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Supreme Court No. _____
Court of Appeals No. 33329-9-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ANTHONY RAY AGUILAR,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Cameron Mitchell, Judge (CrR 3.5 hearing)
Honorable Carrie L. Runge, Judge (Trial and Sentencing hearing)

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Anthony Ray Aguilar, is the Appellant below and asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division III, unpublished opinion filed on October 11, 2016. A copy of the opinion is attached as Appendix A. The current online version is found at *State v. Aguilar*, No. 33329-9-III, 2016 WL 5921454 (Wash. Ct. App. Oct. 11, 2016).

III. ISSUE PRESENTED FOR REVIEW

Whether showing methamphetamine to Mr. Aguilar was the functional equivalent of interrogation, requiring suppression of his unwarned response.

IV. STATEMENT OF THE CASE

A CrR 3.5 hearing was held the week prior to trial to determine admissibility of a statement made by Anthony Ray Aguilar. 1RP[1] 2–11. The evidence showed at 8:50 pm on March 11, 2015, Kennewick Police Detective Roman Trujillo was driving in Kennewick when he found his

[1] The transcript of the trial and sentencing, which took place on May 11, 2015, will be cited to as "2RP __." The transcript of the earlier CrR 3.5 hearing, which took place on May 6, 2015, will be cited to as "1RP __."

path blocked by Mr. Aguilar, who was standing in the middle of the road with his cell phone over his head and looking up into the sky. 1RP 2–3. Mr. Aguilar was trying to get a Wi-Fi signal on his cell phone to provide musical entertainment for him and his girlfriend, who was sitting in a car parked nearby. 1RP 3–5.

The officer ran Mr. Aguilar's identification through the data system, which showed an outstanding arrest warrant. 1RP 3–4. Mr. Aguilar was detained, handcuffed and escorted to the patrol car. In the presence of a backup officer Mr. Aguilar was asked whether he had anything illegal on his person and was told he'd be searched once the arrest warrant was confirmed and then transported to jail. 1RP 4–5. Mr. Aguilar denied having anything illegal. 1RP 6. After the warrant was confirmed Mr. Aguilar was arrested. The officer wouldn't allow Mr. Aguilar to turn his jacket over to his girlfriend and asked Mr. Aguilar if he had any sharp objects that might stick, poke or hurt the officer while searching. 1RP 6–7. The officer inquired if there was any reason Mr. Aguilar would have a hypodermic needle on him and then asked if Mr. Aguilar did have one on him. Mr. Aguilar said no to each of these questions. 1RP 6–7. The officer found a needle in the jacket pocket. Flanked by Mr. Aguilar in handcuffs and the backup officer, the searching

officer pulled a plastic baggie containing a white crystal substance out of the same pocket and said loudly, "This looks like meth to me." 1RP 7, 9. Mr. Aguilar responded, "It is, sir." 1RP 7. At no time had Mr. Aguilar been advised of his *Miranda* warnings. 1RP 5, 8, 9; CP 11, Finding of Fact 10.

The court agreed the situation was custodial but found Mr. Aguilar's statement was admissible because it was spontaneous and the officer's comment was not a question and thus not interrogation. 1RP 11; CP 41, Conclusions of Law.

Mr. Aguilar was convicted of unlawful possession of a controlled substance—methamphetamine following a stipulated facts trial before a different judge. 2RP 2–3; CP 6–8, 28.

V. ARGUMENT IN SUPPORT OF REVIEW

This Court should accept review under RAP 13.4(b)(1) and (4) to resolve a conflict with decisions of this Court and the United States Supreme Court and to determine an issue of substantial public interest.

Mr. Aguilar's incriminating response stemmed from custodial interrogation that occurred before he received *Miranda* warnings, and his response should have been suppressed.

In order to protect a defendant's Fifth Amendment right against compelled self-incrimination, the United States Supreme Court determined in *Miranda v. Arizona*, that a suspect must be given the right to remain silent and the right to the presence of counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). The Washington State Constitution provides the same protection as the Fifth Amendment. Article 1, § 9, *State v. Warness*, 77 Wn. App. 636, 893 P.2d 665 (1995) (citing *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979)).

Miranda warnings are designed to protect a defendant's right not to make incriminating statements while in the potentially coercive environment of custodial police interrogation. *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). The *Miranda* rule applies when "the interview or examination is (1) custodial (2) interrogation (3) by a state agent." *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992) (citing *State v. Sargent*, 111 Wn.2d 641, 649-53, 762 P.2d 1127 (1988)). Unless a defendant has been given the *Miranda* warnings, his statements during police interrogation are presumed to be involuntary. *Sargent*, 111 Wn.2d at 647–48, 762 P.2d 1127.

Miranda interrogation is not limited to express questioning. It includes words or conduct by the police "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Pejsa*, 75 Wn. App. 139, 147, 876 P.2d 963 (1994) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1690, 64 L.Ed.2d 297 (1980)). The test for the latter category focuses primarily on the suspect's perceptions, rather than the officer's intent. *In re Cross*, 180 Wn.2d 664, 685, 327 P.3d 660 (2014). "This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *Id.* at 685 (quoting *Innis*, 446 U.S. at 301, 100 S.Ct. 1682). On the other hand, incriminating statements that are not responsive to an officer's remarks are not products of interrogation. *In re Cross*, 180 Wn.2d at 685, citing *State v. Bradley,* 105 Wn.2d 898, 904, 719 P.2d 546 (1986). When determining whether officers are engaged in interrogation for purposes of requiring *Miranda* warnings, the reviewing court defers to the trial court's findings of fact but reviews its legal conclusions from those findings de novo. *In re Cross,* 180 Wn.2d at 681.

In *Cross*, the trial court concluded an officer's comment that "sometimes we do things we normally wouldn't do and feel bad about it later" was not an interrogation. *In re Cross*, 180 Wn.2d at 684. This Court noted the comment to Cross was the functional equivalent of questioning where it was made after that morning's recent, brutal and emotional killings of members of his family and implied that Cross committed the murders. *Id.* at 686. Cross responded by asking, "[H]ow can you feel good about doing something like this." *Id.* at 686. The Court further noted that

> [w]hile there are several possible responses to [the officer's] comment, all are incriminating. ... For example, Cross could have remained silent, which could be evidence of his guilt; Cross could have denied committing the murders or feigned ignorance, which could have cast doubt on his character for honesty; or Cross could have done as he did and responded with what was essentially a confession.

In re Cross, 180 Wn.2d at 686. This Court ultimately concluded that when a suspect's choice of replies to that comment are all potentially incriminating, then "an officer's comment is designed to elicit an incriminating response." *Id.* And even though a remark is not phrased as a question, when the suspect's actual statement is relevant and responsive to the comment then the comment in fact reasonably elicited an incriminating response. *Id.*

Here, Mr. Aguilar was detained, handcuffed and escorted to the patrol car. In the presence of a backup officer Mr. Aguilar was asked whether he had anything illegal on his person and was told he'd be searched once the arrest warrant was confirmed and then transported to jail. 1RP 4–5. Mr. Aguilar denied having anything illegal. 1RP 6. After the warrant was confirmed Mr. Aguilar was arrested. The officer wouldn't allow Mr. Aguilar to turn his jacket over to his girlfriend and asked Mr. Aguilar if he had any sharp objects that might stick, poke or hurt the officer while searching. 1RP 6–7. The officer inquired if there was any reason Mr. Aguilar would have a hypodermic needle on him and then asked if Mr. Aguilar did have one on him. Mr. Aguilar said no to each of these questions. 1RP 6–7. The officer found a needle in the jacket pocket. Flanked by Mr. Aguilar in handcuffs and the backup officer, the searching officer pulled a plastic baggie containing a white crystal substance out of the same pocket and said loudly, "This looks like meth to me." 1RP 7, 9. Mr. Aguilar responded, "It is, sir." 1RP 7.

The Court of Appeals, Division Three, distinguished this court's decision in *In re Cross* and found Detective Trujillo's comment did not subject Mr. Aguilar to the "functional equivalent" of questioning because the officer did not speak directly to Mr. Aguilar, and his remark did not

target Mr. Aguilar's particular susceptibilities. *Slip Opinion* at 9–10. However, while Mr. Aguilar was not addressed personally the officer chose not to comment on sports or the weather but rather on the crime unfolding through the search of Mr. Aguilar's jacket and for which he was later charged and convicted. As in *In re Cross,* the officer's comment was evocative because it strongly suggested illegal drugs were in fact present in the pocket of the jacket Mr. Aguilar had attempted to deliver to his girlfriend and in which a hypodermic needle he claimed was not there had just been found.

Division Three also reasoned because the comment did not invite a response, if Mr. Aguilar had simply opted to remain silent it would not have been evidence of quilt and would not have been potentially incriminating. *Slip Opinion* at 10. However, as in *In re Cross,* the remark by the officer was obviously intended to elicit an incriminating response, since it was made after having told Mr. Aguilar several times he was definitely going to be searched and communicated to Mr. Aguilar something akin to, "Hey, we the police already know you tried to prevent us from searching the jacket and denied having needles or anything illegal on you so you might as well come clean now." As in *In re Cross*, Mr. Aguilar's choice of replies to the officer's comment were all potentially

incriminating— Mr. Aguilar could have remained silent, which could be evidence of his guilt; Mr. Aguilar could have denied possessing the illegal contraband or feigned ignorance of its presence, which could have cast doubt on his character for honesty; or Mr. Aguilar could have done as he did and responded with what was essentially a confession. *In re Cross*, 180 Wn.2d at 686. And because Aguilar's actual statement was relevant and directly responsive to the officer's comment, the comment in fact reasonably elicited an incriminating response. *Id.*

As both the *Miranda* and *Innis* courts recognized, one of the techniques police commonly use during interrogation is to posit a suspect's guilt—for example, by confronting the suspect with evidence of a crime. *See Innis*, 446 U.S. at 299. Although this technique does not involve a direct question and need not even be verbal, it is nonetheless a technique police officers should know will likely lead to an incriminating response. *See State v. Nixon*, 599 A.2d 66, 67 (Me. 1991) (showing the suspect a crime-scene sketch was functional equivalent of interrogation); *Weathers v. State*, 105 Nev. 199, 202, 772 P.2d 1294 (1989) (confronting suspect with evidence was functional equivalent of interrogation; noting that "[t]he law recognizes that some kind of reaction, incriminating or otherwise, can be expected from one's being accused of criminal

conduct."). Detective Trujillo's act of showing the baggie to Mr. Aguilar while stating "it looked like meth" was the functional equivalent of interrogation. From context, it is clear that when he showed Mr. Aguilar the baggie he was seeking a response that would help the prosecution. The officer testified that when he held the substance up, he already believed it was methamphetamine. 1RP 7, 9. The officer both knew and should have known his conduct was reasonably likely to lead to an incriminating response. His conduct thus was the "functional equivalent" of interrogation under *Innis* and *In re Cross*.

Division Three erred in concluding the officer's comment was not part of an interrogation or likely to elicit an incriminating response. The officer's comment was interrogation conducted while Mr. Aguilar was in custody without having been advised of his *Miranda* rights. This Court should find the trial court's determination that Mr. Aguilar's statement and any follow-up statements were admissible was clearly erroneous.

VI. CONCLUSION

For the reasons stated, the petition for review should be granted under RAP 13.4(b)(1) and (4), and the decision of the Court of Appeals should be reversed.

Respectfully submitted on November 10, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 10, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's petition for review and Appendix A (copy of opinion filed 10/11/16):

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CASE # 333299
State of Washington v. Anthony Ray Aguilar
BENTON COUNTY SUPERIOR COURT No. 151002728

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 33329-9-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ANTHONY RAY AGUILAR,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Anthony Aguilar appeals his conviction for unlawful possession of a controlled substance. He argues his postarrest statement to the police was the result of a custodial interrogation without *Miranda*[1] warnings and was therefore inadmissible. He also argues, and the State agrees, that the trial court erred in imposing $660 in discretionary legal financial obligations (LFOs) without making an adequate inquiry into his ability to pay. We disagree with Mr. Aguilar's first argument, but remand for an individualized inquiry into Mr. Aguilar's ability to pay discretionary LFOs.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

FACTS

On March 11, 2015, Detective Roman Trujillo was driving in Kennewick, Washington, when he saw Mr. Aguilar standing in the roadway and holding his cellular telephone toward the sky in an attempt to get a Wi-Fi signal. Mr. Aguilar was blocking the roadway, so Detective Trujillo stopped his vehicle and spoke with Mr. Aguilar. Detective Trujillo got Mr. Aguilar's name and asked dispatch to check for warrants. Detective Chris Bennett and Officer Wayne Meyer arrived at the scene. Dispatch then told Detective Trujillo that Mr. Aguilar had a warrant for his arrest.

Detective Trujillo and Officer Meyer placed Mr. Aguilar under arrest and searched him incident to arrest. Detective Trujillo found a hypodermic needle and a clear plastic "baggie" in Mr. Aguilar's coat pocket. The "baggie" contained a small amount of a white crystal substance. Detective Trujillo held up the "baggie" and said, "[T]his looks like Meth." Clerk's Papers (CP) at 41. Mr. Aguilar responded, "Yes, it is, sir." CP at 41. At the time of these statements, Detective Trujillo had not given Mr. Aguilar his *Miranda* warnings.

Detective Trujillo sent the "baggie" to the Washington State Patrol Crime Laboratory for testing. The white crystal substance contained methamphetamine.

The State charged Mr. Aguilar with unlawful possession of a controlled substance. Mr. Aguilar moved to suppress his statement to Detective Trujillo under CrR 3.5. During the CrR 3.5 hearing, the State asked Detective Trujillo to whom he directed the statement. Detective Trujillo responded he "said it out loud," and also noted, "Obviously, [Mr. Aguilar] was standing there because I'm searching him. Officer Meyer was standing there as well." Report of Proceedings (RP) (May 6, 2015) at 7. The State asked Detective Trujillo if he directed his statement to anyone specific, and Detective Trujillo responded, "It was a general remark." RP (May 6, 2015) at 7. Detective Trujillo also testified he did not intend to ask Mr. Aguilar questions about the methamphetamine. Finally, Detective Trujillo testified Mr. Aguilar did not appear to be under the influence, did not appear to have difficulty understanding directions or questions, and was extremely pleasant and cooperative.

The trial court found Detective Trujillo's statement was not designed or likely to elicit an incriminating response. The trial court further found Mr. Aguilar's statement to Detective Trujillo was made spontaneously and was not in response to a custodial interrogation or direct questioning from law enforcement. Accordingly, the trial court concluded the statement was admissible.

The trial court held a bench trial on stipulated facts and found Mr. Aguilar guilty of unlawful possession of a controlled substance. The trial court then imposed a $2,000 fine and $1,460 in other LFOs. The LFOs comprised $660 in discretionary costs, which included a $600 court-appointed attorney fee, and a $60 sheriff's service fee. Before imposing the discretionary LFOs, the trial court conducted the following inquiry:

> [THE COURT]: How do you normally support yourself, sir?
> DEFENDANT AGUILAR: I work, Ma'am.

RP (May 11, 2015) at 5. The judgment and sentence contained the following boilerplate language: "The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein." CP at 11. Mr. Aguilar did not object to the LFOs at the sentencing hearing. Mr. Aguilar appeals.

ANALYSIS

A. POSTARREST STATEMENT

Mr. Aguilar argues his postarrest statement to Detective Trujillo—in which he admitted the substance inside the "baggie" was methamphetamine—was inadmissible because it was the result of a custodial interrogation without *Miranda* warnings. The parties agree Mr. Aguilar was in custody and had not received *Miranda* warnings. The issue is whether Detective Trujillo was engaged in "interrogation" for *Miranda* purposes when he held up the plastic "baggie" and said, "[T]his looks like Meth."

When determining whether officers are engaged in interrogation for purposes of requiring *Miranda* warnings, this court defers to the trial court's findings of fact but reviews its legal conclusions from those findings de novo.[2] *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 681, 327 P.3d 660 (2014). Because neither party has assigned error to any of the trial court's factual findings, we treat the findings as verities on appeal and confine our review to whether the trial court derived proper conclusions of law from its findings. *Id.*

Miranda warnings are necessary when a suspect in custody is subjected to interrogation or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). "Interrogation" includes express questioning, but also includes any words or actions by the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Id.* at 301. The test for the latter category focuses primarily on the suspect's perceptions, rather than the officer's intent. *Id.* An important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating

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[2] Mr. Aguilar states that "[a] trial court's factual determination that remarks are not interrogation is reviewed under the 'clearly erroneous' standard." Br. of Appellant at 7 (citing *State v. Walton*, 64 Wn. App. 410, 414, 824 P.2d 533 (1992)). *Cross* abrogated *Walton*'s holding that the issue of interrogation is factual and subject to a clearly erroneous standard. *See In re Pers. Restraint of Cross*, 180 Wn.2d 664, 681 n.8, 327 P.3d

response is knowledge by the police that a defendant is unusually susceptible to a particular form of persuasion. *Id.* at 302 n.8.

Conversely, incriminating statements that are not responsive to an officer's remarks are not products of interrogation. *Cross*, 180 Wn.2d at 685; *State v. Bradley*, 105 Wn.2d 898, 904, 719 P.2d 546 (1986). This includes statements that are the result of "subtle compulsion," which is different than "interrogation." *Innis*, 446 U.S. at 303.

The United States Supreme Court addressed the "interrogation" necessary to trigger *Miranda* warnings in *Rhode Island v. Innis*. In that case, the police received a telephone call from a taxi driver who had just been robbed by a man wielding a sawed-off shotgun. *Innis*, 446 U.S. at 293. The taxi driver identified Thomas Innis as the robber. *Id.* The police later arrested Mr. Innis, who was unarmed, and advised him of his *Miranda* rights. *Id.* at 294. Mr. Innis invoked his right to counsel. *Id.* The police then began driving him to the police station, with three officers accompanying him in the police car. *Id.*

On the way to the station, the officers began discussing the missing shotgun from the robbery. *Id.* One officer stated that there were "'a lot of handicapped children running around in this area'" because a school was located nearby, and "'God forbid one

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660 (2014).

of them might find a weapon with shells and they might hurt themselves.'" *Id.* at 294-95. The same officer then stated, "'[I]t would be too bad if the little [girl] would pick up the gun, maybe kill herself.'" *Id.* at 295. Mr. Innis, apparently worried for the children, interrupted the officers and asked them to turn back so he could show them where the gun was located. *Id.*

The court held Mr. Innis was not "interrogated" within the meaning of *Miranda*. *Id.* at 302. The court first held the officers did not expressly question Mr. Innis, given that the conversation was "nothing more than a dialogue between the two officers" and did not invite a response from Mr. Innis. *Id.* The court also held the officers' conversation was not reasonably likely to elicit an incriminating response from Mr. Innis. *Id.* The court reasoned there was nothing in the record to suggest the officers were aware that Mr. Innis was "peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children," nor was there any evidence the officers knew Mr. Innis was unusually disoriented or upset at the time of his arrest. *Id.* at 302-03. The court further reasoned that the entire conversation "consisted of no more than a few off hand remarks," and the officers' comments were not particularly "evocative." *Id.* at 303. The court acknowledged Mr. Innis was subjected to "subtle compulsion," but was not interrogated. *Id.*

In contrast, Mr. Aguilar relies on *In re Pers. Restraint of Cross.* In *Cross*, Dayva Cross stabbed his wife and her daughters to death. *Cross*, 180 Wn.2d at 675. Officers arrested Mr. Cross and took him to the police station. *Id.* at 678. At the station, one of the officers took pity on Mr. Cross and said, "'Sometimes we do things we normally wouldn't do, and we feel bad about it later.'" *Id.* at 679. Mr. Cross responded, "'How can you feel good about doing something like this.'" *Id.*

The *Cross* court concluded the officer's comment, while not express questioning, was the "'functional equivalent of questioning.'" *Id.* at 686 (quoting *Innis*, 446 U.S. at 302). The court reasoned that unlike the comments at issue in *Innis*, the officer spoke directly to Mr. Cross. *Cross*, 180 Wn.2d at 686. Moreover, the officer could tell Mr. Cross was upset because of the murders, which had just occurred that morning, and the officer's comment was evocative in that it referred to the recent killings, which were brutal, emotional, and involved Mr. Cross's family. *Id.* Although the officer's remark was not phrased as a question, the court still held it reasonably elicited an incriminating response. *Id.*

The court further reasoned the officer's comment was reasonably likely to elicit an incriminating response because it implied Mr. Cross committed the murders, and all the possible responses to the officer's comment were incriminating—silence could be

evidence of guilt, denial or feigning ignorance could cast doubt on his character for honesty, or Mr. Cross could respond as he did and essentially confess. *Id.* at 686. The court then held, "An officer's comment is designed to elicit an incriminating response when a suspect's choice of replies to that comment are all potentially incriminating." *Id.*

Here, Detective Trujillo did not expressly question Mr. Aguilar. Detective Trujillo testified he made the statement "out loud" and that it "was a general remark," rather than being directed at anyone specific. RP (May 6, 2015) at 7. Like in *Innis*, the remark did not invite a response from Mr. Aguilar. Detective Trujillo also testified he did not intend to ask Mr. Aguilar questions about the methamphetamine, which is relevant in determining whether a defendant was expressly questioned. *See Innis*, 446 U.S. at 301.

The closer question is whether Detective Trujillo subjected Mr. Aguilar to the "functional equivalent" of questioning, i.e., whether he should have known that his remark was reasonably likely to elicit an incriminating response. This case has more in common with *Innis* than *Cross*. Important factors for the *Innis* court were that the officers did not target Mr. Innis's particular susceptibilities nor was Mr. Innis unusually disoriented or upset. The *Cross* court relied on these same factors in holding that Mr. Cross *was* subjected to the functional equivalent of questioning—the officer could tell Mr. Cross was upset because of the very recent murders, and her comment was evocative

in that it referred to the recent killings, which were brutal and emotional and involved Mr. Cross's family. Here, however, Detective Trujillo testified Mr. Aguilar did not appear to be under the influence, did not appear to have difficulty understanding directions or questions, and was extremely pleasant and cooperative.

Further, and most importantly, like the comment in *Innis* and unlike the comment in *Cross*, Detective Trujillo did not speak directly to Mr. Aguilar. Because of this, the central reasoning on which the *Cross* court relied—that all of the possible responses to the officer's comment were potentially incriminating—does not apply in this case. Rather, because Detective Trujillo's remark was not directed at Mr. Aguilar and did not invite a response from him, if Mr. Agular had simply opted to remain silent it would not have been evidence of guilt and would not have been potentially incriminating.

Like in *Innis*, Mr. Aguilar may have been subjected to "subtle compulsion," but he was not "interrogated" for purposes of requiring *Miranda* warnings.

B. UNPRESERVED ALLEGED LFO ERROR

Mr. Aguilar contends the sentencing court erred by ordering him to pay $660 in discretionary LFOs without first making an adequate inquiry into his ability to pay.[3] The

[3] Mr. Aguilar contends that the trial court imposed $2,660 in discretionary LFOs, consisting of the $2,000 fine, the $600 court-appointed attorney and the $60 sheriff's service fee. *See* Br. of Appellant at 4. However, this court recently held that a trial court

State concedes error and this court accepts the State's concession. Accordingly, we remand for the trial court to make an individualized inquiry into Mr. Aguilar's ability to pay discretionary LFOs. *See State v. Hart*, No. 47069-1-II, 2016 WL 4366948, at *6 (Wash. Ct. App. Aug. 16, 2016) (remanding for an individualized inquiry when the State conceded error).

C. APPELLATE COSTS

Mr. Aguilar also asks this court to decline to impose appellate costs in its decision terminating review. Mr. Aguilar raises a variety of arguments.

An appellate court has discretion to require a convicted defendant to pay appellate costs to the State. *See* RCW 10.73.160(1); RAP 14.2. Generally, "the party that substantially prevails on review" will be awarded appellate costs, unless the court directs otherwise in its decision terminating review.[4] RAP 14.2. An appellate court's authority to award costs is "permissive," and a court may, pursuant to RAP 14.2, decline to award

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may impose fines under RCW 9A.20.021 *without* inquiring into a defendant's ability to pay. *See State v. Clark*, 191 Wn. App. 369, 375-76, 362 P.3d 309 (2015); *State v. Calvin*, 176 Wn. App. 1, 25, 316 P.3d 496 (2013), *review granted in part*, 183 Wn.2d 1013, 353 P.3d 640 (2015).

[4] "A 'prevailing party' is any party that receives some judgment in its favor. If neither party completely prevails, the court must decide which, if either, substantially prevailed." *Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010) (citations omitted). Here, the State is the substantially prevailing party because we affirmed the primary issue that relates to Mr. Aguilar's conviction.

costs at all. *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

On June 10, 2016, this court issued a general order regarding defendants' requests to deny cost awards when the State substantially prevails on appeal. It directs defendants who want this court to exercise its discretion not to impose appellate costs to make their request, together with citations to legal authority and references to relevant parts of the record, either in their opening brief or in a motion pursuant to RAP 17. Mr. Aguilar has complied with this particular requirement in his opening brief.

If inability to pay is a factor alleged to support the defendant's request, the general order also requires defendants to include in the appellate record the clerk's papers, exhibits, and the reports of proceedings relating to the trial court's determination of indigency and the defendant's current or likely ability to pay discretionary LFOs. Mr. Aguilar designated his RAP 15.2(a) motion and the trial court's order of indigency with the clerk's papers.[5] However, the general order requires defendants to file a report as to continued indigency with this court no later than 60 days after they file their opening briefs. Mr. Aguilar has not complied with this requirement. Because Mr. Aguilar has not complied with the court's general order, we will not exercise our discretion to waive

[5] Mr. Aguilar's RAP 15.2(a) motion was based on the fact that the trial court had previously made an indigency finding, and Mr. Aguilar has not designated any of these documents, or any other documents relating to his ability to pay LFOs, as part of the

appellate costs.

Mr. Aguilar raises a number of other arguments as to why this court should decline to impose appellate costs. He first argues that imposing appellate costs would violate the trial court's order of indigency granting him a right to appeal at public expense. However, while orders of indigency entered pursuant to RAP 15.2 allow criminal defendants to pursue appeals at public expense, they do not prevent the State from attempting to recoup costs if the defendant's appeal is unsuccessful. *See generally State v. Obert*, 50 Wn. App. 139, 143, 747 P.2d 502 (1987) (holding that orders of indigency do not prohibit cost awards against indigent parties because "once defendants enjoy full participation in the process of appellate review, the Rules of Appellate Procedure clearly allow the assessment against them of reproduction and other costs as a reasonable expense necessary for review").

Mr. Aguilar also argues that the appellate cost system undermines the attorney-client relationship and creates a conflict of interest because the Office of Public Defense only gets paid when its client loses. These problems are possible, but Mr. Aguilar has not provided any legal authority, cited any empirical research, given any concrete examples where this has occurred in other cases, or provided any evidence that the attorney-client

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appellate record.

relationship was undermined or a conflict of interest occurred in this case. *See* RAP 10.3(a)(6); *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (appellate courts do not consider "bald assertions lacking cited factual and legal support").

Mr. Aguilar also argues that county prosecutors seek costs to punish defendants for exercising their constitutional rights to counsel and to appeal, as evidenced by the inconsistency at which they file cost bills and the small portion of appellate costs prosecutors' offices receive. This argument fails for the same reason as his previous argument. *See* RAP 10.3(a)(6); *West*, 168 Wn. App. at 187.

Mr. Aguilar also argues that this court should not award appellate costs because of the problems *State v. Blazina*[6] recognized—compounding interest, retention of trial court jurisdiction, difficulty reentering society, and no right to counsel for remission proceedings—apply equally to appellate costs. However, unlike RCW 10.01.160(3), which was at issue in *Blazina*, the statute authorizing appellate costs does not require an inquiry into the defendant's financial resources before appellate costs are imposed. *See* RCW 10.73.160; *State v. Sinclair*, 192 Wn. App. 380, 389, 367 P.3d 612, *review denied*, 185 Wn.2d 1034, 377 P.3d 733 (2016) (noting that while ability to pay is an important

[6] *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

factor that may be considered under RCW 10.73.160, it is not necessarily the only relevant factor, nor is it necessarily an indispensable factor); *State v. Wright*, 97 Wn. App. 382, 384, 985 P.2d 411 (1999) (finding that RCW 10.73.160 only requires an inquiry into ability to pay at the point of collection, and not when the recoupment order is made). This argument, while persuasive, is an appeal to this court's discretion, the exercise of which this court has already delineated in its general order.

Mr. Aguilar also argues that imposing appellate costs on a defendant who lacks the ability to pay violates substantive due process because no legitimate state interest is advanced by imposing costs on defendants who cannot pay them. However, constitutional challenges to the imposition of LFOs generally turn on a defendant's financial circumstances at the time of recoupment. *State v. Mathers*, 193 Wn. App. 913, 928, 376 P.3d 1163 (2016) ("'[i]t is at the point of enforced collection . . ., where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of his indigency'") (internal quotation marks omitted) (quoting *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992)); *State v. Blank*, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997). Because recoupment has not begun, this court cannot yet assess those circumstances.

Finally, Mr. Aguilar argues that in the event this court determines appellate costs are appropriate, it should remand to the superior court for a fact-finding hearing regarding his ability to pay appellate costs. However, Division One has determined this is an inappropriate remedy for two reasons: (1) it "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion," and (2) "it would also potentially be expensive and time-consuming for courts and parties." *Sinclair*, 192 Wn. App. at 389.

Because Mr. Aguilar has not complied with this court's general order and none of his other various arguments have merit, we tentatively award costs to the State as the substantially prevailing party on appeal. But should Mr. Aguilar file a declaration that comports with our June general order within 14 days of the filing of this decision, we give our commissioner discretion to allow the late declaration and deny the State an award of costs. If Mr. Aguilar does not file a declaration within 14 days, the State thereafter has 10 days to file a cost bill with this court pursuant to RAP 14.4(a).

CONCLUSION

We affirm Mr. Aguilar's conviction, remand for the trial court to make an individualized inquiry into Mr. Aguilar's ability to pay discretionary LFOs, and award costs to the State as the prevailing party, subject to the conditions set forth above.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.