

64709-1

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No. 64709-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

GABRIEL JORDON BURNS,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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COURT OF APPEALS  
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A. ARGUMENT IN REPLY

MR. BURNS'S ASSERTION THAT HE "[DID NOT] WANNA TALK ABOUT IT" WAS AN UNEQUIVOCAL REQUEST THAT OFFICERS CEASE QUESTIONING HIM ABOUT THE ALLEGED CRIME AND HIS POSSIBLE MOTIVE

During custodial interrogation of Mr. Burns, one officer asked him, "Why don't you tell us what really happened?" CP 117.

Immediately, the other officer asked whether the alleged robbery "[had] to do with retaliation about gettin' the money back[?]" CP 117. At that point, Mr. Burns said, "Well I don't wanna talk about it man." CP 117. But instead of honoring Mr. Burns's request to cease interrogation on those topics, the officers continued to question and cajole him into answering further questions. CP 118-72. Because Mr. Burns's request to cease questioning was unequivocal, and because the officers did not scrupulously honor that request, Mr. Burns's subsequent statements must be suppressed.

The State acknowledges Mr. Burns's statement, "I don't wanna talk about it," clearly indicated a desire not to answer the officers' questions. SRB at 12. But the State argues Mr. Burns was not invoking his Fifth Amendment right to silence, because his statement indicates only a desire not to answer a "specific

question" about "that particular topic." SRB at 8, 12. The State's argument fails.

As the trial court did, the State relies heavily on the fact that Mr. Burns answered additional questions and engaged in a "continued dialog" with police. SRB at 12. The State's position is clearly contrary to well-established United States Supreme Court case law. As discussed in the opening brief, the Supreme Court has unambiguously established that "an accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request" to be silent. Smith v. Illinois, 469 U.S. 91, 92, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984). In determining whether a suspect's request to be silent is equivocal, the Court may consider only the request itself and "the circumstances leading up to the request." Id. at 98. The Court may *not* consider the suspect's subsequent statements. Id. This bright-line rule protects the accused from police "badger[ing]" or "overreaching," "explicit or subtle, deliberate or unintentional," which "might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request" to be silent. Id. (quoting Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S.Ct. 2830, 77

L.Ed.2d 405 (1983); Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)).

The salutary purpose of this bright-line rule is demonstrated by the facts of this case. Even though Mr. Burns indicated he "[did not] wanna talk about it," the police officers were successful at cajoling him into making further statements. One officer immediately stated,

DETECTIVE: Well, Gabe, you just got done sayin' that you have nothin' to lose. You're gonna away [sic] for eighteen months.<sup>[1]</sup> You want a better life for yourself. So you're, you're gonna, you know this thing might throw a, a co, you know a little cog in the works about you know Friday you bein' sentenced, okay. So I think it might behoove yeah [sic] to, to, to tell us what actually took place so we can get to the bottom of this thing. I mean I'm I'm um, I, I wanna talk to my Supervisor cause I, I kind a have some serious doubts about what happened.

BURNS: What do you mean doubts? What do you, what do you, what do you mean?

DETECTIVE: Well I don't think, I don't think Hani's being totally honest with me. But I, I can't totally confirm anything until you tell me what actually took place. I mean I think it, it's gonna put you in a better situation Gabriel, to, to, to tell us what actually took place that night and what happened beforehand. I mean uh if, if you lie to us it, it just you know . . .

CP 118. At the officers' prodding and suggestion, Mr. Burns continued to talk for an additional 54 pages of transcript. Had the

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<sup>1</sup> Mr. Burns was awaiting sentencing for a conviction in an unrelated criminal matter.

officers scrupulously honored Mr. Burns's request to be silent, the interview would have ended on page 19.

The State's argument that Mr. Burns was selectively choosing not to answer questions on a specific topic, that the officers honored that specific request, and that the trial court did not admit any of Mr. Burns's subsequent statements related to that topic, also fails. As stated, Mr. Burns said he "[did not] wanna talk about it" in response to two questions asked back-to-back by the two officers. First, one officer asked, "Why don't you tell us what really happened?" CP 117. The second officer then immediately asked, "Does that whole thing just have to do with retaliation about gettin' the money back, is that what it was?" CP 117. Thus, the officers' questions related to two topics: (1) what happened during the alleged crime; and (2) Mr. Burns's possible motive. The officers should have ceased questioning about those two topics, but they did not. The trial court should have excluded any subsequent statements related to those two topics, but the court did not.

As discussed in the opening brief, Mr. Burns's statements made after he invoked his right to silence were admitted as evidence of motive and consciousness of guilt. The trial court admitted several of Mr. Burns's incriminating and highly prejudicial

statements about his possible motive—the failed drug deal and his suspicions that Mr. Elgiadi had "ripped [him] off for everything." CP 121-22, 154-57. The trial court also admitted Mr. Burns's statement made in response to the officer's questions about the alleged crime itself. The court admitted the following exchange:

BURNS: Mike, be straight up with me.

DETECTIVE: I'm trying to be straight up with you.

BURNS: What're you trying to charge me with?

DETECTIVE: Well that's what I'm tryin' to find out what. I mean we got a situation here wh, where Hani stole some you know money from you, okay. You went back in retaliation and fucked his house up and hit some people, okay. Everbody's alive and well and nobody has fractured skulls. And like I said, the TV's can be replaced and the paint, coats of paint can go over the wall. 'Kay. I, I don't know what we have here until you tell me what it is and I, I can get a hold of a Prosecutor. Like I said, we work robbery.

BURNS: Mike, there's nothing that you, there's nothing, there's nothing, there's nothing I can say right now to benefit the situation. There's nothin'.

DETECTIVE: I, I (unintelligible) . . .

BURNS: And then regardless you're probably gonna . . .

DETECTIVE: I think you're , I think . . .

BURNS: end up getting really upset with me.

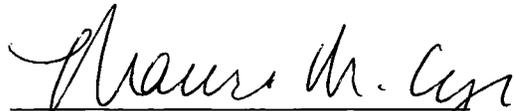
CP 132-33. The court admitted the statements as evidence of consciousness of guilt. 8/26/09RP 43-46. The statements were made in response to questions about what happened during the alleged incident. They therefore relate to a topic that Mr. Burns earlier indicated he did not want to talk about.

In sum, the trial court erred in admitting Mr. Burns's statements made after he invoked his right to silence. For the reasons set forth in the opening brief, pp. 23-24, admission of the statements was not harmless beyond a reasonable doubt.

B. CONCLUSION

For the reasons set forth above and in the opening brief, the trial court erred in admitting Mr. Burns's custodial statements made to police after he invoked his right to silence. Because the statements were highly prejudicial, the convictions must be reversed.

Respectfully submitted this 17th day of February 2011.



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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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v.	)	NO. 64709-1-I
	)	
GABRIEL BURNS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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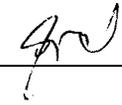
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