

62768-6

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NO. 62768-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAYDEANE FRANCIS ELL,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven J. Mura
The Honorable Charles R. Snyder

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

A jury found Jaydeane Francis Ell guilty of rape in the second degree, two counts of assault in the second degree, felony harassment, two counts of violation of a no-contact order, and attempted violation of a no-contact order. On appeal, Mr. Ell seeks relief for the trial court's violation of his right to an attorney because the court refused to appoint new counsel when Mr. Ell had an irreconcilable conflict with his attorney. Mr. Ell also argues there was insufficient evidence to support his rape in the second degree and felony harassment convictions.

Further, the trial court erroneously answered a jury question outside Mr. Ell's presence and failed to conduct a CrR 3.5 hearing to determine the admissibility of Mr. Ell's statements to law enforcement. Mr. Ell also argues his counsel was ineffective for failing to request a voluntary intoxication instruction and the trial court violated double jeopardy principles when it did not vacate his harassment conviction. Finally, Mr. Ell contends prosecutorial misconduct deprived him of a fair trial. Mr. Ell asks that his rape in the second degree convictions be reversed and dismissed with prejudice. In the alternative, Mr. Ell requests his felony convictions be reversed and the case remanded for a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Ell's right to counsel under the federal and state constitutions because it refused to appoint new counsel when Mr. Ell had an irreconcilable conflict with his attorney.

2. The State did not prove every element of rape in the second degree beyond a reasonable doubt.

3. The State did not prove every element of felony harassment beyond a reasonable doubt.

4. The trial court erred when it answered a jury question outside Mr. Ell's presence.

5. Mr. Ell's counsel was ineffective for failing to request a voluntary intoxication instruction.

6. The trial court erred when it admitted Mr. Ell's statements to law enforcement after it failed to conduct a CrR 3.5 hearing.

7. Prosecutorial misconduct deprived Mr. Ell of a fair trial.

8. The trial court violated Mr. Ell's constitutional right to be free from double jeopardy when it failed to vacate Mr. Ell's harassment conviction, which encompassed the same criminal conduct as the two assault in the second degree convictions.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutional rights to counsel are violated if a defendant is forced to proceed with an attorney with whom he has an irreconcilable conflict. A reviewing court must evaluate 1) the extent of the conflict, 2) the adequacy of the trial court's inquiry, and 3) the timeliness of the defendant's motion to substitute counsel. Where Mr. Ell made a timely motion alleging his counsel cursed at him, revealed client confidences, and would not meet with him for an adequate amount of time and the court failed to adequately inquire into the conflict, did the trial court commit reversible error? (Assignment of Error 1)

2. The State is required to prove each element of a charge beyond a reasonable doubt. To prove rape in the second degree, the State must prove Mr. Ell had sexual intercourse by forcible compulsion, which is physical force that overcomes resistance. Where the alleged victim testified she was not raped and the only substantive evidence was conclusory testimony from a nurse and a doctor that she was "sexually assaulted," could any rational trier of fact find the essential elements of rape in the second degree beyond a reasonable doubt? (Assignment of Error 2)

3. To prove felony harassment, the State must prove beyond a reasonable doubt Mr. Ell, without lawful authority, knowingly made a "true threat" to kill another person and that his words or conduct placed that person in reasonable fear that the threat will be carried out. Where the alleged victim in this case testified Mr. Ell did not threaten to kill her and there was no evidence showing she was afraid of Mr. Ell, could any rational trier of fact find the essential elements of felony harassment beyond a reasonable doubt? (Assignment of Error 3)

4. Both the federal and Washington constitutions guarantee the right to effective assistance of counsel. Mr. Ell's counsel failed to object to hearsay testimony of a nurse describing a threat Mr. Ell made to the alleged victim that was not necessary for medical diagnosis or treatment. Did this conduct fall below a minimum objective standard of reasonable attorney conduct and create a reasonable probability that the jury verdict would have been different but for the attorney's action such that reversal is required? (Assignment of Error 3)

5. Under CrR 6.15(f) and the federal and state constitutions, an accused person has the right to be present when the trial court answers a jury question. Mr. Ell was denied his right to be present

when the court answered a jury question about an assault instruction. Where Mr. Ell objected to the very instruction at issue, was unable to argue for a clarifying instruction, and evidence was weak regarding whether the assaults in this case rose to the level of assault in the second degree, can the State prove beyond a reasonable doubt that any reasonable jury would have reached the same result on the assault charges in the absence of the error?

(Assignment of Error 4)

6. Counsel's failure to request a jury instruction may be raised on appeal as a constitutional ineffective assistance claim. If intent is an element of a crime charged, it is a valid defense that the defendant did not possess that mental state. Where intent was an element of all Mr. Ell's charges, there was evidence Mr. Ell was intoxicated, and there was evidence that intoxication affected his ability to acquire the required mental state, was counsel ineffective for failing to request a voluntary intoxication instruction?

(Assignment of Error 5)

7. A trial court must hold a hearing under CrR 3.5 when a statement of the accused is to be offered into evidence. Where the State elicited Mr. Ell's statements after stating it did not need a CrR 3.5 hearing, Mr. Ell testified he was not given Miranda warnings

before being interrogated, and the State argued his statements were evidence of his guilt, was the court's failure to conduct a CrR 3.5 hearing a manifest error involving a constitutional right? (Assignment of Error 6)

8. When a prosecutor commits misconduct, a defendant may be deprived of a fair and impartial trial. The prosecutor in this case argued that evidence admitted solely for impeachment purposes was substantive evidence of Mr. Ell's guilt. Where defense counsel did not object, was this misconduct so flagrant and ill-intentioned as to deny Mr. Ell a fair trial? (Assignment of Error 7)

9. When a trial court finds that multiple convictions constitute the same criminal conduct, the proper remedy is to vacate the redundant counts because failure to do so violates double jeopardy principles. Where the trial court found Mr. Ell's harassment conviction constituted the same criminal conduct as the assault convictions, did the court err in failing to vacate the harassment conviction? (Assignment of Error 8)

D. STATEMENT OF THE CASE

1. Procedural Overview

The Whatcom County Prosecutor charged Jaydeane Francis Ell with rape in the second degree, two counts of assault in the

second degree, felony harassment, tampering with a witness, two counts of violation of a no-contact order, and attempted violation of a no-contact order. CP 140-42. The court dismissed the witness tampering charge on a defense motion. 3RP 796.¹ A jury convicted Mr. Ell of the remaining charges.² CP 69-78.

At sentencing, the trial court found the harassment charge was the same criminal conduct as the assault convictions. 5RP 29. However, the court still sentenced Mr. Ell to 22 months on the harassment charge with no indication in the judgment and sentence that this charge consisted of the same criminal conduct as the assaults. CP 24. The court sentenced Mr. Ell to standard range sentences on all convictions and ran the sentences concurrently to each other. CP 24-25. This appeal timely follows. CP 4.

2. Right to Counsel Issues

On July 17, 2008, Mr. Ell made a motion in front of the Honorable Steven Mura to discharge his appointed attorney, Lance Hendrix. 2RP 4. Mr. Ell alleged Mr. Hendrix had contacted him

¹ References to the verbatim report of proceedings are as follows:
1RP – February 7, 2008 State's motion to compel (Judge Steven Mura)
2RP – July 17, 2008 Defendant's motion for new counsel (Judge Steven Mura)
3RP – October 13-22, 2008 Jury Trial (Judge Charles Snyder)
4RP – October 22, 2008 Jury Trial (Judge Charles Snyder)
5RP – December 12, 2008 Sentencing (Judge Charles Snyder).

² The no-contact order violations are not at issue in this appeal.

only twice during his first four months of his pretrial incarceration, and those contacts were simply for the purpose of being persuaded into a continuance. 2RP 5. Mr. Ell also stated Mr. Hendrix was not giving him full discovery and that there was a complete breakdown of attorney-client communication. 2RP 6-7. Judge Mura opined, "I was defense counsel and probably defended two thousand people, and the worst way an attorney can spend time, Mr. Ell, is spending his time with a client." 2RP 7.

Mr. Ell further alleged Mr. Hendrix had revealed client confidences, offering a document from a witness that stated "Mr. Hendrix of the Whatcom County Public Defenders office revealed the confidences improperly of Mr. Ell's case by way of yelling...." 2RP 7; Pretrial Ex. 1. Mr. Ell stated Mr. Hendrix "has blown up on me several times, Your Honor, cussed me out, called me a dumb fucking so and so mother...." 2RP 8. He stated he did not think he could work with Mr. Hendrix any more. 2RP 9. Judge Mura offered Mr. Ell the option of representing himself and told Mr. Ell he did not get to choose his counsel. 2RP 9-10. The court denied Mr. Ell's motion for change of counsel and ordered Mr. Hendrix to give Mr. Ell the remainder of the discovery. 2RP 10-11. Mr. Ell continued to

object, saying his attorney was ineffective. 2RP 13. Judge Mura told him he could take it up on appeal. 2RP 13.

Right before trial, Mr. Ell again complained about Mr. Hendrix's representation and asked for a continuance because they had not had sufficient time to talk about the case or prepare an adequate defense. 3RP 5. Mr. Hendrix failed to attend an appointment with Mr. Ell scheduled the night before trial where Mr. Hendrix was supposed to answer Mr. Ell's questions and had only come to see him in jail once during the nine months prior to trial. 3RP 5. Counsel stated he had interviewed the witnesses and was ready for trial. 3RP 8. The court denied Mr. Ell's request for a continuance. 3RP 36-37. During trial, Mr. Ell attempted to voice his displeasure about Mr. Hendrix's representation, but the court did not allow Mr. Ell to express his concerns. 3RP 765-66. After trial, Mr. Ell told the court that he felt his attorney did not present several key pieces of evidence in his defense. 5RP 21-22.

3. Trial Testimony

At trial, the State called 20 witnesses. First to testify was the alleged victim Roxanne Honcoop-Miller, whose version of events at trial was very different from her prior statements. Ms. Honcoop-Miller could not remember many statements she made to police

officers and other witnesses, and the State asked her detailed questions challenging each statement she allegedly made.³ The rest of the witnesses were four of Ms. Honcoop-Miller's co-workers, four medical professionals from the emergency room Ms. Honcoop-Miller visited the day after the incident, seven law enforcement officers, a medical examiner, a forensic scientist, a domestic violence advocate, and a public defender investigator.

The State attempted to impeach Ms. Honcoop-Miller's recantation at trial with four non-medical witnesses. Defense counsel argued the jury should be instructed that any prior inconsistent statements offered to impeach Ms. Honcoop-Miller were to be used only as impeachment, not as substantive evidence. 3RP 429. Before the testimony of Nooksack Police

³ The following exchange is typical of this type of questioning:

Q [Prosecutor]: Do you remember telling [the defense investigator] that the defendant had his arm around your neck?

A [Ms. Honcoop-Miller]: No.

Q: Do you remember telling her that he bit you?

A: No.

Q: Do you remember telling her that he had his hands around your neck?

A: No.

Q: Do you remember telling her that he threatened to snap your neck three different ways?

A: No....

3RP 234.

Department Sergeant Michael Ashby, the court gave the following instruction:

His testimony is not for you to consider as actual evidence of her statement, itself, but it is for your purposes of considering impeachment. In other words, whether or not her statement, her testimony here in court is consistent or inconsistent with statements that she has made at an earlier time.

That's the sole purpose for which you're to consider the statements that she made to Officer Ashby as impeachment of her trial testimony.

3RP 432-33. Detective Ashby then relayed his recollection of statements made by Ms. Honcoop-Miller that were inconsistent in some aspects with her trial testimony. 3RP 433-35.

Ms. Honcoop-Miller's co-worker, Monica Abitia testified to several statements made by Ms. Honcoop-Miller. Defense counsel objected to her relaying a statement by Ms. Honcoop-Miller that she had been anally raped by Mr. Ell. 3RP 589. The court allowed the testimony for impeachment. 3RP 589. In the middle of Ms. Abitia's testimony, the court again instructed the jury that Ms. Abitia's testimony was not for the truth of the statement, but for impeachment of Ms. Honcoop-Miller. 3RP 594.

The State also called public defender investigator Sherry Mulligan and Bellingham Police Department Officer Jeff Hinds to impeach Ms. Honcoop-Miller. Before their testimony, the court

again instructed the jury that their testimony was to be considered for impeachment. 3RP 663, 683.

a. Assaults

Ms. Honcoop-Miller testified she was romantically involved with Mr. Ell in January 2008. 3RP 48, 57. On January 15, 2008, she came home to the motel room she and Mr. Ell were sharing and saw Mr. Ell was asleep. 3RP 59. At some point Mr. Ell woke up and was angry because of a comment she made. 3RP 63. Mr. Ell grabbed Ms. Honcoop-Miller's hair, but calmed down when she began cooking. 3RP 67. Mr. Ell got angry again and slapped her in the face more than one time. 3RP 70, 72.

