SUPREME COURT NO. _____

COURT OF APPEALS NO. 47057-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

JARROD WIEBE,

Appellant.

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

The Honorable Scott Collier, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Jarrod Wiebe asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the part-published opinion of the court of appeals in State v. Jarrod Wiebe, __ Wn. App. __, __ P.3d __, 2016 WL 3999882, filed July 26. A copy of the slip opinion is attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Where petitioner 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?

2. Where the court instructed the jury on the "withdrawal defense" to accomplice liability over petitioner's objection, did the court violate his Sixth Amendment right to control his defense?

3. Where this case involves significant questions of law under the state and federal constitutions, should this Court accept review? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Following a jury trial in Clark County Superior Court, appellant Jarrod Wiebe was convicted of numerous charges, including burglary, robbery, extortion, criminal impersonation and ten counts of theft of a firearm. CP 176; RP 1040-41, 1124-26. Five of the charges carried firearm enhancements. Id.

The state's theory at trial was that Wiebe acted as an accomplice by standing outside and acting as a lookout, while three other men barged into the home of Casimiro Arellano and Manatalia Arevalos and committed the aforementioned crimes. RP 1082. There was no allegation or evidence Wiebe was armed. RP 1077.

1. Violation of Wiebe's Right to Silence

Wiebe moved to suppress his statements to police on grounds the police did not scrupulously honor his invocation of the right to silence. CP 14-25. The relevant portion of the interrogation is as follows:

> JS: Okay, this is Detective Jared Stevens with the Clark County Sheriff's Office. It is December 19th, 2013. It's 1742 hours. Currently at the Clark County Sheriff's Office West Precinct. With me in the room are or yeah Detective Sergeant Duncan Hoss and Jarrod, is it Wiebe?
>
> JW: Wiebe.
>
> JS: Wiebe. Wiebe, can you spell your last name for me?

JW: W-I-E-B as in boy, E again.

JS: And spell your first name for me.

JW: J-A-R-R-O-D.

JS: And what is your date of birth, Jarrod?

JW: 09/03/87

JS: Okay. And you have been advised of your rights, correct?

JW: Yes.

JS: And having those rights in mind you're still willing to talk to me, correct?

JW: Yes sir.

JS. Okay. Do you see the recorder in front a you here?

JW: Yes sir.

JS: Okay am I recording this with your permission?

JW: Yes sir.

JS: Okay. So stories have a beginning, a middle and an end. We learn that when we're all really young first learning how to read. Why don't you tell me the story about what, what happened today.

JW: I, I have nothing to say.

JS: You have nothing to say?

DH: All right. Here's, here's the deal Jarrod, we are going to complete a report. You got that right?

> From your Theft III's and stuff,[1] you know, we put down what happened. Well there's (inaudible) to be involved, right? We've talked to everybody else so we're gonna get their side of the story. All we're lookin for is your side of it. Now, you don't have to tell us, you know, you remember your rights, I can reread em if you want but I'm giving you the opportunity here cause this is the last chance you got to give your side of the story as to what happened, how you got here cause I got to be honest with you this is kind of a fucked up situation and it's got long term consequences. Now whether you want to be cooperative in it or not that's completely up to you. I don't care one way. If you decide that this interview is over tell me right now and I get to go home. But I'm willing to give you that chance and stick around if want it but this is the last chance. I'm not gonna coerce you into anything, I'm only gonna give you the opportunity but I want you to know that the charges that we're lookin at are significant and serious. So having that additional information in mind, we aint talking about your Theft III's now. It's completely up to you and I will give you fifteen seconds to decide whether you want to talk with us or not. That's fifteen seconds my friend. I can see you're worried about your future.
>
> JS: Look man, none of us are new at this, it's not a whodunit. Now we're just trying to figure out why. Are you guys a bunch a hardcore criminals, are you 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 (emphasis added).

Following the detectives' assertions it was a "fucked up situation" with "long term consequences" and question whether Wiebe was a "hardcore criminal[]" or just a "kid that made some bad decisions," Wiebe

[1] Wiebe has a third degree theft conviction out of Issaquah Municipal court. RP 69.

arguably admitted he participated in the offenses by being "the lookout." Ex 2, page 4; Brief of Appellant (BOA) at 9-11.

At the hearing, Hoss acknowledged there was a 17-second delay between the time Stevens asked Wiebe to tell the story of what happened and when Wiebe responded he had nothing to say. RP 41. When asked whether "I have nothing to say" is the "functional equivalent" of "saying that I'm exercising my right to remain silent," Hoss answered "not necessarily." RP 41. Stevens similarly testified: "it's just a response to a question." RP 47.

In arguing Wiebe invoked his right to silence, defense counsel pointed out there was dead silence for 17 seconds between the time Stevens asked Wiebe to tell his story and when Wiebe responded he had nothing to say. RP 52. As defense counsel argued, Weibe thought long and hard about his response. RP 52. Although Wiebe previously stated the detectives were recording with his permission, he clearly indicated he no longer wanted to talk. Wiebe's response he had nothing to say was the functional equivalent of Wiebe saying, I invoke my right to silence. RP 54-55.

The court denied the motion to suppress, reasoning Wiebe's assertion, "I, I have nothing to say" was not an unambiguous invocation of

his right to silence. CP 26-28. The court's Memorandum of Opinion states:

> I find that this was not an unambiguous and unequivocal invocation of his rights. He said he was willing to answer questions and did in fact start out answering some questions and then said he had nothing to say. Was that a response to the last question or an unambiguous and unequivocal invocation of his rights signaling the end of the interview? It's not clear to the court, so it stands to reason that it was not clear to the officers as well. Also, when the officers followed this up they reminded him of his rights and offered to read them again and informed the Defendant he didn't need to talk to them.

CP 27. Nonetheless, the court noted it was a "close call." RP 60, 64, 68.

On appeal, Wiebe argued the court violated his Fifth Amendment privilege against self-incrimination by admitting his statements where police did not scrupulously honor his invocation of the right to silence. BOA at 20-33 (citing United States v. Bushyhead, Sr., 270 F.3d 905 (9th Cir. 2001) ("I have nothing to say" was invocation of right to silence"); State v. I.B., 187 Wn. App. 315, 348 P.3d 1250 (2015) (shaking head in the negative after being asked if he was willing to talk constituted unequivocal assertion of his right to silence); See also Reply Brief of Appellant (RB) at 1-9.

Because Wiebe did not immediately assert "I have nothing to say;" but rather, initially agreed to talk to the detectives, the appellate court

distinguished Wiebe's case from Bushyhead and found Wiebe's statement "I, I have nothing to say" equivocal:

> In Bushyhead, the Court held that Bushyhead's statement, "'I have nothing to say'" – the same statement made by Wiebe – was an invocation of Bushyhead's right to silence. 270 F.3d at 912. But the Court first considered the context surrounding the statement. Following arrest, Bushyhead was restrained in the hospital and when he saw a Federal Bureau of Investigation special agent approaching him with a printed Miranda warning in hand, Bushyhead immediately said, "I have nothing to say, I'm going to get the death penalty anyway." Bushyhead, 270 F.3d at 908.
>
> Here, unlike Bushyhead, Wiebe first unequivocally waived his rights and voluntarily agreed to speak to Detective Stevens and Hoss. Wiebe answered questions about his name and date of birth. And he agreed to have the interview recorded. Because Wiebe initially agreed to speak with the police, his "I have nothing to say" comment is ambiguous and, therefore, Bushyhead is not applicable here.

Appendix at 11 (footnote omitted).

2. Violation of Wiebe's Right to Control His Defense

As indicated, the state's theory was that Wiebe was guilty as an accomplice by acting as the lookout while others committed the charged crimes. In that vein, the jury was instructed that a person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he aids or agrees to aid another person in committing the crime. CP 46.

At the state's request and over defense counsel's objection, however, the court also gave the following instruction:

> A person is not an accomplice in a crime committed by another person if he or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

CP 48 (Instruction 8); RP 931; RCW 9A.08.020(5)(b).

Defense counsel argued he was not raising this affirmative defense and did not want to be limited as to why the jury should doubt Wiebe acted as an accomplice:

> -- the reason I would object to that, Your Honor – I think that, first of all, I'm not raising that as a defense. I think that's kind of a – that's almost like an affirmative defense. I'm not raising that as a defense here, that, you know, he terminated his complicity and gave a timely warning or made an effort to prevent the commission of that crime. The danger that comes in, though, is that I don't want the jury to think that this is the only way that somebody could not be an accomplice here, in that, if that isn't shown, then nothing else makes any difference. I think it adds confusion to it. And so I would ask that that not be submitted to the jury.

RP 95.

In closing, the prosecutor referred to Instruction 8 and argued:

> Now, Instruction 8 defines for you or tells you when a person is not an accomplice to a crime: If he or she terminates his or her complicity prior – before the commission of a crime, okay, and either gives timely warning to law enforcement or somehow makes a good-

> faith effort to prevent the commission of the crime. Did this happen in this – in the case? Is there any evidence of that happening in this case?
>
> Okay. Remember Detective Stevens testified yesterday. I asked him, Did the defendant have a cell phone? Yes. Did you take it from him? Yes. Did you search it? Yes. Did you look for when phone calls were made or text messages and things like that surrounding this time period? Yes. Any phone calls, text messages, whatnot to 911 or police? No.
>
> So if the defendant didn't do any of that – and there's no evidence that he did any of that to either prevent the crimes from happening or give law enforcement notice or head up that, Hey, something is about to go down. Okay. I've got a bad feeling about this. I'm calling to let you know. I don't want to be any part of this. That's what it – that's what it means to not be an accomplice. That clearly did not happen in this case.

RP 1000.

On appeal, Wiebe argued the trial court violated his right to control his defense by instructing the jury on an affirmative defense over his objection. Supplemental Brief of Appellant (SBOA) at 3-10 (citing State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013)).

In the published portion of its opinion, Division Two rejected Wiebe's challenge. Appendix at 4-7. According to the court, Wiebe cited no case holding that RCW 9A.08.020(5) constitutes an affirmative defense. Appendix at 4 and 7.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. BECAUSE THIS CASE INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE FIFTH AMENDEMENT, THIS COURT SHOULD ACCEPT REVIEW.

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Article 1, § 9 of the Washington Constitution provides: "No person shall be compelled in any criminal case to give evidence against himself[.]" The state provision has been held to be coextensive with the federal provision. See, e.g., State v. Earls, 116 Wn.2d 364, 805 P.2d 211 (1991).

To counteract the inherent compulsion of custodial interrogation, police must administer Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Miranda requires that the defendant "be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id. Once a suspect invokes his right to remain silent, police may not continue the interrogation or make repeated efforts to wear down the suspect. Id. at 473–74, 86 S. Ct. 1602; State v.

Piatnitsky, 180 Wash.2d 407, 412, 325 P.3d 167 (2014), cert. denied, __ U.S. __, 135 S.Ct. 950, 190 L.Ed.2d 843 (2015).

Miranda sets a low bar for invocation of the right: "If the individual indicates in any manner, *at any time prior to or during questioning*, that he wishes to remain silent, the interrogation must cease." Miranda, 384 U.S. at 473–74, 86 S.Ct. 1602 (emphasis added). However, suspects must "unambiguously" express their desire to be silent. Piatnitsky, 180 Wash.2d at 413, 325 P.3d 167; see also State v. Hodges, 118 Wash.App. 668, 673, 77 P.3d 375 (2003) (invocation of the right to remain silent must be "clear and unequivocal").

The test as to whether a suspect's invocation of his right to remain silent was unequivocal is an objective one, asking whether "'a reasonable police officer in the circumstances would understand the statement'" to be an invocation of Miranda rights. Piatnitsky, 180 Wash.2d at 413 (quoting Davis v. United States, 512 U.S. 452, 459, 114 S.Ct., 2350, 129 L.Ed.2d 362 (1994)). In Piatnitsky, this Court stated the test as follows, "[t]o be unequivocal, an invocation of Miranda requires the expression of an objective intent to cease communication with interrogating officers." Id. at 412, 325 P.3d 167 (footnote omitted). Once a suspect has clearly invoked the right to remain silent, police questioning must immediately cease. In re Personal Restraint of Cross, 180 Wash.2d at 664, 674, 327

P.3d 660 (2014); see Michigan v. Mosley, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) (invocation of right to remain silent must be "'scrupulously honored'" by police and has the effect of "'cut[ting] off questioning'") (quoting Miranda, 384 U.S. at 479, 474, 86 S.Ct. 1602).

The analysis is context-specific. The court does not examine the statement or conduct in isolation; rather, the statement is considered in the context of the circumstances leading up to the alleged invocation. Cross, 180 Wash.2d at 682–83. While "an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself," the defendant's invocation "may be characterized as ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself." Smith v. Illinois, 469 U.S. 91, 99–100, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984). This determination requires a case-by-case analysis. Medina v. Singletary, 59 F.3d 1095, 1101 (11th Cir.1995).

"I have nothing to say" is an unequivocal invocation of the right to silence. United States v. Bushyhead, 270 F.3d 905 (9th Cir. 2001). After his arrest, Bushyhead was taken to the hospital where he was restrained by handcuffs and leg restraints. FBI Special Agent Olsen testified that he approached Bushyhead in the hospital. According to Olsen, Bushyhead's shoes appeared unstained but his socks were saturated with blood. As he

approached, agent Olsen held a printed Miranda warning statement in his hand. Olsen was permitted to testify at trial that Bushyhead said, "I have nothing to say, I'm going to get the death penalty anyway." The district court instructed the jury that the statement was to be used only "for the limited purpose of tending to show the defendant was conscious of having committed a homicide." The district court permitted reference to this statement both in the prosecutor's opening and closing arguments. Bushyhead, 270 F.3d at 908.

On appeal, Bushyhead argued admission of his statement "I have nothing to say, I'm going to get the death penalty anyway" violated his Fifth Amendment privilege against self incrimination. Bushyhead, 270 F.3d at 911. The Ninth Circuit agreed:

> . . . The entirety of Bushyhead's statement was an invocation of his right to silence and is therefore protected by the Fifth Amendment privilege against self-incrimination. The district court thus erred in admitting the testimony of agent Olsen about Bushyhead's statement and in allowing the prosecutor to comment on this statement.

Bushyhead, 270 F.3d at 912-913.

Under Bushyhead, Wiebe's statement "I, I have nothing to say" constituted an unambiguous invocation of his right to silence. Because the detectives did not scrupulously honor Wiebe's invocation by immediately

ceasing questioning, Wiebe's Fifth Amendment privilege against self-incrimination was violated.

In holding otherwise, the appellate court reasoned that because Wiebe previously waived his rights, answered questions about his name and date of birth and agreed the detectives were recording with his permission, his statement, "I, I have nothing to say" was equivocal. Appendix at 11.

But the appellate decision completely ignores the fact that Wiebe paused for 17 seconds before answering, "I, I have nothing to say." The appellate decision likewise ignores the fact Wiebe remained silent when Stevens followed up by asking, "You have nothing to say?" Ex 2 (pretrial), pages 1-2.

The court of appeals is correct that the context of Wiebe's statement is an important consideration. But contrary to the court of appeals, the context of Wiebe's statement is that he thought long and hard and about his response to say nothing. The context of Wiebe's statement – coming after 17 seconds of dead silence followed by continued silence in the face of further questioning – would lead any reasonable officer to believe Wiebe was invoking his right to silence.

This is so despite the fact he previously agreed to speak to the detectives. Again, context is important. Significantly, Wiebe answered

only innocuous questions such as his name and date of birth. As soon as any question of substance was asked, Wiebe said he had nothing to say. This was in response to the first question either detective asked that could potentially elicit an incriminating response. That Wiebe initially agreed to be polite and answer routine booking-type questions should not lead to a different result than in Bushyhead. "I, I have nothing to say" means exactly that in this context. This Court should take review of this important question of law under the state and federal constitutions. RAP 13.4(b)(3).

2. BECAUSE THIS CASE INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE SIXTH AMENDEMENT, THIS COURT SHOULD ACCEPT REVIEW.

Implicit in the Sixth Amendment[2] is the criminal defendant's right to control his defense. See Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("Although not stated in the [Sixth] Amendment in so many words, the right ... to make one's own defense personally [ ] is thus necessarily implied by the structure of the

[2] The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment."); State v. Jones, 99 Wash.2d 735, 740, 664 P.2d 1216 (1983) ("Faretta embodies 'the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount.'" (quoting United States v. Laura, 607 F.2d 52, 56 (3d Cir.1979))). The defendant's right to control his defense is necessary "to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy." State v. Coristine, 177 Wash.2d 370, 376, 300 P.3d 400 (2013).

"Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense." Id. at 375, 300 P.3d 400; see also State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013); Jones, 99 Wash.2d at 739 (trial court violated defendant's right to control his defense by forcing the defendant to enter a not guilty by reason of insanity plea and appointing amicus counsel to argue the insanity defense over defendant's objections).

In State v. Lynch, the trial court instructed the jury on what was considered at the time to be an affirmative defense – consent – to a charge of rape over Lynch's objection.[3] Lynch, 178 Wn.2d 490. Lynch objected on grounds he had the right to control his defense and because he did not want to bear the burden of proving consent. Lynch argued he introduced

evidence that T.S. had consented in order to create a reasonable doubt about whether the state had proved the element of forcible compulsion. Id.

The Supreme Court held the trial court violated Lynch's Sixth Amendment right to control his defense:

> By "[i]mposing a defense on an unwilling defendant," the trial court "impinge[d] Lynch's autonomy to conduct his defense. Id. [Coristine, 177 Wn.2d at 376]. The State argues that the consent instruction was justified because Lynch introduced evidence that T.S. consented. But in Coristine, we rejected a similar argument made by the State that evidence presented by Coristine bolstering his case somehow justified instructing the jury on an affirmative defense. In accordance with Coristine, we hold that the trial court violated Lynch's Sixth Amendment right to control his defense by instructing the jury on the affirmative defense of consent over Lynch's objection.

Lynch, 178 Wn.2d at 493.

Similarly here, defense counsel argued the defense did not want to have to prove Wiebe terminated complicity or made a good faith effort to prevent the crimes. Rather, the defense intended to focus on reasons to doubt Wiebe's complicity – such as lack of knowledge. As in Lynch, the trial court here instructed the jury on an affirmative defense over the defendant's objection --the "withdrawal" defense. This violated Wiebe's Sixth Amendment right to control his defense.

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[3] This Court has since held it is a "negating" defense the defendant cannot be forced to bear. State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014)

And contrary to the appellate court, Wiebe did cite authority indicating RCW 9A.08.020(5)(b) provides an affirmative defense. See e.g. State v. Handley, 115 Wn.2d 275, 293, 796 P.2d 1266 (1990)). In that case, this 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 (emphasis added).

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 Burkheirmer 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.

The prosecutor here made a similar argument as the prosecutor in Whitaker – that the defendant failed to make a good faith effort to prevent the crimes as indicated by his failure to call 911 or the police. However, that should not have been Wiebe's burden to bear. And the instruction was inconsistent with his theory he was not an accomplice based on the state's failure to prove knowledge. The court violated Wiebe's Sixth

Amendment right to control his defense by hoisting this unwanted defense onto him. This Court should accept review. RAP 13.4(b)(3).

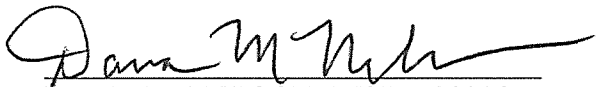
F. CONCLUSION

This Court should accept review of these signficiant questions of law under the Fifth and Sixth Amendments. RAP 13.4(b)(3).

Dated this 25th day of August, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Filed
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JARROD ALAN WIEBE, Appellant.	No. 47057-8-II PART PUBLISHED OPINION

JOHANSON, P.J. — A jury found Jarrod A. Wiebe guilty as an accomplice to burglary, kidnapping, robbery, extortion, criminal impersonation, and firearm theft. In the published portion of the opinion, we hold that the accomplice liability statute, specifically the termination of complicity provision under RCW 9A.08.020(5)(b), did not create either a negating defense or an affirmative defense and that the burden to prove Wiebe was an accomplice fell on the State. We further hold that neither the trial court's accomplice jury instructions nor the State's closing argument shifted the burden of proof to the defendant nor did these instructions deny Wiebe his choice of defense. In the unpublished portion, we hold that Wiebe did not unequivocally invoke his right to silence and that the peremptory challenge procedure did not violate Wiebe's public trial right. We affirm his convictions.

FACTS

In December 2013, Wiebe and three other men drove to the home of Casimiro Arellano and his partner on a dairy farm. The three other men, dressed in camouflage and one wearing a "SWAT" vest, forcibly entered the home, jumped on Arellano, and tied his hands behind his back. The men took money and guns belonging to Arellano, and one of them asked for more money in exchange for not calling the police or immigration to arrest Arellano and his partner. Wiebe stood outside the front door during the incident and knocked on the door when he saw anyone. Wiebe entered the house to bring in two dairy farm workers and/or to carry the guns from the home to the men's car. Wiebe was charged as an accomplice to burglary, kidnapping, robbery, extortion, criminal impersonation, and firearm theft.

After the parties presented evidence at trial, the trial court instructed the jury that the State bore the burden of proving every element of every crime charged. The trial court also instructed the jury that a person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he aids or agrees to aid in the commission of the crime. The trial court further instructed the jury, over Wiebe's objection, that

> [a] person is not an accomplice in a crime committed by another person if he or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

Clerk's Papers (CP) at 48.

In closing argument, the State repeated the basic definition of accomplice liability from the jury instructions and argued that Wiebe aided and assisted in the commission of the crimes charged. The State also reiterated the elements of each crime. Finally, the State noted that Wiebe did not try to prevent the crimes from occurring and did not contact the police as evidenced by the

data from his phone. At no time did the State argue that Wiebe bore the burden of proof. The defense argued that the State had not met the "with knowledge" element of accomplice liability.

The jury convicted Wiebe of burglary, kidnapping, robbery, extortion, criminal impersonation, and 10 counts of theft of a firearm. Wiebe appeals.

ANALYSIS

ACCOMPLICE JURY INSTRUCTIONS

Wiebe argues that the trial court improperly instructed the jury regarding termination of complicity and improperly shifted the burden of proof to him. We disagree.

A. STANDARD OF REVIEW AND RULES OF LAW

We review jury instruction errors based on legal rulings de novo. *See State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Carson*, 179 Wn. App. 961, 984, 320 P.3d 185 (2014), *aff'd*, 184 Wn.2d 207, 357 P.3d 1064 (2015). The rule is well established that instructions must be read together and viewed as a whole. *State v. Hutchinson*, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998). A jury is presumed to follow the court's instructions. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

RCW 9A.08.020(5) sets out the rules for accomplice liability and states in relevant part that

> [u]nless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:
>
> . . . .
>
> (b) He or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

There are two types of defenses in Washington State: affirmative defenses and quasi-defenses. 13A SETH A. FINE & DOUGLAS J. ENDE, WASHINGTON PRACTICE: CRIMINAL LAW, § 105, at 7 (2d ed. 1998). The defendant bears the burden of proving an affirmative defense by a preponderance of the evidence by setting forth facts that entitle the defendant to acquittal, even if the State proves every element of the crime charged. *State v. Riker*, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994) (analyzing the defense of duress); *State v. Lively*, 130 Wn.2d 1, 12-13, 921 P.2d 1035 (1996) (analyzing the defense of entrapment).

A quasi-defense, also called a "negating defense," consists of facts that negate one or more of the elements of the crime. *State v. Hicks*, 102 Wn.2d 182, 187, 683 P.2d 186 (1984) (holding the defense of a good faith claim of title negates the element of intent to steal for robbery). The State bears the burden of disproving a negating defense beyond a reasonable doubt because the constitution does not allow a defendant to bear the burden of disproving an element of the crime. *State v. W.R., Jr.*, 181 Wn.2d 757, 770, 336 P.3d 1134 (2014).

B. BURDEN OF PROOF, NEGATING DEFENSE, AND AFFIRMATIVE DEFENSE

Wiebe argues that because RCW 9A.08.020(5)(b) sets forth a negating defense, the State bears the burden of proving that complicity has terminated. He also argues alternatively that RCW 9A.08.020(5)(b) created an affirmative defense and that the jury likely believed he had the burden to prove complicity had terminated. His arguments are unpersuasive.

Wiebe cites no case holding that RCW 9A.08.020(5) constitutes either a negating defense or an affirmative defense. Wiebe relies on *State v. Handley*, 115 Wn.2d 275, 796 P.2d 1266 (1990), *State v. Whitaker*, 133 Wn. App. 199, 135 P.3d 923 (2006), and *W.R.* to show that the termination

of complicity under the accomplice liability statute constitutes a defense. But these cases do not establish Wiebe's proposition.

The Supreme Court in *Handley* merely referred to RCW 9A.08.020(5)(b) as the "'withdrawal' defense to accomplice liability," while discussing whether a "similar defense" would be available for an anticipatory offense. 115 Wn.2d at 293. But *Handley* referred to the "withdrawal defense" only in passing and did not address whether RCW 9A.08.020(5)(b) established a defense nor what burden of proof would apply to it. *See* 115 Wn.2d at 293.

And in *Whitaker*, the jury was instructed that a person is not an accomplice if he terminates his complicity before the commission of the crime and makes a good faith effort to prevent the crime, but the instruction was not referred to as a "defense." 133 Wn. App. at 235-36. There, the defendant argued that he tried to prevent a murder, the prosecution responded that this claim was unsupported and contradicted by the evidence, and the defendant then argued that the prosecutor's argument was misconduct because it "shifted the burden of proof." *Whitaker*, 133 Wn. App. at 235. The court rejected this argument and held that each party was entitled to present argument as to whether the defendant's actions constituted a good faith effort to prevent the commission of the crime and the prosecutor's argument did not shift the burden to the defendant. *Whitaker*, 133 Wn. App. at 235-36. Thus, *Handley* and *Whitaker* do not establish that RCW 9A.08.020(5)(b) constitutes either a negating defense or affirmative defense.

Finally, Wiebe tries to analogize RCW 9A.08.020 to the issue in *W.R.* to argue that termination of accomplice complicity is a negating defense. But *W.R.* is not analogous. There, the Supreme Court held that the State must bear the burden of disproving a "consent" defense where the defense necessarily negates an element of the completed crime. *W.R.*, 181 Wn.2d at

765-66. The court held that the element of forcible compulsion for the crime of second degree rape cannot co-exist with the defense of consent because there is no forcible compulsion if the victim consents. *W.R.*, 181 Wn.2d at 765-66.

Wiebe argues that because accomplice liability hinges on a person knowingly promoting or facilitating a crime, if a person terminates complicity or tries to prevent the crime by calling police, then he cannot have promoted, aided, or agreed to aid in the crime and, thus, this defense negates elements of the accomplice liability. Wiebe cites no direct authority for this proposition. His argument is not persuasive because one *can* knowingly promote or facilitate the commission of a crime and then later terminate that complicity by calling the police. This is precisely what RCW 9A.08.020(5)(b) contemplates. Wiebe has not shown that accomplice liability cannot co-exist with a later termination of accomplice complicity. Wiebe's argument fails.

We conclude that termination of complicity as found in RCW 9A.08.020(5)(b) is part of the definition of accomplice liability. We hold that RCW 9A.08.020(5)(b) creates neither a negating defense nor an affirmative defense and we conclude that the trial court properly instructed the jury.

C. Right To Control Defense

Next, Wiebe argues that the trial court violated his Sixth Amendment right to control and choose his defense when the jury was instructed, over his objection, about when accomplice liability ends. We disagree.

Implicit in the Sixth Amendment is a criminal defendant's right to control his defense. *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983). Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the

defendant's autonomy to present a defense. *State v. Lynch*, 178 Wn.2d 487, 492, 309 P.3d 482 (2013).

But as discussed above, termination of complicity is not an affirmative defense. Wiebe attempts to analogize this case to *Lynch*, in which the Supreme Court held that the trial court violated Lynch's right to control his defense when the trial court instructed the jury on the affirmative defense of consent to a charge of rape over Lynch's objection. 178 Wn.2d at 493. But again, Wiebe does not offer any authority that demonstrates that RCW 9A.08.020(5)(b) is an affirmative defense.

Accordingly Wiebe was not denied his right to control his own defense when the trial court instructed the jury regarding termination of complicity over Wiebe's objection.

D. CLOSING ARGUMENT

Finally, Weibe argues that the State's closing argument impermissibly shifted the burden of proof to him. This argument fails.

Although in closing argument the State argued that Wiebe did not call the police or 911, the State *did not* say that Wiebe had the burden of proving he was not an accomplice. Instead, the State spoke to all of the requirements of accomplice liability and the elements of the crimes charged, as well as the facts that supported its burden to prove Wiebe was an accomplice. Wiebe argued his chosen defense that he was not an accomplice because he did not know what the other men planned to do or know what they eventually did. The jury was properly instructed that the State bore the burden of proving every element of every crime charged.

Thus, Wiebe does not show that the State's closing argument improperly shifted the burden of proof to him. This argument fails.

We affirm Wiebe's conviction.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

I. CrR 3.5 Hearing

Detective Jared Stevens and Sergeant Duncan Hoss conducted a custodial interview of Wiebe. Wiebe waived his rights and voluntarily agreed to speak to the detectives. Wiebe answered questions about his name and date of birth. And he agreed to have the interview recorded. The recorded interview proceeded:

> JS: Okay, this is Detective Jared Stevens with the Clark County Sheriff's Office. It is December 19th, 2013. Its 1742 hours. Currently at the Clark County Sheriff's Office West Precinct. With me in the room are or yeah Detective Sergeant Duncan Hoss and Jarrod, is it Wiebe?
> JW: Wiebe.

Ex. 2 at 1.

After providing the spelling of his name and his date of birth, the interrogation continued.

> JS: Okay. And you have been advised of your rights, correct?
> JW: Yes.
> JS: And having those rights in mind you're still willing to talk to me, correct?
> JW: Yes sir.
> . . . .
> JS: Okay am I recording this with your permission?
> JW: Yes sir.
> JS: Okay. So stories have a beginning, a middle and an end. We learn that when we're all really young first learning how to read. Why don't you tell me the story about what, what happened today.
> *JW: I, I have nothing to say.*
> JS: You have nothin to say?
> DH: All right. Here's, here's the deal Jarrod, we are going to complete a report. You got that right? From your Theft III's and stuff, you know, we put down

> what happened. Well there's (inaudible) to be involved, right? We've talked to everybody else so we're gonna get their side of the story. All we're lookin for is your side of it. Now, you don't have to tell us, you know, you remember your rights, I can reread em if you want but I'm giving you the opportunity here cause this is the last chance you got to give your side of the story as to what happened. . . .
>
> . . . .
>
> JW: I didn't even know what was going on. We were just goin on a trip and I just volunteered to go.

Ex. 2 at 1-2 (emphasis added).

The court ruled that it was not clear to the court whether Wiebe's statement "'I have nothing to say'" was an unambiguous or unequivocal invocation of the right to remain silent, and so it likely was not clear to the officers interviewing Wiebe either. CP at 27. The court ruled that Wiebe's statements were admissible at trial.

II. JURY SELECTION

During voir dire, the parties agreed to the trial court's suggestion that the parties conduct peremptory challenges by passing a clipboard. After peremptory challenges were completed, the jury panel was brought into the courtroom and the trial court empaneled the jury. There is nothing in the record to suggest the courtroom was closed during this time. The jury sheet shows four jurors were excused by peremptory challenges. This sheet was filed as part of the public record.

ANALYSIS

I. INVOCATION OF THE RIGHT TO REMAIN SILENT

Wiebe argues that the trial court erred when it ruled that his statement "'I have nothing to say'" was an ambiguous invocation of his right to remain silent and admitted his subsequent statements to police. Br. of Appellant at 26. We disagree.

Whether a defendant unequivocally invoked his right to remain silent is a mixed question of law and fact which we review de novo. *See State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004); *State v. Piatnitsky*, 180 Wn.2d 407, 411-413, 325 P.3d 167 (2014), *cert. denied*, 135 S. Ct. 590 (2015). To counteract the inherent compulsion of custodial interrogation, police must administer *Miranda*[1] warnings. *Miranda v. Arizona* requires that the defendant be warned prior to any questioning that he has the right to remain silent and that he has the right to an attorney. 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The standard for whether a defendant has invoked his *Miranda* rights to remain silent and to counsel is the same: invocation must be unambiguous, clear, and unequivocal. *Piatnitsky*, 180 Wn.2d at 413. If a defendant previously waived a *Miranda* right, a later invocation must also be unequivocal. *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008) (holding a defendant must explicitly invoke the right to counsel after previously waiving the right). We evaluate whether an invocation was unequivocal using an objective test that asks whether a reasonable police officer in the circumstances would understand the statement to be an invocation of *Miranda* rights. *Piatnitsky*, 180 Wn.2d at 413. This test requires reviewing the plain language and the context of the purported invocation. *See Smith v. Illinois*, 469 U.S. 91, 98, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984). We may not rely on context arising *after* the suspect's invocation to retroactively cast doubt on an unequivocal invocation of *Miranda* rights, but may consider events preceding the request or nuances inherent in the request itself. *See Smith*, 469 U.S. at 98-100.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

To show his statement was unequivocal, Wiebe argues that this case is analogous to *United States v. Bushyhead* and is distinguishable from *Piatnitsky*, but his arguments are unpersuasive. 270 F.3d 905 (9th Cir. 2001). In *Bushyhead*, the Court held that Bushyhead's statement, "'I have nothing to say'"—the same statement made by Wiebe—was an invocation of Bushyhead's right to silence. 270 F.3d at 912. But the Court first considered the context surrounding the statement. Following arrest, Bushyhead was restrained in the hospital and when he saw a Federal Bureau of Investigation special agent approaching him with a printed *Miranda* warning in hand, Bushyhead immediately said, "I have nothing to say, I'm going to get the death penalty anyway." *Bushyhead*, 270 F.3d at 908.[2]

Here, unlike in *Bushyhead*, Wiebe first unequivocally waived his rights and voluntarily agreed to speak to Detective Stevens and Sergeant Hoss. Wiebe answered questions about his name and date of birth. And he agreed to have the interview recorded. Because Wiebe initially agreed to speak with the police, his "I have nothing to say" comment is ambiguous and, therefore, *Bushyhead* is not applicable here.

Next, *Piatnitsky* does not support Wiebe's argument that his statement was unequivocal. After his arrest for a shooting, Piatnitsky was interviewed by police detectives, was advised of his rights, and then said, "I'm not ready to do this, man," and "I don't want to talk right now, man." *Piatnitsky*, 180 Wn.2d at 410. Piatnitsky also said, "I just write it down, man, I can't do this. I, I, I just write, man," and after the detectives confirmed he did not want to make an audio recorded

[2] Other cases also demonstrate that an invocation of the right to remain silent is unequivocal where the statement in question is the immediate response to an initial police question. *See State v. Gutierrez*, 50 Wn. App. 583, 589, 749 P.2d 213 (1988); *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 684, 327 P.3d 660 (2014); *State v. I.B.*, 187 Wn. App. 315, 317, 323, 348 P.3d 1250 (2015).

confession, Piatnitsky reviewed, made some changes to, and signed a corrected statement of confession. *Piatnitsky*, 180 Wn.2d at 410-11. While the court noted that "I don't want to talk right now, man," could be an unequivocal invocation, it held that the detectives reasonably concluded that Piatnitsky was expressing a preference for a written rather than an audio-recorded statement and any invocation of his *Miranda* rights was equivocal at best. *Piatnitsky*, 180 Wn.2d at 411, 413.

Here, Wiebe first waived his right to remain silent, agreed to speak to the detectives, and allowed the recording of his statements. And during the recorded portion of the interview, Wiebe again acknowledged that he had been read his *Miranda* rights, understood those rights, and agreed to talk with the detectives. In response to the first recorded question about the incident, Wiebe said, "I have nothing to say." 1 Report of Proceedings at 36. After Wiebe agreed, twice, to speak with the detectives, the detectives could reasonably conclude that Wiebe's statement was not an unequivocal invocation of his right to remain silent but simply an answer to their question to tell them about the incident. The trial court did not err in concluding that Wiebe did not unequivocally invoke his right to remain silent based on the context here.

II. PEREMPTORY CHALLENGES

Finally, Wiebe argues that the court violated his public trial right by allowing the parties to pass a clipboard back and forth when conducting peremptory challenges. We disagree.

State v. Love controls our holding here. 183 Wn.2d 598, 354 P.3d 841 (2015), *cert. denied*, 136 S. Ct. 1524 (2016). Peremptory challenges are part of the jury selection process to which the right to a public trial extends. *Love*, 183 Wn.2d at 605. However, written peremptory challenges

are consistent with the public trial right so long as they are filed in the public record. *Love*, 183 Wn.2d at 607.

Here, the record reflects no physical closure of the courtroom to the public during the peremptory challenges and, following the passing of the clipboard, the court announced the names of the empaneled jury in open court. The jury sheet that listed the four peremptory challenged jurors was made part of the public record. Thus, there was no violation of Wiebe's public trial right.

We affirm.

Johanson, J.
JOHANSON, P.J.

We concur:

J.
LEE, J.

Sutton, J.
SUTTON, J.

NIELSEN, BROMAN & KOCH, PLLC

August 25, 2016 - 1:30 PM

Transmittal Letter

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