

No. 44168-3-II
Mason County Superior Court No. 12-1-00123-5

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

TRAVIS C. BAZE,
Defendant-Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO
2019 OCT -4 PM 1:29
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finley, Judge

APPELLANT'S REPLY BRIEF

David B. Zuckerman
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-1595

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I.
STATEMENT OF THE CASE

The State's paraphrasing of Baze's statement to the police suggests that he was certain Stephen Churchill would assault and rob Shawn Morrow. In fact, when asked what he thought Churchill would do, Baze said "Um *maybe* rough him up and take his money . . ." Tr. Ex. 70 at 22 (emphasis added).

II.
ARGUMENT

A. BAZE'S STATEMENT SHOULD HAVE BEEN SUPPRESSED
BECAUSE THE POLICE VIOLATED HIS RIGHT TO
COUNSEL

1. Relevant Facts

In the opening brief, Baze noted that he was initially "not sure" whether he should talk with the detectives and he asked "do I need an attorney?" Detective Rhoades then explained that Baze had a right to an attorney but if he insisted on one he could not give a statement that night. *See* Appellant's Opening Brief (AOB) at 8-9. The State quotes Detective Rhoades telling Baze unequivocally that if he requests a lawyer "we're not gonna be able to do a statement tonight," and explaining in detail the purported reasons for that. Brief of Respondent (BOR) at 9-10.

The State then suggests, however, that "[t]he run-on nature of the transcription of Detective Rhoades' words allows one to choose various

characterizations of what was said.” BOR at 10. It does not explain what those other characterizations might be. Further, the apparent run-on sentences throughout Ptr. Ex. 2¹ are mostly an illusion, due to the State’s transcriptionist using little punctuation. She also declined to use ellipses to indicate pauses. Baze encourages the Court to listen to the actual recording at 2:00 to 3:50. It shows Det. Rhoades explaining slowly, carefully and clearly how Baze would not be able to give a statement “tonight” if he insists on an attorney and why that would likely prejudice Baze. After hearing that, Baze says “um” and pauses for a full 15 seconds until Rhoades continues the discussion.

The State also notes that, initially, Det. Rhoades said that Baze had a right to an attorney “here.” Ptr. Ex. 2 at 3. But when Baze then sought clarification (“what does that mean for me?”), Rhoades immediately explained how asking for a lawyer would make it impossible to speak with the detectives that night, and why that would be unfavorable to Baze. He also strongly implied that the only opportunity for a lawyer would be to have one appointed by the court the next day. In view of the entire discussion, Baze would have understood either that Rhoades misspoke

¹ Baze and the State have both mistakenly referred to the transcript as Ptr. Ex. 1. In fact, Ex. 1 is the audio recording and Ex. 2 is the transcript of the recording.

when he used the word “here”, or perhaps that he meant they could come back “here” at a later time after a lawyer was appointed.

The State also denies that the detectives led Baze to believe that he could face a harsher charging decision if he did not tell his side of the story. BOR at 17. In fact, that message was unmistakable. First, Detective Rhoades explained that they were not yet sure what degree of assault Baze would be charged with. Ptr. Ex. 2 at 5. Detective Ledford then added:

And maybe based on your statement and what you have to say may add to your involvement in this case or take away from your involvement but without your statement you put it in your own words we can't we can't nail it down as to what your involvement was **so we gotta error [sic] on the side of caution as to you maybe being more involved than what you are.** And that's just for safety reasons so that's kinda where we're at.

Id. (emphasis added). The State claims that Ledford's reference to “safety reasons” shows that the entire discussion had nothing to do with charging decisions. The State does not explain what safety considerations could possibly have been at issue other than the need to charge Baze with a serious crime so that he would not be released soon.

The State notes that Baze had been arrested before, BOR at 15, but there is nothing in the record to indicate he had ever before gone through an interrogation (and in fact he never had).

2. Baze's Waiver Was Invalid Under the Fifth Amendment Right to Counsel

The State correctly notes that *Davis v. U.S.*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), held only that the police may continue questioning a suspect if he makes an equivocal request for counsel *after* expressly waiving his *Miranda* rights. BOR at 18. The State also notes that the Washington Supreme Court in *State v. Radcliffe*, 164 Wn.2d 900, 194 P.3d 250 (2008), limited its holding to those facts. BOR at 19. The State further concedes that in this case, Baze clearly had *not* waived his rights at the time he asked whether he needed a lawyer. BOR at 18. The State notes that the Ninth Circuit has concluded that *Davis* does not apply when the suspect makes an equivocal request for counsel *before* waiving his *Miranda* rights. BOR at 20, citing *United States v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008).

The State does not acknowledge the full implications of these points, however. Under the reasoning of *Rodriguez*, and many other cases not cited by the State, the Fifth Amendment required the detectives to limit their questioning to clarifying Baze's wishes after he made an equivocal request for counsel.

In *Rodriguez*, a national park ranger read the defendant his *Miranda* rights and Rodriguez responded "I'm good for tonight." The

ranger took that to mean that Rodriguez wished to talk and began questioning him. *Rodriguez*, 518 F.3d at 1075. The Ninth Circuit found the statement to be ambiguous. *Id.* at 1077. The government argued that, under *Davis*, there was no longer any obligation to clarify. *Id.* The Court, however, noted that in *Davis*, the suspect initially made a clear waiver of his *Miranda* rights, both orally and in writing. *Id.* at 1078, citing *Davis*, 512 U.S. at 455.

The holding of *Davis*. . . addressed itself narrowly to the facts of the case: “We therefore hold that *after a knowing and voluntary waiver of the Miranda rights*, law enforcement officers may *continue* questioning until and unless the suspect clearly requests an attorney.”

Rodriguez, 518 F.3d at 1078 quoting *Davis*, 512 U.S. at 461 (emphasis in *Rodriguez*.) “Indeed, prior compliance with *Miranda* is critical to the logic of the Supreme Court’s holding.” *Rodriguez* at 1078 quoting *Davis* at 460-61 (“A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted.”)

“*Davis*, therefore abrogated our clarification rule only to the extent that our rule required clarification of invocations made *post-waiver*.”

Rodriguez at 1080 (emphasis in original).

Prior to obtaining an unambiguous and unequivocal waiver, a duty rests with the interrogating officer to clarify any ambiguity before beginning general interrogation.

Id. Because Rodriguez did not unambiguously waive his *Miranda* rights and because the interrogator failed to clarify Rodriguez's wishes, his statement was suppressed. *Id.* at 1081.

Many other courts have reached the same conclusion. *See, e.g.,* *Chavers v. State*, 115 So.3d 1017, 1019 (Fla. Dist. Ct. App. 2013); *Com. v. Clarke*, 461 Mass. 336, 347-48, 960 N.E.2d 306, 318 (2012); *United States v. Vargas-Saenz*, 833 F.Supp.2d 1262, 1265 (D. Or. 2011); *State v. Blackburn*, 2009 S.D. 37, 766 N.W.2d 177 (2009); *Noyakuk v. State*, 127 P.3d 856, 869 (Alaska Ct. App. 2006); *State v. Collins*, 937 So.2d 86, 92 (Ala.Crim.App. 2005), *cert. quashed*, 937 So.2d 95, *cert. denied*, 549 U.S. 941, 127 S.Ct. 50, 166 L.Ed.2d 251 (2006); *Nom v. Spencer*, 337 F.3d 112, 118 (1st Cir.), *cert. denied*, 540 U.S. 1081, 124 S.Ct. 955, 157 L.Ed.2d 757 (2003); *State v. Tuttle*, 650 N.W.2d 20, 28, 2002 S.D. 94, ¶ 14 (2002); *State v. Holloway*, 760 A.2d 223, 228, 2000 ME 172 (Me. 2000); *State v. Leyva*, 951 P.2d 738, 743, 324 Utah Adv. Rep. 5 (1997). *See also*, Wayne R. LaFare, Jerold H. Israel, and Nancy J. King, *Criminal Procedure* (2nd ed.1999), § 6.9(g), Vol. 2, p. 615 n. 164 (“Although [this] point is sometimes missed, ... *Davis* is so limited; the Court's ruling was that after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney”).

It does not appear that Washington has addressed this issue directly. The *Radcliffe* opinion, however, goes to great lengths to emphasize that it was dealing with an equivocal request for counsel *after* a valid and express waiver. *See Radcliffe*, 164 Wn.2d at 902 (“When a police detective first questioned James Radcliffe about claims that he molested his girl friend’s young daughter, Radcliffe was read his *Miranda* rights and expressly waived them.”); *id.* at 906 (“Radcliffe agrees he understood his rights and voluntarily waived them, at first, in the interview at the police station.”); *id.* at 906 (“The issue here is how explicit a suspect must be when asking for an attorney after he has already waived his *Miranda* rights.”); *id.* at 908 (“After a knowing waiver of his *Miranda* right to an attorney during police questioning, Radcliffe made, at best, an equivocal request for an attorney. Under the Fifth Amendment, this was not enough to suppress the confession that followed.”)

