

80391-9

NO. 34447-5-II

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

STATE OF WASHINGTON,
Respondent,
v.
JAMES D. RADCLIFFE,
Appellant.

FILED
COURT OF APPEALS
DIVISION II
06 DEC 22 PM 4:01
STATE OF WASHINGTON
BY *[Signature]* Deputy

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 04-1-02111-5

HONORABLE RICHARD D. HICKS and
HONORABLE WM. THOMAS MCPHEE, Judges

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in ruling that the panel of prospective jurors had not been prejudicially tainted by certain limited and incomplete remarks by Juror No. 15.

2. Whether the trial court erred either in finding that the defendant made an equivocal reference to his right to an attorney, or in finding that Detective Miller responded appropriately to that equivocal reference, or in finding that the defendant's statements to Miller in this interview were voluntarily made.

3. Whether the trial court correctly instructed the jury concerning the meaning of the term "forcible compulsion".

4. Whether the trial court abused its discretion in refusing to grant the defendant's request for a SSOSA sentence.

5. Whether there was cumulative error denying the defendant a fair trial in this case.

B. STATEMENT OF THE CASE

In September, 1999, defendant James Radcliffe began residing with Sabrina K. and her three daughters in a Yelm Highway townhouse in Thurston County. Radcliffe was involved in a romantic relationship with Sabrina. Trial RP 119 121, 128. The defendant was 35 years old at the time of the trial in this matter, and so would have been

approximately 29 years old when he moved in with Sabrina and her children. Trial RP 133.

The victim, S.K., is the oldest daughter of Sabrina. S.K.'s date of birth is May 25, 1988, and so she was eleven years old when her family moved into the Yelm Highway townhouse. The next oldest daughter is two-and-a-half years younger than S.K., while the youngest daughter is approximately seven years younger and was only ten years old at the time of the trial of this cause. Trial RP 119-121.

The defendant continued to live at the Yelm Highway townhouse with Sabrina and her children until February, 2003. At that time, they all moved to a new residence on Golf Club Road in Lacey. S.K. was 14 years old at the time of that move and in her high school freshman year. Trial RP 126-127.

In the early summer of 2003, when S.K. was 15 years old, S.K. moved to Seattle to live with Joyce Maund, and was still living with Joyce as of November, 2004. Joyce had taken Sabrina under her

wing and had guided her when Sabrina was on her own as a teenager. In the years thereafter, Joyce was considered by Sabrina's children to be their grandmother. Trial RP 120, 127.

During that same summer of 2003, Radcliffe also moved out of Sabrina's residence. He never again resided with Sabrina, but continued to date her and would stay overnight on occasion. Trial RP 155. During the period from July 2003 to November 2004, S.K. had occasional contact with the defendant when she came down from Seattle to visit her mother. Trial RP. 155-157.

While S.K. and the defendant resided together in Thurston County, the defendant sexually abused S.K. on many occasions. This sexual abuse included multiple acts of penile-vaginal intercourse and oral sex. While S.K. and the defendant lived at the Yelm Highway townhouse, these acts of sexual intercourse occurred both at times when S.K. came home after school and late at night, after Sabrina had gone to sleep. Trial RP 369-397. The sexual abuse continued when the

defendant and S.K. resided together at the house on Golf Club Road. Trial RP 399-405. It also continued on occasion when S.K. came to visit her mother after S.K. had moved to Seattle. Trial RP 409-411.

In September 2003, S.K. became friends with a girl named Maria who was S.K.'s age. During the fall of 2003, S.K. told Maria about the sexual abuse committed by the defendant. Maria encouraged S.K. to report this to authorities but S.K. refused. Trial RP 319-323. This was the first time S.K. had revealed to anyone what the defendant had done to her. Trial RP 412. In September 2004, Maria told another girl named Sophia about what S.K. had revealed to her. Trial RP 339.

On November 13, 2004, which was a Saturday, Joyce Maund and S.K. came to Sabrina's residence for a visit. S.K. was 16 years of age at the time. Sabrina had plans to go to a party that evening with a friend and then stay at the friend's house that night, rather than try to

return home after consuming alcohol. Joyce was going to care for Sabrina's children while Sabrina was gone. Before that day, Sabrina had let the defendant know that S.K. was coming for a visit. Trial RP 157-158.

That afternoon, the defendant came by and picked up S.K. to go riding in his truck. He offered to let S.K. drive his truck in the woods even though S.K. did not have a license. S.K. agreed to go, assuming that the defendant would not try to have sex with her because she was having a menstrual period. Trial RP 418-420.

The defendant drove S.K. to the house of a friend named Lance, who was not at home. Radcliffe had S.K. come inside with him to help carry some hunting and fishing gear out to the truck. S.K. was wearing black jeans, a shirt, and underwear. Trial RP 420-422.

While the defendant and S.K. were in the living room of the residence, the defendant grabbed S.K. by the waist and attempted to take her clothes off. S.K. told him to stop, insisting

that she was not feeling well and was having her period, and tried to push him away with her hands. Initially, the defendant refused to stop and continued attempting to pull her pants down. However, when S.K. continued to resist, the defendant ceased his efforts and S.K. went into the bathroom. Trial RP 423-426.

After about five minutes, S.K. left the bathroom. When she came back into the living room, the defendant grabbed hold of her again. He sat down on a chair and pulled S.K. onto his lap. He again tried to remove S.K.'s clothing. S.K. again told the defendant to stop and unsuccessfully struggled to get free of the defendant's grip on her. While she physically and verbally resisted, he was able to get her shirt partially off, push up her bra, and fondle her chest. Trial RP 426-432.

As S.K. continued to fight to get away from the defendant, he pulled her jeans and underwear partially down and also pulled his own pants down sufficiently to expose his penis. He then rubbed

his penis against S.K.'s buttocks until he ejaculated semen onto her bottom and back. The defendant then let go of S.K., who again fled to the bathroom. Trial RP 433-436.

The defendant and S.K. remained at Lance's residence a short while longer, after which the defendant took S.K. to a store so she could obtain pads for her period, allowed her to drive his truck in the woods, and took her to a restaurant for dinner. He then brought her back to Sabrina's home at about 7:30 that evening. Trial RP 448-450.

That night, S.K. spoke to Maria by phone and told Maria that "it" had happened again. Trial RP 323-324. Maria became emotionally upset and called Sophia to talk about what S.K. had told her. Sophia stated that someone needed to be told so that it would stop. Trial RP 325-326.

Later that evening, Joyce Maund received a phone call from Sophia, who told Joyce that S.K. was being molested by Sabrina's boy friend. Trial RP 581-582. The next day, while traveling back to

Seattle, Joyce asked S.K. if Radcliffe was molesting her. S.K. denied this. Trial RP 584.

On Monday, Maria convinced S.K. to report the sexual abuse. On Tuesday, November 16th, Maria accompanied S.K. to the office of a school counselor, Daryl James. Maria spoke first, letting James know that S.K. had something she needed to report. Eventually, S.K. began to open up to James about what the defendant had done to her. Seattle police were called to the school and Joyce Maund was notified. Trial RP 328-331, 454-457, 585-586.

That evening, Joyce drove S.K. down to Sabrina's home. When they arrived, Sabrina was on the phone with the defendant discussing plans for dinner that evening. Joyce informed Sabrina of what S.K. had disclosed. The three of them then went to the Lacey police station to report the matter. Thereafter, Sabrina had no further contact with the defendant. Trial RP 160-164, 587-588.

Lacey Police Detective Shannon Barnes met

with S.K. around 8:15 that evening. S.K. reported details of the incident on November 13th, and also told Barnes about the years of sexual abuse prior to that. Trial RP 629, 652. Barnes concluded she had probable cause to arrest Radcliffe for indecent liberties and for rape of a child in the second and third degree. 10-3-05 Hearing RP 58.

At the request of Barnes, Lacey Police Sergeant Rick Monk contacted the defendant at his place of employment at about 8 a.m. the next day, November 17th. 10-3-05 Hearing RP 45-47. Monk informed the defendant there was probable cause for his arrest based on the investigation of a reported sex offense. The defendant was handcuffed and transported to the Lacey Police station. Monk informed the defendant that he had the right to remain silent and the right to the assistance of an attorney. 10-3-05 Hearing RP 47-50.

At about 8:30 the morning of November 17th, Detective Barnes was informed that the defendant had arrived at the Lacey Police station. She went

down to meet him. At this point, the restraints had been removed. She escorted Radcliffe upstairs to the detective division's interview room. 10-3-05 Hearing RP 59-60.

Barnes informed the defendant that a complaint had been made by S.K. and that the matter was under investigation. She then used a card she carried to inform the defendant completely and accurately of his constitutional rights concerning the making of any statement, the Miranda rights. 10-3-05 Hearing RP 61-63; Finding of Fact No. 2 in CP 158-162. The defendant responded that he understood his rights and wished to speak with her. 10-3-05 Hearing RP 63; Finding of Fact No. 3 in CP 158-162.

Barnes explained the allegations S.K. had made. The defendant denied them. Barnes' interview with the defendant only lasted about 10 minutes. During that time, the defendant never asked that the questioning cease, nor did he request the assistance of an attorney. There were no promises or threats made to induce him to

speak. The defendant remained cooperative and calm throughout this interview. 10-3-05 Hearing RP 64-65.

Barnes then told the defendant to remain in the room. She left, closing the door behind her. She contacted Detective David Miller and asked him to confront the defendant with the possibility of physical evidence against him. She asked Miller to do this because she was 5 or 6 months pregnant and was not supposed to engage in an interrogation of a suspect. She quickly briefed Miller on the allegations and the fact that the defendant had waived his Miranda rights. 10-3-05 Hearing RP 66-67, 94.

Detective Miller went into the interview room and introduced himself. The defendant confirmed that Barnes had informed him of his Miranda rights. Miller asked if the defendant wanted Miller to repeat those rights. However, the defendant said that would not be necessary, and that he was willing to talk with Miller. 10-3-05 Hearing RP 95-96.

Miller mentioned that it might be easier for the defendant to speak with a male detective about the allegations. The defendant responded that he had never had a sexual relationship with S.K., only a father-daughter type of relationship. At that point, Miller pointed out that law enforcement would be able to have S.K.'s pants tested to determine whether the defendant had ejaculated on her as S.K. had claimed. The defendant responded that such lab results would come back indicating that it was his ejaculate on her pants. He then admitted that he actually had engaged in sexual relations with the victim. 10-3-05 Hearing RP 97-98.

Miller asked the defendant to explain his version of events on tape. The defendant responded that he did not know how much trouble he was in and maybe he should contact an attorney. 10-3-05 Hearing RP 99; Finding of Fact No. 9 in CP 158-162. Miller responded that he could not give the defendant legal advice and asked if the defendant wanted Miller to read the Miranda rights

to him again. The defendant responded that he already understood his rights. Miller then stated that the ball was in the defendant's court. 10-3-05 Hearing RP 99-100; Finding of Fact No. 9 in CP 158-162. He also informed the defendant that if he did not wish to give a taped statement, he could instead give a written statement or just tell Miller his side of the story. The defendant responded that he would tell Miller about it. 10-3-05 Hearing RP 100; Finding of Fact No. 9 in CP 158-162.

Miller then asked the defendant to simply tell his side of the story. The defendant stated that his sexual relationship with S.K. had started when she was 14 years old. He explained that it began when they would wrestle together. He then started touching her over and under her clothing. Miller asked if there had been any sexual intercourse. The defendant responded that there were two incidents of sexual intercourse with S.K, that he had also showered with her but no sexual acts occurred at those times, and that he had

performed oral sex on her and had S.K. perform oral sex on him about once a month. 10-3-05 Hearing RP 101. The defendant made no further reference to an attorney. 10-3-05 Hearing RP 102; Finding of Fact No. 9 in CP 158-162.

Miller's interview with Radcliffe lasted about 10 to 15 minutes. The defendant never asked that questioning stop and never refused to answer a question. Radcliffe remained cooperative and cordial throughout the interview. 10-3-05 Hearing RP 102. During the interview, Miller made no promises or threats to induce the defendant to speak with him. 10-3-05 Hearing RP 102-104.

At the end of the interview, Miller left the room and reported to Barnes what the defendant had told him. Trial RP 104. This occurred at about 9 or 9:15 that morning. The defendant was then booked into the Thurston County Jail. 10-3-05 Hearing RP 69. Miller completed a report concerning the defendant's admissions at about 11 that same morning. 10-3-05 Hearing RP 105; Ex. 2. He then did a supplemental report on November 24,

2004, to detail his conversation with the defendant at the point in the interview when Radcliffe brought up the subject of an attorney. 10-3-05 Hearing RP 106-107; Ex. 3.

