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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 263541-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Jerry Allen Herron,

Appellant.

Appeal From The Superior Court
Of Whitman County
Case No. 07-1-00022-9
The Honorable David Frazier

BRIEF OF RESPONDENT

Denis P. Tracy, WSBA # 20383
Whitman County Prosecutor

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I. DEFENDANT / APPELANT'S ASSIGNMENTS OF ERROR

Defendant, through counsel, makes two general allegations of error which, he argues, warrant a reversal of his conviction for Rape. First, he argues that the trial court erred when it denied his motion to suppress his tape-recorded interview with the police, since he alleged that the statement was obtained in violation of his Fifth Amendment rights. Second, he argues that the court violated his right to a public trial, and the public's right to a public trial, when it conducted individual voi dire questioning of potential jurors in chambers involving sexual abuse issues.

Also, defendant, pro se, argues two additional grounds for review. First, he argues that he should have been allowed to impeach the testimony of the victim with two juvenile convictions of the victim, for Theft 3rd degree and Vehicle Prowling. Second, he argues that the court should have given the jury an instruction which would have allowed them to consider Assault in the Fourth Degree as a lesser included offense to the charged-crime of Rape First Degree.

II. STATEMENT OF THE CASE

First, a note about citations to the record. All of the pre-trial proceedings are reported as Verbatim Transcript of Proceedings, Volume I – pages 1-176. Citations to that transcript in this brief will be noted as

RP-I, followed by the page number. All of the trial and sentencing proceedings are reported as Verbatim Transcript of Proceedings, Volumes I-A, I-B, II-A, II-B, III, IV. All of those volumes have consecutive page numbers beginning in Volume I-A with page 1 and ending with Volume IV, page 748. Citations to those transcripts in this brief will be noted as RP, followed by the page number. Also, one exhibit (exhibit 14) admitted at trial was a CD recording of the defendant's interview with police (edited version). That was transcribed and reported as Verbatim Transcript of Playing Exhibit 14 – pages 1-42. Citations to that transcript of exhibit 14 will be noted in this brief as Supplemental RP, followed by the page number.

FACTUAL HISTORY

The victim, Kristen Beck, was visiting with friends on the afternoon of February 13, 2007; drinking beer and hanging out across the street from a Zip Trip convenience store in Spokane, WA. (RP 207-08.) Ms. Beck was 22 years old at the time. (RP 201.) At approximately 4:00 pm Ms. Beck entered into a conversation with the defendant, Mr. Herron (RP Vol. 210-11, CP 53) with whom she had become acquainted earlier in the day (RP 214.) Mr. Herron was working at the Zip Trip (RP 213) and near the end of his shift he encountered Ms. Beck in the parking lot and

offered to give her a ride to the bus station because she wanted to get to Pullman to visit her family there. (RP 210-12.)

Mr. Herron gave Ms. Beck a ride to the bus station in Spokane where Ms. Beck purchased a ticket for the 5:45 pm bus. (RP 211.) Rather than wait at the station until the scheduled departure time, Ms. Beck went with the defendant to Mr. Herron's trailer in Airway Heights (near Spokane) to drink a couple of beers. (RP 217.) On the way to his trailer, they stopped at a gas station to buy beer. (CP 48.) Upon arriving at Mr. Herron's trailer, Ms. Beck met the neighbor, Mr. Forcum, and talked with him for a few minutes (RP 283) before entering Mr. Herron's trailer. (RP 220.) After a time, Mr. Herron and Ms. Beck returned to the bus station for her scheduled departure but were a few minutes late and the bus had already departed. (RP 220.) Ms. Beck then asked Mr. Herron to drive her to Pullman and he agreed. (RP 221.)

Mr. Herron and Ms. Beck returned to Mr. Herron's trailer so that he could change before driving her to Pullman (RP 221) and they remained there for about an hour. (CP 48.) Ms. Beck used Mr. Herron's telephone to call her father and ask him whether he could give Mr. Herron some gas money for driving her to Pullman; her dad agreed. (RP 222 (victim's testimony), and RP 309 (victim's father's testimony).) The defendant agreed to drive in exchange for gas money. Mr. Herron and Ms.

Beck then ate a couple of TV dinners (RP 221-222) after which Ms. Beck again brought up the topic of the ride to Pullman, wanting to get going. (RP 225.) Mr. Herron now told Ms. Beck that he would drive her if she had sex with him. (RP 225.) Ms. Beck was upset by this "vile and disgusting" demand and left Mr. Herron's trailer. (RP 226.)

Ms. Beck went next door to Mr. Forcum's house and banged on his door. (RP 226, 285.) She told Mr. Forcum that Mr. Herron had been forceful with his demand for her to have sex with him for a ride to Pullman. (RP 285.) At the same time that Ms. Beck was seeking shelter with Mr. Forcum (RP 285), Mr. Herron was on the phone to Mr. Forcum telling him "[t]his bitch won't fuck me doggie-style." (RP 285.)

Mr. Forcum spent some time calming Ms. Beck down (RP 286) before she called her father and told him about Mr. Herron's demand for sex in exchange for a ride. (RP 227, 290, 306.) The defendant phoned Mr. Forcum's house three times while the victim was there, telling Mr. Forcum to tell the victim that he would give her a ride to Pullman. (RP 287.) When the victim was at Mr. Forcum's trailer, she did not have scratches on her face (RP 364-365) (which were later inflicted on her with a knife during the rape (RP 236) and which were noted at the hospital after the rape (RP 341-348)). After Ms. Beck had calmed down she went back over to Mr. Herron's trailer (RP 291) where Mr. Herron apologized,

saying he was drunk and didn't mean what he had said. (RP 229.) Because Ms. Beck was not afraid of Mr. Herron at that time (RP 229) she accepted his apology and his new offer for a ride to Pullman. (RP 229.)

