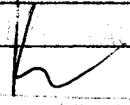


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STATE OF WASHINGTON

BY  COUNTY

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

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER SMITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Linda Lee

No. 06-1-05013-6

Brief of Respondent

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

1. Whether the trial court's findings of fact from the suppression hearing are verities on appeal?
2. Whether the trial court properly admitted the evidence it did where that evidence was attenuated from the illegal search of the motel registry?
3. Whether, if the admission of any evidence other than the testimony of the victims was harmless error in light of the victim testimony?
4. Whether the court properly concluded that the defendant's convictions for Rape in the First Degree and Rape of a Child in the Second Degree did not violate double jeopardy?

B. STATEMENT OF THE CASE.

1. Procedure

On October 23, 2006, the State filed an information, based on events that occurred the previous day, charging Christopher Smith as follows:

Count I, Rape in the First Degree;

Count II, Rape of a Child in the Second Degree,

Count III, Kidnapping in the First Degree;

Count IV, Kidnapping in the First Degree;

Count V, Assault in the First Degree;

Count VI, Felony Harassment;

Count VII, Felony Harassment.

CP 1-5. Each Count included a deadly weapon enhancement. CP 1-5.

Count IV was alleged to have occurred by way of alternative means. CP 2-3.

The defense brought a motion questioning the defendant's competence. CP 9-12. The defendant was determined to be competent. CP 71-72.

The defense filed a motion to suppress the evidence challenging the legality of the search. CP 89-97.¹ The suppression motion was based on a claim that the search was illegal because it was the product of an illegal motel registry check and that all the evidence obtained was the fruit of the unlawful search. *See*, CP 89-97.

On October 9, 2008, the case was assigned to the Honorable Judge Linda Lee for trial. CP 490. Prior to the start of trial the judge conducted a CrR 3.5 hearing regarding the admissibility of custodial statements made by the defendant.

¹ It appears from the record that the memorandum in support of the motion was filed, but the motion itself never was.

The court also heard the defendant's CrR 3.6 motion to suppress evidence prior to the start of trial. *See*, I RP; II RP. The court ruled that the officers could testify as to their observations regarding the condition and demeanor of the victims; the officers' observations of the victims as they received medical aid; and evidence located in the dumpster. CP 492. The victims themselves could testify as to what they observed. CP 492. The officers could not testify as to the condition of the motel room itself, or the defendant's lack of physical injuries. CP 492-93. The officers could not testify as to the defendant's statements in the State's case in chief. CP 492. By agreement of the parties, the evidence obtained during a warrantless search of the motel room was also suppressed. CP 492.

A jury was empaneled October 20, 2008. CP 491. The jury found the defendant guilty as to all counts and found the deadly weapon enhancement as to each count. CP 281-304.

The State filed a sentencing memorandum in which it argued, among other things, that the convictions in Count I for Rape First Degree and Count II, Rape of a Child Second Degree in which L.S. was the victim, were the same course of conduct so that the underlying sentences were concurrent, but the enhancements ran consecutive to each other, but that the two convictions did not violate double jeopardy. CP 338ff.

On January 30, 2009 the court sentenced the defendant to a total of 627 months to life. 438-52.

The notice of appeal was timely filed on February 24, 2009. CP 462-76.

2. Facts

a. Facts from 3.6 Suppression Hearing

The court entered the following findings and conclusions after the suppression hearing. *See* CP 488-493.

THE UNDISPUTED FACTS

I. The Golden Lion Motel in Lakewood participated in a Crime Free Motel Program. Under the terms of the program, the Motel consents to the police randomly reviewing the motel guest registry, and determining if any of the guests have outstanding arrest warrants. In 2005, Division II of the Washington State Court of Appeals decided *State v. Jordan*, 126 Wn. App. 70, 107 P.3d 130 (2005), holding that Article I, Section 7 of the Washington State Constitution is not violated when police randomly viewed the guest registry of the Golden Lion Motel pursuant to the crime free motel program. This was a published opinion.

II. That on October 22, 2006, Officer Lee of the Lakewood Police Department went to randomly view the guest registry of the Golden Lion Motel in Lakewood, WA. The Golden Lion Motel was still participating in the Crime Free Motel Program, which involved the manager of the motel consenting to the police reviewing the motel guests for warrants, under circumstances identical to those in *State v. Jordan, supra*. There was no other reason for the police to have responded to the Golden Lion Motel at that time. At that time, *Jordan* was still good law.

III. Upon reviewing the guest registry, Officer Lee ran the names of the last 10 individuals who had checked into the motel. From this, he learned that the defendant was staying at the Motel and that he had a confirmed arrest warrant that had been issued by Pierce County Superior Court.

IV. Officers then went to the room that the defendant was staying in so that they could arrest the defendant pursuant to the warrant. The warrant had been discovered as a result of the random search of the motel guest registry. The police knocked on the door and the defendant eventually responded and opened the door. He was placed under arrest and taken to a patrol car.

V. During the arrest process, when the door to the motel room was opened, the police observed an adult female present in the motel room. The police were outside of the motel room when they observed the adult female inside of the room. The police could see that the adult female was badly injured, and was holding a bloody towel against her head. She was sobbing and limping. The police entered the motel room to render aid to the female and to ensure the safety of any other occupants in the motel room and to secure any weapons. While inside tending to the victim, the police discovered Quabner's 12 year old daughter L.S. and 2 year old son inside the motel room. Police were informed that the 12 year old had been sexually assaulted. Quabner, who was in great pain, reported that she had been tied with cord around her wrist and her head had been bludgeoned with a metal candle holder. The police were able to examine Quabner's injuries inside the motel room.

VI. While the police were in the motel room, they observed broken glass on the floor, a TV with a hole in the screen and a broken stereo next to the TV. Blood was observed on the floor. The candle holder was located in the kitchen, and it was dented and had blood on it. L.S. identified that candle holder as the one that was used to bludgeon Quabner.

VII. L.S. also reported to police that additional evidence would be found in the dumpster behind the motel. The dumpster is a common dumpster for use of all motel guests. The dumpster is accessible by anyone who might be walking by. When police looked in the dumpster, three bags were observed that contained shards of glass, pieces of gold braided cord, and several items that appeared to be soiled by blood. The bags and their contents were seized as evidence.

VIII. The police called for medical aid, and Quabner was evaluated at the scene and then taken to the hospital for further treatment. Subsequently, L.S. was examined at the Child Advocacy Center.

IX. After the defendant was taken away, and Quabner and her children were taken to the hospital, police conducted a warrantless search the motel room and collected evidence.

X. At the police station, the defendant was interviewed and taken to jail after police took photographs of him. During the interview, the defendant made a series of voluntary statements after being advised of his Miranda warnings.

XI. If the police had not arrived when they did, Quianna Quabner would have called the police as soon as possible. Once called, the police would have entered the motel room under their “community caretaking function”. They would have then discovered Quabner and her two children. Quabner would still have been injured. Quabner and L.S. would have received medical aid just as they did on October 22, 2006. The evidence in the dumpster would have been recovered.

XII. The State has not met its burden in demonstrating that the condition of the motel room would have been the same.

XIII. The State has not met its burden in demonstrating that the defendant would have made the same statements that he made to Officer Lee and Detective Holmes.

XIV. The State has not met its burden in demonstrating that the defendant’s physical condition and lack of injuries, as observed after his arrest, would have been the same when he eventually would have been arrested.

XV. Thereafter, the Washington State Supreme Court rendered a decision in *State v. Jordan*, 160 Wn.2d 121, 156 P.3d 893 (2007), reversing the Washington State Court of Appeals and holding that Article I, Section 7 of the Washington State Constitution is violated when police randomly view the guest registry of a motel.

The available evidence that the court must consider in this case consists of

- 1) Evidence observed or collected by police inside the motel room as they entered to ensure the safety of the occupants; and
- 2) Evidence found by police in the dumpster which the defendant had abandoned;
- 3) Evidence relating to the search of the motel room following the defendant’s arrest;
- 4) Evidence relating to medical treatment of Quabner and L.S.;

- 5) Evidence relating to the defendant's arrest, such as photographs of the defendant's person and statements made by the defendant.

THE DISPUTED FACTS

There are no disputed facts

FINDINGS AS TO DISPUTED FACTS

There are no disputed facts.

REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

I The police officers may testify as to their observations regarding the condition and demeanor of Quabner and her two children during their interactions with them inside and outside of the hotel room. This evidence would have been inevitably discovered under lawful means, as the "community caretaking function" would have allowed police to enter the motel room to ensure the safety of the occupants once this crime was reported.

II. The police may not testify as to the condition of the motel room itself, as the condition of the motel room may have changed before police were lawfully summoned to the scene.

III. The police may testify to their observations of the victims as they received medical aid.

IV. The police may testify as to the evidence located in the dumpster, as it would have been inevitably discovered under lawful means.

V. Quabner and L.S. may testify fully as to what they observed.

VI. By agreement of the parties, evidence seized during the warrantless search of the motel room, after the victims and defendant were gone, is suppressed. This warrantless search was not conducted as part of the community caretaking function.

VII. The police may not testify as to the defendant's statements during the State's case in chief, as they would not necessarily have been made had this matter been reported later, resulting in a subsequent lawful arrest.

VIII. The police may not testify as to the defendant's lack of physical injuries following his arrest, as his condition may have changed before he would have been arrested later.

IX. The defendant's statements may be used to impeach the defendant's testimony in the event that he does testify. *See*

State v. Greve, 67 Wn. App. 166, 834 P.2d 656 (1992). The State shall first seek permission from the court outside the presence of the jury to determine whether the defendant's statements are proper impeachment.

X. The police did not act unreasonably or in an attempt to accelerate discovery of evidence. Furthermore, all of the admissible evidence would have been discovered under proper and standard investigatory means.

XI. That Article I, Section 7 of the Washington State Constitution is not violated by applying the doctrine of "inevitable discovery" to the facts of this particular case.

b. Facts from Trial

At the age of eleven L.S., a female minor, was living with her mother, Quianna Quabner, L.S.'s two year old brother, and the defendant, Christopher Smith, at Smith's apartment in Spanaway when they had to move out because of a problem with mold. VI RP 252-254; VII RP 378, ln. 4-18. At the time Quianna was almost five months pregnant. VI RP 260, ln. 5-11; VII RP 377, ln. 15-19. L.S. trusted Smith and regarded him as a family friend as she had known Smith since she was four or five because he used to work for her grandmother and would spend time around her family at get togethers and holidays. VI RP 252, ln. 16 to p. 253, ln. 4.

They had been living at the motel for up to about two months on the night of October 21st to 22nd, 2006. VI RP 255, ln. 4-23; VII RP 378, ln. 25 to p. 379, ln. 2. Up to that point there had never been any real

problems between L.S. and the defendant or Quianna and the defendant.

VI RP 256, ln. 1-7.

That night, Smith came home around approximately 11:00 p.m. to midnight, and had been drinking and stuff which led Smith and Quianna to get into an argument because the way he had been drinking bothered Quianna. VI RP 257, ln. 19-24; VII RP 379, ln. 14 to p. 380, ln. 15.

L.S. woke up to a whole bunch of yelling by Smith and her mother. VI RP 256, ln. 18-20; p. 260, ln. 21-23. L.S. saw Smith throw a plate at the wall, there was a lot of yelling and L.S. didn't know what was going on. VI RP 256, ln. 23-25.

Smith was telling Quianna to leave and they got into an argument about him kicking her out because she didn't have anywhere to go with her children. VI RP 257, ln. 1-5; VII RP 380, ln. 17 to p. 381, ln. 2. Smith didn't want Quianna or her children staying at the motel. VI RP 257, ln. 1-3. Smith and Quianna went to the front office where he tried to get them to make her leave, during which time they were gone from the room about ten minutes. VI RP 257, ln. 1-3; p. 261, ln. 7-20; VII RP 380, ln. 22 to p. 381, ln. 21.

After she got back to the room Quianna decided to leave, so she and the children were going to walk to the 7-11 to use a phone to try to get a ride because Smith wouldn't let them use his phone. VI RP 257, ln. 3-8;

262, ln. 17-21; 23-25. But as Quianna was trying to pack up all her stuff and leave, Smith started pushing her, telling her that she wasn't going to go anywhere. VI RP 257, ln. 3-8; 263, ln. 1-17; VII RP 381, ln. 1 to p. 382, ln. 1. Then Smith pushed Quianna, causing her to fall on the floor. VI RP 257, ln. 10-14; 263, ln. 9-23; VII RP 381, ln. 25 to p. 382, ln. 1. Quianna stayed down on the ground a couple minutes. VI RP 264, ln. 2-5. L.S. was standing next to her mother and holding her brother when her mother was pushed down. VI RP 263, ln. 19 to p. 264, ln. 1.

After Quianna got back up Smith started throwing stuff to break it, like pictures with glass frames. VI RP 264, ln. 9-24; VII RP 382, ln. 4-8. *But see*, VII RP 392, ln. 5-14. The television was also broken. VI RP 264, ln. 11-12.

Smith tore off the stuff you use to hang the curtain and used that or some cords Quianna had brought from the other apartment to tie up Quianna and L.S. VI RP 266, ln. 8-19; VII RP 382, ln. 3-20; VII RP 387, ln. 19-25. First Smith tied Quianna to the refrigerator handles in the kitchen. VI RP 267, ln. 5-11; 269, ln. 4-22; VII RP 384, ln. 4-5. Then Smith tied L.S. with her wrists tied to her neck and her feet tied. VI RP 266, ln. 20 to p. 267, ln. 21; 272, ln. 2-11; VII RP 384, ln. 8-9; p. 388, ln. 1-6. Because her wrists were still tied to her neck, every time she moved

it choked her. VI RP 272, ln. 11-13; VII RP 388, ln. 7-16. Smith then put L.S. in the bedroom closet. VI RP 268, ln. 7-11; 269, ln. 23-25.

L.S. could then hear her mother screaming. VI RP 268, ln. 19-21. Her brother had been left on the bed and watching everything but he was also picking up pieces of broken glass and his mother told him to put them down. VI RP 268, ln. 22-25; 388, ln. 24-25.

L.S. was in the closet for 20 or 30 minutes when Smith came and took her out of the closet and into the bathroom. VI RP 270, ln. 1-18. Before taking her there he had untied her. VI RP 272, ln. 2-18. In the bathroom Smith put knives up to L.S.'s throat and said she had better do whatever he says. VI RP 270, ln. 19-21. L.S. was wearing a dress pajama [nightgown-?]. VI RP 270, ln. 23-25. First she was sitting on the toilet, but then the defendant told her to bend over the bathtub. VI RP 270, ln. 23 to p. 271, ln. 14. At this point she was still wearing her pajama dress, but not her underwear. VI RP 271, ln. 17. L.S. refused to bend over the tub so Smith hit L.S. in the nose with his hand and she started bleeding. VI RP 271, ln. 19-24. Smith then again told L.S. she better do what he said before he did something to her mom or her family. VI RP 272, ln. 20-24.

At that point L.S. was standing and Smith told her to pull down her bra and then he pulled down the top part of her pajamas. VI RP 274, ln. 2-

12. She then sat on the toilet and Smith put his penis in her mouth with a knife around her throat. VI RP 273, ln. 1-4; 274, ln. 13-17. Smith had several knives, but the knife he held to L.S.'s throat was a big knife. VI RP 273, ln. 3-16; 274, ln. 18-22. Smith hit L.S. on the shoulder with a hammer while he had his penis in L.S.'s mouth. VI RP 314, ln. 12-24.

When Smith took L.S. into the back and L.S. was crying her mom started screaming asking what he was doing. VII RP 389,ln. 8-9. So while Smith was attacking L.S. in the bathroom, L.S. could hear her mom screaming. VI RP 275, ln. 4-9. Smith then brought L.S. out to the kitchen and her mother could see that her shirt was ripped and her bra was hanging and her breasts were "hanging all out." VII RP 389, ln. 9 to p. 390, ln. 2. Smith also tied L.S. to the refrigerator with her mother. VII RP 390, ln. 8. They were tied to the refrigerator for hours. VII RP 390, ln. 13-16.

After tying them to the refrigerator, Smith then left the motel room and said he was going to burn them on fire. VI RP 276, ln. 21 to p. 277, ln. 3. L.S. then went and untied her mother. VI RP 277, ln. 4-16.

Smith then returned to the room with a big red metal gas can from his car which was parked right outside the motel room. VI RP 277, ln. 23 to p. 278, ln. 17. Smith then told Quianna that he was going to cut the baby out of her with the knife in his hand and that he was going to burn them on fire and similar things. VI RP 278, ln. 16-25. Smith would circle the

knife over Quianna's stomach with the tip touching her belly. VI RP 279, ln. 10 to p. 280, ln. 13; VII RP 385, ln. 22 to p. 386, ln. 16.

L.S. told her mother what Smith did in the bathroom and Smith said she was lying. VI RP 280, ln. 15-17.

A few minutes after Smith ran the tip of the knife over Quianna's belly, he hit her in the head hard with a heavy, square, sharp-edged metal candlestick several times. VI RP 282, ln. 10 to p. 283, ln. 16; 284, ln. 3-8; VII RP 391, ln. 8 to p. 392, ln. 4. He swung it like a baseball bat. VII RP 391, ln. 23-24. When Smith did this, Quianna was sitting on the floor of the kitchen with L.S. next to her. VI RP 283, ln. 17-23. Smith also hit Quianna on the head with a picture frame made of either wood or glass and broke it on her head. VI RP 285, ln. 5-12; VII RP 392, ln. 2-14.

After being clubbed with the candlestick, Quianna felt dizzy, was out of it and spacey. VII RP 395, ln. 16-18. She was very sleepy, in and out, could barely walk and didn't feel like staying up, so she told Smith she wanted to lie down or go to sleep and she lay down. VII RP 395, ln. 20 to p. 396, ln. 5.

Blood was on the floor and had been dripping down Quianna's face and was also on the side of the refrigerator. VI RP 284, ln. 13-22; VII RP 394, ln. 7-12. Smith claimed it was all L.S.'s fault, started wrapping up Quianna's head and told L.S. to clean up the blood on the floor and to also

clean the blood off that got on L.S.'s face when he hit her. VI RP 286, ln. 8-15. L.S. used a towel to clean up the blood on the floor and the refrigerator and also cleaned up the broken glass and threw both the towel and the glass in the dumpster for the motel. VI RP 286, ln. 18 to p. 287, ln. 13. L.S. also threw out the clothes she had on because there was blood all over them. VI RP 287, ln. 20-25. L.S. also put the cords used to tie them into a plastic bag and threw the bag into the dumpster. VI RP 288, ln. 7-20.

Officer Austin Lee of the Lakewood Police Department went to the room and knocked on the door. VII RP 330, ln. 5-11. No one answered, so Officer Lee knocked a second time and eventually Smith came to the door and opened it. VII RP 331, ln. 18. Officer Lee took Smith into custody and put him in the patrol car. VII RP 331, ln. 19-25.

Officer Joe Sandall was assisting Officer Lee and after Officer Lee took Smith into custody, Officer Sandall was able to look in the room and see at least one other person in the room with a towel wrapped around her head that appeared to have blood on it. VII RP 340, ln. 15-25. Quianna woke up and saw the police. VII RP 396, ln. 22-23.

