NO. 47057-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

JARROD ALAN WIEBE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-02414-4

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# BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

The State agrees with Wiebe's recitation of the factual and procedural history of this case.

## ARGUMENT

### I. THE TRIAL COURT DID NOT ERR IN ADMITTING WIEBE'S STATEMENTS TO THE DETECTIVES.

Wiebe contends that the trial court erred in concluding, as a mixed decision of law and fact, that Wiebe did not unequivocally invoke his Fifth Amendment right to silence following his knowing, intelligent, and voluntary waiver of that right. The State disagrees with Wiebe, and asks this Court to find that Wiebe's remark was equivocal and unclear in the context of how and when it was uttered.

A person may waive his or her *Miranda* rights; the government bears the burden of showing, by a preponderance of the evidence, that the suspect understood his rights and voluntarily waived them. *State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008) (citing *Edwards v.*

*Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880 (1981)). Wiebe does not challenge the trial court's finding that he knowingly, intelligently, and voluntarily waived his right to silence. Rather, he claims that the trial court erred in finding that he did not unequivocally revoke his waiver. Whether Wiebe unequivocally revoked his waiver of his constitutional right to silence is a mixed question of law and fact. *In re Cross*, 180 Wn.2d 664, 680, 327 P.3d 660 (2014); *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004). In this case the trial court memorialized its findings of fact and conclusions of law in a memorandum opinion found at Clerk's Papers 26-28. Wiebe doesn't assign error to any specific finding of fact or conclusion of law. He appears to assign error only to the trial court's conclusion of law where the court said "Therefore the court is not suppressing the statements of the Defendant on this December 19, 2013 interrogation." CP 28. Unchallenged findings of fact are treated as verities on appeal. *State v. Pierce*, 169 Wn.App. 533, 544, 280 P.3d 1158 (2012); *State v. Lorenz*, 152 Wn.2d 22, 30, 93 P.3d 133 (2004). When error is assigned to a conclusion of law, this Court reviews de novo whether the trial court derived a proper conclusion of law from its findings of fact. *Id.*

Here, the trial court made a finding of fact that Wiebe's remark, discussed below, "was not an unambiguous and unequivocal invocation of his rights." CP 27. This finding of fact is not challenged here. Rather,

Wiebe—in arguing his statement should not have been admitted—is arguing that this, as a conclusion of law, is improper.

Following Wiebe's arrest, he voluntarily spoke with Detectives Hoss and Stevens. Exhibit 2; RP 32-34. At pages 1-2 of Exhibit 2 on the CrR 3.5 hearing, Wiebe answers questions about his name and date of birth. Exhibit 2 at p. 1. Wiebe spells both his first and last names. Exhibit 2. Detective Stevens then asks Wiebe whether he's been advised of his rights, and he confirms that he has. *Id.* Detective Stevens asks Wiebe if, with those rights in mind, he is willing to talk to the detectives? Wiebe says "Yes sir." *Id.* Detective Stevens confirms that Wiebe can see the voice recorder, and asks Wiebe if he (Stevens) has permission to record him. Exhibit 2 at p. 1-2. Wiebe replied "Yes sir." Exhibit 2 at p. 2. At that point, Detective Stevens asks this open-ended question: "Why don't you tell me the story about what, what happened today?" Exhibit 2 at p. 2. Wiebe responded "I, I have nothing to say." *Id.* The trial court correctly concluded that this remark was not an unequivocal invocation of Wiebe's right to remain silent.

A Fifth Amendment right, whether it be the right to silence or the right to speak to an attorney before questioning, must be invoked *unambiguously*. *State v. Piatnitsky*, 180 Wn.2d 407, 413, 325 P.3d 167

(2014).[1] "This is a bright-line inquiry; a statement either is ' "an assertion of [*Miranda* rights] or it is not."' *Piatnitsky* at 413, quoting *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350 (1994) (quoting *Smith v. Illinois*, 469 U.S. 91, 97–98, 105 S.Ct. 490 (1984)). The inquiry is objective, meaning that "an invocation must be sufficiently clear 'that a reasonable police officer in the circumstances would understand the statement to be [an invocation of *Miranda* rights].'" *Piatnitsky* at 414, quoting *Davis* at 459. A reviewing court must consider the context and circumstances leading up to a claimed invocation of a Fifth Amendment right. *Cross*, supra, at 683, *Piatnitsky*, supra, at 411-12. The statements or conduct leading up to the alleged invocation are not examined in isolation. *State v. I.B.,* 187 Wn.App.315, 321, 348 P.3d 1250 (2015).

For example, in *Piatnitsky*, supra, the defendant was not found to have unequivocally invoked his right to remain silent when he said "I'm not ready to do this, man." The detective asked for clarification because Piatnitsky had earlier indicated his willingness to confess on an audio recording. Piatnitsky then said "I just write it down, man, I can't do this. I, I, I just write, man. I don't, I don't want...I don't want to talk right now, man." *Piatnitsky* at 414. The Supreme Court found that Piatnitsky had not unequivocally invoked his right to remain silent. *Id.* Similarly, in *State v.*

[1] "[W]e draw no distinctions between the invocations of different *Miranda* rights." *Piatnitsky* at 413.

*Walker*, 129 Wn.App. 258, 274, 118 P.3d 935 (2005), the defendant was not found to have unequivocally invoked his right to remain silent when told the police that he didn't want to say anything that would make him look guilty or incriminate him. In *State v. Radcliffe*, 164 Wn.2d 900, 907, 194 P.3d 250 (2008), the defendant was not found to have unequivocally invoked his right to counsel when he said "maybe [I] should contact an attorney." In *State v. Gasteazoro-Paniagua*, 173 Wn.App. 751, 756-59, 294 P.3d 857 (2013), the defendant did not unequivocally request an attorney when he said, in response to police questioning, "I mean I guess I'll have to talk to a lawyer about it and, you know, I'll mention that you guys are down here with a story." In *State v. I.B.,* 187 Wn.App. 315, 317, 323, 348 P.3d 1250 (2015), however, the juvenile defendant unequivocally invoked his right to remain silent when, in response to the initial question of whether he would waive his rights and speak to the police, he shook his head from side to side. Likewise, in *Cross,* supra, the defendant unequivocally invoked his right to remain silent when, in response to being read his *Miranda* rights, he said "I don't want to talk about it." *Cross* at 684.

Here, the plain language used by Wiebe would not have led a reasonable officer to conclude that Wiebe was unequivocally revoking his waiver of his Fifth Amendment right to remain silent. Unlike the

defendant in *State v. I.B.*, supra, Wiebe did not say "I have nothing to say" in response to the *initial question* of whether he was willing to speak to the officers. He freely indicated both his willingness to speak to the detectives and his willingness to be recorded. Rather, he said "I have nothing to say" in response to an open-ended question about what he had to say, overall, about what had occurred that day. Moreover, Wiebe's remark came right after he told the detectives he was willing to talk and be recorded. This makes his remark, if viewed as an unequivocal revocation of the waiver he had made seconds earlier, very strange. If Wiebe had experienced a very rapid change of heart about whether to speak to the detectives, one would expect him to say something along the lines of "You know, I've changed my mind. I don't want to talk to you." As this Court noted in *Gasteazoro-Paniagua*, a reasonable police officer would expect a defendant revoking a prior express waiver of *Miranda* rights to "tell [the officers] outright he would not answer any more questions..." *Gasteazoro-Paniagua* at 759. But the words, "I, I have nothing to say," in response to an open-ended, general question about what occurred that day, coming immediately after an express waiver of the right to remain silent, are ambiguous and could just as easily be construed as "I didn't do anything wrong," or "I don't want to incriminate myself" (as in *State v. Walker*, supra, at 274). Wiebe

did not use words that unequivocally expressed revocation of the waiver of rights he gave mere seconds before.

Although not required to clarify Wiebe's intent in the face of an equivocal remark, these detectives did so in an abundance of caution. *Gasteazoro-Paniagua* at 761, citing *Davis v. United States,* supra, at 461 ("Although we hold that Gasteazoro–Paniagua's statement was not an unequivocal request for counsel, we take the opportunity to emphasize that 'when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney.'") Detective Hoss heeded this Court's suggestion, in *Gasteazoro-Paniagua*, about clarifying an equivocal remark and said:

> All right. Here's, here's the deal Jarred,we are going to complete a report. You got that right? From your Theft Ill's and stuff, you know, we put down what happened. Well there's (inaudible) to be involved, right? We've talked to everybody else so we're gonna get their side of the story. All we're lookin for is your side of it. Now, you don't have to tell us, you know, you remember your rights, I can reread em if you want but I'm giving you the opportunity here cause this is the last chance you got to give your side of the story as to what happened, how you got here cause I got to be honest with you this is kind of a fucked up situation and it's got long term consequences. Now whether you want to be cooperative in it or not that's completely up to you. I don't care one way. If you decide that this interview is over tell me right now and I get to go home. But I'm willing to give you that chance and stick around if want it but this is the last chance. I'm not gonna coerce you

> into anything, I'm only gonna give you the opportunity but I want you to know that the charges that we're lookin at are significant and serious. So having that additional information in mind, we aint talking about your Theft Ill's now. It's completely up to you and I will give you fifteen seconds to decide whether you want to talk with us or not. That's fifteen seconds my friend. I can see you're worried about your future.

Exhibit 2.

Detective Hoss, no fewer than four times in the above passage, reminded Wiebe of his right to remain silent. That Wiebe did not unequivocally revoke his prior waiver of his right to remain silent is abundantly clear following Hoss's clarification of his remark, after which Wiebe voluntarily spoke to the detectives.

The trial court did not err, as a matter of law, in admitting Wiebe's statement to detectives Hoss and Stevens.

Should this Court disagree with the State on the admissibility of Wiebe's statement, it must then consider whether the error is harmless. *In re Cross,* supra, at 688. The State bears the burden of proving the error is harmless beyond a reasonable doubt. *Id.* To do so, the State must show that the remaining evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 p.2d 1182 (1985).

In the absence of Wiebe's statement to the police, the remaining evidence is sufficient to sustain his convictions. However, the State is unable to credibly argue that the remaining untainted evidence admitted at trial is "overwhelming." Wiebe's statement was critical to the State's presentation. The State is unable to say that this alleged error was harmless beyond a reasonable doubt in this trial. Should this Court find error in the trial court's admission of Wiebe's statement, the remedy is to remand for a new trial with suppression of the inadmissible statement. *State v. Rhoden*, ---Wn.App.---, 356 P.3d 242, 248 (2015).

## II. THE TRIAL COURT DID NOT ALLOCATE A BURDEN OF PROOF TO WIEBE.

Wiebe assigns error to the trial court's instruction number eight, in which the trial court instructed the jury as follows:

> A person is not an accomplice in a crime committed by another person if he or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

CP 48. Wiebe objected to this instruction at trial. The accomplice liability statute, found at RCW 9A.08.020, provides, in salient part:

> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

> (i) Solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) Aids or agrees to aid such other person in planning or committing it; or
>
> (b) His or her conduct is expressly declared by law to establish his or her complicity.
>
> ....
>
> (5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:
>
> (a) He or she is a victim of that crime; or
>
> (b) He or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.
>
> (6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his or her complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

Wiebe assumes that RCW 9A.08.020 (5) (b) constitutes a defense to a crime in which the State alleges the defendant was an accomplice. Wiebe cites no case which explicitly holds that this provision of the accomplice liability statute is a defense, rather than merely part of the definition of what it means to be an accomplice. The State, likewise, has found no citable authority which directly addresses this question. (*Cf.*

*State v. Handley*, 115 Wn.2d 275, 293, 796 P.2d 1266 (1990), in which the Supreme Court references, in dictum, the "withdrawal defense" to accomplice liability. See also *State v. Whitaker*, 133 Wn.App. 199, 235, 135 P.3d 923 (2006), in which the jury was instructed that a person is not an accomplice if he terminates complicity prior to the crime and makes a good faith effort to prevent the commission of the crime. The defendant argued that the prosecutor committed misconduct when he argued that the defendant's claim of termination of complicity was unsupported by the evidence, and thereby "shifted the burden of proof." The Court rejected this claim, and did not reference the termination of complicity claim as a "defense." Further, the defendant, by framing his assignment of error as one of burden shifting, acknowledged that the burden of showing a lack of termination rests inherently with the State, and did not argue that the mere giving of this instruction to the jury somehow allocated a burden to the defendant where no burden was explicitly stated.)

In Washington, there are two types of defenses. The first is an "affirmative defense," in which a defendant argues he is entitled to acquittal even though the he committed every element of the act with which he was charged. 13A Seth A. Fine and Douglas J. Ende, Washington Practice: Criminal Law, § 3603 (2014-2015 ed.). A negating defense or "quasi-defense," in contrast, negates one or more of the

elements of the crime. *Id.* In the case of a negating defense, the State bears the burden of disproving the defense beyond a reasonable doubt "because the Constitution does not allow the defendant to be given the burden of disproving an element of the crime." *Id*; *State v. W.R., Jr.*, 181 Wn.2d 757, 763, 336 P.3d 1134 (2014).

