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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion to suppress evidence the police obtained in violation of the defendant's right to privacy under RCW 10.31.040, Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when they executed a search warrant in violation of the knock and announce rule.

2. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it failed to correctly answer the jury's question concerning the law on the defense to the child rape charge.

3. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to allow him to present relevant, exculpatory evidence on the reasonableness of his belief that the defendant was of age.

4. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgement for kidnapping because substantial evidence does not support this charge.

5. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when it accepted the jury's special verdict that the defendant was a predator because this special verdict is unsupported by substantial evidence.

6. The trial court violated the defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Sixth Amendment, when it added a sentencing enhancements that was also an element of the underlying crime charged.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it denies a defendant's motion to suppress evidence the police obtained in violation of the defendant's right to privacy under RCW 10.31.040, Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when they executed a search warrant in violation of the knock and announce rule?

2. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it fails to correctly answer a jury's question concerning the law on the defense to the child rape charge, and that failure misinforms the jury on the applicable law?

3. Does a trial court deny a defendant the right to a fair trial under

Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to allow the presentation of relevant, exculpatory evidence on an available defense?

4. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgement for a crime unsupported by substantial evidence?

5. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment if it accepts a jury's special verdict that the defendant acted as a predator when that special verdict is not supported by substantial evidence?

6. Does a trial court violate a defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Sixth Amendment, if it adds a sentencing enhancement that is also an element of the underlying crime charged?

STATEMENT OF THE CASE

Factual History

Telephone “chat” services, also called telephone dating services, are membership services used by individuals in a particular geographical area to find and contact like-minded people. RP 474-477, 529-533. Once a person joins a particular telephone “chat room,” he or she usually creates an “on-line” profile by recording a message setting out his or her particular interests for other members to hear. RP 529-533. The purpose of the profile message is to induce like-minded persons to make contact over the telephone, and potentially arrange personal meetings. *Id.* Many telephone “chat” services require a person to verify that he or she is 18 years or older in order to register for the service. *Id.*

Sometime prior to August of 2008, LM, a thirteen-year-old male, registered for a local Portland telephone chat service he saw advertised on the television. RP 529-533. When he registered, he recorded a user profile and the username of “Chance.” *Id.* The chat service with which LM registered only allows persons 18-years or older to use the service, and LM told the chat service that he was 18-years-old when he signed up for the service. *Id.* After registering, LM used the service to talk to a number of different people over the telephone. *Id.* In addition, LM also maintained separate “my space” accounts in which he identified himself as 16-years-old and 19-years-old

respectively. RP 556.

The defendant Steven Dillon was also a member of the same “chat” service as LM under the username of “Dalton.” RP 474-477. After reading the profile for “Chance,” the defendant left a message with a number for “Chance” to call him.. *Id.* Later, LM reviewed his messages, and responded to the defendant’s recording by calling him on the telephone. *Id.* Exactly when they first talked to each other over the telephone is also unknown. RP 474-477, 529-533, 614-618. LM claimed that he spoke with the defendant three times over the telephone before they met on the evening of August 6th, 2008. RP 474-477. Then he stated that he had called the defendant once and that the defendant called him three times. RP 529-533. However, LM’s cell phone records, as obtained by the police, indicate that on August 6, 2008, the defendant called LM once, and LM called the defendant 15 times. RP 628-631. During these conversations, the defendant invited LM to come to his apartment in Vancouver. RP 480-482, 533-535. LM responded that he did not have a car and asked the defendant to come a pick him up at a business near the intersection of SE 112th and Division in Portland. RP 495-497.

Following their telephone conversations on August 6, 2010, the defendant drove to Portland at about midnight and picked up LM at the prearranged location. RP 482-485. The defendant then drove the two of them to his apartment across the river in Vancouver. RP 495-497. Once at

the apartment, the two of them entered and went back to the defendant's bedroom, where he played a "porno" on his DVD player and asked LM if he wanted a drink. RP 496-497. LM declined the drink. *Id.* At this point, the defendant took off his pants, and had LM perform fellatio on him to orgasm. RP 497-501, 550. The defendant then pulled LM's pants down, and performed fellatio on him to orgasm. *Id.* The defendant then said he would call his girlfriend so they could engage in a threesome. RP 504-506. Within a few minutes, the defendant's girlfriend entered the room. *Id.* However, she left after some brief sexual contact with LM. *Id.* (The defendant had her touch LM's penis. *Id.*)

After the defendant's girlfriend left the bedroom, LM asked the defendant if he would take him back to Portland. RP 511-513. The defendant replied by asking LM to stay longer. *Id.* However, when LM declined, the defendant took LM back to the same intersection in Portland and dropped him off. *Id.* At no point during their contact did the defendant ever threaten or force LM to do anything. RP 542-545. In addition, LM never told the defendant to stop any of his conduct. *Id.*

In fact, LM's house was only a short distance from the place where the defendant had picked him up and dropped him off. RP 482. When he returned to his house, his older sister saw that he had been out, and called their mother at work to report that LM had been out during the night. RP

514-515. When LM's mother came home from work, she confronted LM about being out. *Id.* LM then lied about where he had been and what he had been doing. RP 545-547. Unsatisfied with his answers, LM mother called the police, who began an investigation. RP 516.

Initially, LM told his mother and the police that (1) he had met a man at the library who had given LM his telephone number (2) that he had later called this man, who came to the library to pick him up, (3) that the two of them went to this man's apartment in Vancouver where they watched a movie, and (4) that after the movie, the man drove LM back home. RP 518-523. Based upon this statement, a Portland Police Officer had LM (along with his mother), drive with him to Vancouver, where LM pointed out the apartment complex, the defendant's vehicle, and the defendant's specific apartment. RP 562-568. Once at this location, this officer knocked on the defendant's door and entered with the defendant's consent. RP 568-572. After the defendant provided identification, the officers left. *Id.* According to the officers, at this point they were unsure exactly what had happened. *Id.*

LM later provided a video-taped interview with a social worker at "CARES Northwest," a Portland medical clinic specializing in dealing with child victims of neglect or abuse, including sexual abuse. RP 680-682. During this taped interview, LM again denied that he had engaged in any type of sexual contact with the defendant. *Id.* Eventually, LM's mother was able

to persuade LM into writing two statements in which he finally admitted that he had engaged in consensual homosexual contact with the defendant. RP 426-428. His mother later provided copies of these statements to the police. *Id.*

Based upon LM's eventual claims, Vancouver police detectives obtained a warrant to search the defendant's apartment. RP 156-158. With this warrant in hand, both the Vancouver and Portland Police officers went to the defendant's apartment. *Id.* Once at the apartment door, they knocked on the front door, announced their purpose, and entered after a couple of seconds. *Id.* Inside, they found the defendant standing naked in his bathroom and arrested him. *Id.* They then took the defendant to the police station, where the defendant submitted to a three hour interrogation in which he admitted that (1) he had met LM on the chat line and talked with him a number of times, (2) that they had agreed to meet with the defendant going to a location LM suggested in Portland, (3) that he and the defendant had gone to the defendant's apartment and engaged in consensual oral sex, and (4) that he had taken LM back to Portland at LM's request. RP 614-626. During the interrogation, the defendant told the police that he believed LM was an adult because (1) you had to be at least 18-years-old to be on the phone chat service, (2) LM claimed he had a full time job at a nursing home, and (3) LM had repeatedly stated that he was 18-years-old. *Id.* In fact,

although not known to the defendant, LM also maintained “my space” webpages in which he misrepresented himself as 16-years-old on one and 19-years-old on another. RP 556.

Procedural History

By information filed on October 9, 2008, and amended on October 3, 2009, the Clark County Prosecutor charged the defendant Steven Monroe Dillon with one count of second degree rape of a child. CP 1-2, 240-241. In that charge, the state further alleged that the defendant’s commission of the crime was “predatory” as defined in RCW 9.94A.836. CP 240-241. The amended information also charged the defendant out of the same incident with first degree kidnapping, including special allegations that he had acted with sexual motivation under RCW 9.94A.835, and that “the victim was under fifteen years old” under RCW 9.94A.837. *Id.*

During the pendency of this case, the defense moved to suppress all evidence the police had obtained during the execution of the search warrant at the defendant’s house, arguing that a portion of the information the officers included in the affidavit given in support of the warrant was illegally obtained when the officers first entered the defendant’s home without a warrant and without giving the defendant warnings under *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). CP 18-34.

On March 16, 2009, the court held a hearing on the defendant’s

motion to suppress along with a hearing under CrR 3.5 to determine the admissibility of the defendant's statements to the police. RP 7-51, 59-158. During the CrR 3.5 hearing, the state called Vancouver Police Detective Cynthia Bull, who had been present during the execution of the search warrant and who helped interrogate the defendant at the police station after he was arrested during the execution of the search warrant. RP 117-128, 154-158. On direct examination, Detective Bull described the initial execution of the warrant as follows:

- A. – I can start back. It was a knock and announce and it was served by the SWAT team, so it was pretty much not an immediate entry, but there was a knock, announce and they opened the door. And I was standing outside when they did that, and they immediately did a sweep of the apartment and so I came in probably, I want to say a couple minutes afterwards because, I mean, he was – it was quick because it was served by the actual SWAT team.

RP 154.

On cross-examination, she admitted that at most, the officers only waited a couple of seconds before entering after knocking and announcing and certainly not enough time for the defendant to walk through the apartment. *Id.* Detective Bull's description of the knock and announce went as follows:

- A. It was knocked and announced and entry was made.

Q. Immediately?

A. . Not immediately. Knock, announce, wait and then the door was opened.

Q. How long?

A. I can't tell you, long enough to say the knock, sheriff's office, search warrant, and the door was opened. So –

Q. So fairly immediately?

A. Not immediately, but there was a knock, announce, wait and the door was opened.

Q. So it was a wait, like, one or two seconds?

A. It was – well, it was based on his past history, so it was not an immediate entry. But there was a knock and announce. He – from what he's describing, no, he wouldn't have had time to wander the apartment.

Q. Well –

A. My understanding is, he was in the bathroom.

RP 157.

Following this testimony, the court put argument on both the suppression motion and the CrR 3.5 hearing over to March 24, 2009. RP 159. Based upon Detective Bull's revelation that the police had entered the defendant's apartment without giving him time to answer the door, the defense filed an amended motion to suppress arguing that all of the evidence the officers obtained during the execution of the warrant should also be suppressed based upon their violation of the knock and announce rule. CP 87-102.

On March 24, 2009, the parties appeared before the court and presented argument on both the suppression motion as well as the CrR 3.5 issues. Following argument, the court denied the motion to suppress. RP 160-181. The court also held that all of the defendant's statements made during interrogation prior to a tape recording the police made were admissible. *Id.* However, the court ruled that the taped statement was suppressed because the police had failed to read the defendant his *Miranda* rights at the beginning of the recording. CP 120-122. The court later entered the following Findings of Fact and Conclusions of Law on the motion to suppress.

Findings of Fact

1. That the defendant's residence was search[ed] pursuant to a warrant served upon him on 25th of September 2008.
2. That this warrant was served at his residence at 5701 NE 102nd Avenue, Apartment M73.
3. That evidence was seized at that time and that photographs were taken at that time.
4. That the warrant was based upon evidence that on the 6th of August 2008, Portland Police Bureau (P.P.B.) Officer Blanck in relation to a complaint that L.L.M., a 13 year old juvenile male, transported L.L.M. across the Oregon/Washington border from Portland, Oregon to Vancouver, Washington.
5. That on the 6th of August 2008 that time L.L.M. indicated to Officer Blanck that a male, known to L.L.M. as "Dalton" and a[n] adult female had been involved in the transport to an apartment in Vancouver, WA.

6. Further, that L.L.M. indicated that male had provided alcohol to him while he was at the apartment in Vancouver.

7. Further that L.L.M. was able to give a detailed description of the layout of Dalton's apartment in Vancouver.

8. Further that at that time. P.P.B. Officer Blanck was also contacted by L.L.M.'s mother, who further indicated that she had not given anyone fitting the suspects description permission to transport her son anywhere.

9. That P.P.B. Officer Blanck acted in response to the description of the male suspect asked L.L.M. to guide him to the residence in Vancouver, WA. L.L.M. was able to guide P.P.B. Officer Blanck to 5701 NE 102nd Avenue Apartment M73, Vancouver, WA.

10. That at that above location L.L.M. pointed out a gold Nissan, which L.L.M. indicated had been used to transport L.L.M. to 5701 NE 102nd Avenue Apartment M73, Vancouver, WA.

11. That upon arriving at the 5701 NE 102nd Avenue Apartment M73, Vancouver, WA, P.P.B. Officer Blanck made contact with an adult male, who fit the description of the suspect given by the L.L.M.

12. That the court incorporates all of the facts that were developed by Det. Waddell regarding disclosures including Cindy Bull's investigation that were contained in the warrant.

Conclusions of Law

1. The warrant, excluding all of the observation by Officer Blanck, inside of the defendant's apartment would be sufficient to sustain probable cause to issue a search warrant.

2. The court is adopting the state's analysis as to the "Independent Source Doctrine."

3. The court is not ruling on the issue of whether the entry into the defendant's apartment was a[n] entry violative of the "Knock and Talk" pursuant to *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927

(1998).

4. All evidence that was seized pursuant to the warrant executed on the 25th of September 2008 is admissible in the State' case in chief.

CP 115-116.

The court also entered the following findings of fact and conclusions of law on the CrR 3.5 issues.

Findings of Fact

1. The defendant was arrested subject to execution of a search warrant on the 25th of September 2008.

2. The defendant was apprised of his rights pursuant to a written waiver.

3. The defendant engaged in an interview with P.P.B. Det. Waddell [and] CCSO Det. Bull.

4. The defendant gave statements to both P.P.B. Det. Waddell [and] CCSO Det. Bull.

5. At no time during his interview did the defendant request an attorney.

6. At no time during his interview did the defendant indicate that he did not understand his *Miranda* warnings.

7. At no time during his interview did the defendant appear to be under the influence of any medication or intoxicants.

8. The defendant testified that he was under the influence of a controlled substance.

Conclusions of Law

1. The defendant was in custody when he was arrested on [the] 25th of September, 2008.

2. Before any questioning on the 25th of September 2008, the defendant was fully and properly advised of his *Miranda* rights as required by law, and he appeared to clearly understand his rights.

3. The defendant made a voluntary, knowing and intelligent decision to make statements to officers from after the point at which he was read and claimed he understood his *Miranda* warnings.

4. The defendant's testimony is not credible.

5. All of the defendant's statements taken by P.P.B. Det. Waddell [and] CCSO Det. Bull are admissible in the State's case in chief, and are not barred by the CrR 3.5 and/or *Miranda v. Arizona*.

CP 117-119.

This case finally came to trial before a jury on October 12, 2009. CP 414. During *voir dire*, the defense moved to excuse six venire members for cause. RP 266, 268, 270, 278, 319, 331. The court granted the motion for first two of those venire members, but denied the motion on the remaining four. *Id.* However, the defense had sufficient peremptory challenges to exclude all of the remaining jurors challenged for cause. CP 243. As a result, no venire member challenged for cause ultimately sat on the jury. RP 270, 278, 319, 331; CP 243.

During preliminary motions prior to trial, the state moved to preclude the defense from introducing evidence it had concerning LM's repeated representations to others that he was 18-years-old, including his profile from his "my space" page, and his admissions during interview. RP 449-461. The state argued, and the court agreed, that only those representations the

defendant claimed LM made to him were relevant on the reasonableness of the defendant's belief in those representations. *Id.*

Following the remainder of the preliminary motions and opening by counsel, the state called the first of its 11 witnesses, including LM and Detective Bull. RP 414 to 655. The defense then called four witnesses, and the state called one in rebuttal. RP 663 to 738. These witnesses testified to the facts set out in the preceding Factual History. *See Factual History.* After the reception of evidence, the court instructed the jury without objection or exception from either party. RP 738-741. These instructions included the following statement on the affirmative defense to the rape of a child charge found in WPIC 19.04 and proposed by the defense in this case. CP 245.

INSTRUCTION NO. 11

It is not a defense to the charge of Rape of a Child in the Second Degree if at the time of the act the defendant did not know the age of [LM] or the defendant believed him to be older.

It is, however, [a] defense to the charge of Rape of a Child in the Second Degree that at the time of the acts the defendant reasonably believed [LM] was at least 14 years of age, based upon declaration said to the age by [LM].

The defendant has a burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means you must be persuaded, considering all the evidence of the case, that it is more probably true than not true. If you find the defendant has established this defense, it will be your duty to return a verdict of not guilty as to the charge of Rape of a Child in the Second Degree.

CP 262.

Following instruction and argument by counsel, the jury retired to deliberate on its verdicts. RP 741-785. During deliberations, the jury sent out two questions for the court. CP 103-104. The first read as follows:

Under instruction # 15 does it matter if person under 16yrs old identifies himself as older?

CP 274.

Instruction No. 15 defined the term “abduct” as used in the law defining kidnapping, which was the second count in this case. CP 274. The judge responded to this inquiry with a single word response: “No.” *Id.* The jury thereafter set out a second question regarding the rape of a child charge.

CP 275. This question read as follows:

If Dillon thought that [LM] was over 14 & [LM] stated (declared an older age), do we find him Not Guilty on that statement only? For this child rape in the 2nd Degree?

CP 275 (emphasis in original).¹

In spite of the fact that the jury was asking the court to clarify the law on the affirmative defense argued by the defendant, the court did not give any further definition on the law. CP 275. Rather, without benefit of input from either party, the court responded with the following statement:

¹In fact, the jury wrote the phrase “& [LM] stated (declared an older age)” at the end of the statement, and then inserted it following the initial phrase “over 14” by drawing an arrow from the inserted phrase to the point in the first sentence where the jury want it inserted.

You are the sole judges of the weight to be given to the testimony.

CP 275.

The jury later returned verdicts of guilty on both charges. CP 276, 278. The jury also returned special verdicts finding (1) that for the purposes of the rape of a child charge, the defendant was “a stranger to the victim,” (2) that the defendant committed the kidnapping with sexual motivation, and (3) that [LM] was under fifteen years of age at the time the defendant committed the kidnapping. CP 277, 279, 280. Based upon these special verdicts, the court sentenced the defendant under RCW 9.94A.712 to two indeterminate sentences of 25 years to life in prison. CP 322-334. The defendant thereafter filed timely notice of appeal. CP 337.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED IN VIOLATION OF THE DEFENDANT'S RIGHT TO PRIVACY UNDER RCW 10.31.040, WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT, WHEN THEY EXECUTED A SEARCH WARRANT IN VIOLATION OF THE KNOCK AND ANNOUNCE RULE.

Under RCW 10.31.040, Officers seeking to enter a house to execute an arrest warrant or search warrant must first knock and announce the presence and purpose. This provision states:

RCW 10.31.040. Officer may break and enter. To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance.

RCW 10.31.040.

Absent exigent circumstances, an officer's failure to comply with this statute during the execution of a search warrant requires suppression of the evidence seized. *State v. Hartnell*, 15 Wn.App. 410, 550 P.2d 63 (1976). In addition, the "knock and announce" rule as set out in RCW 10.31.040 is not merely a rule of statutory creation. Rather, it derives from the common law and constitutes a legislative statement of privacy rights also guaranteed under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. *State v. Coyle*, 95 Wn.2d 1, 621 P.2d 1256 (1980); *Ker*

v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). Thus, evidence seized in violation of the “knock and announce” rule must also be suppressed as the “fruit of the poisonous tree.” *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (“When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.”)

The “knock and announce” rule has three main purposes: (1) to reduce the potential for violence to both police and occupants arising from an unannounced entry; (2) to prevent destruction of property; and (3) to protect the occupants’ right to privacy. *Coyle*, 95 Wn.2d at 5. Our courts require “strict compliance with the rule” unless the state can meet its burden to “demonstrate that one of two exceptions to the rule applies: exigent circumstances or futility of compliance.” *State v. Richards*, 87 Wn.App. 285, 941 P.2d 710 (1997). “Exigent circumstances” include a reasonable belief based upon specific facts that evidence will be destroyed or that the officers’ safety will be endangered if the officers comply with the knock and announce rule. *State v. Young*, 76 Wn.2d 212, 455 P.2d 595 (1969). A generalized suspicion of officer safety, or the general easy destruction of narcotics does not meet this requirement. *Id.*

The knock and announce rule has two basic parts. The first part requires that the police knock and announce their identity. *State v.*

Garcia-Hernandez, 67 Wn.App. 492, 837 P.2d 624 (1992). The second part requires a reasonable waiting period, the duration of which is linked to the facts of each case, such as the size of the house, the time of the execution of the warrant, and presence and knowledge of the residents of the house. *State v. Coyle*, 95 Wn.2d 1, 621 P.2d 1256 (1980). A period of several seconds can constitute a reasonable waiting period in certain circumstances. *State v. Johnson*, 94 Wn.App. 882, 891, 974 P.2d 855 (1999) (finding a five-to-ten-second delay between knock and forced entry reasonable where police sought easily destroyed drug evidence and heard the suspects moving around inside); *State v. Schmidt*, 48 Wn.App. 639, 740 P.2d 351 (1987) (finding a three-second delay reasonable where police had identified the small shed as a methamphetamine lab by its distinctive odor, barking dogs may have alerted the occupants of the officers' presence, the occupants of the shed had become quiet, and the officers had reason to believe the occupants were armed and/or destroying evidence). By contrast, under circumstances in which the police have no reason to believe that evidence will be destroyed and they are dealing with a large house, the requisite reasonable waiting time can be much longer. *State v. Coyne, supra*.

In the case at bar, the evidence reveals that at most, five seconds elapsed from the officers entry, knocking and announcing, and their entry. In fact, it was probably a shorter period of time. As Detective Bull testified,

the amount of time was short enough that the defendant did not have the opportunity to walk to the front door and admit the officers. In addition, there was no argument that the defendant was going to attempt to get a weapon or destroy evidence. Under these facts, a wait of a few seconds at best fails to comply with the knock and announce rule.

It is true that the defense did not initially argue that the evidence should be suppressed based upon a violation of the knock and announce rule. However, when Detective Bull testified in the CrR 3.5 hearing concerning the execution of the warrant, counsel for the defense immediately recognized the issue and cross-examined Detective Bull on the facts necessary to argue this claim. The defense then followed up this testimony with an amended motion to suppress, specifically arguing the violation of the knock and announce rule. This motion was prepared and filed prior to the court's ruling on either the motion to suppress or the CrR 3.5 issues. The biggest problem with the court's ruling on the suppression motion was that it failed to even address the knock and announce argument. As the following explains, this failure by the court constituted an abuse of discretion.

Trial courts have broad discretion in ruling on evidentiary matters, and reviewing courts will only reverse such rulings for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable

or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001). In addition, an abuse of discretion also occurs when the trial court fails to exercise its discretion by ruling on a motion or argument properly brought before it. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005). In the case at bar, the trial court committed such an abuse of discretion by failing to rule on the defendant's written amended motion to suppress based upon the claim that the police had violated the knock and announce rule. Given this abuse of discretion, the issue then arises whether this abuse constituted reversible error. The following addressed this argument.

If the court has abused its discretion, the reviewing court will reverse unless the error was "harmless." *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004). A manifest error of constitutional magnitude is only harmless if the state can prove beyond a reasonable doubt that the jury would have reached the same result without the error. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985). Other errors are harmless unless the defense can prove a reasonable likelihood that but for the error, the jury would have returned a verdict of acquittal. *State v. Acosta*, 123 Wn.App. 424, 438, 98 P.3d 503 (2004).

In the case at bar, there is a substantial likelihood that the jury would have returned a verdict of acquittal had the trial court granted the defendant's

motion to suppress, because the most damning piece of evidence the state obtained as a direct result of their violation of the knock and announce rule was the defendant's confession. Absent this evidence, then under either standard of review, the defendant would be entitled to a new trial. The following sets out this argument.

In *Payton v. New York*, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), the United States Supreme Court ruled that the Fourth Amendment prohibits the police from entering a person's home in order to make a routine, warrantless arrest. In this case, the court stated: "[T]he Fourth amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's house in order to make a routine felony arrest." In explaining this interpretation, the court notes that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. at 590.

The Washington State Supreme Court subsequently refined this principle under Washington Constitution, Article 1, § 7, and held that the police may not call a person to the door and then make an arrest without a warrant. In this case, *State v. Holeman*, 103 Wn.2d 426, 693 P.2d 89 (1985), the police went to Defendant's father's house in order to question him about a theft. The defendant's father answered, and then called the defendant to the

door at the officer's request. Once the defendant came to the doorway, one of the police officers read him his Miranda rights, after which the officer reached in the door, and took the defendant by the arm. At this point, the defendant's father grabbed a crow bar and raised it above his head, whereupon the officers arrested the father for obstructing. When the defendant tried to prevent his father's arrest, the police arrested him also. Once at the police station, the defendant confessed to a theft.

The defendant later moved to suppress his confession as the fruit of an illegal arrest, and the trial court denied the motion. Following conviction, the defendant sought review, and the Court of Appeals affirmed. The Washington Supreme Court then accepted the case. The court stated the following concerning the point at which the defendant was "under arrest."

[The defendant] was arrested twice. The first arrest took place while [the defendant] was standing in the doorway of his house. The State does not contest that [the defendant] was under arrest at this point in time despite the fact that the office never told [him] that he was under arrest. A person is under arrest for constitutional purposes when, by a show of authority, his freedom of movement is restrained. *United State v. Mendenhall*, 446 U.S. 544, 64 L.Ed.2d 497, 100 S. Ct. 3051 (1980). Here, when the police began reading [the defendant] his Miranda rights, he was not free to leave and, as such, was under arrest for Fourth Amendment purposes.

State v. Holeman, 103 Wn.2d at 428.

The court then went on to hold that the first arrest was illegal. In so holding, the court first cited to Supreme Court's decision in *Payton*, then

went on to state as follows:

It is no argument to say that the police never crossed the threshold of [the defendant's] house. It is not the location of the arresting officer that is important in determining whether an arrest occurred in the home for Fourth Amendment purposes. Instead, the important consideration is the location of the arrestee. A person does not forfeit his Fourth Amendment privacy interest by opening his door to police officers. A person's home can be invaded to the same extent when the police remain outside the house and call a person to the door as when the police physically enter the house hold itself. Our state constitution guarantees that

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Const. Art. 1, § 7. Here the police did not have the proper authority of law, *i.e.*, a warrant. Consequently, this first arrest of [the defendant] was unlawful.

State v. Holeman, 103 Wn.2d at 429. (Citations omitted; emphasis added).

Although the court held that the first arrest was unlawful, it held that the second arrest for assault a police officer was lawful. Based upon the legality of this second arrest, the court held that the trial court did not err when it denied the defendant's motion to suppress his confession. *Cf. State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982) (citing *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963)) (confession that flows as the direct result of the defendant's illegal arrest is fruit of the poisonous tree and should be suppressed).

In the case at bar, the police officers had probable cause to arrest the defendant, although they did not have an arrest warrant. Thus, they were free

to arrest him in any public location in which they found him. However, under *Peyton v. New York*, the police could not arrest the defendant in his home based solely upon probable, unless they had some legal basis to be within his home. In this case, the only legal basis for entry into the defendant's home was the existence of the search warrant. However, since the officers violated the knock and announce rule, their presence in the defendant's home was illegal. As a result, their arrest of the defendant was illegal, and the confession the police obtained as the result of their illegal arrest of the defendant should have been suppressed.

With the suppression of the defendant's confession, the state would have been left with evidence that the defendant and LM had telephone communication with each other, along with evidence that LM had at one point been in the defendant's home. However, the jury's decision on conviction or acquittal would have necessarily turned on the credibility of the LM, particularly since there was no physical evidence to support LM's claims of sexual contact. The problem with LM's credibility was that he lied to every person who talked to him about the situation, including his mother, the police, the psychologist at CARES, and probably the defense attorney during the defense interview. In addition, LM repeatedly lied about his age to the defendant, to the chat service he used, and on his multiple "my space" pages. In addition, there was compelling evidence presented at trial indicating that

LM also lied during his trial testimony. Specifically, LM repeatedly testified that he only had three telephone conversations with the defendant and that LM had only called the defendant once. However, as LM's cell phone records revealed, he had actually called the defendant fifteen times on the day in question. Given the lack of credibility in LM's statements, it is more likely than not that the jury would have acquitted the defendant but for the admission of the defendant's confession. As a result, this court should reverse the defendant's conviction, remand for a new trial, and given instructions to the trial court to grant the motion to suppress.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT FAILED TO CORRECTLY ANSWER THE JURY'S QUESTION CONCERNING THE LAW ON THE DEFENSE TO THE CHILD RAPE CHARGE.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). Under this rule, the court must correctly instruct the jury on all of the elements of the offense charged. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988) (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)). The failure to so instruct the jury constitutes constitutional error that may be raised for the

first time on appeal. *Id.*

For example, in *State v. Salas*, 74 Wn.App. 400, 873 P.2d 578 (1994), the defendant was charged with vehicular homicide under an information alleging all three possible alternatives for committing that offense. At the end of the trial, the court, without objection from the defense, instructed the jury that to convict, the state had to prove that (1) the defendant drove while intoxicated, and (2) that the defendant's driving caused the death of another person. The court's instruction did not include the judicially created element that intoxication be a proximate cause of accident that caused the death.

Following deliberation, the jury returned a verdict of guilty, and the defendant appealed, arguing that the court's instructions to the jury violated his right to due process because it did not require that the state prove all the elements of the offense charged. The state replied that the defendant's failure to object to the erroneous instruction precluded the argument on appeal. However, the Court of Appeals rejected the state's argument, holding that (1) the court had failed to instruct on the judicially created causation element, and (2) the defense could raise the objection for the first time on appeal because it was an error of constitutional magnitude. Thus, the court reversed the conviction and remanded for a new trial.

In the case at bar, the state charged the defendant in Count I with child molestation in the second degree under RCW 9A.44.076. At pretrial, the

defense gave notice that he was asserting the affirmative defense set out in 9A.44.030 that he reasonably believed that LM was at least 14-years-old. Following the presentation of evidence, the court instructed the jury on this defense, giving an instruction patterned after WPIC 19.04. This instruction stated as follows:

INSTRUCTION NO. 11

It is not a defense to the charge of Rape of a Child in the Second Degree if at the time of the act the defendant did not know the age of [LM] or the defendant believed him to be older.

It is, however, [a] defense to the charge of Rape of a Child in the Second Degree that at the time of the acts the defendant reasonably believed [LM] was at least 14 years of age, based upon declaration said to the age by [LM].

The defendant has a burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means you must be persuaded, considering all the evidence of the case, that it is more probably true than not true. If you find the defendant has established this defense, it will be your duty to return a verdict of not guilty as to the charge of Rape of a Child in the Second Degree.

CP 262.

This jury instruction is problematic for a number of reasons. The first is that it is internally inconsistent. In the first paragraph it states that the defendant's belief that the child was older is not a defense. Then, in the second paragraph, it states that the defendant's reasonable belief that the child was older is a defense. The second problem with the instruction is that it appears to tell the jury that the only evidence of reasonableness that the jury

can consider in judging the reasonableness of the defendant belief's in the age of the child is the actual evidence of the child's specific misrepresentation. Thus, even though the jury might be convinced that the child did affirmative misrepresent his or her age to the defendant, the jury could not look to the surrounding facts to determine reasonableness.

The third problem with the instruction is that it leaves the jury with the impression that the defense only applies if the defense presents evidence, through the witnesses it calls, that the child affirmatively misrepresented his or her age and that the defendant reasonably believe it. This misstatement comes from the use of the sentence: "The defendant has a burden of proving this defense by a preponderance of the evidence." As attorneys and judges, we know the legal import of this sentence, which is that the defendant has claimed an affirmative defense, and that the jury should only acquit the defendant based upon this affirmative defense if the jury, after weighing all of the evidence presented at trial, regardless of the source of that evidence, finds that the elements of the affirmative defense are proved by a preponderance of the evidence. The problem is that the sentence, when read by a layperson, appears to say that the jury should only consider the evidence the defense presented.

Although the language of WPIC 19.04 as used to craft Instruction No. 11 in this case is problematic, the defendant does not assign error to the

court's use of this instruction. The defendant's trial attorney proposed it and the invited error doctrine precludes the argument. However, the obvious problems with this instruction, and its propensity to confuse the jury, are evidence that illustrate the error in the instruction to which the defense does assign error. This error is the court's answer to the jury's second inquiry, which became an additional written instruction to the jury. The jury's second question read as follows:

If Dillon thought that [LM] was over 14 & [LM] stated (declared an older age), do we find him Not Guilty on that statement only? For this child rape in the 2nd Degree?

CP 275 (emphasis in original).

This question is a clear statement by the jury that it did not understand Instruction No. 11 and that it did not know how to measure the affirmative defense. In spite of the fact that the jury was asking the court to clarify the law on the affirmative defense argued by the defendant, the court did not give any further clarification on the law. CP 275. Rather, without benefit of input from either party, the court responded with the following statement:

You are the sole judges of the weight to be given to the testimony.

CP 275.

While this is certainly a correct general statement of the law for the jury to use when deciding the weight to be given to conflicting testimony, it

is an incorrect answer to the jury's question. The correct answer to the jury's question was to either refer the jury by to the instructions as a whole, or to simply answer the question with a response such as the following: "Yes, if you find by a preponderance of the evidence that LM misrepresented his age as 14 or older to the defendant, and that the defendant reasonably believed that misrepresentation, then you must find the defendant not guilty." In other words, once it was clear that the jury was confused as to what the affirmative defense was, the court had the duty to either not answer the question, or to answer it with a correct statement of the law.

In the case at bar, the court did neither. Rather, the court told the jury that they were the sole judges on the "weight" to be given to the testimony. In the context of the affirmative defense, this instruction was erroneous because it invited the jury to disregard the preponderance standard and simply apply their whatever standard, or not standard, that the jury desired. From that point, it robbed the defendant of his opportunity to have the jury correctly apply the affirmative defense. Given the weight of the evidence concerning LM's misrepresentations of his age, and given LM's general lack of credibility, it is likely that but for this erroneous response, the jury would have found the defense proven by a preponderance, thereby resulting in a verdict of acquittal on the first count. Thus, the defendant is entitled to a new trial on this count.

III. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO ALLOW HIM TO PRESENT RELEVANT, EXCULPATORY EVIDENCE ON THE REASONABLENESS OF HIS BELIEF THAT THE DEFENDANT WAS OF AGE.

The due process right to a fair trial also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). For example, in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity

defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments to present relevant evidence supporting his defense.

Under ER 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 402, "all relevant evidence is admissible" with certain limitations. By contrast, under this same rule "[e]vidence which is not relevant is not admissible." Thus, before testimony or exhibit can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951).

In the case at bar, the state charged the defendant in Count I with second degree child molestation, and the defendant then endorsed the affirmative defense that the child had misrepresented his age to the defendant,

and that under all of the facts and circumstances, the defendant had reasonably believed that misrepresentation. The statute setting out the defense is found in RCW 9A.44.030(2)&(3)(b), which states as follows:

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.

(3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:

(b) For a defendant charged with rape of a child in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant;

RCW 9A.44.030(2)&(3)(b).

In order for the defendant to be acquitted based upon this defense, the evidence presented at trial must prove by a preponderance that (1) the child represented his or her age to the defendant as 14-years-old, and (2) that the defendant reasonably believed that representation. In the case at bar, the defense had evidence to present to the jury that LM had repeatedly misrepresented his age to numerous people, including the defendant. However, upon motion of the state, the court ruled that the defense could only

present the evidence that showed the misrepresentations of which the defendant was aware, as only those misrepresentations went to the reasonableness of the defendant's belief. In so ruling, the court conflated the two prongs of the defense into one, and ignored the first requirement that the defendant show that LM had, in fact, made such representations to him.

In this case, the evidence presented through the officers who interrogated the defendant revealed that the defendant had repeatedly claimed that LM had specifically told him that he was 18-years-old. However, during his testimony, LM denied ever making such a statement to the defendant, except in so far as he misrepresented his age to everyone who used the chat service. The evidence the defense was prevented from presenting to the jury would have supported the defendant's claim that LM had directly misrepresented his age to the defendant and that LM had lied to the jury when he denied this fact. As such, the evidence the defense was prevented from presenting was both "relevant" and admissible, as it would have made a fact at issue at trial (that LM misrepresented his age to the defendant) much more likely. Thus, the trial court erred when it granted the state's motion in limine and refused to allow the defense to present this evidence.

In addition, in the case at bar, the trial court's erroneous ruling caused prejudice to the defense because it prevented the defense from effectively arguing its case. With this evidence, it is more likely than not that the jury

would have found the affirmative defense proven, and thereby acquitted the defendant on the charge of rape of a child. As a result, the defense is entitled to a new trial on this charge.

IV. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGEMENT AGAINST FOR KIDNAPPING BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant’s right under Washington Constitution, Article 1, § 9 and United States Constitution, Sixth Amendment to be free from double jeopardy. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205

(1982); *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant in count two with first degree kidnapping under RCW 9A.40.020(1)(b), which states as follows:

(1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent: . . . (b) To facilitate commission of any felony or flight thereafter;

RCW 9A.40.020(1)(b).

In RCW 9A.40, the legislature has provided a specific definition for the term “abducts” as it is used in RCW 9A.40.020. This definition is as follows:

(2) “Abduct” means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force;

RCW 9A.40.010(2).

In addition, the legislature has also provided a specific definition for the term “restrain” as it is used in the definition for the term “abduct” from RCW 9A.40.010(2). This definition is as follows:

(1) “Restrain” means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is “without consent” if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

RCW 9A.40.010(1).

The definition the legislature has provided for the word “restrain” includes two separate parts: the first is to “restrict a person’s movements” and the second is to take that action “without consent.” As a review of the definition for the word “restrain” reveals, the legislature has even provided a definition for the phrase “without consent,” particularly as it relates an

allegation that a person has kidnaped a child less than sixteen years old.

In the case at bar, the state did not allege, and there was no evidence whatsoever, that the defendant in any way threatened to use or threatened to use deadly force against the defendant. Indeed, LM admitted in his testimony that the defendant did not coerce or force him to do anything; LM acted voluntarily in everything that happened. Thus, under the preceding definition for the term “abduct” RCW 9A.40.010(2), only the first section applies in the case at bar. By combining all of these definitions, the crime of first degree kidnapping of a person under 16-years-old has the following four elements:

- (1) The defendant intentionally “abducts” the child, meaning the defendant intentionally restricts the child’s movements; and
- (2) The defendant takes that action “without consent” of the child, including merely obtaining the child’s acquiescence; and
- (3) The defendant secrets or holds the child in a place where he is not likely to be found; and
- (4) The defendant took these actions with the intent to facilitate the commission of a felony.

In the case at bar, the evidence presented at trial, even seen in the light most favorable to the state, fails to prove either that the defendant “restricted LM’s movements,” or that he “secreted or held” LM “in a place where he was not likely to be found.” Rather, the evidence shows that LM called the defendant and asked him to drive him to the defendant’s apartment in Vancouver, that LM then consented to everything that happened at LM’s

apartment, and that LM then returned to his home by asking and obtaining a ride from the defendant. Thus, far from “restricting” LM’s movements, the defendant acted to facilitate the movements that LM desired and sought. Similarly, the defendant did not “secret” LM in any matter at all. Rather, LM voluntarily got into his vehicle, voluntarily entered his apartment, voluntarily participated in all actions that occurred in apartment, and then left as he desired.

The legislature’s use of the terms “restricted,” “held” and “secreted” must be given meaning within the statute. Since the evidence presented in this case fails to show that the defendant in any way “restricted,” “held” and “secreted” LM, the conviction for kidnapping cannot be sustained. As a result, the trial court acceptance of the jury’s verdict on the charge of kidnapping as charged in the second count violated the defendant’s right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and should not be sustained.

V. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ACCEPTED THE JURY’S SPECIAL VERDICT THAT THE DEFENDANT WAS A PREDATOR BECAUSE THIS SPECIAL VERDICT IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The due process requirement that the state prove every element of an offense charged beyond a reasonable doubt also requires the state to prove all

charged sentencing enhancements beyond a reasonable doubt. *State v. Gunther*, 45 Wn.App. 755, 727 P.2d 261 (1986). Originally, this requirement inured from the fact that the court's considered some enhancements so significant that they were treated as if they were an element of the offense that had to be pled and proved beyond a reasonable doubt. *In re Hunter*, 106 Wash.2d 493, 723 P.2d 431 (1986). Later, under the decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the United States Supreme court held that (1) "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," and (2) "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

In the case at bar, the state, as part of the child rape charge, alleged an enhancement under RCW 9.94A.836(1)-(2). This provision states:

(1) In a prosecution for rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, the prosecuting attorney shall file a special allegation that the offense was predatory whenever sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact finder that the offense was

predatory, unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.

(2) Once a special allegation has been made under this section, the state has the burden to prove beyond a reasonable doubt that the offense was predatory. If a jury is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether the offense was predatory. If no jury is had, the court shall make a finding of fact as to whether the offense was predatory.

RCW 9.94A.836(1)-(2).

The term “predatory” is defined in RCW 9.94A.030(39), which states as follows:

(39) “Predatory” means: (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, “school” does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; or (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority.

RCW 9.94A.030(39).

Although RCW 9.94A.030(39) provides many alternative definitions for the term “predatory,” in the case at bar, the state only alleged the definition under subsection 39(a), that the defendant was a “stranger to the

victim.” The term “stranger” is itself defined in RCW 9.94A.030(50) to mean “that the victim did not know the offender twenty-four hours before the offense.” The phrase “know the offender” is not itself defined.

In the case at bar, the problem with this enhancement is that the evidence the state present fails to prove beyond a reasonable doubt that LM and the defendant did not know each other for more than 24 hours. In fact, the evidence reveals that LM had been using the chat service for a number of weeks, reviewing members recorded profiles to get to know them, and then directly contacting them for telephone conversations. It is true that LM testified that on the day in question, he had called the defendant once and the defendant had called him three times. However, LM did not testify that these were either the first contacts and the only contacts.

In fact, one of the police officers testified that he had obtained LM’s cell phone records, which revealed one call from the defendant to LM, and 15 calls from LM to the defendant. The logical conclusion was that LM’s testimony about a day with one call from him to the defendant and three from the defendant’s to him was either (1) a lie, or (2) simply a description of telephone conversations on another day. Once again, this evidence fails to prove beyond a reasonable doubt that LM and the defendant had not known each other for over 24 hours when the defendant drove to Portland at LM’s request to pick him up. Indeed, the whole purpose of the telephone chat

service was to get to “know” people by reviewing their recorded profiles and then engaging in telephone conversations with them.

Absent a specific definition that “know” meant to actually physically meet, the telephone calls between LM and the defendant qualify as a method of getting to “know” each other. Since the state failed to prove beyond a reasonable doubt that this process only occurred within 24 hours of LM and the defendant physically meeting each other, this evidence fails to prove the alleged enhancement beyond a reasonable doubt. As a result, the trial court erred when it accepted the jury’s special verdict on this enhancement, and the trial court erred when it sentenced the defendant on count one to a minimum mandatory term of 25 years under RCW 9.94A.712 based upon this enhancement. As a result, this court should vacate this special verdict, and remand the case back to the trial court in order to strike the 25 year minimum mandatory sentence on the child rape charge and then impose a minimum mandatory sentence within the standard range.

VI. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT, WHEN IT ADDED A SENTENCING ENHANCEMENTS THAT WAS ALSO AN ELEMENT OF THE UNDERLYING CRIME CHARGED.

The double jeopardy prohibitions found in both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth

Amendment, protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989); *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

In order for two prosecutions or punishments to violate double jeopardy, they must both have arisen out of the same offense. *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed.2d 306, 52 S.Ct. 180 (1932). In *Blockburger*, the United States Supreme Court adopted a "same elements" test to determine whether the two punishments or prosecutions arose out of the same offense. In this case, the court stated as follows:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied is whether each provision requires proof of an additional fact which the other does not A single act may be an offense against two statutes; and *if each statute requires proof of an additional fact which the other does not*, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Blockburger, 76 L.Ed. at 309 (emphasis added; citations omitted).

By definition, a lesser included offense does not constitute one for which "additional facts" are required. On this issue, the Washington

Supreme Court has stated as follows.

A person is not put in second jeopardy by successive trials unless they involve not only the same act, but also the same offense. There must be substantial identity of the offenses charged in the prior and in the subsequent prosecutions both in fact and in law. . . .

The rule is, however, subject to the qualification that the offenses involved in the former and in the latter trials need not be identical as entities and by legal name. It is sufficient to constitute second jeopardy if one is necessarily included within the other, and in the prosecution for the greater offense, the defendant could have been convicted of the lesser offense.

State v. Roybal, 82 Wn.2d 577, 582, 512 P.2d 718 (1973) (quoting *State v. Barton*, 5 Wn.2d 234, 237-38, 105 P.2d 63 (1940)); *See also State v. Laviollette*, 118 Wash.2d 670, 675, 826 P.2d 684 (1992) (“If the elements of each offense are identical, or if one is a lesser included offense of the other, then a subsequent prosecution is barred.”) (citing *Brown v. Ohio*, 432 U.S. 161, 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977)).

In the case at bar, the state charged the defendant with kidnapping, alleging that although LM consented to everything that happened to him, the defendant was still guilty of the crime because LM was under 16-years-old, and under RCW 9A.40.010(1), he acted “without consent” when he transported LM without his mother’s consent. While the kidnapping statute, thought the definitions, has many other alternatives for committing the offense, in the case at bar, the only alternative alleged and argued by the state was that the defendant’s conduct constituted a kidnapping because, and only

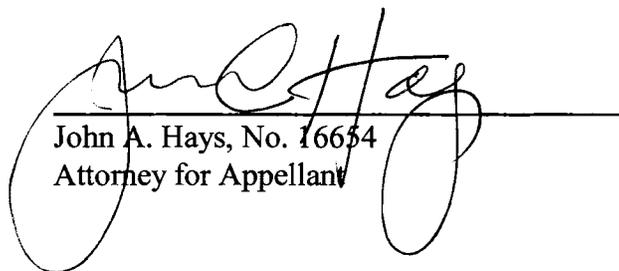
because, LM was under 16-years-old. Thus, under the facts of the case at bar, the state had to prove this element of age beyond a reasonable doubt in order to obtain a conviction. The problem with this element is that it also constituted the fact the jury found in the special verdict under RCW 9.94A.837 that the court used to enhance the defendant's sentence under RCW 9.94A.712(3)(c)(ii) and impose a 25 year minimum on the kidnapping charge. By using an element of the offense to enhance the sentence under the facts of this case, the trial court violated the defendant's right to be free from double jeopardy under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment.

CONCLUSION

The defendant's conviction for kidnapping should be reversed and dismissed because substantial evidence does not support this charge. In the alternative, the defendant's convictions should be reversed and the case remanded for a new trial based upon (1) the trial court's erroneous refusal to suppress evidence the police obtained in violation of the knock and announce rule, (2) the trial court's erroneous, prejudicial response to a jury question, (3) the trial court's refusal to allow the defense to present relevant exculpatory evidence. In the second alternative, the sentencing enhancements should be vacated because they are unsupported by substantial evidence.

DATED this 5th day of August, 2010.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9.94A.030(39)&(50)

(39) "Predatory" means: (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, "school" does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; or (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority.

(50) "Stranger" means that the victim did not know the offender twenty-four hours before the offense.

RCW 9A.40.010

The following definitions apply in this chapter:

(1) "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

(2) "Abduct" means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force;

(3) "Relative" means an ancestor, descendant, or sibling, including a relative of the same degree through marriage or adoption, or a spouse.

RCW 9A.40.020

(1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:

- (a) To hold him for ransom or reward, or as a shield or hostage; or
 - (b) To facilitate commission of any felony or flight thereafter; or
 - (c) To inflict bodily injury on him; or
 - (d) To inflict extreme mental distress on him or a third person; or
 - (e) To interfere with the performance of any governmental function.
- (2) Kidnapping in the first degree is a class A felony.

RCW 9A.44.030

Defenses to prosecution under this chapter

(1) In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.

(3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:

(a) For a defendant charged with rape of a child in the first degree, that the victim was at least twelve, or was less than twenty-four months younger than the defendant;

(b) For a defendant charged with rape of a child in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant;

(c) For a defendant charged with rape of a child in the third degree, that the victim was at least sixteen, or was less than forty-eight months younger than the defendant;

(d) For a defendant charged with sexual misconduct with a minor in the first degree, that the victim was at least eighteen, or was less than sixty months younger than the defendant;

(e) For a defendant charged with child molestation in the first degree, that the victim was at least twelve, or was less than thirty-six months younger than the defendant;

(f) For a defendant charged with child molestation in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant;

(g) For a defendant charged with child molestation in the third degree, that the victim was at least sixteen, or was less than thirty-six months younger than the defendant;

(h) For a defendant charged with sexual misconduct with a minor in the second degree, that the victim was at least eighteen, or was less than sixty months younger than the defendant.

RCW 10.31.030

The officer making an arrest must inform the defendant that he acts under authority of a warrant, and must also show the warrant: PROVIDED, That if the officer does not have the warrant in his possession at the time of arrest he shall declare that the warrant does presently exist and will be shown to the defendant as soon as possible on arrival at the place of intended confinement: PROVIDED, FURTHER, That any officer making an arrest under this section shall, if the person arrested wishes to deposit bail, take such person directly and without delay before a judge or before an officer authorized to take the recognizance and justify and approve the bail, including the deposit of a sum of money equal to bail. Bail shall be the amount fixed by the warrant. Such judge or authorized officer shall hold bail for the legal authority within this state which issued such warrant if other than such arresting authority.

INSTRUCTION NO. 11

It is not a defense to the charge of Rape of a Child in the Second Degree if at the time of the act the defendant did not know the age of [LM] or the defendant believed him to be older.

It is, however, [a] defense to the charge of Rape of a Child in the Second Degree that at the time of the acts the defendant reasonably believed [LM] was at least 14 years of age, based upon declaration said to the age by [LM].

The defendant has a burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means you must be persuaded, considering all the evidence of the case, that it is more probably true than not true. If you find the defendant has established this defense, it will be your duty to return a verdict of not guilty as to the charge of Rape of a Child in the Second Degree.

