

NO. 35021-1

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *JW*
DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STANLEY SCOTT SADLER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 04-1-04384-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has the defendant failed to show that he was denied his right to a public trial and that the State improperly used peremptory challenges to exclude potential jurors on the basis of race when there were race-neutral reasons for excusing the jurors? (Appellant's Assignment of Error Nos. 1 and 2).
2. Is there substantial evidence to support the trial court's finding that the defendant was properly advised of his Miranda warnings, that he waived those rights, and made spontaneous statements? (Appellant's Assignment of Error Nos. 3 and 5).
3. Was Officer Norling's entry into the defendant's residence lawful when the defendant consented to entry? (Appellant's Assignment of Error No. 4).
4. Is the validity of the "protective sweep" irrelevant when the search warrant was not challenged and is valid? (Appellant's Assignment of Error No 4).
5. Assuming, arguendo, that this court reaches the merits of whether the initial sweep of the defendant's residence was lawful, was the sweep justified based on the information known to law enforcement? (Appellant's Assignment of Error No. 4).

6. Was the defendant's Sixth Amendment rights violated when no testimonial hearsay was introduced, and even if this court does find that testimonial hearsay was introduced was any error harmless? (Appellant's Assignment of Error No. 6).

7. Did the trial court properly exercise its discretion in excluding irrelevant or inadmissible evidence, and did such exclusion deprive the defendant of his right to present a defense? (Appellant's Assignment of Error No. 7, 8, 9, and 10).

8. Did the trial court properly exercise its discretion in denying the defendant's motion for a mistrial based on a comment that the defendant asked for an attorney when the defendant cannot establish any prejudice? (Appellant's Assignment of Error No. 11).

9. Did the trial court properly exercise its discretion in denying the defendant's motion for a mistrial based on a question regarding the defendant's incarceration when the court instructed the jury to disregard the comment? (Appellant's Assignment of Error No. 12).

10. Can the defendant establish that the State committed prosecutorial misconduct in closing argument when the argument was not objected to and was proper argument? (Appellant's Assignment of Error No. 13).

11. Did the trial court properly exercise its discretion in declining to give a supplemental jury instruction of a non-technical term which is not defined in the Washington Pattern Jury Instructions or by statute? (Appellant's Assignment of Error No. 14).

15. Has the defendant failed to establish that cumulative error occurred? (Appellant's Assignment of Error No. 15).

B. STATEMENT OF THE CASE.

1. Procedure

On April 10, 2006, STANLEY SCOTT SADLER, hereinafter "defendant," was charged by second amended information with kidnapping in the first degree, three counts of rape of a child in the third degree, eight counts of sexual exploitation of a minor, twenty-three counts of possession of depictions of a minor engaged in sexually explicit conduct, and three counts of dealing in depictions of a minor engaged in sexually explicit conduct. CP 6-22. On March 17, 2006, both parties appeared before the Honorable Judge Vicki L. Hogan for a CrR 3.5 and CrR 3.6 hearing. RP 1. Jury trial began on May 1, 2006. RP 92. At the conclusion of trial, the defendant was found guilty of eight counts of sexual exploitation of a minor, and was found not guilty of all remaining counts. CP 473-535.

On July 21, 2006, the defendant was sentenced to a standard range sentence of 120 months on each count, to run concurrently. CP 564-576, 577-579. The defendant filed a timely notice of appeal on July 26, 2006. CP 587.

2. Facts

In 2003, the defendant placed an ad on Collarme.com, a website devoted to BDSM, which is bondage, domination, and sadomasochism. RP 1000, 1861, 1866-1867. According to the defendant, people need to be over 18 to get into Collarme.com. RP 1862. The defendant was using the screen name “demon2ownfemale” and “Masterthorn.” RP 1012, 1231, 1564, 1782, 1862, 2349. He said he was looking for a relationship with more “intensity.” RP 1862.

Rachael Haughenberry met the defendant in 2004. RP 1011. She had placed a profile on Collarme.com and the defendant had answered her ad. RP 1011-1012. Haughenberry was using the screen name “insolslut.” RP 1012, 1188, 1192, 1859, 2025. Haughenberry described her interests in bondage, being caged, and abduction fantasies. RP 1005-1006. She defined “bondage” as being restrained so that one cannot move. RP 1005.

The defendant indicated he was looking for a slave. RP 1012. Haughenberry and the defendant exchanged messages. RP 1014. At one point, the defendant suggested blackmail fantasy, which Haughenberry was agreeable to. RP 1016. She gave the defendant personal information

such as her full name, address, and social security number. RP 1016.

Haughenberry sent the defendant graphic photos of herself. RP 1017.

Initially, the idea of blackmail was acceptable to Haughenberry. RP 1019.

She later expressed to the defendant that she did not want to continue the blackmail, but the defendant would not allow that because she was testing him. RP 1019-1020. Haughenberry asked to be released from the blackmail many times. RP 1306.

The defendant began making rules for Haughenberry and required that she contact him at least once a day. RP 1022. Haughenberry indicated that sometimes the defendant was extremely intense and reminded her of the situation, and other times, when she was obedient, he was nice to her. RP 1023. Haughenberry asked the defendant to release her approximately once a week, but that she would receive punishment for doing so. RP 1023. Haughenberry did not want people to find out she was interested in bondage or sadomasochistic activity, so she complied with the defendant's demands. RP 1025.

At one point, the defendant became angry when Haughenberry did not contact him as planned, and indicated to her that she needed to make it up to him. RP 1030. She suggested that she come visit the defendant. RP 1030. She made travel arrangements to visit the defendant. RP 1031. Before arriving, Haughenberry had done something to make the defendant angry, so she extended her visit to five days. RP 1037. Once Haughenberry arrived, the defendant chained her up in the back of his

vehicle. RP 1039. The defendant took her to his house, where he chained her up and had intercourse with her. RP 1041, 1044.

At one point the defendant's friends visited the house, and the defendant had Haughenberry get in the floor and spread her legs, and the defendant inserted a dildo into her vagina. RP 1056. The defendant and his friends then played a game of horseshoes with the portion of the dildo that was sticking outside Haughenberry's body. RP 1057, 1470-1476. The game was the defendant's idea and it continued for hours. RP 1057, 1470-1471. During Haughenberry's stay she asserted that the defendant raped her both vaginally and anally. RP 1050, 1058. Haughenberry also indicated that the defendant forced her to perform oral sex on him. RP 1059.

The first night Haughenberry was at the defendant's residence, he looked at her identification. RP 1070-1071. After she left the Seattle area, she remained in contact with the defendant every day per his request. RP 1071. The defendant told Haughenberry that if she could find someone to replace her, he would let her out of the blackmail. RP 1074. She tried to find someone to take her place, but was unsuccessful. RP 1074. The defendant also told Haughenberry that he liked the idea of a "third." RP 1074.

The defendant told Haughenberry that he was going to be meeting somebody named K.T.¹ that he had been talking to. RP 1078. K.T. was using the screen names “bloodyinnocence” and “gummy_nummy_bear.” RP 1850-1851, 1908-1909, 1958. During his chats with “gummy_nummy_bear” she told him that she lived at home with her mother and shared a room with her 12 year-old sister. RP 23-95-2306. She told him that she and her sister slept in bunk beds. RP 2398. At the time the defendant mentioned the name K.T., Haughenberry had plans to visit the defendant for a second time. RP 1081. He told her that he had met K.T. on Collarme.com. RP 1228. The defendant told Haughenberry that he had brought K.T. home. RP 1082. The defendant told Haughenberry that K.T. told him that she was 19 years old. RP 1083, 1228.

K.T.’s mother, Debbie Farnam, testified that K.T.’s date of birth is July 6, 1990. RP 1345. At the end of August 2004, Farnam learned that K.T. had disappeared from the home she was staying at. RP 1346. Farnam did not know where K.T. was. RP 1346. Both Farnam and the Clark County Sheriff’s Office were looking for K.T. RP 1346. Farnam did not know the defendant at that time and did not give him permission to take K.T. away from Clark County. RP 1347.

¹ The transcripts discuss K.T., a minor, by first name only at some points, but in the interests of keeping K.T.’s name private, the State will refer to her by initials only.

C.S., the defendant's 15 year-old daughter, testified that she went camping in August of 2004 with her father, brother and sister. RP 1418, 1423-1424. On the first day of the camping trip, the defendant left for a couple of hours in the evening. RP 1424. When the defendant woke C.S. up, he introduced her to K.T. RP 1428. C.S. stated that while she and her siblings were making breakfast, K.T. and the defendant were in a tent. RP 1428. The defendant told C.S. that K.T. was 19 years old. RP 1430. During the camping trip, K.T. would sleep in the tent with the defendant and his son. RP 1431.

The defendant told Haughenberry that he and K.T. had a sexual relationship. RP 1084. The defendant sent Haughenberry photos of K.T. in bondage. RP 1084. Haughenberry asked the defendant if he had asked K.T. for identification. RP 1085. The defendant said that K.T. did not have identification with her, but that he knew she was 19. RP 1085.

During a conversation with Haughenberry regarding K.T., the defendant asked Haughenberry "So you like the little 16-year old body, huh?" RP 1312, 1336, 2402. The defendant later told Haughenberry that K.T. was fighting it, and that time would teach her. RP 1315. The defendant also referred to K.T. as "young." RP 1316, 1325. In response to Haughenberry's questions about whether the defendant knew for sure how old K.T. was, the defendant told her "she does look so young." RP 2403. In the chat, he capitalized the word "so." RP 2403. He told Haughenberry that K.T. was "still developing" and "very cute." RP 2399.

He told Haughenberry that K.T.'s hair was dyed black to make her look less innocent. RP 2402. He described K.T. as having a "little girl look." RP 2404.

The defendant sent Haughenberry some photographs of K.T. and said that K.T. was doing her "yummy, I want," little girl routine. RP 2400. The defendant described K.T.'s vagina as that belonging to a girl, not a woman. RP 2401-2402.

Haughenberry visited the defendant for a second time, and was placed into chains in the back of the defendant's vehicle upon her arrival. RP 1087. On the drive from the airport to the defendant's house Haughenberry and K.T. engaged in sexual activity. RP 1088. The defendant photographed Haughenberry and K.T. together at his residence. RP 1101. The defendant told K.T. to hide her face to make her look even younger. RP 1101. He asked Haughenberry what her professors would think of the photos of her with a young looking girl. RP 1101. During Haughenberry's visit, she observed the defendant and K.T. have intercourse. RP 1104.

The defendant ordered K.T. to play with Haughenberry. RP 1108. He told K.T. to put her fist inside of Haughenberry's vagina, which K.T. did while the defendant took pictures. RP 1108, 2360. At one point the

defendant pulled Haughenberry up to the “rape box”² by her hair. RP 1126. The defendant had sexual intercourse with Haughenberry and then allowed her sleep. RP 1127. K.T. came up, and talked back to the defendant, so he put her in chains. RP 1127. Haughenberry believed that K.T. was “not happy” and was protesting and crying. RP 1127.

After things calmed down, the defendant released K.T. from the chains. RP 1128. K.T. returned later, and the defendant had her put on a strap-on dildo. RP 1128. The defendant instructed K.T. to use it on Haughenberry, and K.T. put the dildo in Haughenberry’s vagina. RP 1129. The defendant photographed K.T. wearing the strap-on device and using it on Haughenberry. RP 1130-1134. During this trip, Haughenberry performed oral sex on K.T. at the defendant’s order, and the defendant photographed the act. RP 1139, 1273-1274. Wrist and ankle restraints were used on both Haughenberry and K.T. RP 1158.

During the photo sessions, the defendant would tell Haughenberry and K.T. what to do. RP 1167. If Haughenberry did not do what the defendant asked, he would become more demanding. RP 1168.

Lawrence Davis was a co-worker of the defendant. RP 1448. Davis was aware that the defendant liked bondage. RP 1451. The defendant told Davis that he wanted a new home with a 1,100 square foot

² The “rape box” was described by Haughenberry as a rectangular box with columns on all four corners of the box. RP 1090.

basement to expand his ability to have slaves at this home. RP 1467-1468. He also told Davis that he was going camping with his kids and that he was going to bring back a new slave. RP 1480. The defendant described his new slave as funny looking, with big feet and big ears. RP 1482. Davis asked the defendant to send him a picture. RP 1483. The photos Davis received were of someone who was being treated like a slave. RP 1484. One photo was of a naked female who was wearing a hood and was handcuffed to a day bed. RP 1485. When K.T. was in bondage, she did not have access to keys to release herself. RP 2270-2271. The defendant indicated to Davis that the photos were for his eyes only. RP 1487. Davis stated that the pictures "... just didn't look right" and that she looked underdeveloped. RP 1489. He told detectives that she looked too young. RP 1489. Davis deleted the emailed photos from his computer and emptied his computer trash because he did not want them on his computer. RP 1490.

Davis called the defendant and told him that he thought the female looked a little bit underdeveloped and young. RP 1491. Davis thought the female looked 15 or 16 years old. RP 1515. Davis told the defendant to check her out because she looked too young. RP 1492. Davis asked the defendant if he had checked about missing persons on the internet. RP 1493. The defendant told him that he checked and that he did not find anyone missing. RP 1495. The defendant told Davis that she did not have any identification but that she was 18. RP 1497, 1499. The defendant did

not tell Davis that he had seen identification. RP 1502. The defendant stated that he was going to keep his new slave at his house forever. RP 1502-1503. Davis indicated that the defendant mentioned something about identification that the new slave had. RP 1512-1513. The defendant told Davis that the girl may have had a Washington identification card. RP 1532. Davis did not ever get an answer from the defendant that satisfied him or put him at ease with the pictures. RP 1532.

Another co-worker of the defendant, Benjamin Carlsen, indicated that he knew the defendant was into BDSM. RP 1536, 1539. The defendant mentioned K.T. as a girl he was talking to on the computer. RP 1545. The defendant told Carlsen that K.T. was 19 years old. RP 1545-1546. The only woman that the defendant met on the internet that he did not want to talk about much was K.T. RP 1546. The defendant stated that he picked up K.T. when he went fishing with his children. RP 1548. Carlsen learned that when the defendant went to pick up K.T. he had not obtained identification on her first. RP 1554. Carlsen asked the defendant if he was sure about her age. RP 1554. Carlsen told the defendant to check K.T. to see if she was 18 years old. RP 1556. The defendant told him that he was sure of her age and that he had known her for a long time. RP 1557. The defendant also told Carlsen that when he was at work K.T. was cabled to the bed. RP 1558.

At one point, Carlsen asked the defendant specifically if K.T. had any identification on her and the defendant told him to mind his own

business and that he was satisfied with her age. RP 1559-1560. The defendant indicated to Carlsen that she did not have identification but that he trusted her. RP 1563. Carlsen was aware that the defendant had a daughter. RP 1579. The defendant complained that his daughter was over-developed and mature-looking for her age, and that she was getting attention. RP 1579.

The defendant sent Carlsen photos of K.T. RP 1564, 1580. Carlsen did not care for the pictures because they embarrassed him. RP 1583. The female in the photos looked young to him. RP 1583. When the defendant's computer was examined, photos of K.T. were recovered. RP 1778. Some of the photos recovered were pornographic in nature. RP 1778.

The defendant admitted to sending the emails. RP 2379. He stated that the fact that the emails stated "for your eyes only" did not have anything to do with the fact that K.T. was 14 years old. RP 2380.

Clark County Detective Cynthia Bull testified that she was an investigator for the case of the missing child K.T. RP 1351-1352. She stated that K.T. was 14 years old when she went missing. RP 1352. Detective Bull prepared a flyer which was sent out to local press agencies. RP 1371. Other agencies, such as the National Center for Missing and Exploited Children and Child Seek, also assisted in trying to find K.T. RP 1373-1374. Perverted Justice, another agency, contacted Detective Bull,

and informed her that they believed they were tracking K.T. through a website called allpoetry.com. RP 1380-1382. Perverted Justice provided an IP address, which is a computer locate address. RP 1382. The address where the computer was being used was that of the defendant. RP 1383. Detective Bull then requested that a teletype be sent to local law enforcement in University Place. RP 1383-1384.

Fircrest Police Officer Eric Norling and Pierce County Sheriff Deputy Chris Rather were dispatched to a call of a missing juvenile from Clark County. RP 1706, 1710-1711. Officer Norling went to the front door of the residence and knocked on the door. RP 1711-1712. After approximately one minute, the door was opened by the defendant. RP 1712. Officer Norling asked the defendant if K.T. was there. RP 1713. The defendant was sweating and startled. RP 1713. He denied that he had been having sex with K.T. before he answered the door. RP 2389. The defendant stated she is up here, and started to walk up the steps. RP 1716. Officer Norling followed the defendant to the third floor master bedroom. RP 1717. The defendant called K.T.'s name a few times but there was no response. RP 1717-1718. Officer Norling then observed K.T. lying on the bed curled up in a fetal position. RP 1718. K.T. was wearing a plaid skirt with no underwear. RP 1718. Chains were connected to the bed post, and next to the bed was a large vibrator, handcuff-type arm cuffs, and

lubricant. RP 1718-1720. Officer Norling called K.T.'s name more than once but she did not respond. RP 1718. Officer Norling pushed on K.T.'s foot to get her to respond. RP 1723. K.T. was startled, and said that her stomach and head hurt. RP 1724-1725. He asked K.T. how old she was but she did not respond. RP 1725.

Office Norling advised the defendant of his Constitutional rights. RP 1726. The defendant asked Officer Norling why he had asked K.T. how old she was, but Officer Norling did not respond. RP 1727, 1738. Officer Norling asked the defendant how long she had been staying with him, and the defendant indicated she had been staying there about a week. RP 1737. Once the defendant was in Officer Norling's patrol car, he told the defendant that K.T. was a runaway and was 14 years old. RP 1739. The defendant began to yell and told Officer Norling that she was 19 years old. RP 1739.

Detective Robert Jackson of the Pierce County Sheriff's Department was assigned as lead detective to this incident. RP 1644, 1648. The defendant told Detective Jackson that K.T. told him she was 19 years old. RP 1660. Detective Jackson served a search warrant at the defendant's residence. RP 1673. Items such as wrist restraints, ankle restraints, ropes, ties, chains, locks, and belts were recovered. RP 1676-1677. On the defendant's computer, a picture of K.T. was being used as a

screensaver. RP 1681. Personal information on Haughenberry was located in a safe. RP 1684. The information included Haughenberry's name and date of birth, address, and driver's license number. RP 1684. Also in the safe were videos of Haughenberry and the defendant engaged in bondage and sexual activity. RP 1687-1688. There were no items found in the defendant's home that had K.T.'s name on it. RP 1686, 2538-2539. The defendant indicated that he went through Haugehberry's purse and looked at her identification card. RP 2177-2178. He did not, however, ask K.T. for identification upon meeting her in person. RP 2179.

At trial the defendant testified that the "ring toss" game he played with Haughenberry was something that they had discussed beforehand and that she agreed to. RP 1898-1899. He also stated that when he left Haughenberry alone in his home she was chained, but that keys were readily accessible. RP 1903-1904. The defendant indicated that it was Haughenberry, not him, who brought up the subject of bringing another partner into the relationship. RP 1904. He again stated that K.T. indicated to him that she was 19 years old. RP 1916.

The defendant asserted that K.T. had shown him a birth certificate and a Washington picture identification on a webcam. RP 1917. The defendant could not remember if the identification was an identification

card or a driver's license. RP 2187. He could not remember if the identification was current or expired. RP 2193. Farnam, K.T.'s mother testified that K.T.'s birth certificate was missing from where she had seen it a few years earlier. RP 1999. Farnam also asserted that an invalid Washington license of hers was missing. RP 2001, 2012. She stated that her missing license had a hole punched in it. RP 2012. The defendant stated that the driver's license K.T. showed him did not have a hole punched in it. RP 2406-2407. He stated that any comments he made to Haughenberry about liking the 16 year-old body was "age play" and a joke. RP 1960. He described age play as a partner pretending to be younger than he or she actually was. RP 2098. The defendant denied that Carlsen or Davis questioned him about K.T.'s age. RP 1968-1969.

The defendant agreed that K.T.'s screen name of "Gummy_nummy_bear" sounded younger than Haughenberry's screen name of "insol Slut." RP 2025. The defendant also stated that he would never engage in a sexual chat with an underage female and that he was not interested in abduction as part of the rape play. RP 2134-2135. Under the screen name "ForceYF4real" the defendant engaged in an internet chat. RP 2136-2137. In the chat the defendant indicated that he was "... 46, 6'3", 228, big attractive, thick cocked and very real dominant." RP 2138. The person the defendant was corresponding with indicated that she was

15 years old. RP 2139. The defendant indicated to her that 15 was very young and that he was looking for someone over 18, but that she was very pretty and he liked her “need.” RP 2139-2140.

The person the defendant was chatting with, S.M., provided her full name, address and telephone number. RP 2141. The defendant specifically asked S.M. if she was a police officer. RP 2141. He told S.M. that she was very much what he was looking for, other than the age thing. RP 2142. The defendant told her that “age was a legal thing, and that’s all.” RP 2142. The same day as the chat with S.M. where she provided the defendant with her address, a mapquest query was done for directions to S.M.’s address. RP 2166-2168. The defendant stated that mapping out S.M.’s address was role play. RP 2168.

The defendant acknowledged that he did not have Farnam’s permission to take K.T. RP 2255-2256. He stated that when he first picked up K.T. he was intending to have sexual intercourse with her. RP 2257. He stated that when he and K.T. arrived back in Fircrest he began a sexual relationship with her. RP 2261. The defendant admitted that he restrained K.T. when she was at his home. RP 2271. The defendant used wrist cuffs on K.T. RP 2274. The wrist cuffs were attached to a chain that was attached to an eye hook in the ceiling. RP 2274-2275. The defendant also put a hood that had no ear holes or mouth holes. RP 2275-

2276. K.T. was not able to physically free herself from the restraints. RP 2278. When K.T. was chained to the ceiling, the defendant put a belt around her waist and placed surgical clamps with rubber tips on her nipples. RP 2308. The defendant then placed a vibrating device on the clamps and turned it on. RP 2309. He also put a vibrating device in K.T.'s vagina. RP 2309.

During one chat, the defendant told Haughenberry that K.T. was “. . . defiant and in chains, taken her to tears and gasping in anxiety, sobbing and begging.” RP 2305. The defendant also told Haughenberry that K.T. wore a gag. RP 2307. The defendant asserted that what he told Haughenberry was a lie. RP 2307. On August 31, 2004, he told Haughenberry that K.T.'s “little pussy is a bit raw today.” RP 2313. The defendant said that the statement was also a lie. RP 2314. On September 3, 2004, the defendant told Haughenberry that he had sex with K.T. twice that day. RP 2315-2316. The defendant admitted to having sex with K.T. on five or six occasions, and that some of the sexual activity was his idea. RP 2317-2318.

The defendant took photographs of himself and K.T. engaging in sexual activity. RP 2319. He also admitted to photographing sexual activity that occurred between K.T. and Haughenberry. RP 2319. All of the photographs of K.T. admitted in the trial were photos from the

defendant's computer or digital camera. RP 2319. He stated that the photographs he took were for his sexual gratification. RP 2320. He suggested that K.T. and Haughenberry use toys partly for the purpose of his sexual gratification. RP 2321.

During the time that the defendant was taking the pictures he was directing the sexually explicit conduct. RP 2366. The defendant took photographs of K.T. performing oral sex on him. RP 2375. During that photo session the defendant made sure that K.T.'s hair was out of her face so it could be seen. RP 2375.

The defendant discussed the fact that he had a written contract with Haughenberry, which protected both of them from claims of sexual assault and kidnapping. RP 2409. He stated that the contract was important. RP 2409. He did not, however, enter into a written contract with K.T. RP 2410.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT HE WAS DENIED HIS RIGHT TO A PUBLIC TRIAL AND THAT THE STATE IMPROPERLY USED PEREMPTORY CHALLENGES TO EXCLUDE POTENTIAL JURORS SOLELY ON THE BASIS OF THEIR RACE WHEN THERE WERE RACE-NEUTRAL REASONS FOR EXCLUDING THE JURORS.

- a. Facts

- i. **Juror No. 2**

Juror No. 2 stated that the same rules should apply to the most mature 16 or 18 year-old as a runaway who is not in school. RP 524. Juror No. 2 thought it was important for both sides to get a fair trial. RP 813. Juror No. 2 stated that he was in the military. RP 814. When asked if he had ever been fooled, he stated that he was not exactly fooled, but that he learned that one of his soldiers, who was dependable, was using drugs, and he would have never suspected drug use. RP 814-815.

When asked what sadomasochism meant, Juror No. 2 stated that “sodomasacure is you are into Satan type of a relationship” that was like the devil. RP 674.

- ii. **Juror No. 27**

Juror No. 27 indicated that he had been previously arrested for DUI and domestic violence assault. RP 372. He indicated that he served his sentence, paid his fines, and did community service. RP 372. The

DUI charge was in the early 1980's. RP 374. He indicated that the domestic violence charge was a Pierce County case, and he completed the community service on that case eight months prior. RP 373. Juror No. 27 indicated he was treated fairly. RP 373. He stated that he could see no reason why he could not be a fair juror. RP 375.

The State later brought to the Court's attention that Juror No. 27 had disclosed that he was convicted of DUI and a domestic violence charge, but that a check of his criminal record revealed multiple charges for DUI, multiple charges for domestic violence, and a possession of marijuana charge all of which he did not disclose. RP 442. The State requested that Juror No. 27 be spoken to again. RP 442. After further questioning, Juror No. 27 disclosed that he had four different domestic violence charges, and a possession of marijuana charge that was dismissed. RP 497-498. When asked why he did not explain in more detail his criminal charges in the juror questionnaire, Juror No. 27 stated that he had asked a neighbor about how much detail to go into, and was told that his criminal history would be checked anyway and to just list the main charges. RP 498.

Juror No. 27 indicated that he had a prior problem with alcohol and his marriage. RP 499. He stated that he received six weeks of alcohol treatment. RP 500. Juror No. 27 also indicated that he has used the internet to meet someone. RP 592. Juror No. 27 stated that he was involved in a court martial proceeding as a witness. RP 764.

The State exercised peremptory challenges on both Juror No. 2 and Juror No. 27. RP 855. The defendant raised a Batson challenge. RP 855.

The State argued:

All right. Judge, by the notes that I took, Juror No. 2 is a black male. Juror No. 17 appeared to be a Samoan male, or maybe Filipino. Juror No. 27 is a black male. Juror No. 37 was an Asian female. 40 is a Hispanic, or maybe mixed race female. And 52 is an Asian female. 69 is an Asian or Samoan female.

Batson prohibits the State from excluding minorities. It doesn't necessarily distinguish between minority. There has to be a pattern of excusing people. I am sure Mr. Schwartz in his response as to jurors who were out of reach don't matter. That's just not the case, because it's a random draw.

It's also very clear that defense cannot argue for the Court to find a pattern from the exercise of a single peremptory. And for that reason, I don't believe that the Court can order the State to provide racial reasons for preempts for Juror No. 2.

Juror No. 27 would be the second minority who was challenged by peremptory, leaving several other minorities still on the panel, including at least one within reach for an alternative, or an alternate status. It's also a different situation, because if the Court doesn't require the State to produce race neutral reasons, then there is no record that the State wasn't being fair. So it's come to the point where the defense, just to say the word Batson, it's so—it's sort of a difficult position for the State to be in.

Regarding No. 27, I can tell the Court that the individual misrepresented, or at least minimized his criminal history in the questionnaire. He did not disclose a marijuana charge. He did not disclose that he had multiple DUI's, or multiple domestic violence charges. And I believe that he also had a driving conviction on his record that were

misdemeanors, or gross misdemeanors that he did not disclose.

When we asked him about that, he said that he had conversation with a friend of his about how much information he needed to disclose, and was told basically the State is going to run a rap sheet, so you have to give them the general nature. When I was asking him questions about that, it appeared to me that he was very slow and deliberate in his answers. I am not sure that he was fully understanding my questions because it's just not possible that he sought advise (sic) on the questionnaire in the manner in which it sounded like he disclosed doing that, because he would have filled the questionnaire out down here, but without having the opportunity to have told a friend about what he did, which means he either was confused, or was incorrect, or was making up an excuse for why he didn't disclose the additional information that he didn't disclose. That is a myriad of reasons in and of itself. And if in fact, we are looking for a jury that is—that appears to be common sense oriented, and capable of rationally rejection what we expect the Defendant's claim of belief that this girl was 18, based, not only on her visual appearance, but based on the testimony that comes out both in State and defense potential case in chief.

I don't believe that Juror No. 27 presents to be the kind of juror we are looking for from the perspective of open participation in jury selection, or from intelligence. I am not trying to insult him, or degrade him in any way. It's just that there are people who don't participate and by that stand out.

Not one time did Juror No. 27 volunteer to answer a question. He only responded when called on, and he gave extremely minimal answers. We are also looking for a juror that is law abiding citizens. (sic) The juror has the criminal history of a sufficient duration and number that we would be excluding him regardless of the sex.

As far as No. 2 goes, Judge, 2 either couldn't read the words sadomasochism, or didn't understand the word, because he called—I think Satanmassacre when Mr. Schwartz was asking him questions. He has a military background, which is something in common with this Defendant that we are entitled to consider, and we just didn't like a number of his answers to the general questions.

He was more involved, but we just didn't like his answers, and we would have excluded him regardless of his color or sex as well.

RP 856-860.

The State also argued that Juror No. 2 had three sons, and the State believed that jurors with daughters were in a better posture to examine the case. RP 862. The court denied the defendant's Batson challenge, finding that multiple reasons had been stated to exclude both Juror No. 2 and Juror No. 27. RP 862.

- b. The defendant has failed to show that he was denied the right to a public trial when a Batson challenge, a legal hearing, was conducted in the jury room with the defendant present.

Defendant alleges a violation of his right to a public trial as guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. Defendant claims that his rights were violated when the merits of a Batson challenge were discussed in the jury room rather than the courtroom. Brief of Appellant at page 29. Neither party objected to the court hearing the merits of the

motion in the jury room. Present in the jury room was the judge, the court reporter, counsel for the State, counsel for the defendant, and defendant, and two correctional officers. RP 855, 862. There is nothing in the record to indicate if observers were present in the courtroom at the time that the parties moved into the jury room to discuss the motion.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution both protect a defendant's right to a public trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); State v. Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004); Waller v. Georgia, 467 U.S. 39, 44-45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). The right to a public trial applies not only to the evidentiary phase of a criminal trial, but also to other proceedings such as jury voir dire. Gannett Co. v. DePasquale, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1999); Press-Enterprise v. Superior Court of California, 464 U.S. 501, 509-10, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) ("Press-Enterprise I"); Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). A violation of one's right to a public trial is structural error. Waller, 467 U.S. at 49. Structural error is not subject to harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Therefore, once a defendant demonstrates a violation of his Sixth Amendment right to a public trial, he need not show

that the violation prejudiced him in any way. Judd v. Haley, 250 F.3d 1308, 1314-15 (11th Cir. 2001).

In this case, the defendant cannot establish that he was denied his right to a public trial. First, the courtroom was never closed. No one who was present in the courtroom was asked to leave. On the contrary, the court ordered the venire to not leave the courtroom. RP 855. Then the attorneys, the judge, the defendant, two correctional officers, and the court reporter moved to the jury room after the defendant raised a Batson challenge. RP 855, 862-863. The motion was a legal motion, similar to a sidebar motion.

Courts have found that a defendant does not have the right to be present during an in-chambers or bench conference between the court and counsel on *legal* matters. In re Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994); In re Pirtle, 136 Wn.2d 467, 484, 965 P.2d 592 (1998) (emphasis added). If a defendant does not have the right to be present during in-chambers conferences, then presumably the public would also not have a right to be present. The nature of the hearing conducted in the jury room, a Batson challenge, is a question of law. Tolbert v. Page, 182 F.3d 677, 680 (9th Cir. 1999) quoting U.S. v. Bishop, 959 F.2d 820, 821, n.1 (9th Cir. 1992). A Batson challenge is therefore a hearing on a “legal matter” during which the defendant, and therefore the public, need not be present.

The court in the present case was conducting a hearing to determine a question of law. While the defendant and the public did not

have the right to be present, the court allowed the defendant the additional benefit of being present. The defendant's unnecessary presence does not result in the public's right to be present. The appellant provides no authority to support the assertion that the public has the right to attend an in-chambers or bench proceeding.

- c. The trial court properly denied the defendant's Batson challenge when the State offered race-neutral grounds for excusing to jurors and the reasons offered by the State did not demonstrate any discriminatory intent.

In Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Supreme Court held that the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. Six years later in Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), the court extended this principle to peremptory challenges exercised by a criminal defendant as well, reasoning, "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same-- in all cases, the juror is subjected to open and public racial discrimination." Id. at 49.

Batson and its progeny utilize a three-part test to determine whether a peremptory challenge is race based:

[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one),

the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

In deciding whether the second step has been shown the trial court is guided by the following cautionary instruction: “The second step of this process does not demand an explanation that is persuasive, or even plausible.” Purkett, 514 U.S. at 767-68; see also, State v. Vreen, 143 Wn.2d 923, 927, 26 P.3d 236 (2001). While the proponent must have legitimate reasons for exercising the strike, this is not the same as stating that the proffered reason must make sense; the constitution requires only that it be a reason that does not deny equal protection. Purkett, 514 U.S. at 768-769 (“Unless a discriminatory intent is inherent in the . . . explanation, the reason offered will be deemed race neutral”).

Should the prosecutor volunteer a race-neutral explanation before the trial court rules on whether the defendant has made out a prima facie case, and the trial court then rules on the ultimate question of racial motivation, the preliminary prima facie case evaluation is unnecessary. Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

One division of the Court of Appeals has established circumstances for the court to consider in making its determination: (1) striking a group of jurors sharing race as the only common characteristic; (2) disproportionate use of strikes against a group; (3) the level of the group's representation in the venire as compared to the jury; (4) race of the defendant and the victim; (5) past conduct of the prosecutor; (6) type and manner of the prosecutor's voir dire questions; (7) disparate impact of the challenges; and (8) similarities between the individuals who remain on the jury and those stricken. State v. Evans, 100 Wn. App. 757, 769-70, 998 P.2d 373 (2000).

A trial court's determination is accorded great deference on appeal, and will be upheld unless clearly erroneous. Hernandez, 500 U.S. at 364; Luvone, 127 Wn.2d at 699. In this case the court did not make a preliminary determination before the State volunteered its race-neutral reasons. RP 856-860.

The first juror the State exercised a peremptory challenge upon was Juror No. 2, William Evans, Jr., an African-American. CP 359; RP 855. It does not appear from the record that defense counsel made a Batson challenge at that time. The fifth challenge by the State was to Juror No. 27, Ray D. Washington, another African-American juror. CP 359; RP 855. As the State indicated to the trial court, there were other jurors who were minorities that were not challenged by the State. RP 856-

857. At least one of the minority jurors within reach to be seated as an alternate juror. RP 857.

The State properly exercised a peremptory challenge to excuse Juror No. 2, and the State indicated race-neutral grounds on which to do so. Juror No. 2 demonstrated that he did not understand what sadomasochism meant, and such term was a central theme to the State's case and theory. Another race-neutral reason set forth by the State is that Juror No. 2 had sons and the State was concerned that he had no experience with teenage daughters, another issue in the State's case.

Juror No. 27 was also properly challenged on race-neutral grounds. Juror No. 27 had been previously charged or convicted of criminal offenses, including DUI, domestic violence assault, and possession of marijuana. RP 857-858. Juror No. 27 did not disclose a marijuana charge, and only acknowledged its existence after being questioned specifically about it by the State. When asked about why he had not disclosed his criminal history, Juror No. 27 represented that he had discussed with his neighbor about how much information to disclose. RP 858. As the State suggested, such an answer was unusual because the questionnaires were filled out at the courthouse, and therefore Juror No. 27 would not have had the opportunity to discuss the questionnaire with any neighbor. RP 858. Given Juror No. 27's explanation for the non-disclosed or minimized criminal history, the State believed that he was either confused, incorrect, or was making up an excuse. The State did not impugn the juror's

intelligence, as alleged by the defendant, but rather articulated race-neutral reasons for challenging the juror.

Clearly, concealment, nondisclosure, or lying are valid non-discriminatory reasons for removing a juror. The record supports a basis for concluding that the juror was concealing or lying about important information. The court did not abuse its discretion in denying the Batson challenge on this juror.

The prosecutor made it clear that he would have challenged both Juror No. 2 and Juror No. 27 regardless of their race. RP 859-860. As can be seen from the citations to the record each of these reasons was supported by information adduced on voir dire. Each of these reasons is race-neutral. Again, the court's determination that the reasons given were non-discriminatory, are supported by a review of the record. The court did not commit error in denying the Batson challenge to the State's use of peremptory challenges.

The defendant contends that the State did not focus on whether potential jurors had sons or daughters or military experience, and therefore cannot use those reasons as a basis for excusing Juror No. 2. Brief of Appellant at page 23. The record does not support such assertion. There was a motion only made to Juror No. 2 and Juror No. 27. The State may have excused other jurors for the same reason. Even if the defendant could establish that the State did not strike non-minority jurors who had military background and teenage sons, the defendant has not asserted that

any of those persons made it on the jury. Therefore, it may have been the case that the State did not strike a non-minority juror with similar answers or history as Juror No. 2 if there was not a possibility that the juror would have made it onto the jury. The defendant himself excused two potential jurors who had military backgrounds—Juror No. 18 and Juror No. 22. RP 861. The defendant also suggests that prior criminal history of a potential juror is not a valid race-neutral reason for exercising a peremptory challenge. Brief of Appellant at page 22. It is clear, however, that Juror No. 27's criminal history, combined with the fact that he did not initially disclose such history, is a valid basis for a challenge.

Finally, the cases cited by the defendant are inapplicable to the case at bar. In the cases cited by the defendant, the State was unable to articulate a valid race-neutral basis for excusing potential jurors. Such is not the case here. The State clearly had valid reasons for excusing both jurors. As the court stated in Purkett, *supra*, unless the discriminatory intent is inherent in the explanation offered by the State, the reason offered will be deemed to be race neutral. Purkett, 514 U.S. at 768-769. The reasons offered by the State in the case at bar did not demonstrate any discriminatory intent. The State fought to keep Juror No. 17, who was a minority. RP 861. The defendant asserts that the State described the jurors as unintelligent, but that is not supported by the record. The State did not represent that both jurors were unintelligent. Rather, the State represented that Juror No. 27's answers were slow and deliberate and that

he may not have understood some of the questions. RP 858. The trial court properly denied the defendant's Batson challenge, and its ruling was not clearly erroneous.

2. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT THE DEFENDANT WAS PROPERLY ADVISED OF HIS MIRANDA WARNINGS, WAIVED THOSE RIGHTS, AND MADE SPONTANEOUS STATEMENTS.

- a. Facts

Fircrest Police Officer Eric Norling testified that on September 12, 2004, he received a call from dispatch that a 14 year old female was missing from a foster home, and the Clark County Sheriff's office had traced an internet address to an address in Fircrest. CP 270-276; 1³ RP 10-13. The report also stated that the resident of the address was Stanley Sadler and that the 14 year old female may be involved in sadomasochistic sex. 1RP 14. Officer Norling and University Place Police Officer Rather went to the defendant's residence. 1RP 14.

Officer Norling went to the front door and rang the doorbell. 1RP 15. He also knocked on the door very loudly. 1RP 15. After knocking several times and getting no response, Officer Norling started to walk

³ The verbatim report of proceedings from the CrR 3.5 and CrR 3.6 hearing independently numbered. The State will be referencing those proceedings by "1RP." All of the other verbatim report of proceedings will be referenced by "RP."

away. 1RP 15. As he did so, the defendant opened the door. 1RP 15. The defendant looked surprised and was sweating. 1RP 15. When the defendant opened the door it was wide enough for a person to walk through. 1RP 15.

Officer Norling asked the defendant if he was Stanley Sadler and he said he was. 1RP 16. Officer Norling asked the defendant if K.T. was there, and the defendant turned and said “yeah, she is up here.” 1RP 16. The defendant then started to walk up the stairway and Officer Norling followed. 1RP 16. Officer Norling took the defendant’s actions as an invitation to follow. 1RP 43. The defendant never told Officer Norling that he could not come in the residence. 1RP 23.

Officer Norling wanted to check on K.T.’s welfare. 1RP 17. Once he reached the third floor of the residence, the defendant called K.T.’s name. 1RP 17. Officer Norling looked around the defendant and saw K.T. lying on the bed in the master bedroom. 1RP 17. Inside the room Officer Norling observed leather cuffs, bondage-type cuffs, and a chain. 1RP 20. There was a large vibrator plugged into an extension cord next to the bed. 1RP 20.

K.T. was dressed in a kind of school girl uniform. 1RP 17-18. It appeared that K.T. was naked underneath the skirt. 1RP 18. Officer Norling called K.T.’s name but she did not respond. 1RP 17. Officer Norling told Deputy Rather to detain the defendant, based on the fact that Officer Norling did not know what was going on; he had a missing 14

year-old juvenile in a state of undress and in the bed of a man in his mid-40s. 1RP 17. Officer Norling touched K.T.'s foot and she jumped. 1RP 18. She started to moan and said her stomach hurt. 1RP 18. He asked K.T. how old she was and she did not respond. 1RP 18.

Officer Norling advised the defendant of his Miranda rights. 1RP 18. The defendant agreed to speak with him. 1RP 26. He asked the defendant how long K.T. had been with him, and the defendant said about a week. 1RP 19. The defendant asked Officer Norling why he asked him how old K.T. was, and told Officer Norling that she said she was 19 years old. 1RP 19. Officer Norling told the defendant that K.T. was a runaway who was 14 years old. 1RP 21. The defendant began to yell that she told him she was 19 years old. 1RP 21. The defendant was asked to consent to a search of his home, and the defendant stated that he wanted to talk to an attorney. 1RP 20-21, 41.

Deputy Rather checked the rest of the residence to make sure that there was no one else inside. 1RP 20, 49. The residence was checked to make sure that there was not anyone who posed a threat, or any other missing persons. 1RP 42. The security sweep was just a brief search for people. 1RP 49. In a room of the residence there was a "bondage room" that had a bench with chains and sex toys hanging on the walls. 1RP 20. There was black plastic on the walls. 1RP 20. Nothing was disturbed during the sweep. 1RP 55.

Pierce County Sheriff Detective Robert Jackson testified that he responded to the scene. 1RP 75-78. Detective Jackson walked through the residence on the same paths the initial officers used. 1RP 78. He did a walkthrough to get a layout of the place and to describe the residence for a search warrant. 1RP 79. Detective Jackson told the defendant that he was going to be seeking a search warrant, just to keep him up to speed. 1RP 80. The defendant then told Detective Jackson that he thought the girl was 19. 1RP 80.

Detective Jackson went to the hospital where K.T. was taken. 1RP 81. Detective Jackson interviewed a social worker and K.T. at the hospital. 1RP 81. He then wrote a search warrant for the defendant's residence. 1RP 81.

At the conclusion of testimony, the Court made the following written ruling⁴:

THE UNDISPUTED FACTS

1. On September 12, 2004, the Fircrest Police Department received a notice from Clark County Sheriff's Department that requested assistance in locating a juvenile, K.T., who disappeared from Clark County two weeks prior. The notice listed the defendant and his address as being a location where the missing juvenile may be. The notice stated that K.T. was 14 years old and may be involved in

⁴ The appellant assigns error to undisputed facts #11, 12, 15, and 16, and reasons for admissibility numbers 1, 2(a), 2(b), 2(c), 3, 4, 5, 6, 8, 9, and 10 only.

sadomasochistic sex and that she may portray herself as 19.

2. On September 12, 2004, at approximately 1650 hours, Fircrest Officer Eric Norling and Pierce County Sheriff's Deputy Christopher Rather responded to the defendant's address of 4331 67th Avenue West in University Place, Washington. Officer Norling repeatedly knocked and pounded on the front door and rang the doorbell several times. There was no answer. As Officer Norling began to walk away, a male who appeared to be in his 40's and sweating profusely, answered the door. The man appeared surprised.
3. Officer Norling asked the male if he was Stanley Sadler, and the defendant stated that he was. Officer Norling asked if K.T. was there. The defendant stated that she was and turned and started walking upstairs. Officer Norling followed the defendant to the master bedroom upstairs. The defendant's back was to Officer Norling during the walk upstairs. The defendant never verbally objected to Officer's Norlings presence inside the residence.
4. Officer Norling looked into the master bedroom and saw a juvenile female laying on the bed in the fetal position. The juvenile was wearing a very short plaid skirt that was pulled up just below her waist. She did not have any underwear on and her buttocks were exposed. Officer Norling noticed chains on the bed frame and some leather cuffs on the nightstand. He also observed a very large vibrator in the room.
5. Officer Norling stated that he entered the residence because he thought an emergency existed as he needed to recover the missing juvenile and make sure she was okay.

6. When Deputy Rather noticed Officer Norling go into the defendant's residence, he went to the front door, went inside, and started to perform a protective sweep of the residence.
7. While in the master bedroom, Officer Norling called K.T.'s name several times, but received no response. He asked her how old she was, but continued to get no response. Officer Norling requested that Deputy Rather come upstairs and detain the defendant pending the investigation. The defendant was on his way back downstairs when Deputy Rather detained the defendant by handcuffing him and directing that he sit on the floor.
8. Officer Norling continued to attempt to awaken K.T., who appeared to be either unconscious or sleeping. Officer Norling pushed K.T.'s foot. K.T. jumped and started to moan and say her stomach hurt and she was dizzy. The fire dept. was called for medical assistance. Officer Norling remained with K.T.
9. Deputy Rather continued his protective sweep of the residence to determine if any other people were inside. During the sweep, Deputy Rather looked into a bedroom across the hall from where K.T. was located. The bedroom was covered in black plastic and there was a large amount of sex-related "bondage" equipment inside the room. There was also a bench in the middle of the room as well as a video camera on a tripod. No other people were located inside the residence.
10. During the protective sweep, Deputy Rather did not touch or disturb any items inside the defendant's residence. Officer Norling also did not touch or disturb any items inside the residence.
11. Officer Norling read the defendant his Miranda warnings with the assistance of a department issued

card. The defendant stated that he understood his warnings and wished to speak with Officer Norling. The defendant did not appear confused and was able to track Officer Norling's statements and questions appropriately.

12. After being asked, the defendant stated that K.T. had been staying with him for about a week and said, "She told me she was 19."
13. The defendant was placed in Officer Norling's patrol car. Officer Norling stated that he told the defendant that K.T. was a runaway and was 14 years old. The defendant yelled, "She told me she was 19."
14. Officer Norling later asked the defendant if police could search his residence. The defendant stated that he wanted an attorney.
15. Pierce County Sheriff's Detective Bob Jackson was dispatched to the scene. In preparation for a search warrant, Det. Jackson entered the defendant's residence to get a description of the house for purposes of writing a search warrant. Det. Jackson went into the residence with Officer Norling and purposefully only walked where Officer Norling and Deputy Rather had previously been. Det. Jackson did not touch or disturb any items within the residence. Det. Jackson recorded his own observations in the complaint for search warrant.
16. After Det. Jackson viewed the inside of the defendant's residence, he approached the defendant, who was still sitting in a patrol car, and, as a courtesy, told him that he would be requesting a search warrant for the residence and that he would be looking for evidence. Det. Jackson also told the defendant that K.T. was a 14-year-old runaway. In response to the Det. Jackson's statements, the defendant stated, "She told me she was 19." Det.

Jackson reminded the defendant that he asked for an attorney and not to say anything. Det. Jackson told the defendant that he was just informing him of the status of the investigation, to which the defendant again stated, "She told me she was 19."

17. Det. Jackson went to the hospital to gather information from K.T. and then went to the station to write an application for a search warrant. The search warrant took over two hours to write. It was eventually signed and a search of the defendant's residence was executed.

THE DISPUTED FACTS

There are no disputed facts.

FINDINGS AS TO DISPUTED FACTS

Not applicable.

REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

1. Officer Norling and Deputy Rather entered the defendant's residence lawfully.
2. There were exigent circumstances which necessitated police entry into the residence:
 - A. Officer Norling and Deputy Rather believed that a missing juvenile may be inside the residence and in need of assistance;
 - B. A reasonable person under the same circumstances would have believed an emergency existed given the totality of the circumstances: The defendant's delayed response in answering front door after several knocks and doorbell rings by police, the defendant's profuse sweating and startled

expression, the defendant's age, the defendant's statements that K.T. was inside his residence, and that K.T. was a reported missing juvenile who may be involved in sadomasochistic sex; and

- C. Officer Norling only entered the residence to locate and assist a missing juvenile female that apparently was inside the defendant's residence. Deputy Rather merely entered the residence to back-up Officer Norling and provide a safety sweep of the residence. Officer Norling and Deputy Rather were only inside the residence for a short period of time and did not disturb or otherwise search the residence for evidence.
3. Officer Norling and Deputy Rather were also performing their community caretaking function as police officers in providing assistance to a missing juvenile who was inside the residence of an adult male.
4. The defendant impliedly acquiesced to the police entry of his residence.
5. Deputy Rather's routine protective sweep of the residence was lawful and done only for purposes of officer safety. The sweep did not exceed the scope of its intended purpose.
6. Det. Jackson's entry into the defendant's residence was made for purposes of obtaining information for a search warrant and did not exceed the areas already breached by Officer Norling and Deputy Rather. Det. Jackson did not search the residence. Det. Jackson's entry was not improper.
7. The defendant was in-custody at the time Officer Norling read the defendant his Miranda warnings.

8. Officer Norling properly read the defendant his Miranda warnings.
9. The defendant's subsequent statements to Officer Norling were made knowingly, intelligently, and voluntarily and are admissible at trial.
10. The defendant's statements to Det. Jackson were made spontaneously by the defendant and were not made as a result of custodial interrogation. Those statements are also admissible at trial.

CP 270-276.

- b. The court should treat the findings as verities on appeal as there is substantial evidence to support them.

When reviewing a denial of a motion to suppress, an appellate court reviews the factual findings to see if they support the conclusions of law. State v. Dempsey, 88 Wn. App. 918, 921, 947 P.2d 265 (1997). An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Hill, at 644. Credibility

determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's conclusions of law are reviewed de novo. State v. Day, ___ Wn.2d ___, ___ P.3d ___ (2007); State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In applying the above law to the case now on appeal, the court should treat the findings of fact as verities. Defendant has assigned error to undisputed findings of fact 11, 12, 15, 16, and reasons for admissibility 1, 2(a), 2(b), 2(c), 3, 4, 5, 6, 8, 9, and 10. All of the findings of fact were undisputed by the defendant below. The findings are supported by substantial evidence, so this court should treat the findings of fact as verities.

- c. The defendant's statements were properly admitted as they were either made voluntarily after the defendant was advised of his rights, or were made spontaneously to statements not designed to elicit a response.
 - i. **The statements made by the defendant to Officer Norling were properly admitted as the defendant had been properly advised of his rights and had waived those rights.**

Under Miranda, a suspect in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can

be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning.” State v. Brown, 132 Wn.2d 529, 582, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998) (citing Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)).

Before a court will admit a defendant’s custodial statements, the State must prove by a preponderance of the evidence that the defendant was advised of his Miranda rights and made a voluntary, knowing, and intelligent waiver of those rights prior to making the statements to police. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Braun, 82 Wn.2d 157, 160-61, 509 P.2d 742 (1973). A waiver may be expressly made or implied “where the record reveals that a defendant understood his rights and volunteered information after reaching such understanding.” State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986). In reviewing whether a defendant’s statements while in custody were voluntarily made, a reviewing court determines whether there was substantial evidence in the record from which the trial court could have found a confession was voluntary. State v. Broadaway, 133 Wn.2d 118, 129, 942 P.2d 363 (1997). For due process purposes, the voluntariness of a confession is determined from the totality of the

circumstances under which it was made. State v. Aten, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). Some factors considered are the defendant's physical condition, age, mental abilities, physical experience, and police conduct.

Here, there was ample evidence to support the trial court's conclusion that Miranda warnings were given and that defendant voluntarily waived his rights. Officer Norling testified that after Deputy Rather detained the defendant, he read the defendant his rights. 1RP 18. He stated that he read the defendant his rights from his card. Id. The defendant appeared to understand Officer Norling and agreed to speak with him. 1RP 26-27. Officer Norling then asked the defendant how long K.T. had been with him, and he stated about a week. 1RP 19. The defendant then asked Officer Norling why he had asked him how old K.T. was and told Officer Norling that K.T. told him she was 19 years old. 1RP 19. The defendant then indicated that he wanted to talk to an attorney and Officer Norling did not ask the defendant any further questions. 1RP 20, 41-42. Such evidence clearly established that the defendant voluntarily waived his rights.

The defendant asserts that the State presented conflicting testimony regarding whether the defendant was advised of his rights. Brief of Appellant at page 38. The defendant argues that "Although Norling testified that he went to Mr. Sadler and read him his warnings shortly after

he was detained by Deputy Rather, and just after Rather called for medical aid, Rather testified that he did not recall that Mr. Sadler was advised of his rights at that time.” Brief of Appellant at page 38. Such argument is factually incorrect. Deputy Rather testified that at one point he left Officer Norling and the defendant to continue his sweep of the residence, and that he did not hear Officer Norling advise the defendant of his rights. Moreover, the defendant below acknowledged that Deputy Rather was not with Officer Norling at the time that the defendant was advised of his rights. 1RP 106.

Officer Norling was also not inconsistent about when the defendant requested an attorney. The defendant suggests that Officer Norling testified that the defendant asked for an attorney in the residence before Deputy Rather did a protective sweep, when the defendant was in the patrol car, and when Detective Jackson requested that the defendant consent to a search of the residence. Brief of Appellant at page 39. Officer Norling did not testify that the defendant requested an attorney when he was in his residence with Officer Norling. Instead, when read in context, the State was clearly asking Officer Norling about the defendant’s request for an attorney made in the patrol car. 1RP 20. The State even prefaces the question to Officer Norling with “skipping back after the defendant told you, she told me she was 19 . . .” IRP 20. The question clearly was directing Officer Norling back to his conversation with the defendant in the patrol car.

The State did not present contradictory testimony. The State merely presented undisputed evidence that the defendant was properly advised of his rights, voluntarily waived those rights, and when he requested an attorney, questioning stopped. While the court did not make a written finding that she found Officer Norling credible, it is clear that the court did find his testimony credible. The court stated:

The Miranda advisements were properly given to Mr. Sadler, and there was no testimony that he did not understand the rights as read to him by Officer Norling, that he voluntarily waived his rights, and he spoke with law enforcement.

IRP 128-129.

Moreover, the court specifically found that the defendant was properly advised of his rights. CP 270-276. The State satisfied its burden in proving that the defendant was properly and timely advised of his Miranda warnings, and therefore the court did not err in admitting the statements made by the defendant to Officer Norling.

ii. The statements made by the defendant to Detective Jackson were properly admitted as they were spontaneous statements.

An interrogation extends only to words or that law enforcement should have known were reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L. Ed. 2d 297 (1980). A defendant's incriminating statement that is not a

response to an officer's question is freely admissible. Miranda, 384 U.S. at 478; Innis, 446 U.S. at 299 (1980). The Fifth Amendment does not require law enforcement to prevent a person from making incriminating statements. Miranda, 384 U.S. at 478. Rather, “[v]olunteered statements of any kind are not barred by the Fifth Amendment.” Id.

The trial court properly admitted the statements made by the defendant to Detective Jackson. Detective Jackson testified that he knew the defendant had been advised of his rights and was not waiving his rights. 1RP 80. He stated that he told the defendant that he was going to be seeking a search warrant for the residence in order to keep the defendant advised as to what was happening. 1RP 79-80. Detective Jackson stated that he did not ask the defendant any questions. 1RP 80. In response, the defendant volunteered to Detective Jackson that “he thought the girl was 19.” 1RP 80. Moreover, the statement the defendant made to Detective Jackson, even if erroneously admitted, was harmless because the defendant's statements to Officer Norling were properly admitted, the statements to Officer Norling and Detective Jackson were the same, and there was overwhelming evidence of sexual exploitation of a minor.

3. ENTRY INTO THE DEFENDANT'S RESIDENCE
WAS LAWFUL AS THE DEFENANT
CONSENTED TO THE OFFICER'S ENTRY.

Whether consent to search was voluntary, and therefore valid, is a question of fact to be determined from the totality of the circumstances. Schenkloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L. Ed. 2d 854 (1973). In State v. Raines, 55 Wn. App. 459, 778 P.2d 538 (1989), the court held that one of the defendants implicitly consented to officers' entry into the residence. Id. at 462-463. The court stated:

If a householder is in a position to communicate refusal of admittance, and circumstances surrounding the warrantless entry "are such that [police officers] can reasonably conclude [they are] not being refused entry, then no invitation, express or implied, is necessary to make the [officers'] entry lawful."

State v. Raines, 55 Wn. App. 459, 462, 778 P.2d 538 (1989), review denied, 113 Wn.2d 1036 (1990), quoting State v. Sabbot, 16 Wn. App. 929, 937-39, 561 P.2d 212 (1977).

In Raines, the officers arrived at the residence and requested permission "to look around." Id. at 462. The defendant made no objection, but stepped aside as if to allow the officers to enter the residence. Id. The court found that the defendant's act of stepping aside was an affirmative act in response to the officers' request which amounted to more than acquiescence. Id. The court further found that the defendant

was in a position to communicate an objection and did not expressly do so. Id. Failure to expressly communicate an objection amounted to an implied waiver. Id.

Similarly, when Officer Norling asked the defendant if K.T. was there, the defendant told him that K.T. was “right up here” and started to walk up the stairs. 1RP 16-17. Officer Norling stated, “He said she was up here, and he turned and if she is up here, and like follow me; she is up here.” 1RP 23. Similar to the implied consent to enter in Raines, the defendant made the affirmative act of opening the door and walking up the stairs, calling K.T.’s name. 1RP 17. The defendant never told Officer Norling that he could not come inside. 1RP 23. The defendant was in a position, similar to the defendant in Raines, to communicate an objection to Officer Norling’s entry, and he did not do so.

The defendant asserts that “consent to search may not be implied by silence of failure to object when police do not expressly ask for consent.” Brief of Appellant at page. 47. The defendant cites to U.S. v. Jaras, 86 F.3d 383 (5th Cir. 1996), State v. Rison, 116 Wn. App. 955, 69 P.3d 362 (2003), review denied, 151 Wn.2d 1008 (2004), and State v. Browning, 67 Wn. App. 93, 834 P.2d 84 (1992), for such assertion, but misstates that they require an express request for consent. In Rison, the court, citing U.S. v. Jaras, supra, and State v. Browning, supra, stated that

“ . . . consent may not be reasonably implied by one’s silence or failure to object when the officer did not expressly or impliedly ask him for consent to search.” Rison, 116 Wn. App. 955 at 962-963 (emphasis added).

In the present case, there was an implicit request by Officer Norling to enter the defendant’s residence to verify the presence of K.T. When asked if K.T. was present, the defendant acknowledged that she was, turned, and began to walk up the stairs. As demonstrated by his conduct, the defendant clearly was taking an affirmative act in response to Officer Norling’s question that amounted to more than mere acquiescence. This is not a situation where Officer Norling asked the defendant if K.T. was present, and then told him that he was going to come in and look for her regardless of the defendant’s answer. Rather, in response to Officer Norling’s inquiry if K.T. was present, the defendant allowed him to enter the residence and took Officer Norling to K.T. The trial court properly found that the defendant consented to Officer Norling’s entry. Officer Norling was also not requesting to conduct a search, and therefore he need not read the defendant a Ferrier⁵ advisement. State v. Khounvichai, 149 Wn.2d 557, 559, 69 P.3d 862 (2003).

⁵ State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

4. THE VALIDITY OF THE “PROTECTIVE SWEEP” IS IRRELEVANT BECAUSE THE SEARCH WARRANT IS UNCHALLENGED AND VALID.

The search warrant which was obtained in this case was not challenged below. Failure to raise a challenge to the search warrant affidavit at trial precludes appellate review. State v. Christensen, 40 Wn. App. 290, 297, 698 P.2d 1069 (1985). All evidence collected in this case was obtained pursuant to the warrant. The defendant did not challenge the propriety of the search warrant issued for the defendant’s residence at trial. While the defendant attempts to challenge the search warrant on appeal by arguing that “. . . the physical evidence pursuant to the search warrant should be suppressed,” the defendant fails to articulate how a review of the search warrant can occur without the warrant having been contested below. The defendant is asking this court to suppress evidence seized pursuant to a search warrant, but the trial court was never asked to examine the sufficiency of the warrant excluding any information that was, allegedly, the result of an illegal search.

In this case, the State sought to have this court examine the search warrant on appeal, and that request was denied. Even though the search warrant is not before this court, there is evidence in the record to suggest that the search warrant that was obtained did not contain information solely from Officer Norling and Deputy Rather’s entry into the defendant’s house. Detective Jackson testified at the CrR 3.5 and CrR 3.6

hearing that he went to the hospital where K.T. was to talk to the social worker about information that K.T. had disclosed. 1RP 81. Detective Jackson also indicated that the things in the search warrant were things that either the initial officers observed, he observed, *or* that K.T. described. 1RP 90. At trial, Detective Jackson testified that as he was preparing the warrant he insured that K.T. was interviewed and included that information in the search warrant. RP 1651, 1658. Clearly, there is evidence to suggest that the warrant may be valid even if this court were to find that the protective sweep was not lawful.

There was no record developed regarding the sufficiency of the search warrant affidavit, and it appears that information from K.T. was included in the warrant, which would be a source independent from the sources of the protective sweep.⁶ Because all of the evidence in this case

⁶ A search warrant based upon an affidavit containing illegally obtained information is not rendered invalid if the affidavit contains otherwise sufficient facts to establish probable cause independent of the illegally obtained information. State v. Maxwell, 114 Wn.2d 761, 791 P.2d 223 (1990); State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987); see also, State v. Cord, 103 Wn.2d 361, 693 P.2d 81 (1985) (court need not conduct a hearing on allegedly false statement in an affidavit for warrant if affidavit establishes probable cause independently of challenged statements) and State v. Cockrell, 102 Wn.2d 561, 689 P.2d 32 (1984) (fact that there was insufficient probable cause to search all areas listed in warrant did not invalidate warrant with respect to areas for which there was sufficient legal basis). The Washington Supreme Court has held that this application of this “independent source exception” complies with Article I, Section 7 of the Washington State Constitution. State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005); State v. Smith, 113 Wn. App. 846, 856, 55 P.3d 686 (2002).

The “independent source” doctrine allows the government to use evidence that it obtained both illegally and legally, as when evidence first found in an illegal search is later rediscovered in a legal one. Murray v. United States, 487 U.S. 533, 537, 108 S. Ct. 2529, 101 L. Ed. 2d 472, (1988).

was seized pursuant to a valid search warrant, the issue of whether the initial sweep was lawful is of no consequence because no evidence was seized as a result of that sweep, and information from an independent source, K.T., was used in obtaining a search warrant. The defendant cannot now challenge the validity of the search warrant because such issue was not raised below, no evidence was seized from the initial sweep of the defendant's residence, and it appears that information gained from another source was used in obtaining a search warrant.⁷

5. ASSUMING, ARGUENDO, THAT THIS COURT REACHES THE MERITS OF WHETHER THE INITIAL SWEEP OF THE DEFENDANT'S RESIDENCE WAS LAWFUL, THE SWEEP WAS JUSTIFIED BASED ON THE INFORMATION KNOWN TO LAW ENFORCEMENT.⁸

The Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. Warrantless searches are per se unreasonable unless they fall into one of the narrowly construed

⁷ If this court were to allow an untimely challenge to the search warrant, the proper remedy would be remand for a hearing before the trial court to determine the validity of the search warrant, not remand for a new trial.

⁸ The defendant asserts in a footnote that Detective Jackson's walkthrough of the defendant's residence that followed the same path as the responding officers was unlawful. Brief of Appellant at page 46. As argued above, however, the search warrant is not part of the record. Therefore this court is not able to determine if Detective Jackson obtained any additional information from his walkthrough that was not obtained from the responding officers.

exceptions. State v. Ross, 141 Wn.2d 304, 311-312, 4 P.3d 130 (2000); State v. Davis, 86 Wn. App. 414, 420, 937 P.2d 1110 (1997). The emergency exception is one such exception. State v. Davis, *supra*; State v. Menz, 75 Wn. App. 351, 353, 880 P.2d 48 (1994), State v. Downey, 53 Wn. App. 543, 545, 768 P.2d 502 (1989). Similarly, law enforcement may be required to perform a warrantless search as a “part of their function of protecting and assisting the public.” State v. Gocken, 71 Wn. App. 267, 274, 857 P.2d 1074 (1993). This exception is also known as the “community caretaking” function. State v. Dempsey, 88 Wn. App. 918, 922, 947 P.2d 265 (1997); State v. Lynch, 84 Wn. App. 467, 477, 929 P.2d 460 (1996); State v. Hutchison, 56 Wn. App. 863, 866, 785 P.2d 1154 (1990).

In State v. Kinzy, 141 Wn.2d 373, 5 P.2d 668 (2000), the court outlined two separate exceptions included in community caretaking, (1) the emergency aid exception, and (2) routine checks on health and safety. 141 Wn.2d at 386. The emergency aid exception recognizes the function of the police to “assist citizens and protect property.” State v. Schroeder, 109 Wn. App. 30, 38, 32 P.3d 1022 (2001) (quoting, State v. Johnson, 104 Wn. App. 409, 414, 16 P.3d 680 (2001)). This exception applies when (1) the officer subjectively believes that someone likely needs assistance for health or safety reasons; (2) a reasonable person in the same situation

would similarly believe that there is a need for assistance; and (3) there is a reasonable basis to associate the need for assistance with the place searched. Kinzy, 141 Wn.2d at 386-87. A reviewing court must be satisfied that the claimed emergency is not a pretext for conducting an evidentiary search. Schroeder, 109 Wn. App. 30 at 38, citing, Johnson, supra at 414. The court has not required a showing to be made that there is a “*strong belief that a specific person is in actual need of help for a serious health or safety reason.*” Johnson, 104 Wn. App. 409. Contrasted with the emergency aid exception the routine check on health and safety involves less urgency. Schroeder, 109 Wn. App. 38-39. Under routine checks a court must balance the individual’s interest in freedom from police interference against the public’s interest in having the police perform the community caretaking function. Schroeder, 32 P.3d at 1026 (quoting, Kinzy, 141 Wn.2d at 392).

In addition to the three criteria listed above there is another consideration that is important in determining whether to allow for an emergency doctrine exception under the community caretaking function. As noted recently by the Supreme Court:

To determine whether the community caretaking exception applies, the court must examine the subjective intent of the officer and determine whether the law enforcement officer’s actions leading up to the seizure were “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”

[State v. Kinzy, 141 Wn.2d [73], at 385 (quoting Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)). If a law enforcement officer's actions are subjectively divorced from a criminal investigation, then the court must weigh the public's interest in having the community caretaking function performed against an individual's interest in freedom from law enforcement intrusion. If the public interest outweighs the individual's interest, then the warrantless seizure was permissible under our state constitution. Kinzy, 141 Wn.2d at 387.

State v. O'Neill, 148 Wn.2d 564, 597, 62 P.3d 489 (2003).

In its analysis of the community caretaking exception, the court must look to the totality of the circumstances. State v. Davis, 86 Wn. App. 414, 420, 937 P.2d 1110 (1997). "The determination of whether an emergency situation justifies a warrantless search is necessarily tied to the individual facts of each case." State v. Lynd, 54 Wn. App. 18, 22, 771 P.2d 770 (1989).

Many courts have considered the importance of such an exception. One federal circuit court characterized the duties of law enforcement as being a "jack-of-all emergencies." United States v. Rodriguez-Morales, 929 F.2d 780, 784 (1st. Cir. 1991). The officer is "expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety." Id. at 784-85. Further,

When an officer believes in good faith that someone's health or safety may be endangered, particularly if that

person is known to have physical or mental problems, public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer that assistance while a warrant is obtained. To the contrary, the officer could be considered derelict by not acting promptly to ascertain if someone needed help.

State v. Gocken, 71 Wn. App. 267, 277, 857 P.2d 1074 (1993). The emergency does not have to rise to the level of the need for immediate professional medical treatment; the concern is simply for people who are in danger and in need of help. State v. Hutchison, 56 Wn. App. 863, 865, 785 P.2d 1154 (1990).

Public policy also dictates the necessity of the community caretaking exception to the warrant requirement. In State v. Chisholm, 39 Wn. App. 864, 686 P.2d 41 (1985), the court stated:

An individual's interest in proceeding about his business unfettered by police interference must be balanced against the public's interest in having police officers perform services in addition to the traditional enforcement of penal and regulatory laws.

Id. at 867.

Courts have consistently upheld the community caretaking function as an exception to the warrant requirement. In State v. Gocken, 71 Wn. App. 267, 857, P.2d 1074 (1993), the court upheld the entry into a victim's home where the officer was motivated by the victim's niece to enter the residence based on a perceived need to render aid or assistance.

Id. at 277. In Gocken, the victim was elderly, mentally ill, on medication, and her friends and family had been unable to contact her for weeks. Id.

In State v. Hutchison, 56 Wn. App. 863, 785 P.2d 1154 (1990), the court upheld a warrantless search of a defendant's clothing when the defendant, who was lying in a parking lot unconscious and unresponsive, was in need of assistance and the officer conducted the search of his person in an effort to identify the man and his address. Id. at 866-867.

In State v. Davis, 86 Wn. App. 414, 937 P.2d 1110 (1997), review denied, 133 Wn.2d 1028 (1997), the court upheld a search of the defendant's motel room when the dead bolt to the room was locked from inside, the tenant did not respond to repeated telephone calls and knocks at the door throughout the day, and it was after check-out time. Id. at 422. Additionally, in State v. Lynch, 84 Wn. App. 467, 929 P.2d 460 (1996), the court upheld the warrantless entry into the defendant's van, where eyewitnesses reported the van to have been prowled, the officer noticed the inside of the van was in disarray, and the officer was looking for owner identification of the van. Id. at 477-478.

Finally, in State v. Lynd, 54 Wn. App. 18, 771 P.2d 770 (1989), the court permitted the warrantless entry of the defendant's residence to check on a known victim of domestic violence. Id. at 22-23. Police responded to a hang-up 911 call. Id. at 19. When police arrived, they

observed a man loading things into a car as if he were leaving. Id. at 19, 22-23. The man had a cut on his face and admitted to committing acts of domestic violence. Id. at 19. The man told police the victim was gone and refused to give police permission to search the residence. Id. Police entered the house and found a marijuana grow operation. Id.

In upholding the entry to Lynd's residence, the court stated:

Whether a police officer's acts in the face of a perceived emergency were objectively reasonable is a matter to be evaluated in relation to the scene as it reasonably appeared to the officer at the time, "not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis."

Id. at 22 (quoting State v. Bakke, 44 Wn. App. 830, 837, 723 P.2d 534 (1986) (quoting Commonwealth v. Young, 382 Mass. 448, 416 N.E.2d 944, 950 (1981))).

In the present case, police were informed that a missing 14-year-old girl may be at the location of the defendant's residence and that she may be involved in sadomasochistic sex. 1RP 14, 31, 61. There were no additional facts known to the officers except the name and address of the defendant. 1RP 13-14. At the very minimum, police had enough information to glean that the defendant was harboring a missing juvenile girl. 1RP 13, 16, 17, 24, 38. The safe recovery of K.T. was of paramount concern to the police. 1RP 16. The defendant appeared at the door

sweating and out of breath. 1RP 42. Because the officers knew that K.T. may have been involved in sadomasochistic sex, it would be reasonable to sweep the residence to determine if there were any other participants in bondage who were incapacitated and incapable of escape or calling for help. Given that they had specific information regarding sadomasochistic sex, it would be reasonable for officers to see if there was anyone in the residence that could not escape.⁹

The defendant relies in part on State v. Link, 136 Wn. App. 685, 150 P.3d 610 (2007). Brief of appellant at page 41-42. Link, however, is distinguishable on its facts. In Link, the officer testified that he was concerned about the safety of the children in the apartment that he entered, but that his primary purpose was to investigate a possible methamphetamine lab. Link, 136 Wn. App. at 696. In the present case, Officer Norling did not enter the defendant's residence with the purpose of investigating possible criminal activity, and the sweep was not done to investigate criminal activity. Instead, Officer Norling was there to recover

⁹ The trial court below did not find that the sweep was justified on the basis that there may be other individuals engaged in bondage trapped in the residence, this court can affirm the trial court on any grounds. See, State v. Michielli, 132 Wn.2d 229, 242, 957 P.2d 587 (1997); State v. Hudson, 79 Wn. App. 193, 194 n.1, 900 P.2d 1130 (1995), review denied, 128 Wn.2d 1024 (1996).

a missing juvenile. 1RP 24. Officer Norling specifically stated that his intent was not to search the residence, but to find K.T. 1RP 24.

6. DEFENDANT’S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES WAS NOT VIOLATED BECAUSE NO TESTIMONIAL HEARSAY WAS INTRODUCED, AND IF SUCH HEARSAY WAS INTRODUCED, ANY ERROR WAS HARMLESS.

- a. No testimonial hearsay was admitted, therefore the defendant’s Sixth Amendment rights were not violated.

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Court held that an out-of-court testimonial statement may not be admitted against a criminal defendant unless the declarant testifies at trial or is unavailable, and the defendant had a prior opportunity to cross-examine the declarant. Crawford, 124 S. Ct. at 1374. The decision in Crawford was restricted to the use of testimonial hearsay, but “left for another day any effort to spell out a comprehensive definition of ‘testimonial.’” Crawford, 124 S. Ct. at 1374. The court, however, gave guidance on the issue by noting various formulations of the “core class” of testimonial statements at which the Confrontation Clause was directed. These include (1) “ex parte in-court testimony or its functional equivalent—that is, material such as affidavits custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used

prosecutorially;” (2) “extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;” and (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Crawford, 124 S. Ct. at 1364.

In Davis v. Washington, _____ U.S. ____, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and its consolidated case, Hammon v. Indiana, the Supreme Court provided further guidance with regard to the parameters of statements deemed “testimonial.” First, in Davis, the Court held that the complainant’s 911 telephone call was nontestimonial and, therefore, not subject to the Confrontation Clause of the Sixth Amendment. In upholding the admissibility of the 911 call, the Court stated:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 126 S. Ct. at 2273 -74. The Court reached a different conclusion in the second case, which also stemmed from a domestic dispute. At issue was Amy Hammon’s statements to investigating police officers at her home after the police responded to a reported domestic disturbance. Id. at

2272. The Court found the characterization of these statements was “much easier” to resolve because they “were not much different” from the statements in Crawford. Id. at 2278. The interrogation arose from “an investigation into possibly criminal past conduct”; “[t]here was no emergency in progress,” Hammon told the officers when they arrived that “things were fine”; when an officer eventually questioned Hammon a second time and elicited the challenged statements he was not seeking to determine “what is happening,” but rather “what happened.” Id.

In addition to providing further guidance on what constitutes a testimonial statement, the Court explained that it “must decide ... whether the Confrontation Clause applies only to testimonial hearsay.” Davis, 126 S. Ct. at 2274. As noted above, this issue was raised but left undecided by the Court in Crawford. In Davis, the Court clarified that nontestimonial hearsay does not implicate the confrontation clause at all. Thus, any challenge to the admission of hearsay on the basis of the right to confront must assess whether the hearsay at issue is testimonial.

In this case, there were no statements made by K.T. introduced. The State was permitted to ask, over the defendant’s objection, if Detective Jackson, in the process of preparing the search warrant, interviewed K.T. and included information from K.T. in the search warrant. RP 1651-1658. The State did not elicit testimony as to what statements K.T. made, whether they were helpful or harmful to the

defendant, or whether the statements included information about the defendant's prior conduct.

The defendant argues that evidence was presented that K.T. incriminated the defendant and identified physical evidence which was used to provide probable cause for the search warrant. Brief of Appellant at page 51. On the contrary, there was no testimony elicited that suggested that K.T. implicated the defendant in any way. There was also no testimony that probable cause for the warrant was ever established.

The cases cited by the defendant are distinguishable from the case at bar. In State v. Martinez, 105 Wn. App. 775, 20 P.3d 1062, overruled in part on other grounds by, State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003), one of the officers stated that "the information that we had [from] Mr. Tate is that they usually show up in a blue Blazer, so we were on the lookout for a blue Blazer." Id. at 780. The trial court ruled that officers could relate what their own understanding was after Mr. Tate talked to them, and the officer's statements were not hearsay. Id. at 782. The court reversed, holding that "inadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify." Id. at 782, citing U.S. v. Sanchez, 176 F.3d 1214, 1222 (9th Cir. 1999).

Clearly, the facts in the present case are distinguishable from Martinez. In Martinez, the officers' impression was admitted without direct quotations from the declarant. In the case at bar, no witness

testified to his or her impressions or understanding after speaking with K.T. The State merely elicited testimony that officers spoke to K.T., and included her statements in a search warrant. Such testimony does not suggest the nature of what K.T.'s statements were or whether they were helpful or harmful to the defendant.

In State v. Johnson, 61 Wn. App. 539, 811 P.2d 687 (1991), the detective testified that, based on the affidavit containing a confidential informant's statement, he had reason to suspect Johnson was involved in drug trafficking. Id. at 546. The court held that the offered testimony was inadmissible hearsay. Id. at 547. In the present case, no witness testified that he or she suspected the defendant of anything based on a conversation with K.T. No witness testified that any information provided by K.T. implicated the defendant. Rather, the only testimony that was presented was that officers spoke to K.T., her statements were included in the search warrant. RP 1658.

Finally, the defendant asserts that “. . . K.T. incriminated Mr. Sadler and identified physical evidence which was used to provide probable cause for the search warrant.” Brief of Appellant at page 51. However, such assertion is incorrect in several respects. First, there was no testimony regarding any finding of probable cause for the search warrant.

Second, nothing in Detective Jackson's testimony suggests that a judge determined that probable cause existed to issue a search warrant.

Detective Jackson was asked what kind of information goes into a search warrant application. RP 1651. In response, Detective Jackson stated:

You want to establish probable cause of why you want to go in, and what things you are trying to look for. So in this case, I had known from Detective Bull that there was kind of some S&M stuff that was involved, and some bondage and restraints, and obviously [K.T.]¹⁰ is underage. And so just evidence along those lines, there might have been some sexual activity going on related to all of [K.T.] being there.

RP 1651.

Detective Jackson did not testify that a judge determined that probable cause was present or what the probable cause was based on. The defendant cannot establish that any testimonial hearsay of K.T. was admitted.

While the State asked Sergeant Villamor if in his conversation with K.T. he had information about particular items in a room in the defendant's residence, such question was objected to by defendant. RP 1609. While the court overruled the objection, the State nevertheless rephrased the question as "Sergeant Villamor, don't tell us what you were told, just whether or not there were particular items that you were looking for within this room." RP 1609. There was no testimony that any items Sergeant Villmaor was looking for came from statements made by K.T. Finally, even if this court were to find that the testimony somehow

¹⁰ K.T.'s first name was used, and in the interests of privacy, the State changed it to K.T.

suggested that K.T. identified items in the defendant's home, the defendant has still not presented any authority as to how that statement is testimonial hearsay. Sergeant Villamor was merely describing the steps in the police investigation. Nothing in his testimony suggested what K.T. identified or whether such identification implicated the defendant. The defendant cannot establish that any of the testimony offered by the State constituted testimonial hearsay.

- a. If the court does find that the trial court committed error in admitting such evidence, any error was harmless.

A violation of the confrontation clause is also subject to harmless error analysis where the error was harmless beyond a reasonable doubt. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844, affirmed, ___ U.S. ___, 126 S. Ct. 2266; 165 L. Ed. 2d 224 (2006) (citations omitted). To determine whether error is harmless, this court utilizes “the ‘overwhelming untainted evidence’ test.” Davis at 305 (citing State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. Id.

Based on the overwhelming evidence presented in this case, if this court were to find that the trial court erred in admitting what the defendant asserts to be hearsay, any error is harmless.

70. THE TRIAL COURT PROPERLY EXERCISED
ITS DISCRETION IN EXCLUDING
IRRELEVANT AND INADMISSIBLE
EVIDENCE; SUCH EXCLUSION DID NOT
DEPRIVE THE DEFENDANT OF HIS RIGHT TO
PRESENT A DEFENSE.

The Sixth Amendment, applied to the states through the Fourteenth Amendment, guarantees criminal defendants a fair opportunity to present exculpatory evidence free of arbitrary state evidentiary rules. Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987), Washington v. Texas, 388 U.S. 14, 18, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157 (1996).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993); In re Twining, 77 Wn. App. 882, 893, 894 P.2d 1331 (1995). Limitations on the right to introduce evidence are not constitutional unless they affect fundamental principles of justice. Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d

361 (1996) (stating that the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988)). Similarly, the Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

- a. The trial court properly excluded evidence that the victim told others that she was 19 years old, and any error committed in excluding such evidence was harmless as the defendant was acquitted of kidnapping and rape of a child.

The defendant asserts that “What is at issue in this case is Mr. Sadler’s constitutional right to present evidence in support of an affirmative defense to the rape charge and to negate the elements of the kidnapping charges, which was particularly constrained because K.T. was not available as a witness.” Brief of Appellant at page 60 (emphasis added). The defendant’s argument is without merit as the defendant was acquitted of the rape and kidnapping charges. CP 473-535.

The only charges the defendant was convicted of were sexual exploitation of a minor. CP 473-535. The jury was instructed on the statutory defense that the defendant made a bona fide attempt to ascertain the true age of the victim by requiring production of identification and did not rely solely on the oral allegations of K.T. CP 398-472 (Instruction

#27). Because the defendant had the burden of showing that he made a bona fide attempt to verify K.T.'s age by production of identification, whether or not K.T. represented that she was 19 to other individuals is irrelevant to the sexual exploitation charges. The jury was specifically instructed that the statements of K.T. or her apparent age would not be sufficient as a defense to sexual exploitation of a minor. Because the defendant was acquitted of rape of a child and kidnapping, any potential error the court made in excluding evidence that K.T. told others that she was 19 years old is harmless as such evidence is not relevant to a defense of sexual exploitation of a minor.

- b. The trial court properly excluded evidence that the victim told the defendant she was 19 years old and the victim's descriptions of what acts she wanted to perform with the defendant via adult websites, and any error committed in excluding such evidence was harmless as the defendant was acquitted of kidnapping and rape of a child.

Similarly, any potential error committed by the court in excluding statements that K.T. made on the adult website profiles would be harmless because they are not relevant to the charges the defendant was convicted of—sexual exploitation of a minor. The defendant argues that the information on the profiles was relevant to “the issues of whether K.T. told him she was nineteen years old and the reasonableness of his belief

that she was in fact nineteen years old.” Brief of Appellant at page 55.

First, the defendant does not specifically identify in his brief what statements in particular from K.T. should have been admitted, so the State is unable to respond with specificity. Second, such argument could only be made if the defendant was convicted of kidnapping or rape of a child. Because the representations of K.T., which are not identified by the defendant on appeal, are irrelevant to the charges of sexual exploitation of a minor, this court need not reach the issue of whether such evidence was properly excluded. Any error was harmless as the defendant was acquitted of kidnapping and rape of a child.

- c. The trial court properly excluded evidence that the victim may have offered to show someone else a birth certificate because it is hearsay and does not establish that the victim showed the defendant a birth certificate.

Evidence that K.T. offered to show others her birth certificate was properly excluded. RP 2517. The defendant asserts, as he did below, that testimony that K.T. offered to show someone in Tennessee a birth certificate was evidence that it was more likely that K.T. had a birth certificate in her possession at that time. Brief of Appellate at page 56. The defendant cannot, however, argue that such evidence would not be hearsay. The only method the defendant had available to introduce such

evidence was through K.T.'s mother. RP 2424. Introduction of K.T.'s statement to someone in Tennessee that she could show him a birth certificate would be hearsay if it was admitted through K.T.'s mother.

Second, in the chat that the defendant wanted to admit, someone believed to be K.T. offered to show someone a birth certificate. RP 2426. The evidence was not that K.T. actually did show someone else a birth certificate. Id. Therefore, the defendant's argument that the chat made it more likely that K.T. showed the defendant a birth certificate because she may have offered to show someone else a birth certificate is attenuated. An offer to show someone a birth certificate does not necessarily mean that one was actually available to be shown.

The State asked the defendant if it was only his word that K.T. showed him her birth certificate. RP 2415. Such question does open to the door to a hearsay statement that someone Farnam believed to be K.T. offered to show someone else a birth certificate. As argued above, a mere offer to show someone a birth certificate is not synonymous with K.T. having actually shown the defendant a birth certificate. The trial court properly exercised its discretion in excluding such evidence. Finally, if this court were to find that the court below erred, any error would be harmless given the overwhelming evidence of sexual exploitation of a minor that was presented.

- d. The trial court properly excluded evidence that the defendant told the defense investigator that K.T.'s birth certificate was from Michigan because such statement would be hearsay and the State did not argue that the defendant had fabricated seeing a Michigan birth certificate after Farnam's interview.

The defendant sought to introduce evidence through a defense investigator that the defendant told him that K.T.'s birth certificate was from Michigan before K.T.'s mother disclosed the information. RP 2513-2514. The defendant asserts that such testimony was relevant to "rebut the state's attempt to show that Mr. Sadler learned that K.T.'s birth certificate was from Michigan from the transcript of the taped interview between police and Ms. Farnam." Brief of Appellant at page 56. First, the State did not argue that the defendant fabricated seeing K.T.'s birth certificate after seeing an interview of Farnam.

A statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." ER 801(d)(1)(ii).

The State asked the defendant if he saw the taped statement of Farnam where she indicated that K.T.'s birth certificate was from Michigan, and the defendant stated that he did not remember. RP 2393.

The State represented to the court that its questions were not designed to suggest that the defendant came up with the idea that K.T. showed him a Michigan birth certificate after reading the interview of Farnam. RP 2515. There was no argument by the State that the defendant fabricated seeing a Michigan birth certificate after reading Farnam's interview.

Second, the defendant cannot establish a hearsay exception that would allow a defense investigator to testify as to what the defendant told him, nor does the defendant assert that a hearsay exception is applicable on appeal. ER 801(c) defines hearsay as a declarant's out-of-court statement offered in evidence "to prove the truth of the matter asserted." Hearsay statements are inadmissible unless made admissible by some exception. ER 802. As argued above, the defendant cannot show that any hearsay exception is applicable. The defendant, however, did testify that in the Summer of 2004 K.T. showed him a Michigan birth certificate over a webcam. RP 1917-1918. The defendant testified that he did not see Farnam's interview until October. Any testimony regarding statements made by the defendant to a defense investigator is hearsay, and was properly excluded.

8. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL BASED ON A COMMENT THAT THE DEFENDANT EXERCISED HIS RIGHT TO COUNSEL WHEN THE DEFENDANT CANNOT ESTABLISH PREJUDICE.

The trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. See, State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." State v. C.J., 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court's denial of a motion for mistrial will be overturned only when there is a "substantial likelihood" the error prompting the motion affected the jury's verdict. Rodriguez, 146 Wn.2d at 269-70. A trial court should deny a motion for a mistrial unless "the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Id. at 270 (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). The trial court is in the best position to determine the prejudice of the statement in context of the entire trial. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). A reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence

properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow. See, State v. Crane, 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

The privilege against self-incrimination is based upon the Fifth Amendment to the U.S. Constitution which provides that “no person... shall be compelled in any criminal case to be a witness against himself[.]” State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996). The purpose of the right is to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the government. Id.

Courts have generally treated comments on post-arrest silence as a violation of a defendant’s right to due process because the warnings under Miranda constitute an “implicit assurance” to the defendant that silence in the face of the State’s accusations carries no penalty. State v. Easter, 130 Wn.2d at 236. The use of silence at the time of arrest and after the Miranda warnings is fundamentally unfair and violates due process. Id.

A police witness may not comment on the silence of the defendant to imply guilt from a refusal to answer questions. State v. Henderson, 100 Wn. App. 794, 798, 998 P.2d 907 (2000) (citing State v. Lewis, 130

Wn.2d 700, 705, 927 P.2d 2351 (1996)). But a mere reference to silence, which is not a comment on the silence, is not reversible error absent a showing of prejudice. State v. Lewis, 130 Wn.2d at 705; State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999). Testimony about an accused's silence is a "comment" only if used to suggest to the jury that the refusal to talk is an admission of guilt. State v. Lewis, 130 Wn.2d at 707.

The Washington Supreme Court distinguished mere reference to silence and improper comment on silence in two companion cases: Easter and Lewis. In Easter, the court held that police officer testimony that the defendant was a "smart drunk" who refused to answer questions violated the defendant's right to silence. State v. Easter, 130 Wn.2d at 241. The Easter officer testified at trial that defendant was a "smart drunk," which meant the defendant was evasive, "wouldn't talk," and was hiding something. Id. at 235. The prosecution used this silence as a "central theme" in closing argument. Id. at 230.

However, in Lewis, the court held that an officer's indirect reference to the defendant's silence was not a "comment" inferring guilt. State v. Lewis, 130 Wn.2d at 706. There, the officer testified that he told the defendant that "if he was innocent he should just come in and talk to me about it." Id. at 703. The court held that this did not amount to a

comment on the defendant's silence because the officer did not say that the defendant refused to talk to him or reveal the fact that the defendant failed to keep his appointment. Id. at 706.

Similarly, in Sweet, an officer testified that the defendant had said he would be willing to take a polygraph examination and give a written statement after speaking with his attorney. State v. Sweet, 138 Wn.2d at 480. However, no evidence of a polygraph examination nor any written statement by defendant was ever introduced as evidence. Id. The Sweet court distinguished Easter, citing Lewis for the proposition that the officer's testimony was a mere reference to silence. Id. Therefore, "[e]ven assuming it might have been error to admit the testimony, any error was harmless." Id.

A constitutional error is harmless if the court is convinced that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The court examines only the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Id. at 526.

Under the untainted evidence test, this court needs to look at all of the evidence presented. Detective Jackson stated "He said, she told me she was 19. He ended up saying that twice. Right after the first time, I

said, hey, I am not asking you any questions. You asked for an attorney and so –.”¹¹ RP 1660.

Counsel immediately objected and the court sustained the objection. RP 1660. The court offered to give the jury a limiting instruction, which the defendant declined. RP 1665-1666. The court declined to declare a mistrial and specifically instructed the jury to disregard the question and answer. RP 1673. The State does not dispute that the partial comment by Detective Jackson was clearly improper.

First, the defendant cannot establish any prejudice. In Lewis, supra, the court found that mere reference to silence is not reversible error absent a showing of prejudice. Lewis, 130 Wn.2d at 705. In this case, the defendant cannot show that the comment was anything more than a “mere reference.” The comment did not infer in any way that the defendant was guilty because he exercised his rights. Therefore, the defendant cannot establish any prejudice.

Moreover, given the overwhelming evidence presented in this case, any error was harmless. The court instructed the jury to disregard the statement by Detective Jackson, which the jury is presumed to have done. See, State v. Swan, 114 Wn.2d 613, 662, 790 P.2d 610 (1990). The comment was one partial statement during the course of an extremely long

¹¹ Defendant quotes the statement by Detective Jackson, but does so inaccurately. Brief of Appellant at page 60.

trial with many witnesses. A reasonable jury would have reached the same result, even if the comment had not been made. Additional evidence that the jury did not penalize the defendant for asking for an attorney is that the defendant was acquitted of 30 counts. Any error made by Detective Jackson's comment was harmless.

9. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL BASED ON A QUESTION REGARDING THE DEFENDANT'S INCARCERATION WHEN THE COURT INSTRUCTED THE JURY TO DISREGARD THE COMMENT.

As argued above, trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. See, State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." State v. C.J., 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court's denial of a motion for mistrial will be overturned only when there is a "substantial likelihood" the error prompting the motion affected the jury's verdict. Rodriguez, 146 Wn.2d at 269-70. A trial court should deny a motion for a mistrial unless "the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Id. at 270 (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). The trial court is in the best

position to determine the prejudice of the statement in context of the entire trial. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). A reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow. See, State v. Crane, 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

The court has applied a harmless error analysis to a jury observing the defendant in restraints. State v. Damon, 144 Wn.2d 686, 693, 692 P.3d 418 (2001). The court held that the overwhelming evidence test would apply, and that the State bears the burden of proving that the error was harmless. Id.

The case at bar is similar to State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993), review denied, 123 Wn.2d 1031 (1994), in which a witness testified that the defendant called her “when the defendant was getting out of jail.” Id. at 648. Moments later the same witness testified that the defendant had asked her to pick him up from jail in Seattle. Id. The court admonished the jury to disregard the statements. Id. The court found that, unlike cases in which statements were made regarding a

defendant's prior criminal history, the comments made about the defendant being in jail did not warrant a mistrial. Id. at 649-650. The court stated:

In the present case, on the other hand, the reference to Condon having been in jail was much more ambiguous. The mere fact that someone has been in jail does not indicate a propensity to commit murder, and the jury could have concluded that Condon was in jail for a minor offense. Also, the fact that someone has been in jail does not necessarily mean that he or she has been convicted of a crime. Thus, although the remarks may have had the potential for prejudice, they were not so serious as to warrant a mistrial, and the court's instructions to disregard the statements were sufficient to alleviate any prejudice that may have resulted.

Id. at 649-650.

In this case, the State asked the defendant "So in the last 18 months that you have been in jail, you haven't ever thought, well, [K.T.] is 14?" RP 2105. Defense counsel immediately objected to the question, and the court immediately sustained the objection. Id. The court then made the following ruling:

All right. Thank you. On the first motion for a mistrial, in review of the remark that was made by the Prosecutor, I am denying the defense motion for a mistrial, and I find that the remark, while inappropriately made, when it's viewed against the backdrop of the evidence, does not taint this case to require a mistrial.

RP 2119.

This one comment, when viewed against all of the evidence presented, was harmless beyond a reasonable doubt as to the sexual exploitation charges. The jury acquitted the defendant of 30 charges. The objection to the question was immediately sustained by the court. Similar to the comment in Condon, the comment was not sufficient to result in any prejudice. The statement by the prosecutor did not suggest that the defendant was being held on the current case, and as the court in Condon noted, the jury could have believed that the defendant was in jail on a minor offense. Id. Moreover, the comment did not suggest that the defendant had a propensity for violence or that he had been convicted of a crime. Just as the court in Condon did not find that two separate comments that the defendant had been in jail warranted a new trial, the comment by the State in the present case also did not warrant a new trial. While the court in Condon admonished the jury to disregard the statements, in the present case the jury was instructed that comments by the attorneys are not evidence. CP 398-472; RP 954. The jury is presumed to have followed this instruction. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

10. THE DEFENDANT CANNOT ESTABLISH THAT THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT WHEN THE ARGUMENT WAS NOT OBJECTED TO AND WAS PROPER.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996), overruled on other grounds by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See, State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). In closing argument, a prosecutor is permitted reasonable latitude in arguing inferences drawn from the evidence admitted during testimony. State v. Papadopoulos, 34 Wn. App. 397, 401, 662 P.2d 59 (1983).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); see also, State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995), cert. denied, 516 U.S. 843 (1993). A prosecutor may draw inferences as to the

credibility of witnesses if done properly and if the record supports the inference. State v. Hinkley, 52 Wn.2d 415, 420, 325 P.2d 889 (1958); see, State v. Brown, 35 Wn.2d 379, 386, 213 P.2d 305 (1949).

Defendant has failed to show that his claim of prosecutorial misconduct is meritorious or that it was not waived by the failure to object below. Given that the defendant has failed to properly object below, he must establish that any of the comments made by the State were so flagrant and ill-intentioned to create an enduring prejudice. The defendant cannot establish such prejudice.

In the present case, the State argued in part:

Instruction No. 27 requires production of the identification, not a request to see it on a webcam. When someone goes to buy alcohol or cigarettes or something like that, the store clerk doesn't say, can you give me a copy of your driver's license. They need to see the actual license, the actual document, the production of the document. Not show it to me; prove it to me.

And the Defendant, the adult, is burdened with making sure that their attempt at getting this documentation is a bona fide attempt. A good faith attempt. Even if you believe the Defendant when he says she showed me a birth certificate, regardless of the fact that he cannot give you details about when he saw it, what it looked like, he didn't write it down anywhere that anybody knows of, or any of those things, despite that, even if you believe the Defendant when he says I asked her for a copy, or she showed me a birth certificate on the webcam, according to the law, that is not enough. The law requires production, not seeing it over a fuzzy webcam, production of the document.

RP 2670-2671.

When read in context, it is clear that the State was not arguing inapplicable law. Rather, the State presented argument that the defendant's version of events—that K.T. showed him a birth certificate over a webcam—is insufficient as a bona fide attempt to ascertain K.T.'s age. The State is entitled to present argument based on the evidence. It appears to be undisputed that the term “production” is a non-technical term to which jurors are permitted to give its ordinary meaning. State v. Holt, 119 Wn. App. 712, 720, 82 P.3d 688 (2004), overruled on other grounds by State v. Easterlin, 126 Wn. App. 170, 173, 107 P.3d 773 (2005). A word is technical if its legal definition differs from the common understanding of the word. State v. Olmedo, 112 Wn. App. 525, 533-534, 49 P.3d 960 (2002).

The State is entitled to argue from the jury instructions, and advocate its theory of the case—that even if the defendant viewed a birth certificate over his computer, that attempt was inadequate. In addition to the defendant not objecting to the argument at the time it was made, the defendant did not request a definitional instruction of “production” be given to the jury when the jury was first given the case for deliberations. Furthermore, the defendant has to demonstrate that the argument by the State was made in bad faith and was improper. This the defendant cannot establish. The argument by the State was based off of the jury instructions, which required that the defendant make a bona fide attempt to verify K.T.'s age by requiring production of identification. The State was

entitled to argue that allegedly viewing a birth certificate over a computer was not “production,” and the jury could use the common or ordinary definition of “production” to either accept or reject the State’s argument.

If, however, this court were to find that the State’s argument was improper, the defendant cannot establish that it was flagrant or ill-intentioned or that it created an enduring prejudice. The defendant was free to argue that he satisfied his burden of requiring production of identification and did make such arguments. RP 3641. The defendant argues that the prosecutor committed misconduct by misstating the law, but it is clear that the State was merely presenting argument that if the defendant viewed a birth certificate over a webcam, that viewing does not comport with the ordinary definition of “production.” The defendant appears to assert that the State’s argument misstated the definition of “production,” but even under the defendant’s definition of “production,” the State’s argument is appropriate. The defendant defines production as “the act of presenting for display; presentation; exhibition.” Brief of Appellant at page 66. This definition is different from the definition of “production” that was requested by the defendant below. At trial the defendant requested a supplemental jury instruction defining “production” as “the act of producing, or to offer to view or notice,” only after the jury had begun deliberations and had returned with a question. CP 396-397. When placed in context, the State’s argument was that the “displaying” of K.T.’s birth certificate that the defendant alleged occurred did not qualify

as “display” because it may have been unclear or fuzzy. Such argument, even under either of the defendant’s definitions, is proper. The State did not commit misconduct in closing argument.

11. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO GIVE A SUPPLEMENTAL JURY INSTRUCTION OF A NON-TECHNICAL TERM WHICH IS NOT DEFINED IN THE WASHINGTON PATTERN JURY INSTRUCTIONS OR BY STATUTE.

The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court’s proper instructions, and the arguments of counsel. State v. Goldberg, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003). Washington requires unanimous jury verdicts in criminal cases. Id. Judicial intervention is permissible when a jury declares itself deadlocked. State v. Watkins, 99 Wn.2d 166, 171, 660 P.2d 1117 (1983). A trial court’s decision to give or refuse additional instructions after deliberations have begun is reviewed for abuse of discretion. State v. Miller, 40 Wn. App. 483, 489, 698 P.2d 1123 (1985) (citing State v. Studebaker, 67 Wn.2d 980, 987, 410 P.2d 913 (1966)). An abuse of discretion exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162.

Supplemental instructions properly may clarify earlier instructions. See, State v. Duhaime, 29 Wn. App. 842, 631 P.2d 964 (1981) (court did not err in giving accomplice instructions and in responding to written questions from jury on such instructions). “When the court received the interrogatory [from the jury], it had a right to instruct the jury in any manner that it saw fit, and, if the instruction given was correct, as a matter of law, there is no just ground for complaint.” Duhaime, 29 Wn. App. at 857. But the court may not introduce a new theory of the case or go beyond the matters that had been argued by the parties. See, e.g., State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990) (holding reversible error to give supplemental instruction on new accomplice liability theory in response to jury query during deliberations).

In this case, the trial court did not abuse its discretion in declining to give a supplemental instruction on the definition of “production.” “Production” is not defined in the WPICs or by statute. First, as argued by the State below, the definition of “production” that the defendant proposed below was not the only definition of “production” that would be applicable. RP 2692-2693. As the State suggested, another definition of “production” is “to make available to be obtained, used, or reached.” RP 2693.

The defendant asserts that when the trial court declined to give his supplemental jury instruction the court denied him the right to have an instruction that allowed him to argue his theory of the case. Such assertion is without merit. First, the defendant had already argued his theory of the case before he requested a supplemental jury instruction. Second, the defendant was permitted to argue about what “production” meant under the jury instructions given to the jury. The defendant has not articulated a single basis to support a claim that the trial court abused its discretion. This was not a case in which the jury was deadlocked. As the State argued below, the jury was able to resolve any question themselves. The court was under no obligation to give an instruction on the definition of “production” either in its original instructions or in a supplemental instruction. The jury is to give non-technical words their ordinary meaning. State v. Edwards, 84 Wn. App. 5, 10, 924 P.2d 397 (1996), review denied, 131 Wn.2d 1016 (1997). Clearly, that is what the jury did in this case. The defendant cannot establish that the trial court abused its discretion.

12. THE DEFENDANT HAS FAILED TO
ESTABLISH CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that

“an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” Delaware v. VanArsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” Neder v. United States, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (internal quotation omitted).

“[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” Brown v. United States, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also, State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error”).

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); see also,

State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)

(“although none of the errors discussed above alone mandate reversal....”).

The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. See, Id. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. Id. Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. See, e.g., Johnson, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. See, e.g., State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970), review denied, 78 Wn.2d 992 (1970) (holding that three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988), review denied, 112 Wn.2d 1008 (1989) (holding that three errors did not amount to cumulative error), and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979), review denied, 92 Wn.2d 1002 (1979), (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, see e.g., State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, see e.g., State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); State v.

Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, see, e.g., State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See, Stevens, 58 Wn. App. at 498.

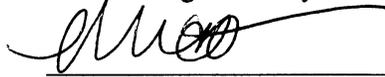
In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that the defendant's convictions be affirmed.

DATED: OCTOBER 18, 2007

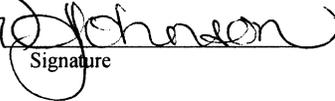
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/19/07 
Date Signature

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