The State respectfully disagrees with Wiebe that this provision of the accomplice liability statute sets forth a statutory defense. In the absence of explicit language from the legislature denoting this as a defense, or case law specifically interpreting this provision as a defense, this provision is merely part of the accomplice definition, and the State bears the burden of proving that a defendant acted as an accomplice if accomplice liability is being asserted as the vehicle of criminal culpability. Accomplice liability is not an element of the crime charged. *State v. Teal*, 117 Wn.App. 831, 838, 73 P.3d 402 (2003), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004). The pertinent law on accomplice liability need not be set forth in a single instruction. *Teal* at 838, citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). Even where the State has the burden to disprove a defense beyond a reasonable doubt, that burden may be set forth in the to-convict instruction or addressed by a separate instruction. *Teal* at 839. The key test is "whether the jury is informed of

the State's burden in an understandable way." *Id.*; *State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988).

Assuming arguendo that this provision of the accomplice liability statute sets forth a statutory defense, Wiebe's claim that he was allocated a burden of proof is unsupported by the record. See Brief of Appellant at 36, 39. Unlike what occurred in *State v. Coristine*, 177 Wn.2d 370, 300 P.3d 400 (2013), and *State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482 (2013), the jury was not instructed that the defendant bore the burden of proving a defense by a preponderance of the evidence. With respect to the burden of proof, the jury was solely instructed that the State bore the burden of proving every element of every crime charged. See CP 44. To the extent that Wiebe's claim is predicated entirely on his assertion that Wiebe was allocated a burden of proof, it fails because he was not.

To the extent Wiebe's argument can be read as claiming that the instructions would have confused the jury into believing that Wiebe bore a burden of proof, the claim likewise fails because the jury was properly and explicitly instructed that the State solely bore the burden of proof, and the jury is presumed to follow the court's instructions. CP 44; *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007); *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Moreover, the instructions must be read together and viewed as a whole, and they do not mislead the jury

where they accurately state the law and permit each party to argue its theory of the case. *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). In the absence of an instruction allocating a burden of proof to Wiebe on any point, the controlling instruction given to the jury was that the State bore the burden of proving Wiebe guilty beyond a reasonable doubt.[2] CP 44. Wiebe asks this Court to find there was an implied allocation of a burden of proof, but this Court should decline that invitation because, as noted, the jury was presumed to follow the trial court's instruction that the State bore the burden of proof and the defendant did not bear *any* burden of proof.[3]

The State respectfully disagrees that RCW 9A.08.020, which defines what it means to be an accomplice, creates a statutory defense for

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[2] The State admits, as it must, that this instruction was arguably irrelevant and unnecessary. Wiebe made it clear that he did not intend to argue that he became an accomplice at some point, but then terminated his complicity by either notifying law enforcement or preventing the crime from occurring. Rather, he intended to argue that he didn't have knowledge of the crimes his cohorts intended to commit—meaning, he never became an accomplice to begin with. The State was obviously concerned that Wiebe would advance some type of withdrawal theory in his closing argument, and likely wanted the jury apprised of what the law actually says with respect to termination of complicity so that the jury would not be misled. Nevertheless, the instruction was an accurate statement of the law, and it did not prevent Wiebe from arguing his theory of the case, which was that the State failed to prove Wiebe engaged in any conduct which would have made him an accomplice.

[3] It should be noted that Wiebe does not argue, as the defendants did in *State v. Coristine* and *State v. Lynch*, supra, that the trial court violated his Sixth Amendment right to control his own defense by forcing him to raise a defense he did not choose to raise. Rather, Wiebe confines his claim to the propositions that 1) this is a statutory defense, as opposed to simply part of the accomplice definition, 2) that the defense is a negating defense, rather than an affirmative defense, and 3) that the trial court allocated a burden of proof to Wiebe that it could not constitutionally allocate to him because this is a negating defense.

terminating complicity. The State submits that RCW 9A.08.020 (5) (b) is part of the definition of what it means to be an accomplice. The State also disagrees that Wiebe was allocated an unwritten, non-verbal burden of proof by the trial court. The State asks this Court to affirm Wiebe's conviction.

## III. WIEBE WAS NOT DENIED A PUBLIC TRIAL.

Wiebe claims that the trial court denied him his right to a public trial by making peremptory challenges on a clip board rather than requiring the lawyers to declare, out loud, who was being peremptorily challenged. The Supreme Court has now rejected this claim. Written peremptory challenges, similar to what occurred in this case, do not offend the public trial right. There is no requirement the peremptory challenges be spoken aloud. *State v. Love*, 183 Wn.2d 598, 607, 354 P.3d 841 (2015). This claim fails under *Love.* Wiebe's conviction should be affirmed.

## CONCLUSION

Wiebe's judgment and sentence should be affirmed in all respects.

DATED this 13th day of October 2015.

Respectfully submitted:

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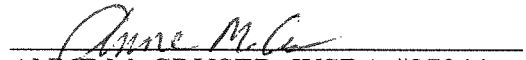
By: 
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**Comments:**

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