Supreme Court No. ____
(COA No. 84939-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONNATHAN HOSKINS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Johnathan Hoskins, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated December 30, 2024, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). A copy is attached.

B. ISSUES PRESENTED FOR REVIEW

1. A person accused of a crime has a right to have the jury consider an inferior degree offense when some evidence supports their commission of only the lesser offense. Mr. Hoskins was charged with committing felony murder based on his alleged participation in a first degree burglary but evidence showed he committed only second degree burglary. Viewing the evidence in the light most favorable to the prosecution, not to Mr. Hoskins, the trial court ruled no lesser included offense instruction is available in a felony murder prosecution. Should this Court grant review to address whether a person is entitled to an instruction on an inferior degree offense when charged

with felony murder, an issue of substantial public importance with scant and conflicting case law?

2. It is presumptively prejudicial for a judge to signal to the jury that any factual issue should be resolved in a certain way. Here, the jury had to decide whether Mr. Hoskins committed burglary by stealing cannabis from another person's property. But during deliberations, the court answered a jury note by saying that stealing cannabis from a home satisfies the theft element of burglary. Should this Court review whether affirmatively resolving a question the jury had to decide constitutes a comment on the evidence, violating article IV, section 16?

3. Under the Fifth Amendment and the greater protections of article I, section 9, the police may not continue a custodial interrogation when the suspect indicates they no longer want to answer questions. Mr. Hoskins repeatedly said he wanted to end his custodial interrogation so he could go home or to jail. Did the Court of Appeals misapply the Fifth

Amendment and misconstrue the independent protections of article I, section 9 by ruling that it was constitutionally permissible to press Mr. Hoskins to make incriminating statements despite his expressed desire to end the police interview?

4. A recently enacted law eliminated using prior juvenile adjudications in an offender score calculation. The legislature said its purpose was to improve fairness in sentencing outcomes and remedy the injustice of automatically increasing an adult's punishment due to their actions as a child. Mr. Hoskins had eight juvenile adjudications that were counted in his offender score and substantially increased his punishment. Should this Court grant review to decide the application of this remedial statute to cases pending on direct appeal?

C. STATEMENT OF THE CASE

On November 22, 2018, Johnathan Hoskins went to a home where he heard there was a cannabis grow operation. 11/14RP 1084.[1] Mr. Hoskins realized from the buzzing in a backyard shed that there was likely cannabis there. 11/14RP 1086. He called his friend Stanley Lee and let him know no one appeared to be home. 11/14RP 1087.

Alone, Mr. Hoskins entered the shed and saw a number of growing plants. 11/14RP 1084, 1087. He gathered cannabis plants using bags in the shed. 11/RP 1087.

Mr. Lee arrived this address with Brandon Cerna but they did not go to the shed. 11/14RP 1087. Mr. Lee and Mr. Cerna wanted to get inside the house and tried to pry open a bar on a window. 11/14RP 1089. But when their forced entry failed,

[1] The transcripts are referred to by the month and day of the proceeding. All proceedings occurred in 2022 unless otherwise noted.

they entered the shed where Mr. Hoskins was collecting cannabis plants. *Id*.

Shortly thereafter, Mr. Hoskins announced he was leaving. 11/14RP 1090. He told Mr. Lee, "I'm out," and suggested he should leave too. 11/8RP 781-82, 856. Mr. Lee did not follow this advice and continued gathering plants. 11/8RP 782.

As Mr. Hoskins was heading to his car, he noticed a motion sensor light activate and heard a voice, but could not hear what was said. 11/14RP 1091. Then he heard a noise. 11/14RP 1094. Mr. Hoskins was no longer at the property, did not know what happened, and drove away. *Id*.

The next day, Mr. Lee told Mr. Hoskins that he shot the homeowner but did not mean to do it. 11/14RP 1094. The homeowner, Kam Tam, died from a single small bullet hole in her abdomen. 10/12RP 905-08; 10/26RP 338. Her husband and son insisted they had no idea Ms. Tam was growing cannabis in the shed. 10/12RP 947, 989.

Police arrested Mr. Hoskins in April 2019, five months later, after finding his DNA on one glove in the shed. 10/26RP 104; 10/17RP 406, 410, 429-32, 433-34, 437-48. Mr. Lee and Mr. Cerna's DNA could not be excluded from some items but did not definitively match. 10/27RP 468-71.

