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June 3, 2015
Court of Appeals
Division III
State of Washington

No. 32808-2-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

LYNN L. JACKSON, Appellant.

BRIEF OF RESPONDENT

CURT L. LIEDKIE
Asotin County Deputy
Prosecuting Attorney
WSBA #30371

P. O. Box 220
Asotin, Washington 99402
(509) 243-2061

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III. STATEMENT OF THE CASE

On March 15, 2014, the Appellant, Lynn L. Jackson, a fifty-two year old man, attempted to force himself sexually on a thirteen year old girl, M.M.[1] at his residence at 1012 Benjamin Street, in Clarkston, Washington. Findings of Fact and Conclusions of Law after Bench Trial, Clerk's Papers (hereinafter CP) 106 - 110; Report of Proceedings (hereinafter RP) at pp.41, 88 - 105, 185; Exhibit P-1.

At the time of the crime, the Appellant was engaged to marry M.M.'s mother, Dena Mellick. RP 40. Ms Mellick and the Appellant had been together romantically for six years prior and had met when M.M. was only seven years old. RP 40 - 41. During this six year period, the Appellant engaged in inappropriate sexual actions involving M.M. including touching her vaginal area, tongue kissing. RP 75 - 77. At one time, the Appellant gave M.M. a dildo, masturbation cream, and condoms. RP 79. When he gave her the dildo, M.M. testified, "he said if I can't - - if he can't pleasure me, then he wants me to pleasure myself." RP 79:19-21. During this time, M.M. and her mother were living in Lewiston, Idaho. RP 49. M.M. did not report these events to anyone at the time. RP 84.

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[1] The victim herein was identified throughout trial by her given name, but out of respect for her privacy, and consistent with the Appellant's designation in his Brief, she will be referred to throughout as M.M. A Declaration of Pseudonym was filed at the outset of the case designating her as "Jane Doe." CP 16 -17.

On March 15, 2014, Appellant drove to Pullman, Washington where Ms Mellick and M.M. were living at that time, and despite her age and lack of a license or learner's permit, he allowed her to drive back to his, taking the backroads between Pullman and Clarkston. RP 84, 86 - 87, 186, 206. During the drive, the Appellant told M.M. that she needed to touch him and he needed to touch her in order for him to marry her mother. RP 83.

When they arrived at the Appellant's residence, the Appellant claimed to have a headache and went into the bedroom to lie down. RP 87. The Appellant's residence was in mostly unfurnished except for a bed, dresser, desk and a computer which were all in his bedroom. RP 87, 188. M.M. came into the bedroom to use the computer and the Appellant asked her to lie with him on the bed. RP 88. The Appellant began tickling and hugging her causing her to fall off the bed. RP 88, 94. While on the floor, M.M. saw a gun under the bed. RP 88. The Appellant then got up, locked the bedroom door, retrieved the gun from under the bed and placed it on the bed. RP 88, 97. At that point, the Appellant threw M.M. onto the bed, laid on top of her holding her down, and began kissing her below her collarbone. RP 88.

At this time he told her, "I didn't plan on anything to you today, but I couldn't help myself." RP 88, 97:15-16. He went on to ask her, "What would you do if I raped you?" RP 98:16 -17. M.M. tried to fight

him off and kicking at him. RP 88, 99. M.M. began to cry while the Appellant continued to kiss her neck. RP 100. M.M. started screaming and the Appellant stopped kissing her and began crying himself. RP 101. The Appellant grabbed the gun, pushed it toward her, and began telling M.M. to shoot him. RP 101, 111 - 113. He continued to lie on the bed and physically caress her on her bare upper hip and under her shirt. CP 106 - 110. This went on for approximately twenty minutes, while M.M. cried and otherwise protested the Appellant's sexual advances. *Id.* In total, the Appellant was alone in his bedroom with M.M. for thrity-eight minutes. RP 159. The Appellant took her shopping at a local store in Lewiston and returned to his house later in the day. RP 106. At that time the Appellant took her back to the bedroom and again tried kissing M.M. RP 106 - 107. When they left that last time, the Appellant insisted on a hug, during which he grabbed her buttocks. RP 108.

The Appellant and Ms Mellick were to be married April 1, 2014 and traveled to Las Vegas, Nevada, along with M.M. for the occasion. RP 43, 75, 194. On the morning of the wedding, the Appellant spoke privately with M.M. and told her that if he married her mother, he was going to rape M.M. RP 75, 195. The Appellant told M.M. to tell her mother this. RP 75. Later that morning, M.M. finally told her mother what had been occurring and what the Appellant had said to her. RP

43. Ms Mellick then broke off the engagement and, upon returning to Pullman, contacted authorities on April 3, 2014. RP 48.

Detective Jackie Nichols of the Asotin County Sheriff's Office ultimately received the report and began investigating. RP 126 - 128. At the time of the initial report it was not clear in what jurisdiction incidents may have occurred so the interview was held at the Lewiston Police Department, in Lewiston, Idaho, on April 4, 2014 with Pullman Police Department contacted as well. RP 128, 132. Detective Jason Leavitt from the Lewiston Police Department was present as was Detective Nichols, Ms Mellick, M.M. and a sexual assault advocate. RP 129. M.M. indicated she would be more comfortable speaking with a female officer so she was interviewed by Detective Nichols as she was the only female detective present. RP 129.

M.M. disclosed to Detective Nichols the above events concerning the Appellant's continued sexual abuse of her from age seven until the April of 2014. RP 130. M.M. described the recent incident at the Appellant's home. RP 131. Detective Nichols also interviewed Ms. Mellick at that time. RP 131 - 132.

At the conclusion of these interviews, Detective Leavitt suggested that Ms Mellick make a call to the Appellant to confront him regarding incidents that occurred in Lewiston, Idaho. RP 132. Detective Nichols took no role in the decision. RP 133. Detective

Nichols specifically talked with Ms Mellick before the call was placed and told her only talk about incidents that would have occurred in Idaho. Detective Nichols left the room and a call was placed by Ms Mellick from the Lewiston Police Department to the Appellant which was recorded by Detective Leavitt. RP 164.

At the conclusion of this call, Detective Leavitt and Detective Nichols went to 1012 Benjamin Street, Clarkston, and contacted the Appellant. RP 133, 165. The Appellant was cooperative and indicated that he had been expecting them. RP 133. The Appellant invited the detectives inside and agreed to talk with them. RP 165. The Appellant also agreed to recording of the interview. RP 165.

During the interview, the Appellant admitted that he had fallen in love with M.M. and had become sexually attracted to her. RP 134. He admitted buying M.M. a dildo and masturbation cream, and that he had become jealous of M.M.'s boyfriend. RP 135 - 136. He described an incident where he was tickling M.M. and her pants fell down and he then pulled his pants down because he "had an evil thought and couldn't go through with it." RP 136 - 137:1-2. When he disclosed this incident, he asked that the recorder be turned off and Detective Nichols honored his request. RP 141.

He confirmed most of the events of March 15, 2014 as described by M.M. except that he omitted kissing her and only admitted to restraining her by her wrists. RP 138. He further

admitted that he had asked her what she would do if he raped her or said he was going to rape her. RP 137:20-21. He confirmed that she began to cry and that he then brought out the gun and told her to shoot him. RP 138. He stated that as soon as she "shed one tear" that he couldn't go through with it. RP 138 - 139. He admitted french kissing her on one occasion and another incident where he licked her chest. RP 140. He further confirmed that, while they were in Las Vegas, he had told M.M. that he would end up raping her if he married her mother and that she needed to say something to Ms Mellick.

At the conclusion of the interview, Detective Nichols placed the Appellant in custody. RP 142. Detective Nichols then applied for a search warrant for the Appellant's residence. RP 143. Upon execution, the gun was found under a pillow on the Appellant's bed and officers also found a computer and game camera[2] in the bedroom. RP 143 - 144. The gun was loaded with five live rounds. RP 145. The camera was positioned so as to record activities on the Appellant's bed. RP 146. The warrant was expanded to included the game camera. RP 144. The computer and camera were processed for images. RP 149 -150. Images from the camera that captured the events were found on the computer in the "recycling bin" electronic

[2]A game camera is designed to observe wildlife and capture digital images every few seconds while activated by a motion sensor. *See* RP 157.

folder.[3] RP 150. Other images were also captured on the camera depicting the Appellant engaged in sexual activities, including episodes of solo-masturbation and sex with two different females on separate occasions. RP 151 - 153.

The Appellant was charged by Information with Attempted Rape of a Child in the Second Degree and Assault in the Second Degree. CP 12 - 13. Prior to trial, the Court allowed the State to amend the Information to allege a Firearm Enhancement as to each charge pursuant to RCW 9.94A.533(3). CP 44 - 45. The Appellant filed a series of pretrial motions which were heard by the Court prior to trial. Defendant's Motions In Limine, CP 46 - 50, Defendant's Amended Motions In Limine, CP 51 - 53, RP 10 - 24. Therein, the Appellant asked that, pursuant to RCW 9.73.030, "the prosecution not be permitted to play a recorded conversation between the Appellant and Witness Dena Mellick." CP 46 - 50. This motion referred to the recorded call placed from the Lewiston Police Department to the Appellant. CP 46 - 50, RP 14 - 21. The Appellant further requested that "the prosecution instruct its witnesses . . . not to mention anything they may have heard spoken by the Appellant in the recorded conversation . . ." CP 46 - 50. The Trial Court reserved ruling on

[3]This would indicate that the images of the Appellant's attack on M.M. had been downloaded off the camera to the computer and then marked for deletion.

these motions. RP 22:2-3. The Appellant waived jury and the matter proceeded to bench trial on July 29, 2014. CP 40, RP 32.

At trial, the State offered testimony from Dena Mellick, M.M., and Detective Jackie Nichols. RP 39 - 176. During Ms Mellick's testimony, the State inquired of the Court for a preliminary ruling on the admissibility of the contents of the call between the Appellant and Ms Mellick that was placed from the Lewiston Police Department. RP 53. The Court had previously indicated it would await the development of foundational testimony before allowing the State to offer the recording or testimony concerning the content of the conversation. RP 35. When the State inquired during Ms Mellick's testimony whether the Court would allow inquiry into the conversation, the Court merely replied, "At this time I'm going to deny that." No further efforts were made to admit the recording or elicit testimony concerning the conversation. RP *generally*. The Court made no findings concerning illegality of the recording or whether Ms Mellick was acting as an agent of the State of Washington during the recorded phone call. RP *generally*.

After the State rested, the Appellant testified on his own behalf and told the Court that he began having sexual feelings for M.M. in February of 2014. RP 184. He claimed that Ms Mellick "planted the seed" during a conversation she had with him at that time. RP 184. He minimized the events of March 15, 2014 but acknowledged that he

had scared M.M. RP 188 - 191. He admitted to grabbing the gun, which was well within reach under his pillow. RP 191. He testified that he kept the gun there for self defense because his house had been broken into. RP 191. He testified he then held the gun out and told M.M. to take it and shoot him with it. RP 192. The Appellant further testified that, when police arrived on April 4, 2014, he invited them into the house. RP 202. When asked why he agreed to talk to the police, he stated, "Well, I didn't figure I had anything to hide." RP 202:21. He then clarified, "So, I, you know . . . I, I wanted - - I didn't have a problem talking with them."

On cross examination, the State's attorney went through the images captured on the game camera including frame 108 which shows the gun in the Appellant's hand. RP 223, Exhibit P-1:108. This image was captured four images after the Appellant is shown locking the door. RP 225, Exhibit P-1:104. The State's attorney further pointed out that, just before he threw M.M. onto the bed, the gun can be seen laying on the bed on top of the comforter. RP 227. The State's attorney also pointed out that, when they prepared to exit and he was hugging M.M., he was smiling with his hand on her buttocks. RP 229 - 230

At the conclusion of trial, the Court found the Appellant guilty of Attempted Rape of a Child in the Second Degree and a lesser included charge of Assault in the Fourth Degree. The Court further

found that the Appellant was armed with a firearm during the commission of the Attempted Rape of a Child charge. RP 269. CP 106 -110. In finding the enhancement and explaining the nexus to the crime, the Court stated:

> And here the handgun was placed on the bed immediately before you picked (M.M.) up and threw her on the bed. It was under the bed prior to that time and you voluntarily moved it into the field of play, so to speak, another act contributing to the total domination of this young girl.

RP 269:8-14. The Court sentenced the Appellant on October 3, 2014, and the Appellant filed a timely Notice of Appeal on October 6, 2014. Judgement and Sentence, CP 120 - 133, Notice of Appeal, CP 134 - 153.

IV. DISCUSSION

1. STATEMENTS OF THE APPELLANT WHICH WERE MADE PRIOR TO ARREST WERE PROPERLY ADMITTED AT TRIAL.

The Appellant claims that he is entitled to a new trial because the Court admitted his statements to Detective Nichols. His claim is based upon three flawed premises which he entangles into a single identifiable claim: that his statements made to Detective Nichols should not have been admitted at trial. Parsing his claims into the individual issues that are presented, the Appellant claims that the recording of the April 4, 2014 conversation between him and Ms

Mellick violated the Privacy Act, RCW 9.73 and that his admissions to Detective Nichols during the interview with him was the fruits of this illegal recording. Appellant's Opening Brief, pp. 16 - 17. He further claims that since he was not read his Miranda[4] rights, his statements to Detective Nichols were not voluntary. *Id.* at 33. Finally, he argues that the failure of the Court to hold a hearing pursuant to CrR 3.5 prior to admission of his statements necessitates reversal and remand for a new trial and hearing on the issue. *Id.* at 37. Because the Appellant did not object to the admission of his own statements based upon Privacy Act concerns, he cannot raise this issue for the first time on appeal. Further, the actions of Lewiston Police Detective Leavitt of recording the conversation in Idaho, for the purposes of furthering the Idaho investigation do not violate Washington law. Finally, despite the absence of a CrR 3.5 hearing, the record is sufficiently clear that the Appellant's statements to Detective Nichols were voluntary. As such, the statements fo the Appellant were properly admitted at trial.

A. RAP 2.5 Precludes Review Where No Objection to Admission of the Appellant's Statement Was Raised Below.

[4]Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

The Appellant is precluded from raising the issue of alleged violation of the Privacy Act and admissibility of his statements to Detective Nichols. Arguments not raised in the trial court will not be considered on appeal unless they concern a manifest error affecting a constitutional right. *See* RAP 2.5(a); State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). First, the Appellant did not object to the introduction of his statements to Detecive Nichols.[5] RP 133 - 142. The Appellant's pretrial motions in limine only requested that the recording itself and testimony concerning his statements made to Ms Mellick therein be excluded from trial. *Defacto*, the Appellant's request was granted without specific finding by the Court that the recording was illegal. He cannot now complain that the Court failed to provide him a remedy that he did not request. Pursuant to RAP 2.5, he cannot raise this issue for the first time on appeal.

The Appellant seeks to avoid this result by entangling the issue of an alleged violation of the Privacy Act with the Fifth Amendment concerns, thereby attempting to manufacture an issue of manifest constitutional error. In a footnote and without citation to any authority, the Appellant claims that violation of the Privacy Act somehow implicates his rights under Article 1, Section 7 of the Washington

[5]Not a single objection was made, on any basis, by the Appellant to any of the testimony of Detective Nichols while she discussed the statements of the Appellant during his interview at his home on April 4, 2014.

State Constitution. Appellant's Opening Brief, at pp. 18. Later, the Appellant again makes this unsupported claim[6]. *Id*, at 29 - 33. Despite his best efforts, the jurisprudence in this area is clearly settled:

> This court has clearly established that where one participant in a conversation has consented to the recording of the conversation, the recording does not violate Article I, Section 7 of the State Constitution. State v. Corliss, 123 Wn.2d 656, 663-64, 870 P.2d 317 (1994). Indeed, in State v. Salinas, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992), where a "wired" undercover informant posed as an illegal narcotics seller and secretly recorded conversations with the defendant-buyer, we observed that this constitutional issue was settled, and stated that there is no expectation of privacy under our State Constitution where one party consents to the conversation being recorded.

State v. Clark, 129 Wn.2d 211, 221, 916 P.2d 384 (1996). Arguments that RCW 9.73 somehow rises to the level of a constitutional right have been rejected. In State v. Courtney, 137 Wn. App. 376, 383, 153 P.3d 238, 242, (Div. III, 2007), the Court therein stated, "Admission of evidence in violation of the privacy act is a statutory, and not a constitutional, violation." In State v. Sengxay, 80 Wn. App. 11, 906 P.2d 368, 370-371 (Div. III, 1995), the police illegally audio recorded the defendant's custodial interview in violation of RCW

[6]As acknowledged therein, all cases cited by the Appellant refute the very claim being made and no case is cited supporting his proposition that RCW 9.73 somehow creates a constitutional right under the State Constitution.

9.73.030. Sengxay, at 15. There, the defendant did not object to testimony from the officer regarding his statements made during the illegal recording. *See id*. In that case, the Court stated:

> The Washington prohibition against videotaping a person without consent is statutory, not constitutional; therefore, Sengxay's failure to object to the testimony on this basis waived the issue.

Id. (*citing* Riley, *supra*, 121 Wn.2d at 31). In Sengxay, the testimony concerned the actual conversation that was illegally recorded. *Id*. Here, there was no testimony concerning the contents of the actual and allegedly unlawful recorded conversation. The Appellant instead claims that the illegal recording somehow tainted the subsequent, and undisputedly lawfully recorded interview. He failed to raise this clearly statutory issue below. He cannot raise it now by attempting to disguise it as one of constitution import and confuse the Privacy Act with the Fifth Amendment.

B. RCW 9.73 Does Not Apply Where Recording Was Made to Aid a Legitimate Criminal Investigation in Idaho.

Assuming *arguendo,* that this issue may be raised for the first time on appeal, the Appellant's claim that the recording in the State of Idaho by Detective Leavitt of the Lewiston Police Department was unlawful and that the subsequent confession by the Appellant is somehow fruits of this unlawful act is unsupported factually or legally. This argument assumes facts that were not determined or decided by

the trial court. No evidentiary hearing or factual finding was made by the Trial Court that the recording was a violation of RCW 9.73.030. Because the facts of this case, as born out by the record reveal that the recording was made in Idaho,[7] by Idaho law enforcement, with legitimate investigatory purposes related to crimes alleged to have been committed in Idaho, such recording did not implicate RCW 9.73.030. RCW 9.73.030 generally precludes intercepting or recording private communications in the State of Washington without the consent of all parties. The State would clearly acknowledge that, had the recording occurred in Washington, such conduct would have violated this provision. However, this was not the case herein. The test for whether a recording of a conversation or communication is lawful is determined under the laws of the place of the recording. State v. Fowler, 157 Wn.2d 387, 395, 139 P.3d 342, (2006). The recording, which occurred in Idaho, was lawful under Idaho law. It was completely appropriate for Lewiston Police to record the conversation.

There are recognized limitations on this restriction. As stated in Fowler:

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[7]As acknowledged by the Appellant, Idaho only requires "one party consent" for recordings and as such, the recording conducted herein was wholly and completely lawful under the laws of Idaho. *See* Idaho Code §16-6702(2)(d)

> Of course, RCW 9.73.030 may be violated by a recording made outside of this state if the recording was made for use of the evidence in Washington by an agent of a Washington official or other person.

Id. at 396. The State would therefore further acknowledge that, had Detective Nichols, a Washington law enforcement officer, instructed, assisted or otherwise directed the recording of the call placed by Ms Mellick. However, that is not the case here.

In Fowler, the Washington Supreme Court ruled that telephone calls lawfully recorded in Oregon were not done at the request of, with the involvement of, or as agents of Washington law enforcement officials otherwise with the intent to use the recordings in Washington, the recordings were not unlawful under RCW 9.73.030 and accordingly are not barred by RCW 9.73.050. Here, Detective Nichols did not request that the call be placed or recorded. RP 132-133. During trial, Detective Nichols testified as follows:

> Q: Without getting into the details, at some point it was suggested that a phone call be placed by Dena to Mr. Jackson?
>
> A: Correct, by Detective Leavitt.
>
> Q: What was your role in, in that decision?
>
> A: I didn't have a role in that decision. That was part of investigation that Detective Leavitt was conducting in the State of Idaho regarding the incidents that occurred in Lewiston.

RP 132 - 133. Lewiston Detective Leavitt was investigating incidents which occurred in Lewiston, Idaho. RP 132. Detective Nichols left the room while the call was placed. RP 164. She did not request that the call be placed, or that the call be recorded. Other than her presence outside the room, she had no involvement in the call or recording. The recording was being conducted for legitimate Idaho investigative purpose. The Appellant would claim that Ms Mellick was acting as an agent of Detective Nichols and the State of Washington. However, Detective Nichols specifically told her, prior to the call, that she needed to only ask questions about the Idaho incidents. *See also* State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) (*recording of appellant's statements to California police while appellant was in California did not violate RCW 9.73.030 or .090(1)(b)(i) and were properly admitted in Washington state courts statements, as they were lawfully recorded under California law, and the California police were not acting as agents of the King County police department*).

By way of illustration, had Detective Nichols not been involved at all, i.e., this matter was entirely investigated by Lewiston Police, there can be no question but that Detective Leavitt would have been fully authorized to place and record the call to the Appellant, and then go to his residence in Clarkston and interview him. The proposition espoused by the Appellant would make it illegal for an Idaho police

officer to conduct an otherwise lawful investigation under Idaho law, simply because a Washington State Officer was present for the purposes of investigating crimes in Washington. Here, there can be no question that the recording was lawful in Idaho and would be admissible at any trial in Idaho concerning crimes committed there. It is beyond dispute that law enforcement in Idaho had a legitimate law enforcement purpose. The recording was otherwise lawful, and did not violate RCW 9.73.030 under State v. Fowler, *supra*[8]. As such, the Appellant's privacy rights were not violated or implicated by a recording made in Idaho for legitimate law enforcement purposes.

C. The Appellant Was Clearly Not in Custody, His Statements Was Not Coerced, and Was Therefore Properly Admitted at Trial Without a Hearing under CrR 3.5.

The Appellant finally claims that his confession was not voluntary as he was not advised of his Miranda rights and that the Court's failure to hold a CrR 3.5 hearing constitutes reversible error. Based upon the trial record, it is more than clear that the Appellant was not in custody, nor was his statement coerced. Therefore, the

[8]The State does not assert that an officer from Washington State could simply go to a neighboring state and have the witness place the call for the purposes of avoiding application of RCW 9.73.030, nor would the State argue that involvement of Idaho authorities in a "sham" investigation resulting in a "one party consent" recorded call. Those are not the facts of this case and this Court need not decide those situations. Where, as here, there is a legitimate and bona fide investigation by Idaho law enforcement, RCW 9.73.030 should not apply to preclude them from utilizing otherwise lawful law enforcement investigative techniques.

trial court properly admitted his statements, even in the absence of a formal CrR 3.5 hearing.

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Police must give Miranda warnings when a suspect is subject to interrogation while in the coercive environment of police custody. *See* State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). "Without Miranda warnings, a suspect's statements during custodial interrogation are presumed involuntary." Heritage, 152 Wn.2d at 214. On the other hand, a defendant's statements made in a noncustodial setting are voluntary and therefore admissible if, under the totality of the circumstances, the statement was not coerced. *See* State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997).

The Appellant was contacted at his home, but this fact alone is not dispositive. *See* Orozco v. Texas, 394 U.S. 324, 326-27, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969); State v. Dennis, 16 Wn. App. 417, 421, 558 P.2d 297 (Div. II, 1976) *(police questioning within a suspect's home may be custodial.)* A suspect is in custody for purposes of Miranda when "a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." Heritage, 152 Wn.2d at 218

(*citing* Berkemer v. McCarty, 468 U.S. 420, 441-42, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). Whether a suspect is in custody is determined by the totality of the circumstances. United States v. Craighead, 539 F.3d 1073, 1082 (9th Cir. 2008). In State v. Rosas-Miranda, 176 Wn. App. 773, 783, 309 P.3d 728 (Div II, 2013), the Court identified four criteria for determining whether the suspect was in custody when questioned:

> (1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.

Here, the Appellant was contacted at his home by only two officers. While they were presumably armed, there is no indication that they had their guns drawn when they approached or entered the residence. The Appellant invited the detectives into the house and stated he had been expecting them. There was no force or restraint prior to or during the interview. While the record reflects that no one else was present, this was due to the fact that the Appellant lived alone at the time. No one had been excluded or removed from the residence. The Appellant was asked of he would talk with the detectives and he agreed to do so. Further, he agreed to be recorded. There is no indication that the Appellant was told he could

terminate the interview, but during the interview the Appellant requested that the recorder be stopped and his request was honored. Clearly, he recognized that the interview was voluntary and that he was not in custody. He was only placed in custody at the conclusion of the interview. RP 142. Because the Appellant was not in custody when he was interviewed by Detectives Nichols and Leavitt, his statements are admissible assuming they were not coerced. *See* Broadway, *supra*.

As to the interview, the Appellant made no complaints that he was forced, compelled, or coerced into speaking with the detectives. At this point, the Appellant raises the recorded phone call and asserts that this somehow tainted his confession. It should be noted that there is no evidence or even indication, in the record or elsewhere, that the Appellant was aware of the recording by Lewiston Police at the time he spoke with the detectives at his home or that the detectives otherwise exploited that fact of the recording when speaking with him. Had the police not recorded the conversation, they certainly would have spoken with Ms Mellick concerning statements the Appellant made to her and further, they certainly would have made contact with the Appellant for the purpose of

interviewing him regarding the allegations herein. The fact that the call was recorded[9]

is of no consequence to whether his confession was otherwise voluntary. More to the point, the Appellant testified at trial that he didn't have a problem talking to the detectives. RP 203:3-4.

Finally, as to the admission at trial of the Appellant's statements to Detective Nichols, he complains that the Court failed to hold a hearing under CrR 3.5.[10] the failure of the Court to hold a hearing pursuant to CrR 3.5 is of no consequence, under the facts of this case.

Before introducing a defendant's statement, a trial court must hold a hearing to determine whether the statement was voluntary. *See* CrR 3.5. Failure to hold a hearing, however, does not render a statement inadmissible where the record indicates there is no question that it was freely made. *See* State v. Kidd, 36 Wn. App. 503, 509, 674 P.2d 674 (Div. I, 1983) (*citing* State v. Harris, 14 Wn. App.

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[9]It should be noted that it was not the fact of the phone call but the recording thereof that would have been illegal under Washington's Privacy Act, RCW 9.73, if it were applicable to a call recorded in Idaho.

[10]In his brief, the Appellant claims that he requested a hearing pursuant to CrR 3.5 but the Court reserved the issue. *See* Omnibus Application by Plaintiff and Defendant, CP 29-32. Counsel for the Appellant would not be aware of local practice in Asotin County Superior Court where the parties not only check of the motions on the Joint Omnibus Application for as provided in CrR 4.5, but mark the corresponding blank for "granted," "denied," or "reserved" according to the party's desires. Only if there is a dispute will the Court make changes. Therefore, it was the Appellant's request that a hearing pursuant to CrR 3.5 be reserved and the Court merely acquiesced to his request.

414, 422, 542 P.2d 122 (Div. II, 1975)). Here, as shown above and on the record at trial, the Appellant was at his home when contacted and not otherwise detained in custody nor were his statements coerced. They were therefore admissible at trial, the lack of defense objection attesting to this obvious fact. *See* Broadway, *supra*.

2. IMPOSITION OF A FIREARM ENHANCEMENT WAS PROPER WHERE THE FIREARM WAS USED IN THE COURSE OF AND IN FURTHERANCE OF THE CRIME OF ATTEMPTED RAPE OF A CHILD IN THE SECOND DEGREE.

The Appellant also claims that the Court erred in finding that he was armed with a firearm when he committed the crime of Attempted Rape of a Child in the Second Degree. The Appellant breaks this claim out into four separate sub-issues, but ultimately this boils down to a challenge to the sufficiency of the evidence to support the special verdict finding. *See* State v. O'Neal, 126 Wn. App. 395, 424, 109 P.3d 429, 443, (Div. II, 2005)(*applying the "sufficiency of the evidence" test to factual challenge to a firearm enhancement special verdict.*). In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, a rational trier of fact could have found guilt beyond a reasonable doubt. Salinas, 119 Wn.2d at 201. The Appellant Court must defer to the fact finder's

resolution of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. O'Neal, 126 Wn. App. at 424.

A defendant is "armed" when he or his accomplice is within proximity of an easily accessible and readily available deadly weapon, for either offensive or defensive purposes. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

Here, the Appellant locked the bedroom door, retrieved the gun from under the bed, placed it onto the bed, threw M.M. onto the bed, got on top of her and began kissing and groping her. It was during this time that he asked her what she would do if he raped her. Clearly the gun was easily accessible and readily available for offensive or defensive purposes. As noted by the Court, placing it on the bed put it into "the field of play" and contributed to "the total domination of this young girl." RP 269. The Appellant used it to create an atmosphere of intimidation.

The Appellant argues that use of the weapon or "nexus" to the crime is required. This is not the law where, as here, the defendant's possession was not constructive but actual.[11] *See* State v.

[11]While the Trial Court considered this nexus requirement in it's pronouncement of verdict, such discussion was not necessary as demonstrated below.

Hernandez, 172 Wn. App. 537, 290 P.3d 1052 (Div. II, 2012). Therein, the Court stated:

> We have previously held that the "nexus" requirement is not applicable to firearm enhancements when there is actual, not constructive, possession of a firearm. State v. Easterlin, 126 Wn. App. 170, 173, 107 P.3d 773 (2005), *aff'd on other grounds*, 159 Wn.2d 203, 149 P.3d 366 (2006) (our Supreme Court has affirmed this concept); See Easterlin, 159 Wn.2d at 209 (*concluding that in actual possession cases, it will rarely be necessary to go beyond the commonly used "readily accessible and easily available" instruction*. So even if we were considering a firearm enhancement, a "nexus" finding is not required because the possession was actual, not constructive.

Hernandez, at 544, *review denied*, 177 Wn.2d 1022, 303 P.3d 1064, (2013). Here, the Appellant not only handled to gun, he placed it on the bed, and later grabbed it and held it out to M.M., insisting that she shoot him with it. The Appellant's reliance on State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007) is likewise misplaced. There, during a burglary, the defendant or his accomplice merely moved the gun from a closet to a nearby bed, leaving it behind when they left. Brown at 430 - 431. The Brown case could best be described a case of "fleeting possession" which doesn't constitute possession under Washington law. See State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Even under the Appellant"s proffered standard, the Appellant was armed with a firearm as the gun was clearly at the ready and available. Further, the Appellant used the gun, along with

his frightening inquiry regarding raping her, to create an atmosphere of intimidation. Further, when M.M. began to cry, he used the firearm to manipulate her into seeing him as the victim, in hope that she either wouldn't say anything to anyone or might acquiesce to his advances. Under either standard, the Appellant was armed with the gun. The Trial Court's special verdict was supported by the evidence.

3. ISSUES RAISED IN THE APPELLANT STATEMENT OF ADDITIONAL GROUNDS DO NOT MERIT RELIEF.

The Appellant filed with the Court a Statement of Additional Grounds wherein he takes umbrage with trial counsel's performance. In order to show that he received ineffective assistance of counsel, The Appellant must show (1) that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (*citing* State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). Competency of counsel is determined based on the entire record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (*citing* State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). "Deficient performance is not shown by matters that go to trial strategy or tactics." State v. Cienfuegos, 144 Wn.2d 222, 227, 25

P.3d 1011 (2001) (*quoting* State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Courts maintain a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

The Appellant's SAG makes two basic claims: 1) that his attorney didn't ask certain questions concerning the victim's credibility or allow him to disparage the victim at trial, and 2) that his attorney failed to offer evidence that the Appellant's statement to the police contained jokes which were "taken out of context."

With regard to the Appellant's claim concerning the failure to ask certain questions or disparage the victim, these claims rely on information outside the record and therefore cannot be reviewed on appeal. *See* State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)(*matters outside the record not addressed on appeal*). Here, the Appellant fails to even identify what questions trial counsel could have asked or what information the Appellant was prevented from introducing concerning the victim which would have had any impact on the outcome of the trial. Further, the decision not to slander a child victim of a sex crime is a tactical decision and cannot provide the basis for a claim of ineffective assistance of counsel. *See* Cienfuegos, *supra.*

With regard to his claim that his attorney did not elicit evidence that certain statements to law enforcement were "jokes and/or taken

out of context," the record does not support his assertion. The Appellant testified at trial and had ample opportunity to explain his statements to the detectives. On direct examination, the Appellant testified concerning statements he made to the detectives after he asked that the recorder be turned off. RP 201. It was during that time that he told the detectives about an incident where he pulled down his pants after the victim's pants came down during a tickling incident. RP 136 - 137, 141. The Appellant explained on direct examination that he claimed that the event therein described by him was not true and that he had only told the story "to make a point." RP 203 - 204. On cross examination, the Appellant admitted telling the officers about this incident and that during the incident, he had an "evil thought." RP 214 - 215. He again reiterated that the statement, while made by him, was not true. RP 215.

The claims made by the Appellant in his Statement of Additional Grounds are, in one case, not supported by facts in the record, and in the other case, refuted by the record itself. He fails to raise any issues meriting consideration, much less reversal of his conviction. On these bases, this appeal should be denied and an order affirming the Appellant's conviction should enter.

V. CONCLUSION

Based upon the above, the Appellant's statements to Detective Nichols were properly admitted. The recorded phone call was not illegal as it occurred in Idaho and was made for the purposes of the Idaho investigation, and in any case, his subsequent confession was not the fruit thereof. His statements to detectives were voluntary, and based upon the record herein, no CrR 3.5 hearing was necessary. Finally, the Trial Court properly found that the Appellant was armed with a firearm at the time he committed this shocking crime. The Appellant fails to raise any additional claims meriting the relief he requests. The State would request that this Court affirm the verdict of the Trial Court and deny this appeal.

Dated this 2nd day of June, 2015.

Respectfully submitted,

CURT L. LIEDKIE, WSBA #30371
Attorney for Respondent
Deputy Prosecuting Attorney for Asotin County
P.O. Box 220
Asotin, Washington 99402
(509) 243-2061

COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. LYNN L. JACKSON, Appellant.	Court of Appeals No: 32808-2 **DECLARATION OF SERVICE**

DECLARATION

On June 3, 2015 I electronically mailed Ms. LeLand, a copy of the BRIEF OF RESPONDENT in this matter to:

COLLETTE C. LELAND
ccl@winstoncashatt.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on June 3, 2015.

Lisa M Webber

LISA M. WEBBER
Office Manager

Benjamin C. Nichols, Prosecuting Attorney
P. O. Box 220, Asotin, WA 99402
(509) 243-2061