71034-6

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NO. 71034-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

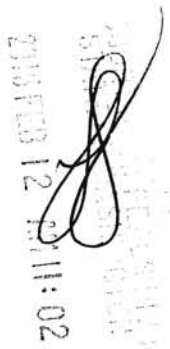
STATE OF WASHINGTON,

Respondent,

v.

ROBERT A. BAKER,

Appellant.



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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

United States Constitution

Washington Constitution

Statutes

A. ARGUMENT

1. The police unlawfully elicited statements from Mr. Baker after he unequivocally invoked his right to remain silent under the Fifth Amendment and article I, section 9.

The State offers an exaggerated version of the facts to portray the circumstances of Mr. Baker's interrogation as non-custodial. But police officers ordered Mr. Baker to leave his home late at night without any personal property, without access to his own car, after having watched numerous police officers seal off his home while they got a search warrant. While he was not in formal custody, he had little money, lacked transportation, and lived on an island from which he could not freely depart. A reasonable person in Mr. Baker's position would have felt he was "deprived of his freedom of action in any significant way." *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Deprived of his freedom of action while the police held his wallet, car, and home for purposes of searching it, Mr. Baker was effectively in custody as legally defined for purposes of *Miranda*.

Mr. Baker's statement "that he did not want to talk with police" further sufficiently "invoke[ed] his right to cut off questioning."

Berghuis v. Thompkins, 560 U.S. 370, 382,130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010). 8/16/13RP 40. As the Supreme Court recently explained, when a suspect says, "I don't want to talk about it," there is nothing equivocal or unambiguous about the invocation of the right to remain silent. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 684, 327 P.3d 660 (2014).

When the police are the people who initiate further questioning after the suspect's request to cease, they violate *Miranda*. *Id.* at 687. They are not permitted to ask the accused if he wants to talk further. *Id.* The police failed to respect Mr. Baker's request as required. Instead, two uniformed police officers told him they "needed to talk to him." 8/16/13RP 63. He was frisked and put into a patrol car. *Id.* Not until he was seated in the police station's interview room did he receive *Miranda* warnings and agreed to give a written statement, which was followed by further questioning, then he was arrested. *Id.* at 53. By being questioned despite telling the police he did not want to ask more questions, during a point in time when his freedom of action had been significantly constrained, Mr. Baker was led to believe that a request to decline answering questions would not be respected. Thus, his

constitutional rights to remain silent were violated contrary to the Fifth Amendment and article I, section 9.

The State summarily asserts that article I, section 9 contains no further protections than the Fifth Amendment. Response Brief at 29-30. But it cites inapposite cases. *Id.* at 30. For example, in *State v. Mecca Twin Theater and Film Exch., Inc*, 82 Wn.2d 87, 91, 507 P.2d 1165 (1973), the court denied a corporation's appeal of an interlocutory civil contempt order because corporations are "not protected by the constitutional privilege against self-incrimination." In *State v. Moore*, 79 Wn.2d 51, 57, 483 P.2d 630 (1971), the court ruled that article I, section 9 is limited to protecting compelled testimonial or communicative evidence, not physical evidence like a breath test to detect alcohol use. Both these cases predate *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986) and *State v. Robtoy*, 98 Wn.2d 30, 39, 653 P.2d 284 (1982) and rest on different applications of the right to remain silent.

The State's citation to *State v. Terry*, 181 Wn.App. 880, 889, 328 P.3d 932 (2014), is also unavailing, because there was no separate argument made seeking a different application of the state constitution.

As explained in Appellant's Opening Brief, the broader language of article I, section 9 demonstrates the state's framers' intent to more thoroughly protect an accused person from being compelled to give evidence against him. Once Mr. Baker asserted his right to cut off questioning, the police were prohibited from telling him he needed to answer more questions. The evidence resulting from the impermissible interrogation occurring after Mr. Baker asserted his right to cut off questioning violated article I, section 9 and the Fifth Amendment and is inadmissible. *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002).

