

NO. 41420-1-II

h

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JUSTIN ADAM LIBERO,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

pm 4-5-11

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	5
D. ARGUMENTS	
I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT UNSUPPORTED BY SUBSTANTIAL EVIDENCE	9
II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED IN VIOLATION OF WASHINGTON CONSTITUTION, ARTICLE 1, § 7	10
<i>(1) The Police Violated Paul Soeby’s Right to Privacy When They Searched His Home Based Solely upon His Girlfriend’s Consent</i>	12
<i>(2) The Defendant Had Automatic Standing to Assert the Violation of Paul Soeby’s Right to Privacy Because the State Charged the Defendant with a Crime which had Possession of the Item Illegally Seized as One of its Essential Elements</i>	20
III. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNDER UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO GIVE THE DEFENDANT’S PROPOSED LESSER INCLUDED INSTRUCTIONS ON MISDEMEANOR MARIJUANA POSSESSION	23

E. CONCLUSION 26

F. APPENDIX

1. Washington Constitution, Article 1, § 3 27

2. Washington Constitution, Article 1, § 7 27

3. United States Constitution, Fourth Amendment 27

4. United States Constitution, Fourteenth Amendment 27

TABLE OF AUTHORITIES

Page

Federal Cases

Rakas v. Illinois,
439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978) 20

State Cases

State v. Agee, 89 Wn.2d 416, 573 P.2d 355 (1977) 9

State v. Carter, 127 Wn.2d 836, 904 P.2d 290 (1995) 20

State v. Coss, 87 Wn.App. 891, 943 P.2d 1126 (1997) 22

State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007) 22

State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998) 12-14

State v. Ford, 110 Wn.2d 827, 755 P.2d 806 (1988) 9

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994) 9

State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002) 22

State v. LeBlanc, 34 Wn.App. 306, 660 P.2d 1142 (1983) 23

State v. MacMaster, 113 Wn.2d 226, 778 P.2d 1037 (1989) 23

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) 23

State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005) 15, 18, 19

State v. Nelson, 89 Wn.App. 179, 948 P.2d 1314 (1997) 9

State v. Parker, 102 Wn.2d 161, 683 P.2d 189 (1984) 24, 25

State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980) 11

State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978) 24

State v. Young, 135 Wn.2d 498, 957 P.2d 681 (1998) 11

Constitutional Provisions

Washington Constitution, Article 1, § 3 23

Washington Constitution, Article 1, § 7 10, 11, 13, 16, 17, 20-22

United States Constitution, Fourth Amendment 10, 17

United States Constitution, Fourteenth Amendment 23

Other Authorities

R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988) 11

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it entered findings of fact unsupported by substantial evidence.
2. The trial court erred when it denied the defendant's motion to suppress evidence the police obtained in violation of Washington Constitution, Article 1, § 7.
3. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, when it refused to give the defendant's proposed lesser included instructions on misdemeanor harassment.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it enters findings of fact unsupported by substantial evidence?

2. Do the police violate a person's right to privacy under Washington Constitution, Article 1, § 7, when they search that person's home in his or her presence based solely upon the consent of a co-tenant, and does a third party charged with a possessory crime have automatic standing to assert that violation?

3. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, if it refuses to give a defendant's proposed instructions on a lesser included offense that is both legally and factually available?

STATEMENT OF THE CASE

Factual History

Sometime around midnight on May 14, 2010, Chehalis Police Officers Christopher Taylor and Warren Ayers responded to Apartment 4 at 227 State Avenue in Chehalis upon a report of the odor of marijuana coming from inside that apartment. RP 27-35, 39-43.¹ As both officers approached the building, they detected the distinct odor of cut marijuana. *Id.* This odor continued into the hallway, right up to the front door of Apartment 4, where it was very strong. *Id.* Once at the doorway, one of the officers knocked. *Id.* In fact, Jessica Guerrero and her boyfriend Thomas Soeby lived in that apartment and had moved in the previous month. RP 9/15/10 23-26, 28-30. The apartment was their only residence, and both of them had all of their clothes and possessions in the apartment. *Id.* The defendant, Justin Adam Libero, who was Mr. Soeby's friend, had stayed the previous night in the apartment with the consent of Ms Guerrero and Mr. Soeby. RP 89-92. All three were present when the two officers knocked. RP 9/15/10 4-9.

