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Court of Appeals  
Division III  
State of Washington

35041-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

CRAIG F. CLARK, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENT OF ERROR**

The trial court erred and violated Mr. Clark's rights under the Fifth Amendment of the United States Constitution and/or under Article I, 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.

## **II. ISSUE PRESENTED**

Did the trial court abuse its discretion in admitting the defendant's confession after it found, after full hearing and testimony, that the confession was voluntary, and where the finding of voluntariness was supported by substantial evidence?

## **III. STATEMENT OF THE CASE**

The defendant's sole assignment of error is that the trial court allowed his recorded conversation with detectives into evidence at trial. He now claims his statements were involuntary because the officers were not truthful with him.

The defendant was charged with third degree rape. CP 1. The defendant waived trial by jury. CP 14 He was tried and convicted as

charged. CP 23-25. He was sentenced to 12 months of confinement. CP 29;<sup>1</sup> RP 396. He appealed from this judgment.

After trial, the court entered the following unchallenged<sup>2</sup> factual findings. These findings are summarized as follows:<sup>3</sup>

On January 13, 2015, Craig Clark engaged in sexual intercourse with Sallye Clark. At that time, Mr. Clark was 56 years old, stood approximately 6'2" and weighed 220 pounds. He had no health or mobility problems. Sallye Clark was 81 years old and suffered from neck and spine injuries, and her mobility was limited. Sallye Clark stood approximately 5'1" and weighed approximately 110 pounds. Sallye Clark did not consent to engage in sexual intercourse with Craig Clark, and her lack of consent was clearly expressed by words and conduct. On January 16, 2015, Sallye Clark called Janet Breshears to report that Craig Clark had sexually assaulted her. On January 19, 2015, Ms. Breshears took Sallye Clark for a medical examination. The exam was performed by Dr. Jlyn Pritchard at Columbia Medical Associates. Ms. Breshears also contacted law

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<sup>1</sup> State has filed a Supplemental Designation of Clerk's Papers and Exhibits. The Judgment and Sentence has been calculated to be designated as CP 26-37 (page 4 of the Judgment and Sentence should be CP 29).

<sup>2</sup> Any unchallenged findings of fact are considered to be verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Bonds*, 174 Wn. App. 553, 562, 299 P.3d 663 (2013).

<sup>3</sup> CP 23-25.

enforcement. During the physical examination, Dr. Pritchard identified two small superficial tears in Sallye Clark's vagina, indicative of penetration. Dr. Pritchard assessed Sallye Clark's mental capacity and reported no signs of psychosis or delusions. On March 4, 2015, Craig Clark agreed to meet with Detectives Koerner and Robertson at the detectives' office at 1427 West Gardner. Clark was not placed under arrest and was free to end the interview at any time. During this meeting, Craig Clark admitted to having sexual intercourse with Sallye Clark.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE DEFENDANT'S CONFESSION, THE VOLUNTARINESS OF WHICH IS SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The Defendant alleges that his confession was involuntary and, therefore, inadmissible at trial.

##### Standard of review.

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 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

The decision regarding the admission of evidence lies within the sound discretion of the trial court and will not be reversed unless an abuse of discretion can be shown. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Discretion is abused if exercised on untenable grounds or for untenable reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

A confession is admissible if the state can show by a preponderance of the evidence that it was voluntarily made considering the totality of the circumstances. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008); *State v. Braun*, 82 Wn.2d 157, 162, 509 P.2d 742 (1973). The trial court's determination of voluntariness will not be disturbed on appeal if it is supported by substantial evidence in the record. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

1. After conducting a full CrR 3.5 hearing, the trial court correctly ruled the defendant's statements made to law enforcement were admissible at trial.

The defendant asserts that law enforcement engaged in a ruse and that his confession was coerced in violation of his right not to incriminate himself, because the "interrogators lied to him regarding the DNA evidence in the State's possession." Br. of Appellant at iv. Defendant complains that

“if such a scenario is allowed, someday, an innocent person will trip him or herself up in explaining a case based upon a lie.” Br. of Appellant at 26.

However, defendant finds little support in this record to assist his argument that the trial court abused its discretion where that court found, under the totality of the circumstances, the defendant voluntarily answered questions, and, the interrogators had not resorted to tactics that “in the circumstances prevented the suspect from making a rational decision whether to confess or otherwise inculcate himself.” *Unga*, 165 Wn.2d at 102 (quotation omitted).

The inquiry as to whether admission of a confession constituted a violation of the Fifth Amendment has two components; it does not depend solely on whether the confession was voluntary, rather, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary.’” *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Thus, both the conduct of law enforcement officers in exerting pressure on the defendant to confess and the defendant’s ability to resist the pressure are important. *United States v. Brave Heart*, 397 F.3d 1035, 1040 (8th Cir. 2005).

2. Defendant's ability to resist.

The trial court's written factual findings regarding the circumstances surrounding the law enforcement interview are not contested on appeal.<sup>4</sup> Mr. Clark testified it was his choice to go to the detectives' office, and he walked there of his own free will. RP 47-48; CP 21. He was a mature adult male, who never asserted any mental, physical, or educational limitations. RP 175.

The defendant's answers to the detective's inquiries tracked their questions; he appeared to be calm and thoughtful. *Id.* He not only walked to the detective's office, but knew he was going there to speak with them. *Id.* He acknowledged that he was never arrested, cuffed, or told that he was not free to leave. RP 17. "He admitted that he was read his rights, that he knew he could remain silent, and that he could stop answering questions at any time. He admitted there were no threats, promises, or inducements." RP 172-73.

Mr. Clark was not prevented from leaving the interview, and he did leave when it was completed. RP 48; CP 21. Mr. Clark consented to the

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<sup>4</sup> These factual findings are found at CP 20-22 (Findings of Fact, Conclusions of Law CrR 3.5 hearing). These uncontested findings of fact are verities on appeal. *Hill*, 123 Wn.2d at 644. The trial court's written findings of fact adopted and included, by reference, the court's oral findings and conclusions of May 24, 2016, contained at RP 167-191. Where findings are not pin-cited, they are contained in the written findings at CP 20-22.

interview being recorded. The interview was recorded both audibly and visually.<sup>5</sup>

Detective Robertson read Mr. Clark his *Miranda* rights. CP 21. Mr. Clark stated that he understood and agreed to waive those rights. CP 21; RP 171-72. Mr. Clark did not request to speak with an attorney, did not request law enforcement contact an attorney on his behalf, and did not request a phone book so that he could contact an attorney on his own behalf. CP 21.

The above uncontested facts establish that the defendant had the ability to resist any of the alleged pressure exerted by the detectives. There was no showing that his will to resist was overcome in any way. *See Unga*, 165 Wn.2d at 101 (the defendant's ability to resist the pressure is important). The undisputed findings of fact are well-supported by substantial evidence in the record.

3. Conduct of law enforcement officers in exerting pressure.

The uncontested findings establish the defendant voluntarily met with the two female detectives. CP 21. These detectives did not make any threats, promises, or inducements to compel the defendant to speak with

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<sup>5</sup> Defendant included the transcript of the interview by attaching it to his appellate brief. The State has filed a Supplemental Designation of Clerk's Papers and Exhibits designating both exhibits of the video (Ex. P1) and transcript (P18) of the interview to be transmitted for review.

them. *Id.* He was not prevented from leaving and did leave after the interview. *Id.* He was read his *Miranda* rights, understood them, and waived them. *Id.* These uncontested findings should end any inquiry as to the voluntariness of his statements. However, defendant claims that the police were not “honest” with him, and that the misrepresentations rendered his confession involuntary. The record and case law do not support this claim.

The trial court carefully examined the questions asked and statements made by law enforcement during the recorded interview. In fact, before making its findings, the trial court had read the entire transcript twice, had watched the entire videotape recording, and had observed the live testimony surrounding the CrR 3.5 hearing. RP 156. The trial court reviewed the entire transcript on the record, and marked any areas that could be considered as a misstatement of fact. RP 176-190. Furthermore, the court went over each area of possible misrepresentation of fact, and did so in detail in its discussion on the record. *Id.* The court concluded that there was no evidence “that the defendant’s will to resist was overcome so that the confession was not freely self-determined.” *Id.*

Defendant first claims that because the victim took six days to report the sexual contact, the detective’s statement that the victim had immediately reported the incident somehow overcame the defendant’s will and rendered

the confession involuntary. Br. of Appellant at 9.<sup>6</sup> However, this suggestion is not supported in logic or in law. Even the defendant concedes the statement that the victim went immediately for testing was not untrue, and could not be called a lie. Br. of Appellant at 8.

The defendant's overarching claim is that the "investigators intentionally deceived him into believing police possessed DNA linking [him] to a 'sex act' with Sallye Clark." Br. of Appellant at 18. However, the trial court rejected this claim, finding the detective's inquiries did not misrepresent that they had DNA evidence, but the detectives were merely suggesting where on the blankets and bed DNA evidence could be found. RP 181.

Furthermore, the defendant disregards the timing of his confession to the sexual contact. The defendant *immediately* proffered that he had intercourse with the victim *without* any claim or suggestion that law enforcement had DNA evidence matching him to alleged crime. Indeed, they were there to obtain a DNA sample from the defendant. The defendant

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<sup>6</sup> While this claim is contained in the "statement of the case" portion of the appellant's brief, it is here that he begins presenting argument.

was first informed of the reason for the detective's visit on page 18 of the interview transcript.

ER [Detective Elise Robertson]:

Okay. Well the, the reason why we're here is, basically on an incident that actually occurred when you were at Sallye's house in the middle of January. Um, she uh, went right after you went to visit, she went in to have an examination done because she said there was some sexual activity between you and her...

Ex. P18.

Immediately thereafter, the detectives informed the defendant that it takes a while to process evidence. They informed Mr. Clark that they were "wondering what may have happened or occurred when [the defendant was] over at the house that day." Ex. P18 at 18. The detectives then suggested that maybe this contact occurred because the victim had some "dementia stuff" going on and that maybe she could have thought that the defendant was her ex-husband; that the defendant could have reacted because of the empathy he had for the victim. *Id.* at 18-19. The defendant immediately jumped on this opportunity to explain the situation, and admitted: "There was um, yes. Um, I, I'm not going to deny it, we had a um, um, uh some moments and uh, we were just, I don't know it was like a consensual weird, weird thing, I don't know what the helk [sic] happened." *Id.* at 19. The

defendant then related how the physical contact began with hugging and immediately progressed to sexual intercourse. *Id.*

The defendant is unable to establish any material falsehood that overcame his will. Defendant agrees that *State v. Burkins*, 94 Wn. App. 677, 695, 973 P.2d 15 (1999), is the closest precedent to his case. Br. of Appellant at 20. There, the police knowingly made untrue statements to the defendant, i.e., they said that the deceased was a suspect in three robberies and that they had recovered her body. These statements prompted Burkins, initially, to tell the police that the victim had attempted to rob him and, ultimately, to lead police to her body. On review, the appellate court held that “[d]eception alone does not make a statement inadmissible as a matter of law; rather, the inquiry is whether the deception made the waiver of constitutional rights involuntary. *State v. Gilcrist*, 91 Wn.2d 603, 607, 590 P.2d 809 (1979).” *Burkins*, 94 Wn. App. at 695. It is of note that the officers in *Burkins* actually made “untrue statements” to the defendant, as opposed to *suggesting* that DNA evidence may be found, as in the present case. The defendant asks this Court to disregard or overrule *Burkins* because the decision “came from a sister Division, Division I” and because the “*Burkins* court did little in the way of real analysis.” Br. of Appellant at 21.

Yet, the defendant fails to address or mention that *Burkins* is quoted with approval in Justice Sanders' concurring opinion in *Unga*:

*See State v. Burkins*, 94 Wn. App. 677, 695–96, 973 P.2d 15 (1999) (“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.”); *State v. Trout*, 125 Wn. App. 403, 105 P.3d 69 (2005) (holding a confession to have been made voluntarily despite a statement by the police that whoever confessed first would receive preferential treatment).

*Unga*, 165 Wn.2d at 116 (Sanders, J. concurring).

Defendant's reliance on *State v. Cayward*, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989), is misplaced. That case found that the difference between the *manufacturing* of actual false DNA *documents* and the presentation of these false documents to the defendant was not acceptable, even though false *verbal* assertions had long been determined to be acceptable:

The reporters are filled with examples of the police making false verbal assertions to a suspect, but counsel has not indicated nor has our research revealed any case in which the police actually manufactured false documents and used them precisely as the police did in this case. Our inquiry then is whether there is a qualitative difference between the verbal artifices deemed acceptable and the presentation of the falsely contrived scientific documents challenged here. We

think there is, and we agree with the trial judge that the police overstepped the line of permitted deception.

*Cayward*, 552 So. 2d at 973. *Cayward* is really an outrageous governmental conduct case. That theory was not argued here. We are not dealing with the presentation of false documents in the instant case.

Many cases have specifically held that verbal misrepresentations regarding the State's possession of DNA evidence do not render the defendant's subsequent confession involuntary. In *State v. Register*, 323 S.C. 471, 478, 476 S.E.2d 153 (1996), the police isolated and deceived defendant by informing him that he had been seen with the victim the night she was murdered, that his tires and shoes matched impressions and prints found at the murder scene, and that they had irrefutable DNA evidence establishing his guilt. The appellate court still found the confession was voluntary under the totality of the circumstances. *Id.*

In *State v. Graham*, 223 N.C. App. 150, 733 S.E.2d 100 (2012), the appellate court held that the detective's false statements to defendant that he failed a polygraph test and that the DNA test incriminated him did not render his confession involuntary.

In *People v. Klausner*, 74 P.3d 421 (Colo. App. 2003), the defendant's confession to the arresting officer was voluntary, and thus admissible, in a prosecution for first degree sexual assault of an at-risk adult,

despite defendant's allegation that the officer made a deceptive claim that police had found his semen in the victim.

In *Conde v. State*, 860 So. 2d 930 (Fla. 2003), the appellate court held the defendant's confession to six murders was not rendered involuntary by one detective's alleged exaggeration of the extent of DNA evidence against defendant.

In summary, the defendant's claim was addressed to the sound discretion of the trial court. As under *Burkins*, here the trial judge's conclusions of law are correct in holding that any suggestion by the detectives that there may be DNA evidence in the instant case did not overbear the defendant's will under the totality of the circumstances approach. *Burkins*, 94 Wn. App. at 695-96. The trial court correctly determined Mr. Clark's will was not overborne and his confession was voluntary. There was no error in admitting Mr. Clark's confession.

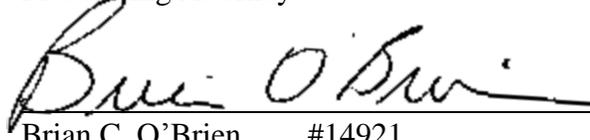
## **V. CONCLUSION**

Mr. Clark's will was not overborne and his confession was a product of his own balancing of competing considerations. His failure to realize the possible consequences of giving the statement does not change its voluntary

nature. This court should affirm the trial court because that court did not err in admitting Mr. Clark's confession.

Dated this 30 day of October, 2017.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

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

STATE OF WASHINGTON,

Respondent,

v.

CRAIG CLARK,

Appellant.

NO. 35041-0-III

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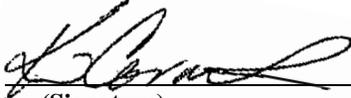
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**SPOKANE COUNTY PROSECUTOR**

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