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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  _____
DEPUTY

No. 38548-1-II

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

STATE OF WASHINGTON,
Appellant,

v.

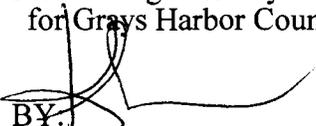
MATHEW C. MEACHAM,
Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF THE APPELLANT

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ASSIGNMENTS OF ERROR

The trial court erred by dismissing the sexual motivation allegation prior to trial in this matter.

ISSUES PRESENTED FOR REVIEW

Did the Grays Harbor Superior Court improperly dismiss the sexual motivation allegation from the Information prior to trial?

STATEMENT OF THE CASE

Anticipated Facts to be Proved at Trial¹

On or between January 18 and 20, 2008, someone entered the garage located at 1216 Lincoln Street in Hoquiam and stole clothing from the clothes dryer. This is the residence of Jami L. Cowden. Ms. Cowden is a 29 year old female who, during the charged time period, lived alone at 1216 Lincoln Street. Cowden reported to the police that the garage was not locked and is accessible through her backyard. Missing from her dryer

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Because there has been no fact finding in this case, the anticipated facts are derived from the original Motion and Declaration for Warrant of Arrest (CP 4-8) and the Bill of Particulars (CP 9-13).

were miscellaneous underwear (panties and bras) and socks and shirts.

On January 25, 2008, Detective Shane Krohn of the Hoquiam Police Department and Detectives Bret Ellis and George Kelley of the Aberdeen Police Department set up video surveillance and a VARDA alarm in Ms. Cowden's garage in hopes of catching the person who entered the garage. At this time, Detective Krohn also had Cowden put a small load of clothes in the dryer and mark them with her initials on the tags with a Sharpie pen to include some underwear and a bra.

On February 20, 2008 at approximately 8:25 p.m., Officers Salstrom, Hergert and Bryant of the Hoquiam Police Department responded to 1216 Lincoln Street as the VARDA alarm had been activated. Salstrom saw an individual, later identified as defendant Mathew C. Meacham, exiting the backdoor of the garage area inside the fenced yard of the residence. Meacham lived two houses away from Ms. Cowden at 1208 Lincoln Street.

Meacham was wearing a dark hooded sweatshirt with the hood pulled up, dark pants and gloves. Salstrom identified he and the officers as police and ordered the defendant to show his hands and get on the ground. The defendant was handcuffed and searched.

The officers then entered the garage and searched for any other suspects. No one else was in the garage, but it was determined that the surveillance equipment had been disconnected. The recording unit was missing from the garage. The recording unit was later found in the grass

on the east side of the garage. Also missing from the garage was the plastic bag that had been covering the recording unit. It was later found on the deck of the residence full of clothes.

Detective Krohn responded to the scene. He looked through the clothing items in the dryer and noticed there were at least a pair of women's underwear and a bra that were missing from the load Cowden had put in the dryer in his presence on January 25, 2008. Cowden was not home at the time. She responded to the scene and looked in the dryer and remembered having originally put more underwear in the dryer on January 25, 2008.

On the morning of February 21, 2008, the defendant was Mirandized and interviewed at the Hoquiam Police Department by Detective Krohn. Meacham admitted entering the garage looking for female clothing. Meacham first denied having anything to do with the large plastic bag of clothing on the deck. He said he entered through the gate of the fenced-in backyard then through the eastside door to the breeze way. He said that he then went through the door into the garage. He said he did not enter the residence. Meacham said he went straight to the clothes dryer and took some clothing items, but claimed he did not know what he took. Meacham said as he was leaving, he caught a red light out of the corner of his eyes and noticed one of the surveillance cameras. He followed the cords and found the DVR and power units and unplugged the cameras. Meacham said he went home and put the clothing items he took

between his bed mattress and box spring. He said he had a couple of drinks, thought about the surveillance system, and then went back to get it. Meacham said he entered the same way he had previously and disconnected the DVR and power supply units and removed them from the garage, putting them in the backyard by the fence. Meacham said he then went back into the garage and thought there may be more surveillance equipment in a large plastic bag which was concealing the units. He said he exited the garage with the bag of clothing on the deck and was confronted by the police. Meacham also admitted that he had entered the residence the same way about a month ago on or between January 18 and 20, 2008.

Krohn asked Meacham where the clothes were from the January incident and he said some of the underwear was in a bottom dresser drawer in his bedroom. Krohn asked Meacham if there were other items in the drawer. Meacham said there were other women's undergarments in the drawer, but they were from past relationships he had with women. Meacham said the other clothes he took from the initial incident were in a bag in his closet as he had taken the whole load of laundry. He said it was very early in the morning when he had done this.

Krohn asked Meacham if he was willing to help him recover the victim's clothing and he said he was. Meacham was transported to his residence and Krohn met him out front. Krohn reviewed a permission to search form with Meacham. Meacham acknowledged that he understood,

agreed to consent to a search of his residence and signed the form. At about 11:30 p.m. on February 20, 2008, Krohn, Officer Hergert and Meacham went into the residence. Meacham led the officers to his bedroom and they located the women's underwear that had been taken the night before between the mattress and box spring. The women's underwear was marked with the victim's initials on the tags which matched what Krohn had witnessed the victim marking on them on January 25, 2008.

Krohn next checked the closet that Meacham had pointed to and found a bag of Ms. Cowden's clothing which consisted of socks, shirts, and "scrubs" which is consistent with what the victim had originally reported missing.

Meacham next pointed to the bottom dresser drawer where he said the women's underwear were from the original time he had entered the residence. Krohn opened the drawer and saw about ten pairs of women's underwear. Meacham was able to immediately identify the underwear that he had taken during the original incident versus the other panties in the drawer.

Meacham did not have permission to enter the garage or take the clothing from the clothes dryer in either January or February of 2008. (Exhibit B).

Procedural History

The defendant was charged by Information on February 22, 2008 with two counts of Residential Burglary. Further, the Information alleged that each count was committed with Sexual Motivation, per RCW 9.94A.835. (CP 1-3).

On September 17, 2008 the defendant noted a motion to dismiss the sexual motivation allegation. (CP 50-60). The State filed a response to this motion on September 26, 2008. (CP 61-65). The court denied the defendant's motion on September 29, 2008. (9/29/08 RP at 7).

On November 5, 2008 the court suppressed items 3, 5 and 11 from page five of the Bill of Particulars and the defendant renewed his motion to dismiss the sexual motivation allegation. The motion to dismiss the sexual motivation allegation was granted on November 14, 2008, with an order to be entered on November 17, 2008. (11/14/08 RP at 11).

The State filed a Notice of Discretionary Review on November 17, 2008, which was granted. (CP 41-42).

ARGUMENT

There is sufficient evidence to support a decision to file a sexual motivation allegation in the case at bar.

In the current case, the State has filed an Information charging the defendant with two counts of Residential Burglary. Further, the State has

alleged, pursuant to RCW 9.94A.835, that the crime was committed with sexual motivation. Originally, the defendant moved to dismiss the sexual motivation allegation pursuant to *State v. Knapstad*. However, at a second hearing to dismiss, the defense argued that 9.94A.835 permitted the court to dismiss the allegation.

RCW 9.94A.835 requires that the prosecutor “shall file a special allegation of sexual motivation in every criminal case...when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.” Here the State intends to rely on all admissible facts submitted in its Bill of Particulars and asks the Court to incorporate that document by reference. (CP 9-13).

Panties by their very use are intimate in nature, closely associated with a woman’s private areas. The defendant chose this victim, a young, attractive woman living alone, on purpose. He admitted that he wasn’t just stealing random clothes, he was “looking for something female,” indicating he must have known who lived in the residence, to increase his chances of finding panties.

The panties were not with the defendant’s clothing as if he were intending to wear them. The defendant didn’t give them to anyone, so there is no evidence that he stole them as a gift. The defendant was not stealing random panties from a clothing store, but had targeted a specific

young woman. There is no evidence that the defendant was stealing panties for any other foreseeable reason than for his sexual gratification.

The defendant did not keep all the clothing from the first burglary in one place. The panties were placed in a drawer with his “collection” of panties from previous relationships. The other clothing was discarded in a bag in the defendant’s closet. He was also able to readily identify which panties belonged to the victim versus panties from other women. The fact that he kept the victim’s panties with trophies from his sexual relationships suggests that the panties had a special significance to the defendant. The fact that it was panties he collected from previous relationships indicates an intimate and sexual meaning, rather than saving photographs or letters.

The panties from the second burglary were found between the mattress and box spring of the defendant’s bed, also an intimate location. Because of this, there is sufficient admissible evidence which justifies an allegation of sexual motivation and is proper under 9.94A.835.

***Knapstad* procedure is not available for pretrial dismissal of an aggravating factor.**

The special allegation is not an element of the crime charged, but an aggravating factor for sentencing purposes. *State v. Knapstad* requires that the Court determine whether the State’s evidence, if believed, is legally sufficient to support a conviction. All reasonable inferences must be made in favor of the State’s in determining whether the State has

sufficient evidence of a prima facie case. *Knapstad* 107 Wash.2d 346, 357 (1986). However, “the *Knapstad* procedure is not available when the defense seeks dismissal of an aggravating factor prior to trial.” *State v. Brown*, 64 Wash.App. 606, 619, 825 P.2d 350 (1992).

In *Brown*, the defendant was charged with two counts of non-capital aggravated murder in the first degree, and the State further alleged, as an aggravating circumstance, that the murders were part of a common scheme or plan. *Brown* 64 Wash.App. at 607. Prior to the beginning of the trial, the defense moved to dismiss the aggravating factor of common scheme or plan as to each count pursuant to *State v. Knapstad*, and the trial court granted the dismissal. *Brown* at 607-608. The court held that

[T]he procedure approved in *Knapstad* may not be applied to dismiss aggravating circumstance allegations under RCW 10.95.020 prior to trial. Because jeopardy attaches at the time the jury is sworn, applying the *Knapstad* procedure to pretrial dismissal of only the aggravating circumstances while proceeding to trial on the remainder of the State’s allegations further neither of the purposes upon which *Knapstad* was premised: promoting fairness and judicial efficiency.
Brown at 610; see *Knapstad* 107 Wash.2d at 349.

The *Brown* court distinguished its case from *Knapstad* in three specific and critical ways. The State believes that the case at bar can be distinguished in the same way.

First, the *Knapstad* procedure rests on the assumption that the entire charge is the subject of the motion to dismiss. Thus, where the *Knapstad* motion is granted, it is granted without prejudice, and the State may either refile the case or appeal the decision because jeopardy had not

yet attached. *Brown* at 611; *see Knapstad* at 357. Second, unlike [the *Brown*] case, the evidence before the court in *Knapstad* was relatively simple. All of the material facts were clearly undisputed and could be summarized in two or three sentences. *Brown* at 611. Third, the State conceded that a conviction was unwarranted under the facts, yet insisted that it had the right to proceed with a trial. *Brown* at 611-612; *see Knapstad* at 351.

“The *Knapstad* procedure is intended to promote ‘[f]airness and judicial efficiency’ when it is clear beyond doubt that the State cannot prove the elements fo the crime.” *Brown* at 612; *see Knapstad* at 349. When only the “aggravation of penalty” factors are dismissed from a charge...the court cannot further both of these goals. *Brown* at 612.

Under *Knapstad*, the entire charge is dismissed without prejudice. Because jeopardy has not yet attached, the State’s right to appeal or refile the charges is preserved. Under such circumstances, the defendant is not forced to endure—and the State is not put to the expense of—a useless trial. Yet, the State is also not foreclosed from challenging the dismissal of from refiling the charge based on new or additional evidence.

Brown at 612-613 (other citations omitted). However, using the procedure requested by the defense, jeopardy will attach at the time the jury is sworn. Then here, as in *Brown*, if the Court denies review of the dismissal of the sexual motivation allegation, the State will be forever foreclosed from further appealing the partial dismissal or retrying the defendant on the additional aggravating factor.

“In evaluating the purposes underlying the *Knapstad* dismissal procedure and its double jeopardy implications, the court must balance the purpose of the Double Jeopardy Clause with the interest of society in assuring the State is afforded a fair opportunity to present its case against a criminal defendant.” *Brown* at 614; *See United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). The Court found that “[d]ismissal of aggravating circumstance allegations prior to trial frustrates any attempt to balance these competing goals.” *Brown* at 615.

It does not relieve the defendant of the burden of undergoing a trial on the underlying charge...but the dismissal will generally bar the State from ever trying the defendant on the aggravating factors. On the other hand, there still remains a risk that the State may seek to retry the defendant if it later discovers additional evidence supporting the dismissed aggravating factors which could “not [have] been discovered [before trial] despite the exercise of due diligence” Should such additional facts be discovered during trial when the court hears the actual testimony of witnesses, as opposed to what the attorneys’ versions of what that testimony will be, a mistrial and a second trial could be required if it were then too late to amend the information to reallege the dismissed aggravating factor.

Brown at 615-616; *citing Illinois v. Vitale*, 447 U.S. 410, 420 n. 8, 100 S.Ct. 2260, 2267 n. 8, 65 L.Ed.2d 228 (1980), *quoting Brown v. Ohio*, 432 U.S. 161, 169 n. 7, 97 S.Ct. 2221, 2227 n. 7, 53 L.Ed.2d 187 (1977); *State v. Pelkey*, 109 Wash.2d 484, 745 P.2d 854 (1987) (mid-trial amendment of charge prohibited except to charge a lesser included offense or a lesser degree of the same offense).

The *Brown* court found the proper to procedure in a case, such as the one at bar, is as follows:

In order to preclude both the possibility of subjecting the defendant to two trials and prejudice to the State, the trial court should await the actual testimony of the State's witnesses and reserve a decision on whether the State has, in fact, adduced sufficient proof to send the aggravating circumstance to the jury. At that point, the State will have had its one full and fair opportunity to convince the trier of fact and because jeopardy will have attached with respect to all of the State's charges, the defendant will not have to bear the risk of a second trial.

Brown at 616.

Because fairness and judicial economy, the heart of *Knapstad*, are not furthered by a pretrial dismissal of the aggravating factor, the trial court's ruling should be reversed.

RCW 9.94A.835 does not justify dismissal of the sexual motivation allegation in this case.

The Superior Court granted the motion to dismiss the sexual motivation allegation under 9.94A.835 on the basis that the jury would have to speculate on the defendant's intent to find sexual motivation. (11/14/08 RP at 10). However, it is not speculation, the jury is entitled to infer intent from the circumstantial evidence in a case. In fact, the jury would be instructed that "The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other." WPIC 5.01.

The defense argument focused on the section of 9.94A.835(3) that reads:

The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or *unless there are evidentiary problems which make proving the special allegation doubtful*. (emphasis added).

However, this is misleading, the section must be read as a whole:

The prosecuting attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

To allow a dismissal under 9.94A.835, is simply a *Knapstad* analysis by another name. This statute should not be used as a backdoor to get around the *Brown* analysis that these special allegations should not be dismissed prior to trial. To interpret this section as the defense does allows the court to dismiss under a *Knapstad* type analysis.

Instead, this section is to allow for plea bargains in cases where special allegations have been made and the posture of the case has changed. Nothing in the case at bar has changed from its initial filing, other than some collateral evidence being suppressed. However, none of that evidence was referenced in the original declaration in support of the charge, which is what the court based its probable cause finding on.

Under either *Knapstad* or 9.94A.835 the State has presented sufficient evidence to allow the special allegation to be presented to the jury.

To dismiss an aggravating circumstance at the close of the State's case, the trial court must be convinced that, viewing the evidence in the light most favorable to the State, no rational trier of fact could find beyond a reasonable doubt that the facts alleged satisfy the aggravating circumstance. *State v. Caliguri*, 99 Wn.2d 501, 505, 664 P.2d 466 (1983).

Here, using all of the facts presented previously, a rational trier of fact could find that when the defendant targeted a female neighbor, took intimate clothing items and secreted them in his bedroom between his mattress and in his dresser, that he acted with sexual motivation.

CONCLUSION

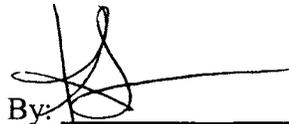
The State respectfully requests the Court to reverse the trial court and reinstate the sexual motivation allegation at this time. Pursuant to *Brown*, the State should be allowed to present its evidence before the Court rules on this issue.

In the case at bar, there is no prejudice to the defendant by allowing the State to proceed to trial with the sexual motivation allegation. The evidence relied on to prove the sexual motivation allegation is part of the *res gestae* of the crime and will be admissible whether or not the allegation is allowed. Therefore, this is not a case where potentially prejudicial material is being excluded now that the allegation has been dismissed.

Further, the defense is still entitled to request dismissal by the Court of a finding of sexual motivation made by the jury or to appeal that finding after trial.

However, dismissal at this point prejudices this the State as once a jury is empaneled jeopardy will attach and the State will be foreclosed from pursuing this allegation any further.

Respectfully Submitted,



By:

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BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

Appellant,

No.: 38548-1-II

v.

DECLARATION OF MAILING

MATHEW C. MEACHAM,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 12th day of February, 2009, I mailed a copy of the BRIEF OF THE APPELLANT to Wayne D. Hagen Jr., Attorney at Law, P. O. Box 2016; Aberdeen, WA 98520 and Mathew C. Meacham; 1208 Lincoln Street; Hoquiam, WA 98550, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 12th day of February, 2009, at Montesano, Washington.

Barbara Chapman