Once the officers knocked, Jessica Guerrero opened the door. RP

¹The record in this case includes two volumes of verbatim reports: (1) the transcript of the suppression motion held on September 15, 2010, and (2) the transcript of the trial held on October 26, 2010 to October 27, 2010. The former is referred to as "RP 9/15/10 [Page #]." The latter is referred to as "RP [page #]." The second verbatim report also contains the transcript of the sentencing held on November 3, 2010.

9/15/10 5-7. Once Ms Guerrero opened the door the officers told them why there were present. *Id.* In response to their questions, Ms Guerrero explained that she and Mr. Soeby lived in the apartment although only her name appeared on the lease. RP 9/15/10 13. While standing in the doorway, the officers could see both Mr. Soeby and the defendant standing in the small front room. RP 9/15/10 5-7. They could also see a cut and dried marijuana. RP 9/15/10 19-20. Upon seeing this, the officers ordered both Mr. Soeby and the defendant to exit the apartment into the hallway. RP 9/15/10 15. They immediately complied. *Id.* After they came out, one of the officers asked Ms Guerrero for permission to search. RP 9/15/10 9-12. When she stated that she would give permission, one of the officers retrieved a consent form from his patrol vehicle, and had Ms Guerrero sign it. *Id.* The officers then entered the apartment and seized a marijuana plant and a number of baggies with recently cut marijuana in them. RP 9/15/10 12-13. The total weight of marijuana recovered well exceeded 40 grams. RP 66-75. At no point during the officers contact with Mr. Soeby did they ask for his permission to search, even though he was present and a co-tenant of the apartment. RP 9/25/10 14-15.

Once the defendant was ordered out, the officers asked him about the marijuana in the apartment. RP 9/15/10 12-13. The defendant, who had small pieces of marijuana leaves on his shirt, told officers that he had found

the dried plant near some railroad tracks, brought it to Mr Soeby's apartment, and that he was in the process of cutting it up and putting marijuana in baggies when the police knocked on the door. *Id.* He further stated that both he and Mr. Soeby had intended to smoke some of the marijuana. *Id.*

Procedural History

By information filed March 1, 2010, the Lewis County Prosecutor charged the defendant Justin Adam Libero with one count of possession of over 40 grams of marijuana. CP 1-3. Following arraignment on this charge, the defendant brought a motion to suppress, arguing that the police had violated Mr. Soeby's rights to privacy under Washington Constitution, Article 1, § 7, when they searched the apartment without getting his consent, and that he had automatic standing to assert the violation of Mr. Soeby's constitutional rights. CP 8, 20-25. The motion later came on for hearing, during which the court heard the testimony of Officers Taylor and Ayers, along with the testimony of Ms Guerrero and Mr. Soeby. RP 9/15/10 4, 18, 12, 27. They testified to the facts set out in the preceding factual history. *See* Factual History. Following this testimony and argument by counsel, the court denied the motion. RP 36-39. The court later entered the following findings of fact and conclusions of law in support of the decision on the Motion to Suppress:

1. FINDINGS OF FACT

1.1 On 05-14-2010, at just after 0004 hours, Chehalis PD was dispatched to a complaint at 277 NW State Avenue, No. 4, Chehalis, WA. Dispatch told the officers that an anonymous complaint was made advising dispatch that there was the odor of marijuana coming from apartment No. 4.

1.2 Officers Taylor and Ayers (Chehalis PD) arrived at apt. No. 4. As they approached the door, they could smell the odor of fresh marijuana as they entered the apartment complex. There was a strong odor of fresh marijuana coming from the seams of the door to Apt. 4. Taylor and Ayers knew the look and smell of marijuana from their training and experience as police officers.

1.3 Ayers knocked on the door. A female, Jessica Guerrero, answered the door. The officers smelled the odor of fresh marijuana coming from inside the apartment. Two other individuals, Justin Libero and Thomas Soeby came from the back of the apartment.

1.4 Ayers told the three persons at the apartment why they were there. Guerrero said the apartment was hers. Guerrero said she did not smoke marijuana because she was six months pregnant.

1.5 Guerrero agreed to allow a search of her apartment. She signed a *Ferrier* consent form.

1.6 Neither Libero nor Soeby objected to the search.

1.7 The *Ferrier* consent was proper in all respects and that was not challenged by the defense.

1.8 The officers searched the apartment. They found a large marijuana plant on the bedroom floor along with more marijuana, two glass smoking devices and "pill" bottle contained marijuana buds and a small glass smoking device in the living area of the apartment.

1.9 Guerrero said the marijuana belonged to Soeby and

Libero. Guerrero said Libero and Soeby came to her apartment. She told them to take the marijuana out of the apartment, but they ignored her.

1.10 Libero told Taylor that he (Libero) found the “weed” along the railroad tracks near Prindle Street. Libero said he brought it to Guerrero’s apartment.

1.11 Soeby was living in the apartment with Guerrero.

1.12 Libero was a guest.

CONCLUSIONS OF LAW

2.1 Libero (the defendant) has automatic standing to challenge the search of the apartment.

2.2 The defendant was not a resident of the apartment and had no expectation of privacy in the apartment above that of the residents.

2.3 The defendant did not have the right to object to the consent to search of the apartment, even if he had objected.

2.4 The search was properly consented to by one of the residents of the apartment pursuant to the terms outlined in *State v. Ferrier*.

2.5 The search was lawful and the defendant’s motion to suppress should be denied.

CP 31-33.

The case later came on for trial before a jury. RP i. During its case in chief, the state called Jessica Guerrero, Officers Taylor and Ayers, along with a law enforcement employee who tested and weighed the marijuana. RP 13, 27, 39, 67. These witnesses testified to the facts set out in the preceding

factual history. *See* Factual History. The defense then called Thomas Soeby and the defendant Justin Libero. RP 88, 100. Mr. Soeby and the defendant testified that it was Mr. Soeby who found the marijuana plant next to some railroad tracks and, although the defendant was present, Mr. Soeby was the person who seized the plant and carried it back to the apartment. He then began to cut it up and put the marijuana into baggies. RP 88-100, 100-112. According to both of these witnesses, the defendant never possessed the plant, and at most, exercised dominion and control over a few leaves that he cut off the plant for his own use. *Id.*

At the end of the case, the defense proposed a lesser included instruction on misdemeanor possession, arguing that the defense testimony, seen in the light most favorable to the defense, established that the defendant had not exercised dominion and control, either constructive or actual, over the plant. CP 114-115. Rather, the only thing he possessed was a small amount of the marijuana he cut off the plant for his own use. *Id.* The court refused to give this instruction. *Id.* Following argument by counsel, the jury retired for deliberation and later returned verdicts of guilty to possession of over 40 grams of marijuana and possession of drug paraphernalia. RP 152-156; CP 81-82. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 95-104.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, the defendant assigns error to the following highlighted portions of findings of fact 1.2, 1.3, and 1.4.

1.2 Officers Taylor and Ayers (Chehalis PD) arrived at Apt. No. 4. As they approached the door, they could smell the odor of fresh marijuana as they entered the apartment complex. There was a strong odor of fresh marijuana coming from the seams of the door to Apt. 4. Taylor and Ayers knew the look and smell of marijuana from their training and experience as police officers.

1.3 Ayers knocked on the door. A female, Jessica Guerrero, answered the door. The officers smelled the odor of *fresh* marijuana coming from the inside the apartment. Two other individuals, Justin Libero and Thomas Soeby came from the back of the apartment.

1.4 Ayers told the three persons at the apartment why they were there. *Guerrero said the apartment was hers.* Guerrero said she did not smoke marijuana because she was six months pregnant.

CP 31-32.

A careful review of the record reveals that the officers' testimony concerning how strong the marijuana was and exactly where it came from was given during the trial, not during the suppression motion. Thus, the trial court erred by finding these facts contained as part of the record of the suppression motion. In addition, the fact was that during the suppression motion (and during the trial also), Ms Guerrero never claimed exclusive possession of the apartment, and she did not claim a possessory right superior to that of Mr. Soeby. Thus, the finding that "Guerrero said the apartment was hers," while technically correct, was misleading to the extent that it implies that she had exclusive or superior control over the apartment.

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED IN VIOLATION OF WASHINGTON CONSTITUTION, ARTICLE 1, § 7.

Under Washington Constitution, Article 1, § 7, as well as United States Constitution, Fourth Amendment, warrantless searches are *per se*

unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized following a warrantless search unless the state meets its burden of proving that the officer's conduct fell within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). Since warrantless searches and seizures are presumptively unreasonable, the state bears the burden of proving an exception to the warrant requirement, if the defendant first meets the burden of production of evidence that the defendant had a privacy interest in evidence that was "seized" without aid of a warrant. *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998).

One of the limited exceptions to the warrant requirement occurs when the police make a warrantless search of an area protected under Washington Constitution, Article 1, § 7, with the valid consent of the person holding a privacy interest in that protected area. *State v. Walker*, 136 Wn.2d 678, 965 P.2d 1079 (1998). In the case at bar, the trial court found that the state had proved the consent exception to the warrant requirement. As the following explains, the trial court erred because (1) the police failed to also get the consent of a co-tenant present in the home when they obtained the other tenant's permission to search, and (2) the defendant had automatic standing

to assert this violation of Washington Constitution, Article 1, § 7/

(1) The Police Violated Paul Soeby's Right to Privacy When They Searched His Home Based Solely upon His Girlfriend's Consent.

In *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998), the police received information that there was a marijuana grow at the defendant's house. Not having sufficient evidence to obtain a search warrant, the police decided to go to the defendant's house to see if she would consent to a search. Upon arriving at the house, two officers went to the front door and two went to the back. The officers at the front then knocked and identified themselves when the defendant came to the door. At that point, the defendant invited the officers into the house. Once in the house, the two officers at the back door also entered. The officers then explained that they had information about a marijuana grow in the house, and they asked for permission to search. They did not inform her that she did not have to consent to their entry into her home, or that she did not have to consent to the search of her home, and they did not inform her of her *Miranda* rights. They did, however, have her sign a written consent to search. After the defendant signed the consent to search, the officers went upstairs and found the suspected marijuana grow.

Following her arrest, the defendant moved to suppress, arguing that her consent was coerced. The trial court denied the motion, and the defendant later submitted to conviction on stipulated facts. The defendant

then appealed, arguing that the procedure used by the police, called a “knock and talk,” was per se a violation of Washington Constitution, Article 1, § 7. A “knock and talk” is a procedure in which the police attempt to get consent to make a warrantless search of a person’s home. Following argument, the Court of Appeals affirmed, and the defendant obtained review before this court.

In its decision, this court first noted that (1) the procedure used by the police met the constitutional requirements of the Fourth Amendment, and (2) that the failure to inform of the right to refuse entry and the failure to inform of a person’s *Miranda* rights were just two of many facts to be considered in determining whether the consent given was knowing and voluntary under the Fourth Amendment. The court then began an analysis under the enhanced privacy protections available under Washington Constitution, Article 1, § 7. In this analysis, the court did recognize the inherently coercive nature of a situation in which the police go to a person’s home and attempt to get a consent to enter and search. However, the court still declined to find the “walk and talk” procedure a per se violation of our state constitution. On this point, the court noted: “We wish to emphasize that we are not entirely disapproving of the knock and talk procedure, and we understand that its coercive effects are not altogether avoidable.” *Id.*

However, in recognition of the enhanced expectation of privacy that

our state constitution and law create in a person's home, this court held that before the police may make a warrantless entry into a person's home based upon consent, they must first explicitly inform the defendant of his or her right to refuse entry. This court stated:

While we recognize that a home dweller should be permitted to voluntarily consent to a search of his or her home, the waiver of the right to require production of a warrant must, in the final analysis, be the product of an informed decision. We, therefore, adopt the following rule: that when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. ***The failure to provide these warnings, prior to entering the home***, vitiates any consent given thereafter.

State v. Ferrier, 136 Wn.2d 1118-119 (emphasis added).

The underlying principle in this decision is that under the heightened privacy protections our state constitution affords to a person's home, officers of the state may not circumvent the warrant requirement and obtain a waiver of those enhanced privacy rights without first informing the occupants of the home that they have the right to deny the police request. Thus, in *Ferrier*, this court invalidated the search because the police did not inform the defendant of her right to exclude them from her home before they (1) obtained consent for a warrantless entry, and (2) before they obtained consent for a warrantless search.

In the case at bar, there should be no question that the decision in *Ferrier* applies to the facts of this case. In the case at bar, as in *Ferrier*, the police had a tip that illegal drugs were being kept in a particular home. In the case at bar, as in *Ferrier*, the police went to the home to perform a “walk and knock” in an attempt to get consent to enter, search, and seize the drugs they suspected were in the home. Finally, in the case at bar, as in *Ferrier*, the police followed through with their plan, went to the home without a warrant, and tried to obtain consent to search for drugs. Thus, the restrictions in *Ferrier* apply in the case at bar.

In this case, the defense does not argue that the police coerced or in some way improperly obtained Jessica Guerrero’s permission to search in compliance with the requirements of *Ferrier*. The error in their conduct came when they used that permission to enter and search without first also obtaining Thomas Soeby’s permission to enter and search because he was present and was known by them to also be a tenant in the residence. The decision in *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005), illustrates this principle. The following examines this case.

In *State v. Morse, supra*, the police went to an apartment complex and contacted the manager in an attempt to find a person with an outstanding warrant. The manager informed the police that the wanted person had stayed in a particular apartment in the past, but had not been around for about a

week. The officers then went to that apartment and knocked on the door. A woman answered and told the police that the wanted person was not in the apartment and had not been there for about a week. Without asking this person's authority over the apartment, the police asked and obtained her permission to search for the wanted person. In fact, the woman and her husband had been staying in the apartment temporarily with the lessor while their apartment was being painted. After entering, one of the officers walked down the hall to the master bedroom, saw the lessor lying on the bed, told him that he was there to look for the wanted person, and entered. As the officer entered, he saw scales and methamphetamine sitting on a desk. The officer then arrested the lessor.

The lessor of the apartment later moved to suppress the evidence the police had seized, arguing that (1) the officers' warrantless search into his apartment violated his right to privacy under Washington Constitution, Article 1, § 7, and (2) that the temporary residents to his apartment did not have authority to consent to a search of his bedroom. The state responded that (1) for the purposes of obtaining consent, the lessor was not present until the officer first found him and determined his relationship to the apartment, (2) that the temporary residents had the apparent authority to consent to a search of the whole apartment, and (3) that the lessor's failure to object when he saw the officer and heard what he intended to do constituted a consent to

search. The trial court denied the motion and the defendant was convicted. He then appealed. However, the Court of Appeals affirmed the denial of the suppression motion, holding in an unpublished opinion that the temporary residents had the actual and apparent authority to consent to the search of the whole apartment, and that because the lessor did not explicitly object to the search, the police did not have to secure his consent before entering his bedroom. Following this decision, the defendant sought and obtained review before the Washington Supreme Court.

In addressing the defendant's arguments, the Supreme Court first noted that the applicable test under the Fourth Amendment is whether or not the police acted reasonably in obtaining consent of a person who had the "apparent authority" to consent. If they did, then the search does not violate the defendant's rights under the United States Constitution, Fourth Amendment. The court then went on to note that the test under Washington Constitution, Article 1, § 7, is different, given the added protections found in the state constitutional provision. In so holding, the court rejected the state's argument that the defendant was not "present" in the apartment unless and until the police found him. The court held:

The State argues that Dangle had common authority to consent to a search of the premises and that when they came upon Morse, the police officers had no duty to obtain his consent. The State argues that it was Morse's affirmative duty to explicitly object to the search. It is essentially the State's position that Morse was not present in his

own apartment until police found him. While such a suggestion may make sense from the perspective of the Fourth Amendment's "reasonableness" requirement, simply inquiring into whether a police officer's subjective beliefs are reasonable is not sufficient under article I, section 7.

We have been quite explicit that under our constitution, the burden is on the police to obtain consent from a person whose property they seek to search. In obtaining that consent, police are required to tell the person from whom they are seeking consent that they may refuse to consent, revoke consent, or limit the scope of consent. We have never held that a cohabitant with common authority can give consent that is binding upon another cohabitant with equal or greater control over the premises when the nonconsenting cohabitant is actually present on the premises. We have never held that a person is not present in her home unless and until the police come upon her. We decline to do so now.

State v. Morse, 156 Wn.2d at 13 (citations omitted).

The court then went on to reverse the Court of Appeals decision, holding that (1) the temporary resident did not have the authority to consent to a search of the defendant's bedroom and (2) that the search was invalid because the police did not obtain the defendant's permission to search. The court's conclusions on these issues were as follows:

The Washington Constitution guarantees to its citizens that they will neither be disturbed in their private affairs, nor have their homes invaded, without authority of law. Warrantless searches are per se unreasonable. While consent is a recognized exception to the warrant requirement, all such exceptions are narrowly drawn. Common authority to consent to a search is based upon authority to control the premises. A cohabitant who has common authority to use and control the premises has authority to consent to a search that is within the scope of that authority. Authority to control is determined by the shared use of the premises, the reasonable expectations of privacy, and the degree to which a cohabitant has assumed the risk that others

will consent to a search. The scope of the authority of a cohabitant to consent extends only to areas shared by the cohabitants. When a cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained and the consent of another of equal or lesser authority is ineffective against the nonconsenting cohabitant. "Presence" is used according to its ordinary meaning. A person is not absent just because the police fail to inquire, are unaware, or are mistaken about the person's presence within the premises. If the police choose to conduct a search without a search warrant based upon the consent of someone they believe to be authorized to so consent, the burden of proof on issues of consent and the presence or absence of other cohabitants is on the police.

State v. Morse, 156 Wn.2d at 14-15 (citation and footnote omitted).

The decision in *Morse* has direct application to the facts in the case at bar. In this case, the first thing the police learned from Jessica Gurrero was that she and her boyfriend Thomas Soeby lived together in the apartment they sought to search. They knew Thomas Soeby was present, and even ordered him out of the apartment along with the defendant. Although the decision in *Morse* does not require that the police "know" that a person is a co-tenant in a home for that person to assert the failure of the police to obtain his or her permission, in the case at bar the police did know this fact. Thus, they had no excuse for failing to also obtain Thomas Soeby's permission to search. Consequently, under the decision in *Morse*, the police violated Thomas Soeby's right to privacy when they entered and searched without first obtaining his consent. The trial court's ruling to the contrary was in error.

(2) The Defendant Had Automatic Standing to Assert the Violation of Paul Soeby's Right to Privacy Because the State Charged the Defendant with a Crime which had Possession of the Item Illegally Seized as One of its Essential Elements.

In *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978), the United States Supreme Court eliminated the concept of automatic standing, under which a defendant could obtain the suppression of evidence based upon the state's violation of another person's Fourth Amendment rights. However, under the increased privacy protections found in Washington Constitution, Article 1, § 7, the Washington State Supreme Court has retained this rule and held that a criminal defendant does have standing to challenge the illegality of a search involving another person's rights if two criteria are met: (1) the offense with which the defendant is charged must have possession as one of its "essential" elements, and (2) the defendant must have been in possession of the contraband at the time of the contested search or seizure. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980), *see also State v. Carter*, 127 Wn.2d 836, 904 P.2d 290 (1995).

For example, in *State v. Carter, supra*, the defendant was charged with possession of cocaine with intent to deliver after the police entered a motel room, found her present, arrested her on a drug sale she had just made to an undercover officer, and searched her person, finding more cocaine. The defendant moved to suppress the evidence on the basis that the police

violated her right to privacy when they made a warrantless, non-consensual entry into the motel room that she had just entered. The trial court denied the motion on the basis that exigent circumstances justified the warrantless entry. Following conviction, the defendant appealed, reasserting her argument on the illegal search. However, while the Court of Appeals affirmed, it did so on the basis that (1) the defendant did not have a legitimate expectation of privacy in the motel room, and (2) that Washington no longer followed the rule of automatic standing, that would have allowed her to assert the officer's violation the motel room tenant's privacy rights.

The defendant thereafter sought and obtained review by the Washington Supreme Court. Following an extensive analysis of the automatic standing rule, the court held that it is still recognized in the state of Washington, and that the defendant had automatic standing to assert the violation of another's privacy rights under Washington Constitution, Article 1, § 7 because (1) she was charged with a crime (possession with intent to deliver) that had possession as an essential element, and (2) she was in possession of the evidence she sought to suppress at the time of the alleged violation. Finding automatic standing, the court then addressed whether or not the police acted illegally when they entered the motel room without a warrant and without permission. Upon its determination that the police had exigent circumstances, the court affirmed the conviction.

In *State v. Coss*, 87 Wn.App. 891, 943 P.2d 1126 (1997), Division III of the Court of Appeals later reaffirmed the viability of the automatic standing rule. In this case, the defendant had been a passenger in a vehicle, and argued that she had automatic standing to assert a violation of the vehicle owner's privacy rights under the state constitution. On appeal, the state had requested that, in spite of the Supreme Court's ruling in *Carter*, Division III should abandon the automatic standing rule. Division III, following an extensive analysis of the Supreme Court's ruling in *Carter*, refused the state's request. See also *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002) (to claim automatic standing, (1) the defendant must be charged with an offense that involves possession of the disputed evidence as an essential element of the crime charged, and (2) the defendant was in actual or constructive possession of the item at the time the police seized it). The Washington State Supreme Court has periodically reaffirmed the viability of the principal of automatic standing under Washington Constitution, Article 1, § 7. See *i.e.*, *State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007).

In the case at bar, the defendant was convicted of possession of over 40 grams of marijuana following the state's presentation of evidence that the defendant and Thomas Soeby were in possession of that marijuana at the very time the police knocked on the door to Jessica Guerrero and Thomas Soeby's apartment, and then ordered Thomas Soeby and the defendant out of that

apartment. Thus, the defendant meets both of the qualifications for automatic standing. First, he was convicted of a crime that had possession as an essential element. Second, he was in actual possession of the contraband he was convicted of possessing at the very time the police seized his person and searched the residence without a warrant. In fact, the trial court entered a conclusion of law that the defendant did have automatic standing to challenge the search of the apartment. In so finding, the trial court did not err.

III. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNDER UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO GIVE THE DEFENDANT'S PROPOSED LESSER INCLUDED INSTRUCTIONS ON MISDEMEANOR MARIJUANA POSSESSION.

It is a fundamental principle of due process under both our State and Federal Constitutions that a defendant in a criminal proceeding must be permitted to argue any defense allowed under the law and supported by the facts. *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983). Thus, the failure to instruct on a defense allowed under the law and supported by the facts constitutes a violation of due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989); *State v. LeBlanc*, 34 Wn.App. 306, 660 P.2d 1142 (1983).

A defendant is entitled to have the jury instructed on a lesser included

offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case affirmatively supports an inference that the defendant committed the lesser crime. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). In addition, “[r]egardless of the plausibility of th[e] circumstance, [a] defendant ha[s] an absolute right to have the jury consider the lesser included offense on which there is evidence to support an inference it was committed.” *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984) (citing, *inter alia*, *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981)).

In the case at bar, the state charged the defendant with felony possession of over 40 grams of marijuana on its presentation of evidence and argument that the defendant, with Thomas Soeby assisting, retrieved a large marijuana plant, brought it to Jessica Guerrero and Thomas Soeby’s apartment, and then proceeded to cut it apart and put the cuttings into baggies. According to the state’s evidence, the total marijuana recovered was well over 40 grams. Thus, there was more than enough evidence to support a conviction in this case.

However, Thomas Soeby and the defendant’s testimony at trial set out a much different theory of the case. They testified that the defendant went with Thomas Soeby when Thomas Soeby retrieved a marijuana plant over which Thomas Soeby exercised exclusive control. According to them, the

defendant did nothing to facilitate Thomas Soeby's initial possession of that plant. Rather, the defendant was merely present. Once in the apartment, the defendant did cut a little bit of marijuana off of the plant and put it in a baggie, but only because Thomas Soeby gave him permission to take that small amount. Thus, under their evidence, the defendant only exercised dominion and control over the small amount of marijuana that he personally cut off of the plant, an amount that the jury could have found weighed well under 40 grams.

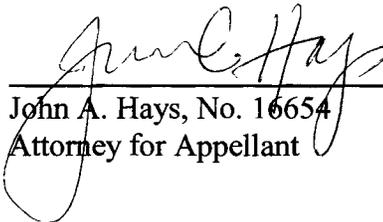
This court might not find Thomas Soeby and the defendant's version of events likely or their claims particularly persuasive or credible. However, as the *Parker* court explained, “[r]egardless of the plausibility of th[e] circumstance, [a] defendant ha[s] an absolute right to have the jury consider the lesser included offense on which there is evidence to support an inference it was committed.” *State v. Parker*, at 166. Thus, in the case at bar, the evidence does factually support the defendant's claim that he only possessed less than 40 grams of marijuana. Consequently, since the lesser included offense of possession of under 40 grams of marijuana is legally available on a charge of possession of over 40 grams of marijuana, the trial court denied the defendant a fair trial when it refused to give its proposed lesser jury instruction on the lesser included offense of possession of under 40 grams of marijuana.

CONCLUSION

The trial court erred when it entered portions of findings not supported by substantial evidence, and when it denied the defendant's motion to suppress. As a result, this court should reverse the defendant's convictions and remand with instructions to grant the defendant's motion. In the alternative, the court should vacate the defendant's conviction and remand for a new trial with instructions to grant the defendant's request for a lesser included offense instruction on the charge of misdemeanor possession of marijuana.

DATED this 5th day of April, 2011.

Respectfully submitted,



John A. Hays, No. 16654
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.

**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,
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.

KW

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

**STATE OF WASHINGTON,
Respondent,**

APPEAL NO: 41420-1-II

vs.

AFFIRMATION OF SERVICE

**Justin A. Libero,
Appellant.**

**STATE OF WASHINGTON)
) vs.
COUNTY OF LEWIS)**

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **April 5, 2011**, I personally placed in the mail the following documents

- 1. **BRIEF OF APPELLANT**
- 2.. **AFFIRMATION OF SERVICE**

to the following:

**MICHAEL GOLDEN
LEWIS COUNTY PROS. ATTY
345 W. MAIN ST.
CHEHALIS, WA 98532**

**JUSTIN A. LIBERO
3220 A GALVIN ROAD
CENTRALIA, WA 98531**

Dated this 5TH day of APRIL, 2011 at LONGVIEW, Washington.

Cathy Russell

**CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS**