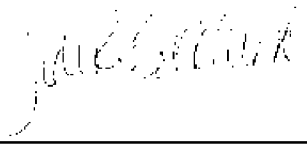
CONCLUSION

The state failed to produce insufficient evidence that Mr. Leonard knew or should have known that C.H. was a minor. There was insufficient evidence to convict him under the rule of *corpus delicti*. Mr. Leonard's defense attorney provided ineffective assistance of counsel by failing to conduct any investigation to support his theory of the defense. The court violated Mr. Leonard's constitutional rights by admitting statements made pursuant to an invalid *Miranda* waiver. Mr. Leonard's conviction must be reversed.

In the alternative, the court exceeded its authority by ordering Mr. Leonard to pay a jury demand fee when he had a bench trial. That order must be stricken from the Judgment and Sentence.

Respectfully submitted on March 31, 2015,

BACKLUND AND MISTRY



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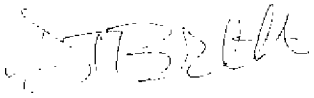

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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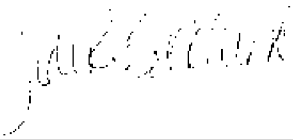
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 31, 2015.



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