Joyce Maund and S.K. returned to their home in Seattle on November 17th. They located the black jeans and underwear S.K. had worn on November 13th. Those items of clothing were put into a brown bag and stapled. Trial RP 588-590. That bag was then given to Sabrina when Sabrina came up to Seattle for a visit the next weekend. Trial RP 164-165 and 590. Sabrina did not open the bag. Rather, she simply transported it to the Lacey Police Department on November 22, 2004, and turned the bag over to Lacey Police Detective Tom Furrer. Trial RP 165-166, 351-352. Furrer then confirmed the contents and placed the bag of clothing into evidence. Trial RP 352-353.

On November 29, 2004, S.K. was examined by Dr Rebecca Wiester at Harborview Hospital's Center for Sexual Assault and Traumatic Stress. Trial RP 283-285. S.K. reported that the defendant had

started sexually touching her, including oral sex, when she was 12 years old, and that he had begun penetrating her vagina with his penis when she was 13 years of age. Trial RP 295-297. During the exam, Wiester found that S.K.'s vaginal hymen appeared normal and uninterrupted. Trial RP 310. However, Wiester could not form an opinion concerning whether sexual penetration had occurred, because even repeated penetrations of a child's vaginal opening by an adult penis often do not produce physical injury evidencing that penetration, or if penetration does produce such injury, the evidence of that injury often disappears as a result of the healing process. Trial RP 300-303.

On April 29, 2005, Detective Barnes had contact with S.K. at the Lacey Police Department in order to obtain samples of S.K.'s saliva by swabbing her mouth. Trial RP 638-639. Then on May 17, 2005, Barnes had contact with the defendant for the same purpose. Trial RP 641. These saliva samples and the clothing worn by S.K.

on November 13, 2004, were then sent to the Washington State Patrol Crime Laboratory for DNA testing. Trial RP 90-108. These items of evidence were then tested by Forensic Scientist William Dean. Trial RP 672, 679, and 687.

Dean found that there was semen, including spermatozoa heads, on the rear of S.K.'s underwear. He was able to determine the DNA profile of the male who was the source of that semen. Dean then determined that the defendant's DNA profile matched the DNA profile obtained from the semen. Dean then conducted a probability analysis of that match and concluded that only one person in the world would have that same DNA profile. Trial RP 692-698.

On November 22, 2004, an Information was filed in Thurston County Superior Court Cause No. 04-1-02111-5 charging the defendant with one count of Child Molestation in the Second Degree, one count of Rape of a Child in the Second Degree, two counts of Rape of a Child in the Third Degree, and one count of Indecent Liberties by forcible

compulsion. The Information also specially alleged certain aggravating circumstances with regard to Counts I through IV. CP 8-9. A First Amended Information was then filed on May 12, 2005, removing the allegations of aggravating circumstances but otherwise retaining the charges as originally filed. CP 10-11. On September 28, 2005, a Second Amended Information was filed which simply changed the designation of Count V, Indecent Liberties by forcible compulsion, from a Class B felony to the correct designation of Class A felony. CP 52-53.

On October 3, 2005, a combined CrR 3.5/CrR 3.6 hearing was held before the Honorable Judge Richard D. Hicks. As regards the CrR 3.6 issue, the court found that the DNA evidence obtained from testing the semen on S.K's underwear was properly admissible at trial. 10-3-05 Hearing RP 185; Findings of Fact and Conclusions of Law re 3.6 Hearing in CP 109-110.

With regard to the defendant's admissions to Detective Miller, the court found that Detective

Barnes had fully informed the defendant of his Miranda rights prior to any questioning and that the defendant had then made a knowing, intelligent and voluntary waiver of those rights, and then voluntarily spoke with Barnes for about 10 minutes. 10-3-05 Hearing RP 176, Conclusion of Law No. 1 in CP 158-162. The court also found that when Detective Miller entered the room, the defendant confirmed that he understood his Miranda rights, that he had waived those rights, and that he did wish to speak with Miller. The court further found that all of the defendant's responses to Miller thereafter were voluntary. 10-3-05 Hearing RP 177-178, 185; Conclusion of Law No. 2 in CP 158-162.

The court then addressed the defendant's reference to an attorney in his interview with Miller. The court ruled that the defendant's admissions before he made that reference were admissible. 10-3-05 Hearing RP 178. The court then determined that the defendant had made an equivocal reference to his right to an attorney.

10-3-05 Hearing RP 183, 185; see also 10-21-05 Hearing RP 19, 22-23 and 11-4-05 Hearing RP 4-5.

The court ruled that Detective Miller was obliged in response to that equivocal reference to clarify whether the defendant was requesting the assistance of an attorney before resuming his interrogation. The court noted that the exchange that took place between Miller and the defendant at that point, wherein Miller asked if the defendant wished his rights read to him again, the defendant responded that he understood his rights, and then Miller's stated that the ball was in the defendant's court, was insufficient to satisfy the requirement in the law for clarification in that situation. Consequently, the court ruled that the admissions made by the defendant after his reference to an attorney were not admissible at trial in the State's case-in-chief. 10-3-05 Hearing RP 179-185.

Subsequently, the State filed a motion to have the court reconsider its ruling with regard to the CrR 3.5 hearing on the basis of a

recently filed opinion of the Court of Appeals, Division One, in State v. Walker, 129 Wn. App. 258, 118 P.3d 935 (2005), *review denied* in 157 Wn.2d 1014, 139 P.3d 350, and the ruling of the United States Supreme Court in Davis v. United States, 512 U.S. 452, 461, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), as discussed in Walker, *supra*. A hearing on that motion took place on October 21, 2005.

Judge Hicks noted that the United States Supreme Court had held in Davis, 512 U.S. at 461, that after a suspect has knowingly and voluntarily waived his Miranda rights, a law enforcement officer may continue questioning unless and until the suspect makes a clear and unequivocal request for an attorney. The court then found that the holding in Davis was controlling in the present case, and therefore Miller had acted properly during his interview with Radcliffe. The court ruled that the defendant's admissions after his equivocal reference to an attorney were admissible at trial. 10-21-05 Hearing RP 27-28; Conclusion

of Law Nos. 3 and 4 in CP 158-162.

A jury trial was held in this case during the period of November 28, 2005 to December 13, 2005 before the Honorable Judge Wm. Thomas McPhee. During the selection of the jury, Prospective Juror No. 15 stated that he had seen the defendant at the restaurant and bar where he was employed. The prospective juror began to say that he had seen the defendant in situations in the bar, and at that point the court cut him off and went on to other jurors. That prospective juror was later excused for cause. Trial RP 21-23. The defendant made a motion for mistrial, arguing that the court should bring in an entirely new jury panel on the basis that the entire existing group of prospective jurors had been tainted by what Prospective Juror No. 15 had said. The court denied that motion. Trial RP 62-64.

The defendant was acquitted on Count I and II, but was convicted on counts III and IV charging rape of a child in the third degree, and was convicted for Count V charging indecent

liberties by forcible compulsion. A sentencing hearing took place on February 2, 2006.

Prior to that hearing, the defendant submitted an evaluation report dated 4-9-05 from Brian Cobb, a certified sex offender treatment provider, in support of the defendant's request for a sentence pursuant to the Special Sex Offender Sentencing Alternative (SSOSA). CP 282-298. The defense also provided a letter from Brian Cobb, dated 1-18-06, in which Cobb indicated his recommendation had not changed and that he still found the defendant to be amenable to sex offender treatment. CP 280-281.

The court further received a pre-sentence investigation report from the Department of Corrections opposing a SSOSA sentence for this defendant because he was a moderate to high risk sex offender, and because of the circumstances of his crimes and the length of time over which they had been committed. CP 216-227. Each party submitted a memorandum of authorities for purposes of the sentencing hearing. In its memorandum, the

State set forth its reasons for opposing a SSOSA sentence in this case. CP 203-215.

The trial court denied the request for a SSOSA sentence. On the conviction for indecent liberties with forcible compulsion, the defendant was sentenced to a maximum term of life in prison and a minimum term of 114 months. On the two convictions for third-degree rape of a child, the defendant was ordered to serve 60 months in prison for each, to run concurrently with his sentence for indecent liberties. CP 259-272.

C. ARGUMENT

1. The trial court did not abuse its discretion in ruling that the panel of prospective jurors had not been prejudicially tainted by the limited and incomplete remarks of a prospective juror who was ultimately excused for cause.

As noted above, Prospective Juror No. 15 stated during jury selection that he was the manager at a restaurant and bar, that he had seen the defendant there as a customer, and that he might weigh or view the defendant's testimony differently from that of another witness. Trial RP 22. The court then asked him why that was the

case. He responded as follows:

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 not going to question you further about that right now Juror No. 15. We'll come back to that later.

Trial RP 22-23. Juror No. 15 was later excused for cause. Trial RP 23.

The defendant then moved for a mistrial, arguing that the entire jury venire had been in the court room and could hear the answers of Juror No. 15, and so the entire jury panel was prejudicially tainted. The trial court disagreed that Juror No. 15's responses had such an effect and denied the motion. Trial RP 61-64.

On appeal, the defendant argues that this denial of the defendant's motion was reversible error, preventing him from having his case decided by a fair and impartial jury. The grant or denial of a mistrial will be deemed error only if it constitutes an abuse of the trial court's discretion. Such an abuse of discretion occurs only when no reasonable person would take the

view adopted by the trial court. State v. Grieff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). A trial court's denial of a mistrial will only be overturned when there is a substantial likelihood that the defendant was prejudiced in a manner which affected the jury's verdict. Grieff, 141 Wn.2d at 921.

Similarly, the standard of review for a trial court's decision whether to excuse members of a jury venire is abuse of discretion. State v. Tingdale, 117 Wn.2d 595, 599-600, 817 P.2d 850 (1991). It is the trial court which is in the best position to determine the ability of jurors to be fair and impartial, and therefore the trial court must have a large measure of discretion in the selection of a jury. State v. Noltie, 116 Wn.2d 831, 839-840, 809 P.2d 190 (1991). On appeal, a party challenging a trial court's decisions in that regard must show more than a mere possibility of prejudice. Noltie, 116 Wn.2d at 840.

In the present case, the defendant claims

the interrupted statement of Juror No. 15 tainted the jury and prejudiced the jurors against the defendant, but offers no evidence of that. The fact that the defendant was found not guilty of the first two counts against him would suggest otherwise.

The defendant argues that reversal is required by Mach v. Stewart, 137 F.3d 630 (9th Cir. 1998). This is incorrect for several reasons. First of all, a decision of the Federal Court of Appeals, including the 9th Circuit, is not binding on the courts of this state. State v. Grisby, 121 Wn.2d 419, 430, 853 P.2d 901 (1993). Second, the decision in Mach, supra, is easily distinguishable.

In Mach, the defendant was charged with a sex offense against a child. The federal appellate court noted the following in regard to the jury selection process in this case:

During voir dire, the trial judge elicited from Bodkin (a) that she had a certain amount of expertise in this area (she had taken child psychology courses and worked with psychologists and psychiatrists; she worked with children as a social worker

for the state for at least three years); and (b) four separate statements that she had never been involved in a case in which a child accused an adult of sexual abuse where the child's statements had not been borne out. While the court did warn Bodkin and the general pool that jurors are to make determinations based on the evidence rather than on their own experiences or feelings, it went on to elicit yet another statement from Bodkin that she had never known a child to lie about sexual abuse. The court asked the other jurors whether anyone disagreed with her statement, and no one responded.

. . . Given the nature of Bodkin'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. This bias violated Mach's right to an impartial jury.

Mach, 137 F.3d at 632-633.

In the present case, the prospective juror began to make a single comment but never finished it. No details of anything said or done by the defendant were ever provided. While the juror said he would likely evaluate the defendant's testimony differently from other witnesses, he did not say whether it would be a positive or negative difference.

The Court instructed the jurors in this case

to decide the case based upon the evidence presented at trial. Court's Instruction to the Jury No. 1 in CP 180-197. The jury is presumed to have followed the court's instructions. State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). There is nothing in the record of this case which suggests anything to the contrary. There was nothing specific stated by Juror No. 15 that might have been difficult for other jurors to ignore despite this instruction. Simply no basis has been provided to find that the court abused its discretion in finding that the jury had not been tainted by the brief and incomplete remarks of Juror No. 15.

2. The trial court properly ruled: (a) that the defendant made an equivocal reference to his right to an attorney in his interview with Detective Miller after a proper advisement of Miranda rights and after the defendant had knowingly, intelligently, and voluntarily waived those rights; (b) that Miller acted lawfully in his response to that equivocal reference,; and (c) that the defendant's responses to Miller in this interview were voluntarily made.

On appeal, the defendant contends that the trial court erroneously relied upon the United States Supreme Court's decision in Davis v.

United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) in finding that Detective Miller had responded appropriately to the defendant when the defendant made an equivocal reference to his right to an attorney. In the alternative, the defendant argues that the trial court erroneously determined that the defendant's reference to an attorney was equivocal. Finally, the defendant contends the court erred in finding that the defendant's statements in this interview were made voluntarily, arguing that Miller's responses to the defendant's reference to an attorney were coercive, thereby causing the defendant's statements thereafter to have been involuntary.

