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I. FACTS

(Several of the main figures in this case are family sharing the same last name. The State will introduce each with first and last name, and then carry on referring to them each by first name. This is done solely to avoid confusion and no disrespect is intended.)

On January 3, 2008, Wahkiakum County Sheriff's Deputy Josh Grasseeth was detailed to answer a phone call from Sheba Ecklund of 232 N. Welcome Slough Rd., Wahkiakum County, Washington. RP 3-4. Ms. Ecklund told him that her stepson Leif, the defendant herein, was growing marijuana in the trailer on which he stayed on Sheba's and the defendant's father, Sheba's husband, Ed Ecklund's, property. RP 4-5. The trailer belonged to Ed. RP 6-7. Deputy Grasseeth said he would be right over and within a few minutes he was there. RP 5. Sheba and Ed Ecklund were there. Id. Deputy Grasseeth asked Ed if there was a marijuana grow in the trailer and he said there was and he had seen it; that he told his son Leif, who stayed in the trailer, to get rid of it because Ed did not want it on his property. RP 5. Since Ed had the only keys to the trailer, defendant Leif kept it unlocked. RP 10.

Deputy Grasseeth told Ed that he wanted to look in the trailer Sheba indicated the marijuana grow was in, and that Grasseeth could either get a warrant or enter with Ed's consent. RP 7. Ed consented. Id. Ed was not under duress, nor under stress or strain, according to the

ruling of the trial court. RP 49. Ed's demeanor was coherent and pleasant. RP 20.

Pursuant to Ed's and Sheba's consent, Deputy Grasseth searched the trailer and found the marijuana grow. RP 8-10. The evidence found in the trailer formed the sole basis for Leif Ecklund's later conviction on the charges herein.

Leif Ecklund was not present for any part of the search or the events leading up to it. However, he did speak to his father Ed by cell phone while Deputy Grasseth was discussing the search with Ed, before the search took place. RP 7. Deputy Grasseth asked Ed to request that Leif come to the house. RP 7. But Leif did not arrive.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The search herein was constitutional. Appellant lacks standing to assert his father's rights and he was not present to override the permission to search granted by his stepmother and his father.
2. Contrary to appellant's claim, he was found guilty by the trier of fact.

III. ARGUMENT

1. Leif Ecklund Neither Has, Nor Has Ever Had, Standing to Assert His Father's Rights

The entire issue of Ed Ecklund's consent is irrelevant. In State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000), the Washington Supreme Court noted: “defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated.” Williams, 142 Wn.2d at 21-22, citing U.S. v. Salvucci, 448 U.S. 83, 85, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980).

Leif Ecklund claims a violation of his father's Fourth Amendment rights. Therefore, the entire claim fails ab initio. It seems likely he can argue a violation of his own constitutional rights, through the benefit of automatic standing, but there appears to be no authority for the notion, accepted by both sides at trial, that Leif's father's objections accrue to the benefit of Leif himself.

(Ordinarily, standing must first be challenged in the trial court. Tyler Pipe Indus., Inc. v. Dep't of Revenue, 105 Wn.2d 318, 327, 751 P.2d 123 (1986). But the State, as respondent, may contest a defendant's standing for the first time on review because of the appellate court's duty to affirm the trial court upon any ground supported by the record. State v. Carter, 74 Wn.App. 320, 324 n. 2, 875 P.2d 1 (1994), aff'd, 127 Wn.2d 836, 904 P.2d 290 (1995); State v. Grundy, 25 Wn.App. 411, 415-16, 607 P.2d 1235 (1980); see State v. Michielli, 132 Wn.2d 229, 242, 937 P.2d 587, 71 A.L.R.5th 705 (1997).)

The Supreme Court held in State v. Walker, 136 Wash.2d 678, 965 P.2d 1079 (1998), that although a search may violate the rights of one cohabitant of a premises, the same search may be legal as to another inhabitant. If the marijuana grow in this case had been charged against Ed Ecklund, it may well be, as was the case of the contraband in Walker, that the evidence of it would have been inadmissible. But there is no authority for the proposition that Leif Ecklund may assert any violation of his father's rights as a defense against his own culpability.

2. In the Alternative: Ferrier Warnings

The case of State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998), was decided "out of a concern that citizens may be unaware that a warrant to search is required or, if aware, may be too intimidated by an officer's presence in the home to deny consent to a warrantless search." State v. Khounvichai, 149 Wn.2d 557, 69 P.3d 862 (2003). The Washington State Supreme Court saw these evils in the "knock and talk" procedure used by police of the Ferrier era:

We recently limited Ferrier to the kind of coercive searches the police employed there. State v. Bustamante-Davila, 138 Wash.2d 964, 983 P.2d 590 (1999). We rejected the contention that Ferrier was a "bright-line" rule required in every case where police obtain search authority by consent. Rather, "[t]his

Court limited its holding in Ferrier to employment of a ‘knock and talk’ procedure.” Id. at 980, 983 P.2d 590.

State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000). And the Williams court goes on:

We recognize that law enforcement officers need to enter people's homes in order to provide their valuable services for the community on a daily basis. We do not find it prudent or necessary to extend Ferrier to require that police advise citizens of their right to refuse entry every time a police officer enters their home. Police officers are oftentimes invited into homes for investigative purposes, including inspection of break-ins, vandalism, and other routine responses. We do not find a constitutional requirement that a police officer read a warning each time the officer enters a home to exercise that investigative duty. To apply the Ferrier rule in these situations would unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry. Instead, we limit the requirement of a warning to situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant.

Williams, 142 Wn.2d at 27-28.

Therefore, the first question is whether the circumstances herein present a "knock and talk" situation. The factual situation herein veers from the limitations set by the Williams court almost immediately, for the Williams court specifies that the police, rather than an inhabitant of the premises to be searched, "seek" to enter and search. This is no doubt the situation in most police investigations. But here, Deputy Grassetth did not seek -- he was sought out. Sheba Ecklund called him for the express purpose of informing him of her stepson's marijuana grow on her property. RP 4. It appears undisputed that she wanted the deputy to come to the Ecklund property to follow up on her report. This distinguishes the present case from the traditional "knock and talk" from its very inception.

"In a 'knock-and-talk' procedure, not having obtained a warrant, police officers proceed to premises where they believe contraband will be found. Once there they knock on the door and talk with the resident, asking if they may enter. After being allowed to enter, the officers then explain why they are there, that they have no search warrant, and ask permission to search the premises." Bustamante-Davila, 138 Wn.2d at 976-77.

It is this procedure, and only this procedure, that Ferrier limits. Williams, *supra*. And, as noted, the facts herein deviate from this outline immediately. In a "knock and talk," police proceed to a premises where

they think contraband may be found, and "once there they knock on the door and talk with the resident, asking if they may enter." Bustamonte-Davila, 138 Wn.2d at 976 (emphasis added). Here, the police first talked with the resident and then went to the premises. Deputy Grassetth was invited to enter before he was ever near the property, by Sheba Ecklund, over the phone. She called the sheriff's office spontaneously, with no police prompting, entirely of her own free will. This is not a "knock and talk" situation. If anything, this is a "talk and knock."

Furthermore, Deputy Grassetth did not go to the Ecklund property to seek, and at no time did he receive, unlimited "permission to search the premises." Rather, as he expected, he was led to the specific area he was invited by Sheba Ecklund to examine. He neither searched the entire premises, nor intended to, nor asked for permission to search the entire premises, coercively or in any other way. He was invited to the property for the specific purpose of searching a specific area, and he adhered to this purpose throughout his stay on Ecklund property.

As the court said in State v. Khounvichai, supra, "We adopted the Ferrier rule out of a concern that citizens may be unaware that a warrant to search is required or, if aware, may be too intimidated by an officer's presence in the home to deny consent to a warrantless search." These concerns are genuine, but expanding the Ferrier rule to include this case does not serve to address them. A warrant to search is not generally required when an owner-occupant calls an officer to come to his or her

home for the purpose of removing contraband. Nor is there any evidence in this case that either owner were in any way intimidated; Sheba was the one who called the police and the court found at RP 49 that Ed was under neither duress, strain, nor stress. Furthermore, Ed testified that, like Sheba, he disapproved of marijuana accoutrements in the household, wanted them removed, had ordered his son to get rid of his drugs, and told the officer so. RP 26-27. And there is no question of ignorance in this situation, since Deputy Grasseth and Ed both testified that the deputy himself said that he would get a warrant if Ed wanted him to. RP 7, 28. Under these circumstances, extending the rule to this case would not serve the policies that rule was intended to support.

3. In the Alternative: No Coercion

A warrantless search is constitutional if voluntary consent is granted. Washington v. Chrisman, 455 U.S. 1, 9-10, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982). Whether consent is voluntary is a question of fact to be determined from the totality of the circumstances. State v. Apodaca, 67 Wn.App. 736, 739, 839 P.2d 352 (1992), overruled on other grounds by State v. Mierz, 127 Wn .2d 460, 901 P.2d 286 (1995). Factors to consider include whether the defendant received a Miranda warning prior to consenting, the defendant's education and intelligence, and whether the defendant was advised of his right not to consent. State v. Flowers, 57 Wn.App. 636, 645, 789 P.2d 333, review denied, 115 Wn.2d 1009 (1990). However, knowledge of the right to refuse is not a prerequisite of

voluntary consent. State v. Tagas, 121 Wn.App. 872, 90 P.3d 1088 (2004). Other factors to consider may include claims of authority to search, prior illegal police action, prior cooperation, and police deception as to purpose. Flowers, 57 Wn.App. at 645. Threats to obtain a warrant may invalidate consent if sufficient grounds to obtain a warrant do not exist. Apodaca, 67 Wn.App. at 739-40.

Although threats to obtain a search warrant may invalidate consent when grounds for obtaining a warrant do not exist, whether consent is coerced is a question of fact determined from the totality of the circumstances. Apodaca, 67 Wash.App. at 739-40, 839 P.2d 352. Thurston County Rental Owners Ass'n v. Thurston County, 85 Wash.App. 171, 184, 931 P.2d 208 (1997).

In reviewing the factual circumstances, "Unchallenged findings of fact are verities on appeal and an appellate court reviews only those facts to which the appellant has assigned error. An appellate court reviews whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citations omitted).

Here, the trial court found that Ed Ecklund voluntarily consented to search. RP 38. This mirrors the court's oral ruling : "I don't find any duress... Mr. Ecklund impressed me as being a man who just really wasn't under much stress or strain that day." RP 49. This judgment of Mr. Ecklund's demeanor matches Deputy Grasseth's assessment that he "didn't

have a problem" with the search. RP 7. The court was entitled to believe this; the finding is unchallenged; and none of the advisory factors suggested by Flowers bear on the case in any event. Miranda warnings were not required because Ed Ecklund was neither in custody nor in jeopardy, as he himself understood. RP 32. Ed is an articulate high school graduate. RP 31. Deputy Grasset had the authority and the cause to search based upon Sheba's call.

The defense appears to base its claim of duress primarily on the notion that the information Sheba gave Deputy Grasset was stale. Leaving aside the question of how this follows, the proposition has no basis in the record. E.g., RP 18. It appears to be a play on the fact that all statements of fact made at the hearing were in the past tense: "She told me there was a marijuana grow" construed by the defense to mean, "She told me there had been a marijuana grow." This court is under no obligation to strain for such a meaning, which clearly was not accepted by the trier of fact below. Beyond that, there is nothing to sustain a claim of coercion other than the defense's allegation, which takes up half of page 18 of its brief, that Ed Ecklund was coerced because he was a mere high school graduate without "specific experience or training in the law of search and seizure;" a standard which, if accepted by this court, would have the no doubt desired effect of eliminating the possibility of consensual searches pretty much entirely.

4. Defendant's Consent Unnecessary

Consent to search a premises is valid, under the common authority rule, where (1) the consenting party has the legal authority to permit the search, and (2) it is reasonable for a court to find that the defendant has assumed the risk that a cohabitant might permit a search. State v. Morse, 156 Wash.2d at 10, 123 P.3d 832 (citing State v. Mathe, 102 Wash.2d 537, 543-44, 688 P.2d 859 (1984)). A person with a sufficient amount of control may have common authority over the premises. See Morse, 156 Wash.2d at 10, 123 P.3d 832 (citing State v. Leach, 113 Wash.2d 735, 739, 782 P.2d 1035 (1989)). But if two cohabitants with equal authority over common areas are present, the police must obtain consent from each cohabitant. Morse, 156 Wash.2d at 13, 123 P.3d 832 (emphasis added).

It is undisputed that Leif was not present at the time of the search. There is no question that he was living in a trailer owned by his father, on real property owned by his father, paying no rent, without the authority to lock the door the only key to which was in his father's possession, and without even the authority to decide what to do inside the trailer -- for we know that his father ordered him to remove any contraband he may have from the premises, which is an unrebutted statement that Ed Ecklund was the person with final authority over what was done on the premises. RP 4, 6, 10, 14, 27, 32. It is undisputed that Ed had "access to the trailer." RP 5. So did Sheba, for that matter. RP 32.

The only way this case differs from the typical, black letter common authority case is the claim that the defendant was available on

cell phone. Any discussion of this factor must acknowledge two items: first, it is only in retrospect that we know the person on Ed's cell phone was, in fact, Leif. Second, as it turned out, Leif was told of what was occurring and had the opportunity to travel to Ed's property, where he could have asserted his presence pursuant to Morse and made such objections as he might have decided to make. Leif's failure to introduce testimony regarding the practicability of his appearing on scene will forever leave to speculation the question whether he tried to assert his presence at the scene, or whether he voluntarily remained away.

In other words, the only thing we do know is that Leif was not present, and that the legal test handed down to us required his presence. Presence is perhaps the single brightest-line rule in the law of common authority. Some might argue that the line is too bright, obscuring shades of gray, but the last time anyone did that it was the State, in Morse, supra, where a person was held to be present (and thus, his consent required) when he was concealing himself in the place searched and the police had no way even to know he was there until they were already inside. Morse, supra. The answer rang back loud and clear from the Supreme Court: if he was present, he was present, incommunicado or not. The lesson is clear. Presence means presence. Leif was not present. The rule is not satisfied. Therefore, Leif's permission was not required before Deputy Grasseth's search.

5. Misdemeanor Conviction

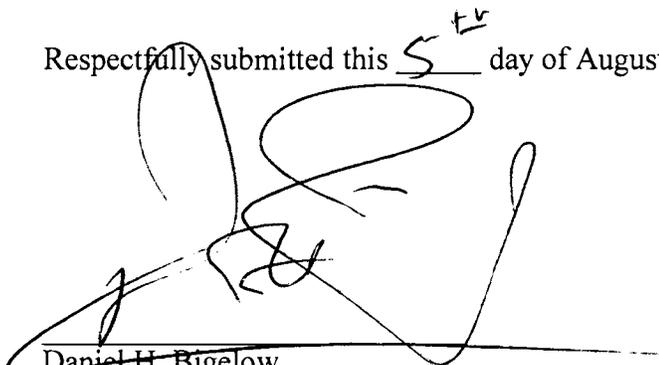
The State concedes that the court's entry titled "Trial, Findings of Fact, Conclusions of Law, and Verdict," RP 37-39, does not contain a verdict of guilt for Count II, Use of Paraphernalia. The State notes that findings of fact 2.3 and 2.4, RP 38, contain sufficient evidence of the crime. RCW 69.50.412 (1) ("It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance"). The State further notes that the defendant's judgment and sentence, in its "Findings" section at RP 34, states, "The defendant is guilty of the following offenses, based upon bench trial (date) 10-27-08: ... (2) Use of drug paraphernalia." This is by its terms a finding of guilt, signed off on without objection by the judge, deputy prosecutor, defendant, and defense attorney. Since the defense failed to object below, this issue may only be raised if it is manifest constitutional error. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). Considering that a finding of guilt was in fact entered, it is hard to call what occurred error, much less manifest error.

IV. CONCLUSION

Leif Ecklund attempts to raise a violation of his father's civil rights to shield himself, but this attempt is without foundation in the law. His own

rights were only violated if he was present to assert them, which by all accounts he was not. And, despite his averment to the contrary, there is a finding of guilt entered against him on the misdemeanor charge. Therefore, this court should affirm the trial court in all particulars.

Respectfully submitted this 5th day of August, 2009,

A handwritten signature in black ink, appearing to read 'Daniel H. Bigelow', written over a horizontal line. The signature is highly stylized and cursive.

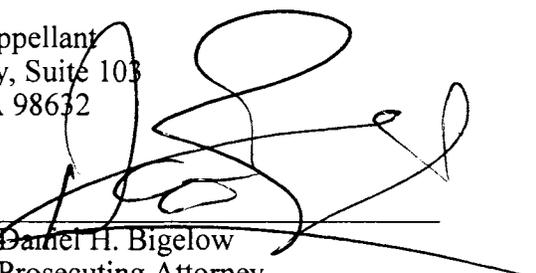
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CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to the following addresses, postage prepaid, on August 5, 2009.

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