Detective Hayden interrogated Mr. Hoskins for about five hours. 9/28RP 101. During this interrogation, Mr. Hoskins asked to leave, telling the detective he wanted to go home or to jail. 9/28RP 92-93, 95-96, 97-100; 9/29RP 146-49; Pretrial Ex. 1 at 64-65, 77, 180, 191. The detective told Mr. Hoskins she needed more information before he could go. Pretrial Ex. 1 at 64-220. The court admitted most of Mr. Hoskins' statements at trial, overruling his objection that the detective violated his right to remain silent.10/3RP 181-85.

Based on Mr. Hoskins' statements and testimony at trial, he asked the court to provide a to-convict instruction for first degree burglary and also instruct the jury on the lesser included offense of second degree burglary, as well as criminal trespass.

CP 82, 89, 96-100; 11/9RP 956-63; 11/10RP 1068-72; 11/14RP 1121-22. The court refused. 11/9RP 961-62; 11/10RP 1071-72; 11/14RP 1122.

While deliberating, the jury asked the court whether stealing cannabis constitutes a theft, in the context of a burglary. CP 131. Over Mr. Hoskins' objection, the court answered "Yes." CP 132; 11/15RP 1216-17, 1225-26, 1228. The court also attached a pattern instruction containing the definition of theft that had not been given to the jury as part of the instructions. CP 129.

Shortly after receiving this answer from the court, the jury returned its verdict, finding Mr. Hoskins guilty of felony murder in the first degree with a firearm enhancement. 11/15RP 1233; CP 132.

The court calculated Mr. Hoskins' offender score as "9." CP 271. Four of these points came from eight juvenile adjudications. CP 134, 276; 1/30/23RP 1260-62. Mr. Hoskins did not agree to this offender score. 1/30/23RP 1255.

D. ARGUMENT

1. In any case, including felony murder, an accused person has the right to a lesser included offense instruction based on the evidence viewed mostly favorably to the accused, contrary to the courts below

a. *The court must instruct the jury on a requested lesser included offense that is factually supported by the evidence*.

A person charged with a crime "has an absolute right" to receive jury instructions on a lesser included offense under certain circumstances as a matter of due process and under controlling statutes. *State v. Laico*, 97 Wn. App. 759, 764, 987 P.2d 638 (1999); *Keeble v. United States*, 412 U.S. 205, 208, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973); U.S. Const. amend. XIV; Const. art. I, §§ 3; *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005) (discussing defendant's "statutory right to

present lesser included offense instructions to the jury"); RCW 10.61.006;[2] RCW 10.61.003.[3]

A person is entitled to an instruction on a lesser or inferior degree offense when two conditions are met: (1) legally the elements of the lesser degree offense are necessary elements of the offense charged, and (2) factually the evidence supports an inference that only the lesser crime was committed. *State v. Workman,* 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The constitutional right to a lesser included offense instruction stems from the "risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes

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[2] RCW 10.61.006 provides: "[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information."

[3] RCW 10.61.003 states that when "an offense consist[s] of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense."

to avoid setting him free." *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3rd Cir. 1988). "When the evidence supports an inference that the lesser included offense was committed, the defendant has a right to have the jury consider that lesser included offense." *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

Mr. Hoskins met this criteria but the court refused to provide the lesser included offense instruction.

b. Second degree burglary is legally a lesser included offense of felony murder that is predicated on first degree burglary.

An offense is legally a lesser included offense if each element of the lesser is necessary to prove the charged offense. *Workman*, 90 Wn.2d at 447.

Mr. Hoskins was charged with first degree felony murder, predicated on committing burglary in the first degree. CP 1. Second degree burglary is an inferior degree of first degree burglary. *State v. McDonald*, 123 Wn. App. 85, 89-90, 96 P.3d 468 (2004). Second degree burglary requires a person

enter or remain in a building other than a dwelling or vehicle. RCW 9A.52.030. First degree burglary contains these same elements and adds a requirement that a participant is either armed with a deadly weapon or assaults a person. RCW 9A.52.020.

As charged here, felony murder required that in the course of committing first degree burglary, or in the immediate flight therefrom, Mr. Hoskins or an accomplice in the felony caused Ms. Tam's death. RCW 9A.32.030(1)(c).

Felony murder requires a clear causal connection between the underlying felony and the killing. *State v. Hacheney*, 160 Wn.2d 503, 513, 158 P.3d 1152 (2007). "[M]ore than a mere coincidence of time and place is necessary." *Id*. (quoting *State v. Brown*, 132 Wn.2d 529, 607, 940 P.2d 546 (1997)). For example, a theft that occurs after a killing is insufficient to prove felony murder. *Id*. at 514.

Mr. Hoskins asked the court to instruct the jury on burglary in the second degree as a lesser included offense as

well as felony murder in the second degree. CP 82, 89, 96-100; 11/9RP 959-60, 1070. Burglary in the second degree qualify as lesser included offenses of felony murder based on first degree burglary under the legal prong of the *Workman* test. The elements of these offenses are necessary to prove the offense charged.

c. The courts below did not look at the facts in the light most favorable to Mr. Hoskins, contrary to settled law.

The factual prong of the *Workman* test requires the court to examine the evidence in the light most favorable to the requesting party. *State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015). Taking the evidence in the light most favorable to the accused, the court decides only whether this evidence "raises an inference that the defendant committed the lesser crime instead of the greater crime." *Id*.

Only "some evidence" supporting the instruction is required. *State v. Coryell*, 197 Wn.2d 397, 407, 483 P.3d 98 (2021).

Here, the jury heard Mr. Hoskins' testimony at trial and his statement to the detective about the incident. This evidence must be taken in the light most favorable to him.

Mr. Hoskins went alone to the shed after he heard "around town" there was cannabis at this home. 11/14/RP 1184. He was not planning on taking any, but once there, he entered the shed and stole cannabis. 11/8RP 732-33, 765, 783, 844. He called Stanley Lee and told him no one seemed to be home. 11/14RP 1087.

Mr. Lee arrived separately with Brandon Cerna. 11/8RP 738-39; 11/14RP 1087. Mr. Lee and Mr. Cerna tried to break into the house and only went later, after they failed to enter the home. 11/8RP 853; 11/14RP 1089. Mr. Hoskins offered no aid to those efforts. 11/8/RP 854; 11/14RP 1089. He took cannabis from the shed and left when he had enough. 11/8RP 781-82; 11/14RP 1090.

Mr. Lee and Mr. Cerna did not leave when Mr. Hoskins left, even though Mr. Hoskins told them they should. 11/8RP

781-83; 11/14RP 1090. As Mr. Hoskins was heading to his car, he heard a noise. 11/14RP 1090-91. He drove away, unaware of what happened at the house. 11/14RP 1094. The next day, he learned Mr. Lee shot and killed the homeowner, Ms. Tam. *Id*.

Mr. Hoskins testified that he did not know Mr. Lee was armed. 11/14RP 1094, 1098. Although he told the detective that he knew Mr. Lee had a gun, he testified that he only learned this the day after the shooting occurred. 11/14RP 1106, 1115.

Some evidence could support a conviction for second degree burglary alone, viewed in the light most favorable to him. He entered a building without permission with the intent to take property that did not belong to him. He was unarmed and did not know about or expect any violence.

The court refused to give any lesser included offense instructions. It ruled that burglary was not a lesser included offense because if he participated in any burglary, he was necessarily an accomplice to the murder that was caused by Mr. Lee's shooting. 11/10RP 1072; 11/14RP 1222.

d. This Court should grant review due to the importance of addressing this legal issue and the scarce, conflicting Court of Appeals decisions involving felony murder.

Previously, the Court of Appeals ruled a lesser included offense instruction for the predicate felony is available in a felony murder case in *State v. Lyon*, 96 Wn. App. 447, 450, 979 P.2d 926 (1999). But here, the Court of Appeals insisted *Lyon* is limited to its unique facts. Slip op. at 11. However, the Court of Appeals analysis directly conflicts with *Lyon* and merits review under RAP 13.4(b)(3).

In *Lyon*, the defendant admitted assaulting and injuring another man who was later found dead. *Id*. at 449. He contended the death could have been caused by someone else, and requested an instruction on second degree assault, the predicate felony charged in the case. *Id*. at 449-50. The Court of Appeals agreed based on evidence of an unrelated third party's involvement. *Id*. at 450. But *Lyon*'s reasoning extends to the case at bar, contrary to the Court of Appeals.

Contrary to *Lyon*, the trial court believed no set of circumstances would permit the inferior degree instruction in a felony murder case, ruling that any commission of a predicate offense establishes felony murder. 11/10RP 1070-72. It construed the evidence in the light most favorable to the prosecution to establish Mr. Hoskins' involvement. *See* 11/10RP 1072; 11/14RP 1222.

As this Court has ruled, weighing the evidence is the jury's role, not the court's role. *Coryell*, 197 Wn.2d at 414. When "any affirmative evidence exists on which a jury could conclude that the lesser included offense was committed," the lesser included offense should be provided to the jury if requested. *Id*. The trial court and Court of Appeals did not apply this test. Both refused to view the evidence in the light most favorable to Mr. Hoskins and deