NO. 47057-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JARROD WIEBE,

Appellant.

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

The Honorable Scott Collier, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT'S ADMISSION OF WIEBE'S STATEMENTS TO POLICE FOLLOWING HIS UNEQUIVOCAL INVOCATION OF THE RIGHT TO SILENCE VIOLATED HIS FIFTH AMENDMENT PRIVILEGE.

In his opening appellate brief, Wiebe argued the court's admission of Wiebe's statements made in response to continued police interrogation – despite his assertion, "I, I have nothing to say" – violated his Fifth Amendment right against self-incrimination because police did not honor his unequivocal invocation of the right to silence. Brief of Appellant (BOA) at 20-33. In response, the state argues this Court should decline to review the issue because Wiebe did not assign error to the court's finding that Wiebe's statement "was not an unambiguous and unequivocal invocation of his rights." Brief of Respondent (BOR) at 2-3. Alternately, the state argues Wiebe's assertion was "equivocal and unclear in the context of how and when it was used." BOR at 1, 3-9. Both arguments should be rejected.

The state's argument Wiebe did not challenge the court's finding his statement was not an unambiguous and unequivocal invocation of his rights is not supported. Assignment of Error 1 reads: "The court violated appellant's Fifth Amendment privilege

against self-incrimination by admitting his statements to police detectives, where police did not scrupulously honor appellant's invocation of his right to silence." BOA at 1. Issue statement 1 asks: "Where appellant invoked his right to silence, and where the detectives failed to scrupulously honor that invocation, did the court's admission of appellant's statements violate his Fifth Amendment privilege to remain silent?" BOA at 2. The first sentence in the corresponding argument section asserts: "Contrary to the trial court's conclusion, Wiebe's assertion, "'I, I have nothing to say,' was an unequivocal invocation of his right to silence." BOA at 20-21. A similar assertion is made thereafter: "'I, I have nothing to say,' is an unequivocal invocation of the right to silence." BOA at 24.

That Wiebe is challenging the court's "finding" his assertion was unequivocal could not be more clear. This Court should therefore address the merits of the issue. See State v. Olson, 126 Wn.2d 315, 318-324, 893 P.2d 629 (1995) (where nature of appeal is clear and relevant issues are argued in the body of the brief, technical flaws in compliance with the rules of appellate procedure will be overlooked); see also RAP 1.2(a) (rules liberally construed to facilitate decisions on the merits).

Moreover, the court's conclusion that Wiebe's assertion, "I, I have nothing to say," amounts to an equivocal invocation is a *legal conclusion* not a finding of fact. In re Pers. Restraint of Cross, 180 Wn.2d 664, 680-81, 327 P.3d 660 (2014) (whether a defendant invoked his right to silence is a mixed question of law and fact); State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997) (trial court's findings of fact reviewed for substantial evidence but legal conclusions from those findings reviewed de novo). There is case law suggesting no assignment of error is required to challenge a legal conclusion. See e.g. State v. Hill, 123 Wn.2d 641, 644-49, 870 P.2d 313 (1994); City of Lynnwood v. Snohomish County, 48 Wn. App. 210, 212, 738 P.2d 699 (1987). Accordingly this Court should reject the state's attempt to elevate form over substance and consider the issue.

The state's argument that Wiebe's assertion, "I, I have nothing to say" was equivocal and unclear in context is also unsupported. Contrary to the state's assertion, events preceding Wiebe's invocation do not render it equivocal or unclear. As indicated in the opening brief, the only questions Wiebe answered before saying he had "nothing to say" were standard booking-type questions, such as his name and age. As soon as the detectives

asked anything substantive, Wiebe paused silently for a period of time and then stated, "I, I have nothing to say." This was in response to the very first question either detective asked that could possibly elicit an incriminating response.