2. The potential that the victim was asleep at the inception of the assault does not sufficiently establish she was particularly vulnerable and incapable of resistance in the context of the sentence authorized for first degree murder.

To establish the legal requirements that a victim's particular vulnerability justifies an exceptional sentence, the State must show (1) the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability was a substantial factor in the commission of the crime. *State v. Gordon*, 172 Wn.2d 671, 680, 260 P.3d 884 (2011) (citing *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006)).

The basic premise of an exceptional sentence is that the circumstances of the offense occurred in a manner that is significantly more egregious than contemplated by the Legislature when setting the standard range. For example, in a prosecution for first degree assault, the horrible, permanent injuries suffered by the victim still fall within the statutory definition of "great bodily harm." *State v. Stubbs*, 170 Wn.2d 117, 128, 240 P.3d 143 (2010). "No injury can exceed this level of harm, let alone *substantially* exceed it." *Id.* (emphasis in original). Therefore, the severity of the injuries cannot support a sentence above the standard range. *Id.*

Here, the prosecution asserts that any time the perpetrator is able to take "additional advantage" of "the conditions" that help the defendant accomplish the criminal act, the particular vulnerability aggravating factor is established. Response Brief at 35. It contends that any time the victim of a murder is surprised so she is not ready to promptly resist, she is particularly vulnerable. *Id.* This overbroad interpretation of the essential elements of the particularly vulnerable victim aggravating factor should be rejected.

The Legislature set the standard range for a person who premediates the intent to kill. *See* RCW 9.94A.505; RCW 9.94A.515.

The element of premeditation elevates the seriousness level and punishment imposed for the offense from intentional murder. *See* RCW 9.94A.510 (setting seriousness levels for offenses); RCW 9A.32.030; RCW 9A.32.050. The increased standard range punishment necessarily contemplates the fact that there has been premeditation, which makes it far more likely that the perpetrator may surprise the victim. RCW 9A.32.030(1)(a). First degree premeditated murder inherently contemplates that the offense is committed at a time that the victim is less able to resist.

Ms. Baker was a healthy adult. She was not preyed upon due to infirmity of age or sickness. She was not substantially weaker or smaller than Mr. Baker. 4RP 507; 8/16/13RP 68, 73. She worked full time, traveled regularly, and was not under the influence of any drugs or alcohol. She traveled regularly for work. 3RP 264; 4RP 634.

Ms. Baker was not particularly vulnerable as legally defined in order to authorize the imposition of an exceptional sentence.

3. By abandoning Mr. Baker at sentencing rather than advocating for him, Mr. Baker was denied his right to effective assistance of counsel at sentencing.

Mr. Baker was completely denied his constitutional right to effective assistance of counsel at sentencing when the putative attorney

who stood by his side had not participated in the case, made absolutely no argument on Mr. Baker's behalf – not even asking for a standard range sentence -- and told the court Mr. Baker would not speak on his own behalf.

"[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 653-54, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). No specific showing of prejudice is required. *Id.*

There was a wholesale lack of adversarial testing at Mr. Baker's sentencing. The prosecutor arranged for a litany of speakers who begged the court to impose as much punishment as possible, while the stand-in attorney did not even ask the court to set a sentence within the standard range, notwithstanding Mr. Baker's lack of criminal history. Mr. Baker is entitled to a sentencing hearing at which he is fairly represented.

B. CONCLUSION.

For the foregoing reasons and those explained in Appellant's Opening Brief, this court should order a new trial and sentencing hearing, and any further relief this Court deems appropriate.

DATED this 10th day of February 2015.

Respectfully submitted,

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Attorneys for Appellant

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	)	
Respondent,	)	
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	)	
ROBERT BAKER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **REPLY 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:

[X] ISLAND COUNTY PROSECUTOR'S OFFICE P.O. BOX 5000 COUPEVILLE, WA 98239	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ROBERT BAKER 369769 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF FEBRUARY, 2015.

X_____

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