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NO. 34110-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. TODD HENDERLING , Appellant
FROM THE SUPERIOR COURT FOR CLARK COUNTY THE HONORABLE JOHN P. WULLE CLARK COUNTY SUPERIOR COURT CAUSE NO. No. 04-1-01253-8
RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

A. Factual History

On June 21, 2004 fifteen year old T.I.T. (female, DOB 2/22/1989) reported to Officer Aaron Kanooth of the Battle Ground Police Department that she was sexually assaulted by Todd Henderling at his residence at 319 North Parkway Avenue in Battle Ground Washington, on or about June 18, 2004. (R. P. (Vol. I) pgs 54- 56, 69, 78-79)

T.I.T. and her friend A.K.A. (female, DOB 3/6/90) made plans to go over to the Henderlings residence on Friday, June 18, 2004. (R. P. (Vol. I) pgs 56-57)

T.I.T. and A.K.A. had previously asked Henderling to “pretend” to need a babysitter that night so that they could come over under the guise of babysitting. (R. P. (Vol. I) pg 57) The reason T.I.T. went to Henderling’s residence was for the purpose of drinking and smoking marijuana. (R. P. (Vol. I) pg 56) When they arrived at the residence, there was another female, and at least a couple of Henderling’s children present.(R. P. (Vol. I) pg 56) Henderling left the residence and returned about two hours later with marijuana and alcohol. (R. P. (Vol. I) pg. 57 and pg 90-91)

T.I.T estimated that she consumed about 7-16 oz. cans of beer during the evening. (R. P. (Vol. I) pgs 57 and 74) T.I.T. stated that she and A.K.A. also shared two bowls of marijuana, using a bong Henderling kept in his bedroom. (R. P. (Vol. I) pg 58)

The next thing T.I.T. remembers about the evening was sitting on Henderling's couch in his bedroom with her pants off, not knowing how her pants had been removed. (R. P. (Vol. I) pg 62) T.I.T. was under the influence of both marijuana and alcohol, both of which had been provided by Henderling. (R. P. (Vol. I) pg 58, 62-64) Henderling began to rub the inside of T.I.T.'s upper thigh. T.I.T. pushed him away several times. Henderling then got on the floor and tried to push his head between T.I.T.'s legs. (R. P. (Vol. I) pgs 62-63) T.I.T. kept trying to push Henderling away. Henderling kept persisting and T.I.T. finally gave up. (R. P. (Vol. I) pgs 63) She was feeling tired and exhausted and wanted to just pass out. Henderling then began to lick her vagina. Henderling then put his penis inside of T.I.T.'s vagina. (R. P. (Vol. I) pg 63) T.I.T. says that after a while she realized what was going on and was able to push herself off of the couch and Henderling's penis came out of her vagina. (R. P. (Vol. I) pg 64) T.I.T. then went into the bathroom.

After coming out of the bathroom T.I.T. and A.K.A. got into bed and fell asleep. (R. P. (Vol. I) pg 64)

Tammy Camp is T.I.T.'s mother. 137 Ms. testified that her daughter's date of birth date was on 2/22/1989. (R. P. (Vol. I) pg 137.) Ms. Camp indicated that she had spoken to Henderling on the phone on the 22nd of June 2006. (R. P. (Vol. I) pg 138.) Henderling told Ms. Camp that he was sorry for what happened and that it shouldn't have happened. (R. P. (Vol. I) pg 138) Ms. Camp testified that she knew the defendant to be 38 or 39 years of age, as he was the brother of (R. P. (Vol. I) pg 138)

Henderling told Camp it would never happen again and it was very dumb on his part. (R. P. (Vol. I) pg 138) Further, that it was a bad choice he made. (R. P. (Vol. I) pg 138) He also told Camp that he was pretty sure she didn't want to hear the details. (R. P. (Vol. I) pg 138) At trial during his testimony Henderling confirmed the he had made the call to Tammy Camp, but that it was all related to minors consuming alcohol. (R. P. (Vol. I) pgs 156).

Officer Kanooth collected the underwear T.I.T was wearing the night of the incident. (R. P. (Vol. I) pg 80) The underwear was packaged and placed into evidence. (R. P. (Vol. I) pg 80) The

underwear was sent to the Washington State Patrol Crime Laboratory. Forensic Scientist Kenneth McDermott tested the underpants and concluded that semen was detected in a portion of a whitish stain from the inner crotch of the underpants. (R. P. (Vol. I) pg 105, 108-110) McDermott prepared a DNA extract that was sent to Seriological Research Institute in Richmond, California, for further testing. (R. P. (Vol. I) pg 115)

Officer Glenn Erickson from the Battleground Police Department testified that he questioned Henderling about the facts surrounding T.I.T. and A.K.A. being at his home on the night of the incident. (R. P. (Vol. I) pg 90)

Officer Erickson's testimony was that Mr. Henderling said that T.I.T. and A.K.A. came to his residence on the premise of that they were going to baby sit. (R. P. (Vol. I) pg 90). Officer Erickson testified that Henderling testified that he had left the house and returned with a six pack of Budweiser. (R. P. (Vol. I) pg 91). Officer Erickson testified that Henderling stated that when he returned the girls (T.I.T. and A.K.A) were interested in smoking some marijuana. (R. P. (Vol. I) pg 91) Officer Erickson testified that Henderling stated that he made a bong out of a Pepsi can, he smoked the marijuana with T.I.T. and A.K.A. (R. P. (Vol. I) pg 91).

This was marijuana that Henderling had provided. (R. P. (Vol. I) pg 91) Officer Erickson testified that Henderling stated he also provided the girls with alcoholic beverages that night. (R. P. (Vol. I) pgs 91-92)

At trial Henderling testified that he had told Officer Erickson that T.I.T. had “snuck into the beer and that was behind his back.” (R. P. (Vol. I) pg 155). Further, Henderling denied making any of the admissions set out above to Officer Erickson. (R. P. (Vol. I) pg 159). However, Henderling did admit under oath that he had consumed alcohol and smoke marijuana that night. (R. P. (Vol. I) pg 159.) Henderling testified that he didn’t have sex relations of any kind with T.I.T. on the 18th of June 2004. (R. P. (Vol. I) pg 160)

Officer Glenn Erickson from the Battleground Police Department obtained an oral swab of D.N.A. from Henderling pursuant to an order of the court. (R. P. (Vol. I) pgs 96- 97) This was also sent to the Seriological Research Institute. (R. P. (Vol. I) pg 97)

Forensic Serologist Angela Butler tested the DNA sample’s using Y-STR testing Analysis. Forensic Serologist Butler concluded that the Y-STR profile from the DNA extract from the underpants was the same as the Y-STR profile generated from

Henderling's DNA sample. (R. P. (Vol. I) pg 134) Butler further explained that this profile has been observed in 25 of 3406(0.73%) of the population. R. P. (Vol. I) pg (134).

B. Procedural History

On the 25th of June 2004, the defendant was charged by information of with the following four counts; Count 1: Rape In The Second Degree; Count 2: Rape Of A Child In The Third Degree ; Count 3 - Furnishing Liquor To Minors; Count 4 - Over 18 And Deliver A Narcotic From Schedule Iii-V, or A Nonnarcotic From Schedule I-V To Someone Under 18 And 3 Years Junior.) CP 5.

On the 8th of July 2004, the defendant was arraigned on the above information. CP 10 Trial was set to be held on the 29th of September 2004. CP 10

On the 21st of September 2004, the state moved the court for an order to allow for an oral swab of the defendant. R. P. (Vol. I) pg (5-8)This was granted. Futher, the state explained that the intent was to send the swab and the piece of evidence containing the biological matter out of state. R. P. (Vol. I) pgs 5-8) The court ordered the taking of the biological sample. R. P. (Vol. I) pgs 5-8) The prosecutor informed the court that she was informed by the

Washington State Lab that the out of state test was needed as it was more accurate. R. P. (Vol. I) pg 6) Washington State Lab' own scientist Kenneth McDermott. R. P. (Vol. I) pg 5-8). At that point, the prosecutor had just received information 2 days earlier, that the item was processed by the state lab and found to be positive for biological matter. R. P. (Vol. I) pg 8) However, it had not yet been processed for DNA other than for detection or "collection" of the biological matter for the above reason. R. P. (Vol. I) pg 5)

The court's inquiry of the prosecutor was at that point to question the prosecutor as to the potential outcome of the test, confirming that it could be potentially exculpatory. R. P. (Vol. I) pg 8) The matter was set over to the 23rd of September 2004 allow all sides the opportunity to provide the court with authority and further argument. R. P. (Vol. I) pg 11).

On the 23rd of September 2004, the court heard a the continuation of the state's motion to continue on the grounds that the state required time to have a DNA swab processed out of state. The defense objected on the grounds that they were ready to proceed. R. P. (Vol. I) pg 17) No other evidence of prejudice was offered. R. P. (Vol. I) pgs 17-24)

The court found that on the ground that the result could be exculpatory, just as easily as it could inculcate the defendant that this was continuance founded in the interest of the “proper administration of justice.” (R. P. (Vol. I) pg 19)

The matter proceeded to trial on the 13th of December 2004. There were instructions submitted to the jury on Count 2, Count 3, and Count 4, that did included within the “To convict” instructions the victim’s initials and her date of birth. CP 99-103. Counsel for both the state and the defense adopted the above instructions as appropriate. ((R. P. (Vol. II) pg 167)

On the 14th of December 2004, the jury deliberated for just under four hours and returned the following verdicts: a not guilty as to Count 1; Guilty as to Count 2; Guilty as to Count 3; and Guilty as to Count 4. ((R. P. (Vol. II) pgs 199 to 201), CP 59, CP 60, CP 61.

On the 22nd of April 2005, the defendant was sentenced to 100 months on Count 4; and top of the range on Counts 2 and Count 3, as Count 4 was the matter with the greatest range. ((R. P. (Vol. II) pg 211), CP 73.

II. RESPONSES TO THE ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

- 1. WHETHER THE COURT ABUSED ITS DISCRETION UPON GRANTING THE STATE'S MOTION TO CONTINUE TRIAL BY FINDING THAT THE REQUESTED DNA TEST WAS IN THE INTEREST IN ADMINISTRATION OF JUSTICE?**
- 2. WHETHER "TO CONVICT" CONTAINED A JUDICIAL COMMENT ON THE EVIDENCE SUCH THAT IT CONSTITUTED SUCH ERROR REQUIRING A REMEDY OF REMAND TO THE TRIAL COURT FOR A NEW TRIAL?**
- 3. WHETHER THE INFORMATION, AS TO COUNT 4, CONTAINED A DEFECT WHICH WOULD MANDATED REVERSAL AND DISMISSALS?**

B. SUMMARY RESPONSE TO ASSIGNMENTS OF ERROR

- 1. THE TRIAL COURT CORRECTLY EXERCISED DISCRETION WHEN GRANTING THE CONTINUANCE OF THE TRIAL WHICH IN NO WAY PREJUDICED THE DEFENDANT.**
- 2. THE RECORD CLEARLY SUPPORTS A FINDING THAT ALTHOUGH THE INSTRUCTIONS SUBMITTED TO THE JURY WERE DEFECTIVE, THAT THERE IS SUFFICIENT EVIDENCE THAT THE ERROR WAS HARMLESS.**
- 3. THE RESPONDENT FAILED TO DEMONSTRATE PREJUDICE AND FURTHER, WHEN OBSERVING THE TOTALITY OF THE COUNTS, ANY EXISTING DEFECT IN CHARGING DOCUMENT WAS HARMLESS.**

III. DISCUSSION

A. THE TRIAL COURT CORRECTLY EXERCISED DISCRETION WHEN GRANTING THE CONTINUANCE OF THE TRIAL WHICH IN NO WAY PREJUDICED THE DEFENDANT.

Generally, trial within 60 (or 90) days is not a constitutional mandate, and a trial court's grant or denial of a motion for continuance will not be disturbed on appeal absent a showing of manifest abuse of discretion. *State v. Brown*, 40 Wn. App. 91, 697 P.2d 583, review denied, 103 Wn.2d 1041 (1985).

A grant or denial of a motion for continuance will not be disturbed absent a showing of manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). A continuance granted by the trial court is an abuse of discretion only if it can be said that the decision was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *In re Det of Schuoler*, 106 Wn.2d

500, 512, 723 P.2d 1103 (1986) (see also *State v. Enstone*, 137 Wn.2d 675, 679, 680 (1999).)

A trial court abuses its discretion only if no reasonable person would take its position or would have decided the issue as the trial court did. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994).

CrR.3.3 (f) provides in pertinent part:

Continuances or other delays may be granted as follows:

(1) Written agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the court or a party. On motion of the court or a party, the court may continue the trial date to a specified date **when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense**. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

The question of whether such an "abuse" occurred is measured in no small part in the review of the record in the instant matter. In this matter the Honorable Judge John P. Wulle was informed that the state was seeking a new type of DNA test at the behest of the Washington State Lab's own scientist Kenneth McDermott. The court indicated that the state's requested continuance could result in either inculpatory, or equally if not more important exculpatory evidence. This would have

put the state in possession of evidence post conviction that would be in line with *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

The Supreme Court has addressed fact pattern very similar to the instant matter in *State v. Ford*, 125 Wn.2d 919, 891 P.2d 712 (1995). In *Ford* the defendant was being arraigned in King County Superior Court on April 27, 1994 on three counts of first degree murder.

The defendant, being represented by counsel expressed his desire to proffer a plea of guilty, as he had a right to do under the criminal rules. *Id* at 921 The prosecutor immediately moved for a continuance of the arraignment, stating he possessed potentially exculpatory material which needed to be disclosed to the Defendant prior to any plea should be entered. *Id*

The court granted the motion to continue the continuance. *Id*. The arraignment was set over by the trial court for 1 week. A week later at the arraignment the state amended the charges to aggravated murder in the first degree, thereby exposing the defendant to the death penalty. *Id*.

The defendant sought immediate review by the appellate courts and the matter was stayed pending the resolution of the issue. *Id.* at 921. The State Supreme court affirmed the trial court. *Id.* at 927. At issue was the scope of the right to plead guilty within the court rule (see *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980).) versus the right of the state to request for time in order to secure information which may prove to be exculpatory.

The court in *Ford* cited to CrR 3.3(h)(2) which set forth standards governing the granting of continuances. It provides in relevant part: "On motion of the State, the court or a party, the court may continue the case when required **in the administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense**" *Id.* at 927.

The court found the following:

There is a second component to the rule governing continuances. "[T]he court may continue the case when . . . the defendant will not be substantially prejudiced in the presentation of the defense." *CrR 3.3(h)(2)*. As the tense of the language indicates, we review whether the defendant was substantially prejudiced in the presentation of the defense *at the time the continuance was granted*. The rule does not require judges to be clairvoyant; neither does the language allow a reviewing court to indulge in Monday-morning quarterbacking. At the time the continuance was granted, there was no reason to suspect the Defendant would be in any way prejudiced in the presentation of the defense by a week's continuance. **To the contrary, the trial court at the time had ample reason to believe the**

weeklong continuance would enhance the presentation of the defense. The events of the week following the continuance cannot be retroactively imported and used to impugn the trial court's decision at the time. We find no manifest abuse of discretion in the trial court's decision to grant the continuance. *Id.* at 927

In the instant case the court engaged in an identical analysis. Although, in the instant case there was even more specific information by which the court could conclude that the basis for the continuance could lead to exculpatory evidence or inculpatory evidence. The Respondent hasn't shown prejudice. In *Ford*, there was the clear specter of potential exposure, but the court could only apply discretion to the facts before it, in light of the other potential outcome the state securing exculpatory evidence and possessing it after the defendant had entered his plea.

Judge John P. Wulle was in the same position. He acted with the interest of administration of justice to both parties, and should not be held to a standard of clairvoyance. The Hon. Judge Wulle did not abuse his discretion, and further at no time, neither at trial nor in any appellate pleading has the Respondent demonstrated how he was prejudiced by the continuance.

Although this assignment of error was well intended it is clearly not supported by the facts or the existing law and is without merit.

B. THE RECORD CLEARLY SUPPORTS A FINDING THAT ALTHOUGH THE INSTRUCTIONS SUBMITTED TO THE JURY WERE DEFECTIVE, THAT THERE IS SUFFICIENT EVIDENCE THAT THE ERROR WAS HARMLESS.

The defense reliance on *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006) is misplaced in application to the instant case. A brief review of the case law prior to the recent holding in *Jackman* is necessary to better understand and distinguish the instant matter.

The court of appeals recently addressed this in *State v. Zimmerman*, 130 Wn. App. 170, 174, 121 P.3d 1216 (2005) review granted, 157 Wn.2d 1012, 138 P.3d 113, (Wash. July 7, 2006).

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law... It is thus error for a judge to instruct the jury that 'matters of fact have been established as a matter of law.'... This prohibits judges from influencing the judgment of the jury on what the testimony proved or failed to prove. *Id.*

Recently, in *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006), the Washington State Supreme Court stated that judicial

comment in a jury instruction is **not a structural error or prejudicial per se**. The court in *Levy* went on to state that “it is presumed prejudicial, and the State bears the burden of showing the absence of prejudice, unless the record affirmatively shows no prejudice could have resulted.” *Id.*

Finally, in *State v. Baxter*, 134 Wn. App. 587; 141 P.3d 92 (August 15, 2006 Div. II) a recently issued post-*Jackman* opinion further clarified the need to engage in a close review of the facts as compared to those set out in *Jackman*.

In *Baxter* the court was reviewing a conviction of arising from an underlying Assault of a Child in the Second Degree with instructional error identical to that in *Jackman*. In *Baxter*, the court in Division II didn’t apply a strict prejudicial per se rule in light of *Jackman*. Rather, *Baxter* was distinguished on a factual analysis. *Id* at 596.

In *Baxter*, the defendant had circumcised an 8 year old child at home in a bath tub. *Id* at 591. The court looked at the facts in *Jackman* and distinguished it as to the victim in contrast, was only eight years old, and the age threshold was thirteen. *Id* at 596.

Further that considering this age discrepancy, combined with Baxter's admission on a 911 tape, and the corroborating evidence, such as a paramedic's testimony that he had noted victim's birthdate, and two other witnesses testified that the victim was approximately eight years old. *Id.* The court stated "it is not conceivable that a jury would have found this element unproven absent the inappropriate comment. Accordingly, the record affirmatively shows that no prejudice could have resulted, and the error was harmless" *Id.* at 595, 596.

In the instant case the victim testified as to her age and her date of birth. However, more importantly, the victims' mother Tammy Camp also testified as to her daughters date of birth . The Respondent argued that Ms. Camp is a bias witness. A careful review of her testimony dispels this fallacy. At trial, The Respondent adopted, confirmed and/or agreed with every portion of Ms. Camp's testimony.

The defendant stated that he called and apologized to Ms. Camp. Ms. Camp testified that the call occurred and that an apology was received. She indicated that it occurred at the same date as the defendant then indicated in his testimony. The only

difference between their testimony was the Respondent gave more detail about what his comments meant. Finally, the Respondent actually used Ms. Camp's testimony to lend credibility to his own.

Another distinguishing fact important to highlight, was the defendant's admission to providing the victim with alcohol and marijuana was, which was admitted through the testimony of Officer Erickson.

It is clear the instant case bears a closer resemblance to *Baxter*, than *Jackman*. Further, that the state has affirmatively shown that no prejudice could have resulted, and the error was harmless. Therefore, the state respectfully requests that the court deny this assignment as it is without merit.

C. THE RESPONDENT FAILED TO DEMONSTRATE PREJUDICE AND FURTHER, WHEN OBSERVING THE TOTALITY OF THE COUNTS ANY EXISTING DEFECT IN THE CHARGING DOCUMENT WAS HARMLESS.

The Respondent assigned error to the content of Count 4 of the original information in this matter.

Count 4 reads as follows:

COUNT 04 - OVER 18 AND DELIVER A NARCOTIC FROM SCHEDULE III-V, OR A NONNARCOTIC FROM SCHEDULE I-V TO SOMEONE UNDER 18 AND 3 YEARS JUNIOR) - 69.50.406(b)/69.50.204(c)(14)

That he, TODD E HENDERLING, in the County of Clark, State of Washington, on or about June 18, 2004 being over eighteen years of age did distribute Marijuana, a non-narcotic controlled substance classified under RCW 69.50.204(c)(14), to a person under eighteen years of age and three years his junior, to-wit: T.I.T.(female, DOB: 2/22/89), in violation of RCW 69.50.401 (a), contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Washington.

Count 4 is predicated upon RCW 69.50.406 (b) which in pertinent part reads:

(b) Any person eighteen years of age or over who violates *RCW 69.50.401(a)* by distributing any other controlled substance listed in Schedules I, II, III, IV, and V to a person under eighteen years of age who is at least three years his junior is punishable by the fine authorized by *RCW 69.50.401(a)(1) (iii)*, (iv), or (v), by a term of imprisonment up to twice that authorized by *RCW 69.50.401(a)(1) (iii)*, (iv), or (v), or both. (69.50.401(b) prior to July 1, 2004)

To simplify the following analysis and argument the state is prepared to stipulate that “knowledge” is a non-statutory element of delivery. Further, the state is prepared to stipulate that this term is not contained within the information as to Count 4 (set out above) specifically, or generally. However, even in consideration of these

stipulations we also agree this was not raised at the trial level. Therefore, it is also agreed that this issue has been raised for the first time on appeal.

It is well settled that charging documents that are not challenged prior to conviction are generally construed more liberally construed in favor of validity, than those challenged at trial. *State v. Kjorsvik*, 117 Wash. 2d 93, 103, 812 P.2d 86 (1991).

Therefore, it appears that the Respondent's reliance on *State v. Kitchen*, 61 Wash. App. 915, 812 P.2d 888, *review denied*, 117 Wash. 2d 1019, 818 P.2d 1099 (1991) was misapplied and misplaced.

The misapplication can be best highlighted in looking to the fact that the Respondent failed to complete the analysis set out in *Kitchen*. Looking specifically at the test the court stated the defendant must demonstrate:

1. Do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so,
2. can **the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?** *Id* 918. (citing to *Kjorsvik*, 117 Wash. 2d 93, 103)

As stated above the first prong appears to be satisfied.

However, the Respondent never met his burden in the application

of the second prong. This was the whole point of the creation of the test by the court in *Kjorsvik*. Therefore, in that the Respondent failed to demonstrate or address the second prong his assignment of error is without merit, and the state respectfully requests that the Respondent's conviction as to count 4 be affirmed.

However, in the alternative it should be noted that even if the second prong of the test had been addressed the Respondent's argument would not be able to demonstrate that he was prejudiced, and thereby, the reliance on *Kitchen* is misplaced for the following reasons.

This question was addressed in *State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993), which has a great deal of factual similarity to the instant case.

Valdobinos was a case which involved co-defendants: Mr. Valdobinos; and Mr. Garibay. *Id* at 275. Mr. Garibay was charged with: possession, delivery and conspiracy to deliver cocaine. *Id*. Mr. Garibay was convicted of these counts after a stipulated facts bench trial. *Id*. Mr. Garibay challenged the sufficiency of the information for the first time on appeal. *Id*. The court in *Valdobinos* applied the rule set out in *Kjorsvik* to the facts in Mr. Garibay's matter.

The court in *Valdobinos* stated the following:

The application of the test in *Kjorsvik* indicates the charging documents in this case were not deficient. In *Kjorsvik*, we held that the term "unlawfully" sufficed to convey the "intent to steal" element of robbery. (citing to *Kjorsvik*, 117 Wash. 2d at 110. **In reaching this conclusion, we examined all the language in the information, "reading it as a whole and in a commonsense manner".** (citing to *Kjorsvik*, at 110-11.)

Applying this approach to the various counts in this case mandates a similar result. The information charged Garibay not only with delivery of a controlled substance, but also with conspiracy to deliver a controlled substance and intent to deliver a controlled substance, and alleged facts to that effect. **It is inconceivable that Garibay would not have been on notice that he was accused of knowing the substance in question was cocaine.** Therefore, reading the information as a whole and in a commonsense manner, the failure to include "guilty knowledge" in count 1 does not render the information constitutionally inadequate. (n4) *Id.* at 286.

Further, The court in *Valdobinos* specifically distinguished the facts in Mr. Garibay's matter from the scenario in *Kitchen* in footnote number four referenced at the end of quote set out above. In that footnote the court in *Valdobinos* stated that:

n4 This case is thus different from *State v. Kitchen*, 61 Wash. App. 915, 812 P.2d 888, review denied, 117 Wash. 2d 1019, 818 P.2d 1099 (1991), in which there was no indication the defendants could have been on notice about their

knowledge of the product being delivered. See *Kitchen* (reversing the judgment because the informations charging unlawful delivery failed to allege the defendants acted with guilty knowledge of the nature of the product being delivered). *Id.*

In the instant case the application of “Common Sense” to the facts yields a result identical to the courts conclusion in *Valdobinos*.

The record at trial in the instant matter includes the following facts :

- The Respondent admitted to Officer Erickson that the victim came to his house under the “premise” of that they were going to baby sit;
- The Respondent admitted to Officer Erickson that he supplied the victim with Alcohol;
- The Respondent, admitted to Officer Erickson that he supplied the victim with Marijuana; and
- The Respondent admitted during his own testimony that he smoked Marijuana.

Further, the allegations related to the Rape in the Second Degree (Count 1): and the Rape of a Child in the Third degree (Count 2) were connected with the use, and distribution of the controlled substance of Marijuana, and Alcohol. Clearly, when applying “common sense” to the facts in the instant matter, it is hard to conceive any surprise to the Respondent with respect to the issue of his “knowledge” as it related to distributing what he “knew” to be marijuana. In fact here the essence of the allegation is that it was done not with the motive of profit. Rather, the

essence of the distribution in count 4 relate to the Respondent's purpose to later engage the minor victim in sexual activity. Specific to this allegation is that the Respondent used the controlled substances as either bait or to decrease the victim's ability to resist. Finally, it is clear that the instant case is analogous in all respects to *Valdobinos*. The only similarity to *Kitchen* was dealt with in the first prong.

Therefore, even if the Respondent had completed the analysis as to the second prong of the test set out in *Kjorsvic*, he would have failed to satisfy the requirements. The Respondent's assignment of error as to charging language of Count 4 is without merit. The state respectfully requests that the reviewing court deny this request on this basis.

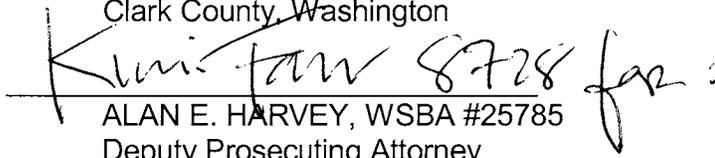
IV. CONCLUSION

Based on the foregoing citations to the record, authority, and argument, the State submits that the defendant's convictions should be affirmed.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


ALAN E. HARVEY, WSBA #25785
Deputy Prosecuting Attorney

COURT OF APPEALS
DIVISION II

07 FEB 12 AM 10:18

STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent.

(Division II)No. 34110-7-II
(Clark County Superior Court)
No. 04-1-01253-8

vs.

TODD HENDERLING,
Appellant.

DECLARATION OF TRANSMISSION BY
MAILING

STATE OF WASHINGTON)
: ss

COUNTY OF CLARK)

On 2-8, 2007, I deposited in the mails of
the United States of America a properly stamped and addressed envelope
directed to the below-named individuals, containing a copy of the document to
which this Declaration is attached.

DATED this on 8 of February, 2007

TO:

David Ponzoha, Clerk
Court Of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Anne Cruser
Attorney for the Appellant P.O.
Box 1670
Kalama, WA 98625
(360) 673-4942

DOCUMENTS: Respondent's Memorandum In Support The
Respondent's Motion On The Merits

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

Suzanne C.
Date: 2-8, 2007.
Place: Vancouver

COURT OF APPEALS
DIVISION II
07 FEB -6 PM 2:11
STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,
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(Division II)No. 34110-7-II
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: ss

COUNTY OF CLARK)

On 2nd February, 2007, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

DATED this on of February, 2007

TO: David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Anne Cruser Attorney for the Appellant P.O. Box 1670 Kalama, WA 98625 (360) 673-4942
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DOCUMENTS: Respondent's Brief

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



Date: 2/2, 2007.
Place: Vancouver