The circumstances here therefore are unlike those in State v. Piatnitsky, 180 Wn.2d 407, 325 P.3d 167 (2014), cert denied, ___ U.S. ___, 135 S. Ct. 950, 190 L.Ed.2d 843 (2015). In that case, Piatnitsky answered the detectives' questions about the shooting at issue for approximately an hour. During the subsequent recorded interview, Piatnitsky stated "[T]hat's the one I should be doing right now," when the detective informed him of his right to silence. Piatnitsky, 180 Wn.2d at 409-10. Thereafter, Piatnitsky said, "I'm not ready to do this man," followed by "I just write it down, man" and "I don't want to talk right now, man." Id. But "I have nothing to say" is 180 degrees from saying I "should" invoke my right to silence. By saying "should," Piatnitsky essentially said he was not doing so. Similarly, saying "I'm not ready" is not a clear invocation because human beings do things they aren't ready for constantly. And when the detective attempted to clarify Piatnitsky's intent, Piatnitsky indicated he was willing to "write it down." Id. Thus, his final statement, "I don't want to talk right now, man" could

reasonably be interpreted as a reiteration Piatnitsky was willing to make a written statement, which certainly does not amount to an invocation of the right to silence.

There is no such willingness to talk about the event in question preceding Wiebe's assertion he had "nothing to say." Accordingly, it can't be interpreted any other way than as an express assertion of his right to silence.

The state appears to argue, however, that because Wiebe initially agreed he was willing to talk to the detective and that they were recording with his permission, that he was required to say he changed his mind in order to invoke his right to silence. Ex 2 (pretrial), pages 1-2; BOR at 5-6. According to the state:

> If Wiebe had experienced a very rapid change of heart about whether to speak to the detectives, one would expect him to say something along the lines of "You know, I've changed my mind. I don't want to talk to you." As this Court noted in Gasteazoro-Paniagua, a reasonable police officer would expect a defendant revoking a prior express waiver of Miranda rights to "tell [the officers] outright he would not answer any more questions. . ."

BOR at 5; citing State v. Gasteazoro-Paniagua, 173 Wn. App. 751, 756-59, 294 P.3d 857 (2013).

Contrary to the state's argument, pausing for 17 seconds and asserting "I, I have nothing to say" is telling the officers outright

he would not answer any more questions. And in that respect, Gasteazoro-Paniagua is as inapposite as Piatnitsky. Like Wiebe, Gasteazoro-Paniagua indicated willingness to speak to the detectives at the beginning of the interview. When police said they would not be where they were at without probable cause, Gasteazoro-Paniagua responded, "I mean I guess I'll just have to talk to a lawyer about it and, you know, I'll mention that you guys are down here with a story." Gasteazoro-Paniagua, 173 Wn. App. at 756.

In finding this was not an unequivocal invocation of the right to an attorney, the court looked at Supreme Court precedent holding that "maybe [I] should contact an attorney" is equivocal. Gasteazoro-Paniagua, 173 Wn. App. at 756 (citing State v. Radcliffe, 164 Wn.2d 900, 906-07, 194 P.3d 250 (2008)). "Should" is like "maybe" – not definitive. Moreover, Gasteazoro-Paniagua's statement was not in the present tense and did not refer to any lawyer in particular. Finally, the court noted use of the word "guess" indicates doubt, and an indication of doubt cannot be an unequivocal request. Gasteazoro-Paniagua, 173 Wn. App. at 756. Considering Gasteazoro–Paniagua's attitude during the interview and his general refusal to cooperate by being unresponsive, the

court held a reasonable officer would conclude that if Gasteazoro-Paniagua wanted to speak to an attorney, he would "tell them outright he would not answer anymore questions without an attorney." Gasteazoro-Paniagua, at 759.

But this was merely an example of what would constitute an unequivocal assertion, not necessarily the only way to make an unequivocal assertion.

And importantly, unlike Gasteazoro-Paniagua, Wiebe did not use such words as "should" or "guess." Moreover, his assertion, "I, I have nothing to say," is in the present tense. Thus, Wiebe's assertion cannot be said to suffer from the same equivocation as Gasteazoro-Paniagua's. Gasteazoro-Paniagua simply does not hold that once an individual has initially agreed to speak to police, he must thereafter say the magic words, "I've changed my mind" to invoke the right to silence. BOR at 6. Rather, Gasteazoro-Paniagua holds that assertions that include words, such as "should" and "guess" and are expressed in the future tense, are not sufficient. Wiebe's statement included no such equivocation.

The state also argues that this case is unlike I.B. and Cross, because in those cases, the defendant invoked when the police initially asked if they would waive their rights. BOR at 5 (citing

State v. I.B., 187 Wn. App. 315, 317, 323, 348 P.3d 1250 (2015); In re Cross, 180 Wn.2d 664, 680, 327 P.3d 660 (2014)). Granted, Wiebe initially agreed to speak to police and to be recorded. However, he only answered innocuous questions, such as his name and date of birth. As soon as the detectives asked anything substantive, Wiebe said he had nothing to say. That Wiebe initially agreed to be polite and answer routine booking-type questions should not lead to a different result where he subsequently unequivocally asserted his right to silence. See State v. Bushyhead, 270 F.3d 905, 912-13 (9th Cir. 2001) ("I have nothing to say" is an unequivocal invocation of the right to silence.")

And contrary to the state, "I, I have nothing to say," is not at all like saying "I didn't do anything wrong," or "I don't want to incriminate myself." BOR at 6 (citing State v. Walker, 129 Wn. App. 258, 274, 118 P.3d 935 (2005)). In Walker, the defendant said he "did not want to say anything that would make him look guilty or incriminate him." Walker, 129 Wn. App. 265-66. But such an assertion is conditional and does not indicate an unwillingness to talk *at all*, unlike Wiebe's assertion "I, I have nothing to say." Walker is therefore inapposite as well.

Wiebe maintains his assertion was an unequivocal invocation of his right to silence. Instead of honoring his request to remain silent, police increased the coerciveness of the interrogation, telling him "this is the last chance you got to give your side of the story" and that it "is kind of a fucked up situation and it's got long term consequences," and by asking whether he was "a hardcore criminal that's out tying people up and doin a bunch a bad stuff with guns or are you just a kid that made some bad decisions and can explain why and how." Ex 2 (pretrial), pages 1-2. Wiebe disagrees with the state's characterization the detectives benignly were attempting to clarify his request. These questions were designed to elicit an incriminating response.

The state concedes that if this Court finds error in the admission of Wiebe's statement, the state cannot prove the error is harmless. For the reasons stated herein and in the opening brief, this Court should find the trial court erred in admitting statements that were elicited in violation of Wiebe's Fifth Amendment privilege. Because Wiebe's statement was critical to the state's case – as the state concedes – this Court should reverse Wiebe's convictions.

2. THE COURT VIOLATED WIEBE'S DUE PROCESS RIGHTS BY ASSIGNING HIM A BURDEN TO PROVE HE WAS NOT AN ACCOMPLICE AS A DEFENSE TO THE CHARGES.

In his opening brief, Wiebe assigned error to the court's instruction to the jury – given over his objection – that a person is not an accomplice in a crime committed by another person if he terminates his complicity before the commission of the crime and either gives timely warning to police or otherwise makes a good faith effort to prevent the commission of the crime. CP 48. As defense counsel argued, the instruction likely caused jurors to believe Wiebe had to terminate complicity and either contact law enforcement or make a good faith effort to prevent the commission of the crime in order to not be a accomplice. RCW 9A.08.020(5)(5). However, as Wiebe argued, it was the state's burden to prove accomplice liability, not his burden to prove the absence of it. The instruction therefore improperly shifted the burden of proof and violated Wiebe's due process right to require the state to prove all the elements of the charged offense.

In response, the state argues Wiebe cited no case "which explicitly holds that this provision of the accomplice liability statute is a defense, rather than merely part of the definition." BOR at 10.

Regardless, cases cited in the state's own brief clearly establish this portion of the statute is in fact a defense. BOR at 11 (citing State v. Handley, 115 Wn.2d 275, 293, 796 P.2d 1266 (1990)). In that case, the Supreme Court expressly recognized the "withdrawal defense" to accomplice liability:

> While a "withdrawal defense to accomplice liability is expressly recognized by statute, RCW 9A.08.020(5)(b), it is unclear whether a similar defense to anticipatory offenses is available.

Handley, 115 Wn.2d at 293.

That RCW 9A.08.020(5)(b) provides a statutory defense the defense bears the burden of proving is also implied by Division One's decision in State v. Whitaker, 133 Wn. App. 199, 135 P.3d 923 (2006). There, the court noted the jury was instructed on when a person is "not an accomplice" and in an effort *to prove it*, the defendant testified in his own defense:

> The jury was instructed that a person is not an accomplice if he terminates his complicity prior to the commission of the crime and makes a good faith effort to prevent the commission of the crime. In an effort to prove that he made a good faith effort to prevent the killing, Whitaker testified that he asked Anderson not to kill Burkheimer.

Whitaker, 133 Wn. App. at 235.

Moreover, Division One held the prosecutor did not improperly shift the burden of proof by arguing Whitaker's claim was unsupported:

> In closing, the prosecutor argued that Whitaker's claim to have asked Anderson not to kill Burkheimer was unsupported by the testimony of other witnesses. Whitaker contends this statement was misconduct because it shifted the burden of proof. We disagree. The prosecutor merely pointed out that Whitaker's claim contradicted the accounts of other eyewitnesses. The prosecutor also argued that, given the circumstances, merely asking Anderson not to kill Burkheimer would not be enough to constitute a good faith effort to prevent the commission of the crime. What constituted a good faith effort was a question for the jury, and the prosecutor was entitled to argue what might and might not constitute such an effort. The prosecutor did not commit misconduct.

Whitaker, 133 Wn. App. at 235.

This passage further indicates that in the court's view, it was Whitaker's burden to prove his actions constituted a good faith effort. Thus, the "withdrawal defense" is a statutory defense the law requires the defendant to prove, not merely definitional as the state posits.

That the jury in this case likewise would have viewed the instruction as imposing a burden on the defense is supported by the fact it was contained in a separate instruction, apart from the accomplice definition instruction and the state's to convict

instructions. CP 46, 48. That the jury would have seen "withdrawal" as Wiebe's burden is further reinforced by the prosecutor's argument in this case. RP 1000 (directing jurors to the "not an accomplice" instruction and pointing out Wiebe never called police or 911).

The state's argument that the jury would not be confused into thinking Wiebe had any burden of proof should be rejected. Although the jury was instructed the state carried the burden to prove the elements of the offenses, the elements of the offenses are contained in the to-convict instructions. CP 44. The instructions do not say anything about who bore the burden of proving Wiebe was not an accomplice. Based on the case law, the state's argument and the fact the instruction was listed separately, the most rational conclusion for jurors to have made was that it was Wiebe's burden.

As indicated in Wiebe's opening brief, allocating the burden to him to disprove accomplice liability violated his due process rights, because it was the state's burden to prove he was an accomplice not the other way around. Accomplice liability and the "not an accomplice" defense cannot coexist. Accomplice liability hinges on whether the person – with knowledge that he is

promoting or facilitating the crime – agrees to aid or aids in its commission. But if a person terminates complicity and summons law enforcement or attempts to prevent the commission of the crime, he clearly is not acting with knowledge he is promoting or facilitating a crime. Nor is he aiding or agreeing to aid. In fact, he is doing the opposite. In short, the defense codified in RCW 9A.08.020(5)(b) negates the mens rea and actus reus of accomplice liability. It was therefore error to assign the burden to Wiebe to prove the defense. State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014).

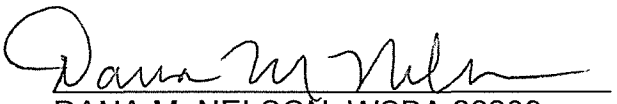
C. CONCLUSION

For the reasons stated in this reply and in the opening brief of appellant, this Court should reverse Wiebe's convictions.

Dated this 19th day of November, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 47057-8-II
	)	
JARROD WIEBE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

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[X] JARROD WIEBE
DOC NO. 379320
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P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF NOVEMBER 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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