Ms. Honcoop-Miller related that at some point Mr. Ell tried to grab her around the throat, hit her with his fist, and possibly bit her hand. 3RP 74, 77. The beating caused her great pain. 3RP 81. When Mr. Ell's hands were on her throat she did not black out or pass out and was only slightly unable to breathe. 3RP 93. She did not recall telling the doctor she was choked several times. 3RP 232.

The next morning, when Ms. Honcoop-Miller went to work, her friend Monica was concerned because Ms. Honcoop-Miller was bruised and her hair was messed up. 3RP 122. She told Monica

that Mr. Ell hit her when he was drunk. 1RP 126. Her coworkers convinced her to go to the hospital. 3RP 141.

Sexual Assault Nurse Examiner Cathy Hardy testified Ms. Honcoop-Miller complained of strangulation, had bruising and red marks on her neck, and stated it hurt when she swallowed. 3RP 371-72. She had multiple bruises on her head and face. 3RP 373.

b. Harassment

Ms. Honcoop-Miller testified she did not remember telling any police officers Mr. Ell threatened to strangle her to death or threatened to kill her or her family. 3RP 88, 94. She could not say for sure whether she was threatened or not. 3RP 247. Nurse Hardy testified Ms. Honcoop-Miller claimed Mr. Ell told her if “she made noise and the cops came, ‘he’d kill me even if the cops came. He’d snap my neck three different ways.’” 3RP 388. Defense counsel did not object to this testimony. Ms. Honcoop-Miller denied making this statement to Nurse Hardy. 3RP 166.

c. Rape

Ms. Honcoop-Miller testified that at some point during the evening, Mr. Ell attempted to put his penis in her anus. 3RP 79. She did not recall telling an officer that she relented to intercourse out of fear. 3RP 82. Rather, Ms. Honcoop-Miller stated she agreed

to try anal sex because they had been talking about it for a while.

3RP 83-84. The sex was uncomfortable. 3RP 86.

Ms. Honcoop-Miller admitted she may have made allegations out of anger because at one point Mr. Ell said he was kissing another woman. 3RP 103. At the hospital, Ms. Honcoop-Miller felt pressured to do a sexual assault examination because she was afraid she would not get her children back from the State. 3RP 134. She did not recall telling any medical personnel at the hospital or police officers that Mr. Ell raped her. 3RP 134, 137, 232.

On cross-examination, Ms. Honcoop-Miller testified she enjoyed rough sex, including restraining, biting, and spanking. 3RP 242. She stated that Mr. Ell was so drunk that night she did not think he would remember what happened, that he kind of blacked out. 3RP 243. She stated unequivocally several times that Mr. Ell did not rape or sexually assault her. 3RP 134, 248, 255.

Sexual Assault Nurse Examiner Cathy Hardy testified that at some point, "someone figured out [Ms. Honcoop-Miller] was there for a sexual assault..." 3RP 366. Ms. Hardy testified Ms. Honcoop-Miller told her she was vaginally, orally, and rectally penetrated. 3RP 387. There was no obvious redness or bruising

of her anal area. 3RP 399. Ms. Hardy testified Ms. Honcoop-Miller told her Mr. Ell was frustrated at not being able to ejaculate and just got meaner. 3RP 388. Ms. Honcoop-Miller did not recall saying that. 3RP 164.

Emergency room doctor Nils Naviaux testified Ms. Honcoop-Miller said she had been punched, choked, and sexually assaulted. 3RP 503; Trial Ex. 81. She complained of pain in the area of her vagina and rectum, but there were no visible vaginal or anal injuries. 3RP 504, 511.

4. Admission of Mr. Ell's Custodial Statements

During motions in limine, the State informed the court that it did not intend to offer any statements made by the defendant; therefore, a CrR 3.5 hearing was unnecessary. 3RP 13. At trial, Mr. Ell testified he was drunk the night of the incident. He is a light drinker, but had four or five shots of vodka. 3RP 831. Ms. Honcoop-Miller woke him up, he spoke to someone on the phone about sexual harassment, and went back to bed. 3RP 800-01. He had no memory of hitting, biting, or forcing Ms. Honcoop-Miller to have anal sex with him. 3RP 843. He testified he was "damn near diminished capacity." 3RP 838.

The next morning Mr. Ell got up early and went to work. 3RP 801. After work, police officers contacted him at the motel and handcuffed him. 3RP 804. Mr. Ell did not understand why the officer was there. 3RP 806. He remembered telling the officer he had a bad feeling about the fact the officers were there. 3RP 806, 846. Mr. Ell stated the officer did not read him his Miranda rights until Mr. Ell arrived at the jail. 3RP 806.

On cross-examination, the State asked Mr. Ell about several statements he made to the officers after his arrest.⁴ 3RP 845-47. Defense counsel did not object. The State recalled Officer Hinds, who testified he immediately arrested Mr. Ell upon arriving at the

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- ⁴ Q: Do you remember stating to Officer Hinds that you wanted to help Officer Hinds out, but you drank a lot of alcohol, blacked out, and didn't remember anything?
A: I think I told him I passed out. I don't know if I said I blacked out to him.
[...]
Q: Do you remember telling Officer Hinds that you tried to call or text Roxanne a few times today to see what had happened last night?
A: I might have said something along those lines...
Q: Do you remember telling Officer Hinds that you just had a bad feeling about last night?
A: Of course. There was cops all over my room....
[...]
Q: Did you go say to Officer Hinds, I just want to find out what happened so I can apologize?
A: Yeah.
Q: Did you say to Officer Hinds if I did het physical with her last night, I deeply regret it?
[...]
A: ...Yes.

CP 845-47.

hotel and read him his Miranda rights, which he waived. 4RP 15-16. Officer Hinds testified to the same statements Mr. Ell stated he made. 4RP 16-17.