On the way to Pullman, now late at night, the defendant pulled off of the highway and stopped. He pulled a knife out and put it to the victim's neck and demanded sex. She pushed it away, initially not knowing what it was, and cut her finger. He then put the knife to her cheek, again demanding sex, and scratched her check with the knife. She then obeyed his commands, in fear for her life, and lay still as the defendant penetrated her vagina with his penis. (RP 231-241.)

After raping the victim, the defendant pulled up his pants and continued on the road to Pullman with the victim. Once there he dropped her off at a McDonalds restaurant, where the victim went in to call her father. She told the defendant that her father would come and give him the money for the ride. She did not tell the defendant that the rape had bothered her. The defendant did not wait for the victim's father to show up and pay him for the gas money, as they had earlier agreed would happen. Instead, the defendant took off in his car, leaving the victim at McDonalds. (RP 241- 248.)

The victim was taken to the hospital and a rape exam was done. The defendant's semen was found in the victim's vagina, which was

confirmed through DNA testing. (RP 530-538.) A cut was found on the victim's finger and a scratch on her cheek, both consistent with having been cut and scratched by the defendant's knife (RP 341-348.), and not consistent with fingernail scratches (RP 353-354). Furthermore, though Ms. Beck had been drinking , the hospital nurse did not observe Ms. Beck having slurred speech, bloodshot, watery eyes, no staggering, no difficulty standing, (RP 328-330), nor did the investigating officer believe she was intoxicated (RP 372.)

After leaving the victim in Pullman, the defendant returned towards his trailer in Airway Heights, WA. Before he got there, however, he was stopped by an Airway Heights police officer for having expired tabs on his car. The officer smelled alcohol on the defendant's breath. The officer found a knife, which matched the description of the knife given by the victim that night, in the defendant's center console. The officer also found the sheath for the knife on the driver's side floor of the car. (RP 250, 398-400.)

The Whitman County Sheriff's office investigated the rape. In the course of that investigation, the defendant was identified as a suspect (through information obtained at the ZipTrip in Spokane and from phone records and from information obtained from the Airway Heights police department) and a search warrant was obtained for his house. (RP 383-

393). In the service of the search warrant, the officers found many empty beer cans of the type described by the victim, found the knife described by the victim, found the TV dinners described by the victim, and found the defendant's ZipTrip employee shirt. (RP 406-415.)

The defendant was arrested and taken to the Whitman County Sheriff's office. He was interviewed by Sgt. Chris Chapman. The interview was recorded. The interview began with the defendant being read his 'Miranda' rights and him waiving those rights and agreeing to answer the officer's questions. (RP 581-587, Supplemental RP 4-7) (Please note, the designation 'Supplemental RP' is being used to refer to the "Verbatim Transcript Of Playing of Exhibit 14", the interview of the defendant that was played for the jury. That exhibit was edited down from the full interview of the defendant, the full transcript of which can be found at CP 43-68. Also, please note that the full un-edited transcript is mistakenly labeled in the Index of Clerk's Papers as part of a Motion in Limine Re Hearsay (and numbered in the Index as being CP 42-68). That transcript was not part of that motion.)

Specifically, when asked if "having these rights in mind do you wish to waive them and talk to me now?", he answered: "I guess. Until I don't want to." (Supplemental RP 7)

During the interview, the defendant specifically denied having sex with the victim (Supplemental RP 41) and repeatedly denied raping her (Supplemental RP 12, 25) and said that nothing of note happened on the drive from Airway Heights to Pullman (Supplemental RP 21, 37) and in general nothing of note, other than that she kissed him while at his trailer in Airway Heights (Supplemental RP 38). But he did admit to being with her and to giving her a ride to Pullman, and he referred to her as "one of the street people, just living on the street up there...." (Supplemental RP 9.)

At two points after the start of the interview, the defendant mentioned the word "attorney." At CP 49 this exchange occurred:

CC[Deputy]: Anything else of interest that you think might be important for me to know about that trip down?
JH[Defendant]: No. And if I'm going to get charged I probably need an attorney. I didn't do it.

At CP 57, this exchange, after denying having sex with the victim,

JH: If it goes farther than that we need to have an attorney or something. I don't know. I don't know what to think. I really don't. I'm just [sic] want to wake up, this can't be happening.

Later, at CP 66 the defendant said he was done talking. The interview then ended.

PROCEDURAL HISTORY

The defendant was charged by information with Rape in the First Degree, with an additional allegation that he was armed with a deadly weapon during the commission of the rape. (CP 8-10.)

The court held a CrR 3.5 hearing as to the admissibility of the defendant's statement and the court entered an extensive written decision. (CP 73- 81.) The court ruled that the defendant knowingly waived his Miranda rights. In the trial court's words: "In response to 'do you wish to waive,?' [the defendant said] 'I guess until I don't want to.' To me, that very clearly expresses on Mr. Herron's part an understanding of his rights, including his right to remain silent, and his desire to talk and his understanding that he could stop talking at any time if he wanted to." (RP –I 31. Again, please note that RP-I refers to the pre-trial report of proceedings, labeled 'volume I'.) The trial court ruled that the defendant's statement, made part way through the interview, "if I'm going to get charged I probably need an attorney" was not even an equivocal request for an attorney. (CP 76-80.) The court ruled the statement would be admissible.

At a pretrial readiness hearing, the issue of jury voir dire came up. The defense asked that the court give the venire a general questionnaire. (RP-I 66-67.) The court then noted that it also usually used a

questionnaire in sex cases, asking whether the potential juror or close friend [or family member] had been charged with a sex offense, or whether they had been a victim of a sex offense. (RP-I 67-68.) The court then went on to state that its usual procedure was to question anyone who answered yes to those questions individually in chambers, with defendant and counsel. But the court noted that recent cases "question that procedure." (RP-I 68.) A discussion was had between the court, the prosecutor, defense counsel, and the defendant. (RP-I 68-72.)

The prosecutor noted that a particular concern was the defendant's right to have the voir dire done in public (his right to a public trial). (RP-I 68.) The court noted: "I have always done that [individual questioning in chambers as to sex-related issues in sex cases] for fear that [with] sex sensitive issues, the jurors may have been victims and not disclose that because they're in front of all the jurors, and then there's a danger of seating jurors that aren't fair and unbiased. I [do this for the] protection of the defendant." But the court noted that it wouldn't do such a thing if the defendant objected. (RP-I 69.)

The prosecutor suggested two alternatives: either have a colloquy between the court and defendant and defense counsel, with a knowing and voluntary waiver of the right to public trial for this purpose, or conduct the individual questioning in a different courtroom down the hall. (RP-I 69-

70.) The defendant's attorney then said that his and his client's preference was to conduct individual questioning in chambers. (RP-I 70.) The court then asked the defendant directly whether he understood the issues and the defendant said he did, and that he preferred the questioning be done in chambers, in the "privacy of your chambers." (RP-I 71.)

The court explained its reasoning, and its concern with both asking these questions in front of other jurors and in front of any spectators [such as in a courtroom down the hall]:

> Here's the issue: If you ask a group of people in open court, 'Have you ever been accused' [or] 'Have you ever been a victim of a sexual offense' or 'Have you ever been the victim of an inappropriate sexual touching' [or] 'Have you ever been accused of a sex crime,' because of the nature of the allegation, if someone has, they might be embarrassed and reluctant to say that in front of 50 other jurors and spectators. And these are things that we want to know, to determine whether that person can be fair and impartial. (RP-I 71.)

The court then explained its preferred method to fix the potential problem in obtaining a fair and impartial jury, which was individual questioning in chambers with both counsel and the defendant, and suggested that defendant talk it over with his counsel. (RP-I 71-72.)

Then at a pretrial motions hearing a few days before the trial, the issue of questioning the jurors in chambers came up again. The court, on the record extensively, and repeatedly explained its reasoning and its

preference for the questioning to be done in chambers, not in front of the venire panel and not in front of any members of the public, to promote full disclosure of the very sensitive topics of sexual abuse or sexual assault. The defendant was given explicit options of 1) conducting the questioning in open court in front of the venire panel, 2) conducting the questioning in a different courtroom so that the venire panel wouldn't be present but members of the public would, and 3) conducting the questioning in chambers with only the court, counsel and the defendant. The defendant, and his counsel, both expressed the clear request for the third option: questioning in chambers. (RP-I 103-10) In addition, the court read into the record the portion of the juror questionnaire which explained the court's reasoning again. (RP-I 109-110.)

Also at this pretrial motions hearing, the court heard a defense motion in limine to allow cross examination of the 22 year old victim's expected testimony, concerning the fact that she had been convicted of two juvenile crimes (Theft Third Degree and Vehicle Prowling) when she was 13 years old. (RP-I 86.) The court considered the defendant's offer of proof, which was that when the victim was 13, she had stolen some beer and some change from another person's porch, and had taken something of small value from a car. (RP-I 87.)

The court denied the request to allow the victim to be examined as to these two juvenile convictions. It reasoned that under ER 608 and ER 609(d) that the court had discretion to admit the evidence of the convictions, but that it would have to be satisfied that such evidence would be necessary to a fair determination of defendant's guilt or innocence. The court ruled that as to these crimes that were committed by a 13 year old girl, nearly nine and a half years before she would be testifying about an alleged violent rape, that such evidence would not be at all necessary for a fair determination of the issue of defendant's guilt or innocence. (RP-I 92-93, and 97.)

During jury selection, the court proceeded in the manner that the defendant had requested and agreed to: those members of the venire panel who answered 'yes' to the questionnaire regarding sexual abuse or sexual assault issues were questioned individually as to those issues in chambers with all counsel and the defendant. Beginning at RP 50, counsel and defendant and the trial judge are in chambers discussing any challenges up to that point (after having some questioning of the venire in open court). Before the individual questions started, the court and defense counsel discuss one potential juror. The court noted: "He pretty well said he'd have trouble being fair in a case involving a sex allegation. But we can bring him in and talk to him in greater detail." To which defense counsel

responded: "Yeah. We don't know if it's somebody who was falsely accused or somebody that was a victim. We don't know a lot about..." (RP 56-57.) This is another example, of very many, where defense counsel expressed his desire to proceed with individual questioning, and expressed the reason therefore: to get the potential jurors to talk openly about very sensitive topics, in order to get a fair panel.

Starting at RP 62, the court, counsel and defendant go through each questionnaire and determine to question every venire person individually who answered yes to the questionnaire. The individual questioning in chambers begins at RP 71 and ends at RP 169. Over and over, the trial judge explains to the individual jurors that the questions are being asked in chambers to make it easier on the jurors to disclose things that might be embarrassing or sensitive. (See eg RP 76-77, 79, 93, 96, 126, 135, 140.) Over and over, the venire persons come forward with embarrassing or sensitive disclosures. For instance, at RP 77: two close friends raped; at RP 79, 81: two nieces sexually assaulted, which caused the venire person to be very upset.

When juror 12 was questioned he disclosed a friend was sexually assaulted. When asked if he could be fair in the case at bar, he said yes. But when pressed a little he admitted that he was still very angry about it, his anger was "boiling up." Defense counsel told that juror in chambers:

"I appreciate your candor and honesty...that's exactly why we're going through this process." Defense counsel challenged Juror 12 for cause and the judge agreed, excusing juror 12. (RP 89-95, 110.)

