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NO. 34447-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON

Respondent,

v.

JAMES D. RADCLIFFE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Wm. Thomas McPhee, Judge
and the Honorable Richard D. Hicks, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant James Radcliffe was denied his constitutional right to a fair and impartial jury trial where a potential juror tainted the entire jury pool when he commented that he is a bartender, that he has seen Mr. Radcliffe in "situations in the bar," that he would weigh Mr. Radcliffe's testimony differently from other witnesses, and that it would "possibly" affect his ability to be fair and impartial.

2. The trial court erred in denying, on reconsideration, the Appellant's Criminal Rule 3.5 motion to suppress statements allegedly made to law enforcement on November 17, 2004, after he said that "maybe he should contact an attorney."

3. The trial court erred by entering the following Findings of Fact pertaining to the CrR 3.5 hearing:

> 4. After Detective Barnes informed the defendant of his *Miranda* rights, the defendant understood those rights and verbally proceeded to voluntarily, intelligently, and knowingly waiver those rights.
>
> 5. After the defendant's waiver of *Miranda* rights, Detective Barnes began questioning the defendant. Detective Barnes' interview with the defendant lasted about ten minutes, during which time the defendant denied the allegations against him.
>
> . . .

7. At the start of this interview, Detective Miller asked the defendant if Detective Barnes had informed him of his *Miranda* rights, and the defendant responded that she had done so. Detective Miller then asked whether the defendant had waived those rights, and the defendant answered that he had waived them. Next, Detective Miller asked the defendant whether the defendant wished to have those rights read to him again. However, the defendant answered in the negative, saying that he understood those rights. After these things had been said, Detective Miller began questioning the defendant concerning the allegations that were the subject of this investigation.

8. The defendant began the interview with Detective Miller by denying the allegations. However, when Detective Miller brought up the subject of testing semen on the alleged victim's clothing for DNA, the defendant admitted to recent sexual activity with the alleged victim.

9. The defendant then made an equivocal reference to his right to an attorney, stating the maybe he should contact an attorney. Detective Miller responded by asking the defendant if he wanted the Detective to read the *Miranda* rights to him again, but the defendant stated that he understood his rights. Detective Miller then told the defendant that the ball was in his court. At that point, the defendant voluntarily resumed answering the Detective's questions without further reference to an attorney during the remainder of the interview.

4. The trial court erred by entering the following Conclusions of Law pertaining to the CrR 3.5 hearing:

1. Before questioning the defendant, the requirements of the Fifth Amendment to the United States Constitution and

Article 1, section 9 of the Washington Constitution were satisfied by Detective Barnes' complete and accurate recitation to the defendant of his rights regarding the making of any statement, the *Miranda* rights, the defendant's knowing, intelligent, and voluntary waiver of those rights in response, and the voluntary answers provided by the defendant to Detective Barnes' questioning thereafter.

2. At the beginning of Detective Miller's interview with the defendant, the answers given by the defendant to Detective Miller's questions concerning the *Miranda* rights confirmed the defendant's knowing, intelligent, and voluntary waiver of those rights, and the defendant's responses to Detective Miller thereafter in this interview were voluntary.

3. Pursuant to *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), and *State v. Walker*, ___ Wn. App. ___, 118 P.3d 935 (2005), Detective Miller was not legally required to stop questioning the defendant in response to the defendant's equivocal reference to his right to an attorney, and clarify whether the defendant wished to have the assistance of an attorney before resuming any questioning. Rather, Detective Miller was permitted to continue his questioning in response to the defendant's equivocal statement, which was followed by the defendant's continued voluntary responses to questioning without any further reference to an attorney.

4. Based on the Findings of Fact and Conclusions of Law above, the statements made by the defendant during questioning by either Detective Barnes or Detective Miller on November 17, 2004, are admissible in the trial of the above cause.

5. The trial court's Restated instruction 17 changed the definition of "forcible compulsion" from the definition suggested by the Washington Pattern Jury Instructions, which is based on RCW 9A.44.010(6), thereby

denying the Appellant his state and federal constitutional right to due process of law.

6. The sentencing court erred in not imposing the Special Sexual Offender Sentencing Alternative [SSOSA].

7. The cumulative error of the acts of law enforcement and errors committed by the trial court prejudiced the Appellant and materially affected the outcome at the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Appellant is constitutionally entitled to a fair and impartial jury. Where, during *voir dire*, a prospective juror describes that he is a bartender, and in that capacity he had seen Mr. Radcliffe in "situations" that he did not further describe, that he would weigh his testimony differently based on what he had seen in his capacity as a bartender, and that it would "possibly" affect his ability to be fair and impartial, in the presence of the entire jury panel, the panel may be irreparably tainted against the accused. The trial court excused Juror 15 for cause, apparently without trying to rehabilitate the juror. Was Mr. Radcliffe denied his right to a fair and impartial jury, requiring reversal? Assignment of Error No. 1.

2. When an accused invokes his constitutional right against self-incrimination by requesting an attorney, no further questioning is permitted

unless that request is subsequently, voluntarily, knowingly, and intelligently withdrawn without any police coercion. Here, Mr. Radcliffe invoked his right to counsel either by making an equivocal statement that "he didn't know how much trouble he was in and didn't know if he needed a lawyer" (the police officer's testimony) or by stating "I want a lawyer" (the Appellant's testimony). The court initially suppressed statements made after his statement, which the court found to be "equivocal." The trial court reversed its ruling on reconsideration, following *State v. Walker*;[1] which follows *Davis v. United States*,[2] and found the statement to law enforcement to be admissible. Are the holdings of *Edwards v. Arizona*[3] and *State v. Robtoy*[4] that when an accused equivocally requests counsel, any further questioning after the equivocal assertion of the right to counsel must be strictly confined to clarifying the suspect's request no longer good law in Washington, and did the court err by admitting Mr. Radcliffe's subsequent statements? Assignments of Error No. 2, 3, and 4.

3. An accused person has the due process right to jury instructions that accurately state the law and make the relevant standard manifestly apparent to the jury. The instruction provided to the jury stated:

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[1] 129 Wn. App. 258, 118 P.3d 935 (2005).
[2] 512 U.S. 452, 114 S. Ct. 2350,129 L. Ed. 2d 362 (1994).
[3] 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)).

"[f]orcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself." The court issued a Restated Instruction providing that "[f]orcible compulsion means physical force which overcomes resistance. Forcible compulsion also means a threat, express or implied, that places a person in fear of death or physical injury to oneself." The instruction issued by the court permitted the jury to find forcible compulsion if Mr. Radcliffe used physical force that overcame resistance, where the previous instruction, modeled after RCW 9A.44.010(6), requires that the physical force used also "places a person in fear of death or physical injury to oneself." Does the court's issuance of the restated instruction require reversal of Mr. Radcliffe's conviction for indecent liberties? Assignment of Error No. 5.

4. Where the court's reasons for denying the SSOSA were manifestly unreasonable, is reversal required? Assignment of Error No. 6.

5. Did the cumulative errors deny Mr. Radcliffe a fair trial? Assignment of Error No. 7.

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[4] 98 Wn.2d 30, 653 P.2d 284 (1982).

C. STATEMENT OF THE CASE[5]

1. Procedural history:

A jury convicted James Radcliffe of two counts of third degree rape of a child, contrary to RCW 9A.44.079,[6] and one count of indecent liberties with forcible compulsion, contrary to RCW 9A.44.100(1)(a),[7] pursuant to a

---

[5]This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

[6] 9A.44.079 provides:

(1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Rape of a child in the third degree is a class C felony.

[7] 9A.44.100 provides:

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

(a) By forcible compulsion;

(b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;

(c) When the victim is developmentally disabled and the perpetrator is a person who is not married to the victim and who has supervisory authority over the victim;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual contact occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual contact with the knowledge that the sexual contact was not for the purpose of treatment;

(e) When the victim is a resident of a facility for mentally disordered or chemically dependent persons and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

second amended information filed by the State in Thurston County Superior Court on September 28, 2005. CP at 52-53, 200, 201, 202. He was found not guilty of Counts I and II. RP at 1101.

Thurston County Superior Court Judge Wm. Thomas McPhee presided over the trial. Judge McPhee imposed a standard range sentence of 60 months for Count III, 60 months for Count IV, and a minimum term of 114 months and a maximum term of life in prison for Count V, to be served concurrently. CP at 259-272. Timely notice of this appeal followed. CP at 273.

2. <u>Substantive facts:</u>

a. Background

S.K. and her two sisters—A.K. and K.K.—lived with her mother Sabrina King in the house of Joyce Maund in Seattle. RP at 120, 121. S.K. was born May 25, 1988. RP at 359. Ms. Maund was Ms. King's foster mother, and they remained close after Ms. King became an adult. RP at 121.

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who has a significant relationship with the victim.

(2)(a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.

(b) Indecent liberties by forcible compulsion is a class A felony.

In 1999 they moved from Ms. Maund's house in Seattle to a townhouse located on the Yelm highway in Lacey, Washington. RP at 121, 128. Appellant Jim Mr. Radcliffe also moved into the house in Lacey at that time. RP at 122. In February 2003, Sabrina, her daughters, and Mr. Radcliffe moved to a house on the Golf Club Road in Lacey. RP at 127, 146. S.K. was described as being a tomboy, and Mr. Radcliffe often took S.K. fishing and camping with him. RP at 133.

S.K. went to live with Ms. Maund in July, 2003. RP at 127, 235-36, 578. S.K. was 15 at the time. RP at 127. S.K. remained with Ms. Maund since that date. Ms. Maund would sometimes drive from Seattle, bringing S.K. with her in order to visit her mother and her siblings. RP at 578. Sometime after S.K. moved to Seattle to live with Ms. Maund, Mr. Radcliffe moved out of the house in Lacey, but continued to date Ms. King. RP at 154-55. S.K. visited during the summer for one to two weeks. RP at 156.

Sabrina King worked for Pro Source, a flooring company in Olympia. RP at 135. Mr. Radcliffe worked for A+ Septic and Plumbing in Olympia. RP at 875-907.

b. Allegations of sexual molestation against S.K.

The State alleged in its information that Mr. Radcliffe had sexual

intercourse with S.K. between May 25, 2002 and September 1, 2003 in two separate incidents. CP at 52-53.

S.K. testified that Mr. Radcliffe touched her vagina with his hands, mouth, and penis after she turned 12 years old during the summer between 6th and 7th grades when they lived in the townhouse on the Yelm Highway in Lacey. RP at 366-74. She stated this occurred on a weekly basis. RP at 374. S.K. testified that this continued when she was in the seventh grade. RP at 375-76. She stated that he had her touch his penis with her hands and her mouth. RP at 376. S.K. testified that this occurred on a weekly basis. RP at 379-84. She stated that this continued to occur during the summer between 7th and 8th grades and continued into the 2002-2003 school year. RP at 388-95, 398.

S.K. turned 14 on May 25, 2002. RP at 395. She testified that she did not have a lock on her door at the house on Golf Club Road. RP at 401. She got a chain lock on her door, but testified that Mr. Radcliffe broke it by pushing on the door. RP at 213, 214, 401. She tried to replace the lock a few weeks later. RP at 212. She said the lock was not fixed after he broke it, so she started sliding the computer desk in front of it at night "to keep him out" and to keep out her sisters. RP at 214, 404. She stated that she did not succeed in keeping him out with the desk. RP at 405.

S.K. stated that Mr. Radcliffe had intercourse with her several times between the ages of 13 and 15, and the he would enter her bedroom at night and have sexual intercourse with her at the house on the Golf Club Road. She stated that he would slide the desk out of the way and enter the room, and then have sex with her. She stated that that he last had sexual intercourse with her when she was 15 years old. She moved to Ms. Maund's house in Seattle at the end of the school year "to get away" from Mr. Radcliffe. RP at 404-06.

Sabrina King testified that the door to S.K.'s room in the house in Lacey did not have a doorknob. RP at 152. Ms. King stated that she "pushed the door opened [sic] one day when [S.] wouldn't come out of her room" and she "assumed I had broken the lock." RP at 154. She stated that after the lock was broken, S.K. would "usually slide her desk in front of the door." RP at 154.

Ms. Maund stated that she brought S.K. to her mother's house on November 13, 2004. RP at 578. Ms. Maund babysat the girls for the weekend. RP at 579. Sabrina King went to a birthday party at the Red Barn, restaurant/bar, in Rochester, Washington with a girlfriend that weekend, and made arrangements to stay at her house in Rochester that night. RP at 157, 252, 255, 418. S.K. left with Mr. Radcliffe for two to three hours on

November 13. RP at 160, 580. They went in his truck to his friend Lance's house in order to drive the truck in the woods. RP at 419. S.K. stated that at Lance's house he sat in a chair, grabbed her waist and pulled down her pants while she was sitting in his lap. RP at 429-436. She stated that he rubbed his penis against her and ejaculated on her "bottom and back." RP at 436. S.K. and Mr. Radcliffe then went in his truck to let her drive in the mountains. RP at 449. Later, back in Seattle, she told her friend M.H. about what had happened with Mr. Radcliffe. RP at 452.

Ms. Maund took S.K. back to Seattle with the clothing that S.K. was wearing on Sunday, November 14. RP at 255, 452, 459, 588. After she heard about the alleged incident, Ms. Maund put the clothing in a paper bag and gave it to Sabrina. RP at 590. Exhibit 1.

On Tuesday, November 16, Ms. Maund and S.K. appeared at Ms. King's house unexpectedly. RP at 161, 259. She was talking on the telephone to Mr. Radcliffe when they arrived. RP at 261. Ms. Maund told her that Mr. Radcliffe had been sexually abusing S.K. RP at 163. They stayed overnight and later went to the Lacey Police Department and made a report. RP at 263-65. The bagged pants and underwear were given to the police by Ms. King on November 22. RP at 164-65, 268-69, 352.

c. *Voir dire* of Juror No. 15

During *voir dire*, the following exchange took place:

THE COURT: The next question, ladies and gentlemen, has to do with who you are acquainted with that may be involved in this trial? And so I'll begin by asking you concerning the defendant himself, Mr. James Mr. Radcliffe. Are any of you acquainted with him? If so, please raise your hand.

You were introduced to the lawyers in the case. Are any of you acquainted with any of them? Is so, please raise your hand.

JUROR NO. 15: I'm sorry.

THE COURT: Juror No. 15?

JUROR NO. 15: I'm not sure what degree of acquaintance you're asking for.

THE COURT: Yes.

JUROR NO. 15: I work in a service industry. I manage a restaurant and bar. And I have seen the defendant as a customer and Frank here on the end.

THE COURT: All right. Okay. And is it just in the context of that environment, that they come in, and you're there to serve them?

JUROR NO. 15: Yes.

THE COURT: All right. Do you know them by name? Obviously, I guess, you know the gentleman you identified as "Frank" by name. Is there anything about that acquaintanceship that you believe would affect your ability to be fair and impartial to both sides here?

JUROR NO. 15: I don't know. Possibly.

> THE COURT: If either or both of these individuals was called upon to testify during the trial, would you weigh their testimony differently than you would any other witnesses?
>
> JUROR NO. 15: Yes.
>
> THE COURT: And why would that be? What's the basis for that conclusion?
>
> JUROR NO. 15: Well, with the defendant, I guess, specifically, I'm a bartender, and I've seen him in situations in the bar, and ---
>
> THE COURT: Okay. All right. I'm going to question you further about that now Juror No. 15. We'll come back to that later.

RP at 23.

> Juror No. 15 was excused by the court in a closed session.

RP at 23.

d. DNA evidence obtained from S.K.'s underpants

The pants and underwear worn by S.K. on November 13, 2004 were put into a paper bag and given to law enforcement on November 22. RP at 165. Exhibit 1. Police obtained a saliva sample from Mr. Radcliffe. Exhibit 2. Forensic scientist William Dean, of the Washington State Patrol Crime Laboratory, testified regarding semen that was present on the back portion of S.K.'s underwear admitted as Exhibit 1. RP at 692-93. Mr. Dean testified that the DNA profile from the saliva sample was the same as the DNA profile

obtained from the underwear and that the statistical probability of that DNA profile occurring is 1 in 780 trillion. RP at 696, 697. Exhibit 3.

e. Mr. Radcliffe's statements to law enforcement

Sgt. Richard Monk of the Lacey Police Department went to A+ Septic on November 17, 2004, and told him that the police had probable cause to arrest him. Sgt. Monk transported him to the Lacey police station. RP at 416. Sgt. Monk stated that he administered Mr. Radcliffe his constitutional warnings, but did not ask him any questions. RP at 416.

Mr. Radcliffe was questioned in the interview room at the Lacey Police Department the morning of November 17, 2004 by Det. Shannon Barnes. RP at 628, 629. Det. Barnes read Mr. Radcliffe his warnings pursuant to *Miranda*[8] and informed him of the accusations against him. RP at 630-31. Det. Barnes stated that Mr. Radcliffe said that he was willing to talk to her. RP at 631. Det. Barnes that Mr. Radcliffe told her that while he was with S.K. on November 13, his wallet fell out and S.K. had got it and was hiding it behind her back. RP at 632-33. He reached around her, trying to get it back from her, and that was the only contact he had with her. RP at 633.

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

Det. David Miller, at Det. Barnes' request, then went into the interview room in order "to confront Mr. Radcliffe with the fact that [S.] stated that he had ejaculated on her jeans and that we would be able to test those for DNA." RP at 635. Det. Miller did not administer *Miranda* warnings. RP at 726. He stated that Mr. Radcliffe said "I don't know how much trouble I'm in, and I don't know if I need a lawyer." RP at 736.

Det. Miller told Mr. Radcliffe that the pants turned over to police by S.K. were being tested for DNA. RP at 715. He stated that Mr. Radcliffe then told him that it was his ejaculate and that he had a sexual relationship with S.K. RP at 716. Det. Miller testified that he told him that he and S.K. went to Lance's trailer, and that Lance was not home. RP at 716. He said that Mr. Radcliffe said that he did not have intercourse with S.K., but that he pulled her pants down while she was sitting with her back to him, and that "he rubbed his penis on her buttocks until he ejaculated[,]" and that it had been consensual. RP at 716, 734. He said that Mr. Radcliffe said the sexual relationship with S.K. started when she was 14, and that he had intercourse with her on two occasions—once about two years prior on a camping trip. RP at 717. He testified that Mr. Radcliffe told him that she would perform oral sex on him on an average of once per month. RP at 717.

Mr. Radcliffe was placed under arrest following the questioning. RP at 719.

f. Continuance of trial

Defense counsel moved for a continuance of the trial in order to obtain records from A+ Septic, where Mr. Radcliffe worked—showing his work hours on the dates in question. RP at 756. The court initially denied the motion, but subsequently agreed to continue the trial to permit the defense to obtain records pertaining to Mr. Radcliffe's work hours during the school years of 2000, 2001, and 2002, and continued the trial until December 12, 2005. RP at 841. The court directed that the material obtained by the defense to be provided to the prosecution not later than December 7. RP at 838, 839.

g. Suppression hearing

Mr. Radcliffe made a statement to law enforcement while at the Lacey Police Department on November 17, 2004. The defense moved to suppress his statements pursuant to Criminal Rule 3.5. CP at 23-28. The motion was heard by the Honorable Richard Hicks, on October 3, 2005.

On November 17, 2004, Sgt. Monk went to A Plus Septic in order to bring Mr. Radcliffe to the police station. RP (10.3.05) at 45-46. Sgt. Monk informed Mr. Radcliffe that Det. Barnes was investigating a case, "that she had probable cause for his arrest and I was there to transport him to the

station to [Det. Barne's] location." RP (10.3.05) at 47. Sgt. Monk told Mr. Radcliffe that he had the right to remain silent and that he had the right to an attorney. RP (10.3.05) at 48. He took Mr. Radcliffe into custody, handcuffed him, and transported him to the station. RP (10.3.05) at 48, 51. After they arrived, Det. Barnes took Mr. Radcliffe into the interview room located upstairs. RP (10.3.05) at 60. Mr. Radcliffe's handcuffs had been removed. RP (10.3.05) at 60. She administered Mr. Radcliffe his constitutional warnings. RP (10.3.05) at 61, 129. Mr. Radcliffe stated that he would talk to Det. Barnes. RP (10.3.05) at 63-64. She stated that he did not request an attorney. RP (10.3.05) at 65. She stated that he denied the allegations of sexual abuse. RP (10.3.05) at 65. Det. Barnes left the room and had Det. Miller go into the interview room to "continue the interrogation and bring up the fact of the [DNA] evidence that we felt we had in regards to the pants." RP (10.3.05) at 66.

Det. David Miller did not re-*Mirandize* Mr. Radcliffe. RP (10.3.05) at 96. He testified that Mr. Radcliffe told him that it would not be necessary. RP (10.3.05) at 96. He stated that Mr. Radcliffe told him that he would be willing to talk to him. RP (10.3.05) at 96. After Mr. Radcliffe denied the allegations to Det. Miller, the detective told him that they had S.K.'s pants, that she said that he ejaculated on them, and that they will know if it is his

ejaculate. RP (10.3.05) at 98. Det. Miller stated that Mr. Radcliffe then told him that the DNA results would show that it was his ejaculate, and that he had had sexual relations with S.K. RP (10.3.05) at 98. He stated that he told Mr. Radcliffe he was going to get a tape recorder to tape Mr. Radcliffe's statement. RP (10.3.05) at 98. He stated that Mr. Radcliffe's response was "[b]ascially at that time he said that he didn't know how much trouble he was in and didn't know if he needed a lawyer." RP (10.3.05) at 99. Det. Miller said he could not give him legal advice and offered to read his rights to him. RP (10.3.05) at 99. He told Mr. Radcliffe that "if he didn't feel comfortable giving a taped statement, he could write me a statement out, and if he didn't [feel] comfortable doing that, he could just tell me it and I would type it into my report." RP (10.3.05) at 99-100. Mr. Radcliffe said of those three choices given him by Det. Miller, he would talk to Det. Miller about the allegations. RP (10.3.05) at 100. Det. Miller staid that Mr. Radcliffe said that the sexual abuse started when S.K. was 14 years old, that they had had sexual intercourse two times, once on a camping trip. RP (10.3.05) at 101. He stated that Mr. Radcliffe told him that he used to take showers with S.K., but that they did not have sex when they were in the shower. RP (10.3.05) at 101. He stated that approximately once per month he would perform oral sex on her, and she would perform oral sex on him. RP (10.3.05) at 101.

Det. Barnes booked Mr. Radcliffe into the jail. RP (10.3.05) at 69.

James Radcliffe denied that Det. Miller specifically asked him if he would waive his rights and talk to him. RP (10.3.05) at 135. Mr. Radcliffe testified that he asked Det. Miller about his rights and that he said "I want a lawyer." RP (10.3.05) at 134, 144. He stated that Det. Miller continued to ask him questions. RP (10.3.05) at 134. He stated that he asked for a lawyer one time, and asked about his legal rights "multiple times." RP (10.3.05) at 136, 151. He stated that he discussed only the November 13, 2004 incident prior to saying that he wanted an attorney. RP (10.3.05) at 150.

Judge Hicks, relying on *State v. Aronhalt*, 99 Wn. App. 302, 994 P.2d 248 (2000), ruled that Mr. Radcliffe's statements after "the request for an attorney" be suppressed. RP (10.3.05) at 184-85.

The State moved for reconsideration of the court's ruling on October 10, 2004, citing *State v. Walker*, 129 Wn. App. 258, 118 P.3d 935 (Div. 1, 2005), which was decided August 29, 2005. CP at 81-91, 92-93. Judge Hicks granted the State's motion for reconsideration on October 21, 2005. The defense moved to dismiss the motion for reconsideration, and also filed a motion to set aside the order of reconsideration on October 28. CP at 100-106, 107-108.

The following findings of fact and conclusions of law were entered

November 1, 2005 regarding a motion pursuant to CrR 3.6 to suppress saliva samples obtained from Mr. Radcliffe:

FINDINGS OF FACT

1. On November 22, 2004, an Information was filed in the above cause charging the defendant with one count of second-degree child molestation, one count of second degree rape of a child, two counts of third-degree rape of a child, and one count of indecent liberties by forcible compulsion.

2. On April 21, 2005, the State filed a motion for court authorization to obtain saliva samples from the defendant for purposes of DNA testing and comparison with any DNA profile obtained from semen on the clothing of the alleged female victim, pursuant to CrR 4.7(b)(2)(vi).

3. On May 12, 2005, the Court approved an Order requiring the defendant to provide saliva samples to the Lacey Police Department for DNA testing and comparison by the Washington State Patrol Crime Laboratory.

4. Saliva swabs were collected from the defendant pursuant to that Order. Those swabs were then submitted to the Washington State Patrol Crime Laboratory and were utilized by the Laboratory, along with other evidence in this case, for DNA testing and comparison.

CONCLUSIONS OF LAW

1. Under the authority of CrR 4.7(b)(2)(vi), the defendant was properly ordered to provide saliva samples for DNA testing and comparison.

2. The defendant's motion to suppress DNA evidence derived from tests utilizing the defendant's saliva samples is denied.

CP at 109-110.

The following findings of fact and conclusions of law were entered November 4, 2005 regarding the CrR 3.5 motion:

I. FINDINGS OF FACT

1. It is undisputed that on the morning of November 17, 2004, Lacey Police Office Rick Monk contacted the defendant at his place of employment, took the defendant into custody, and transported him to the Lacey Police Department. Along the way, Officer Monk informed the defendant of his right to remain silent and his right to an attorney, but did not make any attempt to question the defendant.

2. It is also undisputed that after the defendant arrived at the Lacey Police Department, he was escorted by Lacey Police Detective Shannon Barnes to a Detective interrogation room. Inside that room, which the defendant and Detective Barnes were the only persons present, Detective Barnes fully and accurately informed the defendant of his constitutional rights regarding the making of any statement, hereinafter referred to as the *Miranda* rights.

3. After Detective Barnes informed the defendant of his *Miranda* rights, the defendant understood those rights and verbally proceeded to voluntarily, intelligently, and knowingly waiver those rights.

4. After the defendant's waiver of *Miranda* rights, Detective Barnes began questioning the defendant. Detective Barnes' interview with the defendant lasted about ten minutes, during which time the defendant denied the allegations against him.

5. At the end of the interview, Detective Barnes left the room while the defendant remained inside. Detective Barnes then contacted Lacey Police Detective David Miller and briefly updated him on what this case about and her interview with the defendant. Detective Barnes then asked Detective Miller to take over the interrogation of the defendant because Barnes was five months pregnant and was not supposed to be in situations which could become stressful.

6. Detective Miller then entered the room to speak with the defendant. Only Detective Miller and the defendant were present in the room during the interview that followed.

7. At the start of this interview, Detective Miller asked the defendant if Detective Barnes had informed him of his *Miranda* rights, and the defendant responded that she had done so. Detective Miller then asked whether the defendant had waived those rights, and the defendant answered that he had waived them. Next, Detective Miller asked the defendant whether the defendant wished to have those rights read to him again. However, the defendant answered in the negative, saying that he understood those rights. After these things had been said, Detective Miller began questioning the defendant concerning the allegations that were the subject of this investigation.

8. The defendant began the interview with Detective Miller by denying the allegations. However, when Detective Miller brought up the subject of testing semen on the alleged victim's clothing for DNA, the defendant admitted to recent sexual activity with the alleged victim.

9. The defendant then made an equivocal reference to his right to an attorney, stating the maybe he should contact an attorney. Detective Miller responded by asking the defendant if he wanted the Detective to read the *Miranda* rights to him again, but the defendant stated that he understood his rights. Detective Miller then told the defendant that the ball was in

his court. At that point, the defendant voluntarily resumed answering the Detective's questions without further reference to an attorney during the remainder of the interview.

Based upon the above Findings of Fact, and the applicable legal principles, the Court makes the following:

II. CONCLUSIONS OF LAW

1. Before questioning the defendant, the requirements of the Fifth Amendment to the United States Constitution and Article 1, section 9 of the Washington Constitution were satisfied by Detective Barnes' complete and accurate recitation to the defendant of his rights regarding the making of any statement, the *Miranda* rights, the defendant's knowing, intelligent, and voluntary waiver of those rights in response, and the voluntary answers provided by the defendant to Detective Barnes' questioning thereafter.

2. At the beginning of Detective Miller's interview with the defendant, the answers given by the defendant to Detective Miller's questions concerning the *Miranda* rights confirmed the defendant's knowing, intelligent, and voluntary waiver of those rights, and the defendant's responses to Detective Miller thereafter in this interview were voluntary.

3. Pursuant to *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), and *State v. Walker*, ___ Wn. App. ___, 118 P.2d 935 (20025), Detective Miller was not legally required to stop questioning the defendant in response to the defendant's equivocal reference to his right to an attorney, and clarify whether the defendant wished to have the assistance of an attorney before resuming any questioning. Rather, Detective Miller was permitted

> to continue his questioning in response to the defendant's equivocal statement, which was followed by the defendant's continued voluntary responses to questioning without any further reference to an attorney.
>
> 4. Based on the Findings of Fact and Conclusions of Law above, the statements made by the defendant during questioning by either Detective Barnes or Detective Miller on November 17, 2004, are admissible in the trial of the above cause.

CP at 158-162. Appendix A-1 through A-5.

h. Jury instructions

Neither counsel noted exceptions to requested instructions not given or objected to instructions given. RP at 925-26. CP at 180-97.

The court gave the following instruction No. 17:

> A person commits the crime of Indecent Liberties when the perpetrator knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion.
>
> A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstances or result is a crime.
>
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he acted with knowledge.
>
> Acting knowingly or with knowledge also is

established if a person acts intentionally.

> Forcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself.

CP at 195. Appendix B-1.

During deliberations, the jury submitted the following question to the court:

> In Instruction # 17, last paragraph,
>
> Does "overcome resistance" necessarily require ~~include~~ the final clause ("that places a person in fear of death or physical injury to oneself")?

CP at 178.

Judge McPhee submitted the following Restated Instruction 17 to the jury that amended the final paragraph as follows:

> Forcible compulsion means physical force which overcomes resistance. Forcible compulsion also means a threat, express or implied, that places a person in fear of death or physical injury to oneself.

CP at 176-77. RP at 1096-1099. Appendix C-1 through C-2.

The defense moved for mistrial and noted its objection to the trial court's Restated Instruction 17. RP at 1098. Judge McPhee denied a defense motion for mistrial. RP at 1099.

i. Verdict

The jury found Mr. Radcliffe guilty of Count III and Count IV (rape of a child in the third degree), and Count V (indecent liberties). RP at 1101. CP at 200, 201, and 202. The court found him not guilty of Counts I and II. RP at 1101.

3. **Sentencing:**

The matter came on for sentencing on February 2, 2006. RP at 1119-1170. Mr. Radcliffe was evaluated for Special Sex Offender Sentencing Alternative [SSOSA] by Brian Cobb in early 2005. CP at 229. In an update to his report filed January 18, 2006, Mr. Cobb noted:

> James Mr. Radcliffe is far above the marginal or fair category given his motivation for treatment and sexual history. His risk indicators remain low, and his treatment amenability indicators remain high.

CP at 228.

Defense counsel recommended sentencing under SSOSA. RP at 1150-51. A SSOSA report was prepared prior to trial and submitted to the State. RP at 1157. The State recommended against SSOSA and requested that the court impose a sentence of 60 months—the top of the range--for each count of third degree rape of a child, and a sentence of 130 months—again, the top of the range—for the indecent liberties conviction, to be served concurrently. RP at 1135-36. CP at 203-215.

Mr. Radcliffe was given an opportunity for allocution, which he did through a letter which was read to the court by his trial counsel. RP at 1153-54. Judge McPhee denied the defense request for SSOSA. RP at 1155-56. The court sentenced Mr. Radcliffe to a standard range concurrent sentence on the convictions for third degree rape of a child, and 114 to life for minimum term of 114 months, and a maximum term of life. RP at 1164. CP at 264.

In rejecting the defense motion for SSOSA, Judge McPhee stated that the SSOSA evaluation by Mr. Cobb

> is not a report that I believe would provide to a court the requisite assurances that this was a program that could be successful even if this process had been undertaken last—I think it was April when the report was done, even if the case had gone forward on a plea of guilty to the acts that the defendant had admitted at that time and then recommendation of SSOSA was made to my court.
>
> RP at 1157-58.

Judge McPhee stated that SSOSA would have been "a very close call as to whether any court would have found the defendant amenable to treatment" if it had been presented to him prior to trial, and then stated:

> [T]he trial court was the trial of the family of the victim and the victim herself. The defendant presented no evidence of his own denying the allegations. Rather, he relied upon the ability of his counsel to so attack and impeach the testimony of what I'll refer to as the complaining witnesses, [S.] and her family, that the jury would conclude that they could not be believed and that the defendant did not commit these acts,

even though he had admitted the acts to the treatment provider, a fact that was not known to the jury, and as I indicated, not even known to this court.

One aspect of this trial really stands out in my mind in this regard, and that is the continuance of the trial. Mid trial, the trial stopped and was stopped for a week while the defendant prepared evidence, evidence that was clearly available to them well before this trial began, evidence that, in my estimation, could have been gathered before but was not. But that evidence, I was convinced by argument from the defendant, was so important to establishing his innocence of these charges that the trial needed to stop. And the victim's family was left hanging with the idea that perhaps they were done with their testimony, perhaps they were not, and perhaps they would be called back while the evidence was gathered.

In making that Determination, I reviewed some the evidence preliminarily and observed at that time that the evidence that the defendant, Mr. Radcliffe, sought to produce appeared to be as much inculpatory, as much supporting the charges, as it did appear to be exculpatory. Nevertheless, I permitted it to go forward. And I clearly identified why that would occur, not because it proved Mr. Radcliffe was not guilty of the charges, that he could not have committed all of the acts charged, because clearly the evidence didn't address all of the time frames that were described by [S.] in her testimony, but rather, to show that at least for some periods of the time when she indicated these acts had occurred that Mr. Radcliffe was at work and could not have perpetrated them. And the purpose for all of that was to show that she could not be believed, to impeach her testimony, and to argue then to the jury that if she's wrong here, she must not be believable in all that she says and the jury is not guilty.

The jury didn't buy that, because the period of employment that we are focusing on, if my memory serves, occurred mostly after the time that [S.] was 14. And so the jury's Determination that the State could not prove the

> defendant guilty of acts that occurred before she was 14, even though we now know that Mr. Radcliffe had admitted those acts in an attempt to convince a treatment provider that he was a good candidate for SSOSA, that he was truthful and remorseful—as the case went to trial, the defense was successful in convincing the jury that the State could not prove those charges beyond a reasonable doubt.
>
> Mr. Radcliffe, I can think of no more cynical approach to the criminal justice system in this report than the events that occurred here in this case. They are, in my estimation, breath-taking. To, on one hand, attempt to obtain a SSOSA sentence well before trial, and then when that fact was not assured, to proceed to trial in a manner that challenged the allegations and the truthfulness of those allegations after they had already been admitted by you just seems to me to be a clear indications that any consideration of SSOSA at this point must be tempered by the realization of your willingness to enter into that type of cynical activity. It is a complete reassurance to me that a SSOSA would be inappropriate for this case.

RP at 1159-1162.

D. ARGUMENT

1. MR. RADCLIFFE WAS DENIED HIS RIGHT TO A TRIAL BY AN IMPARTIAL JURY, REQUIRING REVERSAL.

a. A defendant is constitutionally entitled to an unbiased jury.

The accused in a criminal trial has constitutional right to have a fair and impartial jury Determine his guilt or innocence. U.S. Const. amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d

29 (1995). Where a juror's views would "prevent or substantially impair the performance of his duties" as a juror, the juror must be excused for cause. *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)). If a biased juror is permitted to deliberate, the accused is denied his constitutional right to trial by an impartial jury, requiring reversal. *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (196); *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002). Moreover, due process requires that a person accused of a crime be tried only by a jury willing to decide the case solely on the evidence presented. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1981).

b. <u>Jury misconduct occurs when the jury considers facts not in evidence</u>.

One guarantee of jury impartiality is that the jury is constrained to determine factual issues only on the basis of the evidence introduced at trial. *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986). *See also, Turner v. Louisiana,* 379 U.S. 466, 13 L. Ed. 2d 424, 85 S.Ct. 546, 549-50 (1965); WPIC 1.01A. The interjection of extraneous evidence into the jury's deliberations violated this principal as well as an accused's right to due process of law. *Richards v. Overlake Hospital,* 59 Wn. App. 266, 270, 796

P.2d 737 (1990); *Halvorson v. Anderson,* 82 Wn.2d 746, 752, 513 P.2d 8267 (1973).

c. <u>Prospective jurors' comments may irreparably prejudice a jury panel against the accused</u>.

In *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1998), the Ninth Circuit Court of Appeals reversed a defendant's conviction where prejudicial comments by a prospective juror so infected the remaining jury panel members that reversal was the only proper remedy. In *Mach*, the defendant was accused of sexually assaulting a young girl. *Id.* at 631. One prospective juror was a social worker with Arizona's Child Protective Services. *Id.* at 632. The prospective juror readily questioned her ability to be impartial, explaining, in front of the jury panel, that in her experience, every claim of sexual assault by a child had later been confirmed. *Id.* She additionally stated she was unaware of a child ever lying about such a situation. *Id.* Later, the juror disclosed that she had taken classes in child psychology, lending an air of expertise to her remarks. *Id.* at 632-33. The court denied Mach's motion for a mistrial which was based on concerns that the prospective juror had tainted the jury pool, but the court did strike the prospective juror for cause. *Id.* at 632.

The Ninth Circuit took issue with the court's failure to follow up with

the remaining panel:

> At a minimum, when Mach moved for a mistrial, the court should have conducted further *voir dire* to Determine whether the panel had in fact been infected by [the juror's] expert-like statements. Given the nature of [the juror's] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. The bias violated Mach's right to an impartial jury.

Id. at 633. Under a harmless-error standard, the Court found the error had a "substantial and injurious effect or influence in Determining the jury's verdict" since the remarks went straight to the heart of Mach's case—whether the jury believed the accused or the accuser. *Id.*, (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L.2d2d 353 (1993)). The Court found "no doubt" that the prospective juror's comments "had to have had a tremendous impact on the jury's verdict." *Mach*, 137 F.3d at 633. The Court concluded the juror's comments substantially affected or influenced the verdict and reversed Mach's conviction. *Id.*

d. <u>Juror 15's statements during *voir dire* at Mr. Radcliffe's trial tainted the jury pool and require reversal</u>.

Comments by a prospective juror tainted the jury panel against him.

ii. <u>Juror 15's biased comment tainted the jury pool</u>.

In the case at bar, the court asked the jury panel about possible biases. Juror 15 Detailed his bias:

> Well, with the defendant, I guess, specifically, I'm a bartender, and I've seen him in situations in the bar, and—

RP at 22-23.

When the court asked Juror 15 if his acquaintanceship with Mr. Radcliffe would affect your ability to be fair and impartial, juror responded "I don't know. Possibly." RP at 22.

The court excused Juror 15 for cause. RP at 23. Defense counsel moved for a new jury poor on the basis that juror 15's statement that in his capacity as bartender he had seen Radcliffe and that his behavior would make him "possibly" unable to be fair and impartial, and that if Mr. Radcliffe would be called to testify during trial, he would weigh their testimony differently from other witnesses. RP at 61-63. The defense argued that the statements tainted the venire. RP at 62-63. Judge McPhee noted that he had "reviewed that and concluded that that was not something that rose to the level of tainting the panel" and denied the motion. RP at 64.

In denying the motion, the court failed to consider the lingering effects of Juror 15's damaging remarks.

Moreover, the bias prompted by Juror 15 was not diminished by

efforts of the court and the parties to ensure the remaining jurors were unswayed by this opinion, and resulted in Mr. Radcliffe being tried by a jury prejudiced against him from the outset. Under *Mach, reversal is required.* 137 F.3d at 633.

e. Reversal is required.

The jury panel was subjected to highly prejudicial remarks against Mr. Radcliffe. The remarks of the positional juror served to taint the jury pool, and encouraged other jurors to give credence to the State's as-yet unheard case. The effect of these comments prejudiced the jurors who ultimately deliberated in Mr. Radcliff's case. For all of these reasons, reversal is required. *Mach* 137 F.3d at 633; *Gonzales*, 111 Wn. A pp. at 282.

2. THE TRIAL COURT ERRONEOUSLY ADMITTED MR. RADCLIFFE'S STATEMENT AT TRIAL IN VIOLATION OF HIS *MIRANDA* RIGHTS.

c. A suspect's request for counsel must be scrupulously honored.

Once a person is arrested, under *Miranda v. Arizona*, 384 U.S. 436, 471, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the police must apprise the accused of his constitutional rights, including his right to remain silent and his right to an attorney.

If the individual states that he wants an attorney, the

> interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Id. (emphasis added).

> [T]he Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination require[s] that custodial interrogation be preceded by advice to the accused that he has the right to remain silent and the right to the presence of an attorney. . . . If he requests counsel "the interrogation must cease until an attorney is present."

State v. Robtoy, 98 Wn.2d 30, 35, 653 P.2d 284 (1982) (citing *Miranda*, 384 U.S. at 474, 479). If interrogation does not cease, any subsequent statements may be deemed involuntary, and thus inadmissible. *Miranda*, 384 U.S. at 473-74.

Under this principle, where a person unequivocally requests an attorney, all custodial interrogation must stop until an attorney is present unless the person waives the right to counsel on his own initiative. *Davis v. United States*, 512 U.S. 452, 458, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); *State v. Chapman*, 84 Wn.2d 373, 377, 526 P.2d 64 (19794). An unequivocal request to speak to an attorney must be "scrupulously honored." *State v. Grieb*, 52 Wn. App. 573, 576, 761 P.2d 970 (1988).

A waiver of the right to an attorney is valid only where it clearly

indicates a knowing and intelligent willingness to forgo this constitutional right. *Davis*, 512 U.S. at 458; *State v. Earls*, 116 Wn.2d 364, 378-779 805 P.2d 211 (1991) (citing *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)).

As noted, in general, if an accused indicates a desire for an attorney "in any manner and at any stage" of custodial interrogation, officers must immediately stop the interrogation. *Miranda,* 384 U.S. at 444-45. There is limited exception when an accused makes an "equivocal" request for an attorney. *State v. Robtoy,* 98 Wn.2d at 38-39. An equivocal request is a request that "expresses both a desire for counsel and a desire to continue the interview without counsel." *State v. Quillin,* 49 Wn. App. 155, 159, 741 P.2d 589 (1987), *rev. denied,* 109 Wn.2d 1027 (1998); *See e.g., State v. Gutierrez*, 50 Wn. App. 583,589, 749 P.2d 213 (1988) ("I'd rather not talk about it" is an equivocal request to remain silent). The essence of an equivocal request is that, without further clarification, it is impossible to determine if the accused has exercised his right to counsel. *Robtoy*, 98 Wn.2d at 38-39. *State v. Smith*, 34 Wn. App. 405, 408, 661 P.2d 1001, *rev. denied,* 100 Wn.2d 1008 (1983). When an accused makes a statement that is an equivocal request, officers must not continue interrogation but may ask questions that are "strictly confined" to clarifying the suspect's request. *Robtoy*, 98 Wn.2d at

39. Where a person makes an equivocal request for an attorney,

> 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.

Robtoy, 98 Wn.2d at 39 (emphasis added).

When unequivocal request for an attorney is made, *any* questions asked thereafter must be strictly limited to clarifying the suspect's wishes. *Smith,* 34 Wn. App. at 409; *Quillin*, 49 Wn. App. at 159.

Moreover, in Washington, CrR 3.1 outlines the State's obligations when a person expresses an interest in speaking to an attorney. CrR 3.1(c) provides, in part:

> (2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible to assignment lawyers, and any other means necessary to place the person in communication with a lawyer.

(Emphasis added.)

In the case at bar, Judge Hicks initial found that Det. Miller had not taken sufficient steps to clarify whether Mr. Radcliffe requested the assistance of counsel before resuming the interrogation. RP at 183-84.

The court found that Mr. Radcliffe made an "equivocal statement"

requesting attorney. Judge Hicks noted:

> Once the word "attorney" shows up, he has to then become active to get another waiver. It's not enough to say, "Do you want me to read your rights again?" He has to either get a clear statement of a waiver—he doesn't have to do it in writing.

RP at 183.

The State argued on reconsideration that under *State v. Walker*, 129 Wn. App. 258, 118 P.3d 935 (2005), which follows the ruling of *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), an equivocal request for counsel did not infer on the police an obligation to stop questioning Mr. Radcliffe to clarify an equivocal statement. CP at 81-91. In *Davis*, the Supreme Court rejected the requirement that law enforcement stop interviewing a suspect and clarify a defendant's equivocal request for counsel during a custodial interrogation. *Davis*, 512 U.S. at 461-62. In *Walker*, Division 1 of this Court held that "where a suspect has received Miranda warnings the invocation of the right to remain silent must be clear and unequivocal (whether through silence or articulation) in order to be effectual; if the invocation is not clear and unequivocal, the authorities are under no obligation to stop and ask clarifying questions, but may continue with the interview." *Walker*, 129 Wn. App. at 276.

Accepting the State's argument, Judge Hicks reversed his original ruling and granted the State's motion for reconsideration. That ruling was in error.

As a threshold matter, it is important to remember that the "equivocal request" exception to the *Miranda* prohibition against further questioning is "narrowly drawn" and "must be jealously applied." *State v. Lewis,* 32. Wn. App. 13, 21, 645 P.2d 722, *rev. denied*, 98 Wn.2d 1004 (1982). Further, in examining an alleged waiver made after an equivocal request for an attorney, the court must "indulge in every reasonable presumption against waiver." *Robtoy,* 98 Wn.2d at 40, *quoting, Brewer v. Williams,* 430 U.S. 387, 404, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977). Although asking the question "do you want an attorney" is only the preferred method of clarifying an equivocal request, any other method used must meet several requirements, including that "the right to cut off questioning was scrupulously honored" and "the police engaged in no tactics which tended to coerce the suspect to change his mind." *State v. Pierce,* 94 Wn.2d 345, 352, 618 P.2d 62 (1980), *cited with approval in, Robtoy,* 98 Wn.2d at 36.

Here, Det. Miller neither "scrupulously honored" the right to cut off questioning, ask the clarifying question whether he wanted an attorney, nor did he tell Mr. Radcliffe he had a right to stop answering questions.

Compare, Lewis, 32 Wn. App. at 16 (after the equivocal request, the officer clarified several times that the defendant had the right to refuse to answer questions).

This Court is under no obligation to follow Division 1's holding in *Walker*. Until *Walker*, all three Divisions of this Court followed *Robtoy* and *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). This Court has noted that once an accused asserts his right to remain silent, all interrogation must cease "unless the accused himself initiates further communication, exchanges, or conversations with the police." *State v. Schimelpfenig*, 128 Wn. App. 224, 115 P.3d 338 (2005) quoting *Edwards*, 451 U.S. at 485.

This Court noted in *State v. Jones*,

> *Edwards v. Arizona* holds that once an accused "expresse[s] his desire to deal with the police only through counsel," he may not be interrogated further "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Davis v. United States* elaborates on *Edwards* by holding that "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him."
>
> Washington follows *Edwards* but not *Davis*. When a Washington accused requests counsel equivocally, "[a]ny questioning after the equivocal assertion of the right to counsel must be strictly confined to clarifying the suspect's request."

State v. Jones, 102 Wn. App. 89, 96, 6 P.3d 58 (2000) (footnotes omitted).

This Court should not abandon *Edwards*. Moreover, the facts of the case at bar are different from *Walker*. In *Walker*, Garrison (a defendant whose case was made a companion case to *Walker)*,[9] re-initiated the questioning process after stating that he wanted to remained silent. The Court in *Walker* found:

> Garrison did not tell the police that he wished to remain silent, but instead said that he did not want to say anything that would make him look guilty or incriminate him. *He then continued to speak with police for several hours and signed a highly incriminating statement. At no time during the police interview did Garrison stop talking or say that he did not want to talk to the police anymore.*
>
> At best, Garrison's statements to [the Detective] were equivocal as to whether he wanted to invoke his right to remain silent. This raises the issue of whether the police were obligated to stop and clarify whether Garrison was invoking his right to remain silent before proceeding with the interview. As this is a case of first impression in Washington, both parties look to case law addressing the officer's obligations during an interrogation when a suspect is equivocal in invoking his right to counsel.

Walker, 129 Wn. App. at 274 (Emphasis added).

In stark contrast to Garrison's behavior in *Walker,* Mr. Radcliffe did not re-initiate the questioning—Det. Miller instead forced the issue by telling

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[9] Walker and Garrison were consolidated in regard to their mutual confrontation issue invoking *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1370, 158 L.Ed.2d 177 (2004). Walker does not have the confession issue that Garrison's case involves.

Mr. Radcliffe that the "ball was in his court"[10] and gave him four possible choices as how to proceed, three of which involved making a statement to police. RP (10.3.05) at 99-100. Det. Miller did not tell Mr. Radcliffe that if he wanted an attorney, he would stop the interrogation until he got one, nor did he ask if he wanted an attorney. Instead, Det. Miller obfuscated and diminished the importance of the waiver; after Mr. Radcliffe told him that "he didn't know how much trouble he was in and he did not know if he needed a lawyer," Det. Miller gave him the following choices: (1) reread his Miranda rights and that that if he had any questions, to reference those rights, (2) make a taped statement, (3) make a written statement, or (4) "just tell me it and I would type it into my report." RP at 99-100.

The officer's actions in the present case misled Mr. Radcliffe as to whether he could stop the questioning. Det. Miller's actions were not "neutral" but were, in fact, coercive, because he essentially limited Mr. Radcliffe's choices as to what he could do and how he could proceed. The end result was that a defendant, who had indicated a desire to exercise his right to counsel, or at least expressed concern that he may need counsel, instead waived that right.

The trial court erred in holding otherwise, and this Court should

[10] RP (10.3.05) at 99.

reverse.

b. <u>Alternatively, Mr. Radcliffe's request for an attorney was unequivocal.</u>

i. <u>In the alternative to the argument presented *supra*, Mr. Radcliffe's request for counsel was unequivocal</u>.

Based on his testimony at the suppression hearing that he told Det. Miller that he wanted a lawyer,[11] Mr. Radcliffe disputes the court's findings and conclusion that his request for an attorney was equivocal. As noted in the argument *supra*, an equivocal request expresses a desire for counsel as well as a desire to continue the interview without an attorney. *Quillin*, 49 Wn. App. at 159. Equivocation is demonstrated where it is impossible to Determine whether a request has been made without additional clarification. *Smith*, 34 Wn. App. at 408. Where a person makes an equivocal request for counsel, all interrogation must cease; the officer may ask questions merely designed to clarify the suspect's request. *State v. Aten*, 130 Wn.2d 640, 665-66, 927 P.2d 210 (1996). That inquiry must be restricted to clarifying the person's request for counsel. *Id.*

Here, Mr. Radcliffe testified that he asked for counsel one time and asked Det. Miller what his legal rights were "multiple times." RP (10.3.05)

at 134, 136. This statement demonstrated Mr. Radcliffe's growing concern that he was in trouble and that he should inquire about his legal rights. RP (10.3.05) at 133. Given this realization, he asked for an attorney and asked about his legal rights. Based on his testimony, it is clear Mr. Radcliffe's request for counsel was unequivocal and the police were obliged to stop all questioning until Mr. Radcliffe was given access to counsel. But rather than treat Mr. Radcliffe's request for counsel as unequivocal, Det. Miller forced the issue by offering the four alternatives, three of which would result in making a statement. The trial court found that Mr. Radcliffe's statement was equivocal. Finding of Fact No 9, Conclusion of Law 3. CP at 160, 161.

Mr. Radcliffe asserts the court erred in finding his request for counsel was equivocal and asks this Court to recognize his request for an attorney was unequivocal and unambiguous. His testimony on October 3, 2005 was that he asked for counsel and was a clear expression of his desire to contact an attorney. The court did not find that Mr. Radcliffe's statement was not believable. In fact, Judge Hicks specifically noted in his oral ruling that "in this case there is plenty of corroborating evidence because Mr. Radcliffe I thought was credible in what he had to say." RP (10.3.05) at 176. Judge

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[11] RP (10.3.05) at 134, 136.

Hicks also said "I believe Detective Miller; I believe Detective Barnes and I believe Mr. Radcliffe here." RP (10.03.05) at 183. The court made no specific written finding regarding the credibility of each suppression witness; the court did not find that Mr. Radcliffe did not make his unequivocal request for counsel, as he testified. CP at 158-162.

Mr. Radcliffe's request should have been scrupulously honored. *Grieb*, 52 Wn. App. at 576.

ii. <u>The error requires reversal</u>.

Mr. Radcliffe plainly stated that he wanted to speak with an attorney. Det. Miller ignored his unequivocal request for counsel. Even if this Court finds that the statement was equivocal, Det. Miller did not limit further conversation with Mr. Radcliffe to clarifying his request for an attorney, instead, he merely gave Mr. Radcliffe three ways for him to provide a statement without an attorney—knowing his comments would likely elicit an incriminating response. *State v. Johnson*, 48 Wn. App. 681, 684, 739 P.2d 1209 (1987). This was plainly improper. Whether Mr. Radcliffe's request for counsel is viewed as unequivocal or equivocal, Det. Miller did not respect that request and instead made great efforts to circumvent the request for

counsel, in violation of Mr. Radcliffe's constitutional rights. The trial court erred in finding on reconsideration the statements to police that did not pertain to November 13, 2004, to be admissible, as they were the product of an interrogation conducted without Mr. Radcliffe's request for counsel.

Because police ignored Mr. Radcliffe's request for counsel, his sequent statements to police were involuntary, requiring reversal and remand for retrial without the use of the unlawfully obtained statement. *Miranda*, 384 U.S. at 473-74.

In addition, in the event that this Court finds the facts of *Walker* to be analogous, *Walker* constitutes a sea change in the treatment of equivocal, custodial requests for counsel. Division 1 may choose to abandon *Edwards* and *Robtoy* and its progeny and follow *Davis*, but this Court should not.

3. THE TRIAL COURT ERRED WHEN IT SUBMITTED RESTATED INSTRUCTION 17 TO THE JURY, REDEFINING FORCIBLE COMPULSION. THE TRIAL COURT'S SUPPLEMENTAL INSTRUCTION WAS AN INCORRECT STATEMENT OF THE LAW THAT IMPERMISSIBLY PREJUDICED THE DEFENSE AND VIOLATED MR. RADCLIFFE'S CONSTITUTIONAL DUE PROCESS RIGHTS

The trial court issued the standard WPIC instruction regarding forcible compulsion, the final paragraph reads:

Forcible compulsion means physical force which overcomes

> resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself.

Instruction 17. CP at 195.

On December 13, in response to a question by the jury submitted during deliberation, Judge McPhee submitted the following Restated Instruction:

> Forcible compulsion means physical force which overcomes resistance. Forcible compulsion also means a threat, express or implied, that places a person in fear of death or physical injury to oneself.

CP at 176-77. RP at 1096-1099.

Judge McPhee explained his ruling to issue the amended instruction. RP (12.13.05) at 2-8.

a. <u>The Trial Court's Restated Instruction Denied Mr. Radcliffe Due Process</u>.

A fundamental component of the due process protections entailed in a jury trial is that the "jury base its decision on an accurate statement of the law as applied to the facts in the case." *State v. Miller*, 131 Wn.2d 78, 91, 929 P.2d 372 (1997). In criminal cases, the right to due process of law guarantees a defendant the right to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994) (citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). Due process also

grants an accused person the right to have the "jury fully instructed on the defense theory of the case." *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). A criminal defendant has the due process right to instructions that clearly and accurately charge the jury regarding the law to be applied in a given case. U.S. Const. amends V, XIV; Const. art. I, § 3; *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977).

In "forcible compulsion" instruction is based on RCW 9A.44.010. RCW 9A.44.010(6) defines forcible compulsion as:

> "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

The wording of the instruction raises the issue that the Legislature intended that in order for a jury to find that a person used forcible compulsion, he must use physical force that overcomes resistance, *and* that the physical force places a person in fear of death or physical injury. In other words, the statute may be interpreted to require:

(1) physical force overcomes resistance that places a person in fear of death or physical injury
(2) a threat, express or implied, that places a person in fear of death or physical injury to oneself.

The trial court's Restated Instruction obviates that reading of the WPIC, giving a jury three alternate methods of using forcible compulsion:

> (1) physical force that overcomes resistance;
> (2) physical force that places a person in fear of death or physical injury;
> (3) a threat, express or implied, that places a person in fear of death or physical injury to oneself.

b. <u>The error was prejudicial</u>.

Because the error violated Mr. Radcliffe's constitutional rights to due process, the State must prove the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). An error in jury instructions is prejudicial and requires reversal if it "affects, or presumptively affects, the outcome of the trial." *Brown v. Spokane Cy. Fire Protec. Dist. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

c. <u>Mr. Radcliffe is Entitled to Relief</u>.

This Court should reject any effort to impart a harmless error analysis to the erroneous instruction: "Before addressing whether and instruction sufficed to allow a party to argue its theory of the case, the must first decide the instruction accurately stated the law without misleading the jury." *State v. LeFaber*, 128 Wn.2d 903. This Court should reverse the conviction obtained

in Count V.

4. **THE COURT ERRED IN DENYING THE MOTION TO IMPOSE A SUSPENDED STANDARD RANGE SENTENCE UNDER THE SPECIAL SEXUAL OFFENDER SENTENCING ALTERNATIVE.**

a. **The decision is reviewable because the challenge is not to the length of time imposed by the sentencing court.**

As a general rule, the length of a standard range sentence cannot be appealed. RCW 9.94A.210(1). However, as noted by the Supreme Court, "RCW 9.94A.210(1) applies only to 'challenges to the amount of time imposed when the time is within the standard range.' [citation omitted.]" *State v. Onefrey*, 119 Wn.2d 572, 574 n.1, 835 P.2d 213 (1992).

In the case of a SSOSA, the issue is not the amount of time imposed. The defendant still receives a sentence within the standard range. *See Onefrey*, 119 Wn.2d at 576. Rather, the issue is whether the court should exercise its discretion and suspend the time imposed so that the person can enter into treatment. Not surprisingly, therefore, the majority of courts that have considered the issue have held that even though the imposition of a SSOSA is discretionary, the denial of SSOSA is reversible upon a showing of an abuse of discretion. *State v. Frazier*, 84 Wn. App. 752, 930 P.2d 345, *rev. denied*, 132 Wn.2d 1007 (1997); *State v. Ziegler*, 60 Wn. App. 529, 534, 803

P.2d 1355, *rev. denied*, 116 Wn.2d 1029, 813 P.2d 582 (1991) (citing *State v. Hays*, 55 Wn. App. 13, 776 P.2d 718 (1989)).

Mr. Radcliffe has not challenged the length of his sentence. Given the language of RCW 9.94A.210(1), this Court should find that the statute does not preclude review of the trial court's discretionary ruling in granting or denying a SSOSA.

d. <u>The court abused its discretion in denying a SSOSA</u>.

An abuse of discretion exists when the trial court's decision rests on untenable grounds or reasons. *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981); *Sintra, Inc. v. Seattle*, 131 Wn.22d 640, 664, 935 P.2d 555 (1997). Here, Judge McPhee's basis for denying SSOSA was based on manifestly unreasonable grounds. He first told Mr. Radcliffe that SSOSA would have been "a very close call as to whether any court would have found the defendant amenable to treatment" if it had been presented to him prior to trial, but then gave his reasons for denying the motion for SSOSA. Judge McPhee was highly critical of Mr. Radcliffe's decision to go to trial in light of the fact that "he had admitted the acts to the treatment provider, a fact that was not known to the jury . . . ." Judge McPhee stated that by going to trial, Mr. Radcliffe put the "the family of the victim and the victim herself" on

trial. The judge criticized Mr. Radcliffe for having "presented no evidence of his own denying the allegations" and that "he relied upon the ability of his counsel to so attack and impeach the testimony of what I'll refer to as the complaining witnesses, [S.] and her family, that the jury would conclude that they could not be believed and that the defendant did not commit these acts, even though he had admitted the acts to the treatment provider, a fact that was not known to the jury, and as I indicated, not even known to this court." RP at 1159-62.

The court also noted that Mr. Radcliffe asked for a continuance mid-trial to seek "evidence that was clearly available to them well before this trial began, evidence that, in my estimation, could have been gathered before but was not." Judge McPhee that because of that continuation, "the victim's family was left hanging with the idea that perhaps they were done with their testimony, perhaps they were not, and perhaps they would be called back while the evidence was gathered." RP at 1159-62.

Judge McPhee also stated that the evidence that he sought to present following the continuance did not show that he was at work and could not have perpetrated the offenses, but "to show that she could not be believed, to impeach her testimony, and to argue then to the jury that if she's wrong here, she must not be believable in all that she says and the jury is not guilty." RP

at 1159-62

The court also said that "the State could not prove the defendant guilty of acts that occurred before she was 14, even though we now know that Mr. Radcliffe had admitted those acts in an attempt to convince a treatment provider that he was a good candidate for SSOSA, that he was truthful and remorseful—as the case went to trial, the defense was successful in convincing the jury that the State could not prove those charges beyond a reasonable doubt." RP 1159-62.

Finally, Judge McPhee stated that he could

> think of no more cynical approach to the criminal justice system in this report than the events that occurred here in this case. They are, in my estimation, breath-taking. To, on one hand, attempt to obtain a SSOSA sentence well before trial, and then when that fact was not assured, to proceed to trial in a manner that challenged the allegations and the truthfulness of those allegations after they had already been admitted by you just seems to me to be a clear indications that any consideration of SSOSA at this point must be tempered by the realization of your willingness to enter into that type of cynical activity. It is a complete reassurance to me that a SSOSA would be inappropriate for this case.

RP at 1162.

Judge McPhee's reasons for denying SSOSA are clearly erroneous. The judge criticizes Mr. Radcliffe's decision to go to trial, and even charges Mr. Radcliffe with the obligation to present

"evidence of his own denying the allegations." RP at 1159-62.

The judge's statements overlook the fact that it is the State's responsibility to prove its case, and that it is Mr. Radcliffe's constitutional right to require the State to prove its case. Moreover, Judge McPhee criticizes Mr. Radcliffe's trial attorneys for doing their job by forcing the State to prove its case, to aggressively challenge the State's witnesses, and to be zealous advocates. In short, Judge McPhee's ruling addresses only his dissatisfaction with Mr. Radcliffe's decision to proceed to trial, the difficulty it has created for the State's witnesses, and his perception that because Mr. Radcliffe had a SSOSA evaluation prior to trial, that his decision to exercise his rights and make the State prove its case was "cynical." None of this explains why Mr. Radcliffe would not be a good candidate for SSOSA.

Because Judge McPhee's reasoning is manifestly unreasonable, this justification cannot withstand scrutiny.

5. CUMULATIVE ERROR DENIED MR. RADCLIFFE A FAIR TRIAL.

The combined effects of error may require a new trial, even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d

772, 789, 684 P.2d 668 (1984); *United States v. Preciado-Cordobas*, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the Appellant a fair trial. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *United States v. Pearson*, 746 F.2d 789, 796 (11th Cir. 1984). In this case, the cumulative effect of the trial courts errors, in conjunction with the instances of ineffective assistance cited *supra* produced an unmistakable series of errors that prejudiced the Appellant and materially affected the outcome of the trial..

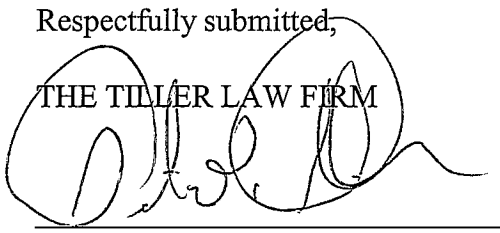
E. CONCLUSION

For the foregoing reasons, Mr. Radcliffe respectfully requests that this Court reverse his convictions and remand this matter for a new, fair trial. In the unlikely event that he does not prevail, he asks this Court to deny any State request for costs on appeal.

DATED: October 4, 2006.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER - WSBA 20835
Of Attorneys for James D. Radcliffe

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IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY	NO. 04-1-2111-5
STATE OF WASHINGTON, Plaintiff, vs. JAMES D. RADCLIFFE, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW RE CrR 3.5 HEARING

A HEARING WAS HELD on October 3, 2005, to consider the admissibility at trial of the defendant's pre-trial statements, pursuant to CrR 3.5; the defendant, JAMES D. RADCLIFFE, appeared in person and through his attorney, Jeanette W. Boothe; the Plaintiff, State of Washington, appeared by its counsel, James C. Powers, Deputy Prosecuting Attorney for Thurston County; the Court heard testimony from the following witnesses: Lacey Police Detective Shannon Barnes, Lacey Police Detective David Miller, and James D. Radcliffe. Certain exhibits were admitted into evidence as well. At the end of the hearing, the court orally recited the court's factual findings as well as legal conclusions.

The matter came back before the Court on October 21, 2005, pursuant to a State's motion for the Court to reconsider its legal conclusions in the light of the 8-29-05 decision of the Washington Court of Appeals in State v. Walker, ___ Wn. App. ___, 118 P.3d 935 (2005) and Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Present at this hearing was the Defendant, JAMES D.

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RADCLIFFE, his attorney Jeanette W. Boothe, and Deputy Prosecuting Attorney James C. Powers. The Court heard arguments from the parties solely on the issue of what legal conclusions should be drawn from the factual findings made by the Court at the 10-3-05 hearing.

This Court having considered the testimony of the witnesses at the 10-3-05 hearing, as well as the exhibits admitted into evidence on that date, and having considered the arguments of the parties presented on 10-3-05 and 10-21-05, now makes the following:

I. FINDINGS OF FACT

1. It is undisputed that on the morning of November 17, 2004, Lacey Police Officer Rick Monk contacted the defendant at his place of employment, took the defendant into custody, and transported him to the Lacey Police Department. Along the way, Officer Monk informed the defendant of his right to remain silent and his right to an attorney, but did not make any attempt to question the defendant.

2. It is also undisputed that after the defendant arrived at the Lacey Police Department, he was escorted by Lacey Police Detective Shannon Barnes to a detective interrogation room. Inside that room, while the defendant and Detective Barnes were the only persons present, Detective Barnes fully and accurately informed the defendant of his constitutional rights regarding the making of any statement, hereinafter referred to as the Miranda rights.

3. After Detective Barnes informed the defendant of his Miranda rights, the defendant understood those rights and verbally proceeded to voluntarily, intelligently, and knowingly waive those rights.

4. After the defendant's waiver of Miranda rights, Detective Barnes began questioning the defendant. Detective Barnes' interview with the defendant lasted about ten minutes, during which time the defendant denied the allegations against him.

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5. At the end of this interview, Detective Barnes left the room while the defendant remained inside. Detective Barnes then contacted Lacey Police Detective David Miller and briefly updated him on what this case was about and her interview with the defendant. Detective Barnes then asked Detective Miller to take over the interrogation of the defendant because Barnes was five months pregnant and was not supposed to be in situations which could become stressful.

6. Detective Miller then entered the room to speak with the defendant. Only Detective Miller and the defendant were present in the room during the interview that followed.

7. At the start of this interview, Detective Miller asked the defendant if Detective Barnes had informed him of his Miranda rights, and the defendant responded that she had done so. Detective Miller then asked whether the defendant had waived those rights, and the defendant answered that he had waived them. Next, Detective Miller asked the defendant whether the defendant wished to have those rights read to him again. However, the defendant answered in the negative, saying that he understood those rights. After these things had been said, Detective Miller began questioning the defendant concerning the allegations that were the subject of this investigation.

8. The defendant began the interview with Detective Miller by denying the allegations. However, when Detective Miller brought up the subject of testing semen on the alleged victim's clothing for DNA, the defendant admitted to recent sexual activity with the alleged victim.

9. The defendant then made an equivocal reference to his right to an attorney, stating the maybe he should contact an attorney. Detective Miller responded by asking the defendant if he wanted the detective to read the Miranda rights to him again, but the defendant stated that he understood his rights. Detective Miller then told the defendant that the ball was in his court. At that point, the

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defendant voluntarily resumed answering the detective's questions without further reference to an attorney during the remainder of the interview.

Based upon the above Findings of Fact, and the applicable legal principles, the Court makes the following:

II. CONCLUSIONS OF LAW

1. Before questioning the defendant, the requirements of the Fifth Amendment to the United States Constitution and Article 1, section 9 of the Washington Constitution were satisfied by Detective Barnes' complete and accurate recitation to the defendant of his rights regarding the making of any statement, the Miranda rights, the defendant's knowing, intelligent, and voluntary waiver of those rights in response, and the voluntary answers provided by the defendant to Detective Barnes' questioning thereafter.
2. At the beginning of Detective Miller's interview with the defendant, the answers given by the defendant to Detective Miller's questions concerning the Miranda rights confirmed the defendant's knowing, intelligent, and voluntary waiver of those rights, and the defendant's responses to Detective Miller thereafter in this interview were voluntary.
3. Pursuant to Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), and State v. Walker, ____ Wn. App. ____, 118 P.3d 935 (2005), Detective Miller was not legally required to stop questioning the defendant in response to the defendant's equivocal reference to his right to an attorney, and clarify whether the defendant wished to have the assistance of an attorney before resuming any questioning. Rather, Detective Miller was permitted to continue his questioning in response to the defendant's equivocal statement, which was followed by the

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defendant's continued voluntary responses to questioning without any further reference to an attorney.

4. Based on the Findings of Fact and Conclusions of Law above, the statements made by the defendant during questioning by either Detective Barnes or Detective Miller on November 17, 2004, are admissible in the trial of the above cause.

DATED this 4th day of November, 2005.

HONORABLE JUDGE RICHARD D. HICKS

PRESENTED BY:

JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTY

APPROVED AS TO FORM:

JEANETTE W. BOOTHE /WSBA #15687
ATTORNEY FOR DEFENDANT

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B

Instruction No. 17

A person commits the crime of Indecent Liberties when the perpetrator knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion.

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Forcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself.

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04-1-02111-5

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SUPERIOR COURT
THURSTON COUNTY, WASH.
BETTY J. GOULD, CLERK
'05 DEC 13
By _____ DEPUTY

Jury Members:

In response to your question about Instruction No. 17, I have attached Restated Instruction No. 17, containing alternative language with an identical meaning in the last paragraph.

Judge McPhee

SCANNED

Restated Instruction No. 17

A person commits the crime of Indecent Liberties when the perpetrator knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion.

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Forcible compulsion means physical force which overcomes resistance. Forcible compulsion also means a threat, express or implied, that places a person in fear of death or physical injury to oneself.

SCANNED

FILED
COURT OF APPEALS
DIVISION II

06 OCT -5 PM 12: 23

STATE OF WASHINGTON

BY _____ DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. JAMES D. RADCLIFFE, Appellant.	COURT OF APPEALS NO. 344447-5-II CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Appellant's Opening Brief and Motion for Leave to File Overlength Brief were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to James D. Radcliffe, Appellant, and James C. Powers, Thurston County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on Wednesday, October 04, 2006, at the Centralia, Washington post office addressed as follows:

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Dated: October 4, 2006.

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