NO. 44998-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TYRONE EAGLESPEAKER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Courts

Decisions of Other States

Constitutional Provisions

Statutes

Rules

Other Authorities

A. SUMMARY OF ARGUMENT

Tyrone Eaglespeaker was acquitted of burglary and rape in the first degree but convicted of second degree rape after the State requested that lesser offense instruction over his objection. The acquittals are not terribly surprising; the complaining witness had perjured herself before.[1] The State was not entitled to a lesser offense instruction because such a conviction could be based only on the jury disbelieving a portion of the State's evidence; no affirmative evidence supported that only the lesser offense occurred.

The conviction should be reversed for a new trial on two additional bases. The trial court admitted the complaining witness's call to 9-1-1 and subsequent 30-minute conversation with police as an excited utterance although no evidence showed she remained continuously under the stress of the alleged event a couple days later when she made the call. Additionally, the court should not have admitted Mr. Eaglespeaker's statements to police made after he requested an attorney but none was provided.

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[1] Additional evidence was produced by the State after sentencing showing that Julie Ricciardi had not only perjured herself before a grand jury on a different topic but had previously made false rape allegations strikingly similar to the instant allegations against Mr. Eaglespeaker. *See* Motion for Stay at 2-3 (Feb. 24, 2014). The jury was unaware of the prior false allegation evidence because Mr. Eaglespeaker did not learn of it until after sentencing. *See id.*

B. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury on the inferior degree offense of rape in the second degree at the State's request.

2. The admission of Julie Ricciardi's hearsay statements in her call to 9-1-1 as an excited utterance was an abuse of discretion.

3. The trial court further abused its discretion by admitting Ms. Ricciardi's statements to responding officers as excited utterances.

4. Mr. Eaglespeaker's Fifth Amendment and article I, section 9 rights to counsel were violated when the court admitted his statements to police made after he requested an attorney. *See* CP 115-16 (CL VII, VII, X, XI, XIII, XIV).

5. The trial court erred in concluding Mr. Eaglespeaker was not in custody. CP 115 (CL VII, CL X).

6. The trial court erred in concluding the officers were not interrogating Mr. Eaglespeaker because they were investigating a hang-up 9-1-1 call and not rape allegations. CP 115 (CL VIII).

7. The trial court erred in concluding Mr. Eaglespeaker's request to speak with counsel was equivocal. CP 116 (CL XII).

8. The trial court erred in concluding the officers were not interrogating Mr. Eaglespeaker later in the same discussion when

Detective Garrity informed Mr. Eaglespeaker he wanted to talk about another incident. CP 115 (CL XI).

9. The trial court's oral rulings to the same effect are likewise in error. *See* CP 116 (CL XVII (incorporating oral rulings)).

10. Cumulative error denied Mr. Eaglespeaker his due process right to a fair trial.

11. The trial court exceeded its authority by imposing discretionary costs without determining Mr. Eaglespeaker's financial circumstances.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The moving party is entitled to a jury instruction on an inferior degree offense when, looking at the evidence in the light most favorable to the moving party, affirmative evidence demonstrates a reasonable inference that only the inferior degree offense occurred. An inferior degree instruction is not supportable if it depends upon the jury simply disbelieving certain evidence. Did the trial court err when it granted the State's request for a second degree rape instruction over Mr. Eaglespeaker's objection where no affirmative evidence showed forcible compulsion without felonious entry and the court and

prosecutor recognized the jury could convict of second degree rape only if it disbelieved the State's evidence of felonious entry?

2. Excited utterances are admissible, as a limited exception to the hearsay prohibition, if the statement relates to a startling event or condition and is made while the declarant remained continuously under the stress of excitement caused by the event or condition. The proponent of the statement bears the burden to prove admissibility. Did the trial court abuse its discretion, requiring reversal of the conviction, by admitting the alleged victim's out-of-court statements under the excited utterance exception where they were made to a 9-1-1 operator and then responding police officers a couple days after the alleged startling event, the State presented no evidence the declarant remained continuously under the stress of the event, and the evidence eventually adduced at trial shows she was not under continuous stress of the event such that she did not have the opportunity to fabricate?

3. Under the federal constitution, police may not continue to question a suspect after he unequivocally invokes his right to counsel. The Court should interpret our state constitutional provision more broadly to hold that an equivocal invocation may be followed up only with clarifying questions regarding the equivocal invocation.

Statements obtained in violation of these constitutional rules may not be admitted at trial. Did the trial court err in admitting Mr. Eaglespeaker's statements to police obtained after he requested an attorney, but was not provided one?

4. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. In light of the cumulative effect of the hearsay statements and Mr. Eaglespeaker's statements to police, both of which were admitted erroneously, coupled with the improperly provided lesser offense instruction, was Mr. Eaglespeaker denied a fundamentally fair trial?

5. The trial court is required to consider a defendant's financial circumstances and ability to pay before imposing discretionary costs. Did the trial court err by failing to do so here, requiring this Court to strike the discretionary costs?

D. STATEMENT OF THE CASE

Julie Ricciardi has lied before. As she now admits, she testified falsely under oath before a grand jury 4/22/13 RP 3-10; 5/14/13 RP 80-82, 96-97; CP 46-57. On December 21, 2013 at approximately 11:30 in the morning, she called 9-1-1 and, with excitement in her

voice, explained to the operator that a friend's boyfriend came over "a couple days ago" and "tried to rape" her. Exhibit 41. She named Tyrone Eaglespeaker. *Id.* The 9-1-1 operator ended the call. *Id.*

Deputy Christian Lyle arrived at Ms. Ricciardi's townhome to investigate, with Detective Tim Garrity arriving a short time later. 3/28/13 RP 6-7, 38-39; 5/13/13 RP 25-28, 61.[2] They spoke with Ms. Ricciardi for at least 30 minutes; although she was excited when they first arrived, she calmed down very quickly. 3/28/13 RP 7, 39; 5/13/13 RP 30-31, 66. She told the officers that Mr. Eaglespeaker entered her bedroom during the night, two nights earlier, and tried to have sex with her. 3/28/13 RP 7; 5/13/13 RP 67-69.[3] The officers photographed a jacket, hat and credit card that Ms. Ricciardi said belonged to Mr. Eaglespeaker. 5/13/13 RP 68-69. Ms. Ricciardi also claimed she had text messages between her and Mr. Eaglespeaker from the past two days—she purported to have both the sending and receiving cell phones because she had lent Mr. Eaglespeaker her incarcerated husband's phone, which he had subsequently returned to her. 5/13/13 RP 71-72; 5/14/13 RP 28-29, 30-33, 67; Exhibits 12-35.

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[2] Her young children were also present. 5/13/13 RP 30.

[3] She eventually testified that Mr. Eaglespeaker digitally penetrated her. 5/14/13 RP 54-55.

Meanwhile, 9-1-1 received a hang-up call from Mr. Eaglespeaker's home. 3/28/13 RP 8. Deputies Lyle and Manning responded to that address, knowing it was the residence of the suspect Ms. Ricciardi had named. 3/28/13 RP 24-25, 5/13/13 RP 96-97. Other officers followed. A caretaker, who is friends with Ms. Ricciardi, let the police into the home after they knocked without answer. 3/28/13 RP 9, 11, 27; 5/13/13 RP 73-76, 98-100, 138, 141, 148. Sergeant Johnston and Manning entered the home first, followed by Lyle and Garrity. 3/28/13 RP 11, 26, 31-32, 40-41.

Mr. Eaglespeaker exited his bedroom into the hallway to find the officers already inside. 3/28/13 RP 28-29. They went through the home on a protective sweep. 3/28/13 RP 16, 27; 5/13/13 RP 100-01. The officers handcuffed Mr. Eaglespeaker and detained him in the hallway. 3/28/13 RP 28-29. Deputy Manning questioned him about calling 9-1-1, while admittedly investigating any connection with the alleged sexual assault. 3/28/13 RP 29-31; *see* 3/28/13 RP 49. After discussing the 9-1-1 call, Deputy Manning told Mr. Eaglespeaker that Detective Garrity wanted to speak with him about "something he was looking into"; Detective Garrity planned to get a statement from Mr. Eaglespeaker about Ms. Ricciardi's allegations. 3/28/13 RP 32, 42.

Alone and in handcuffs, with four officers surrounding him, Mr. Eaglespeaker responded, "My father knows a lawyer and maybe I should call my father." 3/28/13 RP 33, 42, 45. But the officers did not let him speak with an attorney or inquire further into his request to do so. Instead, Deputy Manning read Mr. Eaglespeaker his *Miranda*[4] rights for the first time. 3/28/13 RP 33-35.

Mr. Eaglespeaker admitted he has gone to Ms. Ricciardi's house but denied intending to have sex with her or actually having sex with her. 3/28/13 RP 14-15. He had heard that Ms. Ricciardi was telling stories about him. 3/28/13 RP 43-44. But, he related that he borrows Ms. Ricciardi's car, always knocks before entering, and though she had asked that he take a shower with her, he had declined. 3/28/13 RP 46-47; *see* 5/14/13 RP 25 (testimony of Ricciardi confirming Eaglespeaker borrows her car). He had called 9-1-1 to try to address those rumors but then decided not to say anything and hung up. 3/28/13 RP 29-30.

Mr. Eaglespeaker was then formally placed under arrest, and he again requested to speak with an attorney. 3/28/13 RP 16-17, 49. Only then did the officers' questioning stop. 3/28/13 RP 17.

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[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

While in the home, Detective Manning observed what looked like drugs and drug paraphernalia, which were eventually seized. *E.g.*, 5/13/13 RP 42-48.

From jail, Mr. Eaglespeaker asked to speak to the police, and told the responding officer that he had not raped Ms. Ricciardi and that she had asked him to have sex with her, but he had declined. He said they engaged in consensual digital penetration only. 3/28/13 RP 52-56; 5/14/13 RP 105-09.

The State charged Mr. Eaglespeaker with burglary and rape, both in the first degree. CP 1-3. After Mr. Eaglespeaker declined a plea offer, the prosecutor added charges for possession of a controlled substance and possession of drug paraphernalia. 2/28/13 RP 2; CP 11-14.

After a Criminal Rule 3.5 hearing, Mr. Eaglespeaker's statements to the police in his home and from jail were admitted at trial. 3/28/13 RP 67 (court excluded only Eaglespeaker's statement that he hung up the 9-1-1 call because he did not want to speak to anyone); CP 9-10, 108-17; *see, e.g.*, 5/13/13 RP 37-39 (officers' testimony at trial). The court also admitted Julie Ricciardi's call to 9-1-1 two days after the alleged rape and break-in as well as her subsequent statements to the

responding officers. 4/5/13 RP 4-7; 5/14/13 RP 76-79. The caretaker friend of Ms. Ricciardi's testified Ms. Ricciardi (1) showed her some of the text messages Ms. Ricciardi showed police and (2) told her Mr. Eaglespeaker had broken in and tried to rape her. 5/13/13 RP 137-56; *see* 5/14/13 RP 64-66; 5/14/13 RP 83-84. At trial, Mr. Eaglespeaker did not contest the drug charges. 5/14/13 RP 149.

Without presenting any affirmative evidence that Mr. Eaglespeaker raped Ms. Ricciardi but did not break into her bedroom to do so, the State requested and, over objection, was granted jury instructions on the lesser degree offense of second degree rape. 5/14/13 RP 118-20, 128-29; CP 81-83.

The jury acquitted Mr. Eaglespeaker of burglary and rape in the first degree. However, he was convicted of second degree rape and the uncontested drug charges. CP 103-07, 118-36; CP __ (Sub # 97).[5]

[5] The parties filed a motion to permit entry of the amended judgment and sentence under RAP 7.2(e). The amended judgment reflects a reduced offender score and correspondingly reduced minimum term sentence. Because the amended judgment has not yet been added to the clerk's papers and because it is identical all material respects, this brief cites primarily to the original judgment and sentence.

A supplemental designation of clerk's papers has been filed asking the trial court to transfer documents indicated by subfolder number to this Court.

E. ARGUMENT

1. Because there was no affirmative evidence supporting only the inferior degree offense, the trial court erred in instructing the jury on rape in the second degree at the State's request.

An accused may only be convicted of those offenses charged in the information or those offenses which are either lesser included offenses or inferior degrees of the charged offense. U.S. Const. amend. VI; Const. art. I, § 22; *Schmuck v. United States*, 489 U.S. 705, 717-18, 109 S. Ct. 2091, 103 L. Ed. 734 (1989); *State v. Tamalini*, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) (citing *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1998); RCW 10.61.003).

An instruction on a lesser offense is warranted where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). An instruction for an inferior degree is proper only where:

> (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense;" (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is

> evidence that the defendant committed only inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (emphasis added) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

The factual inference required to satisfy the factual prong is the same for inferior degree and lesser included offense instructions. *Id.* at 455. First, in applying the factual prong, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *Id.* at 455-56. Here, that is the State. Second, affirmative evidence must support the inference that only the lesser offense was committed. *Id.* at 456. An instruction on a lesser offense is not proper simply because the jury might disbelieve a portion of the State's case. *Id.*

This factual prong was at issue in *State v. Brown*, 127 Wn.2d 749, 754-56, 903 P.2d 459 (1995). There, the State charged rape in the first degree alleging forcible compulsion plus the use or threatening the use of a deadly weapon. 127 Wn.2d at 754. At the close of evidence, the State requested an instruction on the lesser offense of rape in the second degree. *Id.* at 753. Our Supreme Court held the trial court erred in granting the instruction over the defendant's objection. *Id.* at 756.

As Mr. Brown argued, the alleged victim and others testified Mr. Brown raped her while holding a gun to her head and Mr. Brown's testimony indicated the two had consensual sex. *Id.* at 754. Thus, affirmative evidence showed either rape in the first degree, as charged, or consensual sex (and no crime). But no affirmative evidence showed Mr. Brown might have raped the alleged victim without holding a gun. *Id.* at 754-55. As the Court noted, "'affirmative evidence' requires something more than the possibility that the jury could disbelieve some of the State's evidence." *Id.* at 755 (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)). "Impeachment evidence that serves only to discredit the State's witness but does not itself establish that only the lesser crime was committed cannot satisfy the factual prong." *Id.* The State failed to satisfy the factual prong to support the provision of an inferior degree instruction; because the trial court nonetheless provided such an instruction reversal was required. *Id.* at 756.

This case is indistinguishable from *Brown*. Like in *Brown*, here there was evidence of forcible compulsion after felonious entry as well as consensual sex. The State presented no affirmative evidence that Mr. Eaglespeaker did not break into Ms. Ricciardi's home. Instead, as the court and the prosecutor recognized, to find Mr. Eaglespeaker

guilty of second degree rape, the jury would have to disbelieve the felonious nature of his entry into the home. 5/14/13 RP 119, 120, 130, 134-35. As the parties agreed in their respective closing arguments, the case came down to credibility, particularly that of Julie Ricciardi. 5/14/13 RP 139, 149, 164. But the factual prong requires the requesting party to show "something more than the possibility that the jury could disbelieve some of the State's evidence." *Brown*, 127 Wn.2d at 755.

Because the State failed to satisfy that burden here, the trial court erred in providing the State's requested lesser offense instruction. *Id.* at 756. Like in *Brown*, the resulting second degree rape conviction must be reversed. *Id.*

2. Because the 9-1-1 call was placed two days after the alleged incident without any showing Ms. Ricciardi remained continuously under the stress of the incident, Ms. Ricciardi's statements to the 9-1-1 operator and then to police should not have been admitted as excited utterances.

Before trial, the State moved to admit as an excited utterance the recording of Julie Ricciardi's two-day delayed call to 9-1-1, and Mr. Eaglespeaker objected. 4/5/13 RP 4. Because significant time had passed between the alleged event and the call and because the State could not show Ms. Ricciardi remained continuously under the stress of

the event at the time of the call, Mr. Eaglespeaker argued the recording did not meet the limited exception for excited utterances, which depends upon a lack of opportunity to fabricate. 4/5/13 RP 4-6.[6] The court listened to the first 20 seconds of the recording, and ruled: "All right, I'm going to grant the state's motion here to offer the 9-1-1 call. The rules on excited utterance's [sic] are considerably more relaxed in the State of Washington . . . and there are enough indicia in [the first 20 seconds of] the call to make a foundational case for the proposition that it is an excited utterance." 4/15/13 RP 6-7. The court misapplied the limited hearsay exception and did not address the State's burden to show that Ms. Ricciardi had remained continuously under the stress of the purported rape since it had occurred.

Based on its ruling admitting the 9-1-1 call, the court also admitted Ms. Ricciardi's statement to responding police officers, who questioned her for over 30 minutes.

[6] Mr. Eaglespeaker renewed his objection when the evidence was presented at trial. 5/14/13 RP 76-78.

a. The evidence rules provide a restrictive exception to the hearsay prohibition for statements made while the declarant remains continuously under the stress of the startling event being discussed.

Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Subject to narrow exceptions, hearsay is presumptively inadmissible. ER 802.

Hearsay is admissible at trial if it is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). The proponent of hearsay under this exception must satisfy three closely connected requirements: "that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition." *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007) (citation omitted).

This hearsay evidence is admissible only under the rationale that "under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control." *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence § 1747, at

195 (1976)). "[T]he key determination is 'whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" *Brown*, 127 Wn.2d at 758 (quoting *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)). Thus, to admit the evidence, the trial court must find by a preponderance of the evidence that the declarant remained continuously under the influence of the event at the time the statement was made. ER 104(a); *State v. Ramires*, 109 Wn. App. 749, 757, 37 P.3d 343 (2002).

ER 803(a)(2) must be interpreted in a restrictive manner, so as to "not lose sight of the basic elements that distinguish excited utterances from other hearsay statements. This is necessary . . . to preserve the purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present." *State v. Dixon*, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

b. As the proponent of the hearsay, the State did not prove Ms. Ricciardi's statements satisfied the restrictive excited utterance exception.

To secure admission of Ms. Ricciardi's 9-1-1 call, the State had to show it was made while she was under the continuing stress of

excitement caused by the startling event or condition. "This element is the essence of the rule." *Chapin*, 118 Wn.2d at 687. Spontaneity is the key. *Id.* at 688. A statement made contemporaneously with or soon after the startling event giving rise to it is most likely to satisfy this requirement. *Id.* The more time that has passed between the startling event and the statement, the more important the "proof that the declarant did not actually engage in reflective thought." *Id.* As the time between the event and the statement lengthens, "the opportunity for reflective thought arises and the danger of fabrication increases." *Id.*

The ultimate inquiry in determining whether this requirement is satisfied is whether the declarant had the time and opportunity between the startling event and the utterance to reflect and consciously fabricate a lie about the incident. *State v. Briscoeray*, 95 Wn. App. 167, 174, 974 P.2d 912 (1999). Satisfying this requirement ensures the statement is "'a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock', rather than an expression based on reflection or self interest." *Chapin*, 118 Wn.2d at 686 (quoting 6 J. Wigmore, Evidence § 1747 at 195).

Here, the State relied exclusively on the 9-1-1 recording to satisfy its burden, of which the court listened to only the first 20 seconds. The court apparently ruled the statements were excited utterances because Ms. Ricciardi sounded upset in these first few seconds of the 9-1-1 call. *See* 4/15/13 RP 4-6. The court per se abused its discretion by applying an incorrect standard. An out-of-court statement is not admissible as an excited utterance simply because the declarant was upset when making the statement. *Dixon*, 37 Wn. App. at 873-74. If that were the case, then "virtually any statement given by a crime victim within a few hours of the crime would be admissible because many crime victims remain upset or frightened for many hours, and even days and months, following the experience." *Id.*

If the court had applied the correct requirements for admitting hearsay statements as excited utterances, the recording clearly would have been excluded. In *Chapin*, the defendant was a nurse's aid at a convalescent center and the alleged victim was an elderly patient. 118 Wn.2d at 683. One day, every time the alleged victim saw Chapin walking the hallway or entering his room, he uttered a loud and angry outburst. *Id.* at 684. When his wife tried to calm him down and asked him why he did not like Chapin, the alleged victim said, "Raped me."

Id. The trial court admitted the statement as an excited utterance. *Id.* at 685.

The Supreme Court reversed. The court held that the statement did not qualify as an excited utterance because the witness was not under the stress of excitement caused by the startling event when he made the statement. *Id.* at 689-90. The alleged rape had occurred "within a day or so." *Id.* at 689. "Because of this time lapse, [the alleged victim] was unlikely to have still been in an excited state caused by the alleged rape itself when he made the statement." *Id.* In fact, earlier in the day, he had been calm and had engaged in his usual activities, which increased the danger of fabrication. Thus, the requirement of an excited state caused by the startling event was not met because about 24 hours interrupted the event and the declaration. *Id.*

The Court confirmed the impropriety of the trial court's admission of the statements by looking to other factors indicating doubtful reliability. For example, the alleged victim's mental state was deteriorated. Medical records showed he engaged in "obvious confabulation." *Chapin*, 118 Wn.2d at 690. He also had a history of being angry prior to the alleged instance. *Id.* at 690-91.

Even more unreliable than the statements in *Chapin*, which were made about a day after the startling event, Ms. Ricciardi waited to call 9-1-1 for "a couple days." Ex. 41 at 00:34-38. Despite Mr. Eaglespeaker's objection, the State presented no evidence that Ms. Ricciardi had remained continuously under the control of the stress of the event during those couple days such that she was incapable of fabricating her statements. *See* 4/5/13 RP 4-6. The evidence at trial, in fact, showed Ms. Ricciardi had gone about her life caring for her children in the intervening days. 5/14/13 RP 58-67, 75. Even more disturbing, she fabricated lies during this intervening time period. 5/14/13 RP 68-70, 88, 90; *compare Briscoeray*, 95 Wn. App. at 168-69, 172 (trial court's ruling admitting statements affirmed where call to 9-1-1 made less than a minute after attempted murder during which time victim got herself to guard's booth to make call) *with Brown*, 127 Wn.2d at 752-53, 757-58 (not excited utterance where victim had opportunity to lie when she conversed with others following startling event and did in fact lie). And like the alleged victim in *Chapin*, whose medical condition and prior outbursts cast doubt on the reliability of his out-of-court statements, Ms. Ricciardi not only fabricated lies before calling 9-1-1 but had lied under oath before. 5/14/13 RP 80-81, 96-97;

CP 46-57 (Ricciardi's perjury raised in pretrial motions). She was clearly capable of fabrication.[7]

Consequently, the statements were not excited utterances and the trial court abused its discretion in admitting them at trial. *See Chapin*, 118 Wn.2d at 689-90; *Dixon,* 37 Wn. App. at 873-74.

c. Reversal is required because the improperly admitted 9-1-1 call was not minor in comparison to the evidence overall.

Evidentiary errors require reversal "if the error, within reasonable probability, materially affected the outcome." *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). The improper admission of hearsay evidence constitutes harmless error only if the evidence is of minor significance in reference to overall, overwhelming evidence as a whole. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010).

The erroneously admitted statements were not harmless. The court's ruling admitting the 9-1-1 call was also applied to Ms.

[7] As discussed, Mr. Eaglespeaker was unfortunately unaware of Ms. Ricciardi's prior false rape allegation at the time of this trial, which also demonstrates her penchant for fabrication. *See* Motion to Stay at 2-3.

Ricciardi's statements to the responding officers. 5/13/13 RP 66-67. Thus, the jury not only heard the 9-1-1 tape, and Ms. Ricciardi's excited tone, but also the officers' recitation of her statements to them over the course of more than 30 minutes. *E.g.*, 5/13/13 RP 25-31, 67-69. These close-in-time statements to law enforcement were the most coherent description of the event offered and were likely weighted favorably by the jury for their closeness in time alone. Indeed, the jury asked to replay the recording during deliberations, showing it believed the call was important. CP 62-63.[8]

Moreover, the officers' response to the 9-1-1 call and Ms. Ricciardi's statements to them was the first evidence of the alleged rape that the jury received. On the stand, the prosecutor first questioned Ms. Ricciardi about the text messages purportedly exchanged between her and Mr. Eaglespeaker. 5/14/13 RP 22-45. These messages were often off topic and hard to follow. *See* Exhibits 12-35. Plus, Ms. Ricciardi's story about how she had both the sending and receiving phone was suspicious. 5/14/13 RP 86-88, 90; *see* 5/14/13 RP 152-54 (defense

[8] The trial court originally responded that the jury would have to recall the testimony. CP 63. The next morning, the court permitted the jury to hear the call again, if it still would like. 5/15/13 RP 2. The jury deliberated for another three hours, but the record does not reflect whether the tape was replayed. *See* CP __ (minutes from 5/15/13, p. 1).

closing argument pointing out multiple bases for lack of reliability in text message evidence).

The hearsay statements helped the State's case for other reasons. As mentioned, Ms. Ricciardi was a questionable witness because she admitted to previously perjuring herself. She also told the jury that she did not call the police sooner because she was in a drug treatment diversion program, had used drugs a few days earlier, and was afraid her children would be taken away if the police learned she had been using again. *E.g.*, 5/14/13 RP 99-100.

The State's case was further weakened by investigational flaws: the police had not interviewed Ms. Ricciardi's neighbors (she shared walls with other units), her front door did not look like it had been tampered with, and her young children were purportedly present during the alleged rape. *E.g.*, 5/13/13 RP 92-93; 5/14/13 RP 22-23, 26, 94-95. Additionally, Ms. Ricciardi claimed she told the police her jeans had been ripped by Mr. Eaglespeaker but the police denied she relayed that information and the jeans were not available as evidence. 5/13/13 RP 92, 143; 5/14/13 RP 50, 52-53, 91-92, 103.

In short, the State's evidence without Ms. Ricciardi's statements was not overwhelming. The admission at trial of Ms. Ricciardi's out-

of-court statements cannot be deemed harmless beyond a reasonable doubt.

3. The admission of Mr. Eaglespeaker's custodial statements, made after he requested an attorney, violated his constitutional right to silence.

a. If an accused requests counsel, police must cease interrogation and may not reinitiate questioning until counsel has been provided.

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, protects criminal suspects against compelled self-incrimination. U.S. Const. amends. V, XIV; *Edwards v. Arizona*, 451 U.S. 477, 481, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Likewise, our state constitution provides, "No person shall be compelled in any criminal case to give evidence against himself . . . ." Const. art. I, § 9. These constitutional clauses provide not only the right to remain silent, but also the right to have counsel present during custodial interrogation. *E.g.*, *Edwards*, 451 U.S. at 482. The assistance of counsel is necessary "to dispel the compulsion inherent in custodial surroundings." *Miranda v. Arizona*, 384 U.S. 436, 458, 466, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Otherwise, "no statement obtained from the defendant can truly be the product of his free choice." *Id.*

If, during questioning, an accused requests counsel, "the interrogation must cease until an attorney is present." *Edwards*, 451 U.S. at 482 (quoting *Miranda*, 384 U.S. at 474). So long as the accused has made "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney," questioning must end. *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). The police may not resume the interrogation until counsel has been made available. *Edwards*, 451 U.S. at 484-85. This is a "rigid rule" protecting an "undisputed right." *Id.* at 485. The Fifth Amendment, "while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" *Withrow v. Williams*, 507 U.S. 680, 692, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993).

A trial court's factual findings following a Criminal Rule 3.5 hearing are reviewed for substantial evidence, *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), but this Court reviews de novo the legal question whether Mr. Eaglespeaker invoked his right to counsel, *State v. Johnson*, 94 Wn. App. 882, 897, 974 P.2d 855 (1999); *United States v. Santistevan*, 701 F.3d 1289, 1292 (10th Cir. 2012).

b. Contrary to the trial court's conclusion, Mr. Eaglespeaker was in custody when he was handcuffed in his home, surrounded by four officers who were looking into a connection between the dropped 9-1-1 call and the alleged sexual assault.

Due to the coercive nature of police custody, police officers must administer *Miranda* warnings prior to interrogation of any suspect who "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. A suspect is in custody if, in light of the totality of the circumstances, a reasonable person would have felt he "was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995); *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

In determining if a suspect is in custody, the reviewing court looks at "all of the circumstances surrounding the interrogation" to determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *J.D.B. v. North Carolina*, __ U.S.__, 131 S. Ct. 2394, 2402, 180 L. Ed. 2d 310 (2011) (quoting *Thompson*, 516 U.S. at 112). The court must "'examine all of the circumstances surrounding the interrogation,' including any circumstance that 'would have affected

how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'" *Id.* (internal citations omitted) (quoting *Stansbury v. California*, 511 U.S. 318, 322, 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)).

Appellate courts review the trial court's custody determination de novo. *State v. Daniels*, 160 Wn.2d 256, 261, 266, 156 P.3d 905 (2007).

Mr. Eaglespeaker was in custody upon review of the totality of the circumstances. In fact at trial, Detective Garrity characterized Mr. Eaglespeaker as "in custody." 5/13/13 RP 32. Two officers had barged into Mr. Eaglespeaker's home, with two more officers following, and conducted a protective sweep; Mr. Eaglespeaker emerged from the bedroom. 3/28/13 RP 24-27; *see United States v. Griffin*, 922 F.2d 1343, 1351 (8th Cir. 1990) (custody finding more likely where contact instigated by law enforcement not suspect). He was alone. *See United States v. Craighead*, 539 F.3d 1073, 1087 (9th Cir. 2008) (isolation from others is "crucial factor" in finding custody); *Griffin*, 922 F.2d at 1355 (suspect in custody when isolated in handcuffs in his home). An officer placed Mr. Eaglespeaker in handcuffs while he was standing in the hallway. 3/28/13 RP 28.

Detained in handcuffs in the hallway of his residence, Mr. Eaglespeaker was surrounded by Detective Manning and Sergeant Johnston. 3/28/13 RP 24-28. And the officers began to question him about the 9-1-1 call without telling him that he was free to leave or cease questioning. 3/28/13 RP 29-30; *see Craighead*, 539 F.3d at 1087 ("If a law enforcement officer informs the suspect that he is not under arrest, that statements are voluntary, and that he is free to leave at any time, this communication greatly reduces the chance that a suspect will reasonably believe he is in custody.").

Detective Manning was looking for a connection between the dropped 9-1-1 call and the alleged burglary and sexual assault of Julie Ricciardi he had been investigating. 3/28/13 RP 30-31; *see* 3/28/13 RP 38 (officers aware dropped call came from assault suspect's residence); CP 109 (FF 7, 8 (9-1-1 call known to be associated with rape and burglary allegations)).[9] Deputy Lyle and Detective Garrity then arrived as well, raising the total to four officers. 3/28/13 RP 31, 42. Deputy Lyle had called in Detective Garrity for help on what he termed a "rape" investigation. 3/28/13 RP 38. The two officers had determined

[9] Thus, the trial court's conclusion that the officers "were not investigating rape allegations but a hang-up 911 call" rendering their questions not interrogation is also in error and not supported by substantial evidence in the record. *See* CP 115 (CL VIII).

they had probable cause to arrest Mr. Eaglespeaker. CP 110 (FF 23). Detectives Manning and Garrity told Mr. Eaglespeaker they wanted to talk to him about something they were looking into, the sexual assault. 3/28/13 RP 32, 49 (investigating 9-1-1 call and rape); CP 111 (FF 42).[10] Again, no one told Mr. Eaglespeaker that his statements were voluntary or he was free to leave. That is when Mr. Eaglespeaker requested an attorney. 3/28/13 RP 33, 45; CP 111 (FF 43).

An objectively reasonable person would conclude that he was not free to leave when he is held in handcuffs in the hallway of his home, isolated from anyone else, surrounded by up to four police officers who entered his home and were questioning him as a suspect in a rape allegation and a dropped 9-1-1 call. The trial court's conclusions otherwise were erroneous. *See* CP 115 (CL VII, X).

c. The trial court violated Mr. Eaglespeaker's constitutional rights by admitting statements he made in response to questioning after stating he wanted to speak with an attorney.

Mr. Eaglespeaker was in custody when he stated his request for an attorney. At that point, law enforcement was required to cease the

[10] As these facts demonstrate, the court's conclusions that the officers were not interrogating Mr. Eaglespeaker and were not talking to him about the rape investigation are not supported by substantial evidence and are erroneous. *See* CP 115 (CL VIII, XI).

interrogation and not reinitiate questioning until an attorney was provided. *Edwards*, 451 U.S. at 484-85; *Miranda*, 384 U.S. at 474. Instead, the officers read his *Miranda* rights for the first time and continued to question him. 3/28/13 RP 33-35.

In *Edwards*, as here, the police did not provide the accused with an attorney but advised him of his *Miranda* rights before resuming questioning. *Edwards*, 451 U.S. at 479 (Edwards was readvised); 3/28/13 RP 33-35 (officer responds to request for attorney by reading *Miranda* rights to Eaglespeaker). In *Edwards*, the Supreme Court held that, despite the readvisement, the statements were inadmissible because once an individual requests counsel, he is not subject to further interrogation until counsel has been made available to him. 451 U.S. at 484-85.

So long as the accused has made "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney," questioning must end. *Davis*, 512 U.S. at 459.

> Although a suspect need not "speak with the discrimination of an Oxford don," [concurring opinion] at 2364 (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the

> circumstances would understand the statement to be a request for an attorney.

Id. at 458-59. Mr. Eaglespeaker did so here when he stated "I know my father has an attorney" and "maybe I should call my dad." His statements mirror the suspect who asserted his rights by stating, "I'd rather wait until my mom get me a lawyer." *State v. Bell,* 958 So.2d 1173, 1174-75 (La. 2007). Similarly, a suspect unambiguously invoked his Fifth Amendment right to counsel by saying, "I think I would rather have an attorney here to speak for me". *McDaniel v. Commonwealth*, 28 Va. App. 432, 433, 437, 506 S.E.2d 21 (Va. Ct. App. 1998). Like these accuseds, Mr. Eaglespeaker invoked his right to counsel, but the officers questioned him without an attorney anyway. The trial court's contrary conclusion is erroneous and admission of his subsequent statements was unconstitutional. *Edwards*, 451 U.S. at 481; CP 116 (CL XII).[11]

[11] Our Supreme Court recently held that the statement "I just write it down, man. I can't do this. I, I, I just write, man. I don't want . . .I don't want to talk right now, man" is at best an equivocal invocation of the right to silence because the speaker indicated a preference to communicate with the police by writing it down. *State v. Piatnitsky*, No. 87904-4, __ Wn.2d __, 2014 WL 1848366, *1-2, 4 (May 8, 2014). The suspect indicated a preference as to the form of communication; he did not invoke his right to silence. *Id.* Unlike Mr. Piatnitsky's statements, Mr. Eaglespeaker did not indicate merely a preferred form of communication but that he wanted his father's attorney present.

d. Reversal is required because the State cannot prove beyond a reasonable doubt that the erroneously admitted statements did not contribute to the verdict obtained.

The State bears the burden of proving that the admission of statements obtained in violation of Miranda was harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 292-97, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In other words, the State must show that the admission of the confession did not contribute to the conviction. *Fulminante*, 499 U.S. at 296 (citing *Chapman*, 386 U.S. at 26).

The State cannot meet this heavy burden here. The State used Mr. Eaglespeaker's statements to the police to indicate consciousness of guilt and to tarnish his credibility. *See State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (inconsistent statements by defendant to police are relevant to show consciousness of guilt); *State v. Allen*, 57 Wn. App. 134, 143-44, 787 P.2d 566 (1990) (sense of guilt inconsistent with denial of improper conduct). The State contrasted his initial statements, in which he denied any sexual contact, to those made later from jail, in which he admitted he digitally penetrated Ms. Ricciardi but stated it was upon her request. *See* 5/13/13 RP 38-40, 77, 91-92;

5/14/13 RP 105-09. Those latter statements would have had significantly more force had the jury not heard they were preceded by an outright denial. Moreover, in closing the prosecutor emphasized the inconsistency in his statements. 5/14/13 RP 144. Alternatively, the State may not have introduced any of Mr. Eaglespeaker's statements if the initial statements had been excluded.[12]

Moreover, as set forth in Section E.2.c, the State's evidence was not overwhelming, rather it was strikingly flawed. In fact, the jury acquitted Mr. Eaglespeaker of the most serious charges. Without Mr. Eaglespeaker's own statements, it cannot be said beyond a reasonable doubt that the State would have secured the lesser rape in the second degree conviction.

[12] The effect of the police misconduct cannot truly be measured simply by excluding Mr. Eaglespeaker's initial statements. If the police had honored Mr. Eaglespeaker's constitutional right to counsel at the time he asserted it, as required, and not elicited the absolute denial from him, Mr. Eaglespeaker likely never would have asked to speak with the police from jail.

e. Even if reversal is not required under the Fifth Amendment, Washington's broader constitutional right necessitates reversal.

As discussed above, reversal is required under the federal constitution. However, if this Court disagrees, it should review the issue under Washington's broader article I, section 9.[13]

To determine whether a state constitutional provision supplies different or broader protections than its federal counterpart, this Court evaluates six nonexclusive criteria: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986).

i. *The text of article I, section 9 and differences in language between article I, section 9 and the Fifth Amendment.*

When "the language of the state provision differs from the federal, and the legislative history of the state constitution reveals that

[13] In *Piatnitsky*, the court did not reach the issue under article I, section 9. 2014 WL 1848366 at *3 n.3.

this difference was intended by the framers" it is particularly appropriate to interpret our "state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution." *State v. Simpson*, 95 Wn. 2d 170, 177, 622 P.2d 1199 (1980). Article I, section 9 of the Washington Constitution provides, "No person shall be compelled in any criminal case to give evidence against himself. . . ." Const. art. I, § 9. The language is significantly different from that of the Fifth Amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

In using the word "witness," the federal constitution's focus is on guaranteeing the right not to testify against oneself at trial. *See Michigan v. Tucker*, 417 U.S. 433, 440, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974) (although caselaw has extended its meaning, the language of the Fifth Amendment "might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify"); *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (a "witness" is a person who "bears testimony"). But our framers explicitly rejected a proposed version of article I, section 9 which would have merely protected the right of a person not to "testify

against himself." *Journal of the Washington State Constitutional Convention, 1889*, at 498 (B. Rosenow ed. 1962). Instead, they favored the broader "give evidence" language. *Id.* In so doing, our founders expressly provided strong protection against self-incrimination at the investigatory stage.

On similar grounds, the Massachusetts Supreme Court has held their state constitution more protective than the Fifth Amendment in the context of equivocal invocations of the right to silence. *Commonwealth v. Clarke*, 461 Mass. 336, 345-46, 350, 960 N.E.2d 306 (Mass. 2012). In light of the differences in text between the Fifth Amendment and article I, section 9, this Court should similarly hold that our state constitution provides broader protection in this context.

ii. *Constitutional history and pre-existing state law.*

The third and fourth *Gunwall* factors, constitutional and common-law history and pre-existing state law, also demonstrate that article I, section 9 provides stronger protection than the Fifth Amendment. As discussed above, our founders rejected language that was similar to that of the federal constitution in favor of language which more broadly protects persons against compelled self-

incrimination. Furthermore, this Court's decisions pre-dating Fifth Amendment case law provided greater protection in this context than the U.S. Supreme Court later endorsed. *See State v. Robtoy*, 98 Wn.2d 30, 39, 653 P.2d 284 (1982). *Robtoy*, which was the law in this state for decades, held that:

> Whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. *Further questioning thereafter must be limited to clarifying that request* until it *is* clarified.

98 Wn.2d at 39 (emphases in original).

In *Radcliffe*, this Court noted that *Robtoy* was no longer good law *as to the Fifth Amendment* in light of *Davis*, but it declined to reach the state constitutional issue. *State v. Radcliffe*, 164 Wn.2d 900, 907, 194 P.3d 250 (2008).[14] The fact that *Robtoy* was the law in this State

[14] Other state courts have reached the issue and applied the *Robtoy* rule under their state constitutions. *See, e.g., State v. Diaz-Bridges*, 208 N.J. 544, 34 A.3d 748 (N.J. 2012); *State v. Holcomb*, 213 Or. App. 168, 159 P.3d 1271 (Or. Ct. App. 2007); *State v. Hoey*, 77 Hawai'i 17, 36, 881 P.2d 504, 523 (Haw. 1994); *Steckel v. State*, 711 A.2d 5, 10-11 (Del. 1998) (announcing same rule under article I, section 7 of Delaware Constitution); *State v. Risk*, 598 N.W.2d 642, 644 (Minn. 1999); *see also State v. Effler*, 769 N.W.2d 880, 895-96 (Iowa 2009) (Appel, J., specially concurring) (suggesting that upon proper briefing, Iowa Supreme Court would decline to follow *Davis* under state constitution). It is appropriate to review those cases to help determine the scope of protection under our state constitution. *See Gunwall*, 106 Wn.2d at 67-68 (reviewing state constitutional cases from Colorado and New Jersey in determining scope of protection under article I, section 7).

for decades, and that it provided stronger protection than that ultimately afforded by the U.S. Supreme Court under the federal Fifth Amendment, weighs in favor of a broader interpretation of the related rights under article I, section 9.

iii. *Structural differences and matters of particular state concern.*

The fifth *Gunwall* factor, differences in structure between the state and federal constitutions, always supports an independent constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). While individual rights were tacked on as amendments to the federal constitution, our state constitution begins with the Declaration of Rights.

Finally, state law enforcement measures are a matter of state or local concern. *Id.* at 180-81; *Miranda*, 384 U.S. at 467 ("We encourage Congress and the States to continue their laudable search for

increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws").[15]

Furthermore, the fundamental fairness of trials held in Washington is a matter of particular state concern. *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984). Here, fundamental fairness dictates that the federal rule does not apply in Washington. When a suspect invokes his rights during a custodial interrogation, but the invocation is ambiguous, police must limit further questioning to clarifying the request. *See Robtoy*, 98 Wn.2d at 39; *Davis,* 512 U.S. at 467 (Souter, J., concurring in the judgment) ("The concerns of fairness and practicality that have long anchored our *Miranda* case law point to a rule requiring law enforcement officials who reasonably do not know whether or not the suspect has invoked his rights to "stop their interrogation and ask him to make his choice clear.").

In sum, an evaluation of the *Gunwall* factors shows article I, section 9 provides broader protection against compelled self-incrimination than the Fifth Amendment.

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[15] That this is a matter of local concern is also supported by the several state courts that have so recognized and have held that their state constitutions are more protective in this context. *See* note 14, *supra.*

iv. *Even if Mr. Eaglespeaker's request to speak with an attorney was equivocal, reversal is required under article I, section 9.*

Under this broader state constitutional provision, even an equivocal invocation of rights cannot be followed by interrogation. Instead, the police are limited to questions that seek to clarify the equivocalness of the invocation. *See Delaware v. Draper*, 49 A.3d 807, 811 (2002) (reversing under Delaware Constitution where defendant ambiguously invoked his right to remain silent but detective did not limit ensuing questions to clarifying the assertion). Further seeking to elicit a waiver in the face of equivocation is unconstitutional. *See Robtoy*, 98 Wn.2d at 39-40 ("we will not permit interrogating officers to use the guise of clarification as a subterfuge for eliciting a waiver of the previously asserted right to counsel").

Thus, even if not unconstitutional under the Fifth Amendment, the officers violated Mr. Eaglespeaker's article I, section 9 right to counsel when he stated "my father has an attorney," and "maybe I should call my dad" but the officers advised him of his *Miranda* rights, obtained a waiver, and then interrogated him. *See* 3/28/13 RP 13-14 (Deputy Lyle understood Eaglespeaker's statement as ambiguous request for attorney). For the reasons set forth above, the State cannot

prove the admission of his subsequent statements was harmless beyond a reasonable doubt. Reversal is required.

4. Cumulative trial errors denied Mr. Eaglespeaker his constitutional right to a fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Each of the above trial errors requires reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Eaglespeaker a fundamentally fair trial. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. On this independent ground, the verdict should be reversed.

5. Because the court did not make an individualized determination that Mr. Eaglespeaker has the ability or likely will have the ability in the future to pay discretionary costs, the imposition of such costs was erroneous.

a. The court failed to comply with its statutory mandate when it imposed discretionary costs without considering Mr. Eaglespeaker's ability to pay.

Alternatively, if the Court affirms Mr. Eaglespeaker's convictions, the discretionary costs should be stricken because the trial court exceeded its statutory authority by imposing them without an individualized determination of Mr. Eaglespeaker's ability to pay.[16] The trial court imposed $4,300 in discretionary costs but only checked a boilerplate finding that Mr. Eaglespeaker has the ability to pay or likely will have the future ability to pay. CP 123, 126-27. The court

[16] The Washington Supreme Court is currently considering a similar issue in *State v. Blazina*, No. 89028-5 (oral arg. heard Feb. 11, 2014).

also set payment to begin in $25 increments on July 10, 2013. CP 128. The imposition of these costs violated the court's sentencing authority. Courts may not require a defendant to reimburse the state for costs unless the defendant has or will have the means to do so. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). The statute requires the court to consider the financial resources of the defendant before imposing discretionary costs. *Id.*

RCW 10.01.160(3) provides:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3). The word "shall" establishes that the requirement is mandatory. *State v. Claypool*, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). Before imposing discretionary costs, the sentencing court has an affirmative duty to make an inquiry into the defendant's individual situation to determine his or her ability to pay. *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013).

The record here makes clear the court made no such consideration. No reference to Mr. Eaglespeaker's resources, ability to pay, or likely future ability to pay was made at sentencing. 6/13/13 RP

2-9. The most the court said about the costs was that it did not matter when the obligation to pay began, but it set that date as July 10, 2013. 6/13/13 RP 8.

b. This Court should review the issue for the first time on appeal.

"[E]stablished case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "This rule applies likewise to a challenge to the sentencing court's authority to impose a sentence." *State v. Hunter*, 102 Wn. App. 630, 633, 9 P.3d 872 (2000) (reviewing challenge to imposition of financial contribution to drug fund raised for the first time on appeal). Also, a defendant may challenge for the first time on appeal the imposition of a criminal penalty on the ground that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).

This Court has previously reviewed this type of sentencing issue for the first time on appeal, and should do so here. *See, e.g., State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011); *State v. Curry*, 62 Wn. App. 676, 678-79, 814 P.2d 1252 (1991), *aff'd* 118 Wn.2d 911; *State v. Baldwin*, 63 Wn. App. 303, 308-12, 818 P.2d 1116 (1991).

c. The issue is ripe for review by this Court.

Mr. Eaglespeaker raises a challenge directly to the court's order imposing the discretionary costs. It is not the enforcement of costs that is at issue but the actual finding, made without individual consideration, and violation of the statutory authority to impose the costs in the first place that is at issue. Therefore, the issue is ripe. *Compare, e.g.*, *Lundy*, 176 Wn. App. at 109 (challenge to order requiring payment of discretionary costs on hardship grounds is not ripe for review until attempt to collect is made) *with, e.g.*, *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (challenged action ripe for review if issue is legal, does not require further factual development, and action is final). While Mr. Eaglespeaker's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing the debt in the first place does not change absent relief from this Court.

For these reasons, this Court should strike the discretionary costs imposed.

F. CONCLUSION

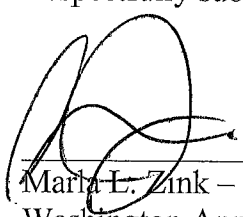
Mr. Eaglespeaker's rape conviction should be reversed due to the individual or cumulative effect of several trial court errors. First,

the court should not have provided a lesser offense instruction because the evidence did not support it. Second, the complaining witness's two day late 9-1-1 call and subsequent statements to police were not excited utterances because the passage of time and evidence Ms. Ricciardi did not remain under the stress of the event during the interceding days shows she had the opportunity to fabricate. Finally, Mr. Eaglespeaker was in custody, subject to interrogation, when he asked to speak with an attorney. Because the police continued to question him in violation of his constitutional right to silence, his subsequent statements should have been excluded.

Alternatively, the court should strike the discretionary costs imposed as part of Mr. Eaglespeaker's sentence.

DATED this 16th day of May, 2014.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. TYRONE EAGLESPEAKER, Appellant.	)))))))))	NO. 44998-6-II

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