During the trial, the State played a part of the recording of the defendant's interview with Sgt. Chapman. (RP 582-587) The portion of the interview that was played for the jury was on a CD recording, which was admitted as Exhibit 14. (RP 582-583.) Before the CD was played for the jury, the prosecutor met with the court and defense counsel in chambers. The prosecutor explained in an extensive offer of proof why he had edited the full recorded interview and what portions of that interview that were now contained on Exhibit 14. (RP 574-580.) Some of the edits were done at the defense's request, such as removing all references to the fact that the defendant was on DOC supervision, and all references to the defendant's use of the word "attorney." (RP 577-580.) But a large edit was done by the prosecutor to edit out the entire (approximately) second half of the interview. This was done to narrow potential appellate issues. The trial court had already ruled that the entire statement was admissible, however the prosecutor felt that an abundance of caution was appropriate, so he declined to offer the portion of the interview following, and including, the defendant's second mention of the word "attorney": "If it

goes farther than that we need to have an attorney or something." (RP 574-577; defendant's quote at CP 57.)

This court of appeal may compare the transcript of the entire interview, found at CP 43-68, with the transcript of the edited interview that was admitted into evidence, exhibit 14, found at Supplemental RP 1-42. But the only issue on appeal is whether it was error to admit the portion of the edited interview, exhibit 14, that occurred after the defendant's statement of "if I'm going to get charged I probably need an attorney." That portion of exhibit 14 that is in question is found beginning at Supplemental RP 21, line 21, (also at CP 49) and begins "Deputy: about that trip down? Defendant: No.", and continues to the end of exhibit 14. Remember that the reference to an attorney was edited out at defendant's request.

At the close of the trial, defense counsel requested that the court give the jury an instruction on a proposed lesser included offense of Assault Fourth Degree. The court denied that request, citing the greater mental state that is required for Assault (intent) than for Rape (knowing) and citing to the cases which hold that Assault is not a lesser included offense of Rape. (RP 612-613.)

III. ARGUMENT

The trial court properly admitted the state's custodial interview with Jerry Herron because Mr. Herron knowingly, voluntarily, and intelligently waived his right to an attorney and did not make a subsequent request for counsel in the portion of his custodial interview introduced at trial. In addition, the trial court acted properly when it allowed Mr. Herron to conduct a portion of the voir dire in chambers so as to increase his chances of uncovering potential juror biases regarding sexual issues. These actions by the trial court were designed to ensure, in a manner that would be least intrusive on the public trial process, that Mr. Herron was accorded a fair trial by an impartial jury -- and that is precisely what Mr. Herron received.

The defendant / appellant has narrowed the potential issues related to his pre-arraignment custodial interview to a single item: the appropriate characterization and effect of his statement, "if I'm going to get charged I probably need an attorney." (Brief of Appellant 2; CP 49, 76.) This statement was the basis for a CrR 3.5 admissibility hearing which similarly dealt with the legal effect of this brief exchange between Mr. Herron and the interviewing officers. (CP 74.) In order to assure that no other potentially disputable language would give rise to an appealable

issue, the portion of the interview introduced at trial was limited to that part of the interview that occurred before any other mention of the word "attorney" by the defendant. (RP 577, Supplemental RP -verbatim transcript of exhibit 14). Therefore, the defendant's issue in this appeal is limited to whether it was error to admit the portion of his interview which occurred after his statement of "if I'm going to get charged I probably need an attorney," and before his next mention of, or reference to, an attorney. That portion can be found at CP 49-57 and Supplemental RP 21-42.

A. ONCE A PERSON IN CUSTODIAL INTERROGATION PROPERLY WAIVES THEIR *MIRANDA* RIGHTS, THE POLICE MAY REASONABLY INTERVIEW HIM UP TO AND UNTIL HE INVOKES THE PROCEDURAL PROTECTIONS AFFORDED BY *EDWARDS* AND *DAVIS*.

A person has the right not to be compelled in any criminal case to be a witness against himself under the Fifth Amendment of the U.S. Constitution. U.S. CONST. amend. V. To protect this right, the U.S. Supreme Court has declared that law enforcement must inform a person "taken into custody or otherwise deprived of his freedom or action in any significant way" of certain procedural safeguards that have been designed to protect him. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). One of these procedural safeguards is "the right to the presence of an attorney, either retained or appointed." *Id.*

Though a person has a "continuous opportunity to exercise" this right to an attorney, it may be waived, provided it is done so "voluntarily, knowingly and intelligently." *Id.*

The right to counsel in a pre-arraignment interrogation is limited to that derived from the Fifth Amendment, as the right to counsel found under the Sixth and Fourteenth Amendments is not triggered until the initiation of adversarial criminal proceedings. *State v. Earls*, 116 Wn.2d 364, 373-74 (1991) (citing *Kirby v. Illinois*, 406 U.S. 682, 688-89, 92 S.Ct. 1877, 1881-82, 32 L.Ed.2d 411 (1972)). A custodial interrogation is not an adversarial criminal proceeding, *Earls*, 116 Wn.2d at 374, as an adversarial proceeding is one where the "adverse positions of [the] government and defendant have solidified" and the "government has committed itself to prosecute." *Moran v. Burbine*, 475 U.S. 412, 432, 106 S.Ct. 1135, 1146, 89 L.Ed.2d 410 (1986) (quoting *United States v. Gouveia*, 467 U.S. 180, 189, 104 S.Ct. 2292, 2298, 81 L.Ed.2d 146 (1984)).

The state constitutional corollary to the Fifth Amendment is found in article 1, section 9, and has been held to be "co-extensive with, not broader than, the protection of the Fifth Amendment." *Earls*, 116 Wn.2d at 374-75 (citing *State v. Moore*, 79 Wn.2d 51 (1971)). Similarly, the state constitutional corollary to the Sixth Amendment, found in article 1,

section 22, attaches at the same time as the Sixth Amendment and is therefore inapplicable to a custodial interrogation situation. *Earls*, 116 Wn.2d at 374. Moreover, any analysis using the approach outlined in *State v. Gunwall*, 106 Wn.2d 54 (1986) seeking an expansion of the state's constitutional protections found in article 1, section 9 beyond those contained in the Fifth Amendment will not be considered by the court. *Earls*, 116 Wn.2d at 374.

1. An expression of a future conditional intent does not rise to the level of an equivocal request for an attorney and does not invoke a person's right to counsel under the Fifth Amendment.

A person's use of the word "attorney" during a custodial interrogation is not an automatic invocation of the right to counsel as the word taken in context may indicate other, more appropriate characterizations. An "ordinary meaning" approach to the use of the word "attorney" is particularly appropriate in a pre-arraignment custodial interrogation because of the source from which the right to counsel in that situation springs. The custodial "right to counsel" was developed by the courts to safeguard a person's constitutional right to not be a witness against himself and as such the word "attorney" is not imbued with a talismanic significance in its own right.

The protections sought by the court in adopting a series of procedural rules governing a custodial interrogation were intended to preserve the underlying constitutional rights. One concern was that once a person invoked his right to counsel, the police might badger the person into again waiving their right to remain silent. *State v. Stewart*, 113 Wn.2d 462, 477 (1989) (referencing *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)). Indeed, "[t]he fundamental purpose of the Court's decision in *Miranda* was 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process." *Connecticut v. Barrett*, 479 U.S. 523, 528, 107 S.Ct. 828, 831, 93 L.Ed.2d 920 (1987) (emphasis in original) (quoting *Miranda v. Arizona*, 384 U.S. 436, 469, 86 S.Ct. 1602, 1625, 16 L.Ed.2d 694 (1966)). The rule of *Edwards* requires "some statement that can be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police.*" *State v. Greer*, 62 Wn. App. 779, 788 (1991) (emphasis in original) (citing *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); accord, *State v. Stewart*, 113 Wn.2d 462, 472-3 (1989)). The expression need be one that expresses a *present* desire for counsel concerning the person's immediate situation. *Bruni v. Lewis*, 847 F.2d 561, 564 (9th Cir. 1988).

The right to choose between speech and silence is the focus of the right to an attorney during a custodial interrogation. When a defendant in custodial interrogation told the police that he was "willing to talk . . . but did not want to put anything in writing until his attorney came," he demonstrated an understanding of his rights and his awareness that he was under no obligation to give any statements. *Barrett*, 479 U.S. at 526, 107 S.Ct. at 830. The contextual considerations of the use of the word "attorney" were held to be entirely relevant because "[t]o conclude that [the defendant] invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the *ordinary meaning* of [the defendant's] statement." *Id.* at 529, S.Ct. at 832. (emphasis added). Whether some people might find the suspect's decision to speak as long as it wasn't put in writing illogical is irrelevant because the court has "never 'embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.'" *Id.* at 530, S.Ct. at 832-833 (quoting *Oregon v. Elstad*, 470 U.S. 298, 316, 105 S.Ct. 1285, 1297, 84 L.Ed.2d 222 (1985)).

The "ordinary meaning approach" directs that the context surrounding the word "attorney" be given weight in determining whether the *Edwards* protections were triggered. A statement to police by a person in custodial interrogation that "his attorney had advised him not to talk to

police" was not an invocation of his right to counsel since "he did not ask for his attorney," "[r]ather, he merely told [the police] what his attorney had advised." *State v. Beldsoe*, 33 Wn. App. 720, 723 (1983). This advisement by the suspect was similar to the statements by another person in custody who declared that "he should not talk to police until he had a chance to talk to another" and that the next time he told his story he would be in front of a judge after his attorney had cut him a deal. *State v. Thompson*, 60 Wn. App. 662, 668-669 (1991). The court found that these statements were simply not requests for an attorney and thus did not invoke the right to counsel. *Id.* at 669.

A person's inquiry to the interrogating officer as to his opinion of the wisdom of obtaining counsel is also insufficient to trigger the *Edwards* protections. After a person's arrest and advisement of his *Miranda* rights he inquired of the interrogating officer "whether he should get an attorney." *Norman v. DuCharme*, 871 F.2d 1483, 1486 (9th Cir. 1989). This expression was held to "not [have] rise[n] to the level of an equivocal request for counsel" because the "[m]ere mention of an attorney does not constitute an equivocal request for counsel, as the word 'attorney' is not talismanic." *Id.*

In the case at bar, Mr. Herron is claiming that his *Edwards* right to remain silent was violated when he said "if I'm going to get charged I

probably need an attorney." (CP 49.) Though this statement includes the word "attorney," the "ordinary meaning approach" described in *Barrett* indicates that his statement needs to be examined in light of its ordinary meaning and as such it is properly characterized as a future expression of his conditional intent to obtain an attorney if he were to be charged. The *Edwards* prophylactic purpose is not reached by such a statement since it does not describe Mr. Herron's desire for the assistance of an attorney "in dealing with custodial interrogation" but rather the desire for assistance were the accusations against him to flower into the initiation of formal adversarial proceedings.

At no point in the admitted statement does Mr. Herron indicate any desire to deal with the police only through counsel; in fact he repeatedly expresses his satisfaction over his treatment by the investigating officers and their willingness to listen to his description of the relevant events. (CP 67.) Similar to the statement in *Thompson* where the suspect said that the next time he told his story he would be in front of a judge after his attorney had cut him a deal, Mr. Herron's declaration that if he were charged he'd probably need an attorney is simply not a request for an attorney in custodial situation. Indeed, Mr. Herron's statement mirrors that of the advisement in *Bledsoe*, where the suspect told the police that

his attorney had advised him not to talk to police, in that both statements do not ask for an attorney.

2. The Washington State *Robtoy* authority does not survive the U.S. Supreme Court's later decision in *Davis* because *Robtoy* was decided on Fifth Amendment grounds and the U.S. Supreme Court is the final authority on the U.S. Constitution...

The Washington Supreme Court addressed the characterization of a person's statements to police during a custodial interrogation so as to bolster the initial procedural mandates established by the Supreme Court to protect a person's Fifth Amendment rights. In an attempt to remain consistent with the principles developed by *Miranda* and *Edwards*, the court stated "[i]n the *Edwards* case itself, the Supreme Court hinted that a different rule may well apply if the request is equivocal in nature . . . ." *State v. Robtoy*, 98 Wn.2d 30, 38 (1982). In that case, the rule the court created was that whenever an equivocal request for an attorney was made by a person in custodial interrogation, all questioning must then "be strictly confined to clarifying the suspect's request." *Id.* at 39. This decision was based in part on a Fifth Circuit decision as well as the court's own belief that this rule would give a suspect "the proper amount of protection to his rights without unduly burdening the police" because otherwise "the mere mention by the suspect of the word 'attorney' takes on talismanic significance." *Id.*

The prediction by the Washington Supreme Court that the procedural protections begun in *Miranda* and extended in *Edwards* would encompass equivocal statements by a suspect in custodial interrogation was in error. The U.S. Supreme Court applied the same reasoning described in *Robtoy* by the Washington Supreme Court to arrive at the opposite conclusion that requiring the police to clarify a suspect's equivocal request for counsel would destroy the "bright line that can be applied by officers in the real world of investigation and interrogation" with the result that the "clarity and ease of application [of *Edwards*] would be lost." *Davis v. United States*, 512 U.S. 452, 461, 114 S.Ct. 2350, 2356, 129 L.Ed.2d 362 (1994). The court declared that the procedural protections already in place were sufficient to protect the underlying constitutional rights such that the court was "unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer" and "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.* at 461-62, 2356-57.

A state court's decision on a federal constitutional question cannot trump a contrary U.S. Supreme Court decision. The U.S. Constitution is the "supreme law of the land" and the "federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1,

17-18 (1958). No "judicial officer can war against the Constitution" without violating his oath to support it since every officer "is solemnly committed by oath taken pursuant to Art. VI" and instituted "to guard against resistance to or evasion of [the Constitution's] authority." *Id.* at 18. Moreover "the particular phraseology of the constitution of the United States confirms and strengthens the principle . . . that a law repugnant to the constitution is void; and that *courts* . . . are bound by that instrument." *Marbury v. Madison*, 1 Cranch 137, 180 (1803) (emphasis in original).

The Washington Supreme Court decided the *Robtoy* case on Fifth and Fourteenth Amendment grounds while relying heavily on the prophylactic procedures developed in U.S. Supreme Court case law. *State v. Radcliffe*, 139 Wn. App. 214, 223-24 (2007) (review granted 163 Wn.2d 1021 (2008)). Furthermore, the state constitutional corollary to the Fifth Amendment is found in article 1, section 9, and has been held to be "co-extensive with, not broader than, the protection of the Fifth Amendment." *Earls*, 116 Wn.2d at 374-75 (citing *State v. Moore*, 79 Wn.2d 51 (1971)).

3. An equivocal request for counsel during a custodial interrogation is one that gives a reasonable officer pause, such that he is not certain whether or not the person has actually requested the assistance of an attorney in conjunction with his present detention; and does not require the officer to clarify whether the person actually wants an attorney.

Only unambiguous and unequivocal requests for the assistance of counsel trigger the *Miranda-Edwards* procedural protections which require law enforcement to cease questioning a suspect; an ambiguous or equivocal request does not. The rule of *Davis* frames this determination from the perspective of an objectively reasonable police officer, rather than a subjective examination of the suspect's beliefs. This approach supports the *Miranda* and *Edwards* bright line procedural protections without nullifying the societal interests in efficient investigative techniques and the benefits derived from statements made following a person's voluntary, knowing and intelligent waiver of his right to remain silent.

The question of whether a suspect has actually invoked his right to counsel is an objective inquiry so as to avoid difficulties of proof and provide guidance to interrogators. *Davis v. United States*, 512 U.S. 452, 458-59, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). A "suspect must unambiguously request counsel" and the suspect's request for counsel is a binary one, such that either it is an assertion of the right or it is not. *Id.* at 459, S. Ct. at 2355. Indeed, the person "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an

attorney." *Id.* If the officers conducting the questioning "reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity..." *Id.* at *460,* S.Ct. at 2355-56.

The Court in *Davis* added to the bright line rules of *Miranda* and *Edwards* by declaring that law enforcement officers are not required to cease questioning a suspect following an ambiguous or equivocal reference to an attorney. *Id.* at 459, S.Ct. at 2355. The Court was aware of the consequences of adopting such a bright line rule in that "requiring a clear assertion of the right to counsel might disadvantage some suspects who-because of fear, intimidation, lack of linguistic skills, or a variety of other reasons-will not clearly articulate their right to counsel although they actually want to have a lawyer present." *Davis. 460-1, 2356.* "But if [the Court] were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, [the] clarity and ease of application [from the current *Miranda* rules] would be lost." *Id.* at 461, 2356. In furtherance of this notion the Court "decline[d] to adopt a rule requiring officers to ask clarifying questions" when a person makes an ambiguous or equivocal request for counsel. *Id.* at 461-62.

