Supreme Court No. 93965-9
Court of Appeals No. 73531-4-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NAVRONE RANDMEL,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Navarone Randmel, the petitioner, asks this Court to review the Court of Appeals' decision holding that police need not stop a custodial interrogation or clarify the suspect's intent when a detained suspect tells police he would "rather not say" in response to questioning that may elicit incriminating statements. The Court should grant review because the decision involves an unresolved issue of whether the Washington Constitution requires police to clarify a suspect's intent when the suspect makes an equivocal invocation of the right to silence. A copy of the Court of Appeals' unpublished opinion, issued on November 14, 2016 is attached in the appendix.

B. ISSUES PRESENTED FOR REVIEW

1. During custodial interrogation, when a suspect unequivocally invokes his or her right to silence, the interrogation must cease. After waiving his rights and while in custody at a hospital, an officer questioned Mr. Randmel about two previous criminal incidents in which the officer suspected Mr. Randmel as being responsible. Mr. Randmel stated he would rather not answer questions, but the officer did not stop. Did Mr. Randmel unequivocally invoke his right to silence, requiring exclusion of his subsequent statements? RAP 13.4(b)(1), (2) , (3) , (4) .

2. State constitutional provisions may provide broader protections than their federal constitutional analogs. Article I, § 9 of the Washington Constitution is different and broader than the Fifth Amendment to the United States Constitution. Prior to the United States Supreme Court ruling otherwise under the Fifth Amendment, the longstanding rule in Washington was that when suspects subject to custodial interrogation make an ambiguous invocation their right to silence or an attorney, police must clarify the intent of the suspect or cease interrogation. Other states have retained this rule under state constitutional analogs to the Fifth Amendment. Does article I, § 9 require the same rule? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

Navarone Randmel was a suspect in three separate car thefts occurring on different days. See CP 9-11. In the first two thefts, the suspect successfully fled from police on foot despite an officer's use of a tracking dog. RP 45-51, 77-81, 179-80. In the third incident, the same dog led police to Mr. Randmel, who was bitten by the dog and arrested. 181-87.

Mr. Randmel agreed to speak with law enforcement. RP 172-73. Shortly after he answered some questions, Mr. Randmel was taken to the hospital to be treated for his injuries. RP 173, 188, 205.

Officer Jeremy Woodward, who oversaw the tracking dog, went to the hospital to interrogate Mr. Randmel further. RP 188. Officer Woodward assumed Mr. Randmel was the person who fled in the two other incidents. RP 132. He asked Mr. Randmel to confirm where he ran so that he could determine if his dog was tracking correctly. RP 189. Mr. Randmel said that "he would rather not say." RP 133. Officer Woodward did not stop his interrogation and did not seek to clarify whether Mr. Randmel wanted to stop talking to him. RP 133. Instead, he continued questioning. RP 133. He elicited inculpatory statements confirming that Mr. Randmel was the person who ran away both times and that his dog had tracked him correctly. RP 189-90.

Based on the three separate incidents, the State charged Mr. Randmel with three counts possession of a stolen vehicle, two counts of resisting arrest, and one count of obstructing a law enforcement officer. CP 9-11. The court refused to suppress Mr. Randmel's statements. RP 137-38. At trial, Officer Woodward testified about what Mr. Randmel told him, including that Mr. Randmel had said he would rather not answer questions. RP 189. Mr. Randmel testified, presenting alibis as to the two earlier incidents. RP 200-02. As for the most recent incident, Mr. Randmel explained that while he had been in the vehicle, he had been merely trying to steal some boots that were inside. RP 203. When he saw

the police, he panicked and ran away. RP 203-04. During closing arguments, the prosecutor recounted Officer Woodward's testimony that Mr. Randmel had said he would rather not answer questions. RP 262.

The jury convicted Mr. Randmel as charged. CP 57-58; RP 295. The Court of Appeals affirmed the convictions, rejecting Mr. Randmel's arguments that his statements should have been excluded under the state and federal constitutions.

D. ARGUMENT

1. By telling police that he "would rather not say," Mr. Randmel unequivocally invoked his Fifth Amendment right to cutoff police questioning and remain silent. The Court of Appeals' contrary decision conflicts with precedent.

The federal and state constitutions protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. To secure these constitutional rights, the police must advise suspects in custody of their right to remain silent and the presence of an attorney before questioning. Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). These rights may be waived, but a suspect may choose to invoke these rights at any time. In re Cross, 180 Wn.2d 664, 682, 327 P.3d 660 (2014).

Under the Fifth Amendment, an invocation of the right to silence or an attorney must be unambiguous or unequivocal to stop questioning.

Berghuis v. Thompkins, 560 U.S. 370, 375, 382, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010); Davis v. United States, 512 U.S. 452, 462, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). When a suspect makes an equivocal invocation, the Fifth Amendment does not require police to clarify whether the suspect is trying to invoke his or her constitutional rights. Berghuis, 560 U.S. at 381.

"An invocation of *Miranda* rights is unequivocal so long as a 'reasonable police officer in the circumstances' would understand it to be an assertion of the suspect's rights." Cross, 180 Wn.2d at 682 (quoting Davis, 512 U.S. at 459). "This test encompasses both the plain language and the context of the suspect's purported invocation." Id. at 682-83. For example, a defendant unequivocally invoked his right to silence in response to police questioning by using the language: "I would rather not talk about it." State v. Gutierrez, 50 Wn. App. 583, 589, 749 P.2d 213 (1988). Similarly, in the context of invoking the right to counsel, the statement, "I gotta talk to my lawyer," was plain language that unequivocally invoked the defendant's right to an attorney. State v. Nysta, 168 Wn. App. 30, 42, 275 P.3d 1162 (2012). While context is relevant, the relevant context is that which precedes the statement. Cross, 180 Wn.2d at 683. Hence, a suspect's responses to further questioning "may

not be used to cast doubt on the clarity of his initial request." Smith v. Illinois, 469 U.S. 91, 92, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984).

In contrast, the words "Maybe I should talk to a lawyer" were insufficient to invoke the right to counsel. Davis, 512 U.S. at 462. Similarly, a defendant did not unequivocally invoke his right to silence by saying "I don't want to talk right now" and that he just wanted to "write it down." State v. Piatnitsky, 180 Wn.2d 407, 412-13, 325 P.3d 167 (2014).

In response to Officer Woodward's accusations that he was involved in two previous incidents involving stolen vehicles where the suspect fled from the police, Mr. Randmel stated "he would rather not say." RP 133. By using these plain words, Mr. Randmel unequivocally invoked his right to silence. The interrogation should have ceased.

Precedent supports this conclusion. In Cross, the suspect said "I don't want to talk about it," after being read his Miranda rights. Cross, 180 Wn.2d at 684. This Court reasoned that there "is nothing unequivocal or ambiguous about this statement." Id. Similarly, in Gutierrez, the defendant, after being read his Miranda rights and in response to an inquiry about drugs, said he "would rather not talk about it." Gutierrez, 50 Wn. App. at 586. The court reasoned this was an unequivocal assertion of his right to remain silent. Id. at 589. As for the specific words used by Mr. Randmel, the Oregon Court of Appeals has recognized that the words

"I'd rather not say," made in response to police questioning, was an invocation of the right to silence under its state constitution. State v. Marple, 98 Or. App. 662, 666, 780 P.2d 772 (1989).

Still, the Court of Appeals held that Mr. Randmel had not unequivocally invoked his right to silence. The Court distinguished Cross and Gutierrez on the basis that the suspects in those cases made the statements following advisement of their rights and before answering questions. Slip. op at 8-9. The court emphasized that Mr. Randmel had agreed to speak with police. Slip. op at 9. But a suspect has the right to cutoff questioning. See, e.g., Smith, 469 U.S. at 91-93; Nysta, 168 Wn. App. at 41-42. Similar to Smith and Nysta, where the requests to cutoff questioning were not honored after invoking the right to counsel, Mr. Randmel's right to cutoff questioning was also not honored after he invoked his right to remain silent.

The Court of Appeals' decision conflicts with precedent. RAP 13.4(b)(1), (2) . The issue is also one of significant constitutional importance and a matter of public interest. RAP 13.4(b)(3), (4) . The Court should grant review on whether Mr. Randmel unequivocally invoked his right to remain silent.

2. If Mr. Randmel's invocation of his right to remain silent was equivocal, article I, § 9 of the Washington Constitution still required the interrogating officer to seek clarification. This Court should accept review to resolve the significant state constitutional question of whether article I, § 9 is more protective than the Fifth Amendment in this context.

Even if Mr. Randmel's invocation was equivocal, the Court of Appeals should have still have ruled that his statements were inadmissible under article I, § 9 of the Washington Constitution. For over a decade, the rule in Washington was that a suspect's equivocal request for counsel or to remain silent forbids any further police questions except to clarify the request. State v. Robtoy, 98 Wn.2d 30, 39, 653 P.2d 284 (1982).[1] This rule is sensible. Limiting police to asking clarifying questions after suspects invoke their rights in an equivocal manner "gives a suspect the proper amount of protection to his rights without unduly burdening the police from taking voluntary statements." Id.

Interpreting the Fifth Amendment to the United States Constitution, the United States Supreme Court in 1994 subsequently determined otherwise. Davis, 512 U.S. at 459. This Court accordingly conformed to this understanding as to the Fifth Amendment. Radcliffe, 164 Wn.2d at 902. The Court, however, did not answer whether article I,

[1] Robtoy involved an invocation of the right to counsel. But Washington courts do not draw distinctions between the invocations of different Miranda rights. State v. Piatnitsky, 180 Wn.2d 407, 413, 325 P.3d 167 (2014).

section 9 required the more protective rule applied in Robtoy. See id. at 907 (declining to address issue).

To determine whether a state constitutional provision supplies different or broader protections than its federal counterpart, Washington courts analyze six "nonexclusive" criteria: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.3d 808 (1986).

Mr. Randmel briefed the nonexclusive Gunwall factors and argued that article I, § 9, required application of the more protective Robtoy rule. The State failed to provide responsive Gunwall briefing, instead contending that this Court had decided that no matter what the context, article I, § 9 means exactly what Fifth Amendment means. The Court of Appeals correctly rejected the State's argument. Slip. op. at 11; State v. Russell, 125 Wn.2d 24, 58, 882 P.2d 747 (1994). Still, after conducting its own analysis, the Court of Appeals concluded there was "no persuasive reason to apply the protections of article I, section 9 more broadly than those of the Fifth Amendment when a suspect equivocally invokes his right to remain silent." Slip. op. at 16.

Contrary to the Court of Appeals opinion, a Gunwall analysis supports independent interpretation. As to the first and second factor, article I, section 9 of the Washington Constitution provides, "No person shall be compelled in any criminal case to give evidence against himself." Const. art. I, § 9 (emphasis added). This language is different and broader than the language of the Fifth Amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V (emphasis added).

Concerning the fifth factor, differences in structure between the state and federal constitutions, this factor always supports an independent constitutional analysis because the federal constitution is a grant of power from the people, while the state constitution represents a limitation of the State's power. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). On the sixth factor, state law enforcement measures are a matter of state or local concern so it also weighs in favor of independent interpretation. Id.

The third and fourth factors, which concern state constitutional history and preexisting state law, support independent interpretation. For example, this Court's decisions pre-dating Davis and Berghuis provided greater protection in this context than the U.S. Supreme Court later endorsed under the federal constitution. In Robtoy, this Court adopted the following rule:

> Whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. *Further questioning thereafter must be limited to clarifying that request* until it *is* clarified.

Robtoy, 98 Wn.2d at 39 (quoting Thompson v. Wainwright, 601 F.2d 768, 771 (5th Cir. 1979)). At the same time that the Court endorsed this rule protecting equivocating suspects from compelled self-incrimination, some other courts were denying such protection, instead requiring unequivocal assertions of the rights to silence or to counsel. See Smith, 469 U.S. at 96 n.3 (describing three different approaches state and federal courts had taken with respect to equivocal invocations; Robtoy fell in the middle, while the U.S. Supreme Court later adopted the least-protective rule).

Also of great significance is that other state courts have rejected Davis and applied more protective rules under their state constitutions. See, e.g., Downey v. State, 144 So. 3d 146, 151 (Miss. 2014) ("*Davis* does not require Mississippi to follow the minimum standard that the federal government has set for itself. We are empowered by our state constitution to exceed federal minimum standards of constitutionality and more strictly enforce the right to counsel during custodial interrogations.")[2]; State v.

[2] The Mississippi Constitution uses language similar to that found in article I, § 9. Miss. Const. art. 3, § 26 ("In all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself").

Diaz-Bridges, 208 N.J. 544, 34 A.3d 748 (N.J. 2012); State v. Holcomb, 213 Or. App. 168, 159 P.3d 1271 (2007); State v. Draper, 49 A.3d 807, 810 (Del. 2002); State v. Risk, 598 N.W.2d 642, 644 (Minn. 1999); Steckel v. State, 711 A.2d 5, 10-11 (Del. 1998); State v. Hoey, 77 Hawai'i 17, 36, 881 P.2d 504, 523 (Haw. 1994).

The Court of Appeals did not find Mr. Randmel's analysis of state constitutional history and preexisting state law persuasive. The court reasoned that Robtoy was irrelevant because it interpreted the Fifth Amendment and that the cases from other states had no bearing on Washington law. Slip. op at 14-15. But even if the third and fourth factors are properly read so narrowly, the Court of Appeals forgot that the Gunwall factors are *nonexclusive*. Gunwall, 106 Wn.2d at 58.

The point of Gunwall is that interpretation of state constitutional provisions should be based on a "process that is at once articulable, reasonable and reasoned." Id. at 63. Accordingly, that other states have interpreted their constitutional analogs to the Fifth Amendment more broadly is plainly relevant. And that Robtoy did not discuss article I, § 9 does not make the case irrelevant. For example, in the context of the Fourth Amendment and article I, § 7, this Court refused to abandon the

longstanding *Aguilar-Spinelli* standard[3] for determining probable cause even though this standard originated under the Fourth Amendment and the United States Supreme Court had departed from it. State v. Jackson, 102 Wn.2d 432, 440, 688 P.2d 136 (1984); Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983). Similarly, that the more protective Robtoy rule existed in Washington for over a decade supports retaining it under article I, § 9.

The issue of whether article I, § 9 requires the more protective Robtoy rule presents a significant constitutional question and is an issue of substantial public interest. This Court should grant review. RAP 13.4(b)(3), (4) .

Additionally, there are conflicting opinions from the Court of Appeals on whether this issue is settled. A panel on Division Two of the Court of Appeals has concluded that the issue is settled. State v. Horton, 195 Wn. App. 202, 215-17, 380 P.3d 608 (2016). Thus, in Horton, where the defendant made an equivocal invocation of the right to counsel, the Court refused to conduct a Gunwall analysis. Id. The panel on Division One in this case properly rejected Horton and held that a Gunwall analysis

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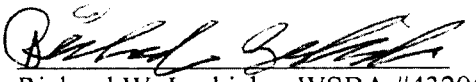
[3] See Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

was necessary. Slip. op. at 10-12. A decision from this Court on the petitioner's request for discretionary review in Horton is pending.[4] This conflict also support granting review. RAP 13.4(b)(2) .

E. CONCLUSION

Under the Fifth Amendment and article I, § 9, the officer should have stopped his custodial interrogation of Mr. Randmel when he told him he "would rather not say." Even if equivocal, under article I, § 9, the officer should have stopped to clarify whether Mr. Randmel was trying to invoke his right to remain silent. This Court should grant review to resolve the significant constitutional issues presented and reverse.

Respectfully submitted this 14th day of December, 2016,



Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Petitioner

[4] The case number in Horton is 93575-1.

Appendix

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NAVARONE GREGORY RANDMEL, Appellant.	No. 73531-4-I DIVISION ONE UNPUBLISHED OPINION FILED: November 14, 2016

LEACH, J. — Navarone Randmel appeals his convictions for possession of stolen vehicles, resisting arrest, and obstructing a law enforcement officer. He claims the trial court's inclusion of definitional terms in the "to-convict" jury instruction added elements that the State did not prove. Also, he challenges the admission of statements he made during a custodial interrogation and the State's reference to his silence during that interrogation. We reject each of these arguments.

This court recently decided that including the definition of "possession" in a to-convict instruction did not require the State to prove any additional elements or "false alternative means" created by adding that definition. Because Randmel did not unequivocally invoke his right to remain silent, the Fifth Amendment did not prohibit the officer from questioning him further. The Washington Constitution does not provide broader protections in this context. Thus, Randmel did not invoke his right to remain silent, and the prosecutor could reference his statements in closing argument.

We affirm Randmel's convictions. But because the trial court failed to make an individualized inquiry into Randmel's ability to pay before imposing discretionary legal financial obligations (LFOs), we remand for resentencing.

Background

Bellingham police officers arrested Randmel after a series of car thefts in December 2014 and January 2015. Officers testified that they twice found Randmel behind the wheel of stolen cars and stopped him. Both times the suspect ran away, and both times the police tracked him with a police dog but did not find him.

The third time, the dog caught him. Officer Joel Douglas read Randmel his Miranda[1] rights. Randmel acknowledged that he understood his rights and that he was willing to talk. Randmel then told the officers that he ran away because he was scared, that he did not know the car had been reported stolen, and that he had gotten the car from a friend's house. Randmel was taken to a hospital for treatment for dog bites.

Officer Jeremy Woodward went to the hospital to question Randmel. Douglas told Woodward that Randmel had agreed to speak. Woodward then asked Randmel about the previous car thefts. Woodward testified that he asked Randmel to "tell me basically where he ran" in those incidents because Woodward wanted to know if his "dog was doing his job properly." Randmel responded that "'he would rather not say.'"

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

Woodward then said to Randmel, "[H]ow about I describe where we tracked and you can tell me whether or not we were correct." Woodward then described the two previous tracking incidents. Randmel told him it sounded about right and that Woodward had a good dog. Woodward then asked if Randmel had been hiding in a tree during the second track. Randmel again responded that "'he would rather not say but that he has been known to climb trees.'"[2]

Randmel testified that he did not know anything about the first two stolen cars and had been at home sleeping both nights. He testified that he had not stolen the third car—only taken a pair of boots out of it—and that he ran when the police came because he had taken the boots.

The State charged Randmel with three counts of possessing a stolen vehicle, two counts of resisting arrest, and one count of obstructing a law enforcement officer.

The trial court held a CrR 3.5 hearing to determine the admissibility of the statements Randmel made to Woodward at the hospital. The State asserted that Randmel "never made an unequivocal statement asking that all questioning should cease." Randmel's counsel did not challenge this statement. The trial court found that Randmel made the statements after a voluntary, knowing, and intelligent waiver of rights and admitted the statements.

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[2] Randmel testified that when Woodward asked about the previous incidents, Randmel thought they were discussing the night he was arrested.

The jury found Randmel guilty as charged. The trial court imposed on Randmel over $2,000 in discretionary LFOs. It later found Randmel indigent for purposes of pursuing an appeal. Randmel appeals.

Standard of Review

We review constitutional questions de novo.[3] We also review de novo a trial court's conclusions of law after a CrR 3.5 hearing.[4]

Analysis

Sufficiency of the Evidence

Randmel first contends that because the State included the definition of "possession" in its to-convict instruction, the law of the case doctrine required the State to prove each of the five methods of possession. Since the State did not present evidence about two of the methods, he claims that this court must reverse his conviction.

In State v. Tyler,[5] this court rejected this argument on identical pertinent facts. We followed the United States Supreme Court decision in Musacchio v. United States[6] that "'when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction.'"[7]

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[3] State v. Castro, 141 Wn. App. 485, 490, 170 P.3d 78 (2007).
[4] State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008).
[5] 195 Wn. App. 385, ___ P.3d ___ (2016), petition for review filed, No. 93770-2 (Wash. Oct. 27, 2016).
[6] ___ U.S. ___, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016).
[7] Tyler, 195 Wn. App. at 395 (quoting Musacchio, 136 S. Ct. at 715).

Tyler controls the outcome in this case. A jury unanimously convicted Randmel of possessing a stolen vehicle, a single-means crime. The trial court's inclusion of the definition of "possession" in the to-convict instruction did not obligate the State to prove every method of possessing a stolen vehicle. The State presented evidence sufficient for the jury to find that Randmel possessed a stolen vehicle. We therefore reject Randmel's claim.

Right against Self-Incrimination

Next, Randmel asserts that the trial court violated his right against self-incrimination under both the Fifth Amendment to the federal constitution and article I, section 9 of the Washington Constitution. Randmel's challenge raises several issues, which we address in turn.

First, the State asserts that Randmel waived his challenge to admission of self-incriminating statements by failing to make this challenge at the CrR 3.5 hearing. We disagree.

In general, this court may decline to address issues a party raises for the first time on appeal.[8] But this court will consider for the first time on appeal a claim of a "manifest error affecting a constitutional right."[9] An error is "manifest" if it resulted in "actual prejudice," meaning that it had "practical and identifiable consequences" at trial.[10]

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[8] RAP 2.5(a).
[9] RAP 2.5(a)(3).
[10] State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015).

As the error Randmel claims—violation of his right against self-incrimination—is plainly constitutional, we need only to ask whether that error is "manifest." We find that it is. The admission of the statements Randmel made after responding to a question from Woodward that he "would rather not say" had "practical and identifiable consequences." At trial, Randmel asserted an alibi defense. The statements he made after purportedly invoking his right to remain silent contradicted that alibi by implying his presence at the first two incidents of car theft and the ensuing dog trackings. The State's argument that the other evidence against Randmel was overwhelming does not persuade us. There was a strong likelihood that Randmel's statements influenced the jury's weighing of the evidence as to the first two counts of possessing a stolen vehicle. We conclude that this claim is appropriate for our review.

Next, the State claims that the record is inadequate for this court to review Randmel's self-incrimination claim. The State does not support its argument with authority, nor does it explain what more context for Randmel's statements this court needs to decide whether Randmel's rights were violated. And although, as the State concedes, the trial court should have made written findings after the CrR 3.5 hearing, that error is harmless because the trial court's oral findings are sufficient for our review.[11]

[11] CrR 3.5(c); State v. Miller, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998).

We therefore review the merits of Randmel's Fifth Amendment claim. First, Randmel asserts that he unequivocally invoked his right to remain silent and the trial court therefore erred in admitting his ensuing statements. We disagree.

The state and federal constitutions protect a defendant's rights against self-incrimination.[12] Under both, the State may not use a defendant's statements made during a custodial interrogation unless the defendant was informed of certain rights.[13] The defendant can waive those rights as long as the waiver is knowing, voluntary, and intelligent.[14] Any time after this waiver, the defendant can stop an interrogation by invoking those rights.[15] This invocation must be unequivocal.[16] Under the federal constitution, officers do not need to stop questioning to clarify equivocal or ambiguous invocations.[17] An invocation is unequivocal if the defendant makes it in an "objectively clear way,"[18] or if "a 'reasonable police officer in the circumstances' would understand it to be an assertion of the suspect's rights."[19] "This test encompasses both the plain language and the context of the

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[12] U.S. CONST. amend. V; WASH. CONST. art. I, § 9.

[13] In re Pers. Restraint of Cross, 180 Wn.2d 664, 682, 327 P.3d 660 (2014); Miranda, 384 U.S. at 444.

[14] State v. Piatnitsky, 180 Wn.2d 407, 412, 325 P.3d 167 (2014), cert. denied, 135 S. Ct. 950 (2015).

[15] Cross, 180 Wn.2d at 682.

[16] Berghuis v. Thompkins, 560 U.S. 370, 381, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).

[17] Berghuis, 560 U.S. at 375.

[18] Piatnitsky, 180 Wn.2d at 412.

[19] Cross, 180 Wn.2d at 682 (quoting Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)); Piatnitsky, 180 Wn.2d at 412-13.

suspect's purported invocation."[20] For the relevant context, a court looks at what came before the invocation, not the defendant's responses to further questioning.[21]

Randmel concedes he initially waived his rights. But he asserts that he later unequivocally invoked them by saying he "would rather not say" in response to two questions that implied he was present for previous crimes. He likens his statements to the defendants' statements in In re Personal Restraint of Cross[22] and State v. Gutierrez,[23] who said, respectively, "I don't want to talk about it" and "[I] would rather not talk about it" after police advised them of their rights. The defendant in Cross said he did not want to talk about "it" immediately after being read his rights. He had not spoken with the police about the incident as Randmel had. The Supreme Court found that any reasonable officer would have understood "it" to refer to the murders.[24] Likewise, in Gutierrez, the defendant said he would rather not talk about "it" immediately after being read his rights and asked about the drugs in front of him.[25] In both cases, the defendants made their statements immediately after being advised of their rights and before answering any other questions.

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[20] Cross, 180 Wn.2d at 682-83.

[21] See Smith v. Illinois, 469 U.S. 91, 92, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984); Piatnitsky, 180 Wn.2d at 418.

[22] 180 Wn.2d 664, 675, 327 P.3d 660 (2014).

[23] 50 Wn. App. 583, 586, 589, 749 P.2d 213 (1988). "[W]e draw no distinctions between the invocations of different Miranda rights." Piatnitsky, 180 Wn.2d at 413.

[24] Cross, 180 Wn.2d at 684.

[25] Gutierrez, 50 Wn. App. at 586.

Cross and Gutierrez are distinguishable. In contrast to the officers in those cases, a reasonable officer here would not interpret Randmel's statements as declining to answer any more questions. Randmel told Officer Douglas he was willing to speak about the stolen vehicle. He never told either officer that he did not want to talk about the stolen vehicles or that he wanted to stop talking altogether; he said only that he did not want to respond to certain questions about being tracked by dogs. To his second such demurral, he added coyly that "'he has been known to climb trees.'" Before these equivocal statements, he answered questions about the vehicle he was arrested for stealing.

Thus, Randmel did not unequivocally invoke his right to remain silent. His statements that he would "rather not say" were at best equivocal. Under the federal constitution, an interrogating officer need not stop questioning at an equivocal invocation of the right against self-incrimination.[26] Federal constitutional law therefore did not prohibit the trial court from admitting Randmel's statements.

Next, Randmel asserts that even if his statement that he would "rather not say" was equivocal, article I, section 9 of the Washington Constitution required Woodward to stop questioning him, except to clarify his statement.[27]

"Whenever a claim of right is asserted under the Washington Constitution, the first step is to determine if the asserted right is more broadly protected under the state constitution than it is under federal constitutional law."[28] Randmel asks

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[26] Davis, 512 U.S. at 461-62; Cross, 180 Wn.2d at 683.
[27] See Davis, 512 U.S. at 461-62; Cross, 180 Wn.2d at 683.
[28] State v. Earls, 116 Wn.2d 364, 374, 805 P.2d 211 (1991).

this court to apply the six-factor analysis from State v. Gunwall.[29] He asserts this analysis shows that article I, section 9 of the Washington Constitution provides broader protections than the Fifth Amendment when a suspect equivocally invokes his right to remain silent.[30]

The State denies any need for this analysis. It relies on the Washington Supreme Court's statement in State v. Earls[31] that "the protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment." The court in Earls declined to apply a Gunwall analysis to decide whether, "as a matter of state law, an otherwise valid waiver of constitutional rights is vitiated if police officers do not inform a suspect of the efforts of an unretained attorney to contact him."[32]

Division Two of this court recently relied on the quoted language from Earls in State v. Horton,[33] when it declined to perform a Gunwall analysis. In Horton, the court considered whether an officer should have stopped questioning and inquired about the defendant's intent when the defendant equivocally invoked his right to counsel.[34] The defendant made an argument similar to Randmel's. He asserted

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[29] 106 Wn.2d 54, 720 P.2d 808 (1986).

[30] Article I, section 9 states, "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." The Fifth Amendment states, in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself."

[31] 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

[32] Earls, 116 Wn.2d at 372-74.

[33] 195 Wn. App. 202, 216-17, ___ P.3d ___ (2016), petition for review filed, No. 93575-1 (Wash. Aug. 25, 2016).

[34] Horton, 195 Wn. App. at 215.

that State v. Robtoy[35] required the officer to stop all questioning except to clarify his ambiguous invocation of his right to counsel.[36] Division Two observed that "Washington courts have consistently ruled . . . that the state constitutional protections under article I, section 9, and the federal constitutional protections under the Fifth Amendment are the same."[37] It decided that no Gunwall analysis was required as the issue had been decided.[38]

The Supreme Court's opinion in State v. Russell[39] directly contradicts the State's position about the need for a Gunwall analysis here. As a result, we do not find Horton or Earls determinative. Two years after Earls, the court in Russell considered whether under article I, section 9 the trial court should have suppressed physical evidence that was the "fruit" of a voluntary but "un-Mirandized" statement.[40] The State contended, as it did in Horton and does here, that the court did not need to do a Gunwall analysis because the Earls opinion squarely stated that "the protection of article 1, section 9 is coextensive with, not broader than, the Fifth Amendment.'"[41] The Russell court rejected this argument. It observed that

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[35] 98 Wn.2d 30, 653 P.2d 284 (1982).

[36] Horton, 195 Wn. App. at 215-16. Division Two noted that this argument echoed the dissent in Earls, which the majority there rejected.

[37] Horton, 195 Wn. App. at 217.

[38] Horton, 195 Wn. App. at 216. The Supreme Court has explicitly acknowledged that "[a]s far as the Fifth Amendment is concerned, Davis states the law, not Robtoy." State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). The court declined to address the defendant's argument that article I, section 9 affords broader protections than the Fifth Amendment because the defendant had not raised the issue below. Radcliffe, 164 Wn.2d at 907.

[39] 125 Wn.2d 24, 882 P.2d 747 (1994).

[40] Russell, 125 Wn.2d at 56-57.

[41] Russell, 125 Wn.2d at 57-58 (quoting Earls, 116 Wn.2d at 374-75).

the State quoted the language from Earls "out of context, thereby giving Earls an overly expansive interpretation and running afoul of an important principle of constitutional construction."[42] It held instead that

> [a] determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990). Similarly, when the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in another context.[43]

Thus, the court explained, its statement in Earls does not mean that article I, section 9 of the Washington Constitution and the Fifth Amendment are coextensive in all contexts. The court then performed a Gunwall analysis for the issue before it.[44]

Accordingly, because no Washington court has performed a Gunwall analysis to compare article I, section 9 and the Fifth Amendment where a suspect equivocally invoked his right to remain silent, a Gunwall analysis is necessary here. As a result of the State's incorrect position, we do not have the benefit of its Gunwall analysis.

The Gunwall factors are "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences;

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[42] Russell, 125 Wn.2d at 58.

[43] Russell, 125 Wn.2d at 58.

[44] The court ultimately concluded "that the Gunwall factors do not support extending greater protection through Const. art. 1, § 9 than that provided by the federal constitution in th[at] context. . . . Policy considerations alone are insufficient . . . to trigger an expansive reading of Const. art. 1, § 9." Russell, 125 Wn.2d at 62.

and (6) matters of particular state or local concern."[45] Because the Supreme Court has analyzed the same two provisions in other contexts, we need to analyze only the fourth and six Gunwall factors here.[46] We conclude that those factors do not support a more expansive meaning for article I, section 9 than the Fifth Amendment when a suspect equivocally invokes the right to remain silent.

The context does not change our consideration of the other four factors, which the Supreme Court addressed in Russell.[47] We address them only briefly.

The first two factors compare the text of the two provisions. Article I, section 9 states, "No person shall be compelled in any criminal case to give evidence against himself." (Emphasis added.) The Fifth Amendment states, "[N]or shall [any person] be compelled in any criminal case to be a witness against himself." (Emphasis added.) Contrary to Randmel's assertions, the relationship between these texts is well established: "this difference in language is without meaning."[48]

The court in Russell found that the third factor did not support an independent interpretation either, as the court "ha[d] not been presented with any evidence suggesting that the framers of . . . 'model' state constitutions"—on which the Washington Constitution is based—"intended any different result than that

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[45] Gunwall, 106 Wn.2d at 58.

[46] See State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990) ("Since Gunwall involved comparing the same constitutional provisions as those to be examined here, we adopt its analysis of the first, second, third and fifth factors and examine only the fourth and sixth factors as they apply to this particular case.").

[47] Russell, 125 Wn.2d at 58 (citing Boland, 115 Wn.2d at 576).

[48] Russell, 125 Wn.2d 60; see State v. Moore, 79 Wn.2d 51, 55-57, 483 P.2d 630 (1971); Earls, 116 Wn.2d at 376.

reached under the federal constitution."[49] Randmel's sole contention here is based on the same textual differences the Supreme Court has repeatedly rejected.

"Our consideration of th[e fifth] factor is always the same; that is that the United States Constitution is a grant of limited power to the federal government, while the state constitution imposes limitations on the otherwise plenary power of the state."[50] This factor thus "supports an independent state constitutional analysis in every case."[51]

The fourth factor considers "[p]reviously established bodies of state law, including statutory law."[52] The court noted in Gunwall that "[s]tate law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established."[53]

Randmel cites no preexisting state law that supports broader protection under article I, section 9. He cites neither Washington statutes nor common law applying the Washington Constitution. He instead relies on Washington cases interpreting the federal constitution. He correctly notes that between 1982, when

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[49] Russell, 125 Wn.2d at 59; see Moore, 79 Wn.2d at 55-57; Earls, 116 Wn.2d at 376.

[50] State v. Foster, 135 Wn.2d 441, 458-59, 957 P.2d 712 (1998).

[51] Foster, 135 Wn.2d at 458.

[52] Gunwall, 106 Wn.2d at 61.

[53] Gunwall, 106 Wn.2d at 61-62. For example, the Gunwall court noted Washington's "long history of extending strong protections to telephonic and other electronic communications," including a 1909 statute "which makes it a misdemeanor for anyone to wrongfully obtain knowledge of a telegraphic message" and was based on the prestatehood Code of 1881, which "extensively regulated telegraphic communications." Gunwall, 106 Wn.2d at 66.

the Washington Supreme Court decided Robtoy, and 1994, when the United States Supreme Court decided Davis v. United States,[54] a suspect's equivocal invocation of the right to counsel required officers to cease questioning except to clarify the statement.[55] Randmel is incorrect, however, that this is "preexisting state law" that supports a broader application of article I, section 9 than of the Fifth Amendment. Robtoy based its holding on an extended discussion of Fifth Circuit interpretation of the Fifth Amendment.[56] Robtoy and its progeny thus interpreted the federal constitution, not Washington's. The relatively brief existence of this interpretation of federal constitutional law by Washington courts does not constitute the "established bod[y] of state law" that the court found to weigh in favor of an expansive interpretation of the state constitutional provision in Gunwall.[57] It is neither state law nor established.

The cases Randmel cites from other states likewise have no bearing on the fourth Gunwall factor, which concerns this state's case law; instead, they punctuate the lack of such jurisprudence under this state's laws.[58]

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[54] 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

[55] Robtoy, 98 Wn.2d at 37. The Washington Supreme Court recognized in Radcliffe that Davis had abrogated Robtoy. Radcliffe, 164 Wn.2d at 902; see also Cross, 180 Wn.2d at 682.

[56] See Robtoy, 98 Wn.2d at 38-39.

[57] See Gunwall, 106 Wn.2d at 61, 66 (interpreting article I, section 7).

[58] Randmel cites Gunwall, 106 Wn.2d at 67-68, for the proposition that other states' constitutional decisions are relevant "in determining scope of protection under article 1, section 9." But Gunwall quoted Colorado and New Jersey opinions in discussing the sixth factor, matters of local interest, not in assessing this state's preexisting law.

Finally, the sixth Gunwall factor asks, "Is the subject matter local in character, or does there appear to be a need for national uniformity?"[59]

Although in general "[s]tate law enforcement measures are a matter of local concern,"[60] the Russell court recognized the national character of the issue in this case:

> [T]he specific exclusionary rule here at issue is peculiarly federal in nature. It is based on a federal case [Miranda] interpreting the federal constitution. Moreover, this court has not held that Miranda (or similar) warnings are required independently under the state constitution. Thus, this case involves a national issue to a greater extent than do many other issues of criminal law.[61]

This analysis applies no differently here. The sixth factor thus weighs against an independent interpretation of article I, section 9.

We conclude that on balance Randmel shows no persuasive reason to apply the protections of article I, section 9 more broadly than those of the Fifth Amendment when a suspect equivocally invokes his right to remain silent. Neither the text of the respective constitutions, state statutory law, nor judicial interpretations of the state constitution warrants a broader application of article I, section 9. This conclusion is in accord with the decisions of other Washington

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[59] Gunwall, 106 Wn.2d at 62. The court noted in Gunwall that "[t]he objective of national uniformity of rules regarding the availability of telephone records and the use of pen registers, important as that may be, is outweighed in this case by overwhelming state policy considerations to the contrary." Gunwall, 106 Wn.2d at 67.

[60] State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

[61] Russell, 125 Wn.2d at 61-62.

courts, which have uniformly held that article I, section 9 does not create a broader right against self-incrimination than does the Fifth Amendment.[62]

References to Silence

Woodward testified that Randmel told him he would rather not answer questions. The State reminded the jury of that testimony in its closing argument:

> When Officer Woodward questioned Mr. Randmel, Officer Woodward described the other two K-9 tracks from the first incident. Like he said, he was asking, he wanted to know if his dog was not performing correctly on the first two pursuits for some reason. Mr. Randmel says he doesn't really want to describe or talk about that. Officer Woodward says, well, can I describe to you the two K-9 tracks and, basically, you can tell me if we got close. Mr. Randmel said that sounds about right. You have a good dog. If you are talking about the tree and everything that happened on those first two pursuits.

Randmel contends that this was an improper comment on Randmel's invocation of his right to remain silent.

"Courts are appropriately reluctant to penalize anyone for the exercise of any constitutional right."[63] Thus, a prosecutor may not intentionally invite a jury to infer guilt from a defendant's invocation of the right to remain silent.[64] Washington courts "distinguish[ ] between comments on silence and mere reference to silence," however.[65]

As discussed above, Randmel did not invoke his right to remain silent. Thus, the prosecutor's reference to his response to two of Woodward's questions

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[62] See Earls, 116 Wn.2d at 374-75; Russell, 125 Wn.2d at 62; Horton, 195 Wn. App. at 217; State v. Allenby, 68 Wn. App. 657, 662, 847 P.2d 1 (1992).

[63] State v. Burke, 163 Wn.2d 204, 221, 181 P.3d 1 (2008).

[64] Burke, 163 Wn.2d at 222.

[65] Burke, 163 Wn.2d at 221.

was not improper. In addition, Randmel did not object to the prosecutor's comment at trial and does not identify any "practical and identifiable consequences" that the trial court could not have cured with an instruction; he thus failed to preserve this claim. For these reasons, we find no error in the State's references to Randmel's demurrals.

Legal Financial Obligations

Randmel asks that even if this court affirms his conviction, it remand for the trial court to make an individualized inquiry into his ability to pay discretionary LFOs. The trial court assessed Randmel $450 in court costs and $1,800 in court-appointed attorney fees. The court waived the costs of appellate review, however, because it found Randmel indigent.

Under RCW 10.01.160(3), a trial court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." When a trial court imposes costs, "[t]he record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay."[66]

As the State concedes, the trial court did not conduct the inquiry that RCW 10.01.160(3) requires before it imposed discretionary LFOs on Randmel. The record contains no discussion about Randmel's ability to pay the $2,000 in discretionary LFOs that the trial court imposed. We therefore remand for the trial court to make an individualized inquiry into Randmel's current and future ability to pay whichever discretionary LFOs the court chooses to impose.

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[66] State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Appellate Costs

Finally, Randmel asks that this court use its discretion to deny any appellate costs the State may request as prevailing party. The trial court found Randmel indigent but made no finding about his future ability to pay.

"The commissioner or clerk 'will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs otherwise in its decision terminating review.'"[67] This court has discretion to consider the issue of appellate costs when a party raises the issue in its brief.[68]

In State v. Sinclair,[69] this court used its discretion to deny appellate costs to the State where the defendant remained indigent and this court saw "no realistic possibility," given that the defendant was 66 years old and received a 280-month prison sentence, that he would be able to pay appellate costs.

Here, because we are remanding for an inquiry about Randmel's future ability to pay discretionary LFOs, we also remand for the trial court to make a finding about his future ability to pay appellate costs. If the trial court finds that Randmel likely has a future ability to pay these costs, it shall award them to the State.

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[67] State v. Sinclair, 192 Wn. App. 380, 385-86, 367 P.3d 612 (quoting RAP 14.2), review denied, 185 Wn.2d 1034 (2016).

[68] Sinclair, 192 Wn. App. at 388-90, 393.

[69] 192 Wn. App. 380, 393, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016).

Conclusion

Because the State showed that Randmel possessed stolen vehicles on three occasions and was not required to prove every different method of possession, sufficient evidence supports Randmel's conviction. Because the Washington Constitution does not provide broader protections than the federal constitution when a suspect equivocally invokes the right to remain silent, the trial court did not err in admitting statements Randmel made to Officer Woodward. We affirm Randmel's convictions. But because the trial court did not conduct an individualized inquiry into Randmel's ability to pay, we remand for resentencing as to discretionary LFOs and for a determination about appellate costs.

Leach, J.

WE CONCUR:

Verellen, C.J.

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73531-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Hilary Thomas, DPA
[Appellate_Division@co.whatcom.wa.us]
Whatcom County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 14, 2016