No. 44168-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

TRAVIS C. BAZE, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay

No. 12-1-00123-5

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

A. Errors Regarding CrR 3.5 Hearing Findings and Conclusions:

i) Finding of Fact No. 10.
ii) Finding of Fact No. 12.
iii) Conclusions of Law No.(s) 4-10.

B. Error Regarding Judgment and Sentence: Baze alleges that the trial court erred by not vacating his convictions for assault and robbery based upon Double Jeopardy.

II. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

A. Baze asserts that his statement was obtained in violation of his right to counsel and that the trial court, therefore, should have suppressed his statement. The State counters that Baze knowingly, voluntarily and intelligently gave his statement after he was correctly advised of, and understood, his rights, including the right to an attorney. Baze never asked for an attorney, and there is no evidence that he wanted an attorney. The State avers, therefore, that the trial court correctly denied suppression of Baze's statement at trial.

1. Relevant Facts

2. Standard of Review

3. Legal Standards

4. On review, Baze argues that his waiver of *Miranda*[1] rights was invalid because the detectives qualified and contradicted the

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 1633, 16 L. Ed. 2d 694 (1966). Throughout this brief case is cited simply as *Miranda*, except where direct citations are appropriate.

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Miranda warnings, mislead him about the availability and usefulness of a lawyer, and urged him to give a statement before contacting a lawyer. In response, the State avers that Baze's will was not overborne by detectives' advice, which was in response to his question to detectives, and that Baze knew that if he didn't want to give a statement all he had to do was ask for a lawyer or just choose to remain silent. Instead, he voluntarily chose to give a statement.

5. Baze asserts that detectives' statements about the availability of a lawyer were misleading and not in compliance with CrR 3.1(c), thereby making Baze's waiver of his right to counsel invalid. But Baze did not raise this issue below, and the record is, therefore, insufficient for review. Additionally, Baze did not ask for an attorney, and there is no evidence that he desired an attorney.

6. Under current controlling precedent, Wash. Const. art. I, § 9 is coextensive with the Fifth Amendment of the United States Constitution.

   (a) The pending Supreme Court case of *State v. Piatnitsky* (No. 87904-4) will not necessarily be determinative in the instant case.

   (b) A *Gunwall*[2] analysis shows that Wash. Const. art. I, § 9 and the Fifth Amendment of the United States Constitution are coextensive.

   (c) Baze asserts that his interrogation was unlawful under the standards of *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982), but the Washington Supreme Court has recognized the abrogation of *Robtoy*, and the facts of *Robtoy* are dissimilar to the facts of the instant case.

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[2] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Referred to generically as *Gunwall* throughout this brief, except where a specific citation is appropriate.

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7. There was no error by admitting Baze's statement; so, whether admission of the statement was prejudicial is not an issue.

B. Baze asserts that his convictions for robbery and assault must be vacated because they subject him to double jeopardy. But Baze's position is contrary to *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), which holds that because the legislature intended separate punishments, convictions of assault in the first degree and robbery in the first degree arising out of the same criminal conduct does not offend Double Jeopardy.

III. FACTS AND STATEMENT OF CASE

On March 26, 2012, Shawn Marrow borrowed his mother's car and left home to run an errand. RP 125-126. He was supposed to be back within an hour, but he did not return. RP 126.

Shawn was a heroin addict and had worked for local police as a confidential informant (CI). RP 140, 171, 326. While working as a CI, Shawn had performed controlled buys where he purchased heroin from the home of domestic partners Jennifer Hansen and Stephen Churchill. RP 176-77, 326, 329, 382. On one occasion during a controlled buy Shawn bought heroin from Churchill; on a separate occasion he bought heroin from Hansen. RP 326.

Based upon information obtained from Shawn, police obtained a search warrant for the residence that Hansen and Churchill shared on Old

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Lyme Road in Mason County. RP 329, 337. Police executed the warrant and found illegal drugs in the home. RP 177. Hansen and Churchill were arrested. RP 329. After they were arrested, Hansen and Churchill also became confidential informants. 330-31.

While Hansen and Churchill were in jail, someone -- probably Shawn -- burglarized their home. RP 332-33. The burglary occurred during February of 2012. RP 329, 341. Hansen and Churchill were angry at Shawn because of the burglary, and they planned to retaliate. RP 134-35, 336-38.

Churchill and Hansen had tried on several occasions to set-up Shawn so they could get even for the burglary. RP 388. They had tried, but had so far failed, to trick Shawn into meeting them. RP 388.

In March of 2012, Travis Baze and his girlfriend, Ashley McCord, lived on the Hansen-Churchill property in a side-house that was separate from the main house where Hansen and Churchill lived. RP 382. A guy named Robert Taft told Hansen that Shawn was trying to buy heroin. RP 455-56. Taft gave Shawn's cell phone number to Hansen. RP 455-56.

Phone records confirmed that after Taft gave Shawn's phone number to Hansen, Baze's cell phone was used to send a text message to

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Shawn. RP 406. The message was sent on March 25, 2012, at 8:58 p.m., but due to technical peculiarities with the phone company, the message was not received by Shawn until 6:35 the following morning. RP 406-07. The message, offering to sell heroin, said: "Rob said to hit you up, said you needed help. Hit me back if you want." RP 407.

On March 26, 2012, at about 1:40 p.m., Shawn responded by returning a text message to Baze's cell phone, wanting to buy heroin. RP 385-86, 408. When Baze saw the message, he took the phone, with the message, to the main house and showed it to Churchill. RP 385-86.

Someone contacted Shawn and set up a meeting, and Baze and Churchill then left in Baze's car and drove to a spot on the side of the road in Mason County to meet Shawn. RP 386-87. Baze had a baseball bat, which he and Churchill brought along when they went to meet Shawn. Tr. Ex. 70 at 5-9, 22-23, 34.[3] Baze would later tell detectives that when he left with Churchill to go meet Shawn, he just thought they were going to go rough him up a bit and maybe take his money. Tr. Ex. 70 at 22.

Baze and Churchill were the first to arrive at the meeting place. Tr. Ex. 70 at 4. When Shawn arrived, he got out of his car and approached

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Baze, where Baze sat in the driver's seat of his car. It appeared that Shawn didn't see Churchill, and since Shawn didn't know Baze, he still didn't realize that it was a set-up. Tr. Ex. 70 at 4, 17. As Shawn approached Baze's car, Baze rolled up his window. Tr. Ex. 70 at 4. As Shawn stood looking at Baze through the closed window, Churchill approached from the side and bashed Shawn in the head with the bat. Tr. Ex. 70 at 4-5, 18. Churchill picked up the $45.00 that Shawn had brought to buy heroin, and he then got back in the car. Tr. Ex. 70 at 11. Baze drove away with Churchill in the passenger seat, leaving Shawn injured on the side of the road. Tr. Ex. 70 at 11.

Within about 20 minutes after they had left home to go meet Shawn, Churchill and Baze were back home again. RP 387. Baze, laughing and smiling, went into the house where McCord was waiting. RP 388. When McCord asked Baze what had happened, Baze didn't give detail, but he told McCord simply that Churchill had "cleaned it up," meaning that Churchill had taken care of business. RP 388-89.

Meanwhile, a passerby discovered Shawn badly injured on the side of the road and summoned help. RP 144-154. An ambulance came and

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[3] For consistency and ease of reading, the State has adopted Baze's system of identifying the record so that in the State's brief, consistent with Baze's brief, "Tr. Ex." Stands for

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took Shawn to the hospital. RP 168. Three days later, Shawn died from his injuries. RP 129, 301-02, 320.

After receiving the evidence, a jury convicted Baze of assault in the first degree, robbery in the first degree, murder in the first degree, and murder in the second degree. RP 638-39. The jury returned deadly weapon special verdicts in regard to each charge. RP 639-40. Because it was charged as an alternative to murder in the first degree, the court vacated count IV, which was the murder in the second degree conviction, and its attached deadly weapons finding,. RP 672-73; CP 4, 7.

IV. ARGUMENT

A. Baze asserts that his statement was obtained in violation of his right to counsel and that the trial court, therefore, should have suppressed his statement. The State counters that Baze knowingly, voluntarily and intelligently gave his statement after he was correctly advised of, and understood, his rights, including the right to an attorney. Baze never asked for an attorney, and there is no evidence that he wanted an attorney. The State avers, therefore, that the trial court correctly denied suppression of Baze's statement at trial.

1) *Relevant Facts*

Trial Exhibit, and P.Tr. Ex." stands for pretrial exhibit.

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The State generally accepts Baze's statement of relevant facts but offers some exceptions and provides additional facts, as follows:

Prior to asking Baze whether he wished to give a formal, recorded statement, detectives provided the following warning to Baze:

Detective Rhodes:	Kay. And I know that we've done this once already um out at the house but since we're back on tape or since we are on tape I am gonna advise you of your rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and to have him present with you while you're being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at anytime to exercise these rights, not answer any questions or make any statements. Do you understand those rights?
Baze:	Yes.
Detective Rhoades:	Kay. Want you to do me a favor sign right there for me please. Um and all you're signing for here is that you've been advised of your rights and that you understand them. Kay?
Baze:	Okay.

PTr. Ex. 1 at 2-3.[4]

[4] The transcript of Trial Exhibit 70 and Pretrial Exhibit 1 is transcribed in all capital letters. Consistent with the convention established by Baze in his Opening Brief, where

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After receiving these warnings and acknowledging that he understood his rights, Baze expressed his willingness and desire to give a statement but then asked, "do I need an attorney?" *Id.* at 3. Detective Rhodes answered as follows:

> That's up to you kay. You have the right to have an attorney here. And what I'll tell you is you know if you want an attorney by all means that's your right I've got no problems with that but we're not gonna be able to do a statement tonight.

Id. Baze then asked, "What does that mean for me?" *Id.* Detective Rhodes answered as follows:

Detective Rhodes:	What that means for you is I can pretty much guarantee you with great certainty that an attorney's gonna tell you not to make any statements or not to say anything to the police. That's their blanket their blanket statement that's the advice they give everybody.
Baze:	Um, hm.
Detective Rhoades:	But the dilemma that puts that puts you in or that puts us in is we've gotta go forward with this case then with the evidence that we already have and statements of the other people involved. So I mean it's up it's up to you right now if you want to tell your story in your own words kay we can do that or if you'd like to talk to an attorney by all means you have that right okay. But the issue is the court is

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ever quotes from these exhibits appear in the briefing, the State has used small and large letters where appropriate to aid in ease of reading.

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> gonna appoint you an attorney I don't I don't appoint an attorney I'm not gonna be able to appoint an attorney tonight, there's not gonna be an attorney who's gonna come down here and talk to you and then let you talk to us tonight. That's just that just doesn't happen okay. Like I said an attorney's gonna say you know don't say anything. But at that point you know it's a roll of the dice as far as as far as you're concerned at that point.

Id. at 4.

In his brief to the court on review, Baze argues as fact that "Detective Rhodes… advised Baze that while he had the right to talk to an attorney, he would not be able to talk to one that night because the court, rather than the detective, appoints an attorney." Appellant's Opening Brief at 9. The run-on sentence nature of the transcription of Detective Rhodes' words allows one to choose various characterizations of what was said, but the State wishes to emphasize in this counter-statement of facts that Baze was not told that he could not talk to an attorney "that night." *Id.*; PTr. Ex. 1 at 4. Instead, what Baze was told was: "You have the right to have an attorney here[,]" *Id.* at 3, and "[i]f you'd like to talk to an attorney by all means you have that right okay." *Id.* at 4. He was also told that:

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> ...there's not gonna be an attorney who's gonna come down here and talk to you and then let you talk to us tonight. ...that just doesn't happen okay. Like I said an attorney's gonna say you know don't say anything.

Id. Intermixed within this explanation was a clarification that it was the court, and not the detective, who would appoint counsel if counsel were to be appointed. *Id.*; RP 39-41.

Baze never asked for a lawyer at any time before or during the interview at which he gave his statement. RP 26, 40-41, 43. Upon review of the record on appeal, the State is unable to locate any citation to the record where Baze objected in the trial court to admissibility of his statement based upon CrR 3.1 or Wash. Const. art. I, § 9.

2) *Standard of Review*

The reviewing court conducts a de novo review of the record to determine whether the trial court's conclusions of law are properly derived from its findings of fact. *State v. Pierce,* 169 Wn. App. 533, 544, 280 P.3d 1158, *review denied,* 175 Wn.2d 1025, 291 P.3d 253 (2012).

Unchallenged findings of fact are verities on appeal. *State v. Gasteazoro-Paniagua*, 173 Wn. App. 751, 755-56, 294 P.3d 857 (2013), citing *Pierce* at 544. Baze does not dispute that he was correctly provided

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Miranda warnings and that he was correctly informed of his rights as required by CrR 3.1(c); thus, these facts (found in Finding of Fact No. 4 and No. 9, CP 173-74) are verities. *Gasteazoro-Paniagua* at 755-56; *Pierce* at 544. Likewise, Baze does not dispute the trial court's finding (at Finding of Fact No. 10, CP 174) that he "indicated that he understood his rights as advised." Instead, Baze challenges only the remainder of the trial court's finding, "that he did understand his rights as advised." CP 174 (Finding of Fact No. 10). But, as argued in the argument sections of this brief, there is no evidence whatsoever in the record to indicate that Baze did not understand his rights, but there is substantial evidence in the record to support the trial court's finding that Baze did understand his rights. On review of a trial court's findings of fact from a CrR 3.5 hearing, the reviewing court will sustain the trial court's findings where those findings are supported by substantial evidence in the record. *State v. Broadaway,* 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

In addition to his claim that he did not understand his rights as advised, Baze also claims (for the first time on review) that he was denied access to counsel in violation of CrR 3.1(c). But appellate courts, as a general rule, will not consider issues that are raised for the first time on

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appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn. 2d 918, 926-27, 155 P.3d 125 (2007); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

As an exception to the general rule, however, a claim of "manifest error affecting a constitutional right" may be raised for the first time on appeal. RAP 2.5(a)(3); *Kirkman* at 926-27; *McFarland* at 333. But to constitute "manifest" constitutional error, the error must be '"truly of constitutional magnitude."' *McFarland* at 333, quoting *State v. Scott,* 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Additionally, an error is not manifest unless the record shows that the alleged error has resulted in *actual* prejudice to the defendant. *McFarland* at 333. "[I]t is this showing of actual prejudice that makes the error 'manifest', allowing appellate review." *Id.*, quoting and citing *Scott*, 110 Wn.2d at 688.

"The right to counsel as provided in CrR 3.1 is not of constitutional origin." *State v. Greer*, 62 Wn. App. 779, 791, 815 P.2d 295, 302 (1991). And Baze has not shown actual prejudice. He has not shown that he desired counsel or that he asked for counsel, and he has not shown that there was, in fact, any counsel available during the night when he was interviewed by police.

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3) *Legal Standards*

The relevant legal standards that pertain to each of Appellant's arguments are incorporated into the relevant sections of the State's responsive arguments throughout the State's brief.

4) On review, Baze argues that his waiver of *Miranda* rights was invalid because the detectives qualified and contradicted the *Miranda* warnings, mislead him about the availability and usefulness of a lawyer, and urged him to give a statement before contacting a lawyer. In response, the State avers that Baze's will was not overborne by detectives' advice, which was in response to his question to detectives, and that Baze knew that if he didn't want to give a statement all he had to do was ask for a lawyer or just choose to remain silent. Instead, he voluntarily chose to give a statement.

When detectives initially began the investigation, and when Baze was formally interviewed by detectives in the interview room at the sheriff's office, Shawn Morrow was still alive. RP 16. At that time, the detectives were investigating a serious assault rather than a homicide. *Id.* When Jennifer Hansen gave detectives information that inculpated Baze, the investigation was still developing, and it follows that detectives could

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not at that time reliably know the full extent of Baze's involvement. RP 17-19.

Earlier, at the time of his arrest, detectives accurately read *Miranda* rights to Baze. RP 19, 22-23. Detectives did not ask any questions at that time, but after the *Miranda* warnings were provided, Baze spontaneously asked detectives how Shawn Morrow was doing. RP 19.

When detectives began the formal interview of Baze at the sheriff's office, they again read *Miranda* warnings to him. PTr. Ex. 1 at 2-3. Baze had been arrested before and had been through the court system before. *Id.* at 8. Baze acknowledged that he understood his rights. *Id.* at 3. His rights included the right to have an attorney present while he was being questioned. *Id.* After acknowledging that he understood his rights, which included the right to an attorney, Baze then asked the detectives: "[D]o I need an attorney?" *Id.*

Baze asserts that detectives "qualified and contradicted" his rights, "made affirmative misrepresentations regarding access to a lawyer, and convinced him that consulting with a lawyer would not be in his best interest." Appellant's Opening Brief at 16. But there is no citation to the record where there is substantial evidence to support Baze's factual

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assertion that he was convinced of anything misleading. To support his legal arguments, Baze speculates imaginatively about what he proposes would have been the details of events that did not occur, and he makes factual assertions that are unsupported by the record. *Id.* at 16-18.

Detectives fairly and truthfully told Baze that regardless whether he made a statement, he was under arrest and would remain in jail at least until he saw a judge. PTr. Ex. 1 at 5. In response, Baze asked detectives, "So what … am I under arrest for?" *Id.* Detectives answered Baze, as follows:

Detective Rhoades:	At this point it's assault. And we're not sure of the degree right now okay. It depends on the degree of [Shawn's] injuries. And that's all it comes down to okay.
Detective Ledford:	And maybe based on your statement and what you have to say may add to your involvement in this case or take away from your involvement but without your statement you put it in your own words we can't we can't nail it down as to what your involvement was so we gotta error on the side of caution as to you being maybe more involved than what you are. And that's just for safety reasons so that's kinda where we're at.

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Id. On appeal, Baze asserts that detectives "strongly implied that Baze would face a more severe charge if he did not speak." Appellant's Opening Brief at 17. But the detectives' comments were related to "safety reasons," not charging decisions, and Baze has provided no citation to the record where there is substantial evidence to support his assertion on review that he believed he was required to give a statement in order to avoid more serious charges.

The trial court found that Baze's question (asking the detectives whether they thought he needed an attorney) "was, at best, an equivocal reference to counsel and did not constitute an unequivocal invocation of his right to an attorney." CP 175-76 (Conclusion of Law no. 5). Thus, the trial court appears to have viewed the facts favorably to Baze and to have analyzed Baze's question on a continuum. The court's use of the qualifying term "at best" indicates that the furthest that Baze's question moved along the continuum was to the point where it was an equivocal reference to counsel, but that Baze's question likely fell short of becoming an equivocal request and was simply a question and nothing more. The court's use of the qualifying phrase, "at best," indicates that the court was indefinite in its finding.

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The State contends that rather than make a specific finding, the trial court applied the stricter standard applicable to an equivocal reference to counsel rather than apply a lesser standard as would apply to a mere solicitation for advice. CP 172-77. Thus, the trial court safely accounted for the possibility that Baze's question was an equivocal request for counsel, rather than a mere question, and by doing so the trial court's analysis moved further along the continuum where it consumed and surpassed the legal analysis that would be applicable if the question did not rise to the level of an equivocal reference to counsel. *Id.*

Baze posed his question after he was read *Miranda* warnings for a second time and indicated that he understood his rights, but he posed the question before, rather than after, he had provided an *express* waiver of his rights. PTr. Ex. 1 at 2-3. In the instant case, Baze never asserted the right to counsel, and while he may have *effectively* waived his right when he asked detectives for advice, his *express* waiver of the right came after, rather than before, detectives had answered his question.

If a suspect "effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him." *Davis v. United States*, 512 U.S. 452, 458, 114 S. Ct. 2350, 2354, 129 L.

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Ed. 2d 362 (1994), citing *North Carolina v. Butler*, 441 U.S. 369, 372-376, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Waiver can be inferred "from the actions and words of the person interrogated." *Id.* at 373. An express waiver of *Miranda* is not necessary. *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 2261, 176 L. Ed. 2d 1098 (2010).

"[O]nce a suspect has knowingly waived his right to an attorney, he must explicitly ask for an attorney or the police may continue questioning." *State v. Radcliff*, 164 Wn.2d 900, 902, 194 P.3d 250 (2008), citing *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Prior to *Radcliff* and *Davis*, a suspect's equivocal request for counsel would have barred any further questioning by police except to clarify the request. *See, e.g.*, *State v. Robtoy*, 98 Wn.2d 30, 39, 653 P.2d 284 (1982). After *Davis*, however, it is now clear that once a suspect has waived the right to counsel, even if the suspect then makes an equivocal reference to counsel, police may continue questioning without clarification. *Radcliff* at 902. Each of these cases, however, addressed facts where the defendant first expressly waived the right to counsel but then made an equivocal reference to counsel after, rather than before,

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waiving the right to counsel. *Radcliff* at 902; *Davis* at 455; *Robtoy* at 31-32.

At least one court has opined that where a subject makes an equivocal reference to counsel before, rather than after, giving a waiver of the right to counsel, the interrogators must stop any questioning and must clarify the defendant's intention before continuing questioning. *United States v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008). According to the *Rodriguez* court, the *Davis* court's holding -- that equivocal requests for counsel do not require interrogators to cease questioning or to clarify the defendant's equivocal request -- applies only where the equivocal request comes after, rather than before, there has been a waiver of *Miranda*. *Rodriguez* at 1077-80.

But, "if a suspect is 'indecisive in his request for counsel,' the officers need not always cease questioning." *Davis* at 460, quoting *Miranda v. Arizona*, 384 U.S. 436, 485, 86 S. Ct. 1602, 1633, 16 L. Ed. 2d 694 (1966). Where a suspect has waived his *Miranda* rights, the State bears the burden of proving by a preponderance of the evidence that the suspect understood his rights and voluntarily waived them. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

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It is not clear that when a suspect asks whether he or she needs an attorney, the question is an equivocal reference to counsel. Instead, some courts have found this statement to be neither an equivocal nor an unequivocal request for counsel, but instead, to be a mere request for advice. *See, e.g.*, *Norman v. Ducharme,* 871 F.2d 1483, 1486 (9th Cir. 1989); *United States v. Ogbuehi,* 18 F.3d 807, 813 (9th Cir. 1994) (defendant's question, "Do I need a lawyer" or "Do you think I need a lawyer" does not "rise to the level of even an equivocal request for an attorney"). Other cases have found similar questions to be ambiguous or equivocal. *See, e.g.*, *Diaz v. Senkowski,* 76 F.3d 61, 63–64 (2nd Cir. 1996) (holding that use of the words "Do you think I need a lawyer?" immediately following the words "I think I want a lawyer" rendered the request equivocal); *State v. Walkowiak,* 183 Wis.2d 478, 515 N.W.2d 863, 867 (1994) (holding that suspect's question "Do you think I need an attorney?" was equivocal).

"*Miranda* gives the defendant a right to choose between speech and silence." *Connecticut v. Barrett*, 479 U.S. 523, 529, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987). To determine whether a statement was voluntary, the court must ask "whether a defendant's will was overborne

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by looking at the totality of all the surrounding circumstances." *Doody v. Schiro*, 548 F.3d 847, 858 (9th Cir. 2008). Baze was not new to the criminal justice system. PTr. Ex. 1 at 8. After receiving proper *Miranda* warnings for a second time and acknowledging that he understood those rights, Baze voluntarily chose to engage detectives in conversation and asked their advice about whether he needed a lawyer. PTr. Ex. 1 at 2-3. The State avers that Baze's choice to engage detectives effectively waived his right to counsel. *North Carolina v. Butler,* 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Because Baze effectively waived his right to counsel after receiving *Miranda* warnings, detectives were free to question him. *Id.* at 372-376.

But regardless whether Baze had effectively waived *Miranda* by engaging the detectives and soliciting their advice, no "interrogation" occurred prior to Baze's later, express, waiver of *Miranda*. The term "interrogation" is defined as express questioning or its functional equivalent, such as words or actions, that are likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Words or actions that are "normally attendant to arrest and custody" are excluded from the definition of

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interrogation. *Id.* at 301. Persuasive authority from the federal Ninth Circuit Court of Appeals has found that "when an officer informs a defendant of circumstances which contribute to an intelligent exercise of his judgment, this information may be considered normally attendant to arrest and custody." *United States v. Crisco*, 725 F.2d 1228, 1232 (9th Cir. 1994).

In the instant case, detectives' responses to Baze's question were not likely to elicit an incriminating response. PTr. Ex. 1 at 2-11. Instead, detectives' responses informed Baze that, if he requested an attorney, they would have to cease the interview, which would interfere with his ability to give a statement. *Id.* at 2-4. "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana,* 338 U.S. 49, 59, 69 S.Ct. 1357, 1358, 93 L.Ed. 1801 (1949) (Jackson, J., concurring). Baze had already expressed his desire to give a statement; detectives, in an accurate and honest response to Baze's question, merely clarified with Baze that his desire to give a statement would likely be thwarted if he asked for counsel. *Id.* Thus, the State asserts that irrespective of whether Baze had *effectively* waived his rights prior to the detectives' responses, because the responses

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were not interrogation, they were not prohibited by the Fifth Amendment or *Miranda*. *See*, *Rhode Island v. Innis*, 446 U.S. 291, 301-03, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Baze argues that detectives' responses to his question were designed to persuade him to waive *Miranda*. But irrespective of whether detectives' responses to Baze's question were interrogation, "[c]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda v. Arizona*, 384 U.S. 436, 478, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). At least one lower federal court, however, has found that "affirmative misrepresentations by the police may be sufficiently coercive to invalidate a suspect's waiver of the Fifth Amendment privilege." *United States v. Anderson*, 929 F.2d 96, 100 (2d Cir. 1991). But other lower federal courts have found that that '"misrepresentations are insufficient, in an of themselves, to render a confession involuntary."' *United States v. Whitfield*, 695 F.3d 288, 302-03 (4th Cir. 2012, *cert. denied*, 133 S.Ct. 1461, 185 L.Ed.2d 368 (2013), quoting *Johnson v. Pollard*, 559 F.3d 746, 755 (7th Cir. 2009). Current

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United States Supreme Court precedent stands for the holding that "[p]loys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within Miranda's concerns." *Illinois v. Perkins*, 496 U.S. 292, 297-98, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990). The Washington Supreme Court, citing to *Miller v. Fenton*, 796 F.2d 598, 605 (3d Cir. 1986) and other persuasive cases, has explained the rule in Washington as follows:

> [P]sychological ploys such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, "but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." *Miller,* 796 F.2d at 605; *accord United States v. Miller,* 984 F.2d 1028, 1031 (9th Cir.1993); *United States v. Durham,* 741 F.Supp. 498, 504 (D.Del.1990); *State v. Darby,* 1996 SD 127, 556 N.W.2d 311, 320; *State v. Bacon,* 163 Vt. 279, 294–95, 658 A.2d 54 (1995). "The question ... [is] whether [the interrogating officer's] statements were so manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess." *Miller,* 796 F.2d at 605; *see United States v. Baldwin,* 60 F.3d 363, 365 (7th Cir.1995) ("the proper test is whether the interrogator resorted to tactics that in the circumstances prevented the suspect from making a rational decision whether to confess or otherwise inculpate himself"), *vacated on other grounds,* 517 U.S. 1231, 116 S.Ct. 1873, 135 L.Ed.2d 169 (1996), *adhered to on remand,* 124 F.3d 205 (7th Cir.1997).

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State v. Unga, 165 Wn.2d 95, 100-03, 196 P.3d 645, 648-49 (2008) (bracketed material appears in *Unga*).

Baze cites *State v. Tetzlaff*, 75 Wn.2d 649, 453 P.2d 638 (1969), to support his assertion that his statement should be suppressed because -- he asserts -- by telling him that the court would appoint counsel on the following morning, detectives misinformed him about the right to counsel during questioning. Appellant's Opening Brief at 19-20. But in *Tetzlaff*, the defendant was provided with an "advisory statement" that said: "if I have no resources by which I can obtain an attorney, I have a right to wait and if I am charged the court will provide me with an attorney." *State v. Tetzlaff*, 75 Wn.2d at 650. But, contrary to the facts in *Tetzlaff*, in the instant case detectives correctly advised Baze as follows:

> You have the right at this time to talk to a lawyer and to have him present with you while you're being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights, not answer any questions or make any statements.

PTr. Ex. 1 at 3.

Thus, Baze was not told that the appointment of counsel was contingent upon charges being filed or upon any other contingent future event. And, the fact that Baze had the right to have counsel present during

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questioning was highlighted when the detectives told him that it was the court, and not the detectives, who appointed counsel, and that if he wanted counsel they would not be able to take his statement that night. *Id.* at 3-4. As distinguished from the facts of *Tetzlaff*, the rights explained to Baze correctly informed him of his right to counsel. *Duckworth v. Eagan*, 492 U.S. 195, 202-206, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989); *State v. Teller*, 72 Wn. App. 49, 52-53, 863 P.2d 590 (1993).

Baze asserts that "the detectives vitiated the written warning by telling [him] he could not talk to a lawyer before his court hearing (even though he was not clearly indigent) and by denigrating the value of speaking to a lawyer." Appellant's Opening Brief at 19. But Baze provides no citation to the record where he was told that he could not talk to an attorney that night; nor does he provide any citation to the record where there is substantial evidence, or any evidence, that he believed that he could not talk to an attorney that night.

The record shows that Baze never asked for an attorney. PTr. Ex. 1 at 2-11. The record also shows that he was correctly told, without reference to whether the attorney was public or private, that he had the *right* to an attorney *at that time*. *Id.* at 3. But Baze never presented an

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attorney and never asked for an attorney. He was told that if he could not afford an attorney, one would be appointed *prior to any questioning*. *Id.* He was told that if he asked for an attorney, there would be no questioning that night. *Id.* at 3-4. He was told that if he wanted a court-appointed attorney, it would be morning before he could see the judge and have the court appoint an attorney. *Id.* at 4. "If the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel." *Duckworth v. Eagan*, 492 U.S. 195, 204, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989). As in *Duckworth*, detectives in the instant case "did just that." *Id.*

Even though he was correctly and bluntly advised that he would remain under arrest and in jail regardless whether he gave a statement, Baze, of his own free will and volition, decided to waive the right to have counsel present and decided to give a statement. *Id.* at 5, 11. Baze asserts that his freewill was overcome because the detectives tried to convince him that it was in his best interest to give a statement and that he was misled about the availability and desirability of counsel. Appellant's Opening Brief at 16-20. But Baze has cited to no evidence in the record to

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show that he was, in fact, convinced against his will or that he was misled about anything.

Speculation by interrogators that cooperation by a defendant will have a positive effect does not render a statement involuntary. *See, e.g.*, *United States v. Guerrero*, 847 F.2d 1363 (9th Cir. 1988). The Ninth Circuit has indicated "there is nothing inherently wrong with efforts to create a favorable climate for confession." *Clark v. Murphy,* 317 F.3d 1038, 1049 (9th Cir.2003) (quoting *Hawkins v. Lynaugh,* 844 F.2d 1132, 1140 (5th Cir.1988).

"[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his" right to counsel. *Miranda v. Arizona*, 384 U.S. 436, 476, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). But, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause...." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

Here, Baze was neither threatened nor promised anything in exchange for his waiver. PTr. Ex. 1 at 1-8; RP 30-31. He was truthfully told that if he asked for a lawyer, all questioning would cease (and he

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would not be able to give a statement). PTr. Ex. 1 at 3-5. Baze was not obligated to remain silent; he had the right to choose to give a statement. *Connecticut v. Barrett*, 479 U.S. 523, 529, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987). Because Baze's decision to give a statement was "a voluntary decision" that "was made with full awareness and comprehension of all the information *Miranda* requires police to convey," his waiver was valid. *Moran v. Burbine*, 475 U.S. 412, 424, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).

Whether an accused's statements given during a custodial interrogation are admissible as evidence is to be determined by use of the totality of the circumstances test. *State v. Unga*, 165 Wn.2d 95, 100-03, 196 P.3d 645, 648-49 (2008). The test is applied "to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." *Id.* at 100, quoting *Fare v. Michael C.*, 442 U.S. 707, 724–25, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979), and citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Miranda v. Arizona,* 384 U.S. 436, 475–77, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Included in the circumstances relevant to the totality of the circumstances test are:

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> the "crucial element of police coercion;" the length of the interrogation; its location; its continuity; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant of the rights to remain silent and to have counsel present during custodial interrogation. *Withrow v. Williams,* 507 U.S. 680, 693–94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (and cases cited therein).

Unga at 101. The Fifth Amendment protects a person from being *compelled* to give evidence against himself. *Unga* at 101-02. But, as argued *supra*, confessions remain an important part of police work, and individuals have a right to confess. *See* State's argument, *supra* at p. 18 (citing *Connecticut v. Barrett*, 479 U.S. 523, 529, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987); and, at p. 21 (citing *Miranda v. Arizona*, 384 U.S. 436, 478, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)).

When applying the totality of the circumstances test, the reviewing court "does 'not ask whether the confession would have been made in the absence of the interrogation.'" *Unga* at 102, quoting *Miller v. Fenton,* 796 F.2d 598, 604 (3d Cir.1986); and citing *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S. Ct. 1246, 1251, 113 L. Ed. 2d 302 (1991). As the Court in *Unga* explained, '"[i]f the test was whether a statement would have been made but for the law enforcement conduct, virtually no statement would be deemed voluntary because few people give incriminating

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statements in the absence of some kind of official action.'" *Unga* at 102, quoting *United States v. Guerrero,* 847 F.2d 1363, 1366 n. 1 (9th Cir.1988). The correct question is whether the defendant's will was overborn by '"coercive police activity."' *Unga* at 101, quoting *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). This finding '"is a necessary predicate to the finding that a confession is not 'voluntary.'"' *Id.*

Applying the totality of the circumstances test to the facts of the instant case, there was no police coercion of any kind. PTr. Ex. 1 at 2-11; RP 15-47. There was nothing unusual or excessive about the length of the interrogation; nor was there anything coercive about the location or continuity. *Id.* The record shows that Baze was in good mental health and that his thought processes were not impaired by drugs, youth, immaturity or other causes. RP 31-32. Baze was correctly advised that he had the right to remain silent and that he had the right to an attorney during and before answering any questions. RP 22-23; PTr. Ex. 1 at 2-3. Baze had prior experience with the criminal justice system. PTr. Ex. 1 at 8. Baze knew that he did not have to answer questions and that if he asked for an attorney, questioning would immediately stop. *Id.* at 3-8, 10-11. With

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these rights and circumstances known to him, Baze voluntarily proceeded without asking for counsel and gave a voluntary statement. *Id.* at 10-11. Thus, there is no legal basis to exclude his statement from evidence. *Unga* at 101-03.

5) Baze asserts that detectives' statements about the availability of a lawyer were misleading and not in compliance with CrR 3.1(c), thereby making Baze's waiver of his right to counsel invalid. But Baze did not raise this issue below, and the record is, therefore, insufficient for review. Additionally, Baze did not ask for an attorney, and there is no evidence that he desired an attorney.

As argued at page 12, *supra*, the State asserts that this Court should not consider this part of Baze's argument because it alleges nonconstitutional error for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn. 2d 918, 926-27, 155 P.3d 125 (2007); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

On the merits, however, the record shows that at the time of arrest, Baze was correctly advised of his *Miranda* rights, which included the right to counsel. RP 19, 22-23. Baze was specifically told:

> You have the right at this time to a lawyer and to have him present... with you while you're being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you

> before any questioning, if you wish, and you can decide at any time to exercise these rights and not answer any questions or make any statements.

Id. at 22-23.

The record shows that Baze was correctly advised of his rights. Washington court rules require that:

> (1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.
> (2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

CrR 3.1(c). The record shows that the first part of this rule, CrR 3.1(c)(1), was complied with in this case. But compliance with subsection (2) requires more analysis, because Baze never raised this issue in the trial court and the record, therefore, is undeveloped.

Immediately after his arrest and advisement of rights, Baze was transported to the Mason County Jail. RP 19. It was not until later, after Baze had been booked into the jail, that detectives went to the jail and escorted him to the sheriff's office for a formal interview. RP 19-20, 38. At the start of the formal interview, Baze was again informed of his rights,

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in virtually the same language as quoted above. RP 23. Baze said that he understood those rights. RP 25.

"When a person in custody unequivocally requests a lawyer, police are obligated under CrR 3.1(c)(2) to make all reasonable efforts to put that person in contact with a lawyer at the earliest opportunity." *State v. Pierce*, 169 Wn. App. 533, 537, 280 P.3d 1158, 1161 *review denied*, 175 Wn.2d 1025, 291 P.3d 253 (2012). Where this rule is violated, the remedy is suppression of the tainted evidence. *Id.*

But nowhere in the record is there any indication that Baze ever desired or asked for an attorney. Because Baze did not raise this issue in the trial court, there is no evidence in the record to show the normal booking procedures of the jail or to show whether Baze could have contacted counsel from the jail had he so desired. Although there is no indication that he contacted counsel from the jail, there is also no indication in the record to show that he wanted to contact counsel or that he asked for an attorney. Nor is there any record to show that he did not contact counsel. Had this issue been raised in the trial court, it follows that some evidence would have been presented on this issue.

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To the contrary, the record shows that Baze never asked for an attorney. CrR 3.1(c)(2) does not apply unless the suspect unequivocally asks for an attorney. *Pierce* at 545, citing *State v. Whitaker*, 133 Wn. App. 199, 217, 135 P.3d 923 (2006). Additionally, "[t]he rule applies only to a person 'who desires a lawyer'." *Whitaker* at 217. There is no evidence in the record of the instant case that Baze desired a lawyer; the only evidence is that he asked detectives for advice about whether they thought he needed a lawyer.

When Baze asked detectives for advice about whether they thought he needed a lawyer, it was during the evening after normal business hours. PTr. Ex. 1 at p.2-3. In response, the detectives gave pessimistic advice and suggested there was no lawyer at that time of night. *Id.* at 3-5. But there is no evidence that Baze was actually deterred by the detectives' advice or that he reacted to, or made any decision based upon, the detectives' pessimistic advice. Because Baze did not raise this issue in the trial court, there also is no record of whether the detectives' predictions were overly pessimistic or whether counsel would have been available if Baze would have actually asked for or desired counsel.

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On appeal, Baze argues that he was told that his right to counsel was contingent upon the occurrence of a future event when he was told that it was the judge, and not the detectives, who appoint counsel. Appellant's Opening Brief at 21-22. Aside from the fact that there is no evidence in the record to indicate that Baze was misled or that he misunderstood his rights when he gave his statement, the evidence that is in the record shows that Baze was informed that he had the right to counsel right then, at that moment, and to have counsel present during questioning. PTr. Ex. 2-3. Detectives pessimistically opined and predicted that, because it was evening, counsel likely would not be located before the following morning. *Id.* at 3-4. But the fact that Baze was informed, and understood, that if he asked for counsel the interview would stop, demonstrates and reinforces the finding that Baze knew that access to and the presence of counsel at that very moment was a right, because it was clear that if that right was not satisfied at that moment then the questioning must stop at that moment. *Id.* at 3-4.

With this right in mind, Baze never asked for an attorney and never indicated that he desired counsel. PTr. Ex. 1 at 2-11. Beyond asking detectives one time for advice about whether he needed an attorney, Baze

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never mentioned an attorney. *Id.* As argued *supra*, CrR 3.1(c)(2) does not apply unless Baze asked for and desired an attorney. *Pierce* at 545; *Whitaker* at 217. But Baze never asked for an attorney, and there is no evidence in the record that he desired an attorney. PTr. Ex. 1 at 2-11. Still more, the fact that he knew the interview would stop if he asked for an attorney, yet he did not ask for an attorney, shows that he, in fact, did not desire an attorney.

Finally, although the State continues to assert both that Baze should not be permitted to raise this claim for the first time on appeal and that CrR 3.1(c)(2) was not violated in this case, the State also asserts that any violation of this court rule, if one did occur, would be subject to non-constitutional harmless error analysis. *State v. Greer*, 62 Wn. App. 779, 790 n.4, 815 P.2d 295, 302 (1991). Nonconstitutional error is harmless if, within reasonable probability, it did not affect the verdict. *State v. Zwicker,* 105 Wn.2d 228, 243, 713 P.2d 1101 (1986). Within the record of this case, there are no facts from which to discern that had Baze desired or asked for counsel, counsel would have appeared, or that his statement would have been any different than what it is.

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6) Under current controlling precedent, Wash. Const. art. I, § 9 is coextensive with the Fifth Amendment of the United States Constitution.

(a) The pending Supreme Court case of *State v. Piatnitsky* (No. 87904-4) will not necessarily be determinative in the instant case.

Baze begins his argument by reasserting his premise that by asking the detectives for advice about whether they thought he needed counsel, Baze was in effect voicing an equivocal request for counsel. Appellant's Opening Brief at 23.

Baze asserts that the Washington Supreme Court will soon decide the issue he has raised, as indicated by the Court's acceptance of review of *State v. Piatnitsky*, 170 Wn. App. 195, 206, 282 P.3d 1184, 1189 (2012), *review granted in part*, 176 Wn. 2d 1022, 299 P.3d 1171 (2013), which is now pending in the Supreme Court as No. 87904-4.

But the facts of the instant case are dissimilar from the facts of *Piatnitsky*. In the instant case, before executing an express waiver of the right to counsel and the right to remain silent, Baze first expressed his desire to give a statement and then asked for detectives' advice about whether he needed counsel. PTr. Ex. 1 at

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2-3. But in *Piatnitsky*, the defendant equivocated about whether he desired to remain silent. *Piatnitsky*, 170 Wn. App. at 201-04. Because the facts are dissimilar, it is not clear or certain that the Court's holding in *Piatnitsky* would decide the instant case.

(b) A *Gunwall* analysis shows that Wash. Const. art. I, § 9 and the Fifth Amendment of the United States Constitution are coextensive.[5]

Baze contends that Washington has stronger protections against self-incrimination and for the right to counsel than the Fifth Amendment of the federal constitution and that Wash. Const. art. I, § 9 provides independent state grounds to support his argument for suppression of his confession. Appellant's Opening Brief at 25-33. To support his assertion, Baze conducts the inquiry required by *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

The six *Gunwall* factors are: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *Gunwall* at 61-63.

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Under current precedent, however, the protection provided by art. I, § 9 of the Washington Constitution is coextensive with the protection provided by the Fifth Amendment of the United States Constitution. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645, 648 (2008), citing *State v. Earls,* 116 Wn.2d 364, 374–75, 805 P.2d 211 (1991).

The textual language and differences in text of the two provisions is only slightly different. Article I, § 9 of the Washington Constitution provides that an accused shall not "be compelled in any criminal case to give evidence against himself." The Fifth Amendment of the United States Constitution provides that an accused shall not "be compelled in any criminal case to be a witness against himself." But the Washington Supreme Court has "already held that this difference in language is without meaning." *State v. Russell*, 125 Wn.2d 24, 59, 882 P.2d 747, 771 (1994), citing *State v. Moore*, 79 Wn.2d 51, 55-57, 483 P.2d 630, 632 (1971).

Regarding constitutional history, the Court in *Russell* recognized a lack of support for reading the Washington Constitution as providing greater protection than the federal constitution. *Russell* at 89-60.

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[5] Significant portions of the State's brief regarding *Gunwall* analysis is borrowed from the King County Prosecutor's Office's brief in *State v. Piatnitsky*, No. 87904-4.

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On the fourth *Gunwall* factor, preexisting state law, neither the law existing prior to adoption of the Washington Constitution nor any law since reveals any basis to read article I, § 9 of the state constitution more broadly that its federal counterpart.

The fifth *Gunwall* factor, structural differences, directs a reviewing court to examine the differences in structure between the Washington and federal constitutions. The United States Constitution is a grant of limited power to the federal government, while the state constitution limits the otherwise

plenary power of the state. *State v. Ortiz*, 119 Wn.2d 294, 320, 831 P.2d 1060 (1992). This difference in structure generally supports an independent state constitutional analysis in every case. *Id.* Analysis of this factor does not shed any light on whether the state constitution is more protective than the federal constitution except in the most general sense.

Finally, the sixth *Gunwall* factor, matters of particular state or local concern, there is nothing unique about the right to remain silent in Washington.

(c) Baze asserts that his interrogation was unlawful under the standards of *State v. Robtoy*, 98

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Wn.2d 30, 653 P.2d 284 (1982), but the Washington Supreme Court has recognized the abrogation of *Robtoy*, and the facts of *Robtoy* are dissimilar to the facts of the instant case.

Baze relies upon *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982), to support his assertion that his interrogation was unlawful in the instant case. But the facts of *Robtoy* are dissimilar to the facts of the instant case. The defendant in *Robtoy* told police: "'Maybe I should call my attorney.'" *Id.* at 32. Rather than express an equivocal desire for counsel, as in *Robtoy*, however, Baze merely asked detectives for advice when he asked, "do I need an attorney?" PTr. Ex. 1 at 3.

Additionally, the Washington Supreme Court has recognized the abrogation of *Robtoy*. *See*, *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008) (recognizing the abrogation of *Robtoy* by *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), "[a]s far as the Fifth Amendment is concerned.").

Baze argues that the facts of the instant case are similar to the facts of *Thompson v. Wainwright*, 601 F.2d 768, 771 (5th Cir. 1979), but this case, also, was abrogated by *Davis*. *See, Soffar v. Cockrell*, 300 F.3d 588, 597 (5th Cir. 2002).

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Although Baze cites to federal cases, he argues that this Court should apply Wash. Const. art. I, § 9 to find that even if his confession is admissible under the Fifth Amendment, it is not admissible under Washington law. To pursue this argument, Baze speculates that *State v. Piatnitsky*, 170 Wn. App. 195, 206, 282 P.3d 1184, 1189 (2012), currently under review in the Washington Supreme Court (No. 87904-4), will result in a new interpretation of the Washington Constitution that is different than the current interpretation of the Fifth Amendment.

In response, the State contends that if a new rule or test is established in *Piatnitsky*, we cannot brief the new rule in the instant case because we don't know what the ruling will be. Even if the Washington Supreme Court does establish a new test or rule, however, the facts of the instant case are not the facts of *Piatnitsky*. The State contends that even under the *Robtoy* standard, Baze's confession was admissible. For this point, the State refers the Court to the State's briefing at pages 13-32, above.

7) There was no error by admitting Baze's statement; so, whether admission of the statement was prejudicial is not an issue.

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For the reasons argued throughout this brief, the State asserts that no error occurred by admission of Baze's confession.

B. Baze asserts that his convictions for robbery and assault must be vacated because they subject him to double jeopardy. But Baze's position is contrary to *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), which holds that because the legislature intended separate punishments, convictions of assault in the first degree and robbery in the first degree arising out of the same criminal conduct does not offend Double Jeopardy.

Baze cites *In re Francis*, 170 Wn.2d 517, 242 P.3d 866 (2010), to support his contention that the trial court violated Double Jeopardy when it sustained his convictions for both assault and robbery. Appellant's Opening Brief at 37-38. However, in the instant case Baze was convicted of robbery in the first degree and of assault in the first degree. RP 638-39. *Francis*, however, involved robbery in the first degree and assault in the *second* degree, rather that *first* degree. The distinction is important, as explained by the court in *State v. S.S.Y.*, 170 Wn.2d 322, 329-30, 241 P.3d 781 (2010), when explaining its holding in *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), as follows:

> In *Freeman* we reviewed two consolidated cases: *Zumwalt* involved first degree robbery and second degree assault; *Freeman*

> involved first degree robbery and first degree assault. We held that second degree assault merged with first degree robbery but that first degree assault did not merge with first degree robbery. *Freeman,* 153 Wash.2d at 778, 108 P.3d 753. We reasoned that the legislature's intent to punish first degree assault separately from first degree robbery was clear from the fact that first degree assault carries a significantly greater sentence than the putatively greater crime of first degree robbery. *Id.*
>
> ¶ 15 Specifically, we noted that Washington courts have found legislative intent to impose only one punishment when first degree robbery and second degree assault are charged because the greater offense " 'typically carries a penalty that incorporates punishment for the lesser included offence.' " *Id.* at 775, 108 P.3d 753 (quoting Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King,* 95 Colum. L.Rev. 1, 28 (1995)). Assigning a lesser sentence for first degree robbery than for first degree assault was anomalous because, in theory, the robbery elevated by assault should carry the greater penalty. This anomaly signified legislative intent to punish the offenses separately.

State v. S.S.Y., 170 Wn.2d 322, 329-30, 241 P.3d 781 (2010). In summary, because the legislature intended to punish robbery in the first degree and assault in the first degree separately, even when those crimes arise out of the same criminal conduct, separate punishments for these offenses, as in the instant case, does not offend Double Jeopardy. *Freeman*, 153 Wn.2d at 777-78.

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D. CONCLUSION

For the reasons stated above, the State asks the court to sustain the trial court's ruling admitting Baze's statement into evidence, to sustain his conviction, and to sustain his sentence.

DATED: September 2, 2013.

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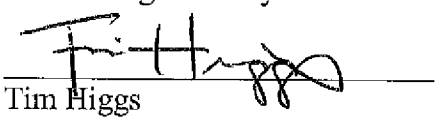

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