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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 350410

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent

vs.

CRAIG CLARK, Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF APPELLANT

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REFERENCE FOR REPORTS OF PROCEEDINGS

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I.

ASSIGNMENTS OF ERROR

1. The trial court erred and violated Mr. Clark's rights under the Fifth Amendment of the United States Constitution and/or under Article One Section 9 of the Washington State Constitution when the Court admitted into evidence Mr. Clark's interrogation, which under the totality of the circumstances was involuntary, in particular due to the fact that Mr. Clark's interrogators lied to him regarding the DNA evidence in the State's possession.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court committed reversible error by not engaging in a full evaluation as to the interrogation as a whole upon finding that law enforcement lied to Mr. Clark about the state of the evidence held against him, especially when the trial court assumed the medical exam came the day after the alleged rape, when in fact it came six days afterward.

2. Whether the trial court committed reversible error in not evaluating the distinct nature of DNA-evidence, and the ramifications of lying to an accused in an interrogation about DNA evidence with a "One in Seventy-Five Quadrillion" chance of being mistaken.
3. Whether the trial court erred in not considering whether Washington case law and the Washington Constitution provide the accused more protection in police interrogations than does the United States Constitution.

II
STATEMENT OF THE CASE

This matter arises out of Appellant's conviction for Third degree rape of "Sallye Clark," an at the time 81-year-old woman who struggles with diminished mental capacity and memory difficulty. R.P. Vol I p. 77 ll. 2-10. The Appellant is the victim's step-son, but not blood-related to the victim. *Interview Transcript*. at 10. (Attached as Exhibit "A")

The State contends that Mr. Clark sexually assaulted Sallye Clarke on January 13, 2015, the date he last visited Sallye Clark. R.P. Vol. II p. 365 ll. 18-19. Ms. Sallye Clark testified she knew Mr. Clark since he was a boy. R.P. Vol I p. 70 ll. 9-11. When Ms. Clark was called as the States witness, the prosecution asked Ms. Sallye Clark if she saw Craig Clark in the courtroom that day, to which she responded; "I don't see him." R.P. Vol I p 69 l.10. (Mr. Clark attended the trial and sat at the Defense table alongside his attorney during Ms. Sallye Clark's testimony.)

Over strong objections to leading questions by the Defense, Ms. Sallye Clark testified that sex occurred between her Appellant, and that it made her angry. R.P. Vol I p. 70 ll 1-8. After the prosecutor asked about

whether Sallye Clark ever said “stop,” she testified that she did tell Defendant to “stop.” R.P. Vol I p. 70 l 12.

The prosecutor asked if Ms. Sallye Clark told anyone about the event, to which she responded: “I told everyone who would listen” (listing no specific names). R.P. Vol I p. 72 l. 5. The State asked whether Ms. Sallye Clark “knew,” certain people, including her sister-in law, doctor and the detectives. R.P. Vol I page 72-73. Presumably, due to memory difficulty, the prosecutor could do no more than ask Sally Clark if she told the individual the truth. Id.

The state asked if Ms. Sallye Clark remembered talking to some detectives, Sallye answered, “I believe I do ...” R.P. Vol I p. 73 l. 13. Defense counsel objected on hearsay grounds and the court overruled the objection. R.P. Vol I p. 73 l 14. Sallye Clarke then finished her thought (and answer to the question by stating) “Yes. My memory’s ...” R.P. Vol I p. 73 l 15. The court immediately interrupted Sallye Clarke’s answer, preventing her from testifying about her mental health. The Defendant does not base his appeal on the Court’s ruling, but the following interruption demonstrates that the victim’s “memory” would be a difficult issue and a central concern for the Defense. THE COURT:

Just one second. Overruled. It was an objection to leading, asking whether she recalled talking to detectives. Again, that's not suggesting an answer of anything of substance; so I've overruled it. The Answer was "I believe I do." (sic) "I believe I do, yes," was her answer. [To the prosecutor], Go ahead.

R.P. Vol I p. 73, ll 8-20. The transcriptionist caught words that certainly apply to an answer of a question actually asked, regarding Sallye Clark's ability to recall speaking to detectives. "My memory's ..." The Court cut the answer off, specifically directed the State to ask its next question, and the State asked only if Ms. Sallye Clark recalled telling the Detectives the truth.

The State established that Janet Breashers worked as Sallye Craig's permanent caregiver. R.P. Vol I. p. 76 ll 16-17. According to the record, Ms. Sallye Craig called Ms. Beshears on January 16, 2015, (3 days after the alleged rape) and said that Craig sexually assaulted her. Ms. Beshears testified that she took Ms. Sallye Clark to the doctor three days later, on January 19, 2015. R.P Vol I p 82, ll 1-25.

Dr. Pritchard testified that Ms. Sallye Clark told her that she had called Craig for help in moving boxes and he forced himself on top of her. R.P. Vol I p.199 ll 20-25. Dr. Pritchard noted that she found two "very small" superficial tears of the vagina. R.P. Vol II p 206 ll6-10. The doctor

admitted that the tears indicated possible sexual intercourse, but could not conclude whether it was forced or consensual sex. R.P. Vol II p. 208 II 3-12. The prosecution also presented testimony and physical evidence from Detective Stormi Koener, which included DNA taken from the comforter, and the interview of Appellant, Mr. Clark. *See generally*, R.P. Vol I pp 133-160.

The State obtained their physical evidence after an interview with Mr. Clark, wherein substantial deception was employed to illicit a confession. *See*, Investigation Transcript, Attached as Exhibit "A"). The issue as to whether to admit Mr. Clarke's statement into evidence was contested. The trial court began a C.R. 3.5 hearing on May 19, 2016, which it then continued – problematically – through the middle of trial, on May 24th, meaning the court had already heard the testimony of Sallye Clark. (The Defendant had requested a bench trial and that is not at issue in this appeal). The court's decision to admit Mr. Clark's interview statements mid-way through trial created problems discussed later in this brief.

The Rule 3.5 hearing centered on whether the State obtained Mr. Clark's statement in violation of the Fifth Amendment of the United States Constitution and Article I Section 9 Washington State

Constitutional, which prohibits the state from compelling a suspect to “give evidence of or against himself.”

Mr. Clark’s statement played a crucial role in a trial where; the alleged victim could not recall whom she told of the matter, could not identify the Defendant Mr. Clark sitting in the courtroom, where little medical evidence existed during an examination that took place *six days after a woman claimed to be raped*, and where it appeared that the detectives knew a conviction required getting “something” from Mr. Clark.

The court made its ruling on the admissibility of Craig Clark’s statement on the second morning of trial, after hearing Ms. Clarke’s testimony. *See generally*, R.P. Vol I pp 160-200. The trial court read its decision into the record. The court made note of the fact that law enforcement learned that a possible sexual assault took place on January 19, 2015. R.P. Vol I p 116 ll 9-10. During the Rule 3.5 hearing, the Court cited the wrong date, January 15th 2015, and yet there is nothing in the record that indicates law enforcement learned of any criminal complaint prior to the testimony of Office Gonzalez cite above at R.P. Vol I p. 167 ll19-20. The court did not address why it took law enforcement over a month to make an attempt to contact Mr. Clark, given that the victim

testified to telling everyone who would listen, noting that law enforcement said they left messages by phone on February 26 and 27, 2015. R.P. Vol I p. 168 ll 2-3. The trial court properly noted that it was on March 4, 2015, roughly six weeks after the incident, that law enforcement went to the Spokane Transit Authority – where Mr. Clark worked - to ask to meet with them. R.P. Vol I p. 168 ll 10. The Court noted Mr. Clark was shocked to be told - at work - that he was a suspect in a rape investigation. R. P. Vol I p. 169 ll 6-7. Mr. Clark acknowledged that he had put together some of the circumstances while walking the block and a half to the meeting. R.P. Vol I p. 169 ll 6-14.

The record reflects that the detectives read Mr. Clark his rights, told him that the interview was voluntary, that he could leave at any time, and that Mr. Clark appeared to be a healthy man of 57 years. *See generally*, R.P. Vol I p. 170. The Court also acknowledged Mr. Clark's testimony that he had been terrified and had difficulty answering the detective's questions because he was in shock. R.P. Vol I p. 45 ll. 1-2.

The court then turned to problems arising from the interview and Mr. Clark's statement; "what this boils down to is the Defendant's assertion that law enforcement lied to him about the evidence they had." R.P. Vol I p. 176 ll 11-13. The court first mentioned that law

enforcement is not obligated to tell the truth all the time, and offered the example of an undercover officer and the *Burkins* case, a case in which the detectives lied about having found the dead body, and several other cases in which law enforcement “duped” Defendants. R.P. Vol. I p 177 ll 16-17.

However, none of the cases cited involved the level of duplicity demonstrated in this matter about such powerful evidence - DNA. The DNA evidence testified to by Ethan Smith stated that the samples were certain within a “one in seventy-five quadrillion match”. R.P. Vol II p. 242 ll. 20-23. The court properly noted that the question required a review of the totality of the circumstances. R.P. Vol I p. 175 ll 3-6.

Facts: The Interview

The investigators had little evidence against Mr. Clark, upon sitting down to speak with him, on March 4, 2015, (seven weeks after the alleged incident). In fact, the investigators had no DNA results back at the time of the interview. R.P. Vol I p. 189 ll 11-13. The first substantive statement the detectives made to Mr. Clark regarding a possible crime claimed they possessed “a lot of physical evidence.” Investigative Transcript, at 18 (Exhibit A). The investigators then orchestrated a

"presentation," premised upon Mr. Clark believing the detectives had DNA-linking Mr. Clark and the rape of Sallye Clark.

This Court should note the exact language used, as the detectives began to discuss why they wanted to speak to Mr. Clark.

Okay. Well, the reason why we're here is, is basically because on (sic) an incident that actually occurred when you were at Sallye's house in the middle of January. Um, she went right after you went to visit. She went to have an examination done because she said that there was some sexual activity between you and her. Um, and she provided um, a lot of physical evidence dealing with that and the reason why it takes a little while.

Interview Transcript, at 18.

In looking at the interview transcript, it appears the detectives wanted Mr. Clarke focused solely upon the fact that the DNA itself would convict him. For example: "She went [to the doctor] right after you visited." R.P. Vol II p. 316 ll13-18. The investigators used a vague timeline of "mid-January," presumably because they needed Mr. Clark to hear that Sallye Clark went to the doctor "right after he visited." The statement is too vague to be called an outright lie, but no investigator considers an exam taking place likely six days after an alleged rape to have been done "right after [it happened]."

To complicate the matter further, the trial court took issue with the statement that Sallye Clark had an examination "right after" the visit, even though the court believed the exam came the day after the visit:

"The evidence is not 100% clear, but I think it was the next day. I haven't heard from the doctor yet; so that was potentially inaccuratebut she did go in and have an examination."

R.P. Vol I p. 179. Of course, as stated above, the evidence is 100% clear that Sallye Clark **did not** see the doctor the next day, but in fact saw the doctor *six days later*. R.P. Vo I p. 196 I 18. The investigators knew the date of the examination at the time they interviewed Mr. Clark. Had the trial court noticed that the investigators used the phrase "right away" as representing "six days later" (or even a day later), the court might have declared the statement an outright lie and better appreciated the reasoning and extent of the deception.

The detectives also said [Sallye Clark] "reported some sexual activity." Interview Transcript, at 18. One generally does not go to the doctor to report "sexual activity." The investigators likely avoided the use of the word "rape" (or Sallye Clark did not claim to be raped while at

the doctor) because the investigators needed Mr. Clark to speak about the matter.

The next statement clearly constitutes a lie, seemingly intended to keep Mr. Clark's focus on saving himself from DNA evidence.

[Sallye Clark] provided um, a lot of physical evidence dealing with that and the reason why it takes a little while for us to get to get a hold of you (sic) is (unintelligible) it takes a while to actually process it to determine whether or not there is male DNA and stuff on the items and stuff, so it's not like TV where you have CSI where you get it back like within an hour so that's, that's the reason why it's taken a little while for us to come and contact you and um,

Investigative Report, at 18-19.

At this point, the investigators did not have a "a lot of evidence, provided by Sallye Clark." The only physical evidence (the type discussed) Sallye Clark provided at that point was a medical report noting vaginal tearing "consistent with penetration" R.P. Vol II p. 206 ll 7-10, and a report from a person with known memory difficulty.

The entire discussion centered upon why police contacted *Mr. Clark at that specific time* and not the week that Sallye Clark claimed "the sex activity". The Court noted only:

[T]he detectives just said it takes a while to process it to determine whether or not there's male DNA. So that part does not unduly suggest that they had his DNA or that it match him. They acknowledged it's going to take a while to process that. So, I would say there is a potential of a modest misrepresentation in terms of how quickly Ms. Clark went to the doctor.

R.P. Vol I p. 179-180 ll 20-3. Twice, the investigator referenced the fact that it took a long time to interview Mr. Clark, both times basing it upon "a lot of evidence" that "cannot be evaluated overnight, so that's, that's the reason why it's taken a little while for us to come and contact you." Again, the court disregarded both references specific to Mr. Clark, specific to DNA, specific to the time it takes, and why they only now determined they would talk to Mr. Clark. Appellant suggests that the only reasonable conclusion anyone might make, upon hearing the above, would be, *"Sallye provided a lot of DNA evidence, but we cannot process it overnight, in fact, it took roughly six weeks for us to determine it was your DNA."*

The Court can trust the investigators knew the meaning intended by the statements, given the odd phrasing, but more importantly because virtually none of the above was true. Yet every word served the same distinct purpose. A layman would not know the length of time it takes to

obtain DNA results, but would know that overnight “like CSI” is not realistic. A layman might know a comparable sample would need be obtained, but not necessarily, and not when Mr. Clark had been at the scene helping move Sallye Clark. A layman would likely presume that detectives interview a suspect the moment one is named by the victim, but here, Mr. Clark heard that the police took time because “it’s not like CSI.” The trial court did not address the tremendous danger that arose from the “ruse.” The investigators essentially said; “We have you, and we have you with evidence almost impossible to overcome, DNA.”

Having now put Mr. Clark in a position to believe that, whatever else was happening, the police had all they needed to convict, the investigators then invited him to give what the investigators sought all along, a confession.

[S]o that why I’m wondering what may have happened or occurred when you when you were over at her house on that day....it sounds like she has some dementia stuff issues going on and maybe did she like possibly think that you were her ex-husband or her son or something like that?

Interview Transcript, at 19.

The court evaluated the statement as:

I don't know because I haven't heard from the doctor yet whether Ms. Clark said there could've been some confusion, but the officer said there's some potential dementia going on, and she was just talking about this as a possibility. Again, I don't see that as being some blatant misrepresentation.

R.P. Vol I p. 180 ll 18-23.

If Sallye Clark's testimony is taken at face value: "that she told everyone who would listen", then the purpose in noting "dementia" and "ex-husbands" was to offer Mr. Clark – at the most emotionally vulnerable time – the opportunity to "explain how his DNA got there," and thereby trip himself up in his explanation.

The trial court noted that the detectives asked several questions about "where they might find DNA evidence" and concluded that there "doesn't appear to be any misrepresentation that we have DNA evidence or we've tested it, the types of statements that could be overly coercive." R.P. Vol I p. 183 ll 12-16. The summation is not erroneous, but it is ultimately irrelevant. At that point, the detectives had already deceived Mr. Clark into the belief that they had DNA evidence against him and deception no longer mattered. It served its purpose because Mr. Clark had begun "explaining himself".

Curiously, mid-way through Mr. Clark's answers as to what occurred, the detectives invite Mr. Clark to "save himself" yet again, only this time openly (and perhaps constitutionally).

When we get done here and we, we present the case and we talk to, um, the prosecuting attorney about all this as far as what should happen here, ok, what a lot of our job is to do is look at – look at the totatlity of the situation is (sic) and is there remorse or is there not remorse, okay? And what should happen. You know, things go a little bit differently for people in situations where there's some admission and apology and denial versus complete denial. There's - there's decisions that are - - are (sic) change a prosecutor's decision as far as what she we do in this type of situation.

Interview Transcript at 41. As the judge noted, there is nothing falsified about that statement. But, it occurred after Mr. Clark had given descriptions, and the insinuation "if you admit you raped her, it will be much easier on you." The statement becomes damaging when one considers how the investigators began the interview, by inferring they knew just about all there was to know.

The deception then began anew with a DNA version of good-bad cop. Detective Robertson said: "I haven't gotten the results back, but I'm thinking that this is exactly where the area right here is where we're going to find the male DNA and semen and all this stuff right here." R.P.

Vol I p. 187 ll 20-23. But then Detective Koerner states: "I know it's there. I've seen it." Id. Clearly, Detective Koerner wants Mr. Clark's thoughts focused back upon the fact that they have him already. The detectives had just told Mr. Clarke that remorse and admissions matter. The trial court mixed the question, stating that it interpreted Koerner as addressing blood, not semen. Read from the perspective of a suspect in an interview, the conclusion seems impossible.

One last deceptive statement stands out such that it deserves special scrutiny. Mr. Clarke discussed oral sex given to him earlier in the interview. Soon after the discussion about remorse and cooperation, the detective said:

Let me ask you another question, Um, because like I said, we deal with physical evidence. Um a lot of people don't realize that um not only are there swabs taken of vaginal, anal but (sic) there are also taken oral-swabs and we have had extremely excellent success as far as with the actual oral swabs when they're taken right away with not semen or pre-cum but with what's called follicles with, with male DNA, which is skin follicles.

Which is how we actually take samples. When we do it (sic) is we swab the mouth because it's, it's actually better for us. There was no physical evidence of DNA in her mouth. Can you explain that?

Investigative Interview at 46. Of course, Mr. Clark could not explain "that" because, as the trial court noted, "that is a false statement as I

understand the facts because they hadn't yet received *any* DNA results back, so they wouldn't know whether or not there was physical evidence of male DNA in her mouth." R.P. Vol I p. 189 ll 11-15. And yet, the investigator followed up on the "no-win" question by asserting (with nothing to back up the reasoning) "the only way that'd be possible is there was no blow job." Investigative Interview at 46.

After noting this as "the most deceptive statement," (R.P. Vol I p 190 l 19,) the trial court failed to link that deceptive lie with the plan to essentially "lie" to Mr. Clark from the substantive beginning of the interview. The discussion effectively started by stating that Sallye Clark had gone "right away" to the doctor for an examination and having "a lot" of physical evidence. Most notably, DNA evidence, the "One in Seventy-Five Quadrillion" brand of evidence, of which no other type exists. And yet, the trial court determined that:

This doesn't appear to be some elaborate ruse. But even acknowledging that they did not have the DNA test and it was not a truthful statement to say that there was no physical evidence of male DNA in her mouth, that just doesn't rise to the level that in my opinion and my finding that the Defendant's will to resist was overcome so that the confession was not freely self-determinedI'm satisfied that he was not unreasonably coerced.

R.P. Vol I p 191 ll 4-10. The court correctly noted that it is the police investigator's jobs to get to the point of the truth and that "sometimes they ask pointed questions." R.P. Vol I p. 191 ll 17-18. Appellant does not argue that the police should not creatively attempt to get at the truth, and no one questions that it often takes pointed questions. The question raised in this appeal is whether use of clear deception inferring that the police already have the "ultimate truth," DNA evidence linking a suspect to the crime, violates both the Fifth Amendment to the Constitution and Article I Section 9 of the Constitution of the State of Washington.

The trial court noted the standard regarding the "totality of the circumstances," addressed the setting of the interview, that the investigators read Mr. Clark his rights, noted Mr. Clark could refuse to speak to the investigators, in essence, accounting for the totality of the setting and circumstances of Mr. Clark's choice to make the statement. However, the court chose to analyze the actual questions and answers in the interview line by line, and not address the clearly deceptive totality, nor acknowledge the obvious "need" for such an interview – that Ms. Sallye Clark's possible memory issues created an urgency to "get an admission" that can be felt in reading the transcript of the interview. Moreover, the Court failed to account for the fact that the deception

centered around DNA evidence. The investigators told Mr. Clarke (of the DNA) “physical evidence does not lie.” *Interview Transcript*, at 43. But, physical evidence *can* lie when law enforcement lies about possessing it, especially DNA evidence specific to the suspect. It renders any statement made thereafter one made under the strong assumption that one might be convicted (as a practical matter) already, in violation of the Fifth Amendment of the Constitution, and maybe more particularly, Section 1, Article 9 of the Washington Constitutions because it near forces a suspect to address it, or “give evidence” of themselves.

III ARGUMENT

FEDERAL CONSTITUTION

Mr. Clark brings this appeal on the basis that the investigators intentionally deceived him into believing police possessed DNA linking Mr. Clark to a “sex act” with Sallye Clark. The deception, indeed one statement constituting an outright lie, put Mr. Clark into a situation where he had to explain how his DNA “voluntarily” ended up in evidence. The only alternative (in the mind of one in his position) is to face

immediate arrest and, near certainly, conviction, due to the unique power of DNA evidence from semen or skin follicles in a rape trial.

"(A)ny evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda v. Arizona*, 384 U.S. 436, 476, 86 S.Ct. 1502,1629 (1966) cited with approval in *State v. Davis*, 73 Wash.2d 271, 287, 438 P.2d 185 (1968). [Deceiving a suspect,] alone does not make a statement inadmissible as a matter of law. Rather, under *Miranda*, the inquiry is whether the deception was such as to make a waiver of constitutional rights involuntary. *State v. Braun*, 82 Wash.2d 157, 161, 509 P.2d 742 (1973); *State v. Riley*, 19 Wash.App. 289, 297, 576 P.2d 1311 (1978). The test of voluntariness is "whether the behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth."

Washington case law provides little guidance because the cases which address law enforcement deception (or lies) in a "ruse," do not involve evidence as uniquely strong as DNA evidence, especially semen in a rape trial.

For example, in *State v. Gilcrest*, 91 Wash.2d 603, 607, 590 P.2d 809 (1979), an inmate/suspect was convicted of murdering another inmate, during the questioning, and after the suspect had been read his rights, the investigator stated; "Okay, this is between you and I," and at that point the suspect laid out several important details. *Id.* at 609. The Washington Supreme Court noted "if deception were involved, it was not the type which overbore Agtuca's will to resist." *Id.* Perhaps more importantly, the Court did note that the "testimony added little to the state's case ...eyewitness testimony provided overwhelming evidence of guilt [and] was unnecessary for conviction, and its admission, if error, was harmless." *Id.* The Washington Supreme Court did not endorse deceptive interrogation in *Gilcrest*.

The Washington appellate case most factually similar to the one before this Court, and the case noted by the trial court is *State v. Burkins*, 94 Wn.App. 677, 973 P.2d 15 (Div. 1 1999). *Burkins* involved a defendant suspected of a murder, after five hours of questioning a story that hadn't changed, the detectives tried two "ruses." *Id.* at 684. The first lie didn't work. *Id.* But, the detectives tried again, and this time lied about finding one of the defendant's hairs in a truck the victim had been known to have been in. *Id.* The defendant "put his head down, started to shake,

and admitted that he had been with the victim that evening". *Id.* Similar to this case, the investigators then invited the defendant to defend himself - suggesting that the victim may have died of a heart attack (after telling him she had been a drug abuser). The defendant then said, "You have the body, don't you?" and the detectives said that they had, telling a second lie. *Id.* Eventually, the defendant in *Burkins* led the detectives to the area in which the victim had been killed. *Id.*

First, this *Burkins* decision came from a sister Division, Division I, and thus the ruling is persuasive, but not controlling. Second, the *Burkins* case involved a murder with four assigned errors analyzed prior to the deception issue, other issues dominated the court's attention. Third, the *Burkins* court did little in the way of real analysis, it merely stated that "courts have held confessions to be voluntary when police falsely told a suspect that his polygraph examination showed gross deceptive patterns, when police told a suspect that a co-suspect named him as the triggerman, and when police concealed the fact that the victim had died. *Id.* at 695-96. The *Burkins* court simply concluded that under the totality of the circumstances, the defendant's will had not been overcome, and moved on to the next issue. *Id.* at 696.

The Washington Supreme Court has expressly stated that it “does not condone deception” with respect to police interrogations. *Braun*, 82 Wn.2d at 161. Indeed, when deception is used, the state bears the burden of proving voluntariness by a preponderance of the evidence. *Id.* But, a review of case law reveals little analysis on what constitutes overbearing one’s ability to resist. Instead, what is generally found is a list of deceptive or threatening tactics that have been ruled legal and a list of those that are not, e.g. from *Braun* (as of 1973):

Confessions have been held to be involuntary when the police have misrepresented that the accused's wife would be taken into custody if he did not confess, or that a friend would lose his job if the accused did not confess, or when a confession was obtained while the accused was under hypnosis. On the other hand, a confession has been held to be voluntary even though the suspect was falsely told that his polygraph examination showed gross deceptive patterns, or that a cosuspect had named him as the triggerman, or when the police concealed the fact that the victim had died.

Braun, at 162. An analysis should focus upon the type of lies so weighty that such a lie “triggers” a psychological process that renders a suspect unable to resist making a statement.

The facts in this matter most resemble the Florida case *State v. Cayward*, 552 So.2d 971 (1989). In the Florida case, the police suspected a man of raping and smothering a five-year-old. Similar to this case, the investigators did not believe they had sufficient evidence to charge the man, despite their suspicions. The police fabricated two false reports indicating that semen stains on the victim's underwear came from the defendant. Upon seeing the reports, the suspect then confessed. The Florida court threw out the confession.

To be sure, the Florida court in *Cayward* focused largely upon the fabrication of *documentation*. The commonality in the cases is two-fold; 1) investigators believed they had the right suspect but did not have sufficient evidence to charge him and needed an admission, and 2) crafting a careful fabrication regarding a direct DNA-semen link to the Defendant and the victim, leaving a defendant unto himself to ponder the consequences of speaking or not. Indeed, in the case before this court, the investigators threw a lie on top of a lie, challenging Mr. Clark to explain how no DNA had been found in Sallye Clark's mouth when they had not yet received *any* DNA evidence back in the matter. Investigative Report at 46. How does a defendant retain his Fifth Amendment rights when asked to explain a lie?

The lie becomes more dangerous upon the realization that even had Mr. Clark responded to the lie with total silence, his silence could have been held against him. In *Salinas v. Texas*, 560 U.S. 370, 133 S.Ct. 2174, 176 L. Ed. 2d 1098 (2013), a suspect voluntarily answered questions about a murder. But, when police asked whether ballistics testing would match his shotgun to casings found at the murder scene, he fell silent. At trial in Texas state court, the prosecution used his failure to answer as evidence of guilt. Defendant was convicted and state courts of appeals affirmed. The U.S. Supreme Court affirmed, reasoning that the defendant *voluntarily* undertook the discussion and then did not invoke his Fifth Amendment right specifically. But, what does the word *voluntary* mean when law enforcement knowingly lies about DNA (of all evidence) to the suspect, for a specific purpose?

Appellant does not argue that the courts ought to overly restrain law enforcement as these men and women goes about the unenviable task of catching the criminals among us. Good police work requires creativity to obtain evidence and always will. But, this case cannot be given proper consideration without acknowledging the power of DNA evidence and the likelihood of its increased power into the future, better techniques, expanded databases, more media exposure and more recognition of

date rape and "consent" issues. This Court must follow the state's policy in not "condoning" deception in police interrogation and draw a line at deception that involves DNA.

Washington Constitutional Analysis

The Washington Constitutional provision concerning "self-testimony" could be construed as broader than the Fifth Amendment to the Constitution of the United States. The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Article I, section 9 of the Washington State Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself." The protection provided by the state provision is coextensive with that provided by the Fifth Amendment. *State v. Earls*, 116 Wash.2d 364, 374-75, 805 P.2d 211.(1991).

Absent controlling precedent, a party asserting a provision of the state constitution offers more protection than a similar provision in the federal constitution must persuade the court this is so by means of the analysis set forth in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808, 76

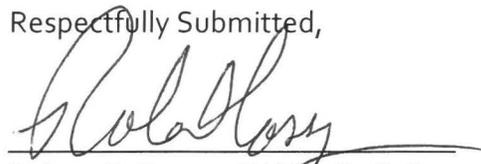
A.L.R.4th 517 (1986). Under *Gunwall*, the court considers six nonexclusive factors. . (nonexclusive) factors: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *Id.*

The first fact and primary concern is the more specific language in the Washington Constitution, "give evidence of himself." Given that DNA evidence, especially in a rape trial, is the only type that points to an individual in the "One in Seventy-Five Quadrillion", it should be unconstitutional for law enforcement to lie regarding possessing DNA-evidence linking defendants to crimes such as rape or murder. In cases where a suspect exists but law enforcement needs more evidence to arrest and convict, it may prove too tempting to law enforcement to run "the lie" by a defendant, and near force that defendant to "give evidence of themselves" to counter the most powerful evidentiary tool yet discovered. If such a scenario is allowed, someday, an innocent person will trip him or herself up in explaining a case based upon a lie.

IV CONCLUSION

The deceptive interrogation in this case went so far as to render Mr. Clark's statement inadmissible because it violated his 5th Amendment right to remain silent, and his Washington Constitution Article One Section 9 right to be free from giving evidence of himself. The case should be remanded back to the trial court to be re-tried without the taint of Mr. Clark's testimony against himself, or at least remanded with instructions that the trial court give proper consideration of the deceptive nature of the entire interview in context, without the line by line analysis, and without the error in assuming the medical exam came "the next day" after the alleged rape.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert R. Cossey", written over a horizontal line.

Robert R. Cossey WSBA # 16481
Attorney for Appellant

FILED

AUG 29 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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AUG 29 2017

Prosecuting Attorney
Spokane County, WA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
IN AND FOR DIVISION III

STATE OF WASHINGTON,
Plaintiff,

and

CRAIG CLARK,

Defendant/Appellant

COURT OF APPEALS NO: 350410

CERTIFICATE OF SERVICE

I, Patricia Story, under penalty of perjury under the laws of the State of Washington,
declare that on August 29, 2017, I personally served the following document to the
individuals listed in this Affidavit at the addresses below: BRIEF OF APPELLANT

Ed Hay
Spokane County Prosecuting Attorney
1100 W Mallon
Spokane WA 99260-2043

Dated this 29th day of August, 2017.



PATRICIA STORY