An equivocal request is one which would give a reasonable police officer pause to consider whether the person had actually requested the assistance of an attorney in dealing with the custodial interrogation. A defendant's statement, "[m]aybe I should talk to a lawyer" was found to an ambiguous statement, *Id.* at 455-56, S.Ct. at 2353-54, which did not require the officers to ask clarifying questions or stop questioning him. *Id.* at 461-62, S.Ct. at 2356-57. The statement "I think I would like to talk to a lawyer" was ambiguous as was "should I be telling you, or should I talk to an attorney?" though the latter statement likely "did not even rise to the level of an *equivocal* request for an attorney." *Clark v. Murphy*, 331 F.3d 1062, 1072 (9th Cir. 2003) (emphasis in original). Likewise the statement "excuse me, if I am right, I can have a lawyer present through all this, right?" was found to be ambiguous and thus insufficient to trigger the *Miranda-Edwards* protections. *United States v. Younger*, 398 F.3d 1179, 1187-1188 (9th Cir. 2005).

If the statement by Mr. Herron in this case is found to have risen to the level of some sort of request for counsel, it is at best an ambiguous one that would not have required the officer to cease his questioning. Mr. Herron's statement, "if I'm going to get charged I probably need an attorney" (CP 49, 76) is no different from the post-*Davis* findings by a number of courts of the ambiguity of statements containing words like

"should I," "I think," "maybe," as these words indicate inherent uncertainty in the request that followed. Indeed, in this case, Mr. Herron's statement has a conditional aspect to it in that it starts with "[i]f" and then follows with an inherently uncertain "probably" before referencing the non-talismanic word "attorney." Mr. Herron's statement was an expression of a future conditional intent and when considered in an objectively reasonable manner, it is at best an ambiguous and equivocal request for counsel. Furthermore, this equivocal request does not indicate a present desire for assistance of counsel in dealing with his interrogation, but indicates a possible future intent for assistance of counsel if he were to be charged.

> 4. Even if the admission of the defendant's statement rises to a constitutional error, its admission was harmless as there is an overwhelming amount of untainted evidence such that any reasonable jury would have reached the same result in the absence of the introduction of defendant's statements at trial.

Constitutional errors may be insignificant and harmless if the court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Ng*, 110 Wn.2d 32, 37 (1988) (quoting *State v. Guloy*, 104 Wn.2d 412, 425 (1985). The test in Washington is the "overwhelming evidence test" as this test provides the "better analysis" and it allows an "appellate court to avoid

reversal on merely technical or academic grounds." *Guloy*, 104 Wn.2d at 426. Under this test, the "court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Id.*

In the case at bar, the trial court found that there was "overwhelming evidence in this case to support the jury's verdict" and that "it was overwhelmingly clear, as clear as any case I've heard, that beyond any reasonable doubt the offense was committed and committed consistently with the manner in which Ms. Beck testified at trial." (RP 736.)

The record supports the court's declaration given the amount and credibility of the evidence introduced at trial which included Ms. Beck's testimony regarding the rape, including the physical evidence of knife cuts on her cheek (which were not there before the rape), finger, neck and back; the knife found in the car; the presence of Mr. Herron's semen in Ms. Beck's vagina; the interview of the defendant up to the point of the mention of maybe needing an attorney, including his denial that anything happened of any significance between him and the victim (implying no sexual relations); and the consistent testimony of other people from whom Ms. Beck sought help following the attack including her father, the hospital staff, and the investigating officers.

The overwhelming evidence also included statements made by Mr. Herron to his neighbor on the night of the attack that "[t]his bitch won't fuck me doggie-style", and this neighbor's testimony that Ms. Beck fled to him for safety. From this neighbor's house, Ms. Beck contacted her father and told him that Mr. Herron had demanded sex for a ride to Pullman and that she didn't want to. Ms. Beck also testified that the demand of sex was "vile and disgusting" and that at no point did she ever consent to any sexual contact with Mr. Herron. Furthermore, though Ms. Beck had been drinking , the hospital nurse did not observe Ms. Beck having slurred speech, bloodshot, watery eyes, no staggering, no difficulty standing, nor did the investigating officer believe she was intoxicated.

Further, the evidence includes the facts of the defendant's being stopped by the Airway Heights police on his way home that night, with the knife – out of its sheath - in the center console of his car. He was stopped with nearly an empty tank of gas because he didn't wait for the gas money that the victim's father had agreed to pay the defendant. Why leave without that money when he wouldn't agree to give the ride without the promise of gas money? Because he had raped the victim on the way and now decided maybe he wouldn't wait five minutes for the gas money after all.

B. THE TRIAL COURT PROPERLY ALLOWED MR. HERRON TO WAIVE A PORTION OF HIS RIGHT TO A PUBLIC TRIAL BY ALLOWING HIM TO CONDUCT A PORTION OF JURY VOIR DIRE IN PRIVATE SO AS TO ENSURE THAT HIS RIGHT TO AN IMPARTIAL JURY WOULD NOT BE IMPACTED BY JUROR BIAS.

The right to a public trial is found in our state and federal constitutions.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. Amend. VI.

"In criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . . ." Const. art. I, § 22.

And as with the right to counsel, this constitutional issue is reviewed de novo. *State v. Jones*, 159 Wn.2d 231, 237 (2006).

As noted by this court in *State v. Castro*, 141 Wn.App. 485, 490 (2007), "[a] criminal defendant has a constitutional right to a 'public' trial, which includes the jury selection process, but that right is not absolute. (Citing to *PRP of Orange*, 152 Wn.2d 795, 804-05 (2004) and *State v. Bone-Club*, 128 Wn.2d 254, 259 (1995).) The *Castro* court noted that a defendant may waive his right with a knowing, intelligent, and voluntary waiver. *Id* at 490. Secondly, the *Castro* court noted that the court may

close proceedings (such as happened in the case at bar for the in-chambers questioning), even without the defendant's consent, "after considering the following criteria: a compelling interest, the opportunity for objections, the least restrictive means available to protect the threatened interest, weighing the threatened interest against the public trial right, and tailoring to insure the narrowest limitation of the threatened interest. *Id* at 491. The record must show the court reviewed the factors. *Id.*

The facts of *Castro* are remarkably similar to the case at bar:

> "Here, defense counsel clearly stated he discussed the public trial right with Mr. Castro, and Mr. Castro wished to waive his right for the limited purpose of questioning jurors in chambers regarding personal sexual matters. Mr. Castro stated he agreed with defense counsel's statement. Based on this record, Mr. Castro provided a valid limited waiver of his 'public' trial rights.
>
> Further, the court considered the Orange factors as to Mr. Castro's rights. The court held an in-chambers hearing and indicated a compelling interest for closing the proceedings to gain better disclosure from the jurors regarding personal sexual abuse and sexual offenses. The court allowed Mr. Castro the opportunity to object, whereby Mr. Castro waived his public trial rights. The court then used the least restrictive means to close the voir dire proceedings solely for that limited purpose. The court properly considered Mr. Castro's public trial rights. Mr. Castro should not be allowed to waive his rights and then appeal an adverse jury verdict, arguing the public was deprived of its right to participate in the hearing; the public has not appealed." *Id.* at 491.

In the case at bar, the trial judge repeatedly stated, at two different pretrial hearings, and again during jury selection, his reasoning. He indicated the compelling interest, which was the same as that in *Castro*, to gain better disclosure from the jurors regarding personal sexual abuse and

sexual offenses. The court repeatedly allowed the defendant the option to object, and told him specifically that the court wouldn't do this if the defendant did object. The court also gave him the option of conducting the sensitive questioning in a different courtroom; although the judge indicated that doing so would not protect the interest of un-biased jurors because they would still have to speak in front of members of the general public. The defendant waived, five different ways from Sunday, his right to have the questioning done in public, and asked the judge repeatedly to conduct the examination in chambers. As in *Castro*, the court used the least restrictive means necessary to accomplish its goal of full juror disclosure. As in *Castro*, the court did not use the words "*Orange* factors" or *Bone-Club* factors"; nonetheless, it put on the record all of the information to satisfy those factors.

There is some small irony that the procedure which ensured that the defendant's public trial would be had with an unbiased jury of his peers, and which the defendant himself sought, is now argued to be the basis to overturn his conviction. At any rate, as in *Castro*, this court should find that all of the 'factors' were met, and that defendant waived his right to a more public forum for the questioning about sexual abuse. This court should deny this ground for appeal.

C. ADDITIONAL GROUNDS FOR REVIEW

Defendant argues in his statement of additional grounds for review, that 1) the trial court erred when it ruled that the victim's juvenile convictions for theft and vehicle prowling, committed when she was 13, should not be admitted as evidence to impeach her testimony as the 22 year old victim of a violent rape; and 2) that the court erred by not instructing the jury on a proposed lesser included offense of Assault in the Fourth Degree.

The first issue is covered by ER 609 (d). Essentially, the court may allow use of such evidence if "the court is satisfied that admission in evidence in necessary for a fair determination of the issue of guilt or innocence." ER 609(d).

As described above in the section titled Procedural History, the trial court fully considered this issue. It determined that the conduct of a 13 year old girl in stealing beer from someone's porch and something of small value from a car, would not help the jury evaluate the credibility of that now-grown up woman of 22 who was testifying that she had been raped at knife point. There was no abuse of the trial court's discretion.

The second issue, whether the court should have instructed the jury as to a proposed lesser included offense of Assault in the Fourth Degree, was also decided correctly by the trial court. As the trial court noted, two

cases are directly on point: *State v. Walden*, 67 Wn.App. 891 (1992) and *State v. Aumick*, 126 Wn.2d 422 (1995). Both cases explicitly hold that Assault is not a lesser included offense of Rape. The reason is that for one crime to be a lesser included offense of another, each element of the lesser included offense must be a necessary element of the offense charged. *Id.* The mental state for Rape is only "knowingly"; while the mental state for Assault is the higher state of "intent." Under the principles of our common law, dating back to the Magna Carta, this court must deny the defendant's appeal on this issue.

IV. CONCLUSION

The defendant thought he could get away with raping "one of those street people," as he called the victim. He was wrong. He was caught, and was convicted by a fair and impartial jury. The procedure that was followed to pick that impartial jury was done at the defendant's request, with his full, knowing consent. The procedure was followed to protect the integrity of the process and to protect the defendant's rights. The defendant should not now be heard to complain about it.

The defendant's statement was used against him at that trial, but only after a knowing and intelligent waiver of his right to remain silent.

The defendant never made a request for an attorney, or, if he did it was at most an equivocal request, which is not enough to halt an interview under controlling United States Supreme Court precedent. Lastly, even if there was error in admitting the defendant's statement, such error was harmless beyond a reasonable doubt due to the overwhelming evidence of the defendant's guilt.

Assault is not a lesser included offense of rape, and so the trial court was correct in not instructing the jury as to assault.

The trial court did not abuse its discretion when it ruled that the victim's juvenile convictions for theft and vehicle prowling, committed when she was 13, should not be admitted as evidence to impeach her testimony as the 22 year old victim of a violent rape.

This court is respectfully requested to uphold the defendant's conviction and deny his appeal.

Respectfully submitted this 16 day of September, 2008.

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Attorney for the State