 350424-II
No. 34042-4-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION TWO**

STATE OF WASHINGTON,

Respondent,
v.

ROBERT COVARRUBIAS,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
#05-1-00079-1

BRIEF OF RESPONDENT

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ORIGINAL

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INTRODUCTION

Substantial evidence proved that defendant Robert Covarrubias raped and then killed 15-year old Melissa Carter. He was the last person seen with her, his DNA matched the semen found in her throat, he denied to investigators that he had sex with her, and he offered an implausible story to the jury about his whereabouts and the cause of his injuries after the murder. The jury had ample reason to disbelieve Covarrubias and credit the compelling circumstantial evidence of his guilt.

Defendant now challenges his conviction on a number of grounds, arguing primarily that his counsel at trial were deficient and had multiple conflicts of interest. But his brief does not describe the trial court's extraordinary measures to protect defendant's right to a fair trial. Covarrubias waived any potential conflicts with trial counsel *after speaking with an independent attorney appointed by the court*. Following a colloquy with defendant on the record, the trial court found,

Mr. Covarrubias' decision to continue to have...Mr. Anderson represent him to be knowingly, intelligently and voluntarily made with full knowledge of the advantages and risks, including but not limited to the likelihood that he will have been deemed to have waived any appeal argument that his attorneys had any conflict of interest based upon the facts as

disclosed in this [acknowledgment of alleged conflicts of interests].

(3/22/06 VRP 31; Acknowledgment of Alleged Conflicts; Supp CP 154; Attached as Appendix A)

Because a Clallam County jury found defendant Covarrubias guilty after a fair trial, the State of Washington respectfully requests this Court to affirm his conviction for one count of first degree murder.

I. RESTATEMENT OF ISSUES PRESENTED.

Defendant's appeal raises seven issues:

A. "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Witnesses identified defendant Covarrubias as the man who followed Melissa Carter from a party, argued with her at a waterfront trail near where her body was found, and matched the DNA of the semen found in her throat. Viewing all facts and inferences strongly in favor of the State, does sufficient evidence support the jury's verdict?

B. An attorney with a potential conflict of interest "may continue to represent the defendant if the defendant makes a

voluntary, knowing, and intelligent waiver.” State v. Dhaliwal, 150 Wn.2d 559, 567, 79 P.3d 432 (2003). Defendant Covarrubias signed a written waiver of conflicts after the trial court appointed separate counsel, held multiple hearings, and inquired in depth about any potential conflicts. Did defendant make a voluntary, knowing, and intelligent waiver?

C. “To show a violation of the Sixth Amendment right to counsel free from conflict, the defendant must always demonstrate that his or her attorney had a conflict of interest that adversely affected his or her performance.” Dhaliwal, 150 Wn.2d at 570 (2003). The trial court independently examined defense counsels’ earlier representation of potential witness, concluding “I cannot find a strong possibility that a conflict of interest exists such as would effect the representation of Mr. Covarrubias by Mr. Anderson and Mr. Gasnick.” (3/16/06 VRP 46). Did the trial court err by finding that defendant failed to prove an actual conflict?

D. The constitutional restrictions in Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) have “no application to pretrial photographic identification procedures engaged in by private citizens.” State v. Knight, 46 Wn. App. 57, 59, 729 P.2d 645 (1986). Law enforcement officials never showed

defendant's photograph to witness Jon Sonnabend; he saw the photograph twice in the newspaper. (4/12/06 VRP 138). Did the trial court appropriately allow Sonnabend to testify about what he saw the night of the murder and identify defendant in court?

E. "In closing argument, the court allows counsel wide latitude to explain and express reasonable inferences from the evidence." State v. Laramie, ___ Wn. App. ___, ___ P.3d ___, 2007 WL 3072449 at 7 (October 23, 2007). The prosecuting attorney explained reasonable doubt by quoting language from the Castle instruction. See State v. Bennett, 161 Wn.2d 303, ___, 165 P.3d 1241, 1243 (2007). Was the prosecutor's quote from the instruction improper and so prejudicial as to require a new trial?

F. "Under Miranda v. Arizona, [384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] a confession is voluntary, and therefore admissible, if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily and intelligently waives those rights." State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). Police detectives brought defendant to an interview room where he sat "3 to 4 minutes at best" before detectives read defendant his Miranda rights, he waived them in

writing, and the interview began. (3/27/06 VRP 36). Did defendant waive his rights *before* speaking with investigators?

G. “A qualified expert is competent to express an opinion on a proper subject even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact.” State v. Kirkman, 159 Wn.2d 918, 929, 155 P.3d 125 (2007). Both forensic pathologists testified at trial that Melissa Carter’s torn clothing and injuries to her body was classic evidence of sexual assault. Did the trial court abuse its discretion by allowing these expert witnesses to discuss reasonable inferences from the evidence?

H. By arguing that Melissa Carter had consensual sex with him, defendant Covarrubias made relevant her state of mind regarding oral sex. State v. Athan, 160 Wn.2d 354, 382, 158 P.3d 27 (2007). Here, the trial court admitted Ms. Carter’s repeated comments to her friends that she did not like oral sex and found it degrading. (4/20/06 VRP 8, 26, 34). Did the trial court abuse its discretion by admitting this statement?

II. STATEMENT OF FACTS.

A. Melissa and Covarrubias Meet At A Party

On December 23, 2004, a group of friends and acquaintances met at the Chinook Hotel in Port Angeles,

Washington for a party. (4/6/06 VRP 21). Nick Stimbert rented the room and his friend, Dustin Lauridsen, was staying with him. Earlier that day, the two walked down to a Safeway and met Rob, defendant Robert Covarrubias.

Q. You said you guys had had a hotel room and [Rob] said what?

A. He mentioned he had some beer he'd bring over and we invited him along.

Q. Did he say how much beer?

A. He might have mentioned two cases.

(4/6/06 VRP 24). Covarrubias had shoplifted the beer from Safeway. (4/19/06 VRP 55).

The three returned to the Chinook Hotel and the party started. During the evening people dropped by, drank, smoked marijuana, and used methamphetamine. (4/6/2006 VRP 71-73). Covarrubias testified that he drank heavily and injected methamphetamine at the party.

Q. Where on you was the drug injected?

A. It was in this arm.

Q. Why is it with methamphetamine you inject it rather than smoke it or inhale it like cocaine?

A. Um, the reason I inject meth is because the people usually who smoke meth end up losing

all their teeth or walk around with black rotten teeth.

(4/19/06 VRP 71).

Melissa Carter met Corvarrubias at the party. She arrived sometime after 6:00 pm with her boyfriend, Travis Criswell, her best friend, Ashley Fruin, and Duane Stephan. (4/6/06 VRP 67-68). Melissa lived with Ashley and her mother after being homeless for a while. As Ashley testified,

[S]he had been sleeping in a car and so she stayed with us and she got into trouble and went to juvey and her parents couldn't get her out so my mom signed papers to get her out and have her under her guardianship.

(4/6/06 VRP 63). They were excited about Christmas only two days away. (4/6/06 VRP 64). They were both 15 years old.

(4/6/06 VRP 91).

At the party, Melissa told Ashley she thought Covarrubias was weird.

Q. Did you notice anything about Rob, and Messa [Melissa's nickname]?

A. Well, he was kind of like hitting on her a little bit. Like, telling her she had a cute tummy and stuff like that. And she told me that she thought he was weird.

(4/6/06 VRP 74). Covarrubias was 23 at the time. (4/19/06 VRP 48).

Travis and Melissa had been sitting together at the party, and they began to fight. Dustin Lauridsen testified that the couple eventually took the argument outside.

A. ...At that point I was, hey, you guys can't be arguing out here and maybe you should leave. Fine. She gets upset and I noticed how upset she was and I told her come on back and at that point it was only, like, me and Nick and Rob, I think maybe Dave, in the room. I don't know, and she just kept walking –

Q. What happened?

A. -- away – what do you mean, this Rob fella came up and said it's all right, I'll go talk to her and went out and followed her.

Q. Okay. So, what as best as you recall were his words?

A. I think he said, "oh, it's okay, I'll go talk to her and try to calm her down."

(4/6/06 VRP 36).

Covarrubias went out the door and caught up with Melissa.

Q. So he left the motel room?

A. Uh-huh.

Q. Where did you see him go?

A. Over to where Messa was.

Q. All right. Did you – what if anything did you see further?

A. I think maybe I seen him catch up with her and they were kind of casually talking and at that point I just shut the door.

Q. Okay.

A. And went back inside.

Q. Did you ever see Messa again?

A. No, I didn't ma'am. I never seen either of them again.

(4/6/06 VRP 38).

B. Jon Sonnabend Sees Covarrubias Later That Night At the Waterfront Trail

Covarrubias and Melissa left the party and according to Covarrubias, went to an abandoned house he was living in.

(4/19/06 VRP 65-66). That same evening, Jon Sonnabend walked down to the waterfront trail in Port Angeles to drink beer and think.

Q. Where were you then?

A. I was at the waterfront trail – well, earlier in the evening I was at the – what we call the 8th Street house and then I had moved to the waterfront trail between the hours of 12 p.m. and 3 a.m.

Q. And why did you go there?

A. At the time I was trying to get my life together. I – everybody at the house had gone to sleep. I was still awake and I usually went to the waterfront trail to think and that’s pretty much why I was down there, to think and –

Q. Now, did you take any food or beverages with you?

A. Yes. I had a 22 ounce 211 beer and a No Fear energy drink.

(4/12/06 VRP 103).

Sonnabend suffered a closed head injury at age 15 and carries a diagnosis of schizo-affective disorder. (4/12/06 VRP 98, 167). Although he controls them with medication, Sonnabend experiences auditory and visual hallucinations. “Auditory, I hear, like, muffled music at night, just things like that. I don’t hear voices that tell me things to do or anything.” (4/12/06 VRP 99). His visual hallucinations are “shadows, I just see shadows. I’ve seen smoke filling buildings when I was in jail, things like that.” (4/12/06 100). Because these hallucinations are distinctive and moderate, Sonnabend has not had trouble distinguishing the hallucinations from reality. (4/12/06 VRP 102, 168). Sonnabend’s treatment provider noted that in December 2004, “he was alert, orientated and functioning well.” (4/12/06 VRP 166).

In the early morning hours of December 24, 2004, Sonnabend saw Covarrubias and a woman matching Melissa's description on the waterfront trail. He first heard a man and woman talking on the trail below.

[S]hortly...after I started hearing people down that way I heard somebody walking in this area where it says walkway underneath where it says rocks. I stood up and it was a male and female. The female was walking backwards – or, actually the male was walking backwards with his hand on her shoulders. It appeared he was trying to kiss her. I overheard her say something about having a boyfriend.

(4/12/06 VRP 107). Sonnabend described the female as a “young teenager, middle to late teens.” (4/12/06 VRP 109).

Sonnabend got a good look at the male when he passed by a flight of stairs.

A. [T]hey had turned – up or they had turned up next to me. There's another staircase that comes up by where I was at. She was in a hurry. She passed me, didn't even really notice me, and I walked to the little light pole. I said “what's up,” and he said what's up back and they both headed – would be heading south.

Q. All right. How close did you come to the man – did the man come to you?

A. With a couple of feet.

Q. And you've indicated that you spoke to him...?

A. Just saying what's up, said what's up back. I think I'm pretty sure I'm not sure exactly.

Q. Can you describe the man?

A. Hispanic looking male, pretty stocky, short goatee like mine, um, black hair, you know, pretty decent cut hair, um, that's about it. Pretty stocky guy.

Q. What about age?

A. Um, early to middle 20's.

(4/12/06 VRP 109-10).

A few minutes later, Sonnabend saw the teenage girl again, followed by the stocky man.

[A]bout 15 to 20 minutes later[,] I had heard somebody coming back down the stairs and it was her. She got to a spot and I stood up and asked her if she was okay. She had walked across a little bit of grass and asked me if I had a cell phone she could borrow. I said no. Asked her again if she was okay, she said yeah. She didn't seem too worried and went down the steps...

(4/12/06 VRP 111). Sonnabend then saw the man pursue her.

Q. Did you see the man again?

A. Yeah, shortly after that he came back down the stairs. He was moving a little bit quicker and didn't notice me and went down and disappeared like she had in ---

Q. Did you hear any voices after that?

- A. After that I heard a woman's voice yell, "just leave me the fuck alone." Um, I'm not quite sure how long it was after that, it didn't seem very long, but I don't know.

(4/12/06 VRP 112). Sonnabend finished his energy drink and jogged down to where he heard the voices. (4/12/06 VRP 112). He did not see the couple after that. (4/12/06 VRP 112).

Sonnabend learned a few days later that police found a body near the trail, but he did not connect what he saw with the crime until February 2005. He read a newspaper with a picture of Covarrubias and identified him as the stocky male he spoke to that evening.

- Q. ...What was it about that newspaper article that caused you to go to the police?

- A. It was the side view of the gentleman that was in the newspaper.

- Q. And what about the side view caused you to go to the police?

- A. It was exactly like the guy I seen that night, from the side.

(4/12/06 VRP 115-16). Accompanied by police investigators, Sonnabend went to the trail again, described what he saw, and even found his crumpled energy drink can. (4/12/06 VRP 116).

Sonnabend would next see Covarrubias face-to-face at trial. (4/12/06 VRP 138). During the investigation leading to defendant's trial, no one from the police or prosecutors' office showed Sonnabend a photo montage or line up. He saw the side-view picture of Covarrubias a second time in the newspaper.

THE COURT: Have you ever – other than that picture, have you ever seen any other pictures of the Defendant in the paper?

THE WITNESS: Last week just another side view I think. I don't read the paper now though, somebody had brought the paper by because my name was in it was all.

(4/12/06 VRP 138). Law enforcement had nothing to do with Sonnabend seeing the picture a second time.

The trial court outside the jury's presence questioned Sonnabend extensively on his ability to identify defendant face-to-face. (4/12/06 VRP 117-146). The court then allowed Sonnabend to testify before the jury that defendant Covarrubias was the stocky man he saw on the trail.

Q. ...[I]s the person that you saw that night out at that trail entrance present in the courtroom today?

A. Yes, he is.

Q. Can you point him out for the jury?

A. Right there [Indicating the defendant].

* * * *

Q. What degree of certainty do you have with respect to that?

A. Very, um, 1 to 10, a 10.

Q. How is it that you are able to identify him after all this time?

A. Because I paid more attention – I mean, I looked him right in the face when we talk – or, we didn't really talk but when we said what's up with each other.

(4/12/06 VRP 146-47).

C. Melissa's Body And The Crime Scene Near The Waterfront Trail Show Signs of A Struggle

Melissa went missing for three days, from the evening of December 23 until December 26, 2006. Three teenagers went to the waterfront trail to smoke marijuana and discovered Melissa's body.

Q. So you went up to this tree that – how is it that people can't see behind it or could not see behind the tree?

A. Because there's lots of leaves and a big tree stump in front of everything.

Q. Vines?

A. Yes.

Q. Okay. And did you, in fact, smoke?

A. We started to. I think I took a hit before we noticed the body.

(4/03/06 VRP 113). After confirming it was a body, the teenagers ran to the trail and flagged down a female walker, who called 911.

(4/03/06 VRP 129). The body was naked, on its back with the head down. (4/03/06 VRP 129).

The Port Angeles Police called in the Washington State Patrol Crime Scene Response Team to examine and document the area around Melissa's body. Forensic Scientist Karen Green with the WSP concluded that Melissa was killed where her body rested.

Based upon the evidence that we saw, we went through the clothing items, the fact that they were wet and muddy and ripped seemed that we had a full compliment of clothes that you would expect to find, the treacherousness of the trail, the location of the body itself, the main conclusion I was able to come to is it's my opinion that the victim was killed in the area that the body was found.

(4/4/06 VRP 41). Dr. Brian Selove conducted an autopsy on the body and concluded that someone strangled Melissa with their hands.

Q. Doctor, based upon this particular autopsy and the information you were furnished, the scene diagrams – or excuse me, the scene photographs, the medical history of Ms. Carter, did you form an opinion within reasonable bounds of medical certainty as to Melissa Carter's cause of death?

A. Yes, I did. I formed an opinion that she died of strangulation. To be more specific,...I would say manual strangulation.

Q. Dr. Selove, and with respect to the manner of death?

A. I formed the opinion that the manner of death is homicide, that this injury was inflicted by another person.

(4/5/06 VRP 79).

Dr. Selove also concluded that the ripped clothes, naked body and semen in Melissa's throat were consistent with a sexual assault.

Because the decedent was a teenage girl found nude at an outdoor, somewhat concealed location. Because clothing was apparently forcibly removed, including tearing of some of the clothing. Because there are injuries to the body that include injuries that lead me to diagnose strangulation and that sexual assault as the activity or events leading up to this type of killing is classical and typical and there was no other obvious explanation to me.

(4/05/06 VRP 77). Defendant's forensic pathologist, Dr. Donald Reay agreed that this scene was classic evidence of homicide with sexual assault. (4/18/06 VRP 126).

D. The Physical Evidence, Including A DNA Match, Implicated Covarrubias

Port Angeles Police began interviewing Melissa's friends and acquaintances soon after securing the crime scene. (4/13/06 VRP 56). Investigators focused on the December 23rd party at the Chinook Hotel, and that Melissa may have left with Covarrubias. (4/13/06 VRP 57-58). On December 28, 2004, a sheriff's deputy arrested Covarrubias and brought him to the Port Angeles Police Station for an interview. (4/11/06 115).

The arrest itself took place at 4:38 in the afternoon. (3/27/06 28) ("during 1638 hours I was notified via radio that Detective Grall needed assistance at the 300 block of South Peabody Street"). Detectives brought Covarrubias to the police station and took him to an interview room. Three to four minutes later, Detectives Robert Ensor and Eric Kovatch entered the room. (3/27/06 VRP 36). Before interviewing Covarrubias, Detective Ensor read him his Miranda rights. "He said he was willing to talk with us and then he signed the waiver." (3/27/06 VRP 39).

During the interview, Covarrubias made two assertions that he would later change when confronted with conflicting physical evidence. First, he claimed that he last saw Melissa at a Reino gas

station the night of the party. During cross-examination, Covarrubias admitted it was untrue.

Q. The story about the Reino gas station was obviously was not the truth, you've already said that; is that right?

A. Yes.

* * * *

Q. So you told [the detectives] an untruth?

A. I did.

(4/19/06 VRP 152).

Second, Covarrubias claimed he never had sex with Melissa. He changed this assertion when investigators matched his DNA to semen found in Melissa's throat. (4/13/06 VRP 190). Again on cross-examination, Covarrubias admitted his denial was untrue.

Q. You told [Detectives] you didn't have sex with Messa?

A. I did.

Q. And again you told them that because if you told them the truth that would get you into trouble?

A. It would have. I believe it would have.

Q. And that too was not true. You also told the police that your DNA would not be found on Messa's body; isn't that true?

A. That is incorrect. I told them I didn't know to answer the question they had asked.

(4/19/06 VRP 153).

Three other pieces of physical evidence implicated Covarrubias. First, investigators found a pair of extra large boxer shorts at the crime scene. (4/4/06 VRP 44-45). Covarrubias admitted he wore boxers, but denied the shorts were his. (4/19/06 VRP 133). Second, defendant had abrasions on his knees and shins, consistent with kneeling in the brushy area of the crime scene. (4/19/06 VRP 128-29). Third, Covarrubias had cuts on his hands, which he claimed he injured while working for the Salvation Army. (4/13/06 VRP 95). A Salvation Army representative testified on rebuttal that Covarrubias did not volunteer for the group in December 2004. (4/20/06 VRP 51).

Defendant's trial spanned three weeks, and after hearing all the evidence, the jury convicted Covarrubias on one count of first degree murder. (4/21/06 VRP 4). Defendant now appeals, but does not challenge the jury instructions. Instead, he argues that errors by the trial judge and his counsel invalidate the verdict. Because substantial evidence supports the verdict and defendant received a fair trial, his appeal should be denied.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews defendant's murder conviction for sufficiency of the evidence.

In a claim of insufficient evidence, a reviewing court examines whether “*any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt,” viewing the evidence in the light most favorable to the State. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005) (internal quotation marks omitted) (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)), overruled on other grounds by Washington v. Recuenco, --- U.S. ---, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” Id. (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006).

The court reviews defendant's allegations of conflict of interest, and the validity of his waiver, de novo. “The determination of whether a conflict exists precluding continued representation of a client is a question of law and is reviewed de novo.” State v. Ramos, 83 Wn. App. 622, 629, 922 P.2d 193 (1996).

Defendant's allegation of an impermissibly suggestive photo identification procedure is a question of law reviewed de novo. State v. Knight, 46 Wn. App. 57, 59, 729 P.2d 645 (1986). The trial

court's decision to admit evidence, whether testimony or exhibits, is reviewed for an abuse of discretion.

Admission of evidence is within the trial court's sound discretion. We will not reverse absent a showing of an abuse of that discretion, even if we might have allowed the proffered evidence had we been in the trial court's position.

State v. Lewis, ___ Wn. App. ___, 166 P.3d 786, 795 (2007).

The Court reviews allegations of prosecutorial misconduct for an abuse of discretion. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999) ("trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard"). Finally, "we review a claim of ineffective assistance of counsel de novo, as it is a mixed question of law and fact." State v. B.J.S., ___ Wn. App. ___, 169 P.3d 34, 39 (2007).

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S VERDICT

Viewing the evidence in favor of the State, a reasonable jury can, and did, find defendant Covarrubias guilty beyond a reasonable doubt. The Court's instruction number 10 listed the elements of first degree murder in this case:

- (1) That on or about a period of time between December 23, 2004 through December 26, 2004, Melissa Carter was killed;

- (2) That Defendant was committing Rape in the Second Degree;
- (3) That Defendant caused the death of Melissa Carter in the course of or in furtherance of such crime, or in immediate flight from such crime;
- (4) That Melissa Carter was not a participant in the crime; and
- (5) That the acts occurred in the State of Washington.

(Jury Instruction No. 10; Supp CP 24). Only elements two and three are at issue. (Defendant's Brief at 50-51).

Sufficient evidence supports the jury's conclusion that Covarrubias committed rape in the second degree with Melissa. First, the physical evidence at the scene – torn clothing, remote location, nude teenager – reasonably implies a sexual assault. Second, Jon Sonnabend heard Melissa yell “just leave me the fuck alone” after Covarrubias followed her. (4/12/06 VRP 112). Third, defendant's semen was in Melissa's throat, and the jury had ample reason to disbelieve his claim that sex was consensual. Finally, Melissa's friends testified that she did not like oral sex and found it degrading. (4/20/06 VRP 8, 26, 34). A reasonable juror could conclude that Covarrubias forced Melissa to have oral sex that night.

Next, sufficient evidence supports the jury's conclusion that Covarrubias killed Melissa "in the course of or in furtherance of such crime, or in immediate flight from such crime." (Jury Instruction No. 10; Supp CP 24). As described in the statement of facts above, both the forensic pathologist and forensic scientist testified that Melissa died where her body was found, next to the physical evidence of sexual assault. Covarrubias' scratches and scrapes were consistent with those from a struggle – and wounds on Melissa's body showed that she fought her attacker. Given this circumstantial evidence, coupled with Covarrubias' implausible testimony, the jury could reasonably conclude he killed Melissa and did it during, or to conceal, his crime.

Defendant challenges this evidence, arguing that the State provided no direct evidence that Covarrubias raped and killed Melissa. (Defendant's Brief at 52). Direct, eyewitness evidence is not necessary to prove the crime. As jury instruction number 3 states, "evidence may be direct or circumstantial...One is not necessarily more or less valuable than the other." (Jury Instruction No. 3; Supp CP 24). The jury could justifiably rely on the circumstantial evidence to find Covarrubias guilty beyond a reasonable doubt.

Finally, defendant offers a number of speculative reasons why he was not guilty of second degree rape or not guilty of killing Melissa in furtherance of the rape. Defendant did not present these arguments at trial, for good reason. They concede his guilt of significant criminal activity. Furthermore, they are mere possibilities without support in the record. Any conceivable doubt is not a reasonable doubt. Here, substantial, compelling evidence supports the jury's verdict that Covarrubias raped and killed Melissa.

V. THE TRIAL COURT EFFECTIVELY ADDRESSED ANY CLAIMS THAT DEFENSE COUNSEL HAD A CONFLICT OF INTEREST

Defendant devotes much of his 108-page brief to describing all the possible conflicts defense counsel might have had representing Covarrubias, but only one sentence to the most important fact. "Mr. Covarrubias indicated he wanted to keep his attorneys after a colloquy with the court." (Defendant's Brief at 17). The trial court took extraordinary measures to examine the potential for a conflict and then allow defendant to make an informed choice on how to proceed. Covarrubias decided to keep his defense counsel despite the possibility of a conflict. This Court may rightfully hold defendant to the consequences of that choice.

A. The Trial Court Properly Inquired Into The Potential For A Conflict

This court in State v. Jensen stated the procedures for addressing a potential conflict between defendant and defense counsel.

The Sixth Amendment right to counsel includes the right to conflict-free counsel. To establish a Sixth Amendment violation, a defendant who did not object at trial must demonstrate that an actual conflict of interest adversely affected his attorney's performance. Prejudice is presumed if the defendant makes this showing. A trial court must inquire if it knows or reasonably should know that a particular conflict exists. But even if the trial court fails to inquire, the defendant must still establish that the conflict of interest adversely affected his counsel's performance.

State v. Jensen, 125 Wn. App. 319, 330, 104 P.3d 717 (2005).

The trial court held six hearings before trial – February 23, March 3, March 8, March 16, March 21, and March 22, 2006 – to examine the potential for conflict. The trial court also took the unusual measure of appointing separate counsel for defendant Covarrubias, *solely to advise him whether a conflict exists and whether to waive a potential conflict.* (3/21/06 VRP 7) (counsel spent 3 ½ hours with defendant reviewing the conflict materials).

At the close of these six hearings, the trial court concluded

that an actual conflict did not exist between defendant and defense counsel.

The test is if there are conflicts, is there a strong possibility that they will substantially affect – adversely affect the ability of the attorney to represent the defendant.

...So a lot has been raised here regarding potential and I think there are potential issues and I don't fault the prosecuting attorney in bringing this to the Court's attention in any way, but looking at what's before me and trying to make an analysis of what I've received, there's a couple of things that are clear.

Number One: there's no prior or even current representation, and by current I mean "since" and when I use the word "current" here throughout this thing, I mean the representations of different people during the course of time that Mr. Anderson and Mr. Gasnick represented Mr. Covarrubias.

...Number Two: There's no evidence that any privileged and confidential information obtained in a prior or current representation is relative to the present case.

...There are affidavits from Mr. Gasnick and Mr. Anderson indicating, with sworn statements, indicating that they have knowledge of no privileged and confidential information that they plan to use that would be relevant to this case.

...Number Three: No evidence that Mr. Anderson or Mr. Gasnick have a divided loyalty so as to compromise their ability to fully and completely and adequately represent Mr. Covarrubias.

(4/16/06 VRP 44-45).

Throughout this procedure, the State, not defendant, pressed the issue of a potential conflict. The purpose was to prevent an appeal like that now filed by defendant. After reviewing all the submissions, the trial court found no evidence of an actual conflict.

[B]ased upon the evidence which is before me, as I've indicated is as thorough as I think we can make it, I cannot find a strong possibility that a conflict of interest exists such as would affect the representation of Mr. Covarrubias by Mr. Anderson and Mr. Gasnick.

(4/16/06 VRP 46).

The trial court's inquiry sufficiently disputes defendant's argument on appeal that a conflict somehow existed. "An accused has the constitutional right to effective assistance of counsel, not to a subjective sense of confidence in court-appointed counsel." Ramos, 83 Wn. App. at 633. Defendant fails to rebut the trial court's conclusion that an actual conflict did not exist.

B. Covarrubias Waived His Conflict Arguments

After concluding that a conflict did not exist, the trial court took an additional precaution to protect defendant's right to a fair trial.

I'm going to appoint an attorney, an independent attorney to represent you for the sole purpose of:

Number One – Reviewing with you all of the information we have collected regarding the conflict of interest issue and raising any particular areas of concern that that attorney may have that you need to be aware.

Two: -- that attorney will advise you of your rights to a conflict free attorney and

Three: -- that attorney will also, if you wish to proceed after a full discussion with this attorney, if you wish to proceed with your current set of attorneys in reviewing with you a written waiver of conflict.

(4/16/06 VRP 47).

Independent counsel met with Covarrubias, and after reviewing all the materials, defendant chose to waive any potential conflicts of interest to keep his trial counsel. Defendant made this waiver both in court and in writing. On March 23, 2006, the trial court had the following colloquy with defendant:

THE COURT: ...Mr. Covarrubias, I want to put on the record that you do have your Acknowledgment of Alleged Conflicts of Interest in your statement in front of you. Is that correct?

DEFENDANT: That is correct, Your Honor.

* * * *

THE COURT: Have you read the Acknowledgment yourself, personally?

DEFENDANT: Yes, Your Honor.

THE COURT: Have you reviewed it in detail with Mr. Ritchie [independent counsel]?

DEFENDANT: Yes, I have.

THE COURT: Do you believe you need any additional time to review the Acknowledgment?

DEFENDANT: No.

THE COURT: Do you have any questions that you would pose concerning the Acknowledgment?

DEFENDANT: No.

(4/23/06 VRP 23-24). After reviewing the contents of the Acknowledgment, defendant, counsel, and the trial court signed it.

(Acknowledgment; Supp CP 154; Attached as Appendix A).

The trial court concluded on the record,

I find Mr. Covarrubias' decision to continue to have Mr., you forgot Mr. Gasnick's name here, to have Mr. Anderson represent him to be knowingly, intelligently and voluntarily made with full knowledge of the advantages and risks, including but not limited to the likelihood that he will have been deemed to have waived any appeal argument that his attorneys had any conflict of interest based upon the facts as disclosed in this document.

(4/23/06 VRP 31). This was more than sufficient to waive any potential conflict of interest. State v. Dhaliwal, 150 Wn.2d 559, 567, 79 P.3d 432 (2003).

Defendant challenges the waivers, arguing he was misinformed by the trial judge, independent counsel and defense

counsel. (Defendant's Brief at 86). The record simply does not support this assertion. Defendant understood what the *risks* of conflict were, and decided to accept defense counsel despite those risks. Now on appeal, defendant argues that those risks "seem to have influenced" counsel's performance. That was exactly what independent counsel and the trial court advised defendant about.

Furthermore, the case defendant cites, Lewis v. Mayle, 391 F.3d 989 (9th Cir. 2004), does not support his argument. In Lewis, the defendant signed a short one page waiver, had no independent counsel and had only a cursory discussion with the judge. Lewis, 391 F.3d at 996. Here, Covarrubias had extensive discussions with the judge and independent counsel and signed an Acknowledgment that lists in detail the public defenders' office past representation. (Acknowledgment; Supp CP 154; Appendix A).

The case more closely resembles Garcia v. Bunnell, 33 F.3d 1193 (9th Cir. 1994), in which defendant waived any conflicts.

The record here shows a defendant who was well aware of his interests, his right to an unbiased counsel, his right to seek outside legal advice, and his right to discuss with the court any dissatisfaction with his appointed counsel. He had received a longer continuance than he requested and, after the court explicitly discussed with him the possible conflict, was articulate and forthright in declaring his desire to proceed with Holmes. Only on appeal after conviction

did he ever indicate any dissatisfaction with Holmes' services, and even then he suggested nothing which could have altered the substance of the pretrial discussion.

Garcia, 33 F.3d at 1197. This same conclusion is appropriate here.

VI. THE TRIAL COURT APPROPRIATELY ADMITTED JON SONNABEND'S TESTIMONY

Defendant challenges Jon Sonnabend's testimony as irrevocably tainted by the two photographs he saw in the newspaper. (Defendant's Brief at 24-32). This argument fails on two grounds: (1) the police did not show Sonnabend the photographs; and (2) defendant's arguments go to the weight, not admissibility, of the testimony.

Defendant's due process argument applies only to police photographic identification procedures.

Knight cites Simmons v. United States, 390 U.S. 377, 88 S.Ct. 697, 19 L.Ed.2d 1247 (1968), for the proposition that convictions will be set aside if based on a trial identification of a defendant following a pretrial identification by photograph that is impermissibly suggestive so as to give rise to a substantial likelihood of irreparable misidentification. In Simmons, impermissibly suggestive photo arrays were shown to witnesses by federal officers. Knight suggests that the rule of Simmons applies to Cason's showing of the photographs to Mike. This contention has no merit. *In our judgment, Simmons has no application to pretrial photographic identification procedures engaged in by private citizens. See People v. Boothe, 135 Cal.Rptr. 570, 65 Cal.App.3d*

685, 691 (1977). See also State v. Agee, 15 Wn. App. 709, 552 P.2d 1084 (1976), aff'd on other grounds, 89 Wn.2d 416, 573 P.2d 355 (1977) (wherein this court held that evidence obtained by a private citizen using illegal means will be suppressed only when the State in some manner "instigated, encouraged, counseled, directed, or controlled the conduct.")

State v. Knight, 46 Wn. App. 57, 59-60, 729 P.2d 645 (1986)
(emphasis added)

Next, defendant's other complaints about Sonnabend's testimony go to its weight, not admissibility. Both the prosecutor and defense counsel discussed Sonnabend's mental health issues, drinking, and recognition of Covarrubias' picture in the paper. The jury took all of this into account in evaluating Sonnabend's testimony.

Finally, the court outside the jury's presence concluded that Sonnabend's testimony was admissible.

I believe that the testimony that Mr. Sonnabend's going to give today, identifying Mr. Covarrubias as the person he saw on the evening in question, is based upon independent origin. It was not based on anything that had any other reason, any other suggestion, anything other than the 2 photographs he's seen, but he's very clear today this is the individual and it's based on what he saw on that evening.

(4/12/06 VRP 140). The trial court did not abuse its discretion by admitting Sonnabend's testimony.

VII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT AND ANY MISTAKES WERE HARMLESS

Defendant makes two allegations of prosecutorial misconduct, arguing the prosecutor improperly defined reasonable doubt in her closing statement and inserted her personal opinion into the case. To prove misconduct, Covarrubias

must first establish the prosecutor's improper conduct and, second, its prejudicial effect. Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. Prejudice on the part of the prosecutor is established only where there is a substantial likelihood the instances of misconduct affected the jury's verdict.

State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Neither claim is misconduct or invalidates the jury's verdict.

A. Relying On The Castle Instruction is Not Reversible Error

In her closing, the prosecutor used language from the Castle jury instruction to explain the concept of reasonable doubt. See State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997); (4/20/06 VRP 138). These comments were not improper and were not

prejudicial within the context of the entire argument and the jury instructions.

The Washington Supreme Court recently held the Castle instruction did not violate a defendant's right to due process. "We conclude the Castle instruction given in Bennett's case satisfied the minimum requirements of due process. The State was not relieved of its burden to prove every element beyond a reasonable doubt." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). However, the Court did not endorse future use of the instruction.

We also exercise our inherent supervisory power to instruct Washington trial courts to use only the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond a reasonable doubt.

Bennett, 161 Wn.2d at 318.

Viewed in context, the prosecutor's use of the Castle language was not reversible error. First, the language is not a misstatement of the law. If it was, the Supreme Court would have reversed in Bennett. Second, both the jury instructions and the prosecutor acknowledged that the attorneys' comments were not evidence and that the jury instructions controlled. Under jury instruction number 1,

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. *Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.*

(Jury Instruction No. 1; CP 24) (emphasis added). The prosecutor repeated this instruction in her closing. (4/20/06 VRP 146-47).

Third, the prosecutor's quote from Castle did not affect the jury's verdict. The jury asked no questions about reasonable doubt and in context, the prosecutor's comment was a small part of a much larger argument that made clear the State's burden of proof.

The prosecutor's argument referred to Instruction 7, the definition of reasonable doubt. That instruction made clear the State's burden, and the prosecutor's argument referred to that burden, asking the jury to look at "all of the circumstances, all of the testimony and the exhibits ... to consider it all." RP at 394. While the phrase "totality of the circumstances" may be used in various ways, in the context used here it was not an improper attempt to undercut the State's constitutional burden of proof. Mr. Laramie has also failed to show prejudice. The jury had the instructions on reasonable doubt, which did not contain the phrase "totality of the circumstances." The jury is presumed to follow the court's instructions. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007).

State v. Laramie, ___ Wn. App. ___, ___ P.3d ___, 2007 WL 3072449

at 7 (2007). The same conclusion is appropriate here.

B. The Prosecutor's Comment During Cross-Examination of Defendant Was Harmless

While cross-examining defendant, the prosecutor made a comment – “sure” – that drew an objection from defense counsel. (4/19/06 VRP 140). The court sustained the objection and struck the comment. (4/19/06 VRP 140). Later in the cross-examination, the prosecutor phrased a question that drew an objection as argumentative. (4/19/06 VRP 154). Although the court sustained the objection, Covarrubias contends he deserves a new trial, alleging the prosecutor expressed her personal opinion that he was a liar.

The prosecutor cross-examined defendant closely on his changing testimony, and he admitted that he had not told the truth to investigators. (4/19/06 VRP 152). Defendant cannot prove any prejudicial effect from the prosecutor's questions beyond the damage his answers already inflicted. The trial court effectively dealt with the objectionable questions and they were inconsequential in light of the full cross-examination. No grounds exist for a new trial.

VIII. NO VIOLATION OF MIRANDA OCCURRED

Defendant alleges that he was not provided his Miranda warnings until after his interrogation started. No evidence supports this argument and it apparently misreads the testimony of the arresting officers.

Covarrubias contends he “was brought into the interrogation room at 1638 (4:38 p.m.) and the interview commenced within three or four minutes.” (Defendant’s Brief at 36). Detective Ensor’s testimony, however, is that he learned of Covarrubias’ arrest at 4:38 p.m. Defendant did not arrive at the police station until 5:00.

Shortly after 1638 hours – well, during 1638 hours I was notified via radio that Detective Grall needed assistance at the 300 Block of South Peabody Street.

(3/27/06 VRP 28) (emphasis added). Detective Grall arrested Covarrubias. Detective Kovatch arranged for officers to take defendant to the police station for the interview. As Kovatch testified, “we walked into the interview room where the defendant was already seated at about 5, after 5 p.m.” (3/27/06 VRP 54). The interview started “3 to 4 minutes at best” after defendant arrived and was placed in the interview room. It began with Detective Ensor reading Covarrubias his rights at 5:08 p.m. (3/27/06 VRP 34).

The detectives did not interview Covarrubias and then read him his rights. No evidence supports defendant's assertion to the contrary.

IX. THE FORENSIC PATHOLOGISTS COULD OFFER THEIR OPINIONS ON HOW THE CRIME SCENE SUGGESTED A SEXUAL ASSAULT

The trial court admitted testimony from Drs. Selove and Reay, both forensic pathologists, that the crime scene was "one of classic homicide with sexual assault." (4/18/06 VRP 126). Defendant now argues this invaded the province of the jury "by amount[ing] to a direct and explicit opinion that Ms. Carter was raped and killed by Mr. Covarrubias." (Defendant's Brief at 55). The trial court did not abuse its discretion by admitting this testimony.

The Washington Supreme Court recently ruled that

[I]t has long been recognized that a qualified expert is competent to express an opinion on a proper subject even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact. The mere fact that the opinion of an expert covers an issue which the jury has to pass upon, does not call for automatic exclusion.

State v. Kirkman 159 Wn.2d 918, 929, 155 P.3d 125 (2007).

Here, both doctors testified to a reasonable inference based on the facts: the crime scene looks like a sexual assault and homicide

took place. Neither doctor suggested who did it, or whether a rape occurred. Instead, relying on their years of experience analyzing crime scenes, they both concluded that it was similar to sexual assault and homicide scenes they had analyzed before.

Because this was the legitimate subject of expert testimony, the trial court did not abuse its discretion by admitting it.

X. MELISSA'S STATEMENTS ABOUT ORAL SEX WERE RELEVANT AND ADMISSIBLE

The trial court admitted testimony on rebuttal regarding Melissa's aversion to oral sex. Because defendant testified that he had consensual oral sex with Melissa, this testimony was relevant and admissible under ER 803(a)(3).

In State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007), the Washington State Supreme Court upheld admission of statements by a murder victim that the defendant Athan gave her "the creeps."

We cannot say the trial court abused its discretion by allowing the statements under the state of mind exception to the hearsay rule because Athan himself put the victim's state of mind into issue. Athan's trial strategy was to suggest a relationship between himself and the victim and to try to distance the sexual encounter he had with the victim with her subsequent murder. By suggesting a relationship between himself and Sumstad, Athan made Sumstad's statements concerning her feelings toward Athan relevant. The trial court did not abuse its discretion by allowing this hearsay evidence because

the defendant made the victim's feelings toward him a relevant issue. Although a limiting instruction on such evidence is generally required, the failure of a court to give a limiting instruction is not error when no instruction was requested. Because Athan failed to request a limiting instruction during the trial, he is precluded from arguing it was harmful error here.

Athan, 160 Wn.2d at 382-383.

Here, Covarrubias made Melissa's feelings about oral sex relevant by arguing that she was a willing participant. The trial court therefore had the discretion to allow Melissa's friends to testify that she found it degrading.

XI. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims his trial counsel were constitutionally deficient on a number of grounds. Because his counsel worked diligently and more than competently, his claim for a new trial is unpersuasive.

To establish ineffective assistance of counsel, Keend must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. Keend must overcome a strong presumption that his counsel's representation was adequate and effective. And to show prejudice, he must establish there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. Keend, ___ Wn. App. ___, 166 P.3d 1268, 1271-1272 (2007).

The majority of defendant's argument concerns the alleged conflict of interest with defense counsel. As detailed above, no actual conflict existed and defendant waived any objection to a potential conflict. Defendant raises two assertions unrelated to his other arguments on appeal: (1) his attorneys should have requested instructions on murder in the second degree; and (2) his attorneys should have moved to exclude his statements under the *corpus delicti* rule. Neither claim proves ineffective assistance.

First, defendant argued consistently at trial that he was innocent. If he asked for a lesser included instruction, he would have suggested to the jury that he was not innocent, but rather guilty of murder but not second degree rape. This would have been a major concession and would have completely undercut his testimony at trial. It was a legitimate tactic not to request a lesser included instruction given Covarrubias' explanation of what happened.

In the cases defendant cites – State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006) and State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004) – the defendant conceded the criminal activity and only contested intent. For example, defendant in Pittman agreed he was trespassing, but not with intent to steal.

Pittman, 134 Wn. App. at 386. In Ward, defendant conceded he showed a weapon, but argued it was in self-defense and he did not point it at the victim. Ward, 125 Wn. App. at 250. Here, the State did not charge Covarrubias with second degree rape; it accused him of first degree murder. Asking for a lesser included instruction on second degree murder would have implied defendant killed Melissa, but only in the course of committing third degree rape.

Defense counsel's decision not to request the subject was a legitimate trial tactic.

Second, defendant's statements were admissible under the *corpus delicti* rule.

Corpus delicti means the 'body of the crime' and must be proved by evidence sufficient to support the inference that there has been a criminal act. A defendant's incriminating statement alone is not sufficient to establish that a crime took place. The State must present other independent evidence to corroborate a defendant's incriminating statement. In other words, the State must present evidence independent of the incriminating statement that the crime a defendant *described in the statement* actually occurred.

State v. Brockob, 159 Wn.2d 311, 327-328, 150 P.3d 59 (2006).

Here, the body of the crime was the crime scene – independent evidence that a murder took place and that it may have followed a sexual assault of some sort.

Defendant's statements undercut his assertion that he had consensual oral sex with Melissa. They therefore supported the crime charged – murder in furtherance of second degree rape. Defense counsel appropriately contested introduction of defendant's statements, requiring a 3.5 hearing. (3/27 VRP). Their performance was not constitutionally deficient.

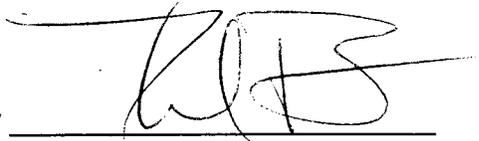
Finally, a fair reading of the complete trial transcript shows two seasoned defense counsel representing defendant competently. Their performance was not deficient; rather, the evidence of defendant's guilt was compelling and persuasive.

CONCLUSION

This appeal illustrates two realities of criminal practice in a small town. First, appointed defense counsel will often have represented witnesses or victims on other matters. Second, the most effective way to address these potential conflicts is to examine them fully and then provide defendant with the information, and independent counsel, to decide whether to waive the potential conflicts. Because defendant Robert Covarrubias chose to keep his counsel, and they performed admirably, the State respectfully requests this Court to affirm defendant's conviction and dismiss this appeal.

DATED this 16th day of November, 2007.

DEBORAH S. KELLY
Clallam County Prosecuting Attorney

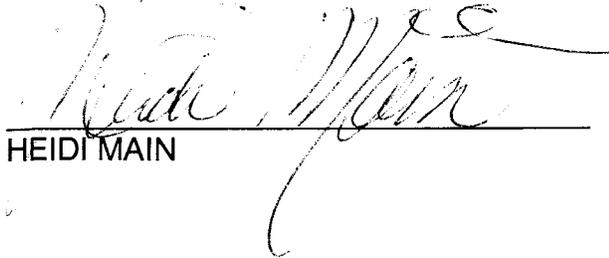
By 
Philip J. Buri, WSBA #17637
Special Deputy Prosecutor
BURI FUNSTON MUMFORD, PLLC
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of

Manek R. Mistry/Jodi Backlund
Backlund & Mistry
203 4th Ave. E. Ste., 404
Olympia, WA 98501-1189

DATED this 16th day of November, 2007.


HEIDI MAIN


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CLALLAM COUNTY
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APPENDIX A

SCANNED 1/2

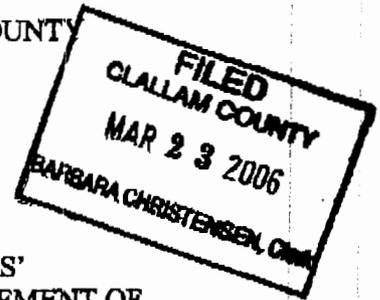
IN THE SUPERIOR COURT OF WASHINGTON FOR CLALLAM COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

ROBERT GENE COVARRUBIAS,
Defendant.

NO. 05-1-00079-1

DEFENDANT
COVARRUBIAS'
ACKNOWLEDGEMENT OF
ALLEGED CONFLICTS OF
INTERESTS OF THE
OFFICE OF THE CLALLAM
PUBLIC DEFENDER'S

I HAVE BEEN ADVISED OF THE FOLLOWING:

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Sixth Amendment right to counsel is the right to representation that is free from conflicts of interest.

In a criminal case, a defense counsel's loyalty to his or her client can be compromised in a variety of ways. A conflict of interest can arise in a criminal case when a defense attorney is called upon to cross-examine another client or a former client.

An individual can voluntarily waive his or her right to conflict free representation, and there are potential advantages and risks of doing so.

1. My true name is: ROBERT GENE COVARRUBIAS.
2. My age is twenty-five (25).
3. I obtained a GED.
4. I understand that I am charged with the crime of murder in the first degree
I understand that this charge was filed on February 16, 2005.
I understand that the victim of this murder was Melissa Carter.
5. I understand that the maximum penalty for the crime of murder in the first degree is life in prison and/or the fine of \$50,000, plus restitution and costs. I understand that a standard range term of incarceration will be calculated based upon the seriousness level of this offense and my criminal history.

I understand that a conviction for this crime may also have an impact upon my employment, my right to bear arms, and other aspects of my life.

6. I understand that I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me.
7. I understand that I have the right to representation by an attorney who has no conflicts of interest.
8. I understand that the Office of the Clallam Public Defender has been appointed to represent me.
9. I understand that attorney Ralph Anderson and attorney Harry Gasnick are members of the Office of the Clallam Public Defender.
10. I have been informed and realize that the Office of the Clallam Public Defender has previously represented or is currently representing many of the witnesses that the State will be calling at trial. A partial list of prior and current representations includes the following:
 - The Office of the Clallam Public Defender acting through attorney Ralph Anderson and Pamela Lindquist represented Jacob Slack in Clallam County Cause No. 02-8-221-2.
 - The Office of the Clallam Public Defender acting through Ralph Anderson represented Brandon Carter, the victim's brother, in Clallam County Cause Nos. 98-8-382-5, 01-8-190-1, 00-8-124-4 (prob viol x2), 01-8-3-3, 00-8-64-7 (pv), 00-8-65-5. Ms. Hayden and Ms. Lindquist have also represented him at least once.
 - The Office of the Clallam Public Defender acting through Ralph Anderson and Mr. Mulligan represented Jason Carter, the victim's brother, in Clallam County Cause Nos. 99-8-440-4, 00-8-210-1, and 02-1-86-9. Ms. Hayden represented him in Cause No. 02-1-377-9.

- The Office of the Clallam Public Defender acting through Suzanne Hayden, represented Melissa Carter, the victim of the current charge in Clallam County Cause Nos. 03-8-223-7 and 03-8-96-0.
- The Office of the Clallam Public Defender acting through Ralph Anderson represented Jeffrey Price in Clallam County Cause Nos. 01-8-153-6. Additionally, Ms. Pamela Lindquist represented him in District Court Case No. PCR 10708.
- The Office of the Clallam Public Defender acting through Ralph Anderson represented Dustin Lauridsen in Clallam County Cause Nos. 00-8-33-7, 98-8-536-4, 00-8-224-1, 00-8-291-7 and 00-8-307-7, and by attorney Harry Gasnick on various Clallam County District Court matters.
- The Office of the Clallam Public Defender acting through Ralph Anderson represented David Burnside in Clallam County Cause Nos. 99-8-274-6, 99-8-277-1, 99-8-448-0, 99-8-44-8, 00-8-119-8, and 01-8-245-1. Ms. Lindquist was appointed in District Court to represent him and withdrew due to conflict. Mr. DeBray was appointed to represent him in Superior Court Cause No. 05-1-00057-0 and withdrew due to conflict.
- The Office of the Clallam Public Defender acting through Ralph Anderson, Ted DeBray, and John Hayden represented Jacob Backman in Clallam County Cause Nos. 05-1-00100-2, 05-1-173-8, and 05-1-00438-9 (while murder case pending), 03-1-83-2, and 02-1-480-5. The Office of the Clallam Public Defender acting through attorneys John Hayden and Loren Oakley represented Jacob Backman in Clallam County District Court matters.
- The Office of the Clallam Public Defender acting through Ralph Anderson represented Cody Sezman in Clallam County Cause Nos. 99-8-286-0, 01-8-193-5, 00-8-132-5, 00-8-211-9. The Office of the Clallam Public Defender acting through Harry Gasnick, Mr.

Oakley, and Ms. Lindquist also have represented Cody Seaman in the Clallam County District Court.

- The Office of the Clallam Public Defender acting through attorneys Ralph Anderson, Harry Gasnick, and Pamela Lindquist has represented William Jacob Pearce in a number of matters, with the most recent cases being Clallam County Superior Court Cause No. 05-1-315-3 and District Court Cause No.s PCR 12176 and 11794. At least two of these representations occurred while my murder case was pending.
- The Office of the Clallam Public Defender acting through Harry Gasnick, Ted DeBray, and Richard Suryan has represented Jon Sonnabend in various Clallam County Superior and District Court cases. Attorney Ralph Anderson has indicated that Jon Sonnabend is suspected by him of being the actual murderer of Melissa Carter. Jon Sonnabend is a witness who may testify that I was on the Waterfront Trail with the victim. Mr. Sonnabend has mental health issues and I am aware that the State alleges that in the course of prior representation of Sonnabend Harry Gasnick very likely has confidences or secrets relating to those mental health issues. I am aware the State has alleged that Mr. Gasnick may even have been present at an evaluation of Mr. Sonnabend. I understand the Office of the Clallam Public Defender may also have represented him in other earlier causes. I also understand from my attorney that the State has copies of some or all of Mr. Sonnabend's mental health records and that my attorneys may be able to use these records in cross-examination depending upon the Court's rulings.
- The Office of the Clallam Public Defender acting through Harry Gasnick represented Christina Garver in June of 2005, in Clallam County District Court Cause No. 11091. Additionally, she was

represented by Ms. Hayden in Superior Court Cause No. 04-8-00054-2.

- The Office of the Clallam Public Defender acting through Harry Gasnick represented Donald Blowers in Clallam County Cause No. 05-1-00487-7 until withdrawal in February 2006 when the conflict became apparent. I understand the Office of the Clallam Public Defender may have represented him in other earlier causes.
- The Office of the Clallam Public Defender acting through Harry Gasnick represented Kelly Banner in Clallam County District Court in 2003 and 2004 in District court Case No. CCR11562. Attorneys Ralph Anderson and Harry Gasnick have indicated that Kelly Banner is suspected by them of being the actual murderer of Melissa Carter.
- The Office of the Clallam Public Defender acting through Suzanne Hayden represented Jayde Rector in Clallam County Cause No. 05-8-10-9 and four other juvenile matters.
- The Office of the Clallam Public Defender acting through Suzanne Hayden represented Laura Oldfield in Clallam County criminal matters including Superior Court Cause No. 03-8-00286-5.
- The Office of the Clallam Public Defender acting through John Hayden represented Ed Steward in Clallam County Superior Court Cause No. 04-1-00534-4 in 2004.
- The Office of the Clallam Public Defender acting through Harry Gasnick represented Carla Carter, the victim's mother, in 2005 in a District Court case C497242. The Office of the Clallam Public Defender acting through John Hayden represented Carla Carter in Clallam County Superior Court Cause No. 02-1-336-1.

- The Office of the Clallam Public Defender acting through Harry Gasnick and John Hayden represented Christopher Carter, the victim's father, in Clallam County Superior Court Cause No. 04-1-290-6. The Office of the Clallam Public Defender withdrew from this representation on the grounds that the representation conflicted with the duties that the office owed to me. The Office of the Clallam Public Defender acting through Harry Gasnick also represented him in 2002 in District Court Case No. PCR 8408.
- The Office of the Clallam Public Defender acting through Ted DeBray represented Gerald Spry in Clallam County Cause No. 05-1-00045-6. Mr. Anderson made at least one appearance on this case. Attorney Ralph Anderson has indicated that Gerald Spry is suspected by him of being the actual murderer of Melissa Carter. Additionally, the Office of the Clallam Public Defender represented Mr. Spry on approximately six to nine other cases between 1998 and 2005. Ralph Anderson also represented Gerald Spry in a VUCSA case in Clallam Co. Cause No. 03-1-00356-4.
- The Office of the Clallam Public Defender acting through Attorney Ralph Anderson represented Robert Welker in Clallam County Cause No. 05-1-00005-1, 03-1-00005-1, 03-1-00487-7, and in Clallam County Cause No. 00-1-00134-6 through Attorney Harry Gasnick and John Hayden and possibly also represented Robert Welker in other Clallam County criminal matters.
- The Office of the Clallam Public Defender acting through Attorney Suzanne Hayden represented Ashley Fruin on Clallam County Court Cause No. 03-1-00289-0.
- The Office of the Clallam Public Defender acting through Attorneys Harry Gasnick and Pamela Lindquist represented Duane Stephan in the Lower Elwha Tribal Court.

- The Office of the Clallam Public Defender acting through Attorney Suzanne Hayden has represented Joseph Farrington in 2005 and 2006 in criminal matters.
- The Office of the Clallam Public Defender acting through Attorney Suzanne Hayden has represented Dustin Davis on two criminal cases in 2002.
- The Office of the Clallam Public Defender acting through Attorneys Ralph Anderson and Harry Gasnick has represented Cody Snow in Clallam criminal matters including Superior Court Cause No. 05-1-00362-5.
- The Office of the Clallam Public Defender acting through Attorney Suzanne Hayden and Ralph Anderson has represented Jacob Slack in Superior Court Cause No. 02-8-00221-2.
- The Office of the Clallam Public Defender acting through Attorney Ted DeBray represented David Burnside in a burglary and in a theft III case 05-1-00057-0 and has withdrawn from such representation.
- The Office of the Clallam Public Defender acting through Attorney Ted DeBray represented Jacob Backman in a VUCSA case 05-1-00100-2 which resulted in a dismissal.
- The Office of the Clallam Public Defender acting through Attorney Ted DeBray represented Cody Snow in a probation violation (04-1-00441-1 and in an assault III case 05-1-00362-5.

11. I understand that any confidences or secrets that the above witnesses and the victim provided to Ralph Anderson and/or Harry Gasnick and/or any member of the Office of the Clallam Public Defender cannot be disclosed by Ralph Anderson and/or Harry Gasnick without the witnesses' permission. RPC 1.6. "Confidence' refers to information protected by

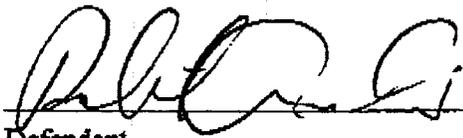
the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client." RPC 1.1.

12. I understand that even after an attorney/client relationship is ended that the attorney still has a duty to not "[u]se confidences or secrets relating to the representation to the disadvantage of the former client", RPC 1.9(b), without the client's permission.
13. I understand that every lawyer who is a member of the Office of the Clallam County Public Defender owes the victim and the above-listed witnesses the same duty to not "[u]se confidences or secrets relating to the representation to the disadvantage of the former client", RPC 1.9(b), without his or her permission RPC 1.10.
14. I understand that all of the individuals listed in paragraph 10 other than the victim may be called as a witness by the State in my criminal trial: State v. Robert Gene Covarrubias, Clallam County Cause No.05-1-00079-1.
15. I understand that any attorney who represents me will be entitled to cross-examine the persons listed in paragraph 10 regarding his or her testimony, his or her credibility, and his or her biases, and will be able to use any information, such as admissible records of criminal convictions, other than confidences and secrets learned from the client while my attorney or the Public Defenders Office was representing the client/witness.
16. I understand that, my attorney may have a duty of "loyalty" to former clients listed in this document, and a duty to keep confidential their confidences and secrets. I also understand that my counsel's ability to cross-examine the witness might be impaired by counsel's duty not to use confidences or secrets revealed to him by such former client during the representation of the former client/witness.

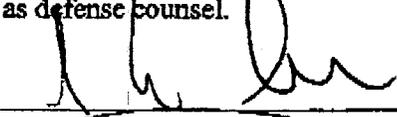
17. I understand that if I agree to have Mr. Anderson and Mr. Gasnick continue to represent me in this case, the State will argue, if I am convicted and I appeal, that any conflict of interest that arose from the Public Defenders Office's prior and current representation of the persons listed in paragraph 10, as disclosed in this document, will not be able to be claimed on direct appeal, in a state collateral attack, or in a federal habeas corpus proceeding. The State may also argue on any appeal that, I have waived any right to argue that Mr. Anderson or Mr. Gasnick or other members of his firm provided me with ineffective assistance of counsel because of any conflicts I may claim on any appeal. I understand that the appellate courts may agree with the State and find I have waived these issues. I further understand that by approving my request to have Mr. Anderson and Mr. Gasnick continue to represent me, the undersigned judge has found that I have waived these issues.
18. I understand that I have the right to consult with an attorney other than Mr. Anderson or Mr. Gasnick before deciding whether I wish to continue having Mr. Gasnick and Mr. Anderson continue their representation. I have consulted with Mr. Craig Ritchie on the alleged conflict of interest issues.
19. I did have an adequate amount of time to discuss with Mr. Ritchie whether I should request other defense counsel than Mr. Gasnick and Mr. Anderson.
20. No one has threatened harm of any kind to me or to any other person to cause me to continue to have Mr. Gasnick and Mr. Anderson represent me.
21. No person has made any promises of any kind to cause me to continue to have Mr. Gasnick and Mr. Anderson represent me.
22. I have no questions I wish to ask the court before I decide whether to continue to have Mr. Gasnick and Mr. Anderson represent me.

- 23. I have not asked to have new counsel. I have not argued that my present counsel, Messrs. Gasnick and Anderson have any conflict of interest in representing me in this case.
- 24. I represent that I have attended all of the court hearings regarding the conflict of interest issues raised concerning my attorneys Ralph Anderson and Harry Gasnick and the Office of Clallam Public Defender. In addition, I have thoroughly discussed the conflict of interest issues with my attorneys Ralph Anderson and Harry Gasnick, as well as with independent counsel Craig A. Ritchie with whom I reviewed all of the materials referenced in the courts order of appointment of Craig A. Ritchie filed 3/16/2006. I understand my rights to a conflict free attorney and further understand that the court will appoint new counsel to represent me should I so request. I fully and voluntarily relinquish any objection to my continued representation by Ralph Anderson and Harry Gasnick due to conflict of interest issues ^{as disclosed.} I affirmatively request the court to allow me to continue to be represented by Ralph Anderson and Harry Gasnick.

RC

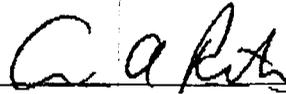

 Defendant

I have discussed these issues with the defendant and I believe that the defendant is competent and fully understands the advantages and risks of having me continue as defense counsel.




WSBA No.s 6707 and 14328
 Attorneys for Defendant

I have read and discussed this form with the defendant and I believe that the defendant is competent and fully understands the advantages and risks of continuing to have Mr. Gasnick and Mr. Anderson represent him.



Craig A. Ritchie
WSBA No. 4818
Independent Counsel for Defendant

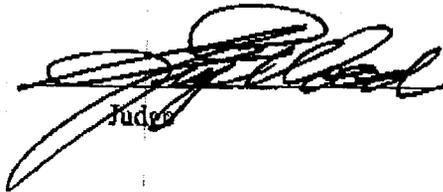
The defendant in open court in the presence of the defendant's lawyer and the undersigned judge signed the foregoing. The defendant asserted that [check appropriate letter(s)]:

- (a) The defendant had previously read the entire statement above and that he understood it in full; or
- (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full, or
- (c) The defendant's independent counsel had previously read to him or her the entire statement above and that the defendant understood it in full.

I find Robert Gene Covarrubias' decision to continue to have ~~Mr.~~ ^{GARUCK} and Mr. ^{AW}

Anderson represent him to be knowingly, intelligently and voluntarily made with full knowledge of the advantages and risks including, but not limited to the likelihood that he will be deemed to have waived any appeal argument that his attorneys had any conflict of interest based upon the facts disclosed in this document. This finding is based upon the above written acknowledgement and Robert Gene Covarrubias' answers to my oral questions.

Dated this 22nd day of March 2006.



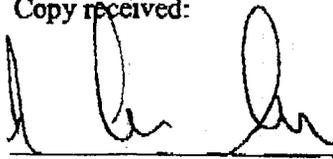
Judge

Waiver form prepared by:



WSBA No.4818
Independent Attorney for Defendant

Copy received:

 #6957

WSBA No.
Attorney for Defendant

Copy received:

 Prosecuting Attorney, WSBA 8582