NO. 42999-3-II
Cowlitz Co. Cause NO. 10-1-00974-1

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM CHARLES WOMACK,

Appellant.

BRIEF OF RESPONDENT

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3. The trial court did not violate the defendant's right to counsel when it found he knowingly, voluntarily, and intelligently waived that right.

II. STATEMENT OF THE CASE

A. Procedural History.

On October 13, 2010, the State filed an information charging William Womack with Rape of a Child in the first degree, domestic violence (DV), Child Molestation in the first degree, DV, Child Molestation in the first degree, DV, and two counts of Rape of a Child in the second degree, DV. CP 1-3. On September 27, 2011, the State amended the information and added two counts of Rape of a Child in the second degree, DV, and a charge of Intimidating a Witness, Current or Prospective Witness, DV. CP 59-63.

At a readiness hearing held three days before trial on August 18, 2011, Womack's attorney filed a motion and moved for a continuance. Womack then stated "[A]t this time, I would like to fire my attorney and

represent myself." RP 24.[1] At that time the court began a colloquy on the dangers of self-representation. RP 24-47. The court questioned Womack during the colloquy regarding whether he had ever practiced law, whether he had issued or knew how to issue subpoenas, and if he understood the rules of evidence and voir dire. The court also informed him he would be held to the same standard as a licensed attorney and that his testimony would be awkward. RP 25-38.

The court inquired whether Womack recognized he was charged with a felony and if he understood the charge. RP 30. Womack indicated he understood the charges and that the maximum sentence was "four life sentences" and that the financial penalty was $20,000. RP 30. The State and court then had a discussion on the record regarding the sentencing range and again inquired if Womack understood the sentencing range. He answered, "yes." RP 31. The court asked Womack "...has anybody promised you anything or made any threats to you so you would represent yourself and not be represented by an attorney?" Womack answered "no." The court again asked if any promises had been made, and he again replied, "no." RP 37.

[1] The Report of Proceedings, hereinafter referred to as RP (page #s), consists of 2,198 consecutively number pages.

As the court continued the colloquy, Womack was asked if he still wanted to represent himself. He responded, "I'm perfectly willing to represent myself"; "I still want myself"; and "Yes, I would like to represent myself." RP 24, 37, 39, 41. Only after the Judge strongly urged Womack not to try to represent himself did Womack inquire if he could have a different attorney. RP 36-37. When the Judge later questioned Womack about his inquiry, Womack responded, "Yeah, I did say that. And the more and more I think about it the more it's just – I think I'm doing the right thing." RP 42. Womack also inquired if there are any court appointed attorney's from out of town. After the Judge explained that attorneys are appointed on a rotating basis, Womack responded, "It's random. I'd rather take my chances." When told the chance he was taking was life in prison, Womack replied, "Yes, actually multiple life sentences, I believe." RP 45.

After the Judge explained the difficulties of self-representation, he questioned Womack about why he wanted to represent himself. Womack responded "I just want my chance to go to trial. I would be more than happy to represent myself at this time"; "Because I feel that the attorney for the county here, and that the attorney's working directly with Ms. Hunter"; "I feel I can get the point across to a jury better than my attorney can..."; "I feel I would be able to get to the jury a lot better myself than

my attorney"; "I – it's the fact that I really feel I could represent myself better than any other attorney at this point"; and "I – I guess my best answer was the only person I really trust at this point is myself." RP 27, 35, 38, 40, 42, 45.

After the court found that Womack had knowingly and voluntarily waived his right to counsel, he made a motion for discovery. RP 46-47. He stated, "[f]irst of all, I should be able to get a full discovery as much as the trial's supposed to be set on the 22nd." RP 47. "That doesn't give me very much time, so I haven't seen the most current discovery for months." *Id.* The State responded that they needed until Monday [August 22, 2011] to prepare the discovery because of potential redaction of addresses and social security numbers to protect the rights of the witnesses. RP 47. The State then moved to continue the trial date because Defense Counsel had indicated that they were not prepared to proceed to trial, one of the State's witnesses, Detective Volker, was unavailable the latter half of the week of trial. The State also had concerns about Womack's ability to prepare for trial and the State's ability to provide discovery. RP 48. The court then indicated the State's discovery was due on Monday, August 22, 2011. RP 50. On August 22, 2011, the State provided over 400 pages of discovery to Womack. RP 1403. In addressing the State's motion to continue, the court reasoned as follows:

> Judge Evans: "Mr. Womack has indicated that he wants to spend some time in the computer lab or the law library to work in preparation for the trial. He's indicated that he's not quite, from my understanding of what you are saying, you are not quite ready to go to trial based on your desire to do some more research.
>
> ... where the last communication between the parties was there was – everybody was looking to probably delay the trial so that computer expert could get on, and there was representations made based on those representations that people could be released and go onto other things, and I think the most weighty concern, at least on my mind, is time for you, Mr. Womack, to prepare... I think any attorney would be hard pressed to be ready in three days, let alone somebody who is not trained in the law. So I am going to find that there is good cause to continue the August 22nd trial date on those factors." RP 50-51.

The State also indicated that they would be seeking a protective order because some of the discovery contained potential images of children depicted in sexually explicit conduct. RP 52. The Judge then set next hearing to August 25, 2011 to discuss discovery and to set a trial date. RP 53. Womack inquired "... I'm not sure how this works exactly, but how I file for a motion of dismissal due to the fact that my speedy trial rights have been violated." Having found good cause for all of the prior

motions to continue, the court denied Womack's Motion to Dismiss. RP 57.

The 3.5 hearing was held on November 14, 2011. RP 162-238. Immediately following the proceeding, the court gave lengthy oral findings of fact and conclusions of law on the record. RP 226-237. The court found that Womack was in custody during the various contacts between law enforcement and Womack on January 12, 2011, January 13, 2011, January, 20, 2011, May 5, 2011, August 5, 2011. The court found that Detective Voelker read Womack the Miranda rights and that Womack neither expressed any confusion nor asked clarifying questions on January 12, 2011. Detective Voelker did not have to re-read any of the rights, and he asked Womack if he understood the rights. When asked if he would be willing to waive those rights and talk, Womack answered, "yes." RP 226. The court found that the statements made after that point were admissible. RP 227. The court also found that later in the conversation between Detective Voelker and Womack, Womack mentioned that he had an attorney for a child custody matter. At no point did he ask to speak with that attorney. RP 227. Later Womack says, "talk to my attorney, I'm done." The court took that statement to mean "Go away, I'm done." RP 229. At that point the questioning ended.

The next day, January 13, 2011, Detective Voelker returned with Deputy Lorenzo Gladson and again read the Miranda rights in full. Womack waived his rights. RP 228. Later in the interview Womack said, "[y]ou guys need to talk to my lawyer." After making that statement, Womack continued to speak, unsolicited. Only later, after Womack had spoken about sex offenders, about how the county "has done certain things", and about his relationship with Tammy Womack did Detective Voelker resume questioning and raise the issue of a polygraph. RP 231. Detective Voelker also asked what lawyer he wanted him to speak to, and Womack answered, "I don't know. Depends if my wife's trying to screw me over." RP 231. The court found that Womack's statements were admissible at trial. RP 226-237.

On August 25, 2011, the parties set a new trial date of October 10, 2011. The court asked Womack, "[d]o you have a position on that?" Womack replied, "I'm – I think that's all right." RP 1376. Womack neither objected to the trial setting date nor moved within 10 days from August 25, 2011 to set a different trial date. RP 1372-1405.

Womack was tried before a jury from November 14, 2011 through November 23, 2011. Womack was convicted of all counts. CP 310-325. Womack has appealed his convictions. CP 332-348.

B. Factual History

The State does not contest the "factual history" as presented by the defendant; however, it makes the following additions.

A.W. testified that she disclosed the abuse to Tammy Womack. RP 478. After A.W. told Tammy Womack of the sexual abuse, Tammy Womack confronted the defendant. RP 657-658, 660. After confronting him with the abuse, Womack replied, "It will stop. It won't happen again." He also stated that he had had a vasectomy so she [A.W.] could not get pregnant and would not have to worry about disease. RP 660. A.W. also testified consistently with Tammy Womack about what is arguably Womack's most egregious act. A.W. testified to being abused one night by both the defendant and Tammy Womack when she was twelve or thirteen years old. 484-488, 667-673. Tammy Womack also testified about the same night, in which, in addition to ordering that A.W. and Tammy perform oral sex on him and each other, Womack penetrated them both himself and with a flesh colored double-ended dildo. 668-670. Both A.W. and Tammy Womack testified that the defendant shaved the hair around his penis and was circumcised. RP 471, 662.

Later, when Womack was in custody, he wrote Tammy Womack a letter in which he told her to change her story if she wanted it to stay out

of the news media. RP 687, Supp. CP. Ex. #59. Further, he said "I have something in a vacuum sealed bag that is very incriminating in my possession that I would much rather would stay in my possession until this is over then it can be given back to you." Supp. CP. Ex. #59. Tammy Womack assumed he was referring to the dildo because it had been taken out of her possessions when she had moved. RP 672-673. When she had confronted Womack about it missing, he had smirked and said "I might need it someday." RP 673.

III. ARGUMENT

A. Womack's trial occurred within the time allowed by CrR 3.3.

Because Womack was brought to trial in accordance with the rules set forth by CrR 3.3, the time for trial rule was not violated.[2] CrR 3.3(a)(1) states: "It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime." Thus, the trial court is vested with the responsibility to ensure a trial occurs according to the totality of the rules set forth by CrR 3.3. For individuals who are detained in jail, CrR 3.3(b)(1) states: "A defendant who is detained in jail shall be brought to trial within the longer of (i) 60 days

[2] There is also a right to a speedy trial guaranteed under the Sixth Amendment of the United States Constitution and under Article I of the Washington State Constitution. However, Womack has not argued that his constitutional speedy trial rights were violated.

after the commencement date specified in this rule, or (ii) the time specified under CrR 3.3(b)(5)."

According to CrR 3.3(b)(5), if any period is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period. CrR 3.3(e) provides a list of periods that are excluded in the calculation of time for trial. This list includes both continuances granted pursuant to section (f) and unavoidable or unforeseen circumstances beyond the control of the court or the parties. CrR 3.3(e)(3) & CrR 3.3(e)(8). CrR 3.3(f)(2) states:

> On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such a motion by or on behalf of any party waives that party's objection to the requested delay.

Thus, when a party makes a motion to continue a trial beyond the 60-day time limit of CrR 3.3 (b)(1) when a defendant is detained in jail, the court may continue the trial beyond 60 days provided that the continuance is required by the administration of justice, the defendant will not be prejudiced in his or her defense, and the motion is made before the time

for trial has expired. CrR 3.3(f)(2). The court must also state the reasons for the continuance. CrR 3.3(f)(2). If these criteria are met, then the speedy trial rule is not violated when a court continues a case beyond 60 days. *See* CrR 3.3(b)(2)(ii).

Here, Womack's argument that his speedy trial rights were violated by the August 18, 2011[3] continuance fails for two reasons. First, because Womack did not comply with CrR 3.3(d)(3) procedures for objecting to the setting of a new trial date, he forfeited his right to object; his failure to properly object to this issue in the lower court waives this issue for appeal. RAP 2.5, CrR 3.3(d)(3). Second, the trial court did not abuse it discretion when it continued the trial pursuant to CrR 3.3(f)(2).

1. Because Womack did not move the court to set the trial within the time limits required under CrR 3.3(d)(3), he waived his right to object to the setting of the trial dates.

Because Womack did not comply with the express provisions of CrR 3.3(d)(3) in objecting to the trial setting, he lost the right to object. Because his objection was not preserved in the lower court, he has waived this issue on appeal. RAP 2.5. CrR 3.3(d) provides the method required for a party to object to a trial setting. It states:

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[3] While there were a number of Motions to Continue in this case, Womack only challenges the State's continuance on August 18, 2011.

> *Objection to Trial Setting.* A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move the court set a trial date within those time limits. Such motion shall be promptly noted for a hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

CrR 3.3(d)(3).

Timely objections are required so that, if possible, the trial court will have an opportunity to fix an error and still satisfy the speedy trial requirements. *State v. Greenwood*, 120 Wn.2d 585, 606, 845 P.2d 971 (1993). A defendant waives his right to have a case dismissed for violating the speedy trial court rules when he or she fails to bring a motion to dismiss before trial. *See State v. Thomas*, 1 Wn.2d 298, 300, 95 P.2d 1036 (1939). "And any party who fails, for any reason, to move for a trial date within the time limits of CrR 3.3 loses the right to object." *State v. Bobenhouse*, 143 Wn. App. 315, 322, 177 P.3d 209 (2008) (*citing* CrR 3.3(d)(3); *State v. Carney*, 129 Wn. App. 742, 748, 119 P.3d 922 (2005). Thus, just as compliance with the rule is required with regard to the time limits as set forth in CrR 3.3(b)(1), compliance with the proper method for objecting to a trial date as set forth in CrR 3.3(d)(3) must also be followed.

One instructive case regarding the requirement of making a proper objection is *City of Kennewick v. Vandergriff*, 109 Wn.2d 99, 743 P.2d 811 (1987). Patricia Vandergriff was arraigned for reckless driving and driving while intoxicated on January 31, 1985. *Id.* at 100. Initially, her trial was scheduled for April 1. *Id.* On March 22, Vandergriff waived her right to a jury trial. *Id.* On March 25, the court rescheduled her trial for May 14, which was more than 90 days after her arraignment had occurred. *Id.* Three days later, on March 28, Vandergriff's attorney objected to the new date by sending a letter to the court clerk stating that pursuant to JCrR 3.08(f)(1)[4] the attorney believed 90 days would run out on May 6. *Id.* However, her attorney did not send a copy of the letter to the prosecutor's office or note the motion onto the Judge's docket. *Id.* On May 14, when the case was called for trial, Vandergriff's attorney moved to dismiss and the district court granted the motion dismissing the case for violating the speedy trial rule. *Id.*

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[4] JCrR was rescinded in 1987 and was replaced by CrRLJ. Former JCrR 3.08 contained the following language that is substantially similar to that of the current CrR 3.3(d)(3):

> [a] party who objects to the date set on the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice [of the new trial date] is mailed or otherwise given, move that the court set a trial date within those time limits.

Like CrR 3.3(d)(3), failure to make such a motion was a waiver of the provisions of this speedy trial rule. Former JCrR 3.08(f)(2). *See Vandergriff*, 109 Wn.2d at 101.

The Washington Supreme Court found that the letter was sufficiently explicit to constitute a motion. *Id.* at 102. However, because Vandergriff's attorney failed to serve a copy of this letter to the city attorney, the motion was invalid. *Id.* Because Vandergriff did not bring a proper motion, she waived her right to object under the speedy trial rule and the case was remanded for a trial on the merits. *Id.* at 103. It should be noted that while both JCrR 3.08(f)(1) and CrR 3.3(d)(3) share the requirement that a party move the court within 10 days for a trial date within the time limits of the speedy trial rule, CrR 3.3(d)(3) contains the additional requirement that the moving party promptly note the matter for a hearing. CrR 3.3(d)(3).

Here, as in *Vandergriff*, Womack failed to comply with the court rule for objecting to a trial setting outside of the time limits of CrR 3.3. After trial date was reset, Womack neither filed a motion to set the trial within the time limits of CrR 3.3, nor did he note the matter for a hearing. By failing to comply with CrR 3.3(d)(3), Womack lost his right to object to the trial date.[5] The record does not reveal the reason Womack failed to follow the requirements of CrR 3.3(d)(3), but no matter the reason, the rule is straightforward: "A party who fails, for any reason, to make such a

[5] "A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule." CrR 3.3(d)(3).

motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule." CrR 3.3(d)(3). In fact, on August 25, 2011, the parties set a new trial date of October 10, 2011. The court asked Womack, "[d]o you have a position on that?" Womack replied, "I'm – I think that's all right." RP 1376. Womack neither objected to the trial setting date nor moved within 10 days from August 25, 2011 to set a different trial date. RP 1372-1405. Because an objection was not properly made in the lower court, Womack has waived this issue for appeal. *See State v. Thomas*, 1 Wn.2d 298, 300, 95 P.2d 1036 (1939); *State v. Greenwood*, 120 Wn.2d 585, 606, 845 P.2d 971 (1993).

2. The trial court did not abuse its discretion when it continued the trial date.

The trial court did not abuse its discretion when it continued the trial date after Womack chose to represent himself three days before trial.

"[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (*citing State v. Miles*, 77 Wn.2d 593, 597-98, 464 P.2d 723 (1970)). A trial court's grant or denial of a motion for a continuance will not be disturbed unless there is a showing of manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691

P.2d 929 (1984) (*citing Miles*, 77 Wn.2d at 597-98). "A court reviewing an exercise of discretion can find abuse only if no reasonable person would have taken the view adopted by the trial court." *State v. Henderson*, 26 Wn. App. 187, 611 P.2d 1365 (1980) (*citing State v. Blight*, 89 Wn.2d 38, 40-41, 569 P.2d 1129 (1977)). A trial court's decision on a continuance must be judged in consideration of the totality of the circumstances in each case, particularly the reasons presented to the trial judge at that time the request is made. *See State v. Kelly*, 32 Wn. App. 112, 114-15, 645 P.2d 1146 (1982).

Here, August 18, 2011, one working day before trial, Womack's attorney moved to continue the trial date. RP 24. Womack then moved to fire his attorney. After making that motion, Womack made a motion for discovery and objected to the continuance. RP 47, 49. He also acknowledged he did not have much time to prepare, and that he had not seen the most recent discovery for months. RP 47. In response to the motion for discovery, the State moved to continue the trial date. The State explained to the court that because the discovery was over 400 pages in length they needed until Monday, August 22 to redact portions and consider protection orders. The State also raised the concern that without the discovery, Womack would be unable to prepare for trial Monday. RP 48. The court ordered that the discovery was due on August 22 and found

that that there was good cause for the continuance. The court granted the continuance for a number of reasons. First, before Womack's attorney was fired he had moved to continue the trial date because he needed additional time to hire a computer expert. Because he had done so, some of the trial witnesses had made other plans. Second, Womack had requested time in the law library at the jail to prepare for trial. Third, Womack had made a motion for discovery but would not have it until the day of trial. Finally, it granted the continuance because Womack was not "quite ready to go to trial...". RP 50-51.

By choosing to represent himself, Womack had a right to the State's discovery. "In order to ensure a meaningful pro se defense, the State must allow the defendant reasonable access to legal materials, paper, writing materials, and the like." *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987), *see generally Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977) (regarding jailed persons' rights of access to the courts generally). *See also State v. Hartwig*, 36 Wn.2d 598, 219 P.2d 564 (1950) (where court appointed counsel for defendant on date set for trial, counsel was entitled to continuance for reasonable time to make a complete investigation of both facts and law in order to advise his client and to prepare adequately and efficiently to present any defenses client might have to charges against him).

The court did not abuse its discretion in finding good cause and granting the continuance in order the allow the "defendant reasonable access to legal materials, paper, writing materials..." *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987). Although Womack objected to the continuance, he had explained to the court he would not be prepared without the discovery. Womack cannot justifiably request discovery and time to prepare for trial, while at the same time object to a continuance of the trial date. Furthermore, Womack did not argue that he was prejudiced by the continuance. RP 49-50. The comment following RPC 3.8 states:

> A prosecutor has the responsibly of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligation to see that the defendant is accorded procedural justice and that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."

Given the voluminous discovery, and the deadline imposed by the court, it was the State's duty to request the continuance as an officer of the court to help protect the rights of the defendant. The court properly found that there was good cause for the continuance.

B. The trial court did not abuse its discretion when it found Womack's Statements to be admissible.

1. The trial court's oral findings of fact and conclusions of law are sufficient for appellate review.

"Under CrR 3.5(c), the trial court is required to enter written findings of facts and conclusions of law. A trial court's failure to comply with this requirement constitutes error, but the error is harmless if the court's oral findings are sufficient to allow appellate review." *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998), *citations omitted*. "We review the trial court's decision after a CrR 3.5 hearing by determining whether substantial evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law." *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008) citing *State v. Broadaway*, 133 Wn. 2d 118, 130–31, 942 P.2d 363 (1997). "'Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.' " *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002). "If substantial evidence in the record supports the trial court's findings of fact, the findings will be considered verities on appeal." *Miller*, 92 Wn. App. at 704, *citing State v. Broadaway*, 133 Wn. 2d 118, 131, 942 P.2d 363 (1997). The trial court assesses the credibility of witnesses. *State v. Hill*, 123 Wn. 2d 641, 646, 870 P.2d 313

(1994). Further, "the court must determine de novo whether the trial court 'derived proper conclusions of law' from its findings of fact." *Id.* (*quoting State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)).

Here, while the court did not enter written findings of fact and conclusions of law, the error is harmless as the court's oral findings are sufficient for appellate review. Womack argues that the absence of findings of fact and conclusions of law prevents adequate review given the testimony at the 3.5 hearing that Womack said "Talk to my attorney – I'm done" and "You guys need to talk to my lawyer at this point." Other than saying the court erred, Womack fails to explain how the record lacks substantial evidence for the court to find those statements to be equivocal.

The court's findings of fact and conclusions of law are sufficient for appellate review. The 3.5 hearing was held on November 14, 2011. RP 162-238. Immediately following the proceeding, the court gave lengthy oral finding of fact and conclusions of law on the record. RP 226-237. The court found that during the various contacts on January 12, 2011; January 13, 2011; January, 20, 2011; May 5, 2011; August 5, 2011, Womack was in custody. On January 12, 2011, the court found that Detective Voelker read Womack the Miranda rights and that Womack neither expressed any confusion nor asked clarifying questions. Detective Voelker did not have to re-read any of the rights, and he asked Womack if

he understood the rights. When asked if he would be willing to waive those rights and talk, Womack answered, "yes." RP 226. The court found that the statements made after that point were admissible. RP 227. The court also found that later in the conversation between Detective Voelker and Womack, Womack mentioned that he had an attorney for a child custody matter. At no point did he ask to speak with that attorney. RP 227. Later Womack says, "talk to my attorney, I'm done." The court took that statement to mean "Go away, I'm done." RP 229. At that point the questioning ended.

The court found that the next day, January 13, 2011, Detective Voelker returned with Deputy Lorenzo Gladson. The court found that again, the Miranda rights were read in full, and again, Womack was willing to speak with them. RP 228. The court found that even if the original statement, "talk to my attorney, I'm done," was an invocation, that by re-reading Miranda and asking clarifying questions, Womack again waived.

The next day, after Miranda, Womack again agreed to speak with officers. Later in the questioning Womack said, "[y]ou guys need to talk to my lawyer." After making that statement, Womack continued to speak, unsolicited, "so, obviously, he's not invoking his right to silence at that point in time." RP 229-230. Only later, after Womack had spoken about

how the county "has done certain things", sex offenders, and his relationship with Tammy Womack does Detective Voelker resume questioning and the raise the issue of a polygraph. RP 231. Detective Voelker also asks what lawyer Womack wants him to speak to; Womack answers. "I don't know. Depends if my wife's trying to screw me over." RP 231. The court found that his request was equivocal. RP 232. Given the court's detained and lengthy ruling from the 3.5 hearing, the record is sufficient for appellate review.

2. Womack did not unequivocally assert his right to counsel.

Because the admissibility of a defendant's statements is a question of due process under the Fourteenth Amendment, claims involving Miranda are reviewed de novo. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007); *State v. McReynolds*, 104 Wn. App. 560, 575, 17 P.3d 608 (Div 3, 2001).

Womack has failed to list which statements were improperly admitted and simply alleges the violation occurred after he said stated "Talk to my attorney, I'm done" and "You guys need to talk to my lawyer at this point." Brief of Appellant at 29. Considering the brief broadly, Womack points to ten statements in his fact section that were admitted at

trial. Brief of Appellant at 18. Looking at the only ten statements he cites to, only three occurred after his equivocal reference to an attorney: that his family was dead to him, that he did not think he could forgive A.W., and that he knew facts there were going to make people in law enforcement look bad. The statements were not in response to questioning. RP 822-824.

Should the court consider these allegations, the following argument illustrates that those statements were admitted after Womack had knowingly, intelligently, and voluntarily waived his Miranda rights and after he had re-engaged the officer's in conversation.

The United State's Supreme Court held that "once a suspect has "clearly" asserted his right to counsel, the police may not subject him to further questioning until he has had an opportunity to confer with counsel, unless the suspect himself initiates further communication." *State v. Radcliff*, 139 Wn. App. 214, 221, 159 P.3d 486 (2007) *citing Edwards v. Arizona*, 451 U.S. 477, 484-485, 101 S.Ct 1880 (1981).

If a defendant has clearly invoked the right to silence and not initiated conversation, then officers can only reinitiate questioning if at the time of invocation the questioning ceased, a substantial interval passed before the second interrogation, the defendant is given his Miranda

warnings again and the subject of the second interrogation is unrelated to the first. *United States v. Rambo*, 365 F.3d 906, 911 (10th Cir, 2004).

In *Davis v. United States*, the court held that an after a waiver of the *Miranda* rights, "an officer may continue questioning unless and until a suspect unequivocally requests an attorney." *State v. Radcliff*, 139 Wn. App. 214, 222, 159 P.3d 486, *citing Davis v. United States*, 512 U.S. 452, 461,114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). *Davis* did not hold that if a request is equivocal, questioning must cease. 512 U.S. at 459 – 60. An equivocal request includes when a suspect evinces both a desire for counsel and a desire to continue talking. *State v. Lewis*, 32 Wn. App. 13, 20, 645 P.2d 7222 (1982).

The statement's made after the equivocal references to an attorney are admissible. Police Officers are not obligated to cease questioning after an equivocal reference to an attorney. In *State v. Radcliff*, the police placed Radcliff under arrest and advised him of his Miranda rights. Radcliff agreed to talk to the officers; however at one point he said "he did not know how much trouble he was in and if he needed a lawyer." 139 Wn. App. 214, 217-218, 159 P.3d 486 (2007). The officer responded that he could not give legal advice and offered to read him his rights again. He also told Radcliff "the ball was in his court." *Id.* 218. Radcliff then gave an oral statement in which he confessed. *Citing Davis v. U.S.*, the court

found that the reference to an attorney was equivocal, and that the officer was neither obligated to stop the questioning nor to clarify Radcliff's statement. *Id.* at 224, citing Davis, 512 U.S. at 461, 114 S.Ct. 2350.

Here, like in Radcliff, Womack made an equivocal statement when he stated "You guys need to talk to my lawyer at this point." RP 178. At the time of the statement, Detective Voelker had read the Miranda rights to Womack and he had agreed to speak. Detective Voelker and Deputy Gladson then explained the extradition process and asked him if he had heard the charges. RP 178. After Womack mentioned that he wanted them to speak to his lawyer, they stopped questioning him. Womack then re-initiated the conversation and began to talk about the county and sex offenders. RP 178. They did not ask Womack any questions as he was speaking. Eventually, they asked him about a polygraph test. Even if the court finds that his statement was unequivocal, Womack clearly reinitiated the conversation.

In *Oregon v. Bradshaw*, 462 U.S. 1039, 1040-41, 103 S.Ct 2830 (1983), the police investigated Bradshaw for first degree manslaughter, driving under the influence and driving with a suspended license. Bradshaw was questioned at the police station and read his Miranda warnings. *Id.* at 1041. He was placed under arrest, questioned some more, and then invoked his right to counsel. *Id.* Sometime later when the

police transported him to jail, Bradshaw asked "[w]ell what is going to happen to me now?" *Id.* at 1042. The officer told Bradshaw he didn't have to talk to him and reminded him he requested an attorney. Bradshaw then continued to speak to the officer. *Id.*

The Court found Bradshaw's question was a clear initiation "evincing a willingness and desire for a generalized discussion about the investigation." *Id.* at 1045-46. The Court then looked to see if the wavier was knowing and intelligent under a totality of the circumstances test. *Id.* The Court was emphatic saying the "determination depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *Id.* The Court found in Bradshaw's case the police did not make any threats, promises, or inducements to talk, he was properly advised of his rights and understood them and within a short time after requesting an attorney, changed his mind. *Id.*

Here, unlike *Bradshaw*, Womack did not invoke his right to counsel. However, even if he had, Womack continued unsolicited statements about the case showed a "willingness and desire for a generalized discussion about the investigation." *Id.* at 1045-46. Because Womack never requested an attorney, his statements were property admitted at trial.

3. Should the court find a constitutional violation, it was harmless error due to the overwhelming evidence of guilt.

Constitutional violations are subject to the harmless error analysis. If a constitutional violation is found, the court then considers if there is overwhelming untainted evidence of the defendant's guilt beyond a reasonable doubt. *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009); *State v. Boggs*, 16 Wn. App. 682, 689, 559 P.2d 11 (Div 2, 1977).

Even based on the factual recitation included in Womack's Brief, there is proof beyond a reasonable doubt that the defendant was guilty given the testimony of victim A.W. Beyond the compelling testimony of A.W., the court heard corroborative testimony from Tammy Womack, a participant in, and an eyewitness to, some of the sexual abuse. Tammy testified that A.W. had disclosed the abuse to her. A.W. also testified she disclosed the abuse to Tammy Womack. RP 478. After A.W. told Tammy Womack of the sexual abuse, Tammy Womack confronted Womack. RP 657-658, 660. After confronting him with the abuse, Womack replied, "It will stop. It won't happen again." He also stated that he had had a vasectomy so she [A.W.] could not get pregnant and would not have to worry about disease. RP 660.

A.W. also testified regarding what is arguably Womack's most egregious act. She testified to being abused one night by both the

defendant and Tammy Womack when she was twelve or thirteen years old. 484-488, 667-673. Tammy Womack also testified about the same night, in which, in addition to ordering that A.W. and Tammy perform oral sex on him and each other, Womack penetrated them both himself, and with a flesh colored double-ended dildo. 668-670. Both A.W. and Tammy Womack also testified that the defendant shaved the hair around his penis and was circumcised. RP 471, 662.

Later, when Womack was in custody he wrote Tammy Womack a letter in which he told her to change her story if she wanted it to stay out of the news media. RP 687, Supp. CP. Ex. #59. Further he said "I have something in a vacuum sealed bag that is very incriminating in my possession that I would much rather would stay in my possession until this is over then it can be given back to you." Supp. CP. Ex. #59. Tammy Womack assumed he was referring to the dildo because it had been taken out of her possessions when she had moved. RP 672-673. When she had confronted him about it missing, he had smirked and said "I might need it someday." RP 673.

Even assuming Womack's statements were not admissible, there was overwhelming and corroborated evidence of his guilt beyond a reasonable doubt.

C. The trial court did not abuse its discretion when it found that Womack made a knowing, intelligent, and voluntary waiver of the right to counsel.

Womack made a knowing, intelligent and voluntary waiver of his right to counsel. "A waiver of counsel must be knowing, voluntary, and intelligent, as with any waiver of constitutional rights." *City of Bellevue v. Acrey*, 103 Wn.2d 203, 209, 691 P.2d 957 (1984) *citing Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). If counsel is properly waived, a criminal defendant has a right to self-representation. Const. art. 1, § 22 (amend. 10); U.S. Const. amend. 6; *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In *Faretta,* the Court articulated the test for valid waiver of counsel:

> "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Faretta, at 835, 95 S.Ct. at 2541 *citing Adams v. United States ex rel. McCann,* 317 U.S. 269, 279, 63 S.Ct. 236, 241, 87 L.Ed. 268 (1942).

In *City of Bellevue v. Acrey*, the Washington Supreme Court recommended a colloquy by the court as an efficient way establish the

waiver. 103 Wn.2d 203, 209, 691 P.2d 957 (1984). "That colloquy, at a minimum, should consist of informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction and that technical rules exist which will bind defendant in the presentation of his case." *Id.* at 211. "The record should also show that the defendant was aware of the existence of technical rules and that presenting a defense is not just a matter of telling one's story." *Id.*, *citing Maynard v. Meachum,* 545 F.2d 273 (1st Cir.1976). "While courts must carefully consider the waiver of the right to counsel, an improper rejection of the right to self-representation requires reversal." *State v. Lawrence,* 166 Wn. App. 378, 390, 271 P.3d 280 (2012), *citing State v. Madsen,* 168 Wn.2d 496, 503, 229 P.3d 714 (2010). Courts should engage in a presumption against a waiver of counsel. *Madsen,* 168 Wn.2d at 504. However,

> [t]his presumption does not give a court carte blanche to deny a motion to proceed pro se. The grounds that allow a court to deny a defendant the right to self-representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. Such a finding must be based on some identifiable fact... Were it otherwise, the presumption could make the right itself illusory.

Id. at 504–505.

Here, Womack's decision to represent himself was unequivocal. At the August 18, 2011 readiness hearing Womack stated "At this time, I would like to fire my attorney and represent myself"; "I'm perfectly willing to represent myself"; "I still want myself"; and "Yes, I would like to represent myself." RP 24, 37, 39, 41. Only after the Judge strongly urged Womack not to represent himself did Womack inquire if he could have a different attorney. RP 36-37. When the Judge later questioned Womack about his inquiry, Womack responded, "Yeah, I did say that. And the more and more I think about it the more it's just – I think I'm doing the right thing." RP 42. Womack also inquired if there were any court appointed attorney's from out of town. After the Judge explained that attorneys are appointed on a rotating basis, Womack responded, "It's random. I'd rather take my chances." When told the chance he was taking was life in prison, Womack replied, "Yes, actually multiple life sentences, I believe." RP 45.

Womack's decision was knowing, intelligent, and voluntary. The record reflects that Womack was made aware of the technical rules in representing himself. He was questioned during the colloquy whether he had ever practiced law, whether he had issued or knew how to issue subpoenas, if he understood the rules of evidence and voir dire. He was

also told that he would be held to the same standard as a licensed attorney and that his testimony would be awkward. RP 25-38.

After the Judge explained the difficulties of self-representation, he questioned Womack about why he wanted to represent himself. Womack responded "I just want my chance to go to trial. I would be more than happy to represent myself at this time"; "Because I feel that the attorney for the county here, and that the attorney's working directly with Ms. Hunter"; "I feel I can get the point across to a jury better than my attorney can..."; "I feel I would be able to get to the jury a lot better myself than my attorney"; "I – it's the fact that I really feel I could represent myself better than any other attorney at this point"; and "I – I guess my best answer was the only person I really trust at this point is myself." RP 27, 35, 38, 40, 42, 45.

Womack was aware of the nature and classification of the charges. During the colloquy on August 18, 2011, the court inquired whether Womack recognized he was charged with a felony and if he understood the charges. RP 30. Womack indicated he understood the charges and that the maximum sentence was "four life sentences" and that the financial penalty was $20,000. RP 30. After the State and court had a discussion on the record regarding the sentencing range, the court again inquired if Womack understood the sentencing range. He answered, "yes." RP 31.

Womack's decision to represent himself was voluntary. The court asked Womack "...has anybody promised you anything or made any threats to you so you would represent yourself and not be represented by an attorney?" Womack answered "no." The court again asked if any promises had been made, and he again replied, "no." RP 37.

Because Womack made a knowing, intelligent, voluntary, and unequivocal waiver of his right to counsel, the trial court did not abuse its discretion.

IV. CONCLUSION

For the above stated reasons, the convictions should be affirmed.

Respectfully submitted this 30 day of July.

SUSAN I. BAUR
Prosecuting Attorney

By:

JODY NEWBY/WSBA # 41460
Deputy Prosecuting Attorney
Representing Respondent

APPENDIX A

CrR 3.3 Time for Trial

(a) General Provisions.

(1) Responsibility of Court. It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(b) Time for Trial.

... (1) Defendant Detained in Jail. A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

(d) Trial Settings and Notice---Objections---Loss of Right to Object.

(3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) Competency Proceedings. All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) Proceedings on Unrelated Charges. Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) Continuances. Delay granted by the court pursuant to section (f).

(4) Period between Dismissal and Refiling. The time between the dismissal of a charge and the refiling of the same or related charge.

(5) Disposition of Related Charge. The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) Defendant Subject to foreign or Federal Custody or Conditions. The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) Juvenile Proceedings. All proceedings in juvenile court.

(8) Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the

control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) Disqualification of Judge. A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

[Amended effective May 21, 1976; November 17, 1978; August 1, 1980; September 1, 1986; November 29, 1991; November 7, 1995; September 1, 2000; September 1, 2001; September 1, 2003.]

CrR 3.5 Confession Procedure

(c) Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

RAP 2.5 Circumstances Which May Affect Scope of Review

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial

court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. John Hays
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Longview, WA 98632
jahayslaw@comcast.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July 31st, 2013.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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