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No. 64709-1-I

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

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

APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

Police arrested Gabriel Burns on suspicion of robbery and interrogated him at the police station. During the interrogation, a detective asked Mr. Burns to "tell us what really happened," and Mr. Burns responded, "Well I don't wanna talk about it man." Mr. Burns's response was an unequivocal request to remain silent. Because police did not "scrupulously honor" that request and instead continued to interrogate him, Mr. Burns's Fifth Amendment right not to incriminate himself was violated. Therefore, his subsequent statements to police should have been suppressed.

In addition, the charge of first degree robbery in count II of the information was constitutionally deficient because it omitted an essential element of the crime—that Mr. Burns took personal property. Therefore, the conviction for that charge must be reversed and the charge dismissed without prejudice.

Finally, the trial court exceeded its statutory authority in imposing a 24-to-36-month term of community custody where only an 18-month term was authorized. Therefore, Mr. Burns must be resentenced.

## B. ASSIGNMENTS OF ERROR

1. The information omitted an essential element in count II, violating Mr. Burns's constitutional right to notice of the charge.

2. The trial court erred in concluding, "[a]t no point in time did the defendant invoke his right to silence." CP 26.

3. The trial court erred in concluding, "[d]efendant's statement that he 'did not want to talk about it' was not a clear and unequivocal invocation of his right to remain silent during the interview since he continued to talk with the officers." CP 27.

4. Admission at trial of the custodial statements Mr. Burns made after he invoked his right to silence violated his Fifth Amendment right not to incriminate himself.

5. The trial court exceeded its statutory authority in imposing a term of community custody of 24 to 36 months, where only 18 months of community custody was authorized.

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is a constitutional requirement that a charging document in a criminal case set forth all essential elements of the crime. An essential element of first degree robbery is that the accused took personal property of another. Was count II of the

information constitutionally deficient where it omitted this essential element?

2. If, during custodial interrogation, a suspect indicates unequivocally that he wishes to remain silent, police must "scrupulously honor" that request and cease questioning. In State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213 (1988), this Court held that an accused's statement that "he would rather not talk about" the alleged crime was an unequivocal invocation of the right to remain silent. Did Mr. Burns unequivocally invoke his right to silence where he stated "I don't wanna talk about it" in response to the officer's request that he "tell us what really happened"?

3. A trial court may impose a term of community custody only as authorized by statute. Did the court exceed its statutory authority in imposing a 24-to-36-month term of community custody, where the statute authorized the court to impose only an 18-month term?

#### D. STATEMENT OF THE CASE

The State charged Gabriel Burns with two counts of first degree robbery, one count of first degree burglary, three counts of felony harassment, one count of second degree assault with a deadly weapon, and one count of second degree malicious

mischief. CP 13-16. The charges arose out of an incident that occurred on the night of December 19, 2008, at a residence in Northeast Seattle. Id.

Witnesses at the scene told police that four men burst through the door of the residence yelling at the people inside to get on the floor. CP 3. Several people were inside the residence at the time. The men who burst through the door were all wearing ski masks and dark clothing and carrying firearms. CP 3. They forced the people inside at gunpoint to get on the floor and tied their hands and feet with zip ties. The masked men demanded to know where the money and drugs were. They ransacked the residence and damaged some household items. They took some personal property from the victims before fleeing. CP 3.

Two of the suspects were referred to during the incident as "Gabe" and "Scott." CP 3. Two of the witnesses told police they recognized "Gabe's" voice as that of Gabriel Burns. CP 3.

Hani Elgiadi lived in the house but was not present at the time of the robbery. CP 3. Mr. Elgiadi told police that about 10 days earlier, he had driven to Spokane to buy marijuana on Mr. Burns's behalf. CP 2. Mr. Elgiadi had informed Mr. Burns that he had a source in Spokane who could sell him a large quantity of

marijuana. CP 2. The two arranged for Mr. Elgiadi to buy 10 pounds of marijuana from the source. Mr. Elgiadi told police that Mr. Burns gave him \$23,000—\$21,000 for the marijuana and \$2,000 for Mr. Elgiadi to keep for himself. CP 2.

Mr. Elgiadi told police that he drove to Spokane with his roommate Lamar Kumangai-McGee. CP 2. Upon their arrival, they met with the source and purchased 10 pounds of marijuana for \$21,000 cash. But after paying the money, Mr. Elgiadi realized the quality of the marijuana was poor. He tried to get the money back but the source refused. Mr. Elgiadi drove back to Seattle and gave the marijuana to Mr. Burns, who became upset, believing he had been "ripped off." CP 2.

Mr. Elgiadi told police that on the day of the robbery, he had gone to the airport to pick up his cousin and returned to the residence at around 11:00 p.m. CP 3. Because the roads were icy, he was dropped off down the street from the house. As he walked toward the house, he noticed Mr. Burns's car parked about a block away. As he approached the house, he saw footprints in the snow along the side of the house. CP 3. He walked toward the rear door and saw Mr. Burns standing at the back door holding a firearm and whispering to another man whose face was covered by

a ski mask. Mr. Burns then put on a ski mask of his own to cover his face. CP 3. Mr. Elgiadi called 911 and reported the incident to police.

Police arrested Mr. Burns on December 23, 2008.

8/10/09RP 15. They took him to the police station and interrogated him. 8/10/09RP 16, 27.

Prior to trial, a CrR 3.5 hearing was held to determine the admissibility of Mr. Burns's custodial statements. Seattle Police Detective Michael Magan testified he advised Mr. Burns of his Miranda rights at the scene of the arrest and again at the police station. 8/10/09RP 17, 21. Mr. Burns indicated he understood his rights and agreed to talk. 8/10/09RP 24. The interrogation lasted about two hours. 8/10/09RP 27. It was captured on both audio and video recording and a transcript was made. 8/10/09RP 20; Sub #59.<sup>1</sup>

Present at the interrogation were Mr. Burns, Detective Magan and Detective Dag Aakervik. 8/10/09RP 21. Mr. Burns was restrained with handcuffs. 8/10/09RP 21. After several minutes of interrogation, one of the detectives asked Mr. Burns, "Why don't you tell us what really happened?" The other detective immediately

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<sup>1</sup> A supplemental designation of clerk's papers has been filed for this document.

asked whether the "whole thing" had "to do with retaliation about gettin' the money back"? Sub #59 at 19-20. At that point, Mr. Burns said, "Well I don't wanna talk about it man." Id. Instead of ending the interrogation, however, the detectives tried to persuade Mr. Burns to answer further questions. Detective Magan testified he did not believe Mr. Burns was asserting his right to silence because he did not request a lawyer specifically. 8/10/09RP 51. Although Mr. Burns never confessed to the robbery, he proceeded to make statements that police believed provided motive for the crime. 9/08/09RP 127-29, 152-53.

Defense counsel argued Mr. Burns asserted his right to silence when he said he did not want to talk about the crime, and that his subsequent statements must be suppressed. 8/10/09RP 90. The trial court stated whether Mr. Burns asserted his right to silence was a "close call." 8/13/09RP 10. But the court ultimately concluded Mr. Burns did not unequivocally assert his right to silence because "he continued to talk with the officers." CP 27.<sup>2</sup> Therefore, the officers were not obligated to stop the interrogation and Mr. Burns's subsequent statements were admissible. 8/13/09RP 11-12; CP 27.

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<sup>2</sup> A copy of the court's written findings of fact and conclusions of law on the CrR 3.5 motion to suppress is attached as an appendix.

Substantial portions of the incriminating statements that Mr. Burns made after he asserted his right to silence were admitted at trial. 9/08/09RP 125-39.

Each of the six witnesses who were present in the house at the time of the robbery testified at the jury trial. Most of them had been in the living room drinking and playing a card game when the masked men burst through the door. 9/01/09RP 30-34, 108; 9/02/09RP 55-56, 157; 9/03/09RP 70. The witnesses heard the men use the names "Gabe," "Scott," "AJ," and "E." 9/01/09RP 205, 225, 237; 9/02/09RP 30, 171; 9/03/09RP 110. Three of the witnesses testified they recognized the voice of one of the men as Gabriel Burns. 9/01/09RP 203-05; 9/02/09RP 168; 9/03/09RP 94. The witnesses agreed that one of the intruders appeared to be doing most of the talking and giving orders to the others. 9/01/09RP 225; 9/02/09RP 169. Two of the witnesses testified they believed that person was Mr. Burns. 9/01/09RP 226; 9/02/09RP 169, 202. But one of the witnesses said he thought that person was *not* Mr. Burns. 9/03/09RP 79-81. The other witnesses did not recognize the voices of any of the robbers. 9/01/09RP 42, 171; 9/02/09RP 68, 201; 9/03/09RP 103. The witnesses generally could not see what was happening because they were lying face-down on

the floor. 9/01/09RP 37, 115, 192-93; 9/02/09RP 64, 163;  
9/03/09RP 75.

The entire episode lasted about 10 to 15 minutes.  
9/01/09RP 49; 9/02/09RP 178; 9/03/09RP 84. At one point, one of  
the masked men said, "I want to shoot one of these bitches,"  
referring to the two women present. 9/01/09RP 42, 199; 9/02/09RP  
165; 9/03/09RP 80-81. One of the men also said he wanted to  
shoot "the guy in the green shirt." 9/01/09RP 38; 9/02/09RP 78.  
Then Timothy Kilgren, who was wearing a green shirt, was struck in  
the head. 9/01/09RP 43-44. No shots were ever fired. 9/01/09RP  
158. The men took a wallet, cell phone, laptop computer and Play  
Station from one of the witnesses and a cell phone and laptop  
computer from another witness. 9/02/09RP 173, 182; 9/03/09RP  
165-66.

Hani Elgiadi testified that as he was returning home that  
evening before the robbery, he saw Gabriel Burns's car parked  
about a block from the house and thought he saw Mr. Burns  
standing outside the basement door talking to another man wearing  
a ski mask. 9/03/09RP 191, 204-08, 211. Mr. Elgiadi was not  
present during the robbery, however, and did not see what  
occurred. 9/03/09RP 213-17. Mr. Elgiadi also testified he had

bought a large quantity of marijuana from a source he knew in Spokane several days earlier and given it to Mr. Burns, and that Mr. Burns became upset when he saw the quality of the marijuana was poor. 9/03/09RP 224-32, 251-52.

The jury was instructed they could find Mr. Burns guilty as either a principal or an accomplice. CP 39.

During deliberations, the jury submitted a written inquiry asking to review a transcript of the portions of Mr. Burns's custodial statements that were admitted at trial. CP 77. The jury explained they wished to review the statements because "[d]efendant appeared to be explaining his reasons for committing [the] crime(s)." CP 77. The court responded that the jury could not review the transcript and that they should "review the instructions." CP 78.

The jury found Mr. Burns guilty of two counts of first degree robbery, one count of first degree burglary, three counts of felony harassment, and one count of second degree malicious mischief, as charged, but not guilty of second degree assault. CP 69-76.

At sentencing, the trial court imposed a 24-to-36-month term of community custody. CP 91.

## E. ARGUMENT

### 1. COUNT II OF THE INFORMATION WAS CONSTITUTIONALLY DEFECTIVE BECAUSE IT OMITTED AN ESSENTIAL ELEMENT OF FIRST DEGREE ROBBERY

a. A charging document in a criminal case must set forth every essential element of the crime. It is a fundamental principle of criminal procedure, embodied in the state<sup>3</sup> and federal<sup>4</sup> constitutions, that the accused in a criminal case must be formally apprised of the nature and cause of the accusations before the State may prosecute and convict him of a crime. The judicially approved means of ensuring constitutionally adequate notice is to require a charging document set forth the essential elements of the alleged crime. See State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000). This "essential elements rule" has long been settled law in Washington and is constitutionally mandated. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008 ) (citing State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995)).

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<sup>3</sup> Article 1, section 22 of the Washington Constitution guarantees that "In criminal prosecutions, the accused shall have the right to appear and . . . to demand the nature and cause of the accusation against him (and) to have a copy thereof."

<sup>4</sup> The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of accusation." In addition, the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."

All essential elements of the crime must be included in the information so as to apprise the accused of the charges and allow him to prepare a defense, and so that he may plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Every material element of the charge, along with all essential supporting facts, must be set forth with clarity. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 97.

The constitutional requirement that the information contain every essential element of the crime is not relaxed simply because the challenge is raised for the first time on appeal. But for post-verdict challenges, the charging document will be construed liberally and deemed sufficient if the necessary facts appear in any form, or by fair construction may be found, on the face of the document. Kjorsvik, 117 Wn.2d at 105. Nonetheless, an information cannot be upheld, regardless of when the challenge is raised, if it does not contain all the essential elements, as "the most liberal possible reading cannot cure it." State v. Hopper, 118 Wn.2d 151, 157, 822 P.2d 775 (1992).

A charging document is constitutionally adequate only if all essential elements are included on the face of the document, regardless of whether the accused received actual notice of the charge. Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 790; State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

b. The charge for count II was constitutionally deficient, because it omitted an essential element of first degree robbery—that Mr. Burns took personal property. Count II of the information alleged:

That the defendant GABRIEL JORDON BURNS in King County, Washington, on or about December 19, 2008, did unlawfully and with intent to commit theft *attempt to take personal property* of another, to-wit: U.S. currency, from the person and in the presence of Braden McRae, against his will, by the use or threatened use of immediate force, violence and fear of injury to such person or his property and to the person or property of another, and in the commission of and in immediate flight therefrom, the defendant displayed what appeared to be a firearm, to-wit: a gun;

Contrary to RCW 9A.56.200(1)(a)(ii) and 9A.56.190 . . . .

CP 14 (emphasis added). Thus, the charge alleged only that Mr. Burns "attempt[ed] to take personal property" from Braden McRae, not that he actually took property. CP 14.

Count II was constitutionally deficient because it omitted the essential element of robbery that Mr. Burns took personal property.

Robbery is defined as:

A person commits robbery when he *unlawfully takes personal property* from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190 (emphasis added). As charged in this case, a person commits the crime of first degree robbery if he displays what appears to be a firearm during the course of the robbery. CP 14; RCW 9A.56.200(1)(a)(ii).

Thus, because count II of the information does not allege that Mr. Burns took personal property from Braden McRae, it omits an essential element of the crime of first degree robbery. Under the authorities cited above, therefore, that charge is constitutionally deficient.

c. The conviction must be reversed and the charge dismissed without prejudice to the State's ability to re-file the charge. If the reviewing court concludes the necessary elements are not found or fairly implied in the charging document, the court must presume prejudice. McCarty, 140 Wn.2d at 425. The remedy is reversal of the conviction and dismissal of the charge without prejudice to the State's ability to re-file the charge. Quismundo, 164 Wn.2d at 504; Vangerpen, 125 Wn.2d at 792-93.

2. MR. BURNS'S CONSTITUTIONAL RIGHT NOT TO INCRIMINATE HIMSELF WAS VIOLATED WHEN THE COURT ADMITTED CUSTODIAL STATEMENTS HE MADE AFTER INVOKING HIS RIGHT TO SILENCE

a. A trial court may not admit an accused's custodial statements made after he unequivocally requests to remain silent, unless police "scrupulously honor" that request. The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."

In Miranda v. Arizona, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966), the Supreme Court fashioned a practical rule to ensure the integrity of the privilege against self-incrimination under the Fifth Amendment:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

A suspect's Fifth Amendment privilege against self-incrimination attaches, and the Miranda safeguards apply, when "custodial interrogation" begins. Miranda, 384 U.S. at 444.

Among the procedural safeguards established by the Miranda Court is the "right to cut off questioning." Miranda, 384 U.S. at 474. Thus, even if a suspect is properly advised of his Miranda rights and agrees to speak to police, he retains the right to cut off questioning at any time. Id. This right, established as a "critical safeguard" of the Fifth Amendment right to remain silent, Michigan v. Mosley, 423 U.S. 96, 103-04, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), requires the police to immediately cease interrogating a suspect once the suspect "indicates *in any manner*, at any time . . . during questioning, that he wishes to remain silent." Miranda, 384 U.S. at 473-74; Mosley, 423 U.S. at 100. This right serves as an essential check on "the coercive pressures of the custodial setting" by enabling the suspect to "control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." Mosley, 423 U.S. at 103-04. The Mosley Court

reaffirmed Miranda's requirement that "the interrogation must cease" when the person in custody "indicates in any manner" that he wishes to remain silent. Mosley, 423 U.S. at 101-02.

Thus, at a minimum, the interrogation must cease if the person in custody invokes his right to remain silent. Mosely, 423 U.S. at 101 (quoting Miranda, 384 U.S. at 474). The admissibility of statements obtained after the suspect invokes the right to silence depends on whether his "'right to cut off questioning' was 'scrupulously honored.'" Mosely, 423 U.S. at 104 (quoting Miranda, 384 U.S. at 479). Police may resume questioning after the passage of a significant period of time and if subsequent interrogation is preceded by a reiteration of the Miranda warnings. Mosely, 423 U.S. at 104-05.

In order to invoke his right to silence, the suspect must do so "unambiguously." Berghuis v. Thompkins, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2250, 2260, 176 L.Ed.2d 1098 (2010). In Davis v. United States, 512 U.S. 452, 459, 461-62, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), in the context of invoking the Miranda right to counsel, the Court held that if an accused makes a statement concerning the right to counsel "that is ambiguous or equivocal," police are not required to end the interrogation or ask questions to clarify whether

the accused wants to invoke his or her Miranda rights. See also State v. Radcliffe, 164 Wn.2d 900, 906-07, 194 P.3d 250 (2008) (applying Davis and holding that once Miranda rights are waived, suspect must make unequivocal request for attorney in order to be entitled to cessation of questioning). In Berghuis, the Court held "there is no principled reason to adopt different standards for determining whether an accused has invoked the Miranda right to remain silent and the Miranda right to counsel at issue in Davis." Berghuis, 130 S.Ct. at 2260. Thus, "[a]n accused who wants to invoke his or her right to remain silent must do so unambiguously." Id.

b. Mr. Burns unambiguously invoked his right to silence. Here, after several minutes of interrogation, one of the detectives asked Mr. Burns, "Why don't you tell us what really happened?" The other detective immediately asked whether the "whole thing" had "to do with retaliation about gettin' the money back"? Sub #59 at 19-20. At that point, Mr. Burns said, "Well I don't wanna talk about it man." Id. Instead of ending the interrogation, however, the detectives tried to persuade Mr. Burns to answer further questions. One of the detectives immediately said, "Well Gabe, . . . you have nothin' to lose. . . . I think it might

behoove yeah [sic] to . . . tell us what actually took place so we can get to the bottom of this thing." Id. Responding to the detectives' pressing, Mr. Burns proceeded to make several more incriminating statements, several of which were admitted at trial.

Mr. Burns's statement that he did not want to talk about the robbery was an unequivocal request to remain silent, and the officers were therefore required to cease interrogating him immediately. In State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213, rev. denied, 110 Wn.2d 1032 (1988), defendant was arrested after police officers found a quantity of cocaine, marijuana and paraphernalia in a storage locker. During custodial interrogation, after advising defendant of his Miranda rights, a police officer asked "whether he cared to comment on the narcotics found?" Id. at 586. Defendant "said he would rather not talk about it." Id. This Court held defendant's statement was "an unequivocal assertion of his right to remain silent." Id. at 589; see also Mosley, 423 U.S. at 97 (defendant arrested on suspicion of robbery invoked right to silence when he "said he did not want to answer any questions about the robberies").

This case is indistinguishable from Gutierrez. Police officers asked Mr. Burns to tell them "what really happened?" Sub #59 at

19-20. In response, Mr. Burns stated he "[did not want to] talk about it." Sub #59 at 19-20. Mr. Burns's response is no different from the defendant's response in Gutierrez. Just like the defendant in Gutierrez, Mr. Burns unequivocally asserted that he did not want to talk about the crime. The officers were required to "scrupulously honor" that request and cease interrogating him.

Although the trial court found the question to be a "close call," 8/13/09RP 10, the court ultimately concluded Mr. Burns's statement was equivocal because "he continued to talk to the officers." CP 27. But "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 Smith, during custodial interrogation, Smith was informed he had the right to have a lawyer present when questioned and in response he stated, "yeah. I'd like to do that." Id. at 93. But instead of terminating the interrogation, the officers finished reading Smith his Miranda rights and pressed him to answer their questions. When he was asked again whether he wished to talk without a lawyer, he gave an equivocal response, "yea and no, uh, I don't know what's what, really," and then proceeded to answer the officers' questions. Id. The Supreme

Court held Smith's initial request for counsel was unequivocal and therefore the officers were required to cease interrogation at that point. The Court explained,

Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.

Id. at 98.

Smith applied the "bright line rule" established in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), that *all* questioning must cease after an accused invokes his Miranda rights. Smith, 469 U.S. at 98. "In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'verreaching'-explicit or subtle, deliberate or unintentional-might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." 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)). Thus, courts may not use "an accused's subsequent responses to cast doubt on the

adequacy of the initial request *itself*." Smith, 469 U.S. at 98-99.

That is what the court did here, in error.

In sum, Mr. Burns unequivocally expressed a desire to be silent by stating he did not want to talk about the crime. His responses to further questioning cannot be used to cast doubt on the clarity of his initial request. The officers were required to cease interrogating him immediately after he invoked his right to silence. All of his subsequent statements should have been suppressed.

c. The convictions must be reversed. Error in admitting evidence in violation of the Fifth Amendment is subject to a constitutional harmless error analysis. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Constitutional error is presumed prejudicial and the State bears the burden of proving that the error was harmless beyond a reasonable doubt. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Where the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. Id.

at 426. A conviction should be reversed "where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." Id.

Although Mr. Burns did not confess to the robbery, he made several incriminating statements that were erroneously admitted at trial. The statements were admitted as evidence of motive and consciousness of guilt. Detective Magan testified he believed Mr. Burns committed the crime in retaliation against Hani Elgiadi for the failed marijuana transaction. 9/08/09RP 168. He thought Mr. Burns's custodial statements were valuable evidence of motive. 9/08/09RP 207.

Mr. Burns made several statements after he invoked his right to silence that were highly prejudicial and probably influenced the jury's verdict. For instance, Mr. Burns told the detectives Mr. Elgiadi "ripped me off," and that this was "the first time I've ever been ripped off for everything." Sub #59 at 23, 58. He said he did not believe Mr. Elgiadi was actually ripped off by the source of the marijuana, implying he believed Elgiadi kept the money for himself. Sub #59 at 24. He said he believed "there's nothing I can say right now to benefit the situation," and that "everything's been out of hand," implying consciousness of guilt. Sub #59 at 34-37. He said

he called Elgiadi several times after the transaction and told him he needed his money back, but Elgiadi simply "kept to the story" and was simply "blowin[g] [him] off." Sub #59 at 56-58.

The jury's inquiry during deliberations shows the importance of the evidence of motive to the State's case. The jury wished to review Mr. Burns's custodial statements because he "appeared to be explaining his reasons for committing [the] crime(s)." CP 77. The jury's inquiry demonstrates the inadmissible evidence of motive was "on the minds of jurors." See In re Detention of Post, \_\_\_ Wn.2d \_\_\_, 2010 WL 4244821, at \*7 (No. 82023-1, Oct. 28, 2010).

The untainted evidence that Mr. Burns acted either as a principal or as an accomplice was far from overwhelming. The intruders were wearing masks, many of the witnesses did not recognize any of the men's voices, and those who thought they recognized Mr. Burns's voice could not agree whether he acted as the ringleader. 9/01/09RP 226; 9/02/09RP 169, 202; 9/03/09RP 79-81. Mr. Burns's custodial statements, indicating he believed Mr. Elgiadi had "ripped him off" and that his own situation was hopeless, were therefore crucial to the State's case. Because it is possible the jury relied on the evidence to reach its verdict, the error is not harmless and the convictions must be reversed.

3. THE COURT EXCEEDED ITS STATUTORY  
AUTHORITY IN IMPOSING A 24-TO-36-  
MONTH TERM OF COMMUNITY CUSTODY

"A trial court only possesses the power to impose sentences provided by law." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

Here, the court imposed 24 to 36 months of community custody under the mistaken impression Mr. Burns was convicted of a "serious violent offense." CP 91. The court exceeded its statutory authority in doing so, as the Sentencing Reform Act (SRA) authorizes only a determinate term of 18 months community custody for first degree robbery and first degree burglary.

RCW 9.94A.701(2) provides:

A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

RCW 9.94A.701(2) took effect July 26, 2009. See Laws 2009, ch. 375, § 5. The law unequivocally applies to Mr. Burns's sentence. See Laws 2009, ch. 375, § 20 ("This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department,

currently incarcerated with a term of community custody or probation with the department, or sentenced after July 26, 2009.").

First degree robbery and first degree burglary are "violent offenses" within the meaning of RCW 9.94A.701(2). They are both class A felonies that are "violent offenses" but not "serious violent offenses." RCW 9A.56.200(2); RCW 9A.52.020(2); RCW 9.94A.030(44), RCW 9.94A.030 (53)(a)(i). Therefore, the court was authorized to impose only 18 months of community custody, not 24 to 36 months.

A sentence in excess of statutory authority is subject to challenge, and the person is entitled to be resentenced. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002) (and cases cited therein). Because the court exceeded its statutory authority in imposing a 24-to-36-month term of community custody, the sentence must be reversed and remanded for resentencing.

#### E. CONCLUSION

The charge for count II omitted an essential element of the crime of first degree robbery, requiring the conviction on that charge be reversed and the charge dismissed without prejudice. Admission of the custodial statements Mr. Burns made after invoking his right to silence violated his Fifth Amendment right not

to incriminate himself, requiring that all of the convictions be reversed. Finally, the court exceeded its statutory authority in imposing a 24-to-36-month term of community custody, requiring that he be resentenced.

Respectfully submitted this 29th day of October 2010.

 3/10/12  
\_\_\_\_\_  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

# **APPENDIX**

FILED  
KING COUNTY, WASHINGTON

SEP 08 2009

SUPERIOR COURT OF WASHINGTON  
ANGIE VILLALOVOS  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 08-1-13391-1 SEA

vs.

Gabriel Burns,

Defendant.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5  
MOTION TO SUPPRESS THE  
DEFENDANT'S STATEMENTS

A hearing on the admissibility of the defendant's statements was held on August 10, 2009 before the Honorable Judge Yu.

The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant did not testify at the hearing.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENTS - 1

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604

1 After considering the evidence submitted by the parties and hearing argument, to wit:  
2 testimony of Seattle Police Department Detective Michael Magan, a copy of the defendant's  
3 written Miranda advisement, and video of the defendant's statement given at the Seattle Police  
4 Department's interview room, as well as oral argument and written briefing by both defense and  
5 the State, the court enters the following findings of fact and conclusions of law as required by  
6 CrR 3.5.

7 **1. THE UNDISPUTED FACTS:**

- 8 1. On December 23, 2009 at around 11:30 am the defendant, Gabriel Burns, was  
9 arrested at the Starbucks in Lynnwood, Washington by Detective Mike Magan of  
10 the Seattle Police Department. The defendant was seen in his vehicle, a KIA.  
11 2. Detective Dag Aakervick and Sgt. Kevin Aritani accompanied Detective Magan  
12 that day.  
13 3. This was the same vehicle with the same license plates as was reported by  
14 victim/witness Hani Elgiadi and Seattle Police Officer Runolfson as being located  
15 less than two blocks from the scene around the time of the crime on December 19,  
16 2008.  
17 4. Mr. Burns was advised of his Miranda rights orally at around 11:31 am in the  
18 Starbucks parking lot by Detective Magan. According to Detective Magan, the  
19 defendant was also advised that he was being arrested for "robbery."  
20 5. Mr. Burns indicated to Detective Magan that he was willing to talk to the  
21 detective. He was then transported to Seattle Police Department.  
22 6. There was a period of time of over an hour between the original advisement of  
23 Miranda and transporting the defendant to Seattle Police Department as Mr.  
24 Burns' car had to be towed. The detective estimated it took about 60 minutes for  
the tow truck to arrive.  
7. Detective Magan, as well as the other detectives who accompanied him, waited  
for the tow truck to arrive on scene while the defendant was seated in the back of  
an unmarked Seattle Police vehicle.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENTS - 2

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- 1 8. According to testimony, no substantive conversation occurred between Mr. Burns  
2 and any of the detectives between when the original advisement occurred and  
3 when the defendant arrived at Seattle Police Department post transport.
- 4 9. There was no substantive conversation which occurred during the transportation  
5 from Starbucks to Seattle Police Department, which took around 35 minutes.
- 6 10. After being taken to the Seattle Police Department, the defendant was walked up  
7 to an interview room located next to the robbery unit.
- 8 11. The room is equipped with recording equipment which audio and video records  
9 interviews when activated by detectives. In this case, detective Magan, along  
10 with detective Dag Aakervick, interviewed Gabriel Burns in the interview room.
- 11 12. Detective Magan activated the recording equipment prior to performing the  
12 interview.
- 13 13. As the recording starts, the defendant asks to use the bathroom and is allowed to  
14 do so by Detective Magan. Shortly thereafter, the defendant is again orally  
15 advised of his Miranda rights. (See attached transcript, admitted for pre trial  
16 purposes.)
- 17 14. The detective has the defendant indicate that he understands each of those rights  
18 on a pre printed Miranda advisement form, also admitted into evidence for pre  
19 trial purposes. He also indicates that he is telling the defendant for a second time  
20 that he was placed under arrest for "robbery."
- 21 15. While the detective did not have the defendant sign the "waiver" portion of the  
22 form, the defendant did agree to talk to him, as he had prior at the Starbucks. As  
23 the detective testified, he deemed the defendant as having given him consent  
24 prior, and hence, took his willingness to conversate as "implied consent."
16. They proceeded to converse about the charges, potential case and Mr. Burns' motives as well as the defendant's life in general for, all told, over an hour.
17. The interview started around 1:45 pm and, all told, lasted one hour and 45 minutes with one break at around an hour into the interview, according to Detective Magan's testimony. Detectives Magan and Akervick left the interview room prior to the one longer break in the interview. (This is evidenced by the recording, admitted for pre trial purposes.)

- 1 18. At no point in time did the defendant invoke his right to silence.
- 2 19. The defendant did not appear to be under the influence of alcohol during the
- 3 *interview.*
- 4 20. The defendant did not appear to be under the influence of drugs during the
- 5 *interview.*
- 6 21. The defendant did get emotional at times during the interview. This is clearly
- 7 noted in the video as he breaks into tears at several times during the interview. At
- 8 no point in time, however, was his emotional state such that he was unable to
- 9 make a knowing, voluntary, intelligent statement.
- 10 22. The defendant was never threatened by any detectives before or during the
- 11 *interview.*
- 12 23. The defendant was never made any promises by any detective before or during
- 13 the *interview.*
- 14 24. The interview lasts over an hour and a half including breaks, as shown in the
- 15 video and captured via the transcribed statement of just over 75 pages.
- 16 25. At one point in time, as captured on page 19, line 18, of the transcribed statement,
- 17 the defendant noted "Well, I don't want to talk about it man" in response to a
- 18 question by the detective about the underlying motive of the alleged robbery.
- 19 26. As the detective testified, he interpreted the defendant's response as the defendant
- 20 having indicated that he did not want to talk about that particular topic, and
- 21 proceeded to ask another question because of the defendant's answer.
- 22 27. The detective then asked a different question, which the defendant was responsive
- 23 to. Despite the statement, that he did not want to talk, the defendant continued to
- 24 talk with the officers for another forty five plus minutes after that exchange.

2. **THE DISPUTED FACTS;** There were no disputed facts.

1 **3. CONCLUSIONS OF LAW REGARDING ADMISSIBILITY**  
2 **OF DEFENDANT'S STATEMENTS:**

3 **a. ADMISSIBLE IN STATE'S CASE-IN-CHIEF**

4 The following statements of the defendant are admissible in the State's case-in-  
5 chief: *(See attached copy of transcription of video statement taken of defendant.)*

6 These statements are admissible because Miranda was applicable and the  
7 defendant's statements were made after a knowing, intelligent and voluntary  
8 waiver of his Miranda rights. Defendant's statement that he "did not want to talk  
9 about it" was not a clear and unequivocal invocation of his right to remain silent  
10 during the interview since he continued to talk with the officers.

11  
12  
13 **b. ADMISSIBLE FOR IMPEACHMENT**

14 The following statement of the defendant is admissible only for impeachment  
15 because, while the statement was voluntary, under the court's 403 balancing test it  
16 is only appropriately admissible if the defendant opens the door by testifying, and  
17 by testifying contrary to this statement in his direct testimony.

18 *(See noted portion in transcript: page 7, line 21 through page 8, line 3.)*

19  
20 **c. INADMISSIBLE**

21 The court deems large portions of this 75+ page transcript to be inadmissible due  
22 to relevancy or 403 balancing test concerns among other concerns. (See the transcript of the  
23 proceeding to supplement these written findings.)

1 It should be noted that much of the transcript the State did not seek to admit, deferring to  
2 the court with regard to concerns raised by the Court. The State withdrew several portions of the  
3 transcript it had previously been seeking to admit due to the Court's articulated concerns about  
4 the detective's interrogation style, form of questions, and concerns about what the jury could  
5 possibly read into/infer regarding the defendant's guilt based on what the detective said or did in  
6 the interview.

7 In addition to the above written findings and conclusions, the court incorporates by  
8 reference its oral findings and conclusions.

9  
10 Signed this 8 day of September, 2009.

11  
12  
13   
JUDGE MARY I. YU

14 Presented by:

15   
16 Deputy Prosecuting Attorney  
Jennifer L Miller WSBA #31600

17   
18 Attorney for Defendant  
Ali Nakkour WSBA # 33547

19  
20  
21  
22  
23  
24 WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENTS - 6

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
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 29<sup>TH</sup> DAY OF OCTOBER, 2010, 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> GABRIEL BURNS 823563 MONROE CORRECTIONAL COMPLEX-WSR PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF OCTOBER, 2010.

X \_\_\_\_\_ 

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