

71506-2

71506-2

NO. 71506-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM T. WRIGHT,

Appellant.

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

The Honorable Thomas J. Wynne, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	3
a. <u>CrR 3.6 hearing</u>	3
b. <u>Trial evidence</u>	8
C. <u>ARGUMENT</u>	21
THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED DURING THE WARRANTLESS SEARCH OF THE HOTEL ROOM.	21
D. <u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Pasco v. Shaw</u> 161 Wn.2d 450, 166 P.3d 1157 (2007) cert. denied, 552 U.S. 1275 (2008)	22
<u>State v. Boot</u> 81 Wn. App. 546, 915 P.2d 592 (1996)	22
<u>State v. Davis</u> 86 Wn. App. 414, 937 P.2d 1110 review denied, 133 Wn.2d 1028, 950 P.2d 478 (1997)	22
<u>State v. Eisfeldt</u> 163 Wn.2d 628, 185 P.3d 580 (2008)	22
<u>State v. Evans</u> 96 Wn.2d 1, 633 P.2d 83 (1981)	25
<u>State v. Guloy</u> 104 Wn.2d 412, 705 P.2d 1182 (1985) cert. denied, 475 U.S. 1020 (1986)	25, 27
<u>State v. Hendrickson</u> 129 Wn.2d 61, 917 P.2d 563 (1996)	23
<u>State v. Jones</u> 68 Wn. App. 843, 857 P.2d 1074 (1993)	22
<u>State v. Ladson</u> 138 Wn.2d 343, 979 P.2d 833 (1999)	25
<u>State v. Mendez</u> 137 Wn.2d 208, 970 P.2d 722 (1999)	23

TABLE OF AUTHORITIES (CON'TD)

	Page
<u>State v. Parker</u> 139 Wn.2d 486, 987 P.2d 73 (1999)	22
<u>State v. Ramirez</u> 49 Wn. App. 814, 746 P.2d 344 (1987)	23
 <u>FEDERAL CASES</u>	
<u>Brendlin v. California</u> 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)	23
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 3.6	2, 3, 5, 24
RCW 9A.44.100	2
U.S. Const. amend. IV	21, 22
Art. I, § 7	22

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the defense motion to suppress evidence gained during a warrantless search of appellant's hotel room.

2. The trial court erred when it entered that portion of finding of fact 5 indicating "the defendant's personal effects were not in the room" when officers searched and when it entered conclusions of law 1-3.¹

Issues Pertaining to Assignments of Error

1. Appellant rented a hotel room in the early morning hours of September 5. Although, under hotel policy, appellant was expected to check out by noon that same day, all documents associated with the check in indicated appellant was not required to check out until September 6. Moreover, the hotel tolerates overtime stays and late payments for those stays. Police did not bother to obtain a warrant. Instead, the hotel gave officers permission to search the room on the afternoon of September 5. Given that appellant was expressly informed that check out was not until September 6, and the hotel accepts overtime stays in any

¹ A copy of the court's written findings of fact and conclusions of law is attached to this brief as an appendix.

event, did he have a reasonable expectation of privacy in the room on September 5, thereby rendering the warrantless search unlawful?

2. Are several of the trial court's key findings and conclusions erroneous?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor's Office charged William Wright with one count of Attempted Indecent Liberties, later amending the charge to Indecent Liberties. CP 78-79, 101-102. The State alleged that Wright had sexual contact with Andrea Bell at a time when Bell was "incapable of consent by reason of being mentally defective, mentally incapacitated, and physically helpless." CP 78; RCW 9A.44.100(1)(b).

Wright filed a motion under CrR 3.6, moving to suppress evidence obtained from the warrantless search of the hotel room he had rented and shared with Bell. CP 91-95. The State opposed the motion. Supp. CP ____ (sub no. 104, State's Response to Motion to Suppress Evidence). Following an evidentiary hearing, the Honorable Thomas Wynne denied the motion. CP 33-38.

A jury convicted Wright as charged. CP 56. Judge Wynne imposed a standard range 24-month sentence. CP 20-21. Wright timely filed his Notice of Appeal. CP 16-17.

2. Substantive Facts

a. CrR 3.6 hearing

Testimony and documentary evidence at the CrR 3.6 hearing revealed that Wright rented a room at the Extended Stay America in Bothell, checking in at 12:05 a.m. the morning of Sunday, September 5, 2010. 1RP² 10. He paid \$100.62 and was assigned room 209. 1RP 9; pretrial exhibits 2-3. In 2010, the hotel's standard check in time was anytime after 3:00 p.m. and its standard check out time was noon. 1RP 5.

Both the guest registration card (which Wright signed) and the folio receipt (a copy of which was available to Wright) indicate that Wright's departure date was Monday, September 6, 2010. 1RP 9, 14-16; pretrial exhibits 2-3. The registration card further indicates, "I (We) agree to the rate and above terms of my (our)

² This brief refers to the verbatim report of proceedings as follows: 1RP – CrR 3.6 hearing on April 18, 2013; 2RP – sequentially paginated trial and sentencing dates from November 22, 2013 to January 31, 2014.

reservation” and the folio receipt states, “The above rate is based on your length of stay as stated on this folio.” Pretrial exhibits 2-3.

Although both the registration card and folio receipt indicate Wright was not required to vacate room 209 until Monday, September 6, 2010, Sonya Abdullah, manager at the hotel, testified that – based on hotel *policy* – Wright’s actual expected check out would have been Sunday, September 5, at noon. 1RP 6, 10-11. Abdullah explained that the hotel’s computer system cannot process a transaction for “0” nights. When a guest checks in after midnight, the computer automatically sets departure for the following calendar date, which is then listed on the documents associated with the transaction. For this reason, Wright was informed departure was not until September 6. RP 10.

Abdullah identified circumstances under which a guest can extend a stay beyond check out time. Guests may stay an additional night if they call the desk before noon on the date of check out. 1RP 13. Guests also may extend their stay another night by simply failing to vacate the room. Once housekeeping discovers a holdover guest, management is alerted and asks the guest if he would like to stay another night. If the guest says yes, he is charged for another night. Depending on housekeeping’s

schedule, this can occur as late as 4:00 p.m. on the date of expected check out.³ 1RP 17-18. Guests also may extend check out time by request. 1RP 13-14. According to Abdullah, Wright did not ask to stay an additional day or request a late check out on September 5. 1RP 13-14.

Abdullah – who did not handle Wright’s check in – testified it is hotel policy to inform guests of check out time. 1RP 17, 20. But she could not say whether this was discussed with Wright and there was no document indicating check out was required at noon on September 5. 1RP 20-21. Rather, the documents uniformly indicate check out on September 6. Pretrial exhibits 2-3.

The only other witness at the CrR 3.6 hearing was Bothell Police Detective Glen Chissus. 1RP 21. According to Chissus, at about 5:30 a.m. on the morning of September 5, officers responded to a reported possible sexual assault in room 209. 1RP 22-23, 27-28. The female complainant was in the lobby when police arrived,

³ The hotel has a flexible policy on what constitutes a “late arrival” versus an “early check in.” According to Abdullah, someone checking in at 12:05 a.m. is a late arrival and must leave at noon that same day. Someone who, for example, checked in at 9 or 10 a.m. could be an early check in and, with payment of an additional fee, would not be required to check out until the following day. 1RP 16-17, 19-20. But the hotel has no set time criteria for distinguishing one situation from the other. 1RP 19.

and no one was present in room 209 at that time. At the request of police, hotel staff secured the room so that no one could re-enter. 1RP 23-24.

Police were provided Wright's registration card and folio receipt. 1RP 29-30. Although both documents indicate a departure date of September 6, officers obtained the hotel's written consent to search based on a departure date of September 5 at noon. 1RP 5, 24-25. At 1:35 p.m., officers obtained a signed consent from the on-duty manager. 1RP 12-13, 25-26; pretrial exhibit 1. At 1:50 p.m., using a key supplied by the hotel, officers entered the room and began collecting evidence to be used against Wright. 1RP 26. Detective Chissus conceded there had been sufficient time to apply for and obtain a search warrant for the room. 1RP 30-31.

During argument on the defense motion, the State conceded that obtaining a search warrant for the hotel room would have been the better course. 1RP 34. The State argued, however, that officers obtained a valid consent to search. According to the State, even if Wright was not told at check in that he had to leave at noon on September 5, he should have known – based on common practice – that he had to leave at that time. Therefore, he did not

have a reasonable expectation of privacy as to the room on the afternoon of September 5, and hotel management lawfully provided consent to search. 1RP 32-35.

Defense counsel argued that Wright's expectation of privacy did not turn on the hotel's unwritten policies, particularly where the written documents associated with check in expressly indicated Wright had the room until September 6. 1RP 35-36. Officers had these documents in hand before the search. 1RP 37. Moreover, the hotel's policies were "wishy-washy" concerning guest departures. Guests sometimes paid an extra fee to stay longer. Other guests simply stayed beyond (sometimes well beyond) the scheduled check out time and were then offered the opportunity to stay another evening. Thus, the hotel regularly permitted late departures. 1RP 36. Because Wright maintained an expectation of privacy in the room, officers could only enter with a warrant. 1RP 37-38.

In an oral ruling, Judge Wynne found that Wright had no expectation of privacy or tenancy in the room beyond noon on September 5. Therefore, Bothell Police obtained a constitutional consent to search from hotel management. The motion to

suppress was denied. 1RP 38-39. Judge Wynne subsequently entered consistent written findings and conclusions. CP 34-38.

b. Trial evidence

Miranda Smyser and Andrea Bell have been friends since middle school. 2RP 46. On the evening of September 4, 2010, Smyser, Bell, Matthew Verhey (a former high school classmate), and one of Verhey's friends met at Bert's Tavern in Bothell. 2RP 46, 48-49. The tavern has a horseshoe pit. The four played horseshoes and had drinks. 2RP 50. As Bell drank, she became louder and was "hanging on" Verhey. 2RP 52.

Bell's state of sobriety was a point of dispute. She had consumed three or four beers earlier that evening at a party, but then had a meal before heading to Bert's, where she had two drinks (gin and cranberry juice). 106-109. Verhey would later claim Bell was merely "a little buzzed." 2RP 77. Bell's recollection was the same. She had just started to feel the effects of the alcohol. 2RP 109. Smyser, however, believed that Bell was "pretty drunk." 2RP 52.

William Wright struck up a conversation with the group. 2RP 53-54. After Wright and Bell had spoken for a while, Bell informed Smyser that she was going outside with Wright to get some alcohol

Wright apparently had in his vehicle. 2RP 54-56. When Bell did not return in the next 20 minutes, Smyser and Verhey stepped outside to look for her, but could not find her. It was now around midnight. The bartender then handed them a note, from Wright, with a phone number. 2RP 56-57. That number was to the Aamco Transmission shop, a five-minute drive, where Wright worked. 2RP 57, 348.

When no one answered the phone at Aamco, Smyser and Verhey drove to the shop. 2RP 57. No one was there, but they could see an open bottle of Heineken and a bottle of soda sitting on a ledge inside the shop. 2RP 58. Smyser and Verhey had Bell's cell phone, so there was no way to call her. 2RP 59. The two lingered for a short while before returning to Bert's. 2RP 58.

Meanwhile, Wright checked in to the Bothell Extended Stay America. Exhibit 93-94. Check in was recorded by a camera in the lobby and shows Wright with Bell standing next to him. Exhibit 88. Kathleen Armstrong was the on-duty manager who dealt with the couple. 2RP 142, 145. Armstrong has discretion to turn away any individual who appears intoxicated or makes her feel uneasy about the circumstances. 2RP 144. According to Armstrong, Wright and Bell "appeared fine" as she interacted with them and neither

appeared under the influence of drugs or alcohol. 2RP 151, 160. Bell seemed sober and in good spirits. 2RP 160. Nothing in the videotape undermines this assessment. Exhibit 88.

Wright indicated he was the only guest for the room and that Bell was not staying, which Armstrong interpreted to mean Bell was going to the room with Wright, but she was not sleeping there that night. 2RP 146-147, 161-162. A few hours later, Wright stopped by the front desk again to inform Armstrong that Bell was, in fact, sleeping in the room, and he was headed out. He then left in his van. 2RP 152.

Smyser and Verhey had stayed at Bert's until it closed at 2:00 a.m., at which time they returned to Aamco. 2RP 59-60. While they were there, Wright pulled in to the parking lot in his van. He was alone. 2RP 60. He looked freshly showered and was in different clothing, including a WSU cap Verhey had given Bell to wear earlier that evening. 2RP 60-61, 82-83. Smyser and Verhey confronted Wright about Bell's whereabouts. 2RP 60-61, 83. Verhey "flipped the hat off" Wright's head and, by his own admission, was "probably a little worked up." 2RP 62, 83. Wright wanted nothing to do with either of them. 2RP 60, 83. At first, he said Bell met and left with other friends. Then he said she was in a

hotel and in bed with another guy, but would not disclose which hotel. 2RP 62-63.

After briefly going inside the Aamco shop, Wright left in his van. Smyser and Verhey followed in their car and called 911. 2RP 63. They continued to follow until Snohomish County Sheriff's Sergeant Stephen Coney stopped Wright's van. 2RP 63, 169-170. Wright told Coney how he met Bell at the bar, she flirted with him, and she agreed to go to the transmission shop to drink tequila. 2RP 175. He said Bell then asked for a ride to the Canyon Park area. He obliged, dropping her off at 7-Eleven, where she left with two friends. 2RP 176. He denied any sexual contact with Bell and denied any drug use by either of them. 2RP 176-177. Coney noted a cut to the index finger on Wright's right hand, and Wright explained he had injured himself back at the shop. 2RP 177.

Sgt. Coney told Smyser and Verhey what Wright said. 2RP 179. He then spoke with Wright again, indicating he thought Wright knew where Bell was. 2RP 180. Wright maintained that, although he did not know, he had ESP, which was telling him that she was in a bed, in a hotel, and that she was fine. 2RP 180. He told Coney that he could find her and, when he did, he would call

911. 2RP 180. Because there was no legal basis on which to detain Wright further, Coney let him leave. 2RP 181.

At about 5:00 a.m., Bell exited room 209 and went to the front desk, where Armstrong was still on duty. 2RP 152-153. Bell was upset, appeared confused, and was crying. 2RP 153. Bell called her own cell phone and reached Verhey. Verhey and Bell's sister then drove to the hotel. 2RP 84, 153. Bell was not sure what had happened. 2RP 192. Police were called, and – at their request – she went to the hospital for a sexual assault examination. 2RP 153, 192, 194.

During the exam, Bell told nurse Dale Fukura how she had been with her friends when she met Wright. 2RP 384. She did not recall leaving Bert's. 2RP 385. She remembered waking up in the hotel at one point and Wright telling her that one of her friends (presumably Verhey) was also at the hotel with a girl. 2RP 385. She asked Wright to go get her friend, but then fell back asleep. 2RP 385. The next time she awoke, both her jeans and her underwear were ripped at the crotch. 2RP 385-386; exhibits 44-45. When she discovered this, she was “freaking out” in front of Wright. She tried to call a friend from the room, but initially Wright kept

hanging up the phone. 2RP 386. She finally reached someone, however, and Wright then left. 2RP 386.

Regarding Bell's physical condition, Fukura found nothing that would account for Bell's claimed loss of memory. 2RP 388. And the gynecological exam was normal. There were no signs of injury and Bell did not complain of any discomfort in that region. 2RP 387. This did not rule out sexual contact, however. 2RP 387-390.

A urine sample revealed .20 grams of alcohol at 10:30 a.m. on the morning of September 5. 2RP 405. However, unlike blood or breath alcohol tests, extrapolation to determine impairment or quantity of consumption is not possible with urine, which collects and concentrates in the bladder over time. 2RP 405-407, 414. Bell also was screened for drugs, including a date rape drug, with negative results. 2RP 407-409.

Back at the hotel, detectives obtained the consent to search room 209 and entered. 2RP 201. Included among the evidence they collected: a dildo found in a cupboard, jean material fibers on the bed, a can of shaving cream, a broken men's razor, and ten bottles of beer (seven full bottles and three partially consumed). 2RP 212, 216, 219, 226, 233, 240, 254-255, 258-259, 263-264,

310-311. Police tested the beer for the presence of date rape drugs. The results also were negative. 2RP 309-310.

After collecting evidence from the hotel room, Bothell Detectives Ryan Odegaard and Glen Chissus drove to the transmission shop to speak with Wright. Both were in plain clothes. 2RP 221. According to the detectives, although the shop was closed, they saw Wright inside, knocked, and identified themselves. Wright retreated to the back of the shop, did not answer the door, and did not answer the phone. 2RP 222-223, 264-267.

Detectives returned to the shop on September 9. 2RP 223-224, 268. Wright had not shown up for work that day. 2RP 350. While detectives were there, Wright left a voice mail message for the owner indicating he was just outside Sacramento, he was confused about what to do because of "that one bad girl," but he was not worried about a criminal charge. He was headed back to Washington and was interested in resuming work at the shop at that time. 2RP 274-275; exhibit 97. In response, the shop owner called Wright, who complained that police were harassing him, denied he had done anything wrong, but agreed to return and take care of the matter. 2RP 275, 351-352.

After leaving the shop, detectives were informed by dispatch that Wright had called in, said he would be back in town the next day, and left his phone number. 2RP 277-278. After some exchanged messages, Wright called again and spoke to Detective Chissus by phone the morning of September 10. 2RP 278-281. Wright described Bell as a "psycho chick." 2RP 282. He explained that Bell had been overtly sexual at Bert's and asked him if he wanted to leave with her. 2RP 282-283. She drank several beers at Aamco, was looking at porn on the Internet there, and was "pretty drunk." 2RP 284. They decided to get a hotel room and picked up some more beer on the way. 2RP 285-286. Bell asked to call her friends back at the bar, which is when Wright called and left his work number with the bartender. 2RP 286.

At the hotel, Wright took a bath while Bell continued to drink beer. 2RP 285-286. Bell indicated she wanted to lie down in bed, and Wright returned to the shop temporarily to clean up glass from a bottle Bell had dropped there. 2RP 287. Upon his arrival, Bell's friends confronted him and treated him like a criminal. 2RP 287. He cut his finger while cleaning up the glass and, on the way back to the hotel, was pulled over by Sergeant Coney, who was rude. 2RP 287-288.

Bell was sleeping when Wright got back to the room. 2RP 288. When she awoke, she was "messed up." 2RP 288-289. She asked for her cell phone, began searching Wright's pockets for it, and took his driver's license, which he took back from her. She asked if Wright had cut her pants. He said no, but offered to get her a new pair. 2RP 289. Bell was acting "crazy" and as if she were on drugs, so Wright gathered his stuff and left. 2RP 289-290. He later discovered \$500.00 missing from his wallet and suspected Bell. 2RP 290. He denied any sexual contact with Bell, and explained that he refused to talk to detectives when they came to the shop on September 5 because he did not know they were police officers. 2RP 290-291.

Wright agreed to come in and give a formal statement, which he did the afternoon of September 10. 2RP 292-293. His version of events largely mirrored what he had told Detective Chissus on the phone that morning, although he provided more detail. Exhibits 87, 98.

The dildo became a key piece of evidence. Exhibits 18, 28. Testing showed the presence of both Bell's and Wright's DNA on and in the object. 2RP 320-321; 2RP 440-455. Detectives contacted Wright again and asked him about these results. 2RP

321. Wright said the dildo was already in the room when they arrived. And although he picked it up briefly and jokingly asked Bell if it belonged to her, he maintained that he never saw Bell touch it. 2RP 324-327. Wright claimed someone at the crime lab must have been trying to frame him. 2RP 327.

At trial, Bell testified the last thing she remembers was playing horseshoes at Bert's. Her next memory is in the transmission shop with Wright and being "kind of blacked out." 2RP 110-111. Next, she remembers waking in the hotel room and asking about her friends. In response, Wright indicated he was Matt Verhey's dad and Verhey was in another room getting laid. 2RP 112-113. Bell then kept alternating between sleep and brief moments of consciousness. 2RP 113-114. When Bell finally and completely woke up, she felt a draft and realized her pants and underwear had been cut in the crotch. Wright told Bell to calm down and not make a scene. He also prevented her from using the phone. 2RP 114-116. Wright provided Bell with a pair of shorts to wear over her jeans and then left the room as Bell placed a call to Verhey. 2RP 117.

Bell denied having a consensual sexual encounter with Wright, testifying she was not the type of person who would leave a

bar with someone she had just met and check in to a hotel with him. 2RP 135-136. She did not, however, attempt to explain the video showing her (apparently willingly) checking in to the hotel with Wright. Nor did she explain the night manager's assessment that she seemed fine at the time. See 2RP 99-139.

Wright took the stand in his own defense and, with some exceptions, his testimony was consistent with what he told detectives. 2RP 545-572. What he did not tell them was that the dildo was his and he had been wearing it in his pants at Bert's. 2RP 548, 555, 587-588. Moreover, there had been some consensual physical contact in the hotel room. He stepped from the bath naked and joined Bell on the bed. She was rubbing against him and he was touching her over her clothes. He had just shaved and still had the razor in his hand. Bell provocatively asked him what he intended to do with the razor and eventually asked him to cut open her pants, which he did.⁴ 2RP 547, 561-565, 597-604. Bell then fell asleep, however, and there was no further physical contact. 2RP 553, 563-565, 601, 604, 608-609. The dildo had

⁴ Wright testified he made only a small slit and suggested the pants must have ripped thereafter to create the larger tear. 2RP 564, 567, 601, 604.

been put away in the cabinet when Wright bathed and was not used. The location where he had placed it was not precisely where police found it, however. 2RP 563-564. Wright had not mentioned these events because Bell was acting as if she did not recall asking him to cut her pants and because of the manner in which Bell's friends and Sergeant Coney treated him.⁵ 2RP 547-552, 554.

In an attempt to undermine the DNA evidence on the dildo, the defense called Dr. Donald Riley, a forensic scientist who has worked with DNA for the past 30 years. 2RP 481-487. Dr. Riley was critical of the crime lab's evidence storage and handling practices, including the lab's use of paper bags and containers, which are porous and permeable. Moreover, the lab stores DNA reference samples near evidence collected from the scene (such as the dildo). 2RP 489-495, 521-524. In light of these practices, Dr. Riley concluded the risk of cross-contamination in Wright's case was "quite high" and questioned the reliability of the State's test results. 2RP 488-489, 492. The crime lab nonetheless expressed confidence in its methods and conclusions. 2RP 457, 534-541.

⁵ Wright also accused Coney of repeatedly and illegally trying to force his way into the shop on September 5. 2RP 552-553.

In closing argument, the prosecutor told jurors there were only two elements in dispute: (1) whether Bell had been incapacitated and (2) whether there was sexual contact. 2RP 654. The prosecutor argued Bell was incapacitated because she could not remember most of what happened with Wright. Moreover, she was incapable of consent. 2RP 660-663. Regarding sexual contact, the prosecutor argued that both the cutting of Bell's clothing with the razor blade and use of the dildo (which contained Bell's DNA) satisfied this element. 2RP 655-660.

In response, the defense argued Bell was not telling the truth about what happened. 2RP 672. Her embarrassment over what her friends would think of her and her theft of \$500.00 provided ample motive. 2RP 690-691. The hotel video and clerk's testimony demonstrated that she was not incapacitated. 2RP 677-678. No drugs, including date rape drugs, were found in her system or anywhere else. 2RP 684. Her intent at the time was to have a consensual sexual encounter with Wright. 2RP 677. And this also was Wright's intent, which is why he registered under his own name, called the bar and left his work number, and later notified the clerk when it appeared Bell was, in fact, going to sleep

in the room. 2RP 679-681. Wright was evasive with Bell's friends and Officer Coney because of their accusatory tone. 2RP 679-680.

Based on Dr. Riley's testimony, defense counsel argued that Bell's DNA was found on the dildo because of cross-contamination during storage, handling, and testing. 2RP 685. An alternative explanation was that Bell had handled the dildo or used it on herself. 2RP 685-686. This latter scenario was possible given that she spent considerable time in the room by herself. 2RP 674, 687.

The defense asked jurors to find that whatever sexual contact occurred was knowing and consensual between Bell and Wright. Alternatively, the defense asked jurors to conclude that, even if Bell had somehow become incapacitated after check in, Wright honestly but mistakenly believed any contact was consensual. 2RP 695-696.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED DURING THE WARRANTLESS SEARCH OF THE HOTEL ROOM.

The Fourth Amendment provides, "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. . . .” Article I, section 7 of the Washington Constitution provides, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” “It is by now axiomatic that article I, section 7 provides greater protection to an individual’s right of privacy than that guaranteed by the Fourth Amendment.” State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

“A challenge to a search and seizure requires that the accused have a legitimate expectation of privacy in the place searched or the item seized.” State v. Boot, 81 Wn. App. 546, 550, 915 P.2d 592 (1996) (citing State v. Jones, 68 Wn. App. 843, 847, 857 P.2d 1074 (1993)). Protection against warrantless searches “is at its apex ‘where invasion of a person’s home is involved.’” State v. Eisfeldt, 163 Wn.2d 628, 635, 185 P.3d 580 (2008) (quoting City of Pasco v. Shaw, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007), cert. denied, 552 U.S. 1275 (2008)). Generally, a hotel guest enjoys the same expectation of privacy during his tenancy as the owner or renter of a private home, thereby negating the innkeeper’s right to control the premises during this period. State v. Davis, 86 Wn. App. 414, 419, 937 P.2d 1110, review denied, 133 Wn.2d 1028, 950 P.2d 478 (1997); State v. Ramirez, 49 Wn. App. 814, 817-818, 746 P.2d

344 (1987). Moreover, this expectation continues past expiration of the tenancy where the hotel has either “accepted late payment and/or tolerated overtime stays in the past.” Davis, 86 Wn. App. at 419.

Warrantless searches are unreasonable per se subject to narrow and carefully drawn exceptions. Consent is one such exception, and the State bears the difficult burden of proving its presence. State v. Hendrickson, 129 Wn.2d 61, 70-72, 917 P.2d 563 (1996). Findings of fact on a motion to suppress are reviewed for substantial supporting evidence, meaning “evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Conclusions of law are reviewed de novo. Id.

At the time of the warrantless search of room 209, Wright enjoyed a legitimate expectation of privacy – negating the hotel’s authority to consent – for two reasons.

First, Wright was told check out was not until September 6. 1RP 9, 14-16; pretrial exhibits 2-3. Although the hotel’s *policy* required check out at noon on September 5, no evidence was

presented establishing Wright was ever told of this expected departure. The on-duty manager, Kathleen Armstrong, did not testify at the CrR 3.6 hearing. But the documents prepared in conjunction with the check in she handled indicate that Wright and the hotel expressly agreed to a September 6 departure.

Second, the Bothell Extended Stay America accepts late payments and tolerates overtime stays. Guests can extend their stay by simply failing to vacate the room. And they need not decide whether to vacate until housekeeping comes to clean the room, which can be as late as 4:00 p.m. At that point, guests must either leave or pay for another night. 1RP 17-18. This is consistent with other flexible policies, for example, deciding what is a “late arrival” versus an “early check in.” See 1RP 16-20.

In ruling against Wright, Judge Wynne made several mistakes. Finding of fact 5 indicates, “The defendant’s personal effects were not in the room” when police entered. CP 34. This is incorrect. Both his dildo and his shaving cream were found in the room. Moreover, Judge Wynn’s conclusions of law are based on a notion Wright’s expectation of privacy turned on the hotel’s unstated policy concerning check out time. They do not address the fact Wright was expressly informed check out was September 6 or the

hotel's practice of accepting late payments and tolerating overtime stays.

“When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). That is the remedy here. All evidence found in room 209 – including the razor, the jean fibers, the beer, and the dildo – should have been suppressed.

Moreover, constitutional error is harmless only if the reviewing court is “convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Washington uses the “overwhelming untainted evidence” test, under which error is harmless if the untainted evidence alone is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426 (quoting State v. Evans, 96 Wn.2d 1, 633 P.2d 83 (1981)).

The State cannot make this showing. Bell appeared to be a willing participant when she left Bert's with Wright and checked in to the Extended Stay America with him. She did not appear to be under the influence of alcohol or drugs at check in, and no drugs –

including date rape drugs – were found in her system. Bell could recall very little of what happened inside the room, but she certainly did not recall any sexual contact. Wright admitted to some limited sexual contact – a cut to Bell’s pants and brief touching over Bell’s clothing – but maintained this was consensual.

One item collected from the room, however – the dildo – was critical to the State’s case and undermined Wright’s version of events. Wright steadfastly denied ever using this device on Bell, yet it contained Bell’s DNA inside and out. Although the defense attempted to convince jurors this might be the consequence of cross-contamination, the crime lab stood behind its practices and its results. Moreover, the prosecutor focused on the dildo during closing argument:

Finally, on the point of sexual contact, we have the dildo itself, which is a device that is manufactured for, designed for sexual contact by definition. By the defendant’s own admission, it is used for sexual contact by definition. By the defendant’s own admission, it is used for sexual contact. We know from the DNA evidence in this case that, in fact, it was used for that purpose with Ms. Bell.

His DNA was on the outside, on the interior, mixed with her DNA at the exterior base and at the interior base.

What we do have, though, again, is strong evidence from [the crime lab] of the fact that this dildo came into physical contact with Ms. Bell at the hotel under the circumstances that I just mentioned before in that hyper-sexualized encounter with William Wright.

2RP 659-660.

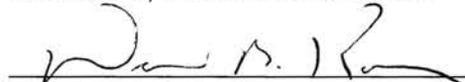
Given the DNA results, and these arguments, jurors were very likely to conclude that, even if (as Wright claimed) there was some initial consensual contact between Wright and Bell, Wright then used the dildo on Bell (despite his denials) at a time when she was no longer capable of giving valid consent. This evidence largely ensured Wright's conviction.

D. CONCLUSION

Because, in the absence of evidence from the hotel room, the untainted evidence was not so overwhelming that it necessarily led to a finding of guilt, Wright is entitled to a new trial. Guloy, 104 Wn.2d at 426. This Court should reverse and remand.

DATED this 30th day of June, 2014.

Respectfully submitted,
NIELSEN, BROMAN & KOCH



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Office ID No. 91051
Attorneys for Appellant

APPENDIX

FILED

2014 JAN 31 AM 10:28

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL16261238

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

WRIGHT, WILLIAM THOMAS

Defendant.

No. 12-1-00961-3

CERTIFICATE PURSUANT TO
CrR 3.6 OF THE CRIMINAL RULES
FOR SUPPRESSION HEARING

On April 18, 2013, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. The defendant checked into a hotel in Bothell, Snohomish County, Washington in the early morning hours on September 5, 2010—just after midnight on September 4, 2010.
2. The defendant paid for one night. The computer-based registration system at the hotel does not allow entry of a check-out date on the same day as the guest's check-in date, so in the defendant's case, the guest registry reflected a check-out date of September 6, 2010 even though in reality, he was expected to vacate the room by the normal check-out time on September 5, 2010.

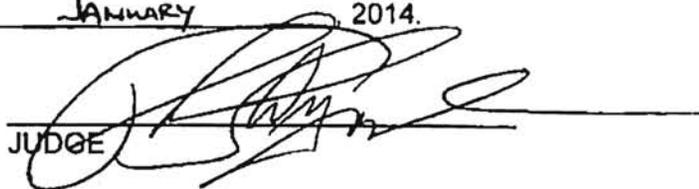
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3. Officers from the Bothell Police Department were called to the room shortly after 5:30 a.m. on September 5, 2010. The defendant had already departed the hotel by that time. Officers secured the hotel room he had been staying in and there is no evidence the defendant returned to the hotel that day.
4. Per hotel policy, check-out time was 12:00 p.m. At 1:35 p.m. on September 5, 2010, the hotel's on-site manager gave the police officers consent to search the hotel room.
5. Officers entered the room, searched it, and recovered several items of evidence. The defendant's personal effects were not in the room.

II. CONCLUSIONS OF LAW

1. The defendant rented the hotel room for one night. After noon on September 5, 2010, he no longer had any reasonable expectation of privacy or tenancy in the room.
2. The officers from the Bothell Police Department were constitutionally permitted to enter the room pursuant to consent from the hotel's on-site manager. No search warrant was required.
3. Accordingly, the defendant's motion to suppress is denied.

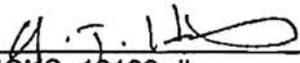
DONE IN OPEN COURT this 31 day of JANUARY, 2014.

JUDGE 

Presented by:


MATTHEW D. BALDOCK, #30892
Deputy Prosecuting Attorney

Copy received this _____ day of
_____, 2014.



JOHN T. HICKS, 13133, #
Attorney for Defendant *as to form*

WILLIAM THOMAS WRIGHT
Defendant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71506-2-1
)	
WILLIAM WRIGHT,)	
)	
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 30TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] WILLIAM WRIGHT
DOC NO. 371144
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JUNE 2014.

X *Patrick Mayovsky*