In response, the State contends that the trial court's findings were based upon substantial evidence, that the court followed the proper legal authority in deciding that no constitutional right of the defendant had been violated in the interview, and that the defendant's admissions during this interview were

properly admitted into evidence at the trial.

In Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United State Supreme Court held that the prohibition in the Constitution's Fifth Amendment against compelled self incrimination requires that custodial interrogation be preceded by advice to a suspect that he has the right to remain silent and the right to the presence of an attorney. Therefore, if the suspect requests counsel, the interrogation must cease until an attorney is present. Miranda, 384 U.S. at 474.

In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), Edwards was informed of his Miranda rights and chose to waive them. Then, during the interrogation that followed, he invoked his right to an attorney by stating, "I want an attorney before making a deal". Questioning ceased at that point. However, the next morning, the defendant was told he had to speak to police officers who had come to make contact with him even though he did not

want to. Those officers then again informed Edwards of his Miranda rights and he chose to speak with them. Edwards, 451 U.S. at 478-479.

The Supreme Court ruled that once a suspect has invoked his right to an attorney during custodial interrogation, he cannot be subject to further interrogation by police until counsel has been made available to him, unless he chooses to initiate further communication with the police. Edwards, 451 U.S. at 484-485.

Edwards had made an unequivocal request for counsel. Thus, Edwards v. Arizona did not address the situation where a suspect makes an equivocal reference to his right to counsel during a custodial interrogation. The only reference to that subject came in a footnote, which discussed the fact that a number of prior decisions of the federal Courts of Appeals had held that it was possible for a suspect to waive his Miranda rights in various circumstances after he had invoked his right to counsel. One of the examples given in that footnote was a decision of

the Court of Appeals for the Fifth Circuit in Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979), holding that such waiver was possible when a suspect had made an equivocal request for counsel. Edwards, 451 U.S. at 486 n.9.

In State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), the Washington Supreme Court considered what the Fifth Amendment to the U.S. Constitution required police to do in response to an equivocal reference by a suspect to his right to an attorney during police questioning, after that suspect had been properly informed of his Miranda rights and had waived them. In Robtoy, during questioning, the defendant had made the statement: "Maybe I should call my attorney". This was determined to have been an equivocal reference to Robtoy's right to an attorney. Robtoy, 98 Wn.2d at 40-41.

In the absence of any clear directive on this point from the United States Supreme Court, the Washington court sought guidance from the decision of the United States Court of Appeals

for the Fifth Circuit in Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) which, as noted above, had been briefly referred to in dicta by the Supreme Court in Edwards v. Arizona, supra. In Nash, the United States Court of Appeals had held that when a suspect makes an equivocal reference to his right to an attorney, interrogation must cease and questioning must be confined to clarifying the suspect's wishes concerning an attorney until those wishes had been clarified. Nash, 597 F.2d at 517-518.

The Washington Supreme Court, in Robtoy, chose to adopt the Nash rule. In doing so, the Washington court stated that the United States Supreme Court had given "seeming approval" to this rule by citing Nash in Edwards v. Arizona. Robtoy, 98 Wn.2d at 39. However, as discussed above, the U.S. Supreme Court had simply cited Nash in support of the idea that an invocation of the right to an attorney did not foreclose the possibility of a waiver thereafter.

In reaching this decision in Robtoy, the

Washington Supreme Court was solely concerned with the requirements of the Fifth Amendment to the United States Constitution. There was no suggestion that the court was looking to the Washington Constitution as the source for its decision, nor was there any suggestion that the state constitution would call for any different result than the federal constitution in this regard.

The United States Supreme Court did not address the issue of how law enforcement should respond to an equivocal request for counsel until its decision in Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). In that case, a member of the United States Navy was interviewed by agents of the Naval Investigative Service (NIS). Davis was informed of his Miranda rights and he then waived those rights. During the interview that followed, Davis made the statement: "Maybe I should talk to a lawyer". The Supreme Court found Davis's statement about an attorney to have been an equivocal reference

to his right to an attorney, and considered what law enforcement response to such an equivocal reference was constitutionally required.

In this case we decide how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the Edwards prohibition on further questioning.

Davis, 512 U.S. at 454-455.

The Supreme Court analyzed this case on the basis that the Fifth Amendment's self-incrimination clause applies to military interrogations and the admissibility of statements in military courts-martial to the same extent that the Fifth Amendment applies to state and federal prosecutions. Davis, 512 U.S. at 457. The Court then noted that state and federal courts had developed three separate approaches to the constitutional requirements placed upon law enforcement when a suspect makes an ambiguous or equivocal request for counsel. One approach was to require that all questioning cease at that point. Another approach was to rule that questioning need not cease until the defendant

had made an unequivocal invocation of a Miranda right. The third approach, as in Washington, was to require that interrogation cease except for questions designed to clarify the defendant's wishes. Davis, 512 U.S. at 456.

In Davis, the Supreme Court firmly rejected the rule previously adopted by the Washington court in Robtoy, supra, and instead held that under the Fifth Amendment, if a suspect makes an equivocal reference to the right to an attorney after having been informed of his Miranda rights and having waived them, law enforcement officers may continue questioning the suspect until that suspect makes a clear request for an attorney.

. . . We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. This was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to

subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

Davis, 512 U.S. at 461-462.

In the years subsequent to the Davis decision, the Washington Supreme Court has not squarely faced the U.S. Supreme Court's rejection of the rule enunciated in Robtoy, supra.

In State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996), Aten was informed of her Miranda rights and asked if she wished to waive them. She responded, "I really do, but I think I better have an attorney present just to see if maybe, ah, I might be messing up somewhere along the line." The interviewing officer then stopped the interview. For the next 40 minutes, two officers responded to questions Aten put to them, but did not attempt to clarify Aten's earlier reference to an attorney. Then, Aten asked that the recorder be turned back on, offered to talk to officers, and signed a waiver of rights. Aten,

130 Wn.2d at 651-652.

On appeal, the Washington Supreme Court treated Aten's reference to having the assistance of an attorney as an equivocal reference to that right. A plurality of four Justices applied Robtoy, supra, without any mention of the U.S. Supreme Court's decision in Davis, supra, and found that, despite the lack of any clarification, the initiation of further questioning by Aten herself and her subsequent waiver caused her further statements to be admissible. However, Aten's conviction was reversed because the corpus delicti was not established independent of Aten's statements. Aten, 130 Wn.2d at 666, 668.

Another four Justices concurred in the decision. However, those four Justices took the position that the U.S. Supreme Court's decision in Davis, supra, was controlling and determinative on the issue of whether the procedures followed in Aten's interview had violated her constitutional rights, and that the

plurality opinion had been mistaken in applying Robtoy, supra. Aten, 130 Wn.2d at 668-669.

A ninth Justice dissented, taking issue with the ruling regarding *corpus delicti*, and obviously supporting the admissibility of Aten's statements, but never referring to what significance Davis v. United States had in all of this. Aten, 130 Wn.2d at 670-673. Thus, the decision in Aten, supra, did nothing to clarify the issue of whether Davis v. United States is controlling law in the state of Washington.

In State v. Jones, 102 Wn. App. 89, 6 P.3d 58 (2000), in dicta, Division Two of the Court of Appeals stated that Washington does not follow Davis v. United States, supra. However, the court provided no explanation of what legal basis would permit the Washington court to ignore Davis, and instead simply cited to Robtoy, supra, and Aten, supra. Of course, Robtoy had been decided long before Davis and, as discussed above, no majority of the Washington Supreme Court had held in Aten that Davis V. United

States did not apply. Indeed, the only four Justices who referred to Davis v. United States in that opinion took the position that Davis did apply, and was controlling law on the issue of a suspect's equivocal reference to his right to an attorney.

The significance of the U.S. Supreme Court's decision in Davis v. United States was finally addressed by Division One of the Court of Appeals in State v. Walker, 129 Wn. App. 258, 118 P.3d 935 (2005), *review denied in State v. Garrison*, 157 Wn.2d 1014, 139 P.3d 350 (2006). In Walker, the Court of Appeals also ruled on the companion case of State v. Garrison. In that case, Garrison was informed of his Miranda rights at the beginning of an interview by police, and Garrison waived his rights. During the interview that followed, Garrison stated "many times" that he did not want to say anything that would make him look guilty or that would incriminate him. When Garrison repeatedly made this statement, police never stopped the questioning to clarify

whether the defendant was invoking his Miranda right to remain silent. Walker, 129 Wn. App. at 265-266.

The appellate court treated Garrison's statements about not wanting to incriminate himself as equivocal references to his right to remain silent. The court was then faced with determining whether the lack of efforts by law enforcement to clarify Garrison's equivocal statements before continuing the interview required suppression of the defendant's admissions. Walker, 129 Wn. App. at 274 .

The court found that Davis v. United States, supra, was controlling on the issue of what response by law enforcement was constitutionally required when a suspect made an equivocal reference to a Miranda right. Therefore, since Garrison never made an unequivocal invocation of his right to remain silent, police were under no obligation to stop questioning him to clarify his equivocal statements, and so the Court of Appeals held that Garrison's admissions had properly been

admitted at trial. Walker, 129 Wn. App. at 274-276.

In the present case, upon reconsideration of its initial decision, the court followed the decision in Walker and applied Davis to the facts of this case, concluding that Miller had acted lawfully in his interview with the defendant. In fact, Miller had gone beyond what was legally required, since he had sought to clarify with the defendant whether the defendant wished to invoke his right to an attorney. While the court had found that Miller's efforts had not gone far enough to satisfy the dictates of Robtoy, supra, Miller's response clearly satisfied the requirements of Davis, supra.

On appeal, the defendant argues that Division Two of the Court of Appeals is not required to follow a holding in a case decided by Division One, and should not do so. Instead, the defendant argues, this court should continue to apply the rule set forth in Robtoy. However, whether State v. Walker is controlling is not the

pertinent question. Rather, the issue is whether this court is required to follow the decision of the United States Supreme Court in Davis v. United States. In any decision based upon the Fifth Amendment to the United States Constitution, clearly this court is required to do so.

It is important to keep in mind, as was mentioned above, that the rule enunciated by the Washington Supreme Court in Robtoy was based on an interpretation of the U.S. Constitution's Fifth Amendment rather than on any independent analysis of the equivalent provision in the Washington State Constitution. Robtoy, 98 Wn.2d at 39-41. The Fifth Amendment states, in part, that no person "shall be compelled in any criminal case to be a witness against himself". 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 consistently held the protections afforded by

Article I, section 9 are coextensive with, and not broader than, the protections of the Fifth Amendment. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); State v. Russell, 125 Wn.2d 24, 62, 882 P.2d 747 (1994); State v. Earls, 116 Wn.2d 364, 374-375, 805 P.2d 211 (1991); State v. Wethered, 110 Wn.2d 466, 472-473, 755 P.2d 797 (1988); State v. Franco, 96 Wn.2d 816, 829, 639 P.2d 1320 (1982); State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979); State v. Mecca Twin Theater & Film Exchange Inc., 82 Wn.2d 87, 91, 507 P.2d 1165 (1973); State v. Moore, 79 Wn.2d 51, 57, 483 P.2d 630 (1971).

In Wethered, 110 Wn.2d at 472-473, the State Supreme Court refused to consider whether there were independent state constitutional grounds for broader protection under Article I, section 9, without a thorough analysis by the Appellant of the criteria set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). In State v. Russell, 125 Wn.2d at 59-62, the Appellant did provide such an analysis of the Gunwall factors,

This contention is in conflict with the trial court's finding that the defendant voluntarily resumed answering questions in response to Miller's comments. Finding of Fact No. 9 in CP 158-162. The defendant himself testified that he had no problem answering Miller's questions and, in fact, wanted to do so. 10-3-05 Hearing RP 147-149. Further, the defendant inaccurately characterizes the nature of Miller's comments.

The defendant claims that after the defendant's reference to an attorney, Miller limited the defendant's choice to four options: to be re-informed of his Miranda rights, to give a taped statement, to give a written statement, or to give an untaped verbal statement. However, Miller's comments contained no such limitation.

Miller's immediate response to the defendant's equivocal reference to an attorney shows that he recognized the defendant was thinking out loud at that point and considering whether he should ask for the assistance of an attorney. Miller explained that he could not

provide the defendant with legal advice, and so he could only re-read the Miranda warnings to him if he had any questions about those rights. However, the defendant rejected that offer, stating that he already knew his rights. 10-3-05 Hearing RP 99.

Miller then simply pointed out to the defendant that the ball was in his court, meaning that it was the defendant's choice whether to invoke his rights or continue with the interview.

10-3-05 Hearing RP 99. A statement that essentially reminds the defendant that the choice is his is certainly not a coercive statement.

Miller then simply clarified that a taped statement was not the only way the defendant could continue with the interview, but rather he could choose to give a written statement or just tell Miller his version. 10-3-05 Hearing RP 99-100. The defendant had just confirmed that he knew his rights, which included the right to end the interview. There is no way this statement by Miller can be fairly characterized as informing

the defendant that he did not have the right to end the interview.

In summary, the trial court properly found that the defendant made an equivocal reference to his right to an attorney during his interview with Miller. At that point, Miller was not obliged to stop questioning the defendant, although he did make some effort to have the defendant clarify what he wanted to do. The defendant then voluntarily chose to resume answering Miller's questions. He then told Miller the version of events he wanted Miller to hear, as he himself testified at the CrR 3.5 hearing. 10-3-05 Hearing RP 147-149. Thus, the defendant's admissions were properly admitted at the trial of this cause.

3. The trial court correctly instructed the jury concerning the meaning of the term "forcible compulsion".

The Court's Instruction to the Jury No. 17 defined the crime of indecent liberties, and stated the following with regard to the element of forcible compulsion.

Forcible compulsion means physical force which overcomes resistance, or a

and so the State Supreme Court engaged in a detailed comparison of the U.S. Constitution's Fifth Amendment and Article I, Section 9 of the Washington Constitution. As a result of that analysis, the court concluded that the state constitution did not provide greater protection than the Fifth Amendment. Russell, 125 Wn.2d at 62.

In the present case, the defendant has not provided any basis to find that Article I, section 9 of the Washington Constitution should be interpreted any differently in the present context. Therefore, the decision of the United States Supreme Court in Davis v. United States is controlling here. The trial court in the present case did not err in following Davis and finding that there was no constitutional violation in Detective Miller's interview with the defendant.

The defendant also contends, in the alternative, that the trial court erred in finding that the defendant's reference to an attorney in the interview with Miller was

equivocal. However, this argument is based upon the defendant's version, in which he claimed he stated the following to Miller: "I said I wanted a lawyer." 10-3-05 Hearing RP 134. The defendant argues on appeal that the court did not make a finding contrary to this testimony by the defendant. However, that is incorrect.

At the hearing on October 3, 2005, the court orally made the following finding with regard to the statement made by the defendant to Miller:

. . . Now he makes a statement about which there is some disagreement. He says, you know, I don't know how much trouble I'm in. Do I need an attorney, maybe I want an attorney, or do I need an attorney, something to that gist.

10-3-05 Hearing RP 178-179. The court then entered the following written finding of fact.

The defendant then made an equivocal reference to his right to an attorney, stating that maybe he should contact an attorney.

Finding of Fact No. 9 in CP 158-162.

Thus, the court did find that the statement made by the defendant to Miller was different from what the defendant claimed in his testimony.

Certainly, the version of the defendant's statement set forth in the court's Finding was correctly characterized as equivocal. See Davis v. United States, 512 U.S. at 455, 462; State v. Robtoy, 98 Wn.2d at 40-41. A court's finding of fact which is challenged must be upheld if it is supported by substantial evidence, which is evidence sufficient to persuade a rational, fair-minded person as to the truth of the finding. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The court's finding as to the defendant's equivocal statement was supported by the testimony of Detective Miller. While the court found all of the witnesses to be generally credible, it was the province of the court as fact-finder to determine that Miller's testimony was more accurate on this disputed point. 11-4-05 Hearing RP 4-5; State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The defendant also contends that Detective Miller's response to the defendant's equivocal reference to an attorney was coercive in nature.

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

CP 195. During deliberations, the jury sent the following note to the court:

Does "overcome resistance" necessarily require the final clause ("that places a person in fear of death or physical injury to oneself")?

CP 178. The trial court consulted with counsel for both parties in regard to this jury question. 12-13-05 Hearing RP 1-7. The court then sent the following written communication to the jury:

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.

CP 176. In the attached Restated Instruction No. 17, the court instructed the jury as follows with regard to the element of forcible compulsion.

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 177.

The Defendant's trial counsel objected to the

restated instruction before it was given to the jury. However, trial counsel did not contend that it incorrectly stated the law on forcible compulsion. Rather, she argued that the better practice would be to rely solely on the instruction already given, which followed the Washington Pattern Jury Instruction, and let the jury work out the confusion themselves. 12-13-05 Hearing RP 4-5, 7.

Defense counsel again raised the subject of Restated Instruction No. 17 before the court just prior to the jury coming out to render its verdicts. The trial court specifically asked the defendant's counsel whether she was contending that the court's restated instruction had inaccurately defined the term "forcible compulsion". Defense counsel denied that she was making such a claim, but rather repeated her argument that the original language should have been left unchanged. The court rejected this argument. Trial RP 1098-1099.

On appeal, the defendant contends for the

first time that Restated Instruction No. 17 misstated the law on the subject of forcible compulsion. He argues that the element of forcible compulsion for the crime of indecent liberties requires the State to prove not only that the victim's resistance was overcome by physical force, but also that the physical force placed the victim in fear of death or physical injury to her self.

RCW 9A.44.010(6) defines the phrase "forcible compulsion" in the following manner:

"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.

Just looking at the grammatical structure of this definition, the defendant's contention makes no sense. If the phrase "or a threat, express or implied" was removed from this definition, the phrase that follows ("that places a person in fear of death or physical injury") would modify the word "resistance", not "physical force", and so

would not have the meaning claimed by the defendant.

Furthermore, there is no authority cited by the defendant for his contention. In State v. McKnight, 54 Wn. App. 521, 527-528, 774 P.2d 532 (1989), Division One of the Court of Appeals held that forcible compulsion means force exerted by the perpetrator that is directed at overcoming the victim's resistance and that is more than what is normally required to accomplish the sexual act. In State v. Ritola, 63 Wn. App. 252, 254-255, 817 P.2d 1390 (1991), Division Two of the Court of Appeals reached that same conclusion with regard to the meaning of "forcible compulsion". There is no basis for the defendant's contention that forcible compulsion requires physical force that overcomes the victim's resistance and that places the victim in fear of death or physical injury.

4. The trial court did not abuse its discretion in refusing to grant the defendant's request for a SSOSA sentence.

At sentencing in this case, the defendant requested that the court grant him a suspended

sentence under the Special Sex Offender Sentencing Alternative (SSOSA). In response, the court was required to consider not only whether the defendant would benefit from the SSOSA option but also whether the community would benefit, and in that regard the court was required to consider the opinion of the victim as to whether the defendant should receive a SSOSA sentence. RCW 9.94A.670(4).