5. Closing Argument

During closing argument, the State referred to testimony by the impeachment witnesses and how that impeachment testimony was corroborated by physical evidence: "She was so consistent telling all these people [the medical staff and police officers]. I don't know, add them up, seven, eight, nine people what happened to her, and the injuries that are consistent with that and corroborate that." 3RP 877. Further, the State argued: "She is seriously caught between the truth which is what she told on the 16th when she went through initially all these statements. Even she keeps that same truth on February 14th [the date of the defense investigator interview] and you got to look at that here." 3RP 882-83.

The State described Ms. Honcoop-Miller telling police officers that she was raped. 3RP 902-903. The State also used Mr. Ell's statements as evidence of his guilt:

Now, he did give a little to Officer Hinds in that, well, I had a bad feeling, bad feeling about that night. What does that come from? And I was trying to get ahold of her all day to see what happened. Why? Well, he knew what happened. He had inflicted those injuries.

He wanted to apologize to her. For what? If I did get physical with her, I deeply regret it. If? There's no if. He clearly got physical with her, and he knew it.

3RP 879.

6. Jury Instructions

While discussing jury instructions, defense counsel objected to the inclusion of the definition of "sexual contact." 3RP 861. The Honorable Charles Snyder found that because the definition of sexual intercourse includes the term "sexual contact," that term should also be defined. 3RP 862; CP 100. The jury instructions included the following instruction about impeachment: "Evidence has been introduced in this case for the limited purpose of impeachment. Your [sic] must not consider this evidence for any other purpose." CP 91. Defense counsel declined to offer a voluntary intoxication instruction. 4RP 53-54.

Defense counsel also objected to the placement of the instructions dealing with the lesser included assault in fourth degree charge. 3RP 860. The court included a definition of assault in the fourth degree, but placed it 17 pages away from the assault in the second degree definitions, and after the instructions about the harassment and no-contact order violation charges. CP 102-19.

Defense counsel was worried that the order of the assault instructions would be confusing for the jury. 3RP 861. The court did not change the order of the instructions. 3RP 861.

7. Jury Question

On the morning of October 23, 2008 at 8:25 AM, the jury submitted the following note to the court: "The jury requests a definition for assault in the fourth degree, similar to the definition of assault in the second degree found in instruction no. 21." CP 80. Seven minutes later, the Judge Snyder responded: "The definitions provided in the instructions are sufficient for the jury to use. Refer to the instructions as a whole." CP 80. There is no indication in the record that the court consulted with defense counsel, the defendant, or the State.

E. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. ELL'S RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT AND ARTICLE 1, SECTION 22 BECAUSE IT REFUSED TO APPOINT NEW COUNSEL WHEN MR. ELL HAD AN IRRECONCILABLE CONFLICT WITH HIS ATTORNEY.

a. Mr. Ell has a constitutional right to representation by counsel without an irreconcilable conflict. Both the federal and state constitutions guarantee the right to counsel in criminal proceedings. U.S. Const. amend. VI; Const. art 1, § 22.⁵ The right to counsel is violated if a defendant is forced to proceed with an attorney with whom he has an irreconcilable conflict. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). An irreconcilable conflict exists if there is a "serious breakdown in communications." United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001). Where "the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant's] Sixth Amendment right to effective assistance of counsel." United States v. Moore, 159 F.3d 1154, 1158 (9th Cr. 1998) (citing Brown, 424 F.2d at 1170).

⁵ "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...." Const. art 1, § 22.

In determining whether an irreconcilable conflict exists, a reviewing court considers: (1) the extent of the conflict between the accused and his attorney, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (citing Moore, 159 F.3d at 1158-59). These factors are the same as those applied to determine whether a court erred in denying a motion to substitute counsel. Moore, 159 F.3d at 1158. Claims of denial of counsel are reviewed de novo. Moore, 159 F.3d at 1157. An evaluation of these three factors in Mr. Ell's case shows an irreconcilable conflict that requires reversal of Mr. Ell's conviction.

b. The extent of the conflict between Mr. Hendrix and Mr. Ell was substantial and irreconcilable. In Moore, the Ninth Circuit found an irreconcilable conflict where Mr. Moore described his relationship with his counsel as one clouded by "an atmosphere of mistrust, misgivings and irreconcilable differences." Id. at 1159. Moore claimed that the relationship broke down when his counsel failed to inform him of plea negotiations and failed to investigate. Id. Mr. Moore threatened to sue his counsel for malpractice and his counsel felt physically threatened by Moore. Id.

The Moore court compared this irreconcilable conflict to other Ninth Circuit cases. In Brown, the court found a conflict when a defendant was forced into trial “with the assistance of a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not, in any manner whatsoever, communicate.” 424 F.2d at 1169. In United States v. Williams, the court found a conflict where the “client-attorney relationship had been a stormy one with quarrels, bad language, threats, and counter-threats.” 594 F.2d 1258, 1260 (9th Cir. 1979).

Similar to Moore, Mr. Ell claimed Mr. Hendrix cussed him out and only met with him for a total of two hours over nine months. 2RP 5, 8; 3RP 5. Mr. Ell made serious allegations that Mr. Hendrix had revealed client confidences and offered a witness statement to support his assertion. 2RP 7; Pretrial Ex. 1. Mr. Ell claimed there was a complete breakdown in communication and he felt he could not work with Mr. Hendrix any longer. 2RP 6-7, 9. Throughout trial, Mr. Ell voiced his displeasure in Mr. Hendrix’s representation.

The conflict between Mr. Ell and Mr. Hendrix was obvious and irreconcilable. When facing such serious felony charges, a mere two hour meeting in nine months and the disrespectful actions of Mr. Hendrix caused a serious breakdown in communication such

that there was an irreconcilable conflict between Mr. Ell and Mr. Hendrix.

c. The trial court inadequately inquired into the conflict. “For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant ‘privately and in depth.’” Nguyen, 262 F.3d at 1004 (citing Moore, 159 F.3d at 1160). “[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2001). An inquiry is adequate if it addresses the defendant’s dissatisfaction, distrust, and concern and provides a sufficient basis for reaching an informed decision. Daniels v. Woodford, 428 F.3d 1181, 1200 (9th Cir. 2005).

Here, the court’s inquiry into the extent of the conflict was inadequate. While the court did ask a few questions of Mr. Ell, the questions were only cursory. When Mr. Ell complained of Mr. Hendrix contacting him only two times in four months for the purpose of talking him into continuing his trial rather than trial preparation, Judge Mura did not see a problem with this, stating, “the worst way an attorney can spend time, Mr. Ell, is spending his time with a client.” 2RP 7. When Mr. Ell alleged Mr. Hendrix was

violating the Rules of Professional Conduct by revealing client confidences, the court did not inquire further. 2RP 7.

As in Nguyen, the trial court asked the defendant and his attorney only a few cursory questions, did not question them privately, and did not interview any witnesses. Nguyen, 262 F.3d at 1005. The court gave Mr. Ell the option of staying with Mr. Hendrix or representing himself. 2RP 9-10. However, there was another clear option, appointing a conflict-free attorney. By assuming it had no power to appoint another attorney, the trial court conducted an inadequate inquiry.

d. Mr. Ell's motion to substitute counsel was timely. In evaluating the timeliness of a motion to substitute counsel, the reviewing court balances “the resulting inconvenience and delay against the defendant’s important constitutional right to counsel of his choice.” Moore, 159 F.3d at 1161 (citing United States v. D’Amore, 56 F.3d 1202, 1206 (9th Cir. 1995), overruled on other grounds by United States v. Garrett, 179 F.3d 1143, 1145 (9th Cir. 1999)). Mr. Ell’s motion to substitute counsel was made on July 17, 2008, the same day the court granted a continuance. Trial began on October 13, 2008. Like Moore, where the motion was made approximately a month before trial began, Mr. Ell’s motion was

timely and would not have caused undue inconvenience or delay. Moore, 159 F.3d at 1161. Therefore, Mr. Ell has satisfied all three prongs of the test and reversal is required.

e. The Sixth Amendment violations require reversal of Mr. Ell's conviction. An irreconcilable conflict undermines confidence in trial proceedings and is reversible error. Moore, 159 F.3d at 1161; Nguyen, 262 F.3d at 1005. Because Mr. Ell has shown: (1) an irreconcilable conflict between himself and Mr. Hendrix throughout all stages of the proceedings, (2) the trial court failed to adequately inquire about the conflict, and (3) Mr. Ell's request to substitute counsel was timely, Mr. Ell's conviction should be reversed.

2. THERE WAS INSUFFICIENT EVIDENCE OF RAPE
IN THE SECOND DEGREE.

a. The State must prove the statutory elements of rape in the second degree beyond a reasonable doubt. In a criminal prosecution the State is required to prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard for a sufficiency of the evidence challenge is whether, after viewing the evidence in a manner most favorable to the State, any rational trier

of fact could find the essential elements of the charge beyond a reasonable doubt. Green, 94 Wn.2d at 221-22.

In order to prove rape in the second degree, the State had to prove Mr. Ell engaged in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050; CP 97. Sexual intercourse

(a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010(1). Forcible compulsion is “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010(6); CP 99.

b. Under the “law of the case” doctrine, the State had to prove the additional element of intent. When the State submits an erroneous jury instruction and the court so instructs the jury, the instruction becomes the “law of the case.” State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). In criminal trials, “the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the ‘to convict’ instruction”; a defendant may challenge the sufficiency of the evidence to support any added elements. Id.

Intent is not an element of rape. State v. Brown, 78 Wn. App. 891, 896, 899 P.2d 34 (1995). The definition of sexual contact, which means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party,” contains the intent element of sexual gratification. RCW 9A.44.010(2); Brown, 78 Wn. App. at 893. Therefore, the jury need not be instructed on the definition of “sexual contact” because it includes the unnecessary intent element. Brown, 78 Wn. App. at 896 (holding trial court did not err by failing to instruct jury on the definition of “sexual contact” because intent is not an element of second degree rape).

Here, over defense objection, the trial court erroneously instructed the jury on “sexual contact,” which includes the unnecessary intent element. CP 100. Because the State did not object to the instruction, but instead proposed it, it accepted the burden of proving “sexual gratification” beyond a reasonable doubt.

c. The State failed to prove forcible compulsion beyond a reasonable doubt. The State argued Ms. Honcoop-Miller was physically forced to have sex with Mr. Ell.⁶ 3RP 865. To establish that a defendant engaged in sexual intercourse by forcible compulsion, the State must show that the defendant exerted force greater than that normally required to achieve penetration and that this force was directed at overcoming resistance by the victim. State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989).

Ms. Honcoop-Miller testified she and Mr. Ell had consensual sex. 3RP 83-84, 134, 248, 255. There was no physical evidence introduced consistent with physical force that overcame her resistance. 3RP 399, 504, 511. All testimony describing a forced sexual act was admitted for impeachment purposes only. The only

⁶Mr. Ell also contends there was insufficient evidence to prove forcible compulsion by threat, “express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped,” which is covered in the harassment section, infra, Argument 4. RCW 9A.44.010(6).

substantive evidence the court admitted to prove forcible compulsion was Ms. Hardy's and Dr. Naviaux's conclusory testimony that Ms. Honcoop-Miller was "sexually assaulted" and penetrated vaginally, orally, and anally. 3RP 366, 387, 503. The doctor and nurse did not testify to any specific acts or physical evidence that led them to these legal conclusions. The definition of "assault" given to the jury⁷ does not include the elements of forcible compulsion because it does not require force to overcome resistance. Therefore, because there was no substantive evidence that Mr. Ell used physical force to overcome Ms. Honcoop-Miller's resistance, there was insufficient evidence of rape in the second degree.

⁷ The court instructed the jury on assault:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

CP 103; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (3d Ed) (2008).

d. Dismissal of Mr. Ell's rape conviction is required. A finding of insufficient evidence to support a verdict necessitates dismissal with prejudice rather than remand for a new trial. Hickman, 135 Wn.2d at 103. Because no rational trier of fact could find the essential elements of Mr. Ell's rape charge beyond a reasonable doubt, this Court must reverse and dismiss Mr. Ell's rape in the second degree conviction.

3. THERE WAS INSUFFICIENT EVIDENCE OF FELONY HARASSMENT.

a. The State must prove all statutory elements of felony harassment and that the threat was a "true threat". To prove felony harassment, the State had to prove beyond a reasonable doubt Mr. Ell, without lawful authority, knowingly threatened to kill Ms. Honcoop-Miller and that his words or conduct placed Ms. Honcoop-Miller in reasonable fear that the threat will be carried out. RCW 9A.46.020. Since the harassment statute criminalizes "pure speech," it must comply with the requirements of the First Amendment. State v. Kilburn, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004); State v. Schaler, 145 Wn. App. 628, 636, 186 P.3d 1170 (2008), review granted, 165 Wn.2d 1015, 199 P.3d 411 (2009). There are several categories of speech that are not protected by

the First Amendment, including “true threats.” Kilburn, 151 Wn.2d at 42-43. Therefore, to avoid constitutional infringement of protected speech, RCW 9A.46.020 must be read to prohibit only “true threats.” Kilburn, 151 Wn.2d at 43. Accordingly, a conviction for harassment requires that the State prove all the statutory elements and that the accused made a “true threat.” Id. at 54.

A true threat is “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted... as a serious expression of intention to inflict bodily harm upon or to take the life” of another. Id. at 43 (internal quotations removed). Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Id. at 44.

b. Trial counsel was ineffective for failing to object to Ms. Honcoop-Miller’s statement to Nurse Hardy. Both the federal and Washington constitutions guarantee the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22. A defendant is denied this right and is entitled to reversal of his conviction when his attorney’s conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney’s

conduct. State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2d 155 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). A statement is not hearsay if it made for “purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” ER 803(a)(4). To determine whether a statement was made for purposes of medical diagnosis or treatment, courts look to whether (1) the declarant's motive was to promote treatment, and (2) the medical professional reasonably relied on the statement for treatment purposes. In re Personal Restraint of Grasso, 151 Wn.2d 1, 20, 84 P.3d 859 (2004).

Here, Nurse Hardy testified Ms. Honcoop-Miller said Mr. Ell told her if “she made noise and the cops came, ‘he’d kill me even if the cops came. He’d snap my neck three different ways.’” 3RP 388. Defense counsel did not object to this testimony. Ms.

Honcoop-Miller denied making this statement to Nurse Hardy and also testified she did not remember telling any police officers Mr. Ell threatened her. 3RP 88, 94, 166. This statement was not pertinent to any medical diagnosis or treatment. It did not describe any symptom, pain, or sensation. Therefore, Mr. Ell's counsel should have objected to its admission and his failure to do so fell below an objective standard of reasonable attorney conduct.

This statement was the only substantive evidence of the crime of felony harassment. Ms. Honcoop-Miller denied Mr. Ell threatened her at all. Absent this hearsay statement, there is no way any rational trier of fact could find the essential elements of the charge beyond a reasonable doubt. Therefore, Mr. Ell has proven there is a reasonable probability that the outcome would be different but for the attorney's conduct and his harassment charge should be reversed.

c. Even assuming the hearsay statement was admissible, there is insufficient evidence that Ms. Honcoop-Miller reasonably feared the threat would be carried out. Ms. Honcoop-Miller testified she could not say for sure whether she was threatened or not. 3RP 247. She offered no testimony that she was afraid of Mr. Ell because of a threat. Because she testified there was no threat to

kill her and there was no other evidence showing she was afraid Mr. Ell might kill her because of a threat, the State did not prove this element beyond a reasonable doubt. Therefore, this Court should reverse and dismiss this charge.

4. THE TRIAL COURT ERRED IN ANSWERING A JURY QUESTION WHEN MR. ELL WAS NOT PRESENT.

a. The trial court violated CrR 6.15(f) when it failed to notify the parties of the jury question. When the jury asks a question during deliberations, “The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response.” CrR 6.15(f). Here, the court failed to notify any parties about the jury question, answering the question within minutes of its submission. CP 80. This is a clear violation of CrR 6.15(f).

b. By violating CrR 6.15(f), the court also denied Mr. Ell the right to be present at all critical stages of his trial proceedings. An accused person has the right to attend all critical stages of his trial. U.S. Const. amends. VI,⁸ XIV⁹; Const. art. I, § 22.¹⁰ “[T]his right

⁸ “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

entitles a defendant to be present at every stage of his trial for which 'his presence has a relation, reasonably substantial, to the [fullness] of his opportunity to defend against the charge.'" State v. Pruit, 145 Wn. App. 784, 798, 187 P.3d 326 (2008) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934)). This right to be present applies to hearings where the defendant's presence would contribute to the fairness of the proceedings, and thus may not apply to hearings that address strictly legal or administrative matters. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 85 L.Ed.2d 486 (1985).

A court hearing to respond to jury questions is a critical stage of the proceedings. State v. Ratliff, 121 Wn. App. 642, 646, 90 P.3d 79 (2004). Because denial of the right to be present is an error of constitutional magnitude, the court must reverse unless the State proves beyond a reasonable doubt that Ell's trial outcome would have been the same absent this error. Id. (citing State v.

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

⁹ "No State shall ...deprive any person of life, liberty, or property, without due process of law...."

¹⁰ "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed...."

Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). In State v. Langdon, the trial court answered a jury's question about one of the jury instructions without notifying counsel. 42 Wn. App. 715, 717, 713 P.2d 120 (1986). The court's answer referred the jury back to the instructions: "You are bound by those instructions already given to you." Id. at 717. On appeal, the court found this error to be harmless because the instruction was neutral and the instruction at issue was not challenged on appeal or at the trial level. Id. at 718.

Like Langdon, the answer given by the judge in this case was neutral. However, unlike Langdon, there was an underlying issue with the exact instruction involved in the jury's question. Over defense objection, the court included the definition of the lesser included offense of assault in the fourth degree 17 pages away from the rest of the assault definitions. CP 102-119. This was a confusing placement, as the assault in the fourth degree instruction was after instructions for harassment and the no-contact order violations and appeared to have no connection to the other assault definitions. This confusion was exactly what defense counsel sought to avoid. 3RP 861.

The jury question indicates the jury was not able to connect the multiple instructions on assault: "The jury requests a definition

for assault in the fourth degree, similar to the definition of assault in the second degree found in instruction no. 21.” CP 80. Instruction number 21 was an instruction defining substantial bodily harm. CP 104. Likely the jury was confused about what sort of level of harm, if any, was necessary for the lesser included offense of assault in the fourth degree.¹¹ Seven minutes after the question was submitted, Judge Snyder responded ex parte: “The definitions provided in the instructions are sufficient for the jury to use. Refer to the instructions as a whole.” CP 80.

c. Violation of Mr. Ell’s right to be present requires reversal of his assault convictions. Violation of the right to be present at all critical stages of a criminal proceeding is subject to constitutional harmless error analysis. In re Personal Restraint of Benn, 134 Wn.2d 868, 921, 952 P .2d 116 (1998). Constitutional error is harmless only where an appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wn.2d at 425. The State has the burden of proving the error was harmless. Id.

¹¹ The definition of assault in the fourth degree was instruction number 36: “A person commits the crime of assault in the fourth degree when he or she commits an assault.” CP 119. The definition of assault was instruction number 20, 16 pages prior. CP 103.

Here, while the court's response to the jury question was neutral, the State cannot prove this error was harmless beyond a reasonable doubt. Defense counsel challenged these instructions because the order was overly confusing. Had defense counsel been given the opportunity to argue, it is likely a more informative answer to the question could have been crafted that would have remedied the confusion, such as specifically referring the jury to instruction number 20.

While evidence of some sort of assaults was strong in this case, evidence tending to show the assaults rose to the level of assault in the second degree was quite weak. In terms of the assault charge based on substantial bodily harm,¹² the only evidence to sustain that charge were bruises and bite marks. 3RP 373, 866. Bruises may be severe enough to qualify as a substantial but temporary disfigurement. See State v. Dolan, 118 Wn. App. 323, 331-32, 73 P.3d 1011 (2003); State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993). That determination is for the trier of fact, who presumably has clear instructions. Dolan, at 331-32. In this case, because the jury appeared to be confused

¹² "Substantial bodily harm" means "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

about the level of harm necessary for assault in the fourth degree and Mr. Ell did not have opportunity to argue for a better response to the jury's question, the State cannot prove beyond a reasonable doubt that any reasonable jury would have reached same result in the absence of the error.

Regarding the strangulation¹³ charge, Ms. Honcoop-Miller remembered being slightly unable to breathe, but did not testify she had the sensation of having the air cut off so she was unable to breathe. 3RP 93. Sexual Assault Nurse Examiner Cathy Hardy testified Ms. Honcoop-Miller complained of "strangulation," had bruising and red marks on her neck, and that it hurt when she swallowed. 3RP 371-72. Therefore, although there was testimony that Mr. Ell had his hands on her neck, Ms. Honcoop-Miller did not testify her ability to breathe was completely obstructed. Just because the nurse testified Ms. Honcoop-Miller was strangled, this was not specific enough to fit the legal definition of strangulation, which requires obstruction of the ability to breathe. The denial of Mr. Ell's right to be present during the answering of the jury question about the assault instructions coupled with the lack of

¹³ "Strangulation" means "to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26).

evidence of an assault rising to the level of strangulation or substantial bodily harm requires reversal of Mr. Ell's assault charges.

5. MR. ELL'S COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A VOLUNTARY INTOXICATION INSTRUCTION.

Counsel's failure to request an instruction generally waives the instructional error for appellate review. State v. Newbern, 95 Wn. App. 277, 295-96, 975 P.2d 1041 (1999). However, counsel's failure may still be raised on appeal as a constitutional ineffective assistance claim. RAP 2.5(a)(3); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (reversing conviction where counsel failed to propose an instruction that would have allowed counsel to argue Thomas' intoxication negated mens rea element of felony flight). Here, counsel's performance was deficient for failing to propose a voluntary intoxication instruction.

Where intent is an element of a crime charged, it is a valid defense that the defendant did not possess that mental state. RCW 9A.16.090. An intoxication defense allows consideration of the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the requisite mental state. State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). In order to be

entitled to a voluntary intoxication jury instruction, the defendant must show that: (1) the charged offense has an element that requires a particular mental state; (2) there is substantial evidence of intoxication; and (3) the intoxication affected the defendant's ability to acquire the required mental state. State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996).

Here, all of the charges required a particular mental state.¹⁴ Assault in the second degree requires that a person intends to assault another. RCW 9A.36.021. Felony harassment requires a knowing threat. RCW 9A.46.020. Generally, rape does not have an intent requirement, but as argued above, because the State did not object to the "sexual contact" instruction, it accepted the burden of proving the intent element of "sexual gratification" beyond a reasonable doubt.

There was also substantial evidence of Mr. Ell's intoxication and that his intoxication affected his mental state. Ms. Honcoop-Miller testified Mr. Ell was so drunk on the night of the incident she did not think he would ever remember what happened. 3RP 243. Mr. Ell testified he was drunk because he had four or five shots of vodka and was normally a light drinker. 3RP 831. He had very

¹⁴ Intent, knowledge, recklessness, and criminal negligence are the main mental states used in Washington's criminal code. RCW 9A.08.010.

limited memory of the incident. He testified he was “damn near diminished capacity.” 3RP 838. There was also testimony that Mr. Ell passed out. 3RP 845.

Given the evidence presented at trial and because the instruction would have negated the intent of all of the most serious charges facing Mr. Ell, counsel’s failure to request the instruction cannot be held to be a legitimate trial strategy. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Mr. Ell’s counsel’s performance fell below a minimum objective standard of reasonable attorney conduct. Because of the evidence of Mr. Ell’s intoxication, there is a reasonable probability that the outcome would have been different but for the attorney’s conduct. Therefore, Mr. Ell’s rape in the second degree, assault in the second degree, and felony harassment convictions should be reversed.

6. THE TRIAL COURT ERRED IN ADMITTING MR. ELL’S CUSTODIAL STATEMENTS TO LAW ENFORCEMENT WITHOUT DETERMINING IF THE POLICE COMPLIED WITH MIRANDA.

An individual has the right to be free from compelled self-incrimination while in police custody. U.S. Const. amend. V; Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). To protect this right, police must inform a

person placed under custodial arrest that he has the right to remain silent, that anything he says can be used against him in court, and he has the right to have an attorney present during questioning. Id. at 479. Miranda safeguards apply as soon as a suspect's freedom of action is restricted to a degree associated with formal arrest. State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350, review denied, 132 Wn. 2d 1015, 943 P.2d 662 (1997). In determining whether an individual was in custody, the reviewing court uses an objective standard: whether a reasonable person in the suspect's position would believe he was in police custody to the degree associated with formal arrest. Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). A reviewing court looks at the totality of the circumstances to determine if the defendant's waiver of his constitutional rights was knowing and voluntary. Miranda, 384 U.S. at 475-77.

CrR 3.5 states: "When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible." The court must inform the defendant of his right to have a hearing. CrR 3.5(b). The purpose of CrR 3.5 is to provide a mechanism by which

a defendant can have the voluntariness of an incriminating statement determined in a preliminary hearing outside the presence of the jury. State v. Williams, 137 Wn.2d 746, 751, 975 P.2d 963 (1999). Where there is no objection to the court's failure to hold a CrR 3.5 hearing, the appellant has the burden of proving this failure is a manifest error affecting a constitutional right, thus enabling him to raise it for the first time on appeal. RAP 2.5(a)(3). It is the showing of actual prejudice that makes the error "manifest" and allows for appellate review. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Failure to hold a CrR 3.5 hearing does not require reversal when a review of the record discloses there is no issue concerning a statement's voluntariness. State v. Kidd, 36 Wn. App. 503, 509, 674 P.2d 674 (1983). Where a defendant does not allege his statements are involuntary, there is no manifest error. Williams, 137 Wn.2d at 754.

In this case, the State informed the court that it did not intend to offer any statements made by the defendant; therefore, a CrR 3.5 hearing was unnecessary. 3RP 13. Later, the State elicited several statements from Mr. Ell, going back on its earlier representation to the court. 3RP 845-47. Unlike Williams, there

was an issue regarding voluntariness of Mr. Ell's statements. Mr. Ell testified the officer who arrested him handcuffed him immediately did not read him his Miranda rights until he arrived at the jail. 3RP 806. He testified he was being interrogated by the officer and admitted to making several incriminating statements while in custody. 3RP 845-47. The court's admitting of Mr. Ell's statements and failure to order a CrR 3.5 hearing prejudiced Mr. Ell because his statements were admitted without assessing their voluntariness and the State used Mr. Ell's statements as evidence of guilt in closing. 3RP 879. Therefore, this was a manifest error affecting a constitutional right and his convictions should be reversed.

7. PROSECUTORIAL MISCONDUCT DEPRIVED MR. ELL OF A FAIR TRIAL.

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Where a prosecutor commits misconduct, the defendant may be deprived of a fair and impartial trial. See id. Misconduct by the prosecutor compels reversal when there is a "substantial likelihood" it affected the verdict. Id. If the defendant fails to object, reversal is

required when the misconduct is so flagrant and ill-intentioned it causes enduring prejudice that could not have been cured by instruction. Id.

Prosecutors must not misstate the law or evidence or urge a guilty verdict on improper grounds. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Here, the prosecutor committed misconduct when she argued that evidence admitted solely for impeachment was substantive evidence. The State referred to testimony by the impeachment witnesses and how that impeachment testimony was corroborated by physical evidence: “She was so consistent telling all these people [the medical staff and police officers]. I don’t know, add them up, seven, eight, nine people what happened to her, and the injuries that are consistent with that and corroborate that.” 3RP 877. Further, the prosecutor argued that Ms. Honcoop-Miller told the defense investigator and police officers “the truth” 3RP 882-83. The prosecutor went on to describe statements Ms. Honcoop-Miller made to police officers, which were admitted for impeachment purposes only, to prove rape. 3RP 902-903.

Further, the jury instruction about impeachment evidence was vague. The current pattern instruction is:

Certain evidence has been admitted in this case for only a limited purpose. This [*evidence consists of* _____ *and*] may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 5.30 (3d Ed) (2008). This instruction contemplates the court describing the specific impeachment evidence, likely so the jury will not be confused about which evidence is substantive and which is only to be used for impeachment of a witness's credibility. However, the court in this case gave this vague instruction: "Evidence has been introduced in this case for the limited purpose of impeachment. Your [sic] must not consider this evidence for any other purpose." CP 91.

Mr. Ell was prejudiced by the prosecutor's misconduct. Here, the prosecutor impermissibly relied on impeachment evidence to argue Mr. Ell's guilt. This misconduct was exacerbated by the nonspecific jury instruction on impeachment. In a case with 21 witnesses, the jury was likely confused about which testimony was substantive and which was for impeachment. Because the

prosecutor misstated the purpose for which evidence could be considered, the jury likely based its verdict on improper grounds. This misconduct was so flagrant and ill-intentioned that it caused enduring prejudice that could not have been cured by the vague impeachment instruction. Therefore, this court should reverse Mr. Ell's convictions and order a new trial.

8. THE TRIAL COURT VIOLATED MR. ELL'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WHEN IT FAILED TO VACATE MR. ELL'S HARASSMENT CONVICTION, WHICH ENCOMPASSED THE SAME CRIMINAL CONDUCT AS THE ASSAULTS.

The double jeopardy clauses of the federal and state constitutions provide that no individual shall be twice put in jeopardy for the same offense. U.S. Const. amend. V; Const. art. 1, § 9. Washington gives its constitutional provision against double jeopardy the same interpretation the United States Supreme Court gives to the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

When a trial court finds that multiple convictions constitute the same criminal conduct, the proper remedy is to vacate the redundant counts. State v. Womac, 160 Wn.2d 643, 659, 160 P.3d 40 (2007). Failure to do so violates double jeopardy principles

even if the defendant is not sentenced on those convictions. Id. at 647. In Womac, the trial court found three convictions constituted the same criminal conduct, determined that sentencing the defendant on all three counts would violate double jeopardy, and sentenced him only on one count. The court, however, found the remaining counts were still valid convictions and entered judgment on all three convictions. Id. Reversing the trial court, the Supreme Court of Washington explained: “That Womac received only one sentence is of no matter as he still suffers the punitive consequences of his convictions.” Id. at 656.

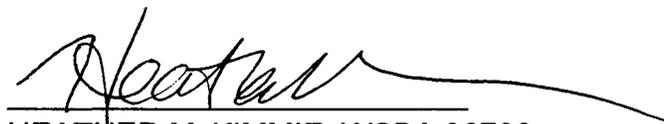
Here, the trial court found the harassment conviction constituted the same criminal conduct as the assault convictions. 5RP 29. However, the court still sentenced Mr. Ell to 22 months on the harassment charge. CP 24. The court should have vacated the harassment conviction. Failure to do so was error, and this court should remand for vacation of the harassment conviction.

F. CONCLUSION

Based on the foregoing, Mr. Ell respectfully requests this court reverse and dismiss his convictions for rape in the second degree and felony harassment. In the alternative, Mr. Ell asks his felony convictions be reversed and remanded for a new trial.

DATED this 29 day of July, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Heather", with a long horizontal flourish extending to the right.

HEATHER MCKIMMIE, WSBA 36730
Washington Appellate Project (91052)
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 62768-6-I
)	
JAYDEANE ELL,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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