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STATE OF WASHINGTON

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Supreme Court No. _____
COA No. 34447-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES D. RADCLIFFE,

Petitioner.

FILED APPEALS
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY

Petitioner James D. Radcliffe, the appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Radcliffe seeks review of Division Two's Part Published Opinion in *State v. Radcliffe*, No. 34447-7-II (Slip Op. filed June 12, 2007), available at ___ Wn. App. ___, 159 P.3d 486, 2007 Wn. App. LEXIS 1511. A copy of the opinion is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

Radcliffe argues that the trial court erred in admitting the statements he gave to the police, and that he equivocally requested a lawyer during a police officer's questioning. Radcliffe testified that he stated that he wanted a lawyer multiple times, but the officer merely continued his questioning. The Court of Appeals found that after a knowing and voluntary waiver of the *Miranda* rights, the officer could continue questioning unless and until Radcliffe unequivocally requested an attorney. The Court of Appeals found that Radcliffe's reference to an attorney was equivocal and that the officer was not required to stop questioning or to clarify Radcliffe's statement and that the trial court properly admitted defendant's

statements at trial pursuant to the Fifth and Fourteenth Amendments.

In *State v. Robtoy*,¹ this Court adopted the Fifth Circuit's rule that when a suspect makes an equivocal request for an attorney, an officer must limit further questioning to clarifying that request. In *Davis v. United States*,² the Supreme Court held that after a knowing and voluntary waiver of the *Miranda* rights, an officer may continue questioning unless and until a suspect unequivocally requests an attorney. In *State v. Walker*,³ Division One found that *Davis* controls equivocal references to an attorney.

Division Two held in *Radcliffe* that *Davis*, not *Robtoy*, is the controlling authority regarding application of *Miranda* in the context of a suspect's equivocal request for an attorney.

Should this Court grant review to clarify the application of *Robtoy* where a suspect makes an equivocal request for counsel, where the decision of the Court of Appeals is in conflict with a decision of the Supreme Court in *State v. Aten*⁴ and *State v. Robtoy*, in conflict with previous decisions of Division 2, and involves a significant question of constitutional law and an issue of

¹ 98 Wn.2d 30, 653 P.2d 284 (1982)

² 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)

³ 129 Wn. App. 258, 275, 118 P.3d 935 (2005)

⁴ 130 Wn.2d 640, 927 P.2d 210 (1996)

substantial public interest? RAP 13.4(b)(1); RAP 13.4(b)(2); RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

1. **Radcliffe's request for counsel.** A jury convicted James Radcliffe of two counts of third degree rape of a child, and one count of indecent liberties with forcible compulsion.

Radcliffe was contacted by police on November 17, 2004, and taken to the Lacey police station. RP at 416. An officer stated that he administered Radcliffe his constitutional warnings, but did not ask him any questions. RP at 416.

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. Barnes read Radcliffe his warnings pursuant to *Miranda*⁵ and informed him of the accusations against him. RP at 630-31. Barnes stated that Radcliffe said that he was willing to talk to her. RP at 631. Barnes stated that 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

⁵ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

her, and that was the only contact he had with her. RP at 633.

Det. David Miller, at 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. Miller did not administer *Miranda* warnings. RP at 726. He stated that 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.

Miller told Radcliffe that the pants turned over to police by S.K. were being tested for DNA. RP at 715. He stated that Radcliffe then told him that it was his ejaculate and that he had a sexual relationship with S.K. RP at 716. He said that 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 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 Radcliffe told him that she would perform oral sex on him on an average of once per month. RP at 717.

Radcliffe was convicted of two counts of third degree child rape and one count of indecent liberties with forcible compulsion, and the court imposed a standard range sentence. CP at 259-72.

2. **Proceedings on Appeal.** On appeal, Radcliffe contended he made an equivocal request for an attorney, that a prospective juror's comments tainted the jury pool, that a jury instruction incorrectly defined forcible compulsion, and the trial court abused its discretion in denying him a suspended sentence under the Special Sex Offender Sentencing Alternative (SSOSA). Br. App. at 30-55.

The court rejected all of Radcliffe's claims. For the reasons set forth below, he seeks review.

E. ARGUMENT

1. **SHOULD EQUIVOCAL REQUESTS FOR COUNSEL BE CONTROLLED BY DAVIS OR ROBTROY?**

Under the Fifth and Fourteenth Amendments to the United States Constitution, the police must inform a suspect of his or her right to remain silent and to the assistance of an attorney before subjecting the suspect to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Once a person is arrested, under *Miranda*, the police must apprise

the accused of his or her constitutional rights, including his right to remain silent and his right to an attorney.

[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.

In *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the United States Supreme Court held that once a suspect has "clearly" asserted his right to counsel, the police may not subject him to further questioning until he has had an opportunity to confer with counsel, unless the suspect himself initiates further communication. *Edwards*, 451 U.S. at 484-85.

When 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). When unequivocal request for an attorney is made,

any questions asked thereafter must be strictly limited to clarifying the suspect's wishes. *State v. Smith*, 34 Wn. App. 405, 409, 661 P.2d 1001, *rev. denied*, 100 Wn.2d 1008 (1983).

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).

The Court of Appeals 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."

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

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. at 408. 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.

In *Davis*, the Supreme Court held that after a knowing and voluntary waiver of the *Miranda* rights, an officer may continue questioning unless and until a suspect unequivocally requests an attorney. *Davis*, 512 U.S. at 461. The Court did not extend the *Edwards* rule to equivocal requests for an attorney because to do so would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present. *Davis*, 512 U.S. at 459-60.

To date, the Divisions of the Court of Appeals have addressed the effect of *Davis* on *Robtoy*, but the courts have nevertheless reached conflicting results. *Radcliffe*, 2007 Wash. App. LEXIS 1511 at 10.

Division Two, like a suitor who cannot decide between two mates, has veered back and forth between the two standards. In *State v. Copeland*, 89 Wn. App. 492, 949 P.2d 458 (1998), the

Court applied the rule from *Davis* that officers need not stop questioning a suspect after an equivocal reference to counsel. *Copeland*, 89 Wn. App. at 500-01. On the other hand, in 2000 Division Two clearly stated that “Washington follows *Edwards* but not *Davis*.” *State v. Jones*, 102 Wn. App. 89, 96, 6 P.3d 58 (2000).

On the other hand, in *State v. Walker*, 129 Wn. App. 258, 275, 118 P.3d 935 (2005), Division One 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.

This Court did not resolve the issue In *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). In that case, a plurality of four Justices concluded that the State did not present sufficient evidence to establish the *corpus delicti* of the crime, applied *Robtoy*, and did not address *Davis*. This Court ruled that the appellant’s request for counsel was equivocal and that the statements were admissible because the defendant had herself initiated further communication. *Aten*, 130 Wn.2d at 662, 665-66.

On the other hand, four concurring Justices questioned the plurality's reliance on *Robtoy* in light of *Davis*, and instead noted that under *Davis*, the officers were not required to stop the interrogation after the appellant's equivocal statement. *Aten*, 130 Wn.2d at 669.

Division Two held in *Radcliffe* "that *Davis*, not *Robtoy*, is the controlling authority on how *Miranda* applies to a suspect's equivocal request for an attorney." *Radcliffe*, 2007 Wn. App. LEXIS 1511 at 13. The Court does not engage in detailed discussion of *Robtoy* and *Davis*, but instead appears to have merely recounted the decisions and adopted *Davis* based on recency of *Walker*.

The decision is in conflict with this Court's ruling in *Aten*, which did not adopt *Davis*, as well this Court's decision in *Robtoy*. RAP 13.4(b)(1); RAP 13.4(b)(2).

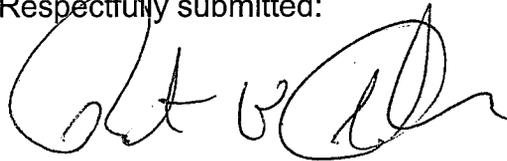
Moreover, the correct resolution of the issue of an equivocal request for counsel is both an important constitutional question and an issue of substantial public interest, as it is likely to affect many future cases. RAP 13.4(b)(3); RAP 13.4(b)(4). This Court should not countenance the whitewashing of *Radcliffe's* rights accomplished at the trial and by Division Two on appeal. This Court should grant review.

F. CONCLUSION

For the foregoing reasons, James D. Radcliffe respectfully requests his petition for review be granted.

DATED this 10th day of July, 2007.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

Peter B. Tiller – WSBA No. 20835
Attorneys for Petitioner

A

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY

IN PITY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 34447-5-II

Respondent,

v.

JAMES D. RADCLIFFE,

PART PUBLISHED OPINION

Appellant.

ARMSTRONG, P.J. -- James D. Radcliffe appeals his conviction of two counts of third degree child rape and one count of indecent liberties with forcible compulsion, arguing that the trial court should have suppressed his statement to the police after he made an equivocal request for an attorney, a prospective juror's comments tainted the jury pool, a jury instruction incorrectly defined forcible compulsion, and the trial court abused its discretion in denying him a suspended sentence under the Special Sex Offender Sentencing Alternative (SSOSA).¹ Finding no error, we affirm.

¹ RCW 9.94A.670.

FACTS

S.K. testified that James D. Radcliffe, her mother's live-in boyfriend, began sexually abusing her when she was 12 years old. The abuse included multiple acts of penile-vaginal intercourse and oral sex. When she was 15, S.K. moved to Seattle to live with a relative, Joyce Maund.

In November 2004, when 16-year-old S.K. was visiting her mother, Radcliffe took her to a friend's house. He grabbed S.K. by the waist, sat in a chair, and pulled her into his lap. While S.K. struggled to break free of Radcliffe's grip, he pushed her shirt and bra up and pulled her jeans and underwear down. He then rubbed his penis against S.K.'s buttocks until he ejaculated on her. A few days later, S.K. reported the abuse to the police and gave them the clothing she had worn when Radcliffe ejaculated.

The following morning, the police arrested Radcliffe and transported him to the police station. Detective Shannon Barnes told him of S.K.'s complaint and advised him of his *Miranda*² rights. After Barnes read Radcliffe his rights, Radcliffe said he understood his rights and wanted to talk to her. Barnes described S.K.'s allegations and Radcliffe denied them. After about 10 minutes, Barnes turned the questioning over to Detective David Miller.

Radcliffe continued to deny S.K.'s allegations. But when Miller told him that the police had S.K.'s clothing and would test it to see if he had ejaculated on it, Radcliffe admitted that testing would reveal that he had ejaculated on S.K.'s clothing. He then told Miller that he had a sexual relationship with S.K.

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

When Miller said that he would get a tape recorder to record Radcliffe's story, Radcliffe responded that he did not know how much trouble he was in and did not know if he needed a lawyer. Miller said that he could not give any legal advice, but he again offered to read Radcliffe his rights. Radcliffe said that he knew what his rights were and he did not need Miller to read them again. Miller told Radcliffe that "the ball was in his court" and if he did not feel comfortable giving a taped statement, he could write out a statement or he could give an oral statement. Report of Proceedings (RP) (Oct. 3, 2005) at 99-100.

Radcliffe chose the last option and told Miller he began having sex with S.K. when she was 14 years old, that they had had sexual intercourse two times, and that she would perform oral sex on him and he would perform oral sex on her about once a month.

The State charged Radcliffe with one count of second degree child molestation, one count of second degree child rape, two counts of third degree child rape, and one count of indecent liberties with forcible compulsion.

Radcliffe moved to suppress his statements to Barnes and Miller. Radcliffe testified at the suppression hearing that Miller told him that the age of consent in Washington is 16 and that the outcome of S.K.'s allegations would likely be counseling and a no-contact order. Radcliffe also testified that he asked what his legal rights were multiple times and stated, "I want a lawyer," but Miller did not respond and continued to question him. RP (Oct. 3, 2005) at 133-34. The trial court initially decided that because Miller improperly questioned Radcliffe after Radcliffe's equivocal reference to an attorney, it would suppress Radcliffe's statements made after that point. But upon reconsideration and in light of a newly issued Division One opinion, the trial court ruled that Miller's continued questioning was not improper and therefore denied Radcliffe's motion to suppress.

Several months before trial, Radcliffe obtained an evaluation for the SSOSA program in hopes that the State would amend the charges and recommend a suspended sentence under that program. But the State declined to do so, and the case proceeded to trial.

During jury selection, one potential juror stated that he was acquainted with Radcliffe from the juror's job as a bartender and that he thought this could possibly affect his ability to be fair and impartial. The court briefly questioned the juror and later excused him in a closed session. Radcliffe moved to discharge the jury panel and seat a new one, arguing that the excused juror's statements tainted the entire jury pool. The trial court denied the motion.

During deliberations, the jury asked the trial court to clarify the forcible compulsion instruction. Over Radcliffe's objection, it restated the instruction by breaking the two definitions into two separate sentences.

The jury convicted Radcliffe of two counts of third degree child rape and one count of indecent liberties. The trial court imposed standard-range concurrent sentences for each count, denying Radcliffe's request for a SSOSA.

ANALYSIS

I. REQUEST FOR COUNSEL

Radcliffe argues that the trial court erred in admitting the statements he gave to the police after he said that he did not know if he needed a lawyer. We disagree.

We will uphold a trial court's CrR 3.5 findings of fact if substantial evidence supports them. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Unchallenged findings are verities on appeal. *Broadaway*, 133 Wn.2d at 131. We review a trial court's legal conclusions de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

A. Findings of Fact

Radcliffe assigns error to the trial court's finding of fact 3 (Barnes informed Radcliffe of his *Miranda* rights and Radcliffe validly waived them); finding of fact 4 (Barnes questioned Radcliffe for about 10 minutes after the waiver and Radcliffe denied the allegations against him); finding of fact 7 (before Miller questioned Radcliffe, Miller asked him if Barnes had read him his rights and if he understood those rights and Radcliffe told Miller he understood his rights and did not wish Miller to inform him of his rights again); finding of fact 8 (Radcliffe initially denied the allegations against him but admitted to sexual activity with S.K. when confronted with potential DNA evidence); and finding of fact 9 (Radcliffe made an equivocal reference to his right to an attorney by stating that maybe he should contact an attorney and Miller offered to read Radcliffe his rights again, but Radcliffe declined and voluntarily resumed answering Miller's questions).

Radcliffe makes no argument, however, pointing to the absence of evidence to support findings of fact 3, 4, 7, and 8. Accordingly, he has waived these assignments of error. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004). Moreover, the findings comport with Radcliffe's own testimony at the CrR 3.5 hearing and are clearly supported by substantial evidence.

With respect to finding of fact 9, Radcliffe maintains that he unequivocally requested a lawyer during Miller's questioning. Radcliffe testified that he said, "I want a lawyer" multiple times but Miller merely continued his questioning. RP (Oct. 3, 2005) at 134. But Miller testified that Radcliffe said only that he did not know if he needed a lawyer and that Radcliffe never specifically asked for an attorney.

A request is equivocal if further questions are needed to determine if the suspect has made a request. *State v. Smith*, 34 Wn. App. 405, 408-09, 661 P.2d 1001 (1983). Although whether a request is equivocal is a question of law, *Smith*, 34 Wn. App. at 408, Radcliffe appears to challenge the trial court's finding that Radcliffe said that he did not know if he needed an attorney, not the court's conclusion that that statement was equivocal. Miller's testimony provides substantial support for the trial court's finding that Radcliffe made this statement. Although the trial court found all the witnesses generally truthful, it accepted Miller's version of Radcliffe's statement. We will not disturb a trial court's credibility determination. *Thomas*, 150 Wn.2d at 874. Substantial evidence supports finding of fact 9.

B. Equivocal Reference to an Attorney

Radcliffe next contends that the trial court erred in relying on *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), to conclude that Miller was not required to stop his questioning and clarify whether Radcliffe was invoking his right to an attorney when he equivocally referred to an attorney. Radcliffe maintains that *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982), continues to govern equivocal requests for counsel in Washington.

Under the Fifth and Fourteenth Amendments to the United States Constitution,³ the police must inform a suspect of his right to remain silent and to the assistance of an attorney before subjecting him to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 471, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L.

³ The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This provision applies to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 88 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

Ed. 2d 378 (1981), the United States Supreme Court held that once a suspect has "clearly" asserted his right to counsel, the police may not subject him to further questioning until he has had an opportunity to confer with counsel, unless the suspect himself initiates further communication. *Edwards*, 451 U.S. at 484-85. The court noted that the Fifth Circuit had held that it was possible to conclude that a suspect had waived the right to counsel when a request for counsel was equivocal. *Edwards*, 451 U.S. at 486 n.9 (citing *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1979) (en banc)).

The Washington Supreme Court addressed equivocal references to counsel under the Fifth and Fourteenth Amendments the following year in *Robtoy*. The court adopted the Fifth Circuit's rule that when a suspect makes an equivocal request for an attorney, an officer must limit further questioning to clarifying that request. *Robtoy*, 98 Wn.2d at 38-39 (citing *Nash*, 597 F.2d at 517-18).

But in 1994, the United States Supreme Court directly addressed equivocal references to counsel. *Davis*, 512 U.S. at 456. In *Davis*, the court held that after a knowing and voluntary waiver of the *Miranda* rights, an officer may continue questioning unless and until a suspect unequivocally requests an attorney. *Davis*, 512 U.S. at 461. The court declined to extend the *Edwards* rule to equivocal requests for an attorney because to do so would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present. *Davis*, 512 U.S. at 459-60. The *Miranda* warnings themselves provide the primary protection for suspects subject to custodial interrogation; a suspect must affirmatively invoke the additional protection *Edwards* provides. *Davis*, 512 U.S. at 460-61. Requiring an unambiguous request for counsel also avoids forcing police officers to make

judgment calls about statements that might or might not be requests for counsel. *Davis*, 512 U.S. at 461.

A majority of the Washington Supreme Court has not addressed the effect of *Davis* on the *Robtoy* rule. In *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996), a plurality of four justices, after concluding that the State did not present sufficient evidence to establish the corpus delicti of the crime, applied *Robtoy* without discussing *Davis* and concluded that the defendant's statements made after an equivocal request for counsel were admissible because the defendant had herself initiated further communication. *Aten*, 130 Wn.2d at 662, 665-66 (plurality). Four concurring justices reasoned that, in light of the conclusion that the State had not established the corpus delicti, it was unnecessary to discuss any further issues. *Aten*, 130 Wn.2d at 668 (Madsen, J., concurring). But the concurrence questioned the plurality's reliance on *Robtoy* in light of *Davis*, asserting that under *Davis*, the officers had no duty to cease questioning the defendant after her equivocal statement.⁴ *Aten*, 130 Wn.2d at 669 (Madsen, J., concurring).

The divisions of the Court of Appeals have also addressed *Davis*'s effect on the *Robtoy* rule, but have reached conflicting results. In *State v. Copeland*, 89 Wn. App. 492, 949 P.2d 458 (1998), without citing either *Aten* or *Robtoy*, we applied the rule from *Davis* that officers need

⁴ The ninth justice dissented, arguing that there was sufficient evidence to establish the corpus delicti of the crime. *Aten*, 130 Wn.2d at 670 (Talmadge, J., dissenting). He did not address the admissibility of the defendant's statements to law enforcement. *Aten*, 130 Wn.2d at 670-73 (Talmadge, J., dissenting).

The only other Washington Supreme Court case to cite *Davis* is *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998), which cites it for the proposition that a person wrongfully and unconstitutionally convicted by court-martial has the right to seek review by the United States Supreme Court, thus ensuring that courts-martial adhere to fundamental constitutional rights. *Morley*, 134 Wn.2d at 619.

not stop questioning a suspect after an equivocal reference to counsel. *Copeland*, 89 Wn. App. at 500-01. In *State v. Jones*, 102 Wn. App. 89, 6 P.3d 58 (2000), however, we said that “Washington follows *Edwards* but not *Davis*.” *Jones*, 102 Wn. App. at 96. We cited both *Robtoy* and *Aten*, but we did not further discuss the issue. *Jones*, 102 Wn. App. at 96 n.16 (citing *Robtoy*, 98 Wn.2d at 39; *Aten*, 130 Wn.2d at 665-66); see also *State v. Aronhalt*, 99 Wn. App. 302, 307, 994 P.2d 248 (2000) (applying rule from *Robtoy*).

Most recently, Division One recognized that *Davis* controls equivocal references to an attorney. *State v. Walker*, 129 Wn. App. 258, 275, 118 P.3d 935 (2005), review denied *sub nom. State v. Garrison*, 157 Wn.2d 1014 (2006). The *Walker* court noted that *Robtoy* “has continued to appear in Washington case law in spite of the *Davis* Court’s clear directive,” and it considered this court’s statement in *Jones* to interpret *Aten* as a rejection of the *Davis* rule. *Walker*, 129 Wn. App. at 275 n.46. But the court declined to assume that our Supreme Court would reject a directive from the United States Supreme Court without explanation and looked to *Davis* for guidance on the issue before it, an equivocal invocation of the right to remain silent. *Walker*, 129 Wn. App. at 275 n.46.

We now hold that *Davis*, not *Robtoy*, is the controlling authority on how *Miranda* applies to a suspect’s equivocal request for an attorney. The United States Supreme Court grounded *Miranda* on the Fifth Amendment, and *Robtoy* relied on a suspect’s rights under the Fifth and Fourteenth Amendments to the United States Constitution, not the Washington Constitution. *Robtoy*, 98 Wn.2d at 35. The United States Supreme Court is the final authority on the federal constitution. *Cooper v. Aaron*, 358 U.S. 1, 18, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). As the *Walker* court noted, our Supreme Court provided no rationale for rejecting a United States

Supreme Court interpretation of the federal constitution and we will not presume that it intended to do so.⁵

The trial court did not err in accepting the *Walker* court's reasoning. Because Radcliffe's reference to an attorney was equivocal, Miller was not obligated to stop his questioning or to clarify Radcliffe's statement. *Davis*, 512 U.S. at 461. Accordingly, the trial court properly admitted Radcliffe's statements at trial.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. IMPARTIAL JURY

Radcliffe next contends that the trial court should have declared a mistrial when a potential juror commented about knowing him, thereby tainting the jury pool and violating his right to a fair and impartial jury.

During jury selection, juror 15 said that he knew Radcliffe from the juror's job and that he might weigh Radcliffe's testimony differently than that of other witnesses because "specifically, I'm a bartender, and I've seen him in situations in the bar, and" RP at 21-23. The trial court stopped the juror and later excused him in a closed session. Radcliffe moved to discharge the jury panel and seat a new one, arguing that juror 15's statements tainted the entire

⁵ Article I, section 9 of the Washington Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself." The Washington Supreme Court has held that the protection of Article I, section 9 is coextensive with that of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). Radcliffe does not suggest that the Washington Constitution provides greater protection than the federal constitution in this context nor does he provide this court with an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

jury pool. The trial court treated the motion as a motion for a mistrial and, after reviewing the transcript of the voir dire, found that the exchange did not taint the panel and denied the motion.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000) (citing *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). A trial court abuses its discretion when no reasonable person would adopt the trial court's view. *Greiff*, 141 Wn.2d at 921. We will overturn the trial court's decision on a motion for mistrial only if there is a substantial likelihood that the prejudice affected the verdict. *Greiff*, 141 Wn.2d at 921 (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

Both the United States and Washington constitutions guarantee criminal defendants the right to a fair and impartial jury. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. The court must excuse prospective jurors if they hold views that make it impossible to be unbiased and fair. *See State v. Hughes*, 106 Wn.2d 176, 185, 721 P.2d 902 (1986) (citing *Spinkellink v. Wainwright*, 578 F.2d 582, 596 (5th Cir. 1978)).

Radcliffe relies primarily on *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1998), where the defendant was charged with sexual conduct with a minor under age 14. A prospective juror who was a social worker and had studied child psychology said during voir dire that she had never become aware of a case in which a child had lied about being sexually assaulted. *Mach*, 137 F.3d at 631-32. The trial court removed her for cause after questioning her before the entire jury pool. *Mach*, 137 F.3d at 632. The Ninth Circuit reversed the defendant's conviction, holding that the juror's comments were so prejudicial that they irreparably tainted the jury pool. *Mach*, 137 F.3d at 634.

Mach is distinguishable. In *Mach*, the juror's observation went to the central issue of the case, the victim's credibility. *Mach*, 137 F.3d at 634. Here, juror 15 said nothing about Radcliffe's or the victim's credibility. Nor did the juror's comment touch on any other possible issue in the case. At most, the juror's comment suggested that he had seen Radcliffe in situations in the bar that might affect his decision, but the juror did not say whether his opinion of Radcliffe was favorable or unfavorable. Because juror 15's statement was neutral, the trial court did not err in denying Radcliffe's motion to excuse the entire panel.

III. FORCIBLE COMPULSION

Radcliffe next maintains that the trial court misstated the law on forcible compulsion when it instructed the jury by separating the definition of forcible compulsion into two sentences.

The court instructed the jury that 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." Clerk's Papers (CP) at 195. This definition, taken from the Washington Pattern Jury Instructions, tracks the statutory definition. *See* RCW 9A.44.010(6) (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").

During deliberations, the jury asked the court if "'overcome resistance' . . . necessarily require[s] the final clause . . . 'that places a person in fear of death or physical injury to one's self.'" RP (Dec. 13, 2005) at 2. Radcliffe objected to restating the instruction, arguing that the trial court should not alter the pattern instruction. The trial court overruled the objection and instructed the jury 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 one's self." RP (Dec. 13, 2005) at 3. The trial court intended the instruction to clarify that the clause "that places a person in fear of death or physical injury to one's self" applies to a threat but not to physical force. RP (Dec. 13, 2005) at 6-7.

Radcliffe argues that the instruction misstated the law because the legislature could have intended the definition of forcible compulsion in RCW 9A.44.010(6) to require either (1) physical force that overcomes resistance *and* that places a person in fear of death or physical injury, or (2) a threat that places a person in fear of death or physical injury.

Radcliffe cites no authority to support his reading of the statute. And the grammatical structure of the statutory definition shows that there are three distinct ways to have forcible compulsion: (1) physical force that overcomes resistance, (2) an express threat that places a person in fear of death, physical injury, or kidnapping, or (3) an implied threat that places a person in fear of death, physical injury, or kidnapping. RCW 9A.44.010(6). As the trial court surmised, the clause "express or implied" within the definition of forcible compulsion by threat likely confused the jury about whether the clause "that places a person in fear of death or physical injury to one's self" applied to physical force. RP (Dec. 13, 2005) at 6. The restated instruction addressed this confusion.

Moreover, courts considering the physical force component of forcible compulsion have focused on the degree of force used, not on whether it placed the victim in fear of death or physical injury. For example, we have held that forcible compulsion by physical force requires more than the force normally used to accomplish the sexual act. *State v. Ritola*, 63 Wn. App. 252, 254, 817 P.2d 1390 (1991). But we did not say that the force must also place the victim in fear of death or physical injury. *Ritola*, 63 Wn. App. at 254; *see also State v. McKnight*, 54 Wn. App. 521, 527-28, 774 P.2d 532 (1989) (forcible compulsion means force that was "directed at

overcoming the victim's resistance and was more than that which is normally required to achieve penetration"). The trial court did not err in restating the forcible compulsion component of the indecent liberties statute.

IV. DENIAL OF SSOSA

Radcliffe contends that the trial court abused its discretion when it imposed standard-range sentences instead of granting him a suspended SSOSA sentence. He maintains that the trial court based its decision on manifestly unreasonable grounds when it considered his pretrial admissions and the fact that he presented no exculpatory evidence at trial but instead attempted to discredit S.K. and her family.

Radcliffe underwent a SSOSA evaluation seven months before his case went to trial. The evaluator concluded that he could not strongly recommend Radcliffe for SSOSA, but he would be willing to suggest giving Radcliffe a month-by-month opportunity to continue treatment. He found Radcliffe to be an "average" candidate for SSOSA. CP at 296. The prosecutor, after reviewing the evaluation, declined to amend the charges against Radcliffe and recommend a SSOSA.

Radcliffe again sought a SSOSA sentence after the jury convicted him. The evaluator submitted a follow-up letter again recommending Radcliffe for a SSOSA. S.K., her mother, and Maund described the impact of Radcliffe's crimes on S.K. and her family and strongly urged the court to reject a SSOSA sentence. The trial court declined to grant Radcliffe a suspended SSOSA sentence and imposed standard range sentences for each conviction.

The Sentencing Reform Act of 1981 (SRA) gives sentencing courts the discretion to impose a SSOSA sentence if the defendant meets certain requirements. RCW 9.94A.670(2). The sentencing court must consider whether the defendant and the community will benefit from

the alternative sentence, whether a SSOSA sentence is too lenient in light of the facts of the case, and whether the offender is amenable to treatment. RCW 9.94A.670(4). And it must give great weight to the victim's opinion whether the defendant should receive treatment instead of confinement.⁶ RCW 9.94A.670(4).

The decision whether to impose a SSOSA sentence is within the trial court's discretion. *State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

In explaining its decision not to grant Radcliffe a SSOSA, the trial court commented that Radcliffe had admitted all of S.K.'s allegations as part of his attempt to significantly reduce his incarceration time, but then, by presenting no evidence denying the allegations and instead attacking the witnesses' credibility, made his trial "the trial of the family of the victim and the victim herself." RP at 1158-59. It noted that, although in his SSOSA evaluation Radcliffe had admitted abusing S.K. before she was 14, the jury had acquitted him of these charges. The court stated it could "think of no more cynical approach to the criminal justice system. . . ." RP at 1161.

The trial court's criticism of Radcliffe's decision to go to trial and his failure to present any exculpatory evidence is troublesome. Radcliffe had a constitutional right to demand a jury trial. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. And due process required that the State had to prove every element of the charges against Radcliffe beyond a reasonable doubt.

⁶ For purposes of the SSOSA, a "victim" is a person who suffers emotional, psychological, physical, or financial harm as a result of the crime, and also includes a parent or guardian of a victim who is a minor child. RCW 9.94A.670(1)(c).

State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). The trial court cannot penalize Radcliffe for exercising these constitutional rights. See *State v. Frampton*, 95 Wn.2d 469, 483, 627 P.2d 922 (1981).

But the record shows that the trial court had ample independent grounds to deny Radcliffe a SSOSA sentence. The court began its ruling by stating that, after carefully reviewing Radcliffe's SSOSA evaluation and the follow-up letter, it "clearly understood" why the State had declined to amend the charges and recommend a SSOSA for Radcliffe before trial. RP at 1155-57. It determined that the report did not provide sufficient assurance that Radcliffe was amenable to treatment or that treatment would assure the community's safety. It also considered letters from S.K., her mother, and Maund urging the court to reject a SSOSA for Radcliffe, opinions the trial court was required to give great weight. RCW 9.94A.670(4).

The trial court said that it would likely have denied Radcliffe a SSOSA sentence if the case had not gone to trial and that Radcliffe's challenges to the allegations he had admitted were a "reassurance . . . that a SSOSA would be inappropriate for this case." RP at 1158, 1161. These statements show that, while the trial court may have considered impermissible grounds for denying Radcliffe a SSOSA, it also based its decision on valid grounds. Accordingly, the trial court did not abuse its discretion in denying Radcliffe a SSOSA sentence.

V. CUMULATIVE ERROR

Finally, Radcliffe contends that he did not receive a fair trial due to cumulative error.

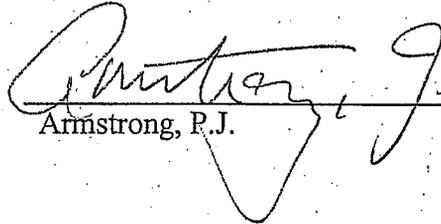
Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a trial that was fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that

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retrial is necessary. *Lord*, 123 Wn.2d at 332. Where the defendant fails to show prejudicial error, we will not find cumulative error that deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

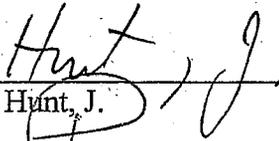
Here, Radcliffe has not shown any error. Accordingly, his cumulative error argument fails.

Affirmed.

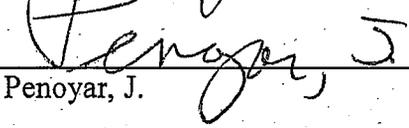


Armstrong, R.J.

We concur:



Hunt, J.



Penoyer, J.

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STATE OF WASHINGTON

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMES D. RADCLIFFE,

Appellant.

COURT OF APPEALS NO.
34447-5-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Appellant's Petition for Review were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to James D. Radcliffe, Appellant, and Carol LaVerne, Thurston County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on Tuesday, July 10, 2007, at the Centralia, Washington post office addressed as follows:

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