The decision whether to employ the SSOSA option is entirely within the trial court's discretion, and therefore can only be reviewed to determine whether there was an abuse of that discretion. State v. Onefrey, 119 Wn.2d 572, 575, 835 P.2d 213 (1992); State v. Frazier, 84 Wn. App. 752, 753, 930 P.2d 345 (1997). There is such an abuse of discretion only if it is shown that the court's decision was manifestly unreasonable or untenable. State v. Ziegler, 60 Wn. App. 529, 534, 803 P.2d 1355 (1991).

A pre-sentence investigation report was submitted by the Department of Corrections which recommended against a SSOSA sentence in this case

because of the circumstances of the defendant's crimes and the length of time during which he had perpetrated those offenses on the child victim in this case, and because the community would not be well served by allowing such a moderate to high risk sex offender to remain free in the community. CP 223. The State submitted a sentencing memorandum in which five reasons were cited as to why a SSOSA sentence was not appropriate in this case. CP 203-215. The victim in this case expressed her opposition to the SSOSA option, as did her mother. CP 220. Nevertheless, the defendant contends the trial court abused its discretion in denying the defendant's request for a SSOSA sentence.

The State argued that there were aggravated facts in this case which made SSOSA inappropriate, relying on State v. Onefrey, 119 Wn.2d at 576, and State v. Goss, 56 Wn. App. 541, 544, 784 P.2d 194 (1990). First, the offenses were part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by

multiple incidents over a prolonged period of time. RCW 9.94A.535(2)(g). The defendant had admitted as much to the evaluating therapist, Brian Cobb. CP 288-289. Second, the defendant had abused his position of trust in order to facilitate the commission of his sex offenses. State v. Marcum, 61 Wn. App. 611, 612-615, 811 P.2d 963 (1991).

Because the circumstances of the defendant's offenses made this an aggravated case, and therefore an inappropriate case for the use of the SSOSA sentencing option, the trial court did not abuse its discretion in denying the defendant the benefit of a SSOSA sentence.

The court acknowledged it had considered the views of the victim and victim's family very carefully in reaching a sentencing decision. Trial RP 1153. This was certainly not an abuse of the court's discretion.

The court found that the report of Brian Cobb did not provide the requisite assurances that this defendant could be successfully treated. Trial RP

1157. The State's sentencing memorandum cited a number of examples from Cobb's report as to why that was so. CP 208-210. The defendant has not even attempted to show on appeal that this assessment of Cobb's report was manifestly unreasonable and so the court did not abuse its discretion in reaching that conclusion.

The defendant limits his argument to a complaint that the court penalized the defendant for putting the State to its burden of proof in denying him a SSOSA sentence. However, his argument ignores critical aspects of the defendant's behavior in this case.

The defendant chose to give his version of events to Detective Miller. It was a version he wanted Miller to have. Trial RP 147-149. In that version, he claimed that his sexual abuse of the victim began when she was 14 years of age. Trial RP 148. While his statements to Miller constituted an admission to rape of a child in the third degree, his version also constituted a denial of either rape of a child or child

molestation in the second degree. In that latter regard, the defendant's statements to Miller were not the truth.

Initially, the defendant was less than forthright about the extent of his abuse of S.K. in speaking with the therapist performing his SSOSA evaluation. The therapist sent the defendant home and ordered him to write down all the offensive behavior against S.K. that he had failed to disclose during his interviews with the therapist. CP 289.

The defendant's ultimate disclosure revealed that his sexual abuse of S.K. had begun when she was 12 years old, just as she had claimed. CP 288. This disclosure placed the beginning of the defendant's sexual molestation of S.K. two years earlier than in the version he gave to Detective Miller.

The defendant's dishonesty in his statements to Detective Miller clearly benefited the defendant in this case. While a defendant can never be penalized for his reliance upon his right

against self-incrimination, if he chooses to speak he has no constitutional right to lie. It was reasonable for the court to take into account the defendant's dishonesty and manipulation in assessing whether the community would benefit from granting him the SSOSA option.

In State v. Frazier, 84 Wn. App. 752, 930 P.2d 345 (1996), Frazier chose to lie about his sex offense against a child, denying he had committed the offense until after he was convicted. He then admitted to the offense in an attempt to obtain a SSOSA sentence, and presented to the court a favorable evaluation from a treatment provider. Frazier, 84 Wn. App. at 753. The court refused to grant Frazier the SSOSA option on the basis of Frazier's dishonesty and the request of the victim's mother that he be sent to prison. The Court of Appeals held that this was a valid exercise of the trial court's discretion. Frazier, 84 Wn. App. at 754. The same is true for the court's exercise of its discretion in the present case.

5. Since there was no prejudicial error in this case, there is no basis for reversal of the defendant's convictions on the basis of cumulative error.

On appeal, the defendant contends that cumulative error deprived him of a fair trial in this case. The application of the cumulative error doctrine is limited to cases where there have been several trial errors that standing alone may not be sufficient to justify reversal, but when combined deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). However, as discussed above, the defendant has failed to identify any instance in this case in which prejudicial error occurred, and therefore there was no cumulative error. See State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

D. CONCLUSION

Based on the arguments set forth above, the State respectfully requests that this court find: that the trial court properly used its discretion in refusing to declare a mistrial based on the remarks of a prospective juror; that the

court properly ruled the defendant's admissions to law enforcement admissible at trial; that the court properly instructed the jury on the meaning of the term "forcible compulsion"; and that the trial court did not abuse its discretion in denying the defendant's request for a SSOSA sentence. For those reasons, this court should affirm the defendant's convictions and sentence in the present cause.

DATED this 22nd day of December, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James C. Powers", is written over a horizontal line.

JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
JAMES D. RADCLIFFE,)	
Appellant)	

FILED
COURT OF APPEALS
DIVISION II
06 DEC 22 PM 4:01
STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

James C. Powers declares and affirms:
I am a Senior Deputy Prosecuting Attorney in the
Office of Prosecuting Attorney of Thurston
County; that on the 22nd day of December, 2006, I
caused to be mailed to appellant's attorney,
PETER B. TILLER, a copy of the Respondent's Brief
and Motion to Allow Filing Over-length
Respondent's Brief, addressing said envelope as
follows:

Peter B. Tiller
Attorney at Law
P.O. Box 58
Centralia, WA 98531-0058

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that
the foregoing is true and correct to the best of
my knowledge.

DATED this 22nd day of December, 2006 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney