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ISSUE PRESENTED FOR REVIEW

1. Should this court overturn the trial court's dismissal of the sexual motivation allegation pursuant to RCW 9.94A.835.

STATEMENT OF THE CASE

Mathew Meacham is charged with two counts of Residential Burglary which were alleged to have been "committed for the purpose of sexual gratification."

Upon motion of the defendant, the State submitted a Bill of Particulars outlining information that it would use to prove the special allegation. *State's Bill of Particulars*, at 5. (See State's Exhibit B). Information contained in number(s) 3, 5, and 11 are no longer available to the State as they were suppressed as the result of motions in limine and stipulations.¹ The trial court subsequently dismissed the special allegation because evidentiary problems now exist that make proving the special allegation doubtful.

The State, on appeal, now presents an argument of trial court error on an issue the State never raised before the trial court.

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This information amounted to "posters of a sexual nature", "numerous pornographic items, including a large amount of pornographic DVDs", and "a vagina-shaped sex toy."

DISCUSSION OF LAW AND ARGUMENT

1. **The State did not argue that RCW 9.94A.835(3) was not available to the defendant prior to trial. Therefore, they should be prohibited from making that claim now.**

The State's statement of this case's procedural history is false.

Contrary to the State's claim, defense counsel, at two separate hearings, argued for dismissal of the sexual motivation allegation pursuant to R.C.W. 9.94A.835(3) and alternatively *Knapstad*.² (See *Verbatim Reports of Proceedings*). "The primary basis of our motion is RCW 9.94(a).835.3...." (RP Sept. 29 2008, at 3). " The motion is made pursuant to RCW 9.94.835(3)...." (RP Nov. 14, 2008, at 2). Any claim by the State this argument was not made is completely false!

The issue now raised by the State, for THE FIRST TIME, is whether a dismissal of an allegation of sexual motivation, pursuant to R.C.W. 9.94A.835(3), without prosecutorial approval, is improper. The State had multiple opportunities to raise this issue prior to this interlocutory appeal. The State failed to raise the issue to the trial court at both the September 29, 2008 and November 14, 2008 hearings to dismiss the special allegation via briefing or during oral

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The State claims in its brief that "[o]riginally, the defendant moved to dismiss the sexual motivation allegation pursuant to *State v. Knapstad*." (*Appellant's brief* at 7). The arguments outlined in defense counsel's two briefs to the trial court and the transcripts of these oral arguments confirm that the State's claim is wholly unfounded.

argument. (RP, Sept. 29 and Nov. 14, 2008)(See also State's Response to Defendant's Motion to Dismiss Sexual Motivation Allegation, CP #3). To illustrate, the State's written response and oral argument at the September hearing is silent as to this issue. In like manner, the State failed to present this argument at either hearing's oral argument. Finally, the State did not provide the trial court with a written response at this latter hearing. Simply put, this court cannot determine whether the trial court committed any sort of error based on an issue the trial court was not asked to consider. Only now, on interlocutory appeal, does the State breath a word of this issue.

In *State v. Brown*, 64 Wn.App. 606, 825 P.2d 350 (1992), the court declined to address an argument by the State, brought for the first time on appeal, that the trial court erred in dismissing the aggravating circumstances because it failed to follow procedures outlined in *Knapstad. Brown*, at 610. (See also *Savage v. State*, 127 Wn.2d 434, 448, 899 P.2d 1270 (1995)(citing *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 481, 843 P.2d 1056 (1993)). Here, as in *Brown*, the State has brought an argument on appeal not raised before the trial court. This court should decline to address this argument now and dismiss the State's interlocutory appeal.

2. **The trial court may dismiss the allegation of sexual motivation when there are evidentiary problems which make proving the allegation doubtful.**

The trial court found:

“A motion such as the one brought by the Defendant in this case requires the Court to view all of the evidence in the light most favorable to the State. I’m not in the position to resolve factual disputes at this point in time, so I’m looking at all of the evidence in a light most favorable to the State and I’m looking at the evidence the State has outlined in its bill of particulars to support elements of the crime in this case, including the special allegation.

The special allegation when it is reduced to its most fundamental element raises an issue of intent, what - what did the Defendant intend when he committed the burglary if, in fact, he committed burglaries as alleged in this case.

