73531-4

No. 73531-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

NAVRONE RANDMEL,

Appellant.

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

APPELLANT'S REPLY BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. Under the jury instructions and because possession of a stolen motor vehicle is an alternative means offense, the State bore of the burden of proving that Mr. Randmel "disposed of" or "concealed" the vehicles.

a. The law of the case doctrine remains good law in Washington.

To convict Mr. Randmel on the possession of stolen vehicle counts, the jury was instructed that the State must prove that Mr. Randmel knowingly received, retained, possessed, concealed, or disposed of the vehicles at issue. CP 38, 40, 42. Consistent with decisions from Division One of this Court, under the law of the case doctrine the State assumed the additional burden of proving each of these five alternatives. State v. Hayes, 164 Wn. App. 459, 480-81, 262 P.3d 538 (2011); State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004).

Under the law of the case doctrine, jury instructions not objected to became the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). "The law of the case is an established doctrine with roots reaching back to the earliest days of statehood." Id. at 101. Hence, in the late 19th century, the Washington Supreme Court held "whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case. . . ." Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45

P. 743, 46 P. 407 (1896). The doctrine finds special support in the Washington Constitution, which provides that judges "shall declare the law." Const. art. I, § 16; see id. at 185 (discussing provision in connection with the doctrine).

Despite its longstanding roots in Washington law, the State contends that the law of the case doctrine no longer exists in Washington. Br. of Resp't at 20. The basis for this argument is a United States Supreme Court case that was issued about a week before Mr. Randmel filed his Opening Brief. Musacchio v. United States, 577 U.S. ___, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016). In Musacchio, the United States Supreme Court held that a challenge to the sufficiency of the evidence under the Fourteenth Amendment "should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction." Musacchio, 136 S. Ct. at 715.

This holding does not overrule Hickman or abrogate long-standing Washington precedent on the law of the case doctrine. The law of the case doctrine in Washington is not premised on the due process clause of the Fourteenth Amendment. Rather, it is premised on the Washington Constitution and the rules of appellate review as crafted by Washington courts since the birth of this state. See Hickman, 135 Wn.2d at 101-02. (collecting cases). As the Washington Supreme Court has indicated, the

law of the case doctrine arises "from the nature and exigencies of appellate review," not simply from the constitutional principle that the State must prove every element of the crime beyond a reasonable doubt:

> This case is framed by two fundamental principles of law: the first constitutional, the second arising from the nature and exigencies of appellate review. The first principle is that constitutional due process requires that the State prove every element of the crime beyond a reasonable doubt. The second principle is that "jury instructions not objected to become the law of the case." If the jury is instructed (without objection) that to convict the defendant, it must be persuaded beyond a reasonable doubt of some element that is not contained in the definition of the crime, the State must present sufficient evidence to persuade a reasonable jury of that element regardless of the fact that the additional element is not otherwise an element of the crime.

State v. France, 180 Wn.2d 809, 814, 329 P.3d 864 (2014) (emphasis added) (citations omitted).

The standard used to evaluate the sufficiency of evidence in criminal cases can be traced to Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) and In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Winship held that the due process clause of the Fourteenth Amendment requires the State to prove every element of a criminal offense beyond a reasonable doubt. Winship, 397 U.S. at 364. Jackson held that in evaluating whether the State has met this burden, the Court should view the evidence in the light most favorable to the prosecution and analyze whether a rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt. Virginia, 443 U.S. at 319. Shortly after Jackson, the Washington Supreme Court adopted this standard in evaluating the sufficiency of the evidence. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

The Washington Supreme Court also adopted the same standard in reviewing whether the State has met its burden to prove an added requirement in a jury instruction. Hickman, 135 Wn.2d at 103. But it does not therefore follow that the law of the case doctrine is dependent on the due process clause of the Fourteenth Amendment, as construed by the United States Supreme Court. The law of the case doctrine was applied in criminal cases predating Winship, Jackson, and Green. See, e.g., State v. Hames, 74 Wn.2d 721, 724-25, 446 P.2d 344 (1968).

Accordingly, the State is incorrect in its contention that Mussachio overruled Hickman. Because the issue is not a matter of federal constitutional law, States throughout the union remain free to continue use the jury instructions as the yardstick in deciding whether parties—including the government, have met their burden. See Michigan v. Long, 463 U.S. 1032, 1040, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds). Hickman remains good law and must be followed.

b. This Court should continue to apply *Hayes* and *Lilard*, which are this Court's own precedent.

Panels from Division One of this Court have held in two published decisions that under the law of the case doctrine, if more than one of these alternative definitions of "possession" are placed in a "to-convict" instruction, there must be sufficient evidence to support each alternative in order to uphold the verdict. Lillard, 122 Wn. App. at; Hayes, 164 Wn. App. at 480-81. The State is asking for a decision departing from these two decisions. Mr. Randmel asks that this Court apply these decisions under *stare decisis* because the State has not shown that these decisions are incorrect or harmful.

"*Stare decisis*," latin for "to stand by things decided," is "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." STARE DECISIS, Black's Law Dictionary (10th ed. 2014). *Stare decisis* "requires a clear showing that an established rule is incorrect and harmful before it is abandoned." In re Stranger Creek & Tributaries in Stevens County., 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

"The various panels of the Court of Appeals strive not to be in conflict with each other because, like all courts, we respect the doctrine of stare decisis." Grisby v. Herzog, 190 Wn. App. 786, 807, 362 P.3d 763

(2015). According to the Grisby panel, the In re Stranger Creek test does not apply to Court of Appeals decisions. Other decisions indicate otherwise. See, e.g., State v. Stalker, 152 Wn. App. 805, 811-12, 219 P.3d 722 (2009) ("We apply the same standard for overruling precedent as does the Supreme Court."); see Grisby, 190 Wn. App. at 808 n.5 (collecting decisions).

As explained in detail below, Lilard was correctly decided for reasons not stated in the decision. Contrary to the dicta in Hayes (stating the definitional statute does not create alternative means), the five various terms in RCW 9A.56.140(1) *are* alternative means of possessing stolen property, including a stolen vehicle. This is because RCW 9A.56.140(1), unlike the statutes cited by the State, is not a mere definitional statute.

c. Possession of a stolen vehicle is an alternative means offense.

The offense of possession of a stolen vehicle incorporates the terms applicable to the offense of possession of stolen property. State v. Satterthwaite, 186 Wn. App. 359, 364, 344 P.3d 738 (2015)[1]; 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 77.21 (3d Ed) (comment). The statute that makes it an offense to commit the crime of possession of a

[1] The Supreme Court has granted review of an unpublished case which applied Satterthwaite. State v. Porter, noted at 184 Wn.2d 1026, 364 P.3d 119 (2016).

stolen property is circular and does not actually set out the elements of the crime. RCW 9A.56.068(1) ("A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle."). This provision only takes on substantive meaning when read in conjunction with RCW 9A.56.140(1), which sets out all the elements:

> "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140(1). This provision does more than simply define a term. It defines the offense.

Hence, the cases the State relies on are inapposite. The cases and analysis that this Court should look to are those involving the crime of theft. Like possession of a stolen vehicle, theft is an alternative means crime. State v. Linehan, 147 Wn.2d 638, 647, 56 P.3d 542 (2002). The three alternatives come from a definitional statute:

> (1) "Theft" means:
> (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
> (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.020; Linehan, 147 Wn.2d at 649 (jury must be unanimous as to whether defendant commits theft by wrongfully obtaining, exerting unauthorized control, or obtaining the property by color and aid of deception).

This results because, as explained in Linehan, the theft statutes are structured differently than other criminal statutes, which results in alternative means crimes despite that the alternatives are derived from a definitional statute:

> The theft statutes are structured differently than other crimes. . . . The statutes describing the degrees of theft do not provide alternative means of committing the crime, nor do they define the crime. Rather, the crime of theft is defined in terms of the alternative means of commission, in a statute separate from those defining the degrees of theft. *Compare* RCW 9A.56.020 *and* 9A.56.030-.050.

Linehan, 147 Wn.2d at 647 (emphasis added). Moreover, as explained by this Court in an earlier case,

> RCW 9A.56.020 is set apart, separate and distinct, from the chapter's general definitions contained in RCW 9A.56.010, and, in essence, actually defines the *crime* of "theft." The crime is merely segregated by degree in subsequent sections.

State v. Laico, 97 Wn. App. 759, 987 P.2d 638, 641 (1999).

The analysis from the Linehan and Laico courts apply here. While there are not different degrees for the offense of possession of a stolen

vehicle, RCW 9A.56.140(1) essentially defines the crime of possession of a stolen vehicle. See Satterthwaite, 186 Wn. App. at 364; 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 77.21 (3d Ed) (commenting that "This definition applies to the other crimes relating to possessing stolen property in RCW Chapter 9A.56, and the definition is the source of the *mens rea* element for all these possession offenses."). Like RCW 9A.56.020, this provision is set apart from the general definition section at RCW 9A.56.010. Moreover, like theft, the offense of possession of stolen property—which used to include vehicles[2]—has three different degrees. Compare RCW 9A.56.150, .160, .170, with RCW 9A.56.030, .40. , 50.

Accordingly, like the unique definitional statute for "theft," which sets out three alternative means, the unique definitional statute for possession of stolen property sets out five alternative means. Applying Linehan, this Court should conclude that to "receive, retain, possess, conceal, or dispose of" are alternative means which must be supported by sufficient evidence. Thus, when a jury is instructed on these alternatives, jury unanimity is required as to the means unless there is sufficient evidence to prove each means. Linehan, 147 Wn.2d at 645; Ortega-

[2] The offense of possession of a stolen vehicle was created in 2007. Laws of 2007, ch. 199. The result is that possessing a stolen vehicle is a class B felony regardless of the value of the vehicle.

Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). Lillard and Hayes were correctly decided, albeit for reasons not explained therein.

A panel on Division Two of this Court has recently reached a different conclusion on this issue. State v. Makekau, 46929-4-II, 2016 WL 3188944, at *6 (Wash. Ct. App. June 7, 2016). Makekau essentially analyzes the issue in the same manner as the State does in its brief. Also like the State, Makekau does not appear to have considered the possibility that the offense of possession of stolen vehicle is akin to theft because the definitional statute at issue is unique. The opinion does not cite to or discuss Linehan or Laico. The cases the State and Makekau rely on are State v. Lindsey, 177 Wn. App. 233, 311 P.3d 61 (2013), State v. Owens, 180 Wn.2d 90, 323 P.3d 1030 (2014) and State v. Sandholm, 184 Wn.2d 726, 364 P.3d 87 (2015).

Owens and Lindsey involved the crime of trafficking in stolen property in the first degree. The statute setting out this offense reads:

> (1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.
>
> (2) Trafficking in stolen property in the first degree is a class B felony.

RCW 9A.82.050. The defendants in Owens and Lindsey argued each of the terms in the first part of the statute created eight alternative means. The Owens and Lindsey courts held the language created only two alternative means. Owens, 180 Wn.2d at 98; Lindsey, 177 Wn. App. at 241. The rationale was that the first seven terms were "merely different ways of committing one act, specifically stealing." Owens, 180 Wn.2d at 99.

Sandholm involved driving under the influence. The provision read:

> (1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
> (b) While the person is under the influence of or affected by intoxicating liquor or any drug; or
> (c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

Former RCW 46.61.502 (2008). The court reasoned that these "statutory subsections describe facets of the same conduct, not distinct criminal acts." Sandholm, 184 Wn.2d at 735. The defendant's "*conduct* is the same—operating a vehicle while under the influence of certain substances." Id.

As explained earlier, in contrast to these cases, the statutory scheme for possession of a stolen vehicle, like the scheme for theft, is unique. This distinguishes the offense from those at issue in Owens and Sandholm. Moreover, the five terms—possesses, receive, retain, conceal, and dispose of—are varied. It is possible to commit the last four alternatives without necessarily "possessing" the thing in question, as illustrated below.

"Possession of property may be either actual or constructive." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). "Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." Id.

When one possesses a vehicle, the classic example would be driving the vehicle because the vehicle is under the driver's dominion and control. In contrast, a person could "receive" a vehicle without it being in their dominion and control, such as by having the vehicle delivered to an agreed location not in the person's control, like a public street. Similarly, a person could "retain" a vehicle without possessing it as well such as by authorizing another person to use the vehicle. A person could also "conceal" a vehicle without possessing it, such as by having the vehicle

covered with a tarp. And a person could "dispose of" a vehicle without possessing it—imagine a person authorizing a scrapyard employee to pulverize a vehicle that was seized by the scrapyard.

In sum, the statute at issue is more like the theft statute. The decision on point is Linehan, not Owens or Sandholm. Accordingly, this Court should continue to apply Lillard and Hayes because they are correct. Moreover, the State has not shown that these decisions are harmful. The State can avoid the potential problem by having the jury instructed on the alternatives that apply. The pattern elements instruction has these alternatives bracketed for this reason. See 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 77.21 (3d Ed) ("(1) That on or about (date), the defendant knowingly *[received] [retained] [possessed] [concealed] [disposed of]* a stolen motor vehicle;").

Applying Lillard and Hayes, Mr. Randmel's convictions for possession of a stolen vehicle should be reversed because there was insufficient evidence that he "concealed" or "disposed of" any of the three vehicles.

2. The trial court erred in admitting the statements Mr. Randmel made during custodial interrogation after he told the interrogating officer he "would rather not say."

a. The issue may properly be considered by this Court as manifest constitutional error.

During the custodial interrogation of Mr. Randmel at a hospital, Mr. Randmel unequivocally exercised his right to cut off questioning by telling the interrogating officer that, "he would rather not say." RP 133. The officer did not stop his interrogation and did not seek clarification as to what Mr. Randmel meant. RP 133. Instead, he continued questioning. RP 133. Nevertheless, at the CrR 3.5 hearing, the trial court admitted all of Mr. Randmel's statements. As argued in the Opening Brief, this violated the Fifth Amendment and article I, § 9.

The State complains that Mr. Randmel did not make the same precise argument below at the CrR 3.5 hearing. Br. of Resp't at 23-24. The CrR 3.5 hearing, however, was mandatory and its purpose was to determine whether the statements made by Mr. Randmel were admissible. CrR 3.5(a). Contrary to the State's contention, a record of all the material facts were made. RP 123-35. The State does not explain what more "context" is necessary. The officers' statements and Mr. Randmel's statements in response provide the necessary context.

In general, this Court may decline to address issues not raised in the trial court. RAP 2.5(a). The Court, however, will not decline to review an issue if it qualifies as manifest error affecting a constitutional right. RAP 2.5(a)(3). To make this determination, the appellate court asks: "(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?" State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). Here, the claimed error is plainly constitutional. The State does not argue otherwise.

The issue is whether the error is "manifest." An error is "manifest" if there is "actual prejudice." Id. at 584. "Actual prejudice" means that the error had "practical and identifiable consequences" at trial. Id. To evaluate this, the appellate court places itself in the position of the trial court and if, given what the trial court knew, the court could have corrected the error. Id. For example, this standard was satisfied when a trial judge gave an erroneous instruction defining the State's burden of proof because the court "should have known" better and the mistake was in the record. Id. at 584-85.

During a CrR 3.5 hearing, when a judge hears that the defendant stated during custodial interrogation that he "would rather not say," alarm bells should be ringing in the judge's mind because defendants have the

right to cut off questioning. Here, Mr. Randmel made an unequivocal invocation of his right to silence. Br. of App. at 18-19. Thus, the trial court "should have known" that it was error to admit any subsequent statements made by Mr. Randmel during that interrogation. At the least, Mr. Randmel's statement was an ambiguous invocation. Under article I, § 9, the trial court should have known that this may require an officer to follow up with a clarifying question before continuing. Br. of App. at 19-29.

The admission of Mr. Randmel's subsequent statements had practical and identifiable consequences. They were essentially confessions. They contradicted his alibi defenses. The likelihood that the prejudice would spill over to all the charges was substantial. Mr. Randmel shows actual prejudice. The error qualifies as "manifest."

In addition to the erroneous admission of Mr. Randmel's statements, the prosecutor elicited testimony from the interrogating officer that Mr. Randmel had told him he would rather not answer questions. RP 189. The prosecutor recounted this testimony during closing. RP 262. This was also manifest constitutional error and thus can be raised for the first time on appeal. State v. Gutierrez, 50 Wn. App. 583, 589 n.1, 749 P.2d 213 (1988); State v. Curtis, 110 Wn. App. 6, 10-11, 37 P.3d 1274 (2002).

b. Mr. Randmel unequivocally invoked his right to silence.

In response to the interrogating officer's accusations that Mr. Randmel was a suspect in two other investigations regarding stolen vehicles, Mr. Randmel told that the officer "he would rather not say." RP 133. By using these plain words, this was unequivocal invocation of his right to silence. In re Cross, 180 Wn.2d 664, 684, 327 P.3d 660 (2014); Gutierrez, 50 Wn. App. at 589; State v. Marple, 98 Or. App. 662, 666, 780 P.2d 772 (1989).

The State claims that this was not an unequivocal assertion, reasoning that Mr. Randmel was only trying to cut off questioning as to a topic. Br. Resp't at 33-34. The State argues Mr. Randmel's words were ineffective to invoke his constitutional rights because he had initially agreed to answer questions. Br. of Resp't at 31-34. But suspects may invoke their Miranda rights after waiving them. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). When they do so unambiguously, it does not matter whether they waived their rights earlier. See, e.g., State v. Nysta, 168 Wn. App. 30, 42, 275 P.3d 1162 (2012) (defendant invoked right to counsel during questioning despite agreeing earlier to speak with police). The non-precedential cases relied on by the State to argue otherwise are inconsistent with precedent from the

Washington appellate courts and the United States Supreme Court. Br. of Resp't at 33 (citing United States v. Hurst, 228 F.2d 751 (6th Cir. 2000) and Owen v. State, 862 So.2d 687 (Fla. 2003)).

This Court should hold that Mr. Randmel unambiguously invoked his right to silence and that the questioning should have stopped.

c. Even if ambiguous, the officer was required to clarify Mr. Randmel's assertion before continuing the interrogation.

Mr. Randmel argues that in the context of an ambiguous assertion of the right to silence during custodial interrogation, article I, § 9 requires the officer to clarify the suspect's wishes before proceeding with further questioning. Br. of App. at 19-29. Otherwise, subsequent statements are not admissible. See State v. Robtoy, 98 Wn.2d 30, 38-39, 653 P.2d 284 (1982) (adopting rule under Fifth Amendment); State v. Radcliffe, 164 Wn.2d 900, 907, 194 P.3d 250 (2008) (declining to address whether this rule is mandated by article I, § 9). This rule is more protective of a suspect's rights than required under the Fifth Amendment. Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) (holding Fifth Amendment does not require officers to clarify an ambiguous assertion of Miranda rights and overruling cases holding

otherwise). To assist the Court in analyzing this issue, Mr. Randmel has briefed the Gunwall[3] factors.

Citing dicta[4] from cases that have long since been eclipsed by subsequent precedent, the State incorrectly asserts that this issue has been resolved. Br. of Resp't at 34-37. The State contends that the Washington Supreme Court has decided that no matter what the context, article I, § 9 means exactly what Fifth Amendment means. Thus, according to the State, when the United States Supreme Court interprets the Fifth Amendment, that interpretation is binding on Washington Courts as to the meaning of article I, § 9.

The foundation for the State's argument is State v. Earls, 116 Wn.2d 364, 805 P.2d 211 (1991). That case did not involve the issue in this case. As framed by the Earls court, the issue was whether "an otherwise valid waiver of constitutional rights is vitiated if police officers do not inform a suspect of the efforts of an unretained attorney to contact him." Id. at 372-73. The court concluded that article I, § 9 did not require a different result than under the Fifth Amendment. Id. at 378.

[3] State v. Gunwall, 106 Wn.2d 54, 720 P.3d 808 (1986).

[4] "A statement is dicta when it is not necessary to the court's decision in a case." Protect the Peninsula's Future v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914 (2013).

The State fails to acknowledge this context. Context is essential because "when the [Supreme] [C]ourt rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in another context." State v. Russell, 125 Wn.2d 24, 58, 882 P.2d 747 (1994). Thus, in Russell, the court rejected the State's argument that, under Earls, it was precluded from analyzing whether article I, § 9 was more protective than the Fifth Amendment in a different context. Id. Because the context was different, a Gunwall analysis was appropriate and useful. Id. at 59-62.

Accordingly, the State's argument that this Court should decline to engage in a Gunwall analysis should be rejected. Br. of Resp't at 35-36. Russell also establishes that this Court misread the scope of Earls in State v. Allenby, 68 Wn. App. 657, 847 P.2d 1 (1992), a case cited by the State. In Allenby, this Court declined to engage in a Gunwall analysis as to article I, § 9 despite that the issue in Allenby was different from the issue in Earls. Id. at 662. This kind of analysis was explicitly repudiated by our Supreme Court in Russell. Russell controls, not Allenby.

The State does not address the issue presented on the merits. The State has not provided its own Gunwall analysis. Rather, relying on an analysis that contradicts Russell, the State argues this Court should not answer the question presented. Br. of Resp't at 36. By not addressing the

issue on the merits, the State has impliedly conceded that article I, § 9 provides greater protection and is inconsistent with Davis. If this Court is unsatisfied with the State's response, the Court should order the State to provide a response on the merits and to brief the Gunwall factors. RAP 10.1(h). Otherwise, the Court should accept the implied concession that article I, § 9 mandates application of the Robtoy rule.

d. The State has not met its burden to prove the errors harmless beyond a reasonable doubt.

It was constitutional error for the trial court to admit Mr. Randmel's statements after he invoked his right to silence. It was also constitutional error for the prosecutor to elicit testimony that Mr. Randmel had invoked his rights and to cite to this testimony during closing. The State does not contest Mr. Randmel's argument that these constitutional errors cannot be proven to be harmless beyond reasonable doubt. Br. of App. at 30-31. The Court should accept the implied concession and reverse all of Mr. Randmel's convictions.

3. The State's concession that remand for a hearing as to the propriety of the trial court's imposition of discretionary legal financial obligations should be accepted.

The trial court erred by imposing discretionary legal financial obligations without conducting an adequate inquiry into Mr. Randmel's ability to pay. State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

The State properly concedes the error and agrees that remand for a new hearing regarding the imposition of legal financial obligations is appropriate. Br. of Resp't at 37. The Court should accept the concession.

4. The opinion should direct that no costs will imposed against Mr. Randmel for this appeal.

If the State substantially prevails in this appeal, Mr. Randmel has requested that this Court direct that no costs will imposed against him. Br of App. at 37-38. "The State has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill." State v. Sinclair, 192 Wn. App. 380, 391, 367 P.3d 612 (2016). The State has not done so, contending the issue is premature. Br. of Resp't at 37. To the contrary, RAP 14.2 empowers this Court with discretion to direct that no costs will be imposed in its opinion. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); Sinclair, 192 Wn. App. at 388. The issue is ripe. If Mr. Randmel does not substantially prevail, this Court should exercise its discretion and direct that no costs will be imposed.

B. CONCLUSION

The law of case doctrine is still valid in Washington. Possession of a stolen vehicle is an alternative means offense and when the jury is instructed on one or more alternative, all the alternatives must be supported by sufficient evidence. Otherwise, reversal is required in order

to protect the defendant's right to a unanimous jury verdict. Additionally, when a suspect tells an officer during custodial interrogation that he would rather not say, this is an unequivocal invocation of the suspect's right to silence. Even if equivocal, under article I, § 9, the officer must first clarify the suspect's intent, otherwise subsequent elicited statements from the suspect are inadmissible. This Court should hold the foregoing and reverse all of Mr. Randmel's convictions.

DATED this 5th day of July, 2016.

Respectfully submitted,

s/ Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON, RESPONDENT,	)	
v.	)	NO. 73531-4-I
NAVARONE RANDMEL, APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF JULY, 2016, 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:

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[X]	NAVARONE RANDMEL 354918 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF JULY, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711