73531-4

**No. 73531-4-I**

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**NAVARONE RANDMEL, Appellant.**



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# BRIEF OF RESPONDENT

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1. Whether the listing of the various terms within the definition of "possession" for possession of a stolen motor vehicle, in the disjunctive, in the to-convict instruction converted the terms into alternative means under the law of the case doctrine, where caselaw has held that definition does not create alternative means and the application of the law of the case doctrine to a sufficiency of the evidence challenge has been disapproved by the U.S. Supreme Court.

2. Whether the defendant preserved for review an issue as to whether he invoked his right to remain silent in response to a question from an officer, after he had waived his *Miranda* rights and spoken about the incidents with another officer, where he failed to raise this issue at the CrR 3.5 hearing and the court was never asked to address or make findings regarding an alleged invocation.

3. Whether the matter should be remanded for an inquiry into the defendant's ability to pay the legal financial obligations the court imposed where the judge and the defendant never addressed the issue at sentencing.

4. Whether this Court should deny all appellate costs where the case has not yet been decided, the State has yet to request any costs and where the record shows that the defendant was working at the time of the incidents, and is able to and intends to continue working.

## C. FACTS

### 1. Procedural facts

On January 5, 2015 Appellant Navarone Randmel was charged with three counts of Possessing a Stolen Vehicle, contrary to RCW

9A.56.068 and RCW 9A.56.140(1)[1], class B felonies, and two counts of Resisting Arrest, contrary to RCW 9A.76.040 and one count of Obstructing, in violation of RCW 9A.76.020(1). CP 4-6, 9-11. A jury found him guilty of all counts. CP 57-58, 63-64. At sentencing the judge imposed a Drug Offender Sentencing Alternative pursuant to RCW 9.94A.660, whereby he imposed 25 months of incarceration and 25 months of community custody conditioned in part on his working at DOC-approved education or employment and payment of his legal financial obligations, in addition to completing a drug treatment program. CP 66, 67, 73.

**2. Substantive Facts**

On December 20, 2014 Tiffany Geaudreau called police to report that her 1994 Nissan pickup truck had been taken. RP 30. She discovered it missing that morning and had last seen it outside her boyfriend's apartment in the Columbia neighborhood when she had parked it at the street corner under lights. RP 31. She had locked it and taken the only keys with her and had not given anyone permission to use it that night. RP 31-32. She didn't know Randmel and had not given him permission to use her truck. RP 35-36.

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[1] The original information charged that Randmel did "possess" the stolen vehicles, and the First Amended Information amended that language to state that he did "receive, retain, possess, conceal, or dispose of" the stolen vehicles. CP 4-6, 9-11.

While on patrol a couple nights later, Officer Woodward, a K-9 officer, recognized what he thought was a vehicle that had been reported stolen in the Walmart parking lot. RP 40. The vehicle was running, its taillights were on, and there were two persons inside it. RP 40, 54. After confirming that the vehicle had been reported stolen, he parked a couple rows away while he waited for another officer to arrive. RP 41. While waiting, he saw the truck's reverse lights come on and became concerned the truck would leave, so he pulled in behind the truck to prevent it from leaving and activated his red and blue lights as well as the spotlight. RP 42-43. Officer Woodward yelled to the two persons that they were in a stolen vehicle, they were under arrest and to show their hands. RP 43. The passenger stuck his hands out the vehicle, but the driver didn't. RP 43-44. After a few seconds, the driver stepped out of the truck, faced Woodward with both hands up by his head. RP 44-45. Woodward told the driver to get back in the truck, but instead he backed up a few steps and took off running. RP 45-46. Woodward got a good look at the driver when he when got out of the truck; the parking lot was well lit, the driver was within the spotlight's beam and Woodward was only about a car's lengths away from the driver. RP 43, 45-46, 52. In court, Woodward identified Randmel as the driver. RP 47.

Woodward started to chase after Randmel, but then decided not to for safety reasons. Instead he yelled to Randmel that he was sending his dog after him to bite him, but Randmel didn't stop running. RP 47. Woodward didn't deploy the dog until another officer arrived at the scene, and Woodward handcuffed the passenger and requested containment in the meantime. RP 47-49. The dog started tracking where Woodward had seen Randmel run, but when they got to a big grassy field, there was a transient population there, the scent became contaminated and the dog couldn't track Randmel any further. RP 49- 51. Despite looking in every tent for Randmel, Woodward did not find him that night. RP 51.

In the meantime, the other officer, Officer Burt, had contacted Geaudreau to come pick up her truck. RP 59. When Geaudreau got there, she found her truck had been trashed, it smelled, some Christmas presents were missing, and there was damage to the body of the truck. RP 33, 35. Some of the items in the truck were not hers: an e-cigarette, some cans, cell phone, a key that was in the ignition, and EBT card, etc. RP 34, 36, 60, 65. The key had the Chevy emblem on it, not Nissan, and it appeared that it had been shaved down so as to fit into the ignition. RP 62-64.

A few days later, on December 28, 2014, Benjamin Garding reported his 1989 Toyota pickup truck stolen. RP 66-67. He had last seen it earlier that night around 1 a.m. when he parked it in the Salvation Army

parking lot. RP 67-68. His girlfriend was the only other person who had keys to the truck and had permission to use it, but she had been with him the entire time. RP 68-69. Garding didn't know Randmel and had never given him permission to use his truck. RP 69.

A day later, Officer Allen saw an older pickup truck on F Street around 2 a.m. and confirmed that it had been reported stolen. RP 75. While waiting for back-up, Officer Allen followed the truck. RP 76. Officer Landry was up ahead in another patrol car, and as he waited to pull in behind the other patrol car, the truck passed in front of him traveling at a normal speed. RP 95-97. There was only one person in the truck, the driver, whom Officer Landry recognized as Randmel. RP 98. Landry got a good luck at the driver as Randmel drove past him because his patrol car was an SUV which sat up higher, its headlights were on, there was a street light at the intersection where he was waiting, the truck didn't have tinted windows and the truck was traveling about 25 miles per hour. RP 98-99. There was no doubt in Landry's mind that it was Randmel. RP 99. Landry pulled in behind Allen, and then both of them activated their emergency lights. RP 76, 99. The truck pulled over, Allen used his spotlight to illuminate the vehicle, and Randmel started to get out of the truck. RP 76-77. Allen yelled at him to get back in the truck, but instead, Randmel took one look at Allen and took off running through neighborhood yards. RP

77-79, 99. Allen lost sight of Randmel as he ran though some houses and waited for the K-9 unit to respond. RP 79-80, 100. Allen got a good luck at the driver when he looked at him while he was outside the truck, and identified Randmel as the driver in court. RP 78, 80. Officer Woodward arrived with his dog, and the dog track ended at a tree nearby. Woodward believed Randmel was hiding in the tree, but they couldn't see up into the 200 foot tree, so they abandoned the track. RP 178-80.

CSI Officer Kolby responded to the scene and discovered a shaved key stuck in the ignition of the truck. RP 85, 88. There were two other keys in the truck as well. RP 87-88. Kolby explained that with some older model vehicle ignitions, you can shave down a vehicle key to fit into the ignition. RP 89. The marks on this key indicated it had been shaved down. RP 90. When Garding picked up his truck, it was very messy inside but there was no body damage to the truck. RP 68.

A few days later, on January 1st, 2015, Morgan Longwell discovered that his car, a 1998 Crown Victoria, wasn't where he had left it and that a bike had been left in its place. RP 140-41. He hadn't given anyone permission to use it, and he didn't know Randmel and hadn't given Randmel permission to use it. RP 142-43. He hadn't given anyone else the keys, but a set of keys had been in the side door pocket of the car. RP 141, 144.

The next day after Officer Frank got off his late shift around 3 a.m., Frank happened to see a late model Crown Victoria he confirmed had been reported stolen. RP 147-50. He followed the car, which appeared to only have one person in it, and then parked across the street, about 125 feet away, when it pulled into a gas station. He waited for an officer to respond. RP 150-52, 157. He saw the driver get out of the car, look at the gas pumps and then stand outside the door of the car. RP 151. Frank didn't see anyone else enter or exit the car, but he couldn't identify the driver. RP 153.

Officer Douglas arrived with lights and sirens activated. RP 160. There was only one car at the gas station, and a guy was getting out of the car and closing the door behind him when Douglas arrived. RP 160-61, 164. When the guy turned around, Douglas immediately recognized him, and ordered, "Navarone, get on the ground." RP 161. Although it was night, the station was well lit. RP 162. Randmel took a look around and took off running. RP 151-52, 164. Douglas yelled after him to stop but Douglas had to chase after him. RP 165. Douglas was able to keep track of Randmel with his flashlight because Randmel was wearing a jacket that had a reflective stripe up the back. RP 165. Frank assisted him in giving chase. RP 154-55, 166. However, eventually they lost Randmel, and waited for the K-9 unit to show up. RP 155, 166.

After Woodward arrived and a dog track was started, Randmel was found hiding in some bushes nearby. RP 168, 182-84. Despite being told repeatedly that he was under arrest, Randmel resisted being arrested and the dog eventually had to be deployed and latched onto Randmel. RP 168-70,183-87. After having been read his rights, Randmel told Officer Douglas that he didn't stop because he got scared, that he didn't know the car had been reported stolen yet and that he had gotten the car from a buddy's house. RP 171-73.

Randmel was then taken to the hospital for treatment of the dog wounds, which had only required cleansing and bandages, no stitches. RP 173, 176, 191. Woodward went to the hospital to document Randmel's injuries and to ask him some questions about whether his dog had been tracking right since the dog hadn't found him on the two prior occasions. RP 188. Woodward told Randmel that he knew Randmel had been involved in the other two incidents and asked Randmel if he would tell him where Randmel had run so Woodward could figure out if his dog had been tracking properly. RP 188. Randmel said he'd rather not say. RP 188-89. Woodward then suggested that he tell Randmel where the dog track went and then Randmel could tell him whether they'd been right. RP 188-89. Woodward then described the dog track that had occurred when the first vehicle was found and Randmel stated that sounded about right,

that Woodward had a good dog. RP 190. Woodward then asked if Randmel had been hiding in a tree during the second track, and Randmel stated that he'd rather not say, and then said said he'd been known to climb trees. RP 190.

When Longwell got his car back, he was missing some gift cards and a brown pair of Xtratuff rubber boots. RP 193. The boots were found in Randmel's property box and returned to Longwell. RP 193-94.

Randmel testified that he didn't know anything about the stolen pickup trucks, that he'd been at home sleeping both those nights. RP 200-02. As for the Jan. 2nd incident, Randmel testified that he had been out drinking with friends, lost his key and was locked out of his house, which was about a block away from the gas station. RP 202, 210. He walked down to the station to use their phone, but then realized the station was closed. RP 202. While he was sitting there smoking a cigarette, a car pulled up to the station, the driver got out and started walking away towards a trail in the grass. RP 203. Randmel got up and looked in the car, saw the boots and took them because his shoes were wet. RP 203. The police car then pulled in and Randmel fled, panicked, because he had stolen things from the car. RP 203. He ran and hid and ended up being bit by the dog when the officers tried to arrest him. RP 204-05. He remembered speaking with the officer at the gas station and not giving him

too much information, but didn't remember speaking with Officer Woodward about the other dog tracks at the hospital. RP 207-08. He said his roommate had been home on the nights of the two prior incidents when he'd been sleeping. RP 208-09.

## D. ARGUMENT

### 1. Under a sufficiency of the evidence challenge, there need not be proof of all methods of "possessing" a stolen vehicle where the definition of "possession" does not set forth alternative means, even though the definition was included in the to-convict instruction.

Randmel contends there was insufficient evidence to convict him of the three counts of possession of a stolen motor vehicle because there wasn't evidence of all the methods contained in the definition of "possession" and the State took on the additional burden of proving each and every one of those methods because it included the definition in its proposed to-convict instruction. Randmel acknowledges that the definition of possession does not create "alternative means" pursuant to State v. Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011), and thus the jury did not need to be unanimous as to the "means." Instead, he contends that under the law of the case doctrine since the State proposed the to-convict instruction containing all the different methods within the definition, it was required to provide proof of each of those methods and failed to do

so. First, the various methods[2] of possession listed in the definition are merely facets of the same element, and the to-convict instruction set forth those methods in the disjunctive. Therefore, on appeal, there need only be sufficient evidence of *one* of the alternative methods to support those convictions. The inclusion the definition of "possession" in the to-convict instruction did not convert this from an otherwise non-"alternative means" case into an "alternative means" one. Second, under the recent U.S. Supreme Court case of Mussachio v. United States __ U.S. __, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), the law of the case doctrine does not require states to prove "extra elements" that are included in the to-convict instructions where those "elements" are not actual elements of the crime. As there does not need to be evidence of every one of the methods pursuant to the law of the case, the evidence that Randmel was seen in possession of all three vehicles was sufficient to support his convictions for three counts of possession of stolen motor vehicles.

*a. the State did not need to prove every method of "possession" because the list of terms in the instruction was in the disjunctive.*

"A person is guilty of possession of a stolen motor vehicle if he or she possesses a stolen motor vehicle." RCW 9A.56.068(1). The WPICs

[2] The State is purposefully using the term methods in lieu of means, so as to distinguish the term from the legal term of art "alternative means."

borrow the definition for possessing stolen property under RCW 9A.56.140 in setting forth the elements of possession of a stolen motor vehicle in the to-convict instruction. WPIC 77.21; Hayes, 164 Wn. App. at 480. Under RCW 9A.56.140 "possessing stolen property" includes to "receive, retain, possess, conceal, or dispose of" knowingly … . RCW 9A.56.140.

In Hayes, the court determined this definition under RCW 9A.56.140 did not create alternative means in the context of possessing a stolen access device. Hayes, 164 Wn. App. at 476-78. Instead, it found that it was purely a definitional statute, and as such, it did not create alternative means of committing the crime of possession of stolen access device. Id. at 477. With respect to the defendant's convictions for possession of stolen motor vehicle, the court, however, held the State was obligated to have provided evidence of each of the methods of "possession" for the stolen motor vehicle offenses because the various methods had been set forth in the to-convict instruction, whereas in the possession of stolen access device offenses, the alternative methods had not been set forth in the to-convict but in a separate definitional instruction. Id. at 479-81. The defendant contended that because the alternatives were set forth in the to-convict instruction they became "alternative means" for which the State bore the burden of providing

substantial evidence of each and every one, based on State v. Lillard, 122 Wn. App. 93 P.3d 969 (2004), *rev. den.*, 154 Wn.2d 1002 (2005). Id. at 481. The State apparently did not contest this argument, and the court therefore limited its review to a determination of whether substantial evidence supported each of the "alternative means." Id. The court then reversed two of the possession stolen motor vehicle convictions because there was no evidence the defendant had concealed or disposed of the motor vehicles. Id. In doing so, it stated: "we are treating concealment and disposal as alternative means, not because they necessarily are alternative means, but because they were listed in the to-convict instructions for the two counts of possession of a stolen motor vehicle and under *Lillard* the State was obligated to support them with substantial evidence." Id.

In Lillard, the defendant had been convicted of first degree possession of stolen property and asserted on appeal that he had been deprived of his right to a unanimous jury because there was no specificity as to which of the "alternative means" the jury had relied upon in finding him guilty. Lillard, 122 Wn. App. at 433-34. The court noted that the to-convict instruction required the State to prove that the defendant "knowingly received, retained, possessed, concealed or disposed of stolen property." Id. at 434. Relying on State v. Hickman, 135 Wn.2d 97, 102,

954 P.2d 900 (1998)[3] and State v. Rivas, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999) in a footnote, the court stated that because the instruction listed the alternative definitions as "alternative means of the offense to be proved by the State," there therefore needed to be sufficient evidence to support each alternative. Lillard, 122 Wn. App. at 435. The court then found that there was substantial evidence to support each "alternative means." Id.

Given the Washington Supreme Court's subsequent treatment of Rivas, this portion of the Lillard opinion is no longer reliable. Rivas was a case in which the defendant was convicted of assault in the second degree and asserted that jury unanimity was not assured because there wasn't substantial evidence of all the means of "assault." Rivas, 97 Wn. App. at 351-52. The definition of assault, with its three alternatives, had been set forth in a separate instruction. The court determined there was "no evidence [ ] offered at trial to support the first and second alternative means of committing assault." Id. at 352. Despite this, the court concluded that the jury could not have based its verdict on anything but the third "alternative means" based on the charging document and the record at trial, and therefore affirmed the conviction. Id. at 353-54.

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[3] In Hickman, the Supreme Court found that the state bore the burden of proving venue under the law of the case doctrine because the state had not objected to inclusion of that element in the to-convict instruction. Hickman, 135 Wn.2d at 102-05.

Rivas was abrogated by State v. Smith, which held that the common law definition of assault did not set forth alternative means of committing the crime of assault, but merely defined the element of assault. State v. Smith, 159 Wn.2d 778, 785-87, 154 P.3d 873 (2007). In doing so, it expressly disavowed the "means within a means" argument urged by the defendant, and declined to extend the alternative means beyond those set forth by the legislature. Id. at 789-90.

The continuing validity of Lillard is in doubt post-Smith. Hayes' reliance on Lillard in stating that alternatives of the definition of possession were "alternative means" for which the State bore the burden because of the law of the case doctrine is likewise misplaced. Since definitions do not create "alternative means," absent some legislative intent that they do, the Lillard court was wrong in concluding that the inclusion of the definition for "possessing stolen property" in the to-convict instruction ipso facto meant that the State bore the burden of proving each and every one of the alternative methods of the definition where the to-convict instruction explicitly stated them in the disjunctive, "retain, receive, possess, conceal **or** dispose of." Even assuming that Hickman's analysis of the law of case doctrine is still valid post Mussachio, including the definition of possession within the to-convict instruction does not mean that the state bears the burden of proving each

and every alternative where the alternatives are listed in the disjunctive. Neither Lillard nor Hayes address the fact that the to-convict instruction stated "**or"** before "disposed of," making the alternatives simply that, alternatives, any of which could provide sufficient evidence of the element of possession.

Not every time a to-convict instruction includes an alternative term, or method, must the State provide sufficient evidence of each of the alternatives. Generally speaking, jurors are not required to agree as to the evidence that supports the individual elements. *See*, Schad v. Arizona, 501 U.S. 624, 631-32, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) ("Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.")

> Where, under a penal statute, a single offense can be committed in different ways or by different means and the several ways or means charged in a single count are not repugnant to each other, a conviction may rest on proof that the crime was committed by any one of the means charged.

State v. Dixon, 78 Wn.2d 796, 803, 479 P.2d 931 (1971). For example, the offense of driving while under the influence formerly stated:

> 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.

RCW 46.61.502(1) (2008) (emphasis added). The court in State v. Sandholm, 184 Wn.2d 726, 364 P.3d 87 (2015) found the offense of driving under the influence did not create alternative means based on the three alternative subsections. In explaining the alternative means statutory analysis, the court reasoned:

> The more varied the criminal conduct, the more likely the statute describes alternative means. But when the state describes minor nuances inhering in the same act, the more likely the various 'alternatives' are *merely facets of the same criminal conduct.*

Id. at 734 (emphasis added). The court held the "affected by" clauses did not create "alternative means," but rather set forth "facets of the same criminal conduct, not distinct criminal acts." Id. at 735. It didn't matter whether the defendant was driving under the influence of alcohol, or drugs, or some combination thereof, the criminal conduct was the same, operating a vehicle while under the influence of a substance. Id. The court then affirmed the conviction because the offense had no alternative means and there was sufficient evidence that the defendant drove under the influence of alcohol. Id at 736. Evidence of only one of the alternatives was sufficient to support the conviction despite the fact the to-convict instructions stated that to find the defendant guilty, the jury had to find

that the defendant was "under the influence of alcohol *or* drugs, or that [he] was under the *combined* influence of alcohol *and* drugs." Id at 730 (emphasis in the original).

In State v. Owens, 180 Wn.2d 90, 323 P.3d 1030 (2014), the Supreme Court addressed the issue of whether the crime of trafficking in stolen property under RCW 9A.82.050 is an alternative means crime and what the alternative means are. The Court of Appeals in the case had determined that the offense had eight alternative means: "knowingly (1) initiating, (2) organizing, (3) planning, (4) financing, (5) directing, (6) managing, or (7) supervising the theft of property for sale to others, or (8) knowingly trafficking in stolen property." Id. at 97. Another case had reached a different conclusion, that the offense only created two alternative means. *See*, State v. Lindsey, 177 Wn. App. 233, 311 P.3d 61 (2013), *rev. den.*, 180 Wn.2d 1022 (2014). The Lindsey court found the seven terms in the first part of the statute all related to "the theft of property for sale to others" and therefore constituted one alternative means, while the "knowingly trafficking in stolen property created the other alternative means." Owens, 180 Wn.2d at 97-98. In doing so, it reasoned that treating those terms as a group indicated that "they represent multiple facets of a single means of committing the crime." Id. at 97. The court further explained:

> …the first group of seven terms relate to different aspects of a single category of criminal conduct – facilitating or participating in the theft of property so that it can be sold. As a result, these terms appear to be definitional. They are examples of such facilitation or participation."

Id. at 98. The Supreme Court approved of the latter analysis and concluded the offense only set forth two alternative means. Id. In determining whether there was sufficient evidence of each of those two alternative means, it did not review whether there was sufficient evidence of each of the sub-means of facilitating theft of property alternative. Id. at 99-101.

The different alternatives of "possessing" a stolen motor vehicle are just different facets or examples of the element of "possession." Merely by moving the definition into the to-convict instruction did not magically make each of the examples "alternative means." Given that there was a disjunctive at the end of the list of the examples, and not a conjunctive, the State was not required to prove, and there does not need to be sufficient evidence on appeal of, each and every method or facet of "possessing" a stolen motor vehicle.

Randmel does not contend that each of the terms or methods of possession are alternative means. Jury unanimity is therefore not an issue, and Randmel only contests the sufficiency of the evidence. Randmel acknowledges sufficient evidence was only lacking as to the "concealed"

method and the "disposed of" method. As the State wasn't required to prove more than one method of possessing the vehicle, and there is clearly sufficient evidence that Randmel received, possessed and/or retained the vehicles, there is sufficient evidence to support his convictions.

*b. Mussachio overrules Hickman's analysis regarding law of the case doctrine as to "extra" elements.*

The Hickman court held that under the law of the case doctrine when venue is added as an element to a to-convict instruction without objection, the State bears the burden of proving that element. Hickman, 135 Wn.2d at 102. It further held that on appeal a defendant may challenge the sufficiency of the evidence as to those "extra" elements. Id. The court applied the same sufficiency of the evidence test to the extra element as it did to the other statutory elements, "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 103. This was the test set forth in State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), which was a direct quotation from Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The U.S. Supreme Court recently addressed the issue of challenges to the sufficiency of the evidence on appeal as to "extra elements" in

Mussachio. It concluded that the sufficiency should only be assessed as to the actual elements of the charged crime. Mussachio, 136 S.Ct. at 713. In that case the defendant was charged with unauthorized access to a protected computer which by statute could be committed either by intentionally accessing a computer without authorization *or* exceeding one's authorized access. Id. The defendant was only charged with intentionally accessing a protected computer without authorization. Id. The jury instructions however stated that the jury had to find intentional access without authorization *and* exceeding authorized access. Id. at 714. On appeal the defendant challenged the sufficiency of the evidence regarding the added element of exceeding authorized access. Id. A sufficiency of the evidence challenge, however, is a due process claim, the purpose of which is to ascertain whether the prosecution's case was so lacking that it never should have been submitted to a jury. Id. at 715. The court concluded that in reviewing a sufficiency of the evidence claim how the jury was instructed does not matter as long as the jury was instructed on all the elements of the charged crime. Id. With a finding of guilt, the jury has found all the elements it was required to find in accord with due process. Id. All that a defendant is entitled to on a sufficiency challenge is for the court to determine whether the evidence was sufficient to go to the

jury, which is not impacted by the prosecution's failure to introduce evidence regarding an "extra element." Id. The Court ultimately held

> when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction.

Id. at 715.

In doing so, it rejected the law of the case doctrine that the Fifth Circuit had relied upon in reaching its conclusion. Id. at 716. It noted that the law of the case doctrine applies generally to legal decisions a court has made so as to limit the ability to reopen an issue that a court has already made within the case. Id. An appellate court, however, is not bound by a lower court's ruling under the doctrine, and therefore the doctrine does not alter the analysis of a sufficiency of the evidence challenge. Id.

Given this limitation on the law of the case doctrine and the appropriate analysis regarding a sufficiency of the evidence claim, the evidence presented in this case certainly met the standard: taking the evidence in the light most favorable to the State, there was sufficient evidence for any rational trier of fact to find all the elements of the charged crime beyond a reasonable doubt. Randmel himself does not contest that there was insufficient evidence that he retained, received, i.e., possessed the stolen vehicles. Even assuming that "concealed" and

"disposed of" became additional elements due to their presence in the jury instruction, despite their being listed in the disjunctive, under a sufficiency of the evidence challenge all this court asks on review is whether there was sufficient evidence on the elements of the charge to present the case to the jury. And the clear answer to that is yes: Randmel was the driver and/or the one in the driver's seat of the three stolen vehicles.

**2. Randmel cannot raise his 5th Amendment right to remain silent issue for the first time on appeal, and even if he could, state law did not require the officers to clarify his statement before continuing to speak with him.**

Randmel asserts that he invoked his right to remain silent when he responded he'd "rather not say" when asked if he would tell the officer where he fled during the dog tracks. He, however, never asserted this at the CrR 3.5 hearing, and therefore a complete record was not made regarding the context within which he made the statement. Randmel has failed to demonstrate that this issue is a manifest one of constitutional magnitude that this Court should review for the first time on appeal. The current record demonstrates that Randmel was read his rights, waived them, and answered some questions from the first officer, and then another officer made the inquiry about the dog track information. Under these circumstances Randmel's statement was not an objectively clear invocation of his right to remain silent, and the prosecutor did not err in

referencing it in closing. Moreover, any error in admitting the statement would have been harmless as the evidence was overwhelming that Randmel possessed all three stolen vehicles. Randmel also asserts that Art. 1 §9 of the state constitution is more protective than the Fifth Amendment, but the Washington Supreme Court has consistently held that it is not.

a. *Randmel has not shown that his right to remain silent issue is a manifest issue of constitutional magnitude.*

Randmel raises a different issue than he raised at the CrR 3.5 hearing and has not asserted the issue he asserts now is a manifest issue of constitutional magnitude. He now asserts that he invoked his right to remain silent when he told the officer he'd "rather not say" in response to a question about whether he would be willing to tell the K-9 officer where he ran during the prior incidents so the officer could determine if his dog had been tracking properly. The record as developed below does not provide a sufficient basis to address Randmel's new issue, and he waived the issue by failing to raise it below. The record is otherwise sufficient to review the court's determination his statements were voluntary and therefore remand for findings pursuant to CrR 3.5 is not warranted.

RAP 2.5(a) permits the Court to consider an issue raised for the first time on appeal only when it involves a "manifest error affecting a

constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' under RAP 2.5(a) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). In order to show actual prejudice, an appellant must demonstrate that the asserted error had practical and identifiable consequences in the trial of the case. Id. An alleged unpreserved instructional error must be analyzed on a case by case basis to determine whether it was a manifest error affecting a constitutional right. *See*, O'Hara, 167 Wn.2d at 100.

The purpose of the hearing under CrR 3.5 is to provide a fair hearing, outside the presence of the jury, to determine the voluntariness of a defendant's statements to law enforcement. State v. Williams, 137 Wn.2d 746, 750-51, 975 P.2d 963 (1999). It is aimed at preventing the admission of "involuntary, incriminating" statements. Id. at 751. In a CrR 3.5 hearing the burden is on the State to show by a preponderance of the evidence that a defendant's waiver of *Miranda* was intelligent, knowing and voluntary. State v. Campos-Cerna, 154 Wn.App. 702, 709, 226 P.3d 185, *rev. den.*, 169 Wn.2d 1021 (2010). If a court fails to make written findings as required by CrR 3.5(c), the error is harmless if the court's oral

findings are sufficient for review. State v. Miller, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998), *rev. den.*, 137 Wn.2d 1023 (1999). A reviewing court defers to the trial court regarding findings of fact regarding waiver or invocation of *Miranda* rights, but reviews the legal conclusions de novo. In re Cross, 180 Wn.2d 664, 680-81, 327 P.3d 660 (2014).

To preserve an issue regarding the admissibility of his statements to law enforcement, a defendant must raise the issue at the CrR 3.5 hearing. Campos-Cerna, 154 Wn. App. at 710. If he fails to do so, he waives the issue unless he demonstrates on appeal that it is a manifest error of constitutional magnitude pursuant to RAP 2.5. Id. *When an adequate record exists*, an appellate court may review the constitutional adequacy of proceedings if the defendant has shown a manifest error of constitutional magnitude. Id. (emphasis added). If the record provided supports the trial court's determination the waiver was knowing and voluntary, the fact that the alleged error implicates a constitutional right, does not mean the defendant has shown a manifest error of constitutional magnitude. *See*, Campos-Cerna, 154 Wn. App. at 711-13 (although the juvenile warning on the advice of rights could have been clearer, the record otherwise showed a valid waiver of *Miranda* and therefore the alleged error did not constitute a manifest error of constitutional magnitude warranting review).

The court held a CrR 3.5 hearing to determine the admissibility of Randmel's statements to the officers during the course of trial due to one of the officer's schedule. RP 6, 122-37. The issue raised by defense counsel at trial was whether Randmel's nodding his head, in response to being asked whether he was willing to waive his rights and talk with the officer, meant that he nodded his head yes, as opposed to no. RP 136. Otherwise, she deferred to the court. RP 136. Officer Douglas testified that after Randmel was placed under arrest, he read Randmel his rights, word for word from his advice of rights card. RP 125-26. He also testified that Randmel indicated he understood those rights and acknowledged the waiver by nodding his head. RP 126. He then asked Randmel some questions about why he ran, and testified that Randmel never asked for an attorney in responding to those questions and never indicated he didn't want to answer questions. RP 127-28. Officer Woodward heard Douglas advise Randmel of his rights at the scene and contacted Randmel at the hospital after being advised that Randmel had waived his rights. RP 131-32. Woodward told Randmel he knew Randmel was the suspect in the other incidents involving stolen vehicles and asked if Randmel would tell him where Randmel ran because he had attempted to track him with his dog, the dog couldn't locate Randmel, and he wanted to know if his dog had been tracking properly. RP 132. Woodward

testified that Randmel initially said he would rather not say, Woodward then said "How about I describe where we tracked and you can tell me whether or not we were correct." RP 133. After describing the first track, Randmel stated "that sounds about right. You have a good dog." RP 133. After Woodward described the second track, Woodward asked Randmel if he'd been hiding in the tree, to which he responded he'd rather not say, but that he had been known to climb trees. RP 133. Woodward also testified that Randmel never requested to speak with an attorney and never stated he wanted to cease questioning. RP 134.

The court found the officer's testimony indicated that

> … Mr. Randmel understood his Miranda rights as given, then there was the question of whether, with those rights in mind, Mr. Randmel wishes to talk with the officer and the officer responded to that that he acknowledged by nodding his head and I think I'm drawing a fairly well understood distinction of nodding a head and shaking a head and not all but in most of Western society and … a nod is acknowledged as an affirmative response.
> So, considering all the evidence and testimony, I'll note there are no – I don't find there are any disputed facts. If there is a disputed fact, it would only be whether it was an indication of the affirmative nodding of the head and I would find that it was in the affirmative, … the preponderance of the evidence indicates that the statements made after warnings … This was a custodial interrogation, but it was not a coerced custodial interrogation, so again the preponderance of the evidence indicates the statements were made as a result of a voluntary, knowing and intelligent waiver of rights and therefore admissible.

RP 137-38. Randmel did not testify and defense counsel never asserted that in responding to Woodward's question by saying that "he'd rather not

say," Randmel was invoking his right to remain silent. Apparently, no one at the hearing interpreted Randmel's remark that way. Presumably if defense counsel had inquired about that statement, additional testimony would have been forthcoming about the entire context in which Randmel made it.

Randmel waived the issue of whether he was invoking his right to remain silent when he responded to Woodward's initial question by failing to raise it at the trial court. He has failed to address whether, let alone demonstrate that, it is a manifest error of constitutional magnitude. This Court should decline to review this issue.

Randmel also asserts that written findings were not done for the CrR 3.5 hearing. While written findings should have been done as required by the rule, the trial court's oral ruling is sufficient to review the issue that was raised by defense counsel at the hearing. The trial court concluded that the only possible disputed issue of fact was whether Randmel's nodding of his head meant he was indicating yes. The trial court clearly did not contemplate there was a disputed issue regarding whether his statement "I'd rather not say," was an unequivocal invocation of his right to remain silent. There would be no point in remanding for written findings since the issue Randmel wants this Court to address now

was never presented to the trial court. The trial court would not be able to make any findings upon this new issue.

b. *As Randmel's statement was not a clear invocation of his right to remain silent after he had waived his Miranda rights, the officer did not violate his right to remain silent by continuing to speak with him.*

Even if a defendant waives his *Miranda* rights and agrees to speak with law enforcement, he can subsequently invoke his right to remain silent. State v. Piatnitsky, 180 Wn.2d 407, 412, 325 P.3d 167 (2014). However, he must do so in an unequivocal manner, expressing his intent to cease communication in an objectively clear manner. Id. To invoke the right to remain silent, a defendant's invocation "must be sufficiently clear 'that a reasonable police officer in the circumstances would understand the statement to be [an invocation of *Miranda* rights.]" Id. at 413 (quoting, Davis v. v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994)). If the defendant makes an ambiguous or equivocal statement about his right to remain silent, officers are not required to cease the interview or to clarify the defendant's intent. Id. at 415; *see also*, In re Cross, 180 Wn.2d at 682 (officers may continue questioning a suspect if the invocation is equivocal). Courts are to consider both the plain text of the statement as well as the context in which it was made. In Re Cross, 180 Wn.2d at 682-83. The court considers circumstances up to the time

the statement is made, but does not consider the context after the time of the alleged invocation. Id. at 683.

Under the circumstances here, Randmel did not unequivocally invoke his right to remain silent. After waiving his rights, he responded to Officer Douglas's questions, never indicating that he wanted to invoke his right to remain silent. When he responded to Officer Woodward's question as to whether he would be willing to tell Woodward where he went when he ran, Randmel didn't say he didn't want to talk with Woodward, he said he'd rather not say. It was not unreasonable for Officer Woodward to interpret that to mean he'd rather not tell the officer where he ran. It is not reasonable, given the context in which the statement was made, to interpret that as an unequivocal invocation of the right to remain silent.

Cases cited by Randmel are distinguishable. In In re Cross, the defendant was read his *Miranda* rights twice after being arrested for the murder of his wife and two of her daughters and acknowledged that he understood them both times. In re Cross,180 Wn.2d at 679. After the second time, he immediately stated that he didn't want to talk about it, without having been asked any specific question. Moreover, he had not spoken with police about the incident at all before stating that he did not want to talk about it. Within this context, the appellate court concluded

the it was objectively unreasonable for the trial court to conclude that the defendant did not invoke his right to remain silent by immediately stating he did not want to talk about it right after being read his *Miranda* rights, finding that any reasonable police officer would have understood the "it" to refer to the murders. Id. at 684.

Similarly in State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213, *rev. den.* 110 Wn.2d 1032 (1988), the defendant was taken into custody while police searched his storage unit. Gutierrez, 50 Wn. App. at 585-86. After the search resulted in the discovery of illegal narcotics, the defendant was advised of his *Miranda* rights and asked to comment on the narcotics found. He immediately said he would rather not talk about it. Id. at 586. The officer then followed up with a couple more questions. Id. Like In re Cross, the defendant stated he didn't want to talk about it right after being informed of his rights, without answering any other questions.

Here, Randmel affirmatively indicated to Officer Douglas that he was willing to speak with him about the stolen vehicle and answered some questions about it. Then, while at the hospital Officer Woodward asked him a question concerning the dog tracks regarding the other two stolen vehicles. Randmel never told either officer that he didn't want to talk to him about the stolen vehicles, and in fact waived his rights and answered some questions about the one for which he'd been arrested. Both officers

testified that Randmel did not ask to cease questioning after being advised of his rights. Within this context, it was not unreasonable for the officer to conclude that Randmel's statement was not an unequivocal invocation of his right to remain silent.

The facts of this case are more closely aligned with those in United States v. Hurst, 228 F.3d 751 (6th Cir. 2000). In that case, law enforcement contacted the defendant while he was in jail and informed him that they wanted to talk with him about some burglaries in which the defendant may have been involved. Id at 758-59. He was read his *Miranda* rights and indicated he was willing to answer only certain questions. Id. at 759. When he was told the officers were interested in information regarding trafficking in firearms, the defendant said he wasn't willing to discuss stolen firearms because he was a convicted felon. After one of the officers told him that they had good information on him, the defendant told them that he knew from whom they got their information, and that it was that person's idea to do the burglaries. Id. On appeal, he argued that he had invoked his right to remain silence when he chose not to answer questions about firearms. On review, the court held that as the defendant had been aware of his *Miranda* rights and agreed to answer certain questions, his refusal to answer questions about firearms was not a clear and unequivocal invocation of his right to remain silent. Id at 761;

*see also*, Owen v. State, 862 So.2d 687, 695-99 (Fla. 2003), *cert. den.*, 543 U.S. 986 (2004) (defendant's statements, post advisement of his *Miranda* rights, that he did not want to talk about it and that he'd rather not talk about it to certain questions were not unequivocal assertions of his right to remain silent under the circumstances).

*c. The state constitutional right to remain silent is coextensive with the 5th Amendment*

Randmel asserts that if his invocation was ambiguous, that the officers should have been required to ask only clarifying questions as to whether he wished to assert his right to remain silent under Art. 1 §9 of the Washington State Constitution. In doing so, he acknowledges that this is not the law under the United States Constitution. *See* Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). He asserts that the state constitution is more protective than the federal constitution in this regard. The Washington Supreme Court has previously held that the state and federal constitutional provisions regarding a defendant's right to remain silent are co-extensive in State v. Earls, 116 Wn.2d 364, 805 P.2d 211 (1991). Randmel has cited no authority to overturn this holding.

In Earls, the Supreme Court addressed a contention that the State constitutional provision against self-incrimination was more protective than the 5th Amendment provision in the context of the waiver of *Miranda*

rights. The court there thoroughly examined the history of its analysis regarding the two provisions and again concluded that the Art. 1 §9 is co-extensive with the 5th Amendment. Earls, 116 Wn.2d at 374-78. Washington courts have consistently held that the rights are co-extensive. *See*, State v. Hager, 171 Wn.2d 151, 157 n.3, 248 P.3d 512 (2011) (Art. 1 §9 and 5th Amendment are interpreted co-extensively); State v. Russell, 125 Wn.2d 24, 56-62, 882 P.2d 747 (1994) (Art. 1 §9 provision is not broader than 5th Amendment right to remain silent in the context of un-Mirandized confessions); State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979) (the federal and state constitutional provisions against compulsory testimony are given the same interpretation); State v. Campos-Cerna, 154 Wn. App. 702, 708-09, 226 P.3d 185, *rev. den.* 169 Wn.2d 1021 (2010) (5th Amendment and Art. 1 §9 of State Constitution are coextensive in context of contention that defendant's waiver of *Miranda* warnings was invalid). The court in State v. Allenby, 68 Wn. App. 657, 847 P.2d 1 (1992), *rev. den.* 121 Wn.2d 1033 (1993), declined to engage in a *Gunwall* analysis of the two provisions in the context of a claim that the defendant's post-*Miranda* statements were not voluntary due to a prior unwarned statement the defendant had made. Rejecting the assertion that Earls was not applicable because it involved an issue regarding the 5th Amendment right to counsel, the Allenby court noted that the precedent

Earls had relied upon involved the right against self-incrimination. Id. at 662.

Randmel asserts that the Supreme Court left open the issue in State v. Radcliffe, 164 Wn.2d 900, 194 P.3d 250 (2008). The court in Radcliffe did not "leave open" the issue, it simply declined to address it at all because the appellant had failed to brief it below.

> Radcliffe argues here that article I, section 9 of Washington's constitution provides greater protection than its federal counterpart. However, he failed to argue the issue at trial or in the Court of Appeals and did not raise the issue in his motion for discretionary review. We therefore do not address it. RAP 13.7(b)

Id. at 907. Radcliffe explicitly overruled State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), the case Randmel relies upon for a broader application of the right against self-incrimination under the state constitution. As noted by the Radcliffe court, the decision in Robtoy was based on the 5th Amendment, and given the U.S. Supreme Court decision in Davis holding that an invocation must be unequivocal, the decision in Robtoy was no longer good law. Id. at 906-07.

This Court should not engage in a *Gunwall* analysis regarding the state and federal constitutional provisions regarding the right to remain silent. A number of courts have already held that the provisions are co-extensive. Certainly, it would be improvident to do so where defense

failed to even raise the issue at the trial level and an inadequate record has been presented for review.

**3. The Court should remand to the trial court for the limited purpose of inquiring into Randmel's ability to pay legal financial obligations.**

Randmel asserts the court imposed discretionary legal financial obligations without inquiring into his ability to pay those obligations. The State concedes the judge made no inquiry at sentencing and defense counsel and Randmel did not address the issue. Although Randmel testified about his jobs and a former employer wrote to the court on his behalf at sentencing, and his DOSA sentence requires that he be employed or in school, the judge did not specifically address this issue at sentencing. RP 198-201; SRP 4. Therefore, the State concedes remand would be appropriate since the judge did impose some discretionary legal financial obligations.

**4. Should the State be entitled to appellate costs based on the outcome of this Court's review, costs should be awarded.**

Randmel asks this Court to address appellate costs even though the appeal has not been decided and the State has not requested costs yet. This issue is premature. Should the State be entitled to costs, costs should be awarded, if requested, in accord with the rules of appellate procedure related to costs. The record is replete with evidence that Randmel had

been working at the time, is capable of working as he is only in his mid-twenties and desired to continue working. RP 198-201; SRP 4-7, 11, 15. Just because Randmel was unable to afford an appellate attorney does not mean that he won't be able to work in the future and that he cannot afford *any* appellate costs.

## E. CONCLUSION

The State respectfully requests this Court to affirm Randmel's convictions, but remand for the limited purpose of an inquiry into his ability to pay his legal financial obligations.

Respectfully submitted this 25th day of May, 2016.

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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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