In order for the State to prevail on its special allegation, it needs to prove that the Defendant committed these burglaries for the express purpose of his sexual gratification. That’s what the statute says.

And the evidence being advanced in support of that special allegation by the State is the nature of the personal property allegedly taken by the Defendant when he committed the burglaries, and that’s it. And I think it would require the jury to engage in a highly speculative process to reach the conclusion beyond a reasonable doubt that he committed this crime for the purpose of sexual gratification.

I don’t know why he committed the crime and it is not my job to make that ruling. And I’m looking in the evidence now most favorable to

the State. And given the suppression of the other evidence and what we are left with, I - I do not believe that there remains sufficient evidence to support a verdict in favor of the State on a special allegation, so I'm going to dismiss it."

RP, Nov. 14, 2008 at 9-11.

The State provided defense counsel with a bill of particulars clarifying the facts and statements it would rely on to prove the allegation of sexual motivation. Subsequently, the trial court granted the defendant's motion in limine to exclude evidence originally relied upon by the State in its bill of particulars.

Defense Counsel's Motion to Dismiss the Special Allegation of Sexual Motivation was made pursuant to RCW 9.94A.835(3), and alternatively *State v. Knapstad*, 41 Wn. App. 781; 706 P.2d 238 (1985) (*affirmed by* 107 Wn.2d 346; 729 P.2d 48 (1986)).

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

RCW 9.94A.835(3).

There is no connection to the crime of Residential Burglary and any "sexual motivation".

The definition of "sexual motivation" is found in RCW 9.94A.030(47). Sexual motivation "means that one of the purposes

for which the defendant committed the crime was for the purpose of his or her sexual gratification.” *Id.* Sexual gratification is the defining phrase of sexual motivation. Thus, in order to prove the sexual motivation allegation, the State must establish the defendant acted with a purpose of sexual gratification, which is an intent requirement. (See *State v. Stevens*, 158 Wn.2d 304; 143 P.3d 817 (2006) discussing that in order to prove the sexual contact element of second degree child molestation, the State must prove the defendant acted with the purpose of sexual gratification).

Here, there is absolutely no evidence to establish the purpose of the residential burglary was sexual in any way. The Revised Code of Washington does not contain a definition for "sexual gratification" and only a few unpublished Washington State cases discuss the dismissal of a sexual motivation allegation without recitation of the courts reasoning. Turning to dictionary definitions, "sexual" is defined as "[o]f, relating to, or involving sex, the sexes, or the sex organs; and "gratification" is defined as "to give or be a source of pleasure to" or to fulfill the desires of: indulge." *Webster's II New College Dictionary*, 303 and 622 (Houghton Mifflin Company 1996). Because evidentiary problems exist that make proving the allegation doubtful, it is

impossible for this court to find that the burglary was committed with the sexual motivation allegation of the crime charged.

The State is now relying upon the following facts to prove the element of sexual motivation:

1. On February 22, 2008, a search warrant was obtained for the defendant's house to recover the clothing the defendant was wearing on February 20 and the backpack he possessed.
2. The defendant's backpack was probably in his bedroom.
4. The door was secured by a hasp and padlock.
6. The defendant admitted that when he removed the clothing from the dryer he "wanted something female".
7. The items taken in January were separated. The panties were placed into a drawer with other panties and the other clothing was stored in a bag in the defendant's closet.
8. The defendant stated that these other pairs of panties were pare (sic) of "a collection of woman's underwear from past relationships."
9. The defendant was immediately able to identify the specific panties that he [had] taken from Miss Cowden out of approximately ten pairs.
10. The panties taken on February 20 had been placed between the defendant's mattress and box spring.
12. The defendant eventually admitted that he had thrown the backpack and the remaining women's panties into the [d]umpster at his work.

CP #1, *Bill of Particulars*, at 5.

The State does not allege facts to show a nexus. Simply put, although women's clothing was taken and admitted to, the State presents no factual basis to show that the taking of the clothing was sexually motivated. Moreover, no facts, regarding statements made, suggest that this was a sexually motivated crime; thus, proving the special allegation is impossible (let alone doubtful).

In short, the facts remaining, that the State intends to prove, do not show that Mr. Meacham acted for the purpose of his sexual gratification. Lastly, there is no evidence that Mr. Meacham's statements expressed a sexual desire to take Miss Cowden's clothing from her dryer for his sexual gratification.

Certainly, had the legislature intended RCW 9.94A.835(3) to be a tool only triggered by the prosecuting authority, it would have stated so. RCW 9.94A.835(3) gives the trial court authority to dismiss the special allegation when, as in this case, evidentiary problems exist that make proving the special allegation doubtful.

3. The Trial court may also dismiss the special allegation of sexual motivation under *Knapstad*.

Alternatively, the defendant argues that the trial court has the inherent power to dismiss a prosecution prior to trial when it is apparent that the State does not have the ability to prove all elements

of the crime charged. *Knapstad*, at 240. This Court's holding in *Brown*, which dealt specifically with an aggravated murder allegation, is not dispositive. Contrary to State's reading of *Brown*, the instant case can be distinguished from *Brown* and its narrow holding.

In particular, the court held that "the procedure approved in *Knapstad* may not be applied to dismiss aggravating circumstance allegations **under RCW 10.95.020.**" 107 Wn.2d at 349. The procedural anomaly created by the trial courts dismissal of one of the aggravating allegations further distinguishes that case. Prior to the State's interlocutory appeal in *Brown*, the trial court dismissed one allegation of aggravating circumstances alleged. However, due to this dismissal, the State was left to try the defendant on two counts of murder, one of which still alleged aggravating circumstances. Hence, the State was prejudiced by the issue of double jeopardy in the event it had to try each count separately. Here, the trial court dismissed both of the State's allegations. The State is unable to claim it is prejudiced in any way.

Furthermore, in *Brown*, the court noted the unique circumstances underlying the decision in *Knapstad*. Specifically, the court pointed out the defendant was faced with having to endure a full trial where the State conceded it could not prove the elements of the

offense. Here, the trial court has ruled that the only way a fact finder could find the defendant guilty of the special allegation would be through speculation. RP, November 14, 2008, at 10.

Simply put, what the State is asking this court to do is to reinstate the special allegation and require Mr. Meacham to go through a useless criminal trial on patently unsupportable allegations. *Brown*, at 616, footnote 9. This is significantly burdensome and unfair where these allegations will unquestionably be before the jury only to then have them dismissed when defense counsel renews its motion to dismiss at the close of the State's case.

CONCLUSION

This court should deny the State's request to reverse the trial court's dismissal of the special allegation pursuant to RCW 9.94A.835(3). This argument was not raised at the trial court proceedings and is therefore waived.

Proving the special allegation is doubtful. The trial court's ruling should stand as the evidence available to the State would require the jury to engage in a highly speculative process. Reinstating the special allegation would require Mr. Meacham to go through a burdensome and unfair trial only to have the special allegation dismissed at the close of the State's case.

DATED this April 7, 2009

RESPECTFULLY SUBMITTED:
HAGEN & ASSOCIATES, P.S.
Attorneys for Defendant

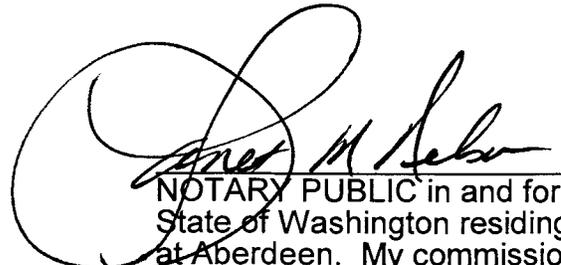
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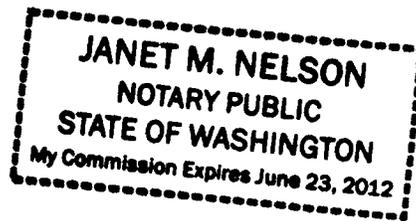
WAYNE D. HAGEN, JR., WSBA #18640

1 which envelopes contained the Brief of Respondent.

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5 LINDA BARR

6 SUBSCRIBED AND SWORN to before me this 8th day of April, 2009.

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9 NOTARY PUBLIC in and for the
10 State of Washington residing
11 at Aberdeen. My commission
12 expires 06/23/2012.

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