Officers contacted Quianna, who was injured, bleeding from her head with a substantial amount of dried blood in her hair. VII RP 332, ln. 23-24. Quianna's answers to officer's questions were vague and unclear.

and she seemed not to be very coherent as to where she was or what had happened to her. VII RP 341, ln. 7-9. Officers had Quianna remove the towel so they could see what the injury consisted of and if she needed assistance. VII RP 341, ln. 25 to p. 342, ln. 2. Quianna removed the towel and they could see a gash on her head. VII RP 342, ln. 2-3. At that time officers called an ambulance for her. VII RP 24-25. Quianna was treated at the scene and then transported to the hospital. VII RP 342, ln. 7-9. Officer Sandall also photographed her injuries. VII RP 342, ln. 9-11.

In the room officers also observed a young female about age ten to twelve, as well as a younger male. VII RP 10-17. L.S. told police about the items she had disposed of in the dumpster. VI RP 289, ln. 25 to p. 290, ln. 3. Officer Sandall looked in the motel dumpster across the parking lot from the room and observed discarded items in the dumpster. VII RP 343, ln. 7-21. He located the items in the dumpster, and photographed them, but did not remove them, and then secured the scene for the evidence technicians to come and retrieve the items. VII RP 345, ln. 9-12.

Quianna needed 16 staples to close the wounds on her scalp, suffered a permanent scar and had to wear a wig to cover over the area where the hair would not grow back on the scar. VII RP 415, ln. 2 to p. 416, ln. 8.

C. ARGUMENT.

1. THE TRIAL COURT'S FINDINGS OF FACT AS TO THE SUPPRESSION HEARING ARE VERITIES ON APPEAL

The defense assigns error only to a portion of finding of fact 3.

That portion of finding of fact 3 indicating that the Court of Appeals decision in "Jorden was still good law" at the time of the unlawful search to the extent it implies officers had no reason to doubt its continued validity.

Br. App. 1.

The defense provides no argument that there was not substantial evidence to support the challenged finding. Nor are any other findings challenged. Therefore, all the courts findings are verities on appeal.

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. *Hill*, 123 Wn.2d at 644. 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).

In *Henderson Homes, Inc v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no citations to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also, State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact. *Rickert v. Pub.Disclosure Comm'n*, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)). *See, Hoke v. Stevens-Norton, Inc*, 60 Wn.2d 775, 778, 375 P.2d 743 (1962); *see also, Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.*, 68 Wn.2d 172, 174, 412 P.2d 106 (1966) (stating that where conclusions of

law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law).

The court reviews conclusions of law *de novo*. *State v. Smith*, 154 Wn. App. 695, 226 P.3d 195 (2010) (citing *State v. O'Neill*, 148 Wn.2d 464, 571, 62 p.3d 489 (2003); *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008)).

2. THIS COURT SHOULD UPHOLD THE LOWER COURT'S ADMISSION OF THE EVIDENCE UNDER THE DOCTRINES OF ATTENUATION AND INDEPENDENT SOURCE.

At the suppression hearing, the State argued to the trial court that the evidence should be admitted under the doctrine of inevitable discovery, and the trial court admitted the evidence on that basis. CP 492. The brief of appellant argues this issue, as well as the inapplicability of the good faith exception to the exclusionary rule.

The State recognizes that since the suppression ruling was made on this case, the Washington Supreme Court has recently issued opinions rejecting both the "inevitable discovery" doctrine and the "good faith" doctrine. See, *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009); *State v. Afana*, Slip. Op. 82600-5, --- Wn.2d ---, --- P.3d --- (2010). In those cases, the court held the inevitable discovery and good faith doctrines were inapplicable under Article I, § 7 of the Washington Constitution. The State acknowledges that there is a high likelihood that

the court would similarly reject those doctrines as applicable to this case, although given the substantially different factual and procedural posture of this case, there might still remain a basis to argue their application, particularly as to the doctrine of good faith.

However, this court need not reach either inevitable discovery or good faith in order to uphold the lower court's ruling admitting the evidence in this case. That is because this Court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). Here, the trial court's admission of the evidence was proper under the attenuation doctrine, which includes independent source as a sub-component.

A brief overview of the origins of the exclusionary rule in the United States Supreme Court caselaw is helpful to a proper understanding of the issues in this case.

Search and Seizure under the Fourth Amendment was largely undeveloped until 1886 when the Supreme Court issued its seminal case on the subject, *Boyd v. United States*. See, *Carroll v. U.S.*, 267 U.S. 132, 45 S. Ct. 280, 69 L.Ed. 543 (1925) (citing *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886)). *Boyd* was not a criminal case, but rather involved a court order for production of evidentiary records to be used in a forfeiture action against Boyd for glass that had been imported without payment of customs duties. *One 1958 Plymouth Sedan v. Com.*

Of Pa., 380 U.S. 693, 696, 85 S. Ct. 1246, 14 L.Ed.2d 170 (1965). The court in *Boyd* held that the order to produce the records was unconstitutional (under both the Fourth and Fifth Amendments) and the evidence obtained thereby was inadmissible. *Boyd*, 106 U.S. at 633-35, 638.



Until 1949, the case law developed solely with regard to the admissibility in federal courts of evidence from illegal searches. A series of cases worked together to elucidate a rule that, evidence obtained in illegal searches by local law enforcement would not be admissible in federal courts if the defendant challenged the evidence in a pre-trial motion and federal officers were either involved in the search or it was done on behalf of federal authorities. See, *Adams v. New York*, 192 U.S. 585, 24 S. Ct. 372, 48 L.Ed. 575 (1904)); *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L.Ed. 652 (1914); *Byars v. United States*, 273 U.S. 28, 47 S. Ct. 248, 71 L.Ed. 520 (1927); *Gambino v. United States*, 275 U.S. 310, 48 S. Ct. 137, 72 L.Ed. 293 (1927). Several of these cases involved a pre-trial motion for the return of the illegally seized property, thereby making it unavailable for admission as evidence by the State at trial. See, e.g., *Weeks*, 232 U.S. at 387.

While this was going on, the court was developing the beginnings of what would soon be called the exclusionary rule. Thus, in *Silverthorne Lumber Co. v. U.S.* the court held that a contempt order was not valid where incriminating papers were not turned over in response to a court

order for a grand jury hearing where the papers were originally discovered as the result of an unlawful warrantless search of the business of the two suspects. *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 40 S. Ct. 182, 64 L.Ed. 319 (1920). In so holding, the court declared:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Silverthorne Lumber Co., 251 U.S. at 392. The *Silverthorne* case is interesting for two reasons. First, it traces out the beginnings of the exclusionary rule. Second, it already refers to “an independent source”, thereby making the independent source rule even older than the exclusionary rule, at least in terms of their being named as such.

Raffel v. United States provides the first instance of the Supreme Court using “exclusion” language:

If, therefore, the question asked of the defendant were logically relevant, and competent within the scope of the rules of cross-examination they were proper questions, unless there is some reason of policy in the law of evidence which requires their exclusion.

Raffel v. United States, 271 U.S. 494, 497, 46 S. Ct. 566, 70 L.Ed. 1054 (1926). However, *Raffel* considered a defendant’s right against self-

incrimination under the Fifth Amendment, not unlawful searches under the Fourth Amendment.

Notwithstanding the fact that *Raffel* was a Fifth Amendment case, in *Nardone v. United States* the court apparently picked up the language from *Raffel* and applied it in a Fourth Amendment context:

Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land.

Nardone v. United States, 308 U.S. 338, 340, 60 S. Ct. 266, 84 L.Ed. 307 (1939). *Nardone*, as will be explained in greater detail below, was also the first case to discuss attenuation, and independent source. The court in *Nardone* recognized that the issue of attenuation related to the “fruit of the poisonous tree” doctrine, and that if the State could show its evidence had an “independent origin” it would not be the fruit of the poisonous tree. *Nardone*, 308 U.S. at 341.

In *Wolf v. Colorado*, the court held for the first time that the Fourth Amendment protections applied to the states via the Due Process Clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 69 S. Ct. 1359, 93 L.Ed. 1782 (1949). However, in doing so the court in *Wolf* went on to consider:

But the immediate question is whether the basic right to protection against arbitrary intrusion by the police [in state courts] demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded.

Wolf, 338 U.S. at 28. The court in *Wolf* concluded that the exclusionary rule did not apply to prosecutions in State courts for State crimes. *Wolf*, 338 at 33. This was because:

It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication.

Wolf, 338 U.S. at 28. This led to Justice Black's famous statement in his concurrence that;

...the federal exclusionary rule is not a command of the Fourth Amendment but a judicially created rule of evidence which Congress might negate.

Wolf, 338 U.S. at 39 (Black concurring). Nonetheless, three dissenting justices were of the opinion that the exclusionary rule did apply to the States. *Wolf*, 338 U.S. at 40-48.

It is therefore not surprising that some 12 years later in *Mapp v. Ohio*, the court held the exclusionary rule did apply to the states. *See, Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961). In so holding, the court noted that relegating the protection of the Fourth

Amendment to other remedies would be futile, as had been recognized by the court at least since *Wolf v. Mapp*, 367 U.S. 651-53. To that end, the primary purpose of the exclusionary rule, at least since *Terry v. Ohio*, and arguably going all the way back to *Boyd* in 1886, is to deter police misconduct. *Terry v. Ohio*, 392 U.S. 1, 12, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968) (“Thus its major thrust is a deterrent one...”). More recent cases have certainly focused on the rule’s deterrent purpose. *See, Herring v. United States*, --- U.S. ---, 129, S. Ct. 695, 700-01, 172 L.Ed.2d 496 (2009); *Hudson v. Michigan*, 547 U.S. 586, 594ff, 126 S. Ct. 2159, 165 L.Ed.2d 56 (2006).

The Supreme Court has held that the rule serves at least one other purpose as well. That other purpose is the imperative of judicial integrity, namely that courts which sit under the Constitution, will not be made party to unlawful violations of constitutional rights by permitting unhindered governmental use of the fruits of such violations. *See, Terry v. Ohio*, 392 U.S. at 12-13 (citing *Elkins v. United States*, 364 U.S. 206, 222, 80 S. Ct. 1437, 4 L.Ed.2d 1669 (1960)).

The Washington Supreme Court has determined that in Washington the exclusionary rule exists as a separate but analogous counterpart to the federal rule under which deterrence is a purpose, but the primary purposes is protecting an individual’s right of privacy. *State v.*

Afana, Slip. Op. 82600-5, p. 4, --- Wn.2d ---, --- P.3d --- (2010). This is because, as the court has held, article I, section 7 emphasizes “protecting personal rights rather than [...] curbing governmental actions.” *Afana*, Slip. Op. 82600-5 at 4 (citing *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).

With regard to the specific issues in this case, it is necessary to return to the opinion in *Nardone*. *Nardone* appears to be the first case to use the phrase “fruit of the poisonous tree.” See, *Nardone*, 308 U.S. at 341. The fruit of the poisonous tree doctrine defines the scope or extent of the application of the exclusionary rule, which applies not only to primary or direct evidence obtained by illegal conduct, but also to secondary or indirect evidence derived therefrom. *Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 82 L.Ed.2d 599 (1984) (citing *Weeks*, 223 U.S. 383; *Nardone*, 308 U.S. at 341; *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Without it being referred to as the “fruit of the poisonous tree” the first consideration of indirect or secondary evidence was nineteen years prior to *Nardone* in *Silverthorne Lumber Co. Nardone*, 308 U.S. at 341 (citing *Silverthorne Lumber Co.*, 251 U.S. at 392).

When the exclusionary rule is applied to derivative evidence, the immediate and next obvious question is, “What is the test to determine when evidence derives from the underlying illegal conduct?”

This, of course, makes it perfectly clear, if indeed ever there was any doubt about the matter, that the question of causal connection in this setting, as in so many other questions with which the law concerns itself, is not to be determined solely through the sort of analysis which would be applicable in the physical sciences. The issue cannot be decided on the basis of causation in the logical sense alone, but necessarily includes other elements as well. And our cases subsequent to *Nardone, supra*, have laid out the fundamental tenets of the exclusionary rule, from which the elements that are relevant to the causal inquiry can be divined.

United States v. Ceccolini, 435 U.S. 268, 274, 98 S. Ct. 1054, 55 L.Ed.2d 268 (1978).

Under the fruit of the poisonous tree doctrine, evidence will not be excluded if the connection between the illegal police conduct and the evidence is so attenuated as to dissipate the taint. *Segura*, 468 U.S. at 805 (citing *Nardone*, 308 U.S. at 341). Already in *Nardone*, the very origin of the fruit of the poisonous tree doctrine, the court indicated that the State can show attenuation if it was of “independent origin.” *Nardone*, 308 U.S. at 341. Not only are the attenuation and independent source doctrines basic and closely related fundamental aspects of the fruit of the

poisonous tree doctrine, “independent source” is in fact one means for showing attenuation.

In *Wong Sun*, the court held that the policies underlying the exclusionary rule did not invite any logical distinction between physical and verbal evidence. *Wong Sun*, 371 U.S. at 486 (citing *Silverman v. United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L.Ed.2d 734 (1961) (excluding the overhearing of verbal statements); *McGinnis v. United States*, 227 F.2d 598 (1st Cir 1955) (excluding testimony of matters observed during an unlawful invasion)). Thus, where verbal evidence derives so immediately from an unlawful entry and/or unlawful arrest, that verbal evidence too is the fruit of the poisonous tree. *Wong Sun*, 371 U.S. at 485-86.

In *Ceccolini* the court reaffirmed the holding of *Wong Sun* and again rejected the State’s argument that the court should adopt a *per se* rule that the testimony of a live witness at trial should not be excluded no matter how close and proximate the connection between it and the Fourth Amendment. *Ceccolini*, 435 U.S. at 274-75. However, the court in *Ceccolini* went on to draw a different distinction and held that where the testimony of a live witness is sufficiently attenuated from the illegal action, that testimony may be admitted. *See, Ceccolini*, 435 U.S. at 275ff. In making that distinction, the court noted that with regard to attenuation

there are significant differences between evidence that is testimony by a live witness and physical evidence, and therefore outlined issues to be particularly considered when evaluating whether testimonial evidence by a live witness is fruit of the poisonous tree or attenuated. *Ceccolini*, 435 U.S. at 276-77.

The first issue discussed by the court is the degree of free will exercised by the witness. *Ceccolini*, 435 U.S. at 276. Thus, where, as in *Wong Sun*, the live testimony consists of a report of challenged statements made by a putative defendant after arrest, they are the fruit of the poisonous tree and should be excluded. *Ceccolini*, 435 U.S. at 276 (citing *Wong Sun*, 371 U.S. at 491; *Brown v. Illinois*, 422 U.S. 590, 603, 95 S. Ct. 2254, 45 L.Ed.2d 416 (1975)). However, the greater the willingness of a witness independent of law enforcement to freely testify, the more attenuated the testimony. This is because, as the court in *Ceccolini* recognized,

Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality

which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify.

Ceccolini, 435 U.S. at 276-77. Implicit within this statement is a recognition that as human beings capable of acting independently, when witnesses are freely willing to discuss the case with officers or testify in court, they are inherently an independent source.

The second issue to be considered is whether the exclusion would perpetually disable a witness from testifying about relevant and material facts regardless of how unrelated such testimony might be to the purpose of the originally illegal search. *Ceccolini*, 435 U.S. at 277. Such an exclusion could pose serious obstructions to the ascertainment of truth. *Ceccolini*, 435 U.S. at 277 (citing C. McCormick, Law of Evidence § 71 (1954)). Thus, even after a defendant has made a confession under unlawful circumstances that preclude its use, the court will nonetheless admit a subsequent confession if it is made free of unlawful circumstances. *Ceccolini*, 435 U.S. at 278 (citing *United States v. Bayer*, 331 U.S. 532, 541, 67 S. Ct. 1394, 91 L.Ed. 1654 (1947)). The courts have also admitted at trial the testimony of a witness whose identity was disclosed in a statement by the defendant that was given after inadequate Miranda warnings. *Ceccolini*, 435 U.S. at 278 (citing *Michigan v. Tucker*, 417 U.S. 433, 450-451, 94 S. Ct. 2357, 41 L.Ed.2d 182 (1974)).

Finally, the courts have also permitted testimony regarding illegally obtained evidence to be used to impeach a defendant who testifies on his own behalf. *Ceccolini*, 435 U.S. at 275 (citing *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L.Ed. 503 (1954)).

In the context of this second issue, it is worth noting that the Article I, § 35 of the Washington Constitution specifically provides rights to crime victims on felony cases, including the right to attend trial and all other court proceedings the defendant has the right to attend, subject to the approval of the individual presiding over trial. Washington Const. Article I, § 35. The victim also has the right to make a statement at sentencing and at any proceeding where the defendant's release is considered. Washington Const. Article I, § 35. Even under Article I, § 35 the victim's rights must be balanced against the defendant's due process rights. *State v. Gentry*, 125 Wn.2d 570, 625-26, 888 P.2d 1105 (1995), *certiorari denied* 516 U.S. 843, 116 S. Ct. 131, 133 L.Ed.2d 79 (1995). Nonetheless, given the express grant of rights to crime victims in the Washington constitution, the status of a voluntarily testifying victim should be accorded greater deference as an independent action than it is under federal law. Moreover, where exclusion would perpetually disable a victim from voluntarily testifying about relevant and material evidence, that consideration should be given particular weight in determining

whether the voluntary statement of a victim is sufficiently attenuated from the underlying illegal action.

Several Washington cases have applied attenuation and/or independent source. Under that analysis, the court first looks to see if the evidence is sufficiently attenuated. *See, State v. Warner*, 125 Wn.2d 876, 888, 889 P.2d 479 (1995). Attenuation can occur in either of two ways: 1) if there are intervening independent factors in the chain of causation between the original illegality and the evidence; and 2) if there was an independent source for the evidence. *Warner*, 125 Wn.2d at 888. Second, even if the evidence is not attenuated, it will be admitted if the State can show it inevitably would have been discovered. *Warner*, 125 Wn.2d at 889.² *See also, State v. Reid*, 38 Wn. App. 203, 208-09 n. 6, 687 P.2d 861 (1984). More recently, courts have oversimplified this analysis into a simple three part test. Under that test, the State has been required to show either, 1) that the evidence was attenuated from the illegality; 2) the evidence was discovered through an independent source; or 3) the evidence would have inevitably been discovered through legitimate

² The State recognizes that in light of the Washington Supreme Court's opinion in *Winterstein*, the inevitable discover portion of the analysis is no longer valid law or applicable in Washington.

means. See, *State v. McReynolds*, 117 Wn. App. 309, 322, 71 P.3d 663 (2003); *State v. Le*, 103 Wn. App. 354, 362, 12 P.3d 653 (2000).

In *State v. O'Bremski*, under the independent source doctrine, the court admitted the statements of a fourteen year old girl who had been found in the defendant's apartment after police unlawfully entered the apartment. *State v. O'Bremski*, 70 Wn.2d 425, 423 P.2d 530 (1967).

The girl had been reported as a runaway by her parents.

O'Bremski, 70 Wn.2d at 426. A week later, patrol officers received a report that the girl and a man known as Russ were seen in a car that was identified as to make year and license number. *O'Bremski*, 70 Wn.2d at 426. Police observed the car and stopped it. *O'Bremski*, 70 Wn.2d at 426. One of the two people in the car, a boy, told officers he had been with Russ and the girl at Russ's apartment, and then led the officers to the apartment. *O'Bremski*, 70 Wn.2d at 426. Officers knocked on the door, entered over the defendant's objection and located the girl, naked but covered in a blanket, hiding behind a couch. *O'Bremski*, 70 Wn.2d at 426. The defendant was charged with carnal knowledge of a girl under fifteen. *O'Bremski*, 70 Wn.2d at 426.

The only witnesses at trial were the two people in the car when police stopped it and the girl. *O'Bremski*, 70 Wn.2d at 427. The girl's

testimony provided the only evidence of the actual commission of the crime. *O'Bremski*, 70 Wn.2d at 427.

The court noted that she was the victim of the crime. *O'Bremski*, 70 Wn.2d at 429. Then, considering the case under both the Fourth Amendment and Article I, § 7, the court held that under the independent source doctrine she was not a witness discovered solely as a result of the search, held the admission of her testimony was lawful and affirmed the conviction. *O'Bremski*, 70 Wn.2d at 429-30.

In *Wells v. State*, the Florida appellate court held that the testimony of a witness against the defendant at trial was sufficiently attenuated from the illegal stop of the defendant's car even where the witness was ultimately located as a result of statements the defendant made upon his arrest after the illegal stop. *Wells v. State*, 975 S.2d 1235 (2008).

In Washington, in *State v. Childress*, the court held that a crime victim's testimony at trial was sufficiently attenuated from an illegal search and that it was properly admitted. *State v. Childress*, 35 Wn. App. 314, 666 P.2d 941 (1983). The court applied a multipart test derived from *Ceccolini*.

Relevant factors to be considered in determining whether the witness's testimony is sufficiently attenuated from the police misconduct are: (1) the length of the "road" between

the unlawful conduct of the police and the witness's testimony; (2) the degree of free will exercised by the witness; and (3) the fact that exclusion would permanently disable the witness from testifying about relevant and material facts regardless of how unrelated such testimony might be to the purpose of the original illegal search or the evidence discovered thereby.

Childress, 35 Wn. App. at 316 (citing *Ceccolini*, 435 U.S. at 275-77).

In *Childress*, California police illegally searched the defendant's apartment, and as a result of the search obtained the defendant's wallet, which contained a photograph of two nude girls, a Washington driver's license and a bank check showing an Everett address. *Childress*, 35 Wn. App. at 315-16. California police located one of the girls in the photograph who told them that the other girl was named Stephanie and that she lived in Seattle. *Childress*, 35 Wn. App. at 315. Everett police canvassed the neighborhood around the address on the bank check and discovered that a girl named Stephanie resided on the street listed on the check. *Childress*, 35 Wn. App. at 315. Officers showed the photograph to Stephanie's parents, who identified the girl as their daughter. *Childress*, 35 Wn. App. at 315. The parents then asked Stephanie whether she had been keeping any secrets and she told them she had been sexually involved with Childress and the other girl, and that pictures were taken. *Childress*, 35 Wn. App. at 315-16. The parents relayed the information to Everett Police, and after further investigation Childress was charged with

indecent liberties. *Childress*, 35 Wn. App. at 316. The trial court admitted Stephanie's testimony at trial over Childress's objection that it was the fruit of an illegal search. *Childress*, 35 Wn. App. at 316.

The court affirmed the conviction, holding that the illegal search merely suggested an investigation, and that the victim's testimony developed from the subsequent investigation and was sufficiently attenuated to dissipate the taint of illegality. *Childress*, 35 Wn. App. at 317. While the facts surrounding the illegal California search could not be determined from the record, the court noted that it seemed "reasonable to assume the California police did not undertake the search with the expectation of finding evidence of an unknown crime in another state." *Childress*, 35 Wn. App. at 317.

In *State v. Early*, the court approved the admission of the testimony of a co-defendant as being from an independent source, and therefore sufficiently attenuated to dissipate the taint of the illegal search. *State v. Early*, 36 Wn. App. 215, 220-21, 674 P.2d 179 (1983). In *Early*, Police in North Carolina located a vehicle, two people connected to it had been involved in a grocery store robbery, one of whom was Early. *Early*, 36 Wn. App. at 217. Officers searched the vehicle unlawfully. *Early*, 36 Wn. App. at 217. In a briefcase inside the vehicle, officers found an atlas. *Early*, 36 Wn. App. at 217.

The FBI received the material and issued an information flier on Early's co-defendant, Beardsley, stating that an atlas was seized in which States that had cities circled on the atlas included Washington. *Early*, 36 Wn. App. at 217. A Spokane Sheriff's deputy saw the flier in the local FBI office and recognized that Beardsley used a distinctive modus operandi that matched one used in a grocery store robbery in Spokane that occurred about a month before the North Carolina Robbery. *Early*, 36 Wn. App. at 217, 218. The Spokane Robbery victims then identified Beardsley from a photo montage. *Early*, 36 Wn. App. at 218. The FBI in Colorado began an investigation of Beardsley as a result of large sums of cash he was depositing at a bank. *Early*, 36 Wn. App. at 218. They were also aware Beardsley and Early resided together. *Early*, 36 Wn. App. at 218. The FBI obtained Early's credit card number and were able to trace the use of the card in and around Spokane. *Early*, 36 Wn. App. at 218. Beardsley entered into a plea agreement which involved his testifying against Early at trial. *Early*, 36 Wn. App. at 218.

The court held that no serious challenge could be made to Beardsley's testimony as it was derived from an independent source from the illegal search of the vehicle. *Early*, 36 Wn. App. at 220. The court also followed *Ceccolini* and applied a four part test regarding the testimony of a live witness to determine whether Beardsley's testimony

was sufficiently attenuated to warrant its admission. *Early*, 36 Wn. App. at 220 (citing *Ceccolini*, 435 U.S. 268). Under that test:

[T]he testimony of a live witness must be measured by whether: (1) the illegal seizure played an important role in the decision to testify; (2) the witness testified voluntarily; (3) disqualification of the witness hampered ascertainment of the truth; (4) the “road” between the seizure and the testimony was sufficiently attenuated to break the chain of causation.

Early, 36 Wn. App. at 220 (citing *Ceccolini*, 435 U.S. 268).

When the factors of *Childress* and *Early* are combined, you have the following: 1) The degree of free will exercised by the witness; 2) the fact that exclusion would permanently disable the witness from testifying about relevant and material facts regardless of how unrelated such testimony might be to the purpose of the original illegal search or the evidence discovered thereby; 3) disqualification of the witness would hamper ascertainment of the truth; and 4) The road between the unlawful conduct and the witness testimony is sufficiently attenuated. As is clear from *Childress*, one consideration in assessing the fourth factor is the motive of the officers in engaging in the illegal conduct and whether they were seeking to locate evidence.

Here, the trial testimony of the victims in this case was sufficiently attenuated as to be properly admissible. First, the victims exercised complete free will in reporting this to the police and in testifying at trial.

Indeed they stated they were going to call the police at the first opportunity indicating that they were also actively seeking out the police of their own accord. Second, exclusion of the evidence would permanently disable the witness from testifying. Third, disqualification of the witnesses would completely hamper ascertainment of the truth because they were the only source of evidence as to the crimes.

Fourth and finally, the road between the unlawful conduct and the testimony is sufficiently attenuated. The illegal conduct at issue in this case consisted of the officer's review of the motel registry. Police conducted the registry check to determine if any of the guests had outstanding arrest warrants and arrest them. There was no intent to search for evidence of any crime or unlawfully advance an investigation. Moreover, shortly prior to this search, the Court of Appeals had expressly approved the registry check program as lawful. It was only after this case that the Supreme Court reversed the Court of Appeals and held the registry check program was unlawful.

Once the defendant was arrested, officers made no attempt to enter or search the motel unit until they saw an injured Quianna Quabner through the open door. Once they observe her and realize she needs help, the emergency and community caretaking exceptions to the warrant requirement apply notwithstanding any prior illegality and the officers

may enter to render assistance to her and L.S., which is what they did, ultimately having Quianna taken to the hospital by ambulance. I RP 38, ln. 14 to p. 40, ln. 23. The facts of this case fall clearly within the emergency/community caretaking exception under which an officer may enter without a warrant if the officer 1) subjectively believed someone needed assistance; 2) that belief was reasonable; and 3) there is a reasonable basis to associate the need with the place entered. See, *State v. Davis*, 86 Wn. App. 414, 420, 937 P.2d 1110 (1997); *State v. Williams*, 148 Wn. App. 678, 201 P.3d 371 (2009); *State v. Hos*, 154 Wn. App. 238, 246-47, 225 P.3d 389 (2010). Here, the emergency and community care taking exceptions serve as an intervening cause that further attenuated the testimony of the witnesses at trial. Quianna and L.S. also testified that they were going to call the police at the first opportunity, which indicates that they were themselves going to sought the assistance of the police.

Under the facts of this case, the testimony at trial was sufficiently attenuated as not to be the fruit of the poisonous tree. For this reason, the Court should affirm the conviction.

3. IF THE COURT WERE TO HOLD ANY EVIDENCE OTHER THAN THE TESTIMONY OF THE VICTIMS TO HAVE BEEN IMPROPERLY ADMITTED, THE ERROR WAS HARMLESS.

Two different standards for harmless error have been applied to Washington cases. In *State v. Welchel*, the Washington Supreme Court held that a constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Welchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)(holding the error was harmless where statements were admitted in violation of the defendant's rights under the confrontation clause). The court in *Welchel* held that independent of the improperly admitted statements, there was overwhelming evidence to support the defendant's conviction so that the erroneous admission was harmless beyond a reasonable doubt. *Welchel*, 115 Wn.2d at 730.

However, when the same case went before the Ninth Circuit Court of Appeals on an appeal to a habeas corpus motion, the Ninth Circuit held that the standard for harmless error was whether a given error had a substantial and injurious effect or influence in determining the jury's verdict. *Welchel v. Washington*, 232 F.3d 1197, 1205-06 (9th Cir. 2000) (hereinafter *Welchel II*). In *Welchel II*, the Ninth Circuit affirmed the Federal District Court's grant of habeas corpus relief to the defendant, holding that the statements were not cumulative of other evidence, and

were inherently suspect. *Whelchel II*, 232 F.3d at 1208. The court also noted that the other evidence did not point overwhelmingly to Whelchel's guilt. *Whelchel II*, 232 F.3d at 1208. The court did find harmless error as to other improperly admitted statements where they were merely cumulative. *Whelchel*, 232 F.3d at 1211.

Here, the overwhelming majority of the evidence of the crime came from the testimony of the victim's. The other evidence was largely duplicative of the victims' so that any error from the admission of the other evidence was harmless.

4. IN LIGHT OF *STATE V. HUGHES*, IT APPEARS THE DEFENDANT'S CONVICTION OF RAPE OF A CHILD IN THE SECOND DEGREE MAY VIOLATE DOUBLE JEOPARDY.

In *State v. Hughes*, the court held that convictions for Rape in the Second Degree (based upon the fact that the victim was incapable of consent based on incapacitation), and Rape of a Child in the Second Degree, violated double jeopardy when these convictions were based on the same act. *State v. Hughes*, 166 Wn.2d 675, 682-84, 212 P.3d 558 (2009).

The defendant has relied on *Hughes* to argue that his separate convictions in count I for Rape in the First Degree, and Count II Rape of a Child in the Second degree also violate double jeopardy. Br. App. 15.

However, the defendant's reliance is misplaced because this case is distinguishable from *Hughes*. In *Hughes* the defendant was charged with

Rape in the Second Degree, and Rape of a Child in the Second Degree.

Hughes, 166 Wn.2d at 679. Part of the reason the court held that the crimes violated double jeopardy was because they were crimes based on nonconsent as a result of the victim's status. *Hughes*, 166 Wn.2d at 684.

Here, however, the charge of rape in the first degree was based on forcible compulsion, while charge of Rape of a Child in the Second Degree was based on a lack of consent due to the status of the victim. To that extent, the crimes contain different elements so that the two crimes are not the same. *But see, Hughes*, 166 Wn.2d at 685-86 (citing *State v. Birgen*, 33 Wn. App. 1, 651 P.2d 240 (1982)(concluding on grounds other than double jeopardy that the legislature did not intend for a defendant to be convicted of both nonconsensual rape and statutory rape for a single act of intercourse)).

Therefore, because the elements differ between Rape in the First degree and Rape of a Child in the Second Degree, here the two crimes are not the same in law or in fact, and double jeopardy is not violated.

D. CONCLUSION.

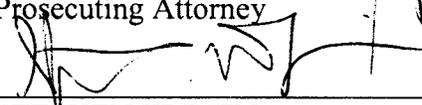
The need to render assistance to Quianna Quabner, under the emergency and community caretaking exceptions, along with the voluntary statements to police by Quabner and L.S., sufficiently attenuated the evidence admitted at trial from the unlawful motel registry check so that the admission of the evidence was proper. The defendant's

convictions for Rape in the First Degree, and Rape of a Child in the Second Degree based upon the same act did not violate double jeopardy, where Rape in the First Degree includes the separate element of forcible compulsion so that the elements of the two differ.

The Court should affirm the conviction and the sentence.

DATED: July 20, 2010.

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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.

7.20.10 
Date Signature