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Supreme Court No. _____
COA No. 54975-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CURTIS GRAHAM,

Petitioner.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF MOVING PARTY 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 3
1. Facts of the Alleged Incident 3

2. Graham's 11-Hour Detention in a Police Holding Cell, the Taped Interrogation by Bothell Police and Privacy Act Violation 5

3. Charges, Jury Verdict and Unconstitutional Sentence 8

4. Proceedings on Appeal 9

E. ARGUMENT 9

1. THIS COURT SHOULD DECIDE WHETHER ARTICLE I, SECTION 3 OF THE STATE CONSTITUTION PROVIDES BROADER DUE PROCESS SAFEGUARDS THAN THE FEDERAL DUE PROCESS CLAUSE AND MANDATES SUPPRESSION OF A STATEMENT PROCURED BY THE COMBINED EFFECTS OF A LENGTHY DETENTION, DENIAL OF ACCESS TO A TELEPHONE OR MEANS OF POSTING BAIL, AND DISINFORMATION ABOUT PROSPECTS FOR RELEASE 9

2. THIS COURT SHOULD REVIEW THE IMPORTANT QUESTION PRESENTED BY THE OFFICERS' FAILURE TO SCRUPULOUSLY HONOR GRAHAM'S INVOCATION OF HIS RIGHT TO COUNSEL 13

a. Constitutional Right to Counsel 13

b. CrR 3.1 15

3. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' OPINION WHICH FAILED TO APPLY THIS COURT'S

MANDATORY EXCLUSIONARY RULE FOR VIOLATIONS OF THE PRIVACY ACT 16

4. SUPPRESSION IS MANDATED UNDER ARTICLE I, SECTION 7 19

5. WHERE A POLICE OFFICER'S TESTIMONY INTIMATED GRAHAM HAD A DUTY TO PROVIDE AN ALIBI AND THAT THE ALIBI WAS NOT CREDIBLE, AND OTHER DIVISIONS OF THE COURT OF APPEALS WOULD HAVE FOUND THIS TO BE ERROR, THIS COURT SHOULD GRANT REVIEW OF DIVISION ONE'S CONTRARY HOLDING 19

a. Improper Opinion 20

b. Failure to Give Proposed Instruction 21

6. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S OPINION IN *RECUENCO,* WARRANTING REVIEW UNDER RAP 13.4(b)(1) 22

F. CONCLUSION 23

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Christensen, 153 Wn.2d 186, 102 P.3d 789 (2004) 17, 18
State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1138 (1980) 17
State v. Faford, 128 Wn.2d 476, 910 P.2d 447 (1996) 17, 18
State v. Fjermestad, 114 Wn.2d 828, 791 P.2d 897 (1990) 18
State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) 23
State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188, cert. granted, 126 S.Ct. 478 (2005) 3, 9, 22, 23
State v. Salinas, 121 Wn.2d 689, 853 P.2d 439 (1993) 18
State v. Templeton, 148 Wn.2d 193, 59 P.3d 632 (2002) 13, 15
State v. Trevino, 127 Wn.2d 735, 903 P.2d 447 (1995) 15
State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982) 19

Washington Court of Appeals Decisions

State v. Allen, 50 Wn. App. 412, 749 P.2d 702 (1988) 21
State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004) 20, 21
State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005) 20
State v. Jaquez, 105 Wn.App. 699, 20 P.3d 1035 (2001) 15
State v. Jones, 117 Wn. App. 89, 68 P.3d 1153 (2003) 20
State v. Kirkpatrick, 89 Wn. App. 407, 948 P.2d 882 (1997), rev. denied, 135 Wn.2d 1012 (1998) 16
State v. Mazzante, 86 Wn. App. 425, 936 P.2d 1206 (1997) 17
State v. Valdez, 82 Wn. App. 294, 917 P.2d 1098, review denied, 130 Wn.2d 1011 (1996) 14

United States Supreme Court Decisions

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 22
Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.3d 2d 403 (2004) 22
Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). 10
Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1357, 93 L.Ed.2d 1801 (1949)... 14

United States Constitutional Provisions

U.S. Const. amend. 5 ..... 3, 10, 13-14
U.S. Const. amend. 6 22
U.S. Const. amend. 14 ..... 3, 10

Statutes

RCW 9.73.030 ..... 16, 17
RCW 9.73.040 16
RCW 9.73.050 16
RCW 9.73.080 17

Rules

CrR 3.1 ..... 1, 15, 16
RAP 13.4(b)(1) 2, 3, 22, 23
RAP 13.4(b)(2) 2, 21
RAP 13.4(b)(3) 1, 3
RAP 13.4(b)(4) 1-3, 21-23

Other Authorities

Washington Bar Association Task Force Comment to CrR 3.1 15

A. IDENTITY OF MOVING PARTY

Petitioner Curtis E. Graham, the appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Graham seeks review of Division One of the Court of Appeals' opinion in State v. Graham, Court of Appeals No. 54975-8-I (slip opinion filed May 8, 2006).

C. ISSUES PRESENTED FOR REVIEW

1. An involuntary confession is offensive to principles of due process. Should this Court review the Court of Appeals' finding that petitioner's confession was voluntary although it was procured during a 14-hour detention and four-hour interrogation during which he was denied access to a phone, deceived about his prospects of securing his release and cajoled into believing if he "cooperated" with the interrogation he would be released sooner? Alternatively, should this Court hold that the confession should be excluded under the Washington Constitution's due process clause? RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Should this Court review the Court of Appeals' application of CrR 3.1 and the Fifth Amendment where police officers failed to scrupulously honor appellant's invocation of his right to counsel? RAP 13.4(b)(3); RAP 13.4(b)(4).

3. The Bothell police officers who interrogated petitioner secretly videotaped the interrogation, in violation of his statutory right to privacy. Notwithstanding the flagrant Privacy Act violation, the Court of Appeals found audio recordings could be admitted because petitioner consented to an audio tape. This Court has consistently applied a broad exclusionary remedy to violation of the Privacy Act, requiring suppression of *all* evidence obtained in violation of its provisions. Should this Court review the Court of Appeals holding which fails to correctly apply this Court's precedent and so strips the Privacy Act of substance? Is suppression otherwise mandated under Article I, section 7, of the Washington Constitution? RAP 13.4(b)(1); RAP 13.4(b)(4).

4. Petitioner told interrogating officers he had an alibi, but at the trial, his defense was general denial. Nonetheless, the prosecutor solicited testimony from a police detective that implied appellant's alibi was not credible and that suspects in a criminal investigation initially tend to deny involvement in a crime. The court then denied petitioner's proposed jury instruction which would have informed the jury he had no burden to prove his alibi. Should this Court review Division One's opinion finding no error, in deviation from recent precedent of other Divisions of the Court of Appeals? RAP 13.4(b)(2); RAP 13.4(b)(4).

5. In State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188, cert.

granted, 126 S.Ct. 478 (2005), this Court held the Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process of law require "an *explicit firearm finding* by the jury" before a firearm sentence enhancement may be imposed. Where the Court of Appeals refused to follow Recuenco and instead affirmed petitioner's sentence although the jury verdict found only that he was armed with a deadly weapon, should this Court grant review? RAP 13.4(b)(1); RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

1. Facts of the Alleged Incident. Curtis Graham was in a dating relationship with Vivian Moore for approximately two years. 5RP 44, 46.[1] In early December 2003, Moore ended the relationship. 5RP 47, 74. At Christmastime, Moore became involved with Mohammed Sylla. 5RP 54, 77, 90; 6RP 143-44.

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[1] Ten volumes of transcripts shall be referenced herein as follows:

5/6/04	-	1RP
5/21/04	-	2RP
6/3/04	-	3RP
3.5 Hearing (7/15, 8/9-11/04)	-	4RP
8/16/04	-	5RP
8/17/04	-	6RP
8/18/04	-	7RP
8/19/04	-	8RP
8/20/04	-	9RP
8/31/04	-	10RP

On January 14, 2004, Sylla spent the night at Moore's home. 5RP 58; 6RP 148. Moore worked at a collections agency in Bothell and her work day started at 5 a.m. 5RP 58. At approximately 3:30 a.m., Graham telephoned Moore's home and asked where she was. He told her he was waiting for her at her work. 5RP 59.

Moore reported the incident to the police. The 9-1-1 dispatcher requested a description of Graham and told Moore to wait at her home for an officer. 5RP 60. Moore subsequently telephoned dispatch to withdraw the request for police assistance and shortly thereafter left for work, driven by Sylla. 5RP 61.

When Sylla and Moore arrived at Moore's workplace they said goodbye, then Moore got out of the car. As Moore was shutting the door she saw a car coming from around the right side of the building. 5RP 61; 6RP 152. Sylla recalled Moore saying, "Oh my God, it's Curtis, what is he doing here?" 6RP 156, 181. Sylla told Moore to run into the building. 6RP 157. As Moore walked quickly to the door, she heard a voice say, "Hey, come here." 5RP 61. She looked back and saw Graham running with his hand in his pocket toward her. Moore fled into the building. As she ran through the lobby she heard three gunshots. 5RP 62, 94.

Sylla was shot in his left side and another bullet was recovered from the padding of the passenger seat. 6RP 158, 187, 211, 243, 246, 259;

7RP 459-60. There were two bullet holes in the driver's side door. 6RP 210. Sylla testified that he did not see who shot him but recalled hearing the noise of the window shattering as he tried to drive very slowly from the scene. 6RP 157. He described seeing a man walking toward him pointing a gun but was unable to identify the man from photographs shown him by police. 6RP 152-53, 166, 168, 175.

2. Graham's 11-Hour Detention in a Police Holding Cell, the Taped Interrogation by Bothell Police and Privacy Act Violation. Graham was pulled over by Kent and Seattle police officers at about 9:30 or 10 a.m. on the morning of the shooting. 6RP 123-26. He was then transported to the Bothell police station where he was placed in a 15 foot by 10 foot holding cell. 4RP 35, 50. He was held there until 9:15 p.m. 4RP 39. During that time frame, police did not allow him to use a telephone, although he specifically requested to do so several times. 4RP 38-39, 70, 81-82. At 9:15 p.m., Bothell police detectives Andrew Ungvarsky and Julie Blessum removed Graham from the holding cell and brought him to an interview room. 4RP 39.

Prior to commencing their interrogation, and without informing Graham, Ungvarsky started videotaping "in anticipation of going in and talking to Mr. Graham." 4RP 32. However, although Ungvarsky obtained Graham's consent to an audio recording, he never told Graham about the

video recorder. Ex. 2 at 3. At points during the interrogation Ungvarsky made a show of turning off the audio tape recorder at Graham's request, but did not leave the room to also turn off the videotape. In fact, Ungvarsky never turned off the video recording device, even though at one point Graham asked the officers to stop recording him and, when Graham asked for a lawyer, the officers made a show of turning off the tape recorder. 4RP 48, 63, 65-69.

Throughout the interrogation, officers intimated Graham would not be given access to counsel or an opportunity to secure his release by posting bail until he "cooperated" with the interview, presumably by giving police the confession they desired. When Graham already had been held for ten consecutive hours, he asked Blessum when he could post bail or contact his family. He told her he was anxious and intimidated by what he feared would be an indefinite detention. Ex. 2 at 56-60. In response, Blessum evasively suggested she did not know the process whereby Graham could post bail or when that would occur, and stated that he would not be permitted to post bail while the Bothell Police were "continuing an investigation." Id. at 58. She told Graham he could not get a telephone call from "up here" although she admitted at the CrR 3.5 hearing that she had a cell phone on her person. 4RP 132-33.

The police similarly failed to accede to Graham's request for counsel. After Ungvarsky and Blessum's initial effort to extract a confession was unsuccessful, Robert Buendia, the lead detective, stepped in "because it's my case and I had a lot of the facts that I could present." 4RP 141. Due perhaps to Buendia's more abrasive interrogation style, Graham invoked his right to counsel, stating, "the way you all came on me right here...I need my lawyer in front of me at this point." Ex. 2 at 83. Ungvarsky and Buendia terminated the interview but did not make any effort to allow Graham to obtain counsel as requested. 4RP 48, 87. Instead, Ungvarsky told Graham, "we really can't talk to you any more when you say that." Ex. 2 at 84. Ungvarsky then escorted Graham to the bathroom.

During the bathroom break, Ungvarsky had a conversation with Graham that was partially recorded on the videotape. After Buendia showed Graham where the bathroom was, Ungvarsky initiated a dialogue with Graham about Vivian Moore. Ex. 2 at 84. When Graham responded, Ungvarsky testified he told Graham: "We can't talk anymore. You've asked for your attorney. The only way anything happens is if you agree that you don't want your attorney anymore and that you decide that you want to keep talking." 4RP 54. He did not state he had an obligation nto provide Graham with access to counsel.

Graham then agreed to speak with Ungvarsky without his attorney present. Ex. 2 at 84. Police ultimately obtained a statement from Graham in which he acknowledged going to Moore's place of work to talk to Moore and claimed he fired two shots at Sylla's vehicle in self-defense because Sylla revved his engine and drove towards him. Ex. 2 at 139-41, 186-90; 4RP 26-28.

Graham's interrogation lasted for four hours and 15 minutes and concluded approximately fourteen hours after Graham's arrest. 4RP 62.

3. Charges, Jury Verdict and Unconstitutional Sentence. The Snohomish County Prosecuting Attorney charged Graham with first degree assault and one count of violation of the uniform firearms act in the second degree. CP 111-12. At trial, the prosecutor also requested the jury find by special verdict that Graham was armed with a deadly weapon as to the assault count. The jury convicted Graham as charged and delivered a special verdict that he was armed with a deadly weapon at the time of the crime's commission. CP 46-48.

At sentencing, the court made an additional factual finding that "A special verdict/finding for use of a **deadly weapon** which was a **firearm** was returned on Court[s] [sic] I [.]." CP 22 (emphasis in original). Based on this additional factual finding, the court imposed a 221-month sentence on Count I, which included 60 months for the firearm enhancement.

4. Proceedings on Appeal. The Court of Appeals affirmed Graham's convictions, finding that, in pertinent part, his confession was voluntary, the Privacy Act violation did not necessitate suppression of the audio-taped statements, suppression was not otherwise required under Article I, section 7 of the Washington Constitution, the trial court did not err in permitting the opinion testimony and, this Court's opinion in Recuenco notwithstanding, that the firearm enhancement was authorized by the jury's verdict. Graham seeks review.

E. ARGUMENT

1. THIS COURT SHOULD DECIDE WHETHER ARTICLE I, SECTION 3 OF THE STATE CONSTITUTION PROVIDES BROADER DUE PROCESS SAFEGUARDS THAN THE FEDERAL DUE PROCESS CLAUSE AND MANDATES SUPPRESSION OF A STATEMENT PROCURED BY THE COMBINED EFFECTS OF A LENGTHY DETENTION, DENIAL OF ACCESS TO A TELEPHONE OR MEANS OF POSTING BAIL, AND DISINFORMATION ABOUT PROSPECTS FOR RELEASE.

In Miranda v. Arizona, the United States Supreme Court recognized that custodial interrogations, by their very nature, generate "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so

freely." Miranda v. Arizona, 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). To guard against law enforcement abuse and preserve the integrity of criminal trials, the Court has held a confession obtained by compulsion or trickery violates due process. Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) ("It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, on an involuntary confession, without regard to the truth or falsity of the confession, and even though there is ample evidence apart from the confession to support the conviction."); U.S. Const. amends. 5, 14.

Bothell police locked Graham in a holding cell for nearly 11 hours, during which time they repeatedly denied his requests to use a telephone. 4RP 38-39, 70, 81-82. Following this lengthy detention, police subjected Graham to four hours and fifteen minutes of interrogation. During the interrogation, Graham communicated his unease regarding the indefinite detention to Detective Blessum, requested bail be set, that he be told when he would be booked into Snohomish County Jail and again asked to use a telephone. Ex. 2 at 56-60. In response, Blessum actively lied to him about his ability to access a phone or make bail and stated Graham's detention would persist without relief or any prospect of securing his release until the police "investigation" was concluded. Ex. 2 at 58.

These implications were reinforced by the officers' repeated refusals to terminate their interrogation until Graham provided the information they wanted. See e.g. Ex. 2 at 58-60 (Blessum told Graham he would not be able to make bail until the police concluded their investigation), 76 (Ungvarsky persisted in interrogation although Graham suggested police should not talk to him further because they had it "all in the park"), 82 (managing detective Buendia continued questioning even after Graham asked, "if you got it, why you want to talk to me then?").

Viewed together, the police behavior in this case evinces an intent to (1) isolate Graham; (2) instill fear in Graham of an indefinite detention with no means of telling his family or loved ones where to find him; and (3) induce Graham to believe that the police interrogation would not cease until he gave the police what they wanted – i.e., an admission to involvement in the shooting. According to the totality of the circumstances test, these tactics rendered Graham's statements involuntary and denied Graham his federal right to due process of law, requiring suppression of the statements.

Division One nonetheless found the confession was voluntarily made. The court reasoned,

> Graham was engaged, calm, and responsive throughout the questioning. He did not seem fearful or intimidated; he showed a willingness to talk. The officers honored his

> rights and were respectful. Although they did not allow him use of their department-issued cell phones, they did offer to call his girlfriend for him. They were honest with him when they explained the procedure for setting bail. The tone of the questioning was conversational for the most part and was not coercive.

2006 Wash. App. LEXIS 909 at 4.

This summary ignores key facts and misstates others. For example, Blessum lied about the procedure for setting bail. The officers did not provide Graham with access to *any* telephone, not just their "department-issued cell phones." They offered to call Graham's girlfriend but would not allow him to speak to her. Although Ungvarsky's tone was conversational, Buendia was aggressive and occasionally abusive. This Court should conclude the confession violated due process.

The court likewise refused to suppress under the state constitution. The court acknowledged this Court has applied a heightened due process standard under Article I, section 3, noting, "A review of state law shows that Washington's due process clause does afford greater protections, but only when United States Supreme Court interpretations of the federal clause lead to offensive or fundamentally unfair results."[4] Graham submits such results were reached here, in light of the combined pressures of the indefinite detention, lies about the prospects for release, and total

[4] Graham incorporates by reference his Gunwall analysis in his opening brief at 24-31.

isolation from friends, family, or legal counsel. To clarify this important issue, and to provide guidance to lower courts, this Court should grant review.

2. THIS COURT SHOULD REVIEW THE IMPORTANT QUESTION PRESENTED BY THE OFFICERS' FAILURE TO SCRUPULOUSLY HONOR GRAHAM'S INVOCATION OF HIS RIGHT TO COUNSEL.

When Graham invoked his right to counsel, police officers misinformed him about the significance of that invocation, failed to provide him with a lawyer or means of access to a lawyer, and reinitiated a conversation with him.

a. Constitutional Right to Counsel. The Fifth Amendment right to counsel contemplates the "admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedure which assures that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." State v. Templeton, 148 Wn.2d 193, 207, 59 P.3d 632 (2002) (citing Miranda, 384 U.S. at 444, and observing state constitutional right under Article I, § 9 is coextensive with Fifth Amendment right). Once an accused has asserted his Fifth Amendment right to counsel, custodial interrogation must cease unless the accused initiates further communication or until counsel has been made available

to the accused. State v. Valdez, 82 Wn. App. 294, 917 P.2d 1098, review denied, 130 Wn.2d 1011 (1996).

Ungvarsky told Graham that his request for counsel meant "we can't talk to you any more." Ex. 2 at 84. Ungvarsky specifically did *not* tell Graham his request for a lawyer meant Ungvarsky had to provide Graham with means of accessing counsel. In fact, Ungvarsky affirmatively suggested he had no such obligation by telling Graham, "The only way anything happens is if you agree that you don't want your attorney anymore. . ." 4RP 54 (emphasis added).

Presumably, Ungvarsky omitted telling Graham he was entitled to contact a lawyer because Ungvarsky knew that with the assistance of counsel, it is highly unlikely Graham would ultimately have confessed. "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59, 69 S.Ct. 1357, 93 L.Ed.2d 1801 (1949). This critical omission slights Miranda's guarantees. Viewed together with Blessum's egregious misrepresentations, Graham's lengthy detention and the fact that police actively refused to ever give Graham access to a phone, there is no basis to conclude Graham understood he had the right to have his invocation honored.

b. CrR 3.1. The right of an accused held in custody to speedy access to counsel is of such importance in Washington that it is expressly protected by court rule. CrR 3.1. Analyzing the right to counsel contained in CrR 3.1, the Washington Supreme Court has held CrR 3.1 did *not* exceed the Court's rule-making authority and that the language requiring provision of counsel as soon as practicable means "immediately." Templeton, 148 Wn.2d at 211 (citing Washington Bar Association Task Force Comment to CrR 3.1); State v. Trevino, 127 Wn.2d 735, 744, 903 P.2d 447 (1995). Further, CrR 3.1 "goes beyond the requirements of the constitution." Templeton, 148 Wn.2d at 211 (internal citations omitted).

Division Two has observed that while CrR 3.1 appears similar to the Miranda warning, it serves a different purpose. CrR 3.1 "is designed 'to provide a meaningful opportunity to contact a lawyer.'" State v. Jaquez, 105 Wn.App. 699, 715, 20 P.3d 1035 (2001) (internal citation omitted). "[T]he fact that a warning valid within the meaning of Miranda has been made should not in itself be considered to fulfill the requirement of a formal offer [of counsel pursuant to CrR 3.1(c)(2)]." Id. (citation omitted). The rule requires police to make reasonable efforts to contact an attorney for a suspect who has invoked his right to counsel *at the earliest opportunity.* Jaquez, 105 Wn. App. at 715-16 (reversing conviction where

police delayed provision of counsel for 45 minutes after defendant's request for attorney); State v. Kirkpatrick, 89 Wn. App. 407, 415-16, 948 P.2d 882 (1997), rev. denied, 135 Wn.2d 1012 (1998).

The detectives' failure to provide Graham with a lawyer when requested, and misrepresentation regarding their obligation to do so, violated CrR 3.1. Division One nonetheless found no CrR 3.1 violation because the court found Graham waived his right to counsel after invoking it. 2006 Wash. App. LEXIS 909 at 9. This ignores the fact that any "waiver" was not knowing, and was not scrupulously honored. Because the police violated CrR 3.1, this Court should grant review.

3. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' OPINION WHICH FAILED TO APPLY THIS COURT'S MANDATORY EXCLUSIONARY RULE FOR VIOLATIONS OF THE PRIVACY ACT.

Washington's Privacy Act requires the government to obtain a person's consent before recording any private conversation. RCW 9.73 et. seq. The Act prohibits the admission of "any information" obtained in violation of the Act's provisions in a criminal case and is "one of the most restrictive in the nation." RCW 9.73.050;[5] State v. Faford, 128 Wn.2d

[5] RCW 9.73.050 states:
Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under

476, 481, 910 P.2d 447 (1996) (considering RCW 9.73.030);[6] State v. Christensen, 153 Wn.2d 186, 199, 102 P.3d 789 (2004). The portion of the Act pertaining to law enforcement recordings of arrestees is narrowly tailored and requires strict conformance with its provisions. RCW 9.73.090(1);[7] see also, State v. Cunningham, 93 Wn.2d 823, 829-30, 613 P.2d 1138 (1980); accord State v. Mazzante, 86 Wn. App. 425, 428-30, 936 P.2d 1206 (1997) (rejecting State's contention that "substantial compliance" with the statute's terms is all that is required).

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the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

[6] RCW 9.73.030 prohibits the interception or recording of any:

Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication....

RCW 9.73.030(1)(a).

[7] RCW 9.73.090 provides:

Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities.

RCW 9.73.090(1)(b) (emphasis added).

The Court of Appeals agreed Graham's rights under the Privacy Act were violated. 2006 Wash. App. LEXIS 909-10. However, while acknowledging the statute by its plain terms requires "strict compliance," the court differentiated between the video recording and contemporaneous audio recording. This was contrary to this Court's precedent, which repeatedly has repudiated State efforts to narrow the scope of the Privacy Act's protections. See e.g., Christensen, 153 Wn.2d at 194-95 (speakerphone function on telephone was a "device" within meaning of Privacy Act); Faford, 128 Wn.2d at 481 (recordings by private citizen of neighbor's cordless telephone conversations done in violation of privacy act); State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990) (conversations obtained with illegal wire rendered both recording and officer's visual observations inadmissible); accord State v. Salinas, 121 Wn.2d 689, 693, 853 P.2d 439 (1993).

This Court should grant review and hold, therefore, that the secret video recording violated Graham's rights under the Privacy Act, that the violation was not "cured" by Graham's subsequent, uninformed consent to an audio recording, and that the remedy was the suppression of all statements, including the allegedly consented-to audio recording.

4. SUPPRESSION IS MANDATED UNDER ARTICLE I, SECTION 7.

In a footnote, Division One dismissed Graham's claim that suppression of the recording was mandated under Article I, section 7.[8] 2006 Wash. App. LEXIS 909 at 15. The court also incorrectly opined that Graham did not explain why Washington's exclusionary remedy mandated suppression of all recordings. However, Washington has applied a unitary exclusionary remedy that, in stark contrast to the remedy provided by federal courts for Fourth Amendment violations, focuses on protecting individual rights, rather than curbing government actions. State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Contrary to Division One's terse declaration, suppression is required under the State constitution. This Court should grant review, hold the secret recording violated Article I, section 7, and find the State cannot circumvent the constitution's requirements by obtaining nominal, fundamentally uninformed consent.

5. WHERE A POLICE OFFICER'S TESTIMONY INTIMATED GRAHAM HAD A DUTY TO PROVIDE AN ALIBI AND THAT THE ALIBI WAS NOT CREDIBLE, AND OTHER DIVISIONS OF THE COURT OF APPEALS WOULD HAVE FOUND THIS TO BE ERROR, THIS COURT SHOULD GRANT REVIEW OF DIVISION ONE'S CONTRARY HOLDING

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[8] Graham adopts and incorporates by reference his Gunwall analysis in his opening brief at 39-43.

At the trial, the prosecutor invited Ungvarsky to comment that Graham "offered up" an alibi but "abandon[ed]" it after persistent questioning by Ungvarsky in the interrogation room and, further, that suspects commonly attempt an initial denial before admitting their involvement in an offense. 7RP 373-74. Graham had not asserted an alibi defense. Defense counsel requested a curative instruction that would have informed the jury that he had no burden to prove an alibi, which the court refused. 7RP 419-23; 8RP 428, 430-31.

a. Improper Opinion. Divisions Two and Three have recognized that the opinion of a government official, especially a police officer, may unduly influence the jury. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); State v. Jones, 117 Wn. App. 89, 92, 68 P.3d 1153 (2003). A prosecutor commits misconduct where he asks a witness to comment on another witness's credibility. State v. Boehning, 127 Wn. App. 511, 518-20, 111 P.3d 899 (2005); cf., State v. Stevens, 127 Wn. App. 269, 273-75, 110 P.3d 1179 (2005) (prosecutor's inquiry to investigating officer whether two girls' testimony was consistent was improper, especially where comment on truthfulness was sole relevance).

The questions asked by the prosecutor here implied Ungvarsky believed Graham was lying when he initially denied involvement in the offense, and that this was a diversionary tactic commonly employed by

criminal suspects. 9RP 973-74. Further, similar to Stevens, this was the sole relevance of the questions. The questions and answers therefore implied both that Graham bore a burden of proof where the burden rested solely with the State, and that Graham's initial alibi was untruthful. This testimony invaded the province of the jury, as it was for the jury to decide when Graham was being candid to the detectives and when he was not. Barr, 123 Wn. App. at 384.

Although the recent Division Two and Three cases were cited to Division One as authority, Division One elected to not mention or even attempt to distinguish these cases, instead relying on its own opinion in State v. Allen, 50 Wn. App. 412, 749 P.2d 702 (1988), a case decided 18 years ago. Division One evidently does not view the decisions of other Divisions of the Court of Appeals as binding. Because of the conflict in Divisions of the Court of Appeals, and pursuant to RAP 13.4(b)(2) and (4), this Court should grant review.

b. Failure to Give Proposed Instruction. This Court should also review the Court of Appeals approval of the failure to give an instruction that would have properly informed the jury of the parties' respective burdens. The court simply said, "It was not error for the trial court to refuse Graham's instruction on alibi evidence." 2006 Wash. App. LEXIS 909 at 24. This was inaccurate. The Court had a constitutional

duty to issue the instruction in order to safeguard Graham's due process right to a fair trial. See Jones, supra, 117 Wn. App. at 92 (finding "no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him."). Because Division One resolved this important issue incorrectly, this Court should grant review.

6. THE COURT OF APPEALS FAILED TO FOLLOW THIS COURT'S OPINION IN *RECUENCO*, WARRANTING REVIEW UNDER RAP 13.4(b)(1).

In Recuenco, *supra*, the State accused the defendant of second degree assault for assaulting his wife while holding a gun. 154 Wn.2d at 158. At the State's request, the court submitted a special verdict that Recuenco was armed with a deadly weapon at the time of the commission of the crime. Id. at 159. On review, this Court held the firearm enhancement violated Recuenco's Sixth Amendment right to a jury trial as defined by Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.3d 2d 403 (2004). In so concluding, this Court reasoned, "Without an *explicit firearm finding* by the jury, the court's imposition of a firearm sentence enhancement violated Recuenco's jury trial right as defined by Apprendi and Blakely." 154 Wn.2d at 162. Then, citing its

opinion in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), this Court found the error could not be harmless – even though there was no evidence from which the jury could have found Recuenco was armed with a deadly weapon other than a firearm.

Notwithstanding the absence of an *explicit finding* by the jury that Graham was armed with a firearm, Division One did not apply Recuenco, and instead affirmed Graham's sentence. 2006 Wash. App. LEXIS 909 at 26. This was improper, and flatly contrary to Recuenco's express holding. Review is warranted under RAP 13.4(b)(1).

F. CONCLUSION

For the reasons stated, Curtis Graham requests his petition for review be granted.

DATED this 7th day of June, 2006.

Respectfully submitted:

SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Petitioner

Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

JUN - 7 2006
Date

Done in Seattle, Washington

COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2006 JUN -7 PM 4:56

State v. Curtis Graham, No. 54975-8-I

Appendix

Source: Legal > States Legal - U.S. > Washington > Cases > WA State Cases, Combined
Terms: 54975-8 (Edit Search | Suggest Terms for My Search)

*2006 Wash. App. LEXIS 909, **

STATE OF WASHINGTON, *Respondent*, vs. CURTIS EUGENE GRAHAM, *Appellant*.

No. **54975-8**-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2006 Wash. App. LEXIS 909

May 8, 2006, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed the judgment of a Washington trial court convicting him of assault with a deadly weapon and unlawful possession of a firearm.

OVERVIEW: Defendant was convicted for shooting the victim, a friend of defendant's ex-girlfriend. On appeal, the court held that the trial court did not err by admitting defendant's confession into evidence. Defendant's confession was voluntary because (1) his seven-hour detention preceding the questioning was not inherently coercive; (2) defendant was engaged, calm, and responsive throughout the questioning; (3) defendant did not seem fearful or intimidated, and he showed a willingness to talk; (4) although the officers did not allow defendant to telephone his girlfriend, they offered to call her for him; (5) the officers were honest with him when they explained the procedure for setting bail; and (6) the tone of the questioning was conversational for the most part and was not coercive. Defendant's right to counsel was not violated because the evidence showed that defendant withdrew his request for counsel and indicated that he wanted to continue talking to the officers. Even though the interrogation was videotaped in violation of defendant's rights under the Privacy Act, Wash. Rev. Code § 9.73.090, that fact did not require the suppression of the audiotape of defendant's confession.

OUTCOME: Defendant's convictions were affirmed.

CORE TERMS: recording, detective, confession, firearm, right to counsel, audiotape, videotape, questioning, interview, conversation, video, custody, window, motive, admissible, misconduct, armed, Privacy Act, substantial evidence, local concern, waived, firearm enhancement, deadly weapon, broken window, detention, convicted, confessed, federal constitution, gang affiliation, federal law

LexisNexis(R) Headnotes • Hide Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence

Evidence > Procedural Considerations > Rulings on Evidence

HN1 Unchallenged findings of fact from a Wash. Super. Ct. Crim. R. 3.5 hearing are verities on appeal. If challenged, they are verities if supported by substantial

evidence in the record. More Like This Headnote

Criminal Law & Procedure > Interrogation > Voluntariness

HN2 The test for voluntariness of a confession is whether, under the totality of the circumstances, the confession was coerced. These circumstances include the defendant's condition, his mental abilities, and police conduct. More Like This Headnote

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

HN3 Once a suspect in custody requests counsel, all questioning must cease until counsel is provided or the suspect reinitiates the conversation. More Like This Headnote

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

HN4 No person can be forced to give evidence against himself, and that right is protected by the ancillary right to counsel during custodial questioning by police. U.S. Const. amend. V; Wash. Const. art. I, § 9. More Like This Headnote

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

HN5 Wash. Crim. R. Ct. Ltd. J. 3.1 requires that a person in custody who desires a lawyer must be provided with the means to contact counsel at the earliest opportunity. More Like This Headnote

Criminal Law & Procedure > Interrogation > Miranda Rights > Right to Counsel During Questioning

HN6 Wash. Crim. R. Ct. Ltd. J. 3.1 only applies when the person in custody desires a lawyer. More Like This Headnote

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN7 For the purpose of appellate review, the Washington due process clause is considered equal to the federal due process clause unless the appellant conducts a Gunwall analysis. The six Gunwall factors are (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. More Like This Headnote

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN8 A review of state law shows that Washington's due process clause does afford greater protections, but only when United States Supreme Court interpretations of the federal clause lead to offensive or fundamentally unfair results. More Like This Headnote

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN9 See Wash. Const. art. I, § 3.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN10 See U.S. Const. amend. V.

Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview

HN11 See Wash. Rev. Code § 9.73.090(b).

Criminal Law & Procedure > Interrogation > Miranda Rights > General Overview

HN12 Wash. Rev. Code § 9.73.090(b) does require strict compliance on its face. Nonconforming recordings are generally inadmissible. More Like This Headnote

Criminal Law & Procedure > Pretrial Motions > Motions in Limine

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Mistrial

HN13 Absent an abuse of discretion, an appellate court will not disturb a trial court's rulings on motions in limine, the admissibility of evidence, or motions for mistrial. The court abuses its discretion if a ruling is manifestly unreasonable or based upon untenable grounds or reasons. More Like This Headnote

Evidence > Relevance > Confusion, Prejudice & Waste of Time

Evidence > Relevance > Prior Acts, Crimes & Wrongs

HN14 Before a court may admit evidence of past crimes or misconduct, it must (1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence

Evidence > Relevance > Prior Acts, Crimes & Wrongs

HN15 Despite an incomplete record of a court's reasoning, admission of past crimes or misconduct is upheld if supported by substantial evidence. More Like This Headnote

Criminal Law & Procedure > Appeals > Reversible Errors > Evidence

HN16 Evidentiary error is grounds for reversal only if, with reasonable probability, it materially affected the outcome of the trial. Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole. More Like This Headnote

Evidence > Relevance > Prior Acts, Crimes & Wrongs

HN17 Evidence of a prior crime is not admissible to prove the defendant's propensity to commit the charged crime. But Wash. R. Evid. 404(b) does allow it for other purposes. More Like This Headnote

Evidence > Relevance > Prior Acts, Crimes & Wrongs

HN18 See Wash. R. Evid. 404(b).

Evidence > Relevance > Prior Acts, Crimes & Wrongs

HN19 The list of admissible purposes is not exclusive. Prior acts can complete the res gestae, or story, of the crime. They can also be admitted as evidence of motive. Motive is what prompts a person to act. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Evidence > Relevance > Prior Acts, Crimes & Wrongs

HN20 If any of the reasons to admit under Wash. R. Evid. 404(b) is justified, then the decision to admit is upheld. More Like This Headnote

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview

HN21 When prosecutorial misconduct is alleged, the defense must show that the conduct was improper and prejudicial. Alleged misconduct should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. More Like This Headnote

Evidence > Testimony > Lay Witnesses > General Overview

HN22 Facts and observations by a witness are admissible, even if they lead to the inference that the defendant is lying. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Jury Instructions

HN23 Errors of law in jury instructions are reviewed de novo; reversal is required when erroneous instructions prejudice a party. Jury instructions are sufficient if they are not misleading, properly tell the jury the applicable law, and allow both parties to argue their case theories. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Penalties

Criminal Law & Procedure > Verdicts > Special Verdicts

Criminal Law & Procedure > Sentencing > Adjustments

HN24 In State v. Recuenco, the Washington Supreme Court has found a "deadly weapon" special verdict form insufficient for a firearm enhancement, even when the evidence shows that a firearm was used, unless the jury explicitly finds beyond a reasonable doubt that the defendant was armed with a firearm. More Like This Headnote

COUNSEL: *Susan F. Wilk* (of Washington Appellate Project), for appellant.

Thomas M. Curtis and *Seth A. Fine*, for respondent.

JUDGES: Baker, J. WE CONCUR: Schindler, A.C.J., Agid, J.

OPINIONBY: BAKER

OPINION: BAKER, J. -- Curtis Eugene Graham was convicted of assault with a deadly weapon and unlawful possession of a firearm. He appeals, raising evidentiary issues, prosecutorial misconduct, and improper sentence enhancement for use of a firearm. We affirm, because Graham's confession was properly admitted, there was no misconduct, and the jury explicitly found that Graham was armed with a firearm.

I.

Graham was arrested in January 2004 for shooting Mohamed Sylla, a friend of Graham's ex-girlfriend Vivian Moore. Graham was held at the Bothell Police Department for about seven hours, and then brought to an interview room. Before the questioning began, a detective started a videotape recording of the interview room. The videotape recorded the entire interview, including the sounds. The detectives then asked for Graham's permission to record the interview and started a cassette tape recorder that was sitting in full view on the interview table. The consent form Graham signed said **[*2]** that it authorized "audio and/or video" recording, but Graham was never aware of the videotaping. At various times during the interview, the audiotape was either not functioning properly, or Graham had asked the detectives to turn it off. Also, the cassette recorder was inadvertently set to a "loop" function, so when the tape reached its end, it automatically flipped and kept recording. Earlier parts of the interview were accidentally taped over.

At one point, Graham invoked his right to counsel. The detectives stood up and left the room. Graham asked to go to the bathroom. Then there was a hallway conversation, the sound of which was partially captured by the videotape. The detectives and Graham returned to the room and Graham said he no longer wanted an attorney. Eventually, Graham confessed on the audiotape. Afterward, a complete transcript of the interview was created by piecing together portions of the audio and videotapes, including those parts that were not on the audiotape because it was off, not functioning, or taped over.

Before trial, there was a CrR 3.5 hearing to determine the admissibility of Graham's confession. The court excluded the video depictions entirely, ruling **[*3]** that they were obtained in violation of the Privacy Act. n1 All audio obtained during the time Graham had consented, regardless of whether the transcript was obtained from the audiotape or the sounds from the videotape, was admitted. Graham was convicted. He appeals.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Ch. 9.73 RCW.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

Admissibility of Graham's Confession

*HN1*Unchallenged findings of fact from a CrR 3.5 hearing are verities on appeal. If challenged, they are verities if supported by substantial evidence in the record. n2

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n2 *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

A.*Voluntariness*

Graham first argues that police interrogation tactics were coercive, and his confession was involuntary. The alleged improprieties include a seven-hour detention, suggestions that he would not be allowed to post bail until he cooperated, and **[*4]** refusing permission to make a phone call. Graham argues that these tactics were meant to instill fear and give the impression that his detention would be indefinite until he confessed.

Substantial evidence supports the trial court's finding that Graham's confession was voluntary. HN2 The test for voluntariness is "whether, under the totality of the circumstances, the confession was coerced." n3 These circumstances include the defendant's condition, his mental abilities, and police conduct. n4 Graham's seven-hour detention preceding the questioning was not inherently coercive. n5 Graham was engaged, calm, and responsive throughout the questioning. He did not seem fearful or intimidated; he showed a willingness to talk. The officers honored his rights and were respectful. Although they did not allow him use of their department-issued cell phones, they did offer to call his girlfriend for him. They were honest with him when they explained the procedure for setting bail. The tone of the questioning was conversational for the most part and was not coercive. The trial court did not err in concluding that the confession was voluntary.

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n3 *Broadaway*, 133 Wn.2d at 132 (citing *State v. Rupe*, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984)). **[*5]**

n4 *Broadaway*, 133 Wn.2d at 132.

N5 *State v. Saunders*, 120 Wn. App. 800, 810, 86 P.3d 232 (2004).

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B. *Constitutional Right to Counsel*

Graham maintains that the police did not scrupulously honor his invocation of the right to counsel and immediately provide counsel. The State contends that although Graham did invoke his right to counsel at one point, he immediately reinitiated contact and explicitly waived the right to counsel. The right to counsel during questioning arises from the Fifth Amendment protections against self-incrimination in the federal constitution and from Article I, § 9 of the Washington Constitution. n6 HN3 Once a suspect in custody requests counsel, all questioning must cease until counsel is provided or the suspect reinitiates the conversation. n7

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 HN4 No person can be forced to give evidence against himself, and that right is protected by the ancillary right to counsel during custodial questioning by police. U.S. Const. amend. V; Wash. Const. art. I, § 9; *Miranda v. Arizona*, 384 U.S. 436, 469, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). **[*6]**

n7 *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Substantial evidence supports the trial court's findings. Finding of Fact 18 summarizes the trial court's reasoning:

> At one point in the interview, the defendant stated he wanted an attorney. At that point the detectives immediately stopped the interview, and turned off the cassette tape. . . . The defendant was permitted to use the bathroom. During this brief break the defendant asked detectives a question. He was told by Detective Ungvarsky that he could not discuss the case because of the invocation of a right to counsel. The defendant said he wanted to talk more. Detective Ungvarsky asked the defendant if he wanted to reinitiate the conversation. The defendant said yes, he did want to talk more. The officers and the defendant went back into the interview room and turned the tape back on.

The court's finding was supported by substantial evidence in the record, including the testimony of the detectives and the partial recording of the hallway conversation. The trial court **[*7]** did not err in concluding that Graham reinitiated the conversation.

C. *CrRLJ 3.1 and Access to Counsel*

Graham asserts that his right to counsel under CrRLJ 3.1 was violated. HN5 This court rule requires that "a person in custody who desires a lawyer" must be provided with the means to contact counsel "at the earliest opportunity." n8

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n8 CrRLJ 3.1(c)(2).

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In *State v. Kirkpatrick*, n9 a suspect was arrested in Port Angeles and questioned for 90 minutes, at which time he asked for a lawyer. The police ceased questioning, but did not provide Kirkpatrick with access to a lawyer. n10 Later, a detective drove him to Lewis County. n11 During the four-hour journey from Port Angeles to Lewis County, Kirkpatrick initiated conversations with the detective and said he no longer wanted a lawyer. He eventually confessed on tape. n12 Kirkpatrick made his request for a lawyer at the police station during working hours, and did not withdraw the request until some time had elapsed. On appeal, the court concluded that **[*8]** Kirkpatrick was not provided with access to

counsel at the "earliest opportunity," which was immediately after his request. n13 The court concluded that the officers had violated CrR 3.1(c)(2). n14

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n9 89 Wn. App. 407, 948 P.2d 882 (1997).

n10 *Kirkpatrick*, 89 Wn. App. at 409.

n11 *Kirkpatrick*, 89 Wn. App. at 409.

n12 *Kirkpatrick*, 89 Wn. App. at 409-10.

n13 *Kirkpatrick*, 89 Wn. App. at 415.

n14 *Kirkpatrick*, 89 Wn. App. at 414-15.

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The only other case on point is *State v. Wade*. n15 Wade requested counsel upon arrest and was immediately transported to the police station. Before the booking process ended, he was approached by an officer he knew. He told the officer he wanted to talk, signed a waiver, and confessed. n16 All of this took place within one hour. n17 On appeal, the court held that Wade had waived his right to counsel before his first opportunity to contact a lawyer, which was **[*9]** right after the booking process was completed. n18

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n15 44 Wn. App. 154, 721 P.2d 977 (1986).

n16 *Wade*, 44 Wn. App. at 157.

n17 *Wade*, 44 Wn. App. at 159.

n18 *Wade*, 44 Wn. App. at 159.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

HN6 CrRLJ 3.1 only applies when the person in custody desires a lawyer. This case is similar to *Wade*, because Graham waived his Fifth Amendment right to counsel almost immediately after invoking it. Once he waived his constitutional right to counsel, he no longer desired a lawyer. Because there was no opportunity to provide Graham access to counsel during the three-minute time period that he desired a lawyer, the detectives did not violate the court rule.

D. *Due Process and Gunwall*

Graham next suggests that Washington has stronger due process protections than the federal constitution, providing independent state grounds for excluding the confession. He conducts an analysis of the subject under *State v. Gunwall*. n19 HN7For the purpose of **[*10]** appellate review, the Washington due process clause is considered equal to the federal due process clause unless the appellant conducts a *Gunwall* analysis. n20 Graham undertook the analysis, so we address the issue.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n19 106 Wn.2d 54, 720 P.2d 808 (1986).

n20 *In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001).

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The six *Gunwall* factors are: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. n21 Graham concedes that the federal and state due process clauses are textually identical. n22 He also notes that our state constitutional and common law history is unrevealing. HN8A review of state law shows that Washington's due process clause does afford greater protections, but only when United States Supreme Court interpretations of the federal clause lead to offensive or fundamentally unfair results. n23 Graham claims **[*11]** that federal law allows for "[f]rightening a suspect into believing his detention will be indefinite and he will be denied access to counsel or family until he cooperates with an interrogation." But he points to no federal case that stands for this proposition. He shows no federal standard from which to depart.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n21 *Gunwall*, 106 Wn.2d at 58.

n22 Article I, § 3 of Washington's Constitution states, HN9"No person shall be deprived of life, liberty, or property, without due process of law." The Fifth Amendment says, HN10"No person shall be . . . deprived of life, liberty, or property without due process of law."

n23 *See*, *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984) (overruled on other grounds) (allowing evidence of prior criminal activity regardless of whether defendant was charged or convicted was "particularly offensive" in capital penalty phase); *State v. Davis*, 38 Wn. App. 600, 605-06, 686 P.2d 1143 (1984) (ruling that postarrest silence could be used against defendant absent *Miranda* warnings "fundamentally unfair" and not adopted).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*12]**

For *Gunwall* factor 5, Graham argues that "Article I, §3 should be construed so as to

discourage the concerted behavior of police to deny suspects in custody access to counsel and mislead them regarding their constitutional rights." Graham has failed to show how the federal constitution does not adequately protect against this danger, nor why a ruling in his favor on this issue would reflect a difference in the structure of our constitution.

Finally, factor 6 addresses matters of particular state interest or local concern. Graham cites *State v. Hensler* n24 and *Heinemann v. Whitman County of Washington District Court* n25 for the proposition that the use of "deceptive practices" in custodial interrogations is a matter of "particular local concern in this state." Curiously, both cases uphold police conduct, n26 and neither involves custodial interrogation. n27 Again, Graham has not demonstrated why Washington's local concern mandates a break from any contrary federal jurisprudence.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n24 109 Wn.2d 357, 745 P.2d 34 (1987).

n25 105 Wn.2d 796, 718 P.2d 789 (1986). **[*13]**

n26 *Hensler*, 109 Wn.2d at 363; *Heinemann*, 105 Wn.2d at 809.

n27 *Hensler*, 109 Wn.2d at 362; *Heinemann*, 105 Wn.2d at 808.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Graham has not shown how Washington must depart from federal law and hold that our constitution affords him greater protections than the Fifth and Fourteenth Amendments.

E. *Privacy Act*

Finally, Graham contends that no part of the secret videotape should have been admitted, and that this Privacy Act violation also required exclusion of the audiotape of his confession. RCW Ch. 9.73.090 establishes the parameters for recording a custodial interrogation:

> HN11 (b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:
>
> (i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;
>
> (ii) The recording **[*14]** shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
>
> (iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;
>
> (iv) The recordings shall only be used for valid police or court activities. [n28]

Graham asserts that because he was never informed of the videotaping, n29 the police violated RCW 9.73.090(1)(b)(i): Graham did not know that "such" recording was being made. This violation of the statute's strict rules, Graham argues, necessitates not only the suppression of the videotape, but of the confession that he consented to have audiotaped as well.

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n28 RCW 9.73.090(1)(b).

n29 The trial court made a finding of fact that Graham did not know about the video. This finding is not challenged on appeal.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

HN12 RCW 9.73.090(1)(b) **[*15]** does require strict compliance on its face. Nonconforming recordings are generally inadmissible. n30 However, Graham cites no authority for the notion that a violation of the Privacy Act with respect to one recording negates the admissibility of another contemporaneous recording that conforms to the Act's requirements. n31 Even assuming arguendo that the videotape was inadmissible, Graham fails to support his argument that its invalidity requires suppression of the audiotape as well. It is undisputed that the confession introduced at trial was from the audiotape, not the video. Therefore Graham's argument fails. n32

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n30 *State v. Mazzante*, 86 Wn. App. 425, 428, 936 P.2d 1206 (1997).

n31 Graham's argument is that where the Act is violated, the fruits of the poisonous tree are also excluded. The audiotape does not fall into this category.

n32 Graham also conducts a *Gunwall* analysis of the state constitutional right to privacy. Again, he makes no argument as to why the violation with respect to the videotape warrants suppression of the audiotape as well, and shows no federal law from which this state must depart in order to justify the audiotape's exclusion.

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[*16]

Prior Acts Evidence

HN13 Absent an abuse of discretion, we will not disturb the trial court's rulings on motions in limine, the admissibility of evidence, or motions for mistrial. n33 The court abuses its discretion if a ruling is manifestly unreasonable or based upon untenable grounds or reasons. n34

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n33 *See* Hume v. Am. Disposal Co., 124 Wn.2d 656, 666, 880 P.2d 988 (1994) (admissibility of evidence); State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (motion for mistrial); Gammon v. Clark Equip. Co., 38 Wn. App. 274, 286, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985) (motions in limine).

n34 Wick v. Clark County, 86 Wn. App. 376, 382, 936 P.2d 1201 (1997).

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Graham argues that certain acts of vandalism (tire slashing and breaking a window) were improperly admitted under ER 404(b) because they were not proved by a preponderance of evidence, and did not show motive or res gestae.

HN14 Before **[*17]** the court may admit evidence of past crimes or misconduct, it must: "(1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice." n35 Unfortunately, the bulk of the ER 404(b) discussion, including the judge's preliminary ruling, took place in chambers and was not transcribed. So the record does not reflect whether the argument was made or not. The court did conduct the proper ER 403 balancing test and stated the reasons for admission under ER 404(b).

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n35 State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001) (citing State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)).

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HN15 Despite an incomplete record of the court's reasoning, admission is upheld if supported by substantial evidence. n36 Witness Vivian Moore testified **[*18]** that just before each tire slashing (in one instance only 7 hours earlier), Graham had made hostile calls to her cell phone. The exchange about the broken window had no connection to Graham:

Q: Any other damage to your property during that period of time?

A. Yes. A rock was thrown through my window, my dining room window.

Q: Do you recall roughly when that was?

A. It was January, approximately around the middle of January.

Q: Have you ever had a rock thrown through your window?

A. No.

This is not substantial evidence that Graham broke the window. Substantial evidence supported the finding that Graham slashed Moore's tires, but the trial court erred in admitting evidence regarding the broken window.

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n36 *State v. Benn*, 120 Wn.2d 631, 653, 845 P.2d 289 (1993).

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The court's error regarding the broken window was harmless. HN16 Evidentiary error is grounds for reversal only if, with reasonable probability, it materially affected the outcome of the trial. **[*19]** n37 "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." n38 Given Graham's confession, Moore and Sylla's eyewitness accounts, the other admissible threats and acts of vandalism, and the fact that window breaking was unrelated to the crime charged, the error did not affect the outcome of the trial.

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n37 *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

n38 *Neal*, 144 Wn.2d at 611.

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HN17 Evidence of a prior crime is not admissible to prove the defendant's propensity to commit the charged crime. But ER 404(b) does allow it for other purposes:

> HN18 Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [n39]

HN19 The list **[*20]** of admissible purposes is not exclusive. n40 Prior acts can complete the res gestae, or story, of the crime. n41 They can also be admitted as evidence of motive. n42 Motive is "what prompts a person to act." n43

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n39 ER 404(b).

n40 *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996).

n41 *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980).

n42 *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995).

n43 *Powell*, 126 Wn.2d at 261 (quoting *Black's Law Dictionary* 810 (6th ed. 1990).

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Motive was a proper ER 404(b) basis on which to admit the challenged evidence. If a hostile relationship between two lovers can prompt one lover to kill the other, n44 it can certainly prompt someone to shoot the current partner of his former girlfriend. Graham suggests that the prior acts might have been admissible if he had shot Moore, but that the acts are "too attenuated" in a crime against Moore's current boyfriend. But, **[*21]** the act would be relevant to motive in either case. Since the acts were properly admitted to show motive, there is no need to reach the res gestae issue. HN20 If any of the reasons to admit under ER 404(b) is justified, then the decision to admit is upheld. n45

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n44 *Powell*, 126 Wn.2d at 261.

n45 *Powell*, 126 Wn.2d at 264.

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Graham next suggests that a statement he made to Moore's mother about being "from the C-O-M-P-T-O-N" should have been excluded under ER 404(b) because it suggested that Graham had a gang affiliation. This evidence was neither highly probative - gang affiliation was not otherwise a part of the case - nor was it particularly prejudicial. It was one statement about being from a particular geographical area generally affiliated with gangs. n46 In balancing these two elements, the trial court did not abuse its discretion when it admitted the statements.

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n46 *Cf. State v. Campbell*, 78 Wn. App. 813, 821-22, 901 P.2d 1050 (1995) (detailed evidence about defendant's actual gang affiliation and activities highly probative and not unduly prejudicial under ER 404(b) because it fit the State's theory of the case).

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Finally, Graham maintains that the trial court did not provide the jury with an instruction on the limited uses of ER 404(b) evidence. Graham did not request the instruction. Failure to give such an instruction, even if it would have been proper to give one, was not manifest constitutional error, and may not be raised for the first time on appeal. n47

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n47 RAP 2.5(a); *State v. Ellard*, 46 Wn. App. 242, 244, 730 P.2d 109 (1986).

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Alibi Evidence

Graham claims that the prosecutor committed misconduct by eliciting testimony about Graham's discredited alibi. He also maintains that the trial court erred in refusing his proposed curative instruction on alibi evidence. HN21 When prosecutorial misconduct is alleged, the defense must show that the conduct was improper and prejudicial. Alleged misconduct "should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." n48 The prosecutor elicited testimony from a detective **[*23]** that Graham had presented an alibi, then later abandoned it after phone calls were placed to the alibi witness. The content of the calls was excluded by the trial court, but the fact that the calls were made was allowed in.

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n48 *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

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The questions and answers were not a direct statement on Graham's credibility, although the jury might conclude that Graham had lied. HN22 Facts and observations by a witness are admissible, even if they lead to the inference that the defendant is lying. n49 Eliciting this testimony was not prosecutorial misconduct.

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n49 *See State v. Allen*, 50 Wn. App. 412, 418-19, 749 P.2d 702 (1988) (police officer can recount personal observations of conduct that directly and logically supported conclusion that defendant was not being sincere).

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HN23 Errors of law in jury instructions are reviewed de novo; reversal is required when erroneous instructions prejudice a party. n50 Jury instructions are sufficient if they are not misleading, properly tell the jury the applicable law, and allow both parties to argue their case theories. n51 It was not error for the trial court to refuse Graham's instruction on alibi evidence. Because there was no misconduct, no curative instruction was needed. Also, the court properly instructed the jury that the defendant had no burden of proof, so the defendant was not prejudiced.

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n50 *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

n51 *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662, 935 P.2d 555 (1997).

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Pro Se Motion

Graham next argues that the trial court refused to grant a motion to proceed pro se at the sentencing hearing. His only motion at the sentencing hearing was for ineffective assistance of counsel. Later, he interrupted the prosecutor's recitation **[*25]** of criminal history and asked, "Your Honor, may I represent myself concerning that paperwork, please?" The court asked Graham not to interrupt, and told him he would have a chance to speak. He made no further mention of self-representation. This single comment was also not a timely, unequivocal, knowing and intelligent pro se motion, which Graham acknowledges is the proper standard. n52 There was no error.

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n52 *State v. DeWeese*, 117 Wn.2d 369, 377-78, 816 P.2d 1 (1991).

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Firearm Enhancement

Graham contends a five-year firearm enhancement was improper because the jury found that he was armed with a deadly weapon, warranting only a two-year enhancement. HN24 In *State v. Recuenco*, n53 our Supreme Court found a "deadly weapon" special verdict form insufficient for a firearm enhancement, n54 even when the evidence shows that a firearm was used, n55 unless the jury explicitly finds beyond a reasonable doubt that the defendant was armed with a firearm. In *Recuenco*, both the charges and **[*26]** the jury instructions referred to a "deadly weapon." Although evidence was admitted that indicated the weapon was a firearm, there was no explicit jury finding that a firearm was used.

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n53 154 Wn.2d 156, 110 P.3d 188 (2005).

n54 *Recuenco*, 154 Wn.2d at 164.

n55 *Recuenco*, 154 Wn.2d at 160.

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Recuenco does not apply. The jury specifically convicted Graham of unlawful possession of a firearm. Also, they could not have convicted Graham of first degree assault without finding that he was armed with a firearm. This was explicit in Instruction 8:

> To convict the defendant of the crime of assault in the first degree as alleged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 14th day of January, 2004, the defendant assaulted Mohammed Sylla;
>
> (2) That the assault was committed with a firearm . . . .

The jury convicted Graham of first degree assault. Because **[*27]** the jury explicitly found beyond a reasonable doubt that Graham was armed with a firearm, the firearm enhancement was proper.

Cumulative Error

Finally, Graham argues cumulative error. "The combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial." n56 In this case, there was one error in admission of testimony about the broken window. The error was harmless, and Graham did not receive an unfair trial.

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n56 *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

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AFFIRMED.

Baker, J.

WE CONCUR:

Schindler, A.C.J.

Agid, J.

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