

NO. 38920-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SMITH,

Appellant.

FILED
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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda CJ Lee, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE CONVICTIONS ARE NOT SAVED BY THE INDEPENDENT SOURCE DOCTRINE.

The State has properly conceded that based on State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007), State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009), and State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010), Lakewood police had no lawful grounds to contact Smith in his motel room, and the evidence subsequently obtained is not admissible under the inevitable discovery doctrine or the good faith exception to the exclusionary rule.¹ See Brief of Respondent, at 18-19.

For the first time on appeal, the State now asks this Court to uphold some of the evidence – the testimony of Quianna Quabner and L.S. – under the independent source doctrine. See Brief of Respondent, at 37-39. In the trial court, however, the State affirmatively conceded the independent source doctrine did not

¹ Although rendered moot by its concessions, the State claims that Smith waived his challenge to the court's finding of fact 3 by failing to support the assignment of error with argument or citations to authority in his brief. See Brief of Respondent, at 16-18. The State is mistaken. See Brief of Appellant at 14-15 (extensive argument and citations directed at court's finding suggesting officers could reasonably rely on Court of Appeals decision in Jorden).

apply. Thus, the issue was never litigated and the witnesses never examined with the doctrine in mind. RP 176. Nonetheless, the State now cites this Court's authority to affirm on any ground adequately supported by the record and the law. See Brief of Respondent, at 19.

The State's argument fails on two fronts. First, because the issue was never raised (and in fact conceded) below, the record simply does not contain the facts necessary to affirm admission of the victims' testimony on this ground. Defense counsel had no incentive to address the doctrine's requirements with the witnesses or the court. Second, even if admission of the victims' testimony could be affirmed on this ground, the State cannot demonstrate that the improper admission of the other evidence at trial, including testimony from the responding officers, an evidence technician, an ambulance driver, and a pediatric nurse – and significant physical evidence collected at the scene – was harmless beyond a reasonable doubt.

a. The Issue Has Been Waived.

This Court has the authority to affirm on any ground supported by the facts and the law. State v. Villarreal, 97 Wn. App. 636, 643, 984 P.2d 1064 (1999), review denied, 140 Wn.2d 1008 (2000). But where the State has argued that the fruits of a search should be affirmed on an alternative ground it failed to argue below, and therefore “the requisite factual inquiry for proper analysis was not done,” this Court will not speculate on the necessary facts. State v. Rulan C., 97 Wn. App. 884, 889, 970 P.2d 821 (1999); see also State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (citing general bar against arguments made for first time on appeal and concluding record insufficient to determine whether some evidence independent from initial illegality). That is the situation here.

Had the State argued independent source below, it would have shouldered the burden to demonstrate the evidence was not fruit of the poisonous tree. State v. Childress, 35 Wn. App. 314, 316, 666 P.2d 941 (citing Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 2d 307 (1939)), review denied, 100 Wn.2d 1031 (1983). On appeal, the State attempts to address factors a trial court would be required to assess in deciding whether testimony has an independent source. See Brief of Respondent, at

37-38 (identifying four factors). Based on a compilation of state and federal decisions, those factors include:

- (1) the length of the “road” between the unlawful conduct of the police, the witness’ decision to testify, and the witness’ testimony;
- (2) the degree of free will by the witness, including the role played by the illegally-seized evidence in gaining the witness’ cooperation;
- (3) the fact exclusion would permanently disable a witness from testifying regardless how unrelated the evidence might be to the purpose of the original illegal search or the evidence discovered;
- (4) the stated willingness of the witness to testify; and
- (5) the police motivation in conducting the search.

State v. West, 49 Wn. App. 166, 168-170, 741 P.2d 563, review denied, 109 Wn.2d 1010 (1987).

As the United States Supreme Court made clear 80 years ago in Nardone, whether evidence is sufficiently attenuated from an illegality is left to the discretion of the *trial judge*. See Nardone, 308 U.S. at 341-342 (Supreme Court focuses on role of trial judges, reverses conviction, and notes that it had “not indulged in a finicky appraisal of the record” regarding independent sources of the challenged evidence); see also State v. Knighten, 109 Wn.2d 896, 913, 748 P.2d 1118 (1988) (Pearson, J., dissenting) (noting that

where independent source not considered below, appellate court not proper place for findings on issue).

Both the trial judge and the defense are deprived the opportunity to address the relevant factors where, as here, the State waits until appeal to argue independent source. Appellate Courts do not find facts or assess credibility. See Boeing v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002); State v. Bunch, 2 Wn. App. 189, 191, 467 P.2d 212, review denied, 78 Wn.2d 92 (1970).. Nor do they engage in initial decision-making; they are courts of review. Wold v. Wold, 7 Wn. App. 872, 876, 503 P.2d 118 (1972). This Court should decline the State's invitation to address independent source for the first time on appeal. Indeed, even putting aside for a moment the proper role of an appellate court, not all of the factors can be addressed.

Regarding factor (1), where the illegality leads directly to discovery of the prosecution witnesses, "the 'road' between the police misconduct and the witnesses' testimony is short and direct" and "does not support attenuation of the taint." West, 49 Wn. App. at 168-69. That is the situation here. The unlawful arrest of Smith led directly to the State's complaining witnesses.

Factors (2) and (4) can be considered together because both are aimed at determining the witnesses' free will in testifying. A trial court's ultimate determination on attenuation can turn on this one factor alone. See West, 49 Wn. App. at 169-171. But because the State conceded below the absence of an independent source, it does not possess the evidence to satisfy this factor. The State notes that Quabner said she had planned to call police once she got the chance. Brief of Respondent, at 37-38; RP 132-34. But L.S. made no similar statement.² And neither Quabner nor L.S. was ever asked to what extent the illegally discovered and collected evidence ultimately influenced their decisions to cooperate with law enforcement and testify at trial.³

² In its brief, the State claims that both Quabner and L.S. indicated they planned to call police. See Brief of Respondent, at 38-39. The State provides no citation to the record and undersigned counsel could find nothing in the record indicating L.S. made such a statement.

³ The State also argues that Const. art. 1, § 35, which addresses the rights of crime victims, weighs in favor of finding that a victim's testimony is an independent action unrelated to a prior illegality. Brief of Respondent, at 30. But that provision simply assures the right to attend certain proceedings in the case, stay informed about the case, and make a statement regarding a defendant's release and sentencing. It has nothing to do with whether a decision to testify at trial is tainted by a prior illegality.

Regarding factor (3), where the witnesses' testimony relates to the evidence gathered as a result of the illegality, this factor does not support attenuation, either. West, 49 Wn. App. at 169. That is the situation here. Both Quabner and L.S. testified regarding the very evidence collected and the very crime investigated at the scene following Smith's illegal arrest.

Finally, regarding factor (5) – police motivation in conducting the search – the State focuses on the Lakewood Police Officers' motivation in searching the motel registry, noting the absence at that point of any intent to search for evidence of a crime. See Brief of Respondent, at 38. But the illegality did not stop there. After unlawfully arresting Smith, officers began collecting evidence of crimes against Quabner and L.S., taking statements from them and gathering physical evidence to support their claims. While officers were *also* motivated to render aid to Quabner and L.S. at that point, this was not, as the State argues, an intervening event that attenuated their testimony at trial. See Brief of Respondent, at 39. Rather, it was part and parcel of Smith's unlawful arrest. Therefore, this factor also militates against a finding of attenuation.

At the very least, several of the pertinent factors undercut the State's argument on appeal. But ultimately this Court should

decline the State's request that it become a trier of fact and address an issue it conceded below and for which the record is insufficient. In short, by conceding the doctrine does not apply, the State waived the issue for appeal.

Finally, the State discusses in detail three Washington opinions it believes dictate the outcome in Smith's case. See Brief of Respondent, at 32-37. In none of these cases, however, is there any indication the State waited until appeal to make its attenuation argument. Moreover, unlike Smith's case, in every one of these cases the evidence used at trial was truly the product of an independent investigation and not the illegality at issue. See State v. O'Bremski, 70 Wn.2d 425, 429, 423 P.2d 530 (1967) (victim not discovered solely as a result of search; other untainted witnesses led police to victim); State v. Early, 36 Wn. App. 215, 218-222, 674 P.2d 179 (1983) (evidence linking defendant to crime from independent sources and police efforts unrelated to illegality); Childress, 35 Wn. App. at 317 (illegal search merely suggested need for investigation and did not provide actual evidence).

b. Even If The Victims' Testimony Were Admissible, Admission of The Remaining Evidence Was Not Harmless.

Even if this Court were to assume the testimony of Quabner and J.S. was untainted by the illegal arrest and investigation at the motel, the State cannot show that admission of the other testimonial and physical evidence at Smith's trial was harmless beyond a reasonable doubt.

As discussed in the opening brief, the State used significant physical and photographic evidence collected at the scene to prove the charges against Smith, including evidence of a struggle in the room, evidence of restraint, and evidence of the victims' injuries. RP 292-296, 354-371; exhibits 1-20, 22-27, 32-38, 40-41, 42A, 44-51. In addition, two officers involved in Smith's arrest described what they saw at the scene. RP 330-336, 339-348. An evidence supervisor for the Lakewood Police testified about items found in the dumpster and Quabner's injuries. RP 351-354, 360-371. A pediatric nurse testified that L.S. described in detail how she was restrained and sexually assaulted. RP 439-440, 451-452. A responding paramedic testified to Quabner's injuries and her claim of assault. RP 483-489. And a police detective and Quabner's

sister testified to Quabner's injuries after she had been taken to a hospital. RP 460-467, 493-495.

The State does not argue that any of this evidence has an independent source. Instead, the State now seeks to downplay its significance by calling it "largely duplicative" of the victims' testimony. Brief of Respondent, at 41.

But this evidence was sufficiently important that the trial deputy introduced it for the jury's consideration and repeatedly used it to his great advantage during closing argument. See RP 525-26 (physical evidence corroborates L.S.'s story); RP 526-28 (blood stained evidence consistent with assault on Quabner); RP 528 (cords and ropes in dumpster consistent with testimony that L.S. and Quabner were restrained and kidnapped); RP 528 (cuts on cords consistent with L.S.'s testimony that Davis was armed with a knife during crimes); RP 530 ("as with [L.S.]'s testimony, what Quianna tells you is corroborated by the physical evidence in the case, and also the observations of the police officers"); RP 530-531 (Quabner's reaction to seeing bloody shirt collected at scene demonstrated "demeanor of someone who's telling you the truth."); RP 532 (evidence in dumpster, bloody clothes, ropes, cords, and broken glass corroborate victims' testimony); RP 532 (ambulance

driver's observations of Quabner point to defendant's guilt); RP 533 (L.S.'s statements about rape to pediatric nurse shows Smith guilty); RP 533 (cut electrical cord, photographs of injuries, and broken picture frame show guilt); RP 534 (fact police found Smith alone with victims shows that he was culprit); RP 534 (ropes, cords, and broken glass found in dumpster); RP 568-69 (ropes, cords, and glass again).

Smith's defense was that although he did assault Quabner, it was not a first-degree assault, and he did not commit any of the other charged crimes involving Quabner or L.S. RP 545-46, 553-54, 556-565. Counsel argued that both witnesses had time to concoct their story and a motive given that Smith had assaulted Quabner and tried to evict Quabner and her children from the motel room. RP 554-55. Without the significant corroborating evidence (both physical and oral) presented by the State and emphasized during closing argument, Smith had a chance of convincing jurors his guilt had not been established. But with the corroborating evidence, jurors were far more likely to convict. Because the State cannot demonstrate this evidence was harmless beyond a reasonable doubt, reversal is still required.

2. THE RAPE CONVICTIONS VIOLATE DOUBLE JEOPARDY.

The State seems to concede a double jeopardy violation in its heading: "IN LIGHT OF **STATE V. HUGHES**, IT APPEARS THE DEFENDANT'S CONVICTION OF RAPE OF A CHILD IN THE SECOND DEGREE MAY VIOLATE DOUBLE JEOPARDY." Brief of Respondent, at 41. However, the State then argues there is no double jeopardy violation and "the defendant's reliance [on Hughes] is misplaced." Id. at 41-42.

The State's concession of error in its heading is correct. For the reasons discussed in Smith's opening brief, State v. Hughes, 166 Wn.2d 675, 685-686, 212 P.3d 558 (2009), State v. Calle, 125 Wn.2d 769, 772-775, 779-780, 888 P.2d 155 (1995), and State v. Birgen, 33 Wn. App. 1, 5-14, 651 P.2d 240 (1982), review denied, 98 Wn.2d 1013 (1983), quite clearly indicate that nonconsensual rape and statutory rape define a single crime when based on the same act.

B. CONCLUSION

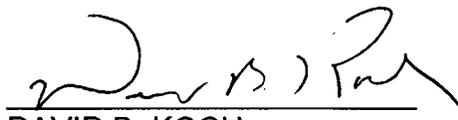
The State conceded below that the independent source doctrine did not apply and the issue was never litigated. The issue has been waived. Therefore, the evidence stemming from Smith's unlawful arrest at the motel was improperly admitted and Smith is entitled to a new trial. Whether Quabner and L.S. can be called to testify at any retrial can be litigated following remand from reversal of the convictions.

Smith's two convictions for rape violate double jeopardy. His conviction for Rape of a Child in the Second Degree must be vacated.

DATED this 15th day of September, 2010.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

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)	
Respondent,)	
)	
vs.)	COA NO. 38920-7-II
)	
CHRISTOPHER SMITH,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF SEPTEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*