73531-4

FILED
Feb 03, 2016
Court of Appeals
Division I
State of Washington

No. 73531-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

NAVRONE RANDMEL,

Appellant.

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

APPELLANT'S OPENING BRIEF

RICHARD W. LECHICH
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington Court of Appeals Cases

Other Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

A. INTRODUCTION

Based on an incident involving a stolen vehicle, Navarone Randmel was arrested. After waiving his rights, police questioned him about two other investigations related to stolen vehicles. Mr. Randmel responded he would "rather not say," but the interrogating officer kept asking questions and elicited inculpatory statements. At trial on charges of possessing stolen vehicles, the prosecutor used Mr. Randmel's invocation of his right to silence and his subsequent statements to urge the jury to convict him. Because Mr. Randmel unequivocally invoked his right to silence, the court's admission of his subsequent inculpatory statements violated the Fifth Amendment. Even if Mr. Randmel's invocation was equivocal, the admission violated article I, section 9 of the Washington Constitution. Because the constitutional violations cannot be proven harmless, all the convictions should be reversed. Additionally, the convictions for possession of a stolen vehicle should be reversed because there was no proof that Mr. Randmel "concealed" or "disposed of" the vehicles, as required under the "to-convict" instructions.

B. ASSIGNMENTS OF ERROR

1. Under the law of the case doctrine and in violation of Mr. Randmel's right to a unanimous verdict and, the jury was not instructed that it had to be unanimous on the alternative means of committing

possession of a stolen vehicle and sufficient evidence did not support each means.

2. In violation of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution, the trial court admitted custodial statements made by Mr. Randmel after he invoked his right to silence.

3. The trial court failed to enter findings of fact and conclusions of law, as required by CrR 3.5.

4. In violation of the due process provisions of the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, the prosecutor improperly elicited the fact that Mr. Randmel had invoked his right to silence and highlighted this fact during closing argument.

5. The trial court erred in imposing discretionary legal financial obligations upon Mr. Randmel without first conducting an on-the-record inquiry into his ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In each of the three "to-convict" instructions on the counts for possession of a stolen vehicle, the State was required to prove that Mr. Randmel "knowingly received, retained, possessed, concealed, or disposed of a stolen motor vehicle." When in a "to-convict" instruction, these five

various ways of committing the offense must be supported by sufficient evidence in order to uphold the verdict. There was no evidence that Mr. Randmel "concealed" or "disposed of" any of the three vehicles. Should these convictions be reversed?

2. During custodial interrogation, when suspects unequivocally invoke their right to silence, the interrogation must cease. Any statements elicited afterward must be excluded at trial. After waiving his rights and while in custody at a hospital, an officer began to question Mr. Randmel about two previous criminal incidents in which the officer suspected Mr. Randmel as being responsible. Mr. Randmel stated he would rather not answer questions, but the officer did not stop. Mr. Randmel's subsequent inculpatory statements were admitted at trial. Did Mr. Randmel unequivocally invoke his right to silence, requiring exclusion of his subsequent statements?

3. Prosecutors and witnesses may not comment on a defendant's invocation of his right to silence. At trial the prosecutor elicited testimony from an officer that Mr. Randmel stated he would rather not answer questions. The prosecutor recounted this testimony during closing. Did the State violate Mr. Randmel's rights under due process by commenting on his invocation of his right to silence?

4. State constitutional provisions may provide broader protections than their federal constitutional analogs. The text of article I, section 9 of the Washington Constitution is different and broader than the language used in the Fifth Amendment to the United States Constitution. Further, prior to the United States Supreme Court ruling otherwise, Washington courts held that when suspects make an ambiguous invocation their right to silence or attorney, police must clarify the intent of the suspect or cease interrogation. If Mr. Randmel's invocation of his right to silence was equivocal, were his statements still improperly admitted when police did not clarify Mr. Randmel's intent, as required by article I, section 9?

5. Before imposing discretionary legal financial obligations, the court must make an on-the-record, individualized inquiry into the defendant's ability to pay. Without discussing the issue of legal financial obligations at sentencing, the Court imposed over $2,000 in discretionary legal financial obligations upon Mr. Randmel. Should this Court exercise its discretion and remand for a new sentencing hearing?

D. STATEMENT OF THE CASE

The owner of a 1994 Nissan pickup truck reported to police that her truck was missing on December 20, 2014. RP 30-31. A few days later, Officer Jeremy Woodward of the Bellingham Police Department was working the night shift. RP 38-39. Officer Woodward, who always looks

out for recently reported stolen or missing vehicles, noticed the Nissan parked at a Walmart. RP 40-41. He pulled up behind the vehicle, noticing that its taillight was on and that there were two people inside. RP 42-43. When the Nissan's reverse lights activated, he activated his lights. RP 42. He told the occupants they were in a stolen vehicle and were under arrest. RP 43. The person in the driver's seat got out and ran away. RP 45-46. Officer Woodward initially pursued, but stopped because there was still a another person in the vehicle. RP 47. After other officers arrived, Officer Woodward deployed his tracking dog, but the dog was unable to find the person. RP 48-51. At trial, Officer Woodward identified the person as Navarone Randmel. RP 46-47.

The owner of a 1989 Toyota pickup truck contacted police to report that his vehicle was missing on December 28, 2014. RP 67. The following morning, around 2:00 a.m., Officer Mathew Allen spotted the vehicle being driven in Bellingham. RP 75. He followed, and after another officer arrived as backup, stopped the car. RP 76. After pulling over, the driver of the vehicle got and ran, ignoring Officer Allen's commands to get back in the vehicle. RP 77-78. The officers lost sight of the driver. RP 78. Officer Woodward arrived and deployed his tracking dog. RP 80-81. The dog led Officer Woodward to a large tree. RP 179. Officer Woodward suspected that the driver might be hiding in the tree,

but ultimately decided to leave and did not find the driver. RP 179-80. At trial, Officer Allen identified the driver as Mr. Randmel. RP 80.

The owner of a 1998 Crown Victoria reported his car was missing on January 1, 2015. RP 140-42. Early the next morning, Officer Craig Frank spotted the vehicle on the road in Bellingham as he was driving home from work. RP 148-49. He contacted dispatch and followed the vehicle to a gas station. RP 150. Officer Joel Douglas, who was on duty, pulled behind the vehicle, which was parked at a gas pump, and activated his lights and sirens. RP 161. As Officer Douglas pulled up, he saw that a man was just getting out of the vehicle. RP 161. He recognized the man as Mr. Randmel and told him to get on the ground. RP 161.

Frightened, Mr. Randmel ran away. RP 163-64, 173. Officer Woodward arrived on the scene. RP 181. He deployed his tracking dog. RP 181-82. The dog led the officers to Mr. Randmel. RP 184. Because Mr. Randmel did not comply with commands to lay down, Officer Woodward instructed his dog, a German shepherd, to bite Mr. Randmel. RP 184-86. Shortly thereafter, Officers Douglas and Woodward forcibly arrested Mr. Randmel. RP 171, 186-87.

Mr. Randmel was read his rights and agreed to answer questions. RP 172-73. Mr. Randmel purportedly said he did not know the vehicle had been reported stolen and that he had got the vehicle at a friend's

house. RP 173. Because Mr. Randmel had numerous dog bites, he was transported to the emergency room for treatment. RP 173, 188, 205.

Officer Woodward went to the hospital to interrogate Mr. Randmel further. RP 188. Officer Woodward assumed Mr. Randmel was the person who ran away in the two December incidents. RP 132. He asked Mr. Randmel to confirm where he ran to so that he could determine if his dog was tracking correctly. RP 189. Mr. Randmel said that he would rather not answer questions, but Officer Woodward continued his interrogation. RP 189. He elicited statements confirming that Mr. Randmel was the person who ran away both times and that his dog had tracked him correctly. RP 189-90.

Based on these three separate incidents, the State charged Mr. Randmel with three counts possession of a stolen vehicle, two counts of resisting arrest, and one count of obstructing a law enforcement officer. CP 9-11. The court refused to suppress Mr. Randmel's statements. RP 137-38. Mr. Randmel denied responsibility, presenting alibis as to the December incidents. RP 200-02. As for the January incident, Mr. Randmel explained that he had been by the gas station when he saw the Crown Victoria pull up. RP 203. The driver got out and walked away. RP 203. Mr. Randmel then went inside the vehicle and took some boots

because his shoes were wet. RP 203. When the police arrived, he panicked and ran away. RP 203-04.

The jury found Mr. Randmel guilty as charged. CP 57-58; RP 295. Although there was no discussion as to legal financial obligations or Mr. Randmel's ability to pay, the court imposed over $2,000 in discretionary legal financial obligations. CP 68; 5/12/15RP 26. The court then found Mr. Randmel indigent. Supp. CP __ (sub. no. 54). He appeals.

E. ARGUMENT

1. The evidence was insufficient to prove that Mr. Randmel "concealed" or "disposed of" the stolen vehicles.

a. Defendants have a constitutional right to a unanimous jury verdict and the law of the case doctrine requires the State to prove any unnecessary requirements in a "to-convict" instruction.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). If the evidence is insufficient to prove whether the defendant committed the offense by any one of the means submitted to the jury, the conviction must be reversed. Ortega-Martinez, 124 Wn.2d at 708. Under the law of the case doctrine, the State assumes the burden of proving any unnecessary requirements that find their way into the jury instructions. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998).

b. Alternative means listed in a "to-convict" instruction for possession of a stolen vehicle charge must be supported by sufficient evidence. Otherwise the conviction must be reversed on appeal.

To be guilty of possession of a stolen vehicle, one must "possess." the vehicle. RCW 9A.56.068(1) ("A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle."). This offense implicitly incorporates the terms applicable to the offense of possession of stolen property. State v. Satterthwaite, 186 Wn. App. 359, 364, 344 P.3d 738 (2015). "'Possessing stolen property' means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). Though these terms are not defined, the terms must be read distinctly because the Legislature does not include superfluous words in statutes. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) ("statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.") (internal citations omitted).

This Court has indicated this definitional statute does not create alternative means. State v. Hayes, 164 Wn. App. 459, 477, 262 P.3d 538 (2011). Nevertheless, under the law of the case doctrine, if more than one

of these alternative definitions of "possession" are placed in a "to-convict" instruction, there must be sufficient evidence to support each alternative in order to uphold the verdict. State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004) (so holding, but determining there was sufficient evidence that the defendant received, retained, possessed, concealed, and disposed of stolen property); Hayes, 164 Wn. App. at 480-81 (applying Lillard where "to-convict" instructions for possession of a stolen vehicle included all five alternative definitions and reversing for lack of proof defendant concealed or disposed of vehicles).

c. The State assumed the additional burden of proving that Mr. Randmel "concealed" and "disposed of" the vehicles. The evidence did not prove that Mr. Randmel "concealed" or "disposed of" any of the vehicles, requiring reversal.

All three "to-convict" instructions on the possession of stolen vehicle counts required the State to prove that Mr. Randmel "knowingly received[,] retained, possessed, concealed, or disposed of a stolen motor vehicle." CP 38, 40, 42.[1] These "to-convict" instructions are materially

[1] The to-convict instruction on the first count reads:

> To convict the defendant of the crime of possessing a stolen motor vehicle as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

indistinguishable from the "to-convict" instructions in Lillard and Hayes. Compare CP 38, 40, 42 with Lillard, 122 Wn. App. at 434 n.25; Hayes, 164 Wn. App. at 480. Accordingly, the State assumed an additional burden and there must be sufficient evidence to support each alternative means on each count. Hayes, 164 Wn. App. at 480-81.

Evidence is sufficient to support a determination of guilt only if a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Only reasonable inferences are drawn in favor of the State. Jackson, 443 U.S. at

---

> (1) That on or about December 23, 2014, the defendant knowingly received[,] retained, possessed, concealed, or disposed of a stolen motor vehicle;
>
> (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
>
> (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
>
> (4) That any of these acts occurred in the State of Washington.

CP 38. The other two "to-convict instructions" were identical except as to the count number and the date. CP 40 ("Count III"; "on or about December 29, 2014); CP 42 ("Count V"; "on or about January 2, 2015).

319. "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

There was insufficient evidence that Mr. Randmel "concealed" any of the three vehicles. "Conceal" means:

> to prevent disclosure or recognition of: avoid revelation of: refrain from revealing: withhold knowledge of: draw attention from: treat so as to be unnoticed . . . to place out of sight: withdraw from being observed . . . .

Webster's Third International Dictionary, 469 (1993). There was no evidence that Mr. Randmel concealed any of the three vehicles. The first vehicle (Count I), a Nissan pickup truck, was in open view at a Walmart parking lot; the second vehicle (Count III), a Toyota pickup truck, was pulled over on the public streets; and the third vehicle (Count V), a Crown Victoria, was observed on the public streets and parked at a gas station. This does not show concealment. Hayes, 164 Wn. App. at 481 (State identified no evidence of concealment of stolen vehicle, a Hummer, where defendant was driving the Hummer when arrested.); cf. Lillard, 122 Wn. App. at 435 (substantial evidence that defendant "concealed" stolen property where property was in back of padlocked "U-Haul" truck).

There was also insufficient evidence that Mr. Randmel disposed of any of the three vehicles. To "dispose of" means:

> to transfer into new hands or to the control of someone else (as by selling or bargaining away): relinquish, bestow . . . to get rid of: throw away: discard . . . to treat or handle (something) with the result of finishing or finishing with . . . .

Webster's Third International Dictionary, 654 (1993).

In Hayes, this Court applied this dictionary meaning. Hayes, 164 Wn. App. at 481 ("The parties agree that 'dispose of' means to transfer into new hands or to the control of someone else."). Applying this meaning, the Court reversed a conviction for possession of a stolen vehicle, a Tahoe, because there was "no evidence to show that someone other than [the defendant] himself drove the Tahoe to Puyallup or that he transferred control of it to another person." Id. at 481. Here, according to the State, Mr. Randmel was the driver of all three vehicles. Similar to the Tahoe in Hayes, there is no evidence that Mr. Randmel transferred control of the vehicles to someone else. Cf. Lillard, 122 Wn. App. at 435 (sufficient evidence that defendant "disposed of" stolen property where stolen merchandise was returned to store).

There was insufficient evidence that Mr. Randmel "concealed" or "disposed of" any of the three vehicles. Accordingly, the State did not meet its burden of proof and all three convictions for possession of a stolen vehicle should be reversed. Hayes, 164 Wn. App. at 481.

2. Mr. Randmel unequivocally invoked his right to silence during custodial interrogation. Even if equivocal, the interrogating officer did not clarify Mr. Randmel's intent. The admission of his statements violated the Fifth Amendment and article I, section 9.

a. After a person waives his or her Miranda rights, a person may cut-off further interrogation through an unequivocal invocation of the right to silence.

The federal and state constitutions protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. To secure these constitutional rights, the police must advise suspects in custody of their right to remain silent and the presence of an attorney before questioning. Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). These rights may be waived, but a suspect may choose to invoke these rights at any time. In re Cross, 180 Wn.2d 664, 682, 327 P.3d 660 (2014).

Under the Fifth Amendment, an invocation of the right to silence or an attorney must be unambiguous or unequivocal to stop questioning. Berghuis v. Thompkins, 560 U.S. 370, 375, 382, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010); Davis v. United States, 512 U.S. 452, 462, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). When a suspect makes an equivocal invocation, the Fifth Amendment does not require police to clarify whether the suspect is trying to invoke his or her constitutional rights. Berghuis, 560 U.S. at 381.

"An invocation of *Miranda* rights is unequivocal so long as a 'reasonable police officer in the circumstances' would understand it to be an assertion of the suspect's rights." Cross, 180 Wn.2d at 682 (quoting Davis, 512 U.S. at 459). "This test encompasses both the plain language and the context of the suspect's purported invocation." Id. at 682-83.

For example, a defendant unequivocally invoked his right to silence in response to police questioning by using the language: "I would rather not talk about it." State v. Gutierrez, 50 Wn. App. 583, 589, 749 P.2d 213 (1988). Similarly, in the context of the invoking the right to counsel, the statement, "I gotta talk to my lawyer," was plain language that unequivocally invoked the defendant's right to an attorney. State v. Nysta, 168 Wn. App. 30, 42, 275 P.3d 1162 (2012). While context is relevant, the relevant context is that which precedes the statement. Cross, 180 Wn.2d at 683. Hence, a suspect's responses to further questioning "may not be used to cast doubt on the clarity of his initial request." Smith v. Illinois, 469 U.S. 91, 92, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984).

In contrast, the words "Maybe I should talk to a lawyer" was insufficient to invoke the right to counsel. Davis, 512 U.S. at 462. Similarly, a defendant did not unequivocally invoke his right to silence by saying "I don't want to talk right now" and that he just wanted to "write it down." State v. Piatnitsky, 180 Wn.2d 407, 412-13, 325 P.3d 167 (2014).

And a suspect's act of remaining largely silent during a three hour interrogation was also insufficiently clear to invoke defendant's right to silence as well. Berghuis, 560 U.S. at 375.

b. Mr. Randmel invoked his right to silence by stating, in response to an incriminating question, that he "would rather not say."

At the CrR 3.5 hearing,[2] Officer Douglas testified that after he placed Mr. Randmel under arrest, he read him his Miranda rights. RP 125. According to the officer, Mr. Randmel understood his rights and agreed to speak to him. RP 126. Mr. Randmel explained he ran away because he "got scared." RP 126. He stated he was not aware that the Crown Victoria had been reported stolen. RP 127. Mr. Randmel was transported to a hospital. See RP 132.

Later, Officer Woodward went to the hospital to also question Mr. Randmel. RP 132. Officer Woodward testified that Officer Douglas had indicated to him that Mr. Randmel had agreed to speak. RP 132. Officer Woodward questioned Mr. Randmel about the two previous December incidents police were investigating. RP 132. Assuming that Mr. Randmel was the person who fled in both incidents, Officer Woodward inquired

[2] This hearing was held in the middle of the trial.

whether Mr. Randmel "would tell me basically where he ran because we attempted to track him and we were unable to locate him so I was curious where he ran for the sake of whether my dog was doing his job properly." RP 132. In response, Mr. Randmel stated that "he would rather not say." RP 133.

Ignoring Mr. Randmel's request to stop, Officer Woodward continued pressing for incriminating statements, telling Mr. Randmel, "how about I describe where we tracked and you can tell me whether or not we were correct." RP 133. Mr. Randmel purportedly agreed. RP 133. Officer Woodward described the two previous trackings. RP 133. Mr. Randmel said that it sounded about right and that Officer Woodward had a good dog. RP 133. Inquiring further into the second tracking, Officer Woodward asked if Mr. Randmel had been hiding at the top of a large tree that his dog had led him to. RP 133. Mr. Randmel stated "he would rather not say but that he has been known to climb trees." RP 133.

The State argued that Mr. Randmel "never made an unequivocal statement asking that all questioning should cease" and asked the court to admit Mr. Randmel's statements. RP 136. The court admitted the statements. RP 136-37.

c. By using the plain language, "I would rather not say" in response to questions about two previous criminal incidents under investigation, Mr. Randmel unequivocally invoked his right to silence.

In response to Officer's Woodward accusations that he was involved in two previous investigations involving stolen vehicles where the suspect or suspects fled from the police, Mr. Randmel stated "he would rather not say." RP 133. By using these plain words, Mr. Randmel unequivocally invoked his right to silence. The interrogation should have ceased.

Precedent supports this conclusion. In Cross, the suspect said "I don't want to talk about" after being read his Miranda rights. Cross, 180 Wn.2d at 684. Our Supreme Court reasoned that there "is nothing unequivocal or ambiguous about this statement." Id. Similarly, in Gutierrez, the defendant, after being read Miranda and in response to an inquiry about drugs, said he "would rather not talk about it." Gutierrez, 50 Wn. App. at 586. This Court reasoned this was an unequivocal assertion of his right to remain silent. Id. at 589. As for the specific words used by Mr. Randmel, the Oregon Court of Appeals has recognized that the words "I'd rather not say," in response to police questioning, was an invocation of the right to silence under its state constitution. State v. Marple, 98 Or. App. 662, 666, 780 P.2d 772 (1989).

As in Cross, Gutierrez, and Marple, Mr. Randmel unequivocally invoked his right to silence. That Mr. Randmel spoke with Officer Woodward after he invoked his rights is irrelevant. Cross, 180 Wn.2d at 675. Thus, the trial court erred by admitting Mr. Randmel's subsequent statements to Mr. Woodward.

d. Under article I, section 9 of the Washington Constitution, when a person makes an equivocal assertion of the right to silence, the police may not ask further questions except to clarify the assertion.

Reversal is also justified under article I, section 9 of the Washington Constitution. There are good reasons for addressing a state constitutional issue even where reversal is also required under the federal constitution:

> First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts. Second, the histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty. . . . Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied. Fourth, we will be able to assist other states that have similar constitutional provisions develop a principled, responsible body of law that will not appear to have been constructed to meet the whim of the moment.

State v. Coe, 101 Wn.2d 364, 373-74, 679 P.2d 353 (1984) (reversing and holding prior restraint on press invalid under both state and federal constitutions).

Here, Mr. Randmel's statements were also inadmissible because Officer Woodward did not clarify whether Mr. Randmel intended to invoke his right to silence when he stated, that he "would rather not say." For over a decade, this was previously understood be the law under the Fifth Amendment. State v. Robtoy, 98 Wn.2d 30, 39, 653 P.2d 284 (1982).[3] The United States Supreme Court, however, subsequently held otherwise in 1994. Davis, 512 U.S. at 459. The Washington Supreme Court accordingly conformed to this understanding. Radcliffe, 164 Wn.2d at 902. The court, however, kept open the possibility that article I, section 9 requires the rule applied in Robtoy. See id. at 907 (declining to address issue). An analysis of article I, section 9, shows that this rule is required under our state constitution.

To determine whether a state constitutional provision supplies different or broader protections than its federal counterpart, this Court

---

[3] Robtoy involved an invocation of the right to counsel. But Washington courts do not draw distinctions between the invocations of different Miranda rights. Piatnitsky, 180 Wn.2d at 413.

evaluates six nonexclusive criteria. These are: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986).

It is "well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution." State v. Simpson, 95 Wn.2d 170, 177, 622 P.2d 1199 (1980). Doing so "is particularly appropriate when the language of the state provision differs from the federal, and the legislative history of the state constitution reveals that this difference was intended by the framers." Id.

Article I, section 9 of the Washington Constitution provides, "No person shall be compelled in any criminal case to give evidence against himself." Const. art. I, § 9. This language is broader than the language of the Fifth Amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

In using the word "witness," the focus of the federal constitution is on guaranteeing the right not to testify against oneself at trial. See

Michigan v. Tucker, 417 U.S. 433, 440, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974) (although caselaw has extended its meaning, the language of the Fifth Amendment "might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify"). But our framers explicitly rejected a proposed version of article I, section 9 which would have only protected the right of a person not to "testify against himself." Journal of the Washington State Constitutional Convention, 1889, at 498 (B. Rosenow ed. 1962).[4] Instead, they favored the broader "give evidence" language. Id. The founders thus expressly provided strong protection against self-incrimination at the investigatory stage.[5]

The Massachusetts Constitution uses language similar to Washington's, providing, "No subject shall . . . be compelled to accuse, or furnish evidence against himself." Mass. Const. art. 12. Applying factors similar to the Gunwall factors, that state's supreme court has held that

---

[4] The *Journal* is now available online through the Washington State Constitutional Law Project. https://lib.law.washington.edu/content/guides/waconst#section-6 (last accessed January 15, 2016).

[5] The framers also changed the order of the clauses, placing the protection against self-incrimination first and double jeopardy second. It is reasonable to conclude this rearrangement is another sign of the importance our founders attached to the right not to be compelled to give evidence against oneself. See Rosenow at 498.

article 12 is more protective than the Fifth Amendment in the context of equivocal invocations of the right to silence. Commonwealth v. Clarke, 461 Mass. 336, 345-46, 350, 960 N.E.2d 306 (Mass. 2012). Because of the textual differences between the Fifth Amendment and article I, section 9, this Court should similarly hold that our state constitution provides broader protection in this context.

In sum, the text of article I, section 9 and the differences in language between that provision and the Fifth Amendment demonstrate that the framers of our constitution intended to confer stronger protection against self-incrimination upon Washingtonians than that provided by the federal constitution. See Gunwall, 106 Wn.2d at 65 (difference in language between Fourth Amendment and article I, section 7 is "material," and suggests state constitution provides broader protection).

The third and fourth Gunwall factors, constitutional and common-law history and pre-existing state law, also demonstrate that the provision provides stronger protection. As discussed above, the delegates to the Constitutional Convention who served on the Declaration of Rights Committee rejected language that was similar to that of the federal constitution in favor of language which more broadly protects persons against compelled self-incrimination.

Moreover, as explained earlier, this Court's decisions pre-dating Davis and Berghuis provided greater protection in this context than the U.S. Supreme Court later endorsed under the federal constitution. In Robtoy, our Supreme Court held:

> Whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. *Further questioning thereafter must be limited to clarifying that request* until it *is* clarified.

Robtoy, 98 Wn.2d at 39. At the same time that the court endorsed this rule protecting equivocating suspects from compelled self-incrimination, some other courts were denying such protection, instead requiring unequivocal assertions of the rights to silence or to counsel. See Smith, 469 U.S. at 96 n.3 (describing three different approaches state and federal courts had taken with respect to equivocal invocations; Robtoy fell in the middle, while the U.S. Supreme Court later adopted the least-protective rule).

This rule is sensible. Limiting police to asking clarifying questions after suspects invoke their rights in an equivocal manner "gives a suspect the proper amount of protection to his rights without unduly burdening the police from taking voluntary statements." Robtoy, 98 Wn.2d at 39.

Other state courts have applied the Robtoy rule under their state constitutions. See, e.g., State v. Diaz-Bridges, 208 N.J. 544, 34 A.3d 748

(N.J. 2012); State v. Hoey, 77 Hawai'i 17, 36, 881 P.2d 504, 523 (Haw. 1994). It is appropriate to review those cases to help determine the scope of protection under our state constitution. See Gunwall, 106 Wn.2d at 67-68 (reviewing state constitutional cases from Colorado and New Jersey in determining scope of protection under article I, section 9).

Even though the language of Hawaii's self-incrimination clause is the same as that of the Fifth Amendment, the Hawaii Supreme Court held it was appropriate "to afford our citizens broader protection under article I, section 10 of the Hawai'i Constitution than that recognized by the *Davis* majority under the United States Constitution." Hoey, 881 P.2d at 523. The court was persuaded by the reasoning of the concurring opinion in Davis:

> A rule barring government agents from further interrogation until they determine whether a suspect's ambiguous statement was meant as a request for counsel . . . assures that a suspect's choice . . .will be scrupulously honored, and it faces both the real-world reasons why misunderstandings arise between suspect and interrogator and the real-world limitations on the capacity of police and trial courts to apply fine distinctions and intricate rules.

Id. (quoting Davis, 512 U.S. at 469 (Souter, J., concurring in the judgment)). The court accordingly held that police must clarify ambiguous invocations of counsel or cease interrogation:

> (1) When a suspect makes an ambiguous or equivocal request for counsel during custodial interrogation, the

> police must either cease all questioning or seek non-substantive clarification of the suspect's request, and (2) if, upon clarification, the defendant unambiguously and unequivocally invokes the right to counsel, all substantive questioning must cease until counsel is present.

Hoey, 881 P.2d at 523.

Other supreme courts have adopted the same rule under their respective state constitutions. For example, the Minnesota Supreme Court held, "in order to protect an accused's right to counsel under the state constitution, police must stop questioning and must clarify an accused's intentions if the accused makes a statement during custodial interrogation that could reasonably be construed as an expression of a desire to deal with the police only through counsel." State v. Risk, 598 N.W.2d 642, 644 (Minn. 1999); accord Steckel v. State, 711 A.2d 5, 10-11 (Del. 1998) (announcing same rule under article I, section 7 of Delaware Constitution); see also State v. Effler, 769 N.W.2d 880, 895-96 (Iowa 2009) (Appel, J., specially concurring) (suggesting that upon proper briefing, Iowa Supreme Court would decline to follow Davis under state constitution).

Oregon, Delaware and New Jersey have adopted the same rule with respect to the right to silence. The New Jersey Supreme Court did so after Thompkins was decided, expressly declining to follow that opinion under the New Jersey Constitution. Diaz-Bridges, 208 N.J. at 564. The

Delaware Supreme Court, which had already rejected Davis in the right-to-counsel context, preemptively rejected Thompkins in State v. Draper, 49 A.3d 807, 810 (Del. 2002). There, the court held that a defendant's request to speak to his mother was an ambiguous invocation of his right to remain silent, and that the police should have clarified his intent before continuing the interrogation. Id. at 808. Because the detectives instead forged ahead with questioning, the resulting statements should have been suppressed. Id. at 811. The Oregon Constitution similarly protects equivocal invocations of both the right to silence and the right to counsel. State v. Holcomb, 213 Or. App. 168, 159 P.3d 1271 (Or. Ct. App. 2007). Following such invocations, the police are only permitted to "ask follow-up questions to clarify whether the suspect, through the equivocal request, intended to invoke either right." Id. at 174.

The above state constitutional decisions are consistent with this Court's decision in Robtoy. The fact that Robtoy was the law in this State for decades, and that it provided stronger protection than that ultimately afforded by the U.S. Supreme Court under the Fifth Amendment, weighs in favor of a broader interpretation of the analogous rights under article one, section 9.

The fifth Gunwall factor, differences in structure between the state and federal constitutions, always supports an independent constitutional

analysis because the federal constitution is a grant of power from the people, while the state constitution represents a limitation of the State's power. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). While individual rights were tacked on as amendments to the federal constitution, our state constitution begins with a Declaration of Rights.

Finally, state law enforcement measures are a matter of state or local concern. Id. Indeed, the Supreme Court has recognized as much in the specific context of custodial interrogations. Miranda, 384 U.S. at 467 ("We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws"). As explained above, several state supreme courts have recognized that this issue is a matter of state concern, and have held that their state constitutions are more protective in this context. Diaz-Bridges, 208 N.J. 544; Hoey, 881 P.2d at 523; Draper, 49 A.3d at 810; Risk, 598 N.W.2d at 644; Holcomb, 213 Or. App. at 174.

The fundamental fairness of trials held in Washington is also a matter of particular state concern. State v. Bartholomew, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984). Here, fundamental fairness dictates that the when suspects subjected to custodial interrogation make ambiguous or equivocal invocation of their rights under article I, section 9, police must

limit further questioning to clarifying the request. See Robtoy, 98 Wn.2d at 39; Davis, 512 U.S. at 467 (Souter, J., concurring in the judgment) ("The concerns of fairness and practicality that have long anchored our *Miranda* case law" point to a rule requiring law enforcement officials who reasonably do not know whether or not the suspect has invoked his rights to "stop their interrogation and ask him to make his choice clear").

In sum, an evaluation of the Gunwall factors shows article I, section 9 provides broader protection against compelled self-incrimination than the Fifth Amendment. The framers of the Washington Constitution purposely chose language that is different from that of the Fifth Amendment, the structure of our state constitution emphasizes individual rights, and prior caselaw in this state protected individuals who asserted their rights ambiguously from continued interrogation absent clarification. This Court should hold that under article I, section 9, if a suspect asserts his rights during a custodial interrogation but the assertion is equivocal, further questioning must be limited to clarifying that request. Robtoy, 98 Wn.2d at 39.

e. The State improperly commented on Mr. Randmel's right to remain silent.

In addition to testifying about Mr. Randmel's substantive answers, Officer Woodward testified that Mr. Randmel told him that he would

rather not answer questions. RP 189. The prosecutor recounted this testimony during closing. RP 262. Because Mr. Randmel invoked his right to silence, it was improper for the State to elicit this testimony and to emphasize it during closing when arguing that the jury should convict Mr. Randmel. By doing so, the State impliedly invited the jury to use Mr. Randmel's invocation of a constitutional right against him. See State v. Burke, 163 Wn.2d 204, 221-22, 181 P.3d 1 (2008) (prosecutor impermissibly commented on defendant's right to silence); State v. Holmes, 122 Wn. App. 438, 443, 93 P.3d 212 (2004) ("It is fundamentally unfair, and a violation of due process, to allow an arrested person's silence to be used to impeach an exculpatory explanation offered by that person at trial.").

f. The errors cannot be proven harmless beyond a reasonable doubt.

The admission of statements obtained in violation of Miranda and a comment on a defendant's right to silence are subject to the constitutional harmless error test. Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); Burke, 163 Wn.2d at 222. Prejudice is presumed and the State bears the burden of persuading the appellate court that the error is harmless beyond a reasonable doubt.

Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

Here, the admission of Mr. Randmel's statements and the comments on his right to silence cannot be proven harmless as to any of Mr. Randmel's convictions. Mr. Randmel presented alibi defenses as to the charges premised on the December incidents (Counts I, II, III, and IV). His statements to Officer Woodward were effectively confessions to these crimes. As recognized by the United States Supreme Court, "[a] confession is like no other evidence." Fulminante, 499 U.S. at 296. Besides these inculpatory statements, only questionable eyewitness testimony linked Mr. Randmel to the December crimes.

As for the January incident (Counts V and VI), the statements hurt Mr. Randmel's credibility, who testified that he had not been in possession of the vehicle (he only took a pair of boots from the car) and that he had only fled because he was frightened. Moreover, there was the additional danger that the jury would use Mr. Randmel's invocation of silence against him. Finally, there was also a real risk that the jury would unfairly use Mr. Randmel's substantive statements about the December incidents to find him guilty of charged crimes from January.

The State cannot meet its burden to prove harmless error. All of the convictions should be reversed.

g. The court failed to enter findings of fact and conclusions of law.

After conducting a CrR 3.5 hearing, the court must enter written findings of fact and conclusions of law. CrR 3.5(c). This ensures that there is an adequate record for the review. See State v. Head, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998).

Although the court directed the State to prepare written findings of fact and conclusions, no findings or conclusions were entered. RP 138. Unless the court is satisfied with the record, the remedy is remand for entry of the findings and conclusions. See Head, 136 Wn.2d 624-25.

If this Court is satisfied that the court's oral ruling provides sufficient information to enable review, this Court may review the issues without remanding. State v. Radka, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004). This Court should reverse because the record establishes Mr. Randmel invoked his right to silence and that the erroneously admitted statements were prejudicial. If this Court remands, Mr. Randmel reserves the right to challenge the court's findings and argue that the belated entry is prejudicial. See Head, 136 Wn.2d at 624-25.

3. Without considering Mr. Randmel's ability to pay, the court imposed over $2,000 in discretionary legal financial obligations. Because the court did not conduct the necessary inquiry into Mr. Randmel's ability to pay, this Court should remand for a new sentencing hearing.

a. The court fails to inquire into Mr. Randmel's ability to pay.

At sentencing, the parties and the court did not discuss the issue of legal financial obligations. 5/12/15RP 1-29. Still, the trial court imposed a total of $2,750 in legal financial obligations. CP 68 ($500 victim penalty assessment fee; $200 criminal filing fee; $250 jury demand fee; and $1,800 fee for court appointed attorney). Of this amount, $2,050 were discretionary ($250 jury demand fee and $1,800 fee for court appointed attorney). See State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). Without conducting an on-the-record inquiry into Mr. Randmel's ability to pay, the court entered a boilerplate finding that it had "considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." CP 68.

b. Before imposing legal financial obligations, a sentencing court must inquire into the defendant's ability to pay. Appellate courts may address this issue for the first time on appeal.

Before a trial court imposes legal financial obligations (LFOs), RCW 10.01.160(3) requires that the sentencing judge must make an individualized inquiry into the defendant's current and future ability to pay. State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Washington appellate courts have discretion to review LFOs challenged for the first time on appeal:

> RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. *State v. Russell*, 171 Wn.2d 118, 122, 249, P.3d 604 (2011). Each appellate court must make its own decision to accept discretionary review. National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.

Blazina, 182 Wn.2d at 834-35. Following our Supreme Court's lead in Blazina, this Court should review the issue.

c. The trial court erred by not conducting an on-the-record, individualized inquiry into Mr. Randmel's ability to pay. This Court should exercise its discretion and remand for a new sentencing hearing.

Under RCW 10.01.160(3) and Blazina, the trial court erred. RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future

ability to pay before the court imposes LFOs. Blazina, 182 Wn.2d. at 837-38. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Id. at 838. The sentencing court should examine whether the defendant is indigent under GR 34. Id. Hence, because the records in the two cases in Blazina did not show that the sentencing courts inquired into either defendant's ability to pay, the Court remanded for new sentencing hearings. Id.

Likewise, the trial court did not engage in this inquiry before imposing legal financial obligations. Given the significant sum imposed on Mr. Randmel and the logic of Blazina, this Court should exercise its discretion and remand for a new sentencing hearing.

4. This Court should direct that no costs will be awarded to the State for this appeal.

If Mr. Randmel does not substantially prevail in this appeal, the State may request appellate costs. RCW 10.73.160(1) ("The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs."); RAP 14.2 ("commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review."). This Court has discretion

under RAP 14.2 to decline an award of costs. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, No. 72102-0-1, slip op. at 8 (January 27, 2016). This means "making an individualized inquiry." Sinclair, slip. op at 12 (citing Blazina 182 Wn.2d at 838). A person's ability to pay is an important factor. Id. at 9.

Here, there has been no inquiry into Mr. Randmel's ability to pay legal financial obligations. Mr. Randmel was found to be indigent. Supp. CP __ (sub. no. 54). This creates a presumption of indigency that continues on appeal. RAP 15.2(f); Sinclar, slip. op. at 13. Given this record, the Court should exercise its discretion and decline any request for costs. Cf. Sinclair, slip. op. at 12-14 (declining State's request for costs in light of defendant's indigency and lack of evidence or findings showing that defendant's financial situation would improve).

F. CONCLUSION

Under the to-convict instructions and the law of the case doctrine, the State failed to prove that Mr. Randmel "concealed" or "disposed of" any of the three motor vehicles, requiring reversal of the three convictions for possession of a stolen motor vehicle. Because of the error in admitting Mr. Randmel's custodial statements and the improper comments by the State on his right to silence, this Court should reverse all of the convictions. Irrespective of these issues, this Court should remand for a

new sentencing hearing because the sentencing court imposed significant discretionary legal financial obligations without considering Mr. Randmel's ability to pay.

DATED this 3rd day of February, 2016.

Respectfully submitted,

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

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	RICHARD WEYRICH WHATCOM COUNTY PROSECUTOR'S OFFICE [Appellate_Division@co.whatcom.wa.us] 311 GRAND AVENUE BELLINGHAM, WA 98225	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	NAVARONE RANDMELL 354918 MONROE CORRECTIONAL COMPLEX-WSR PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF FEBRUARY, 2016.

X_____

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