In this case, of course, Baze maintains that he *never* made a valid waiver of his *Miranda* rights. *See* AOB at 16-20. The State disagrees with that, but it is undisputed that he had not waived his rights at the time he asked whether he needed a lawyer. This Court should hold that *Davis* and *Radcliffe* did not change the rule in that situation: if a suspect makes an equivocal request for an attorney before waiving his *Miranda* rights, the detectives are limited to clarifying his request. It is quite clear in this

case that the detectives went far beyond that. *See* AOB at 33-35. A ruling on that basis would avoid the need to address the State constitutional issue raised by Baze. *See* AOB at 23-35.²

The State does not take a clear position on whether Baze made an equivocal request for counsel or no request for counsel, but notes a split of authority on that issue. The better-reasoned cases hold that statements similar to “do I need a lawyer?” are an equivocal request for counsel.

In *State v. Walkowiak*, 183 Wis.2d 478, 515 N.W.2d 863 (1994), *overruled on other grounds by State v. Jennings*, 252 Wis.2d 228, 647 N.W.2d 142 (2002),³ the suspect said “Do you think I need an attorney?” The Wisconsin Supreme Court found the statement to be “equivocal” and “ambiguous.” *Id.* at 486. The Court also found that the officer responded appropriately by stopping questioning and telling the suspect that “she would have to decide for herself whether or not to get an attorney.” *Id.* at 487.

Likewise, in *Towne v. Dugger*, 899 F.2d 1104 (11th Cir.), *cert. denied*, 498 U.S. 991, 111 S.Ct. 536, 112 L.Ed.2d 546 (1990), the suspect

² In the pending *Pianitsky* case, the issue is whether, under the State constitution, the police must limit their comments to clarification when a suspect makes an equivocal statement *after* waiving his *Miranda* rights. *See State v. Pianitsky*, Supreme Court No. 87904-4, State’s Supplemental Brief at 1 (available on Supreme Court’s web site).

³ *Jennings* suggested that *Davis* would have changed the *result* in *Walkowiak*. The Court did not question its holding that *Walkowiak* had made an equivocal request for counsel.

asked the officer if the officer thought the suspect needed a lawyer. *Id.* at 1107. The Court concluded that “questions such as the one posed by Towne are equivocal requests that require clarification before investigating officers initiate any further questioning.” *Id.* at 1108. “Such questions reveal to the interrogating officer that the defendant is contemplating exercising his right to have an attorney present.” *Id.* at 1109. *See also, Diaz v. Senkowski* 76 F.3d 61, 63-64 (2nd Cir. 1996) (“Do you think I need a lawyer?” was an ambiguous request for counsel); *United States v. Cherry*, 733 F.2d 1124 (5th Cir. 1984) (“Why should I not get an attorney?” was an equivocal request)⁴; *Almeida v. Florida*, 737 So.2d 520 (1999), *cert. denied*, 528 U.S. 1182, 120 S.Ct. 1221, 145 L.Ed.2d 1121 (2000) (“What good is an attorney going to do?” was not a “ruminative or rhetorical question”, but rather a request for “fundamental information.”)

It is true that in *United States v. Ogbuehi*, 18 F.3d 807 (9th Cir. 1994), and *Norman v. Ducharme*, 871 F.2d 1483 (9th Cir. 1989), *cert. denied*, 494 U.S. 1031, 110 S.Ct. 1483, 108 L.Ed.2d 619 (1990), the Ninth Circuit found that the suspect’s question about whether a lawyer was

⁴ As with *Walkowiak*, *Cherry* was abrogated after *Davis* to the extent it held that an equivocal, post-waiver statement could invalidate a statement. *See Soffar v. Cockrell*, 300 F.3d 588 (5th Cir. 2002).

needed did not rise to the level of even an equivocal request. These cases may be distinguishable from Baze's, however. In *Ogbuehi*, the suspect quickly agreed to talk after asking that question. *See Ogbuehi*, 18 F.3d at 813. Here, Baze equivocated for over 15 minutes before agreeing to speak without a lawyer. In *Norman*, the suspect asked if he needed a lawyer and the officer "declined to advise him." He then signed a *Miranda* waiver. *Norman*, 871 F.2d at 1484. Again, the suspect's lack of equivocation distinguishes the case from Baze's. Further, the officer in Norman's case acted properly by declining to advise him. Rather, he simply read the *Miranda* warnings again, which was a legitimate attempt to clarify the suspect's wishes. *Id.*

That the Ninth Circuit's holdings depend on all the circumstances is clear from its ruling *United States v. Fouche*, 833 F.2d 1284, 1285 (9th Cir. 1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988). In that case, the suspect was permitted to leave the interrogation room to call an attorney. He returned and admitted he had called his wife instead. He then asked the agent what he should do. The agent declined to give advice. *Id.* at 1286. The Court held that Fouche made an equivocal request for counsel but that the agent's response was sufficient. *Id.* at 1288-89.

The prosecutor maintains that there was no “interrogation” prior to the time Baze signed a *Miranda* waiver. As a preliminary matter, Baze need not prove there was interrogation prior signing the waiver because, as discussed above, the waiver was invalid and there was certainly interrogation after it was signed. But in any event, the State is wrong: the detective’s comments prior to Baze signing the waiver did amount to interrogation.

As the State concedes, the standard is whether the detectives engaged in words or actions “likely to elicit an incriminating response.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Here, the detectives told Baze that providing his side of the story would likely help him. They also played on his conscience by saying he would feel better by coming clean because he was not a “psychopath.” See AOB at 17-18. The comments were clearly designed to obtain incriminating statements.

The State suggests that the detectives could properly deceive and pressure Baze into waiving his *Miranda* rights. The cases it relies upon, however, deal with different situations. In *United States v. Whitfield*, 695 F.3d 288, 302 (4th Cir. 2012) *cert. denied*, 133 S.Ct. 1461, 185 L.Ed.2d 368 (U.S. 2013), the police deceived the suspect about the status of their investigation – not about his rights during interrogation. *Illinois v. Perkins*,

496 U.S. 292, 296, 110 S.Ct. 2394, 2397, 110 L.Ed.2d 243 (1990), involved confessions elicited by undercover agents. The Court held that *Miranda* did not apply at all because the suspect did not know he was dealing with a law enforcement officer. In *State v. Unga*, 165 Wn.2d 95, 196 P.3d 645, 647 (2008), there was no question that the suspect made a valid waiver of his *Miranda* rights. *Id.* at 98. In the ensuing conversation the officer said he would not charge the suspect with “malicious mischief” or “vandalism” for covering a car with graffiti if the suspect would give a statement regarding that. When writing his statement, however, the suspect also confessed to riding in a stolen car. *Id.* at 99. The Court found that the officer’s conduct was not so coercive that it overbore the defendant’s will. *Id.* at 111. None of these cases suggest that law enforcement may deceive or pressure a defendant when he is deciding whether to waive his rights.

The State suggests that *United States v. Anderson*, 929 F.2d 96, 98 (2d Cir. 1991), represents a minority view in holding that an agent’s misrepresentations could invalidate a confession. In fact, *Anderson* is the only cited case in which law enforcement misled the defendant about his rights during interrogation. *See Anderson* at 100 (after a waiver of *Miranda* rights, agent told suspect that he would have to choose between having an attorney and cooperating with the government).

3. The Detective's Statements About The Availability Of A Lawyer Were Contrary To CrR 3.1(c) And Misleading, Thereby Making Baze's Waiver Of His Right To Counsel Invalid

The State appears to be correct that trial counsel failed to discuss CrR 3.1. This Court nevertheless has discretion to consider the issue.

RAP 2.5(a), provides:

Errors Raised for First Time on Review. The appellate court *may* refuse to review any claim of error which was not raised in the trial court. (emphasis added).

This language shows that the rule is discretionary. *See, e.g., State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (“By its own terms, however, [RAP 2.5(a)] is discretionary rather than absolute.”); *Obert v. Envtl. Research & Dev. Corp.*, 112 Wn.2d 323, 333, 771 P.2d 340 (1989) (“The rule precluding consideration of issues not previously raised operates only at the discretion of this court.”).

Further, “Washington courts have allowed issues to be considered for the first time on appeal when fundamental justice so requires.” *State v. Card*, 48 Wn. App. 781, 784, 741 P.2d 65 (1987); *see also State v. Lee*, 96 Wn. App. 336, 338 n.4, 979 P.2d 458 (1999) (courts may consider issues for first time on appeal in interests of justice); *Greer v. Northwestern Nat'l Ins. Co.*, 36 Wn. App. 330, 338-39, 674 P.2d 1257 (1984).

In this case, the record is sufficient to determine whether CrR 3.1 was satisfied. The detectives made clear statements about Baze's access

to a lawyer, and trial counsel brought up those points at the evidentiary hearing. Declining to consider the issue now would lead to unnecessary post-conviction litigation regarding ineffective assistance of counsel. Fundamental justice requires considering the issue now.

4. Under Article I, Section 9, If A Suspect Makes An Equivocal Request For Counsel, Further Questions Must Be Limited To Clarifying The Assertion

Baze will not respond to the State's arguments on this issue because the matter will soon be decided by the Washington Supreme Court. If this Court believes the state constitutional analysis to be dispositive, it should stay the case pending the resolution of *Pianitsky*. In view of the discussion in section 2, above, however, the court should find that a state constitutional analysis is unnecessary; because Baze, unlike *Pianitsky*, waived his *Miranda* rights only *after* an equivocal assertion of his rights, he should be entitled to the pre-*Davis* standard even under the Fifth Amendment.

5. The Error Was Prejudicial

The State does not contest that Baze's statement was sufficiently prejudicial to warrant reversal if it was improperly admitted at trial.

B. BAZE’S CONVICTIONS FOR ROBBERY AND ASSAULT MUST BE VACATED BECAUSE THEY SUBJECT HIM TO DOUBLE JEOPARDY

The State relies on *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), for the proposition that convictions for assault in the first degree and robbery in the first degree do not violate the Double Jeopardy Clause. It does not challenge Baze’s position that his convictions for robbery and for felony murder based on the underlying felony of robbery violate double jeopardy. See AOB at 37-40, citing *In re Francis*, 170 Wn.2d 517, 527-28, 242 P.3d 866 (2010). Therefore, at the least, the Court must vacate the robbery conviction along with its 24-month enhancement.

Further, the Court should find that the reasoning of *Freeman* does not apply to the assault 1 charge in Baze’s case. The *Freeman* court stressed that merger of robbery and assault charges have always been analyzed on a case-by-case basis. *Freeman*, 153 Wn.2d at 774. “[W]e conclude that no per se rule has emerged; instead, courts have continued to give a hard look at each case.” *Id.* (citation omitted).

In *Freeman*, as here, the defendant was convicted of both assault 1 and robbery 1. *Id.* at 769-70. In finding no double jeopardy violation in *Freeman*’s case, the Court relied primarily on “an important piece of evidence that recent legislatures intended to punish *first* degree robbery

and *first* degree assault separately, at least under some circumstances.” *Id.* at 775 (emphasis in original).

As the legislature is well aware, when a court vacates a conviction on double jeopardy grounds, it usually vacates the conviction for the crime that forms part of the proof of the other. This is because the greater offense typically carries a penalty that incorporates punishment for the lesser included offense. But when a first degree assault raises a robbery to first degree robbery, the case is atypical. The standard sentence for first degree assault (in this case, 111 months) is considerably longer than the standard sentence for first degree robbery (in this case, 41 months).

Id. at 775-76 (citations and internal quotation marks omitted).

As the Court acknowledged, however, this reasoning does not necessarily apply in all circumstances. Here, Baze was convicted of murder 1, a crime far more serious than either robbery 1 or assault 1. The assaultive conduct raised the degree of robbery to first degree and the robbery in turn raised the degree of the felony murder to first degree. Baze’s sentencing range for murder 1 was 250-333 months in view of his offender score of 1. CP 5. His range for murder 2 would be 134-234 months. *See* RCW 9.94A.530. Thus, striking the assault as well as the robbery results in no “anomaly” in this case. Rather, the usual rule should apply: because the assault formed part of the proof of the more serious crime, and thereby greatly increased the punishment, the legislature did not likely intend to punish both crimes. This Court should therefore find

that Baze's conviction for assault, as well as his conviction for robbery, violated double jeopardy.

**III.
CONCLUSION**

The Court should find that Baze's statement should have been suppressed and remand for a new trial. In the alternative, it should vacate the convictions for assault and robbery based on double jeopardy.

DATED this 3rd day of October, 2013.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Travis C. Baze

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Mr. Michael Dorcy
Mason County Prosecutor's Office
Appellate Unit
PO Box 639
Shelton, WA 98584

Mr. Travis C. Baze #345757
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

10/3/13
Date

Christina Alburas
Christina Alburas

BY _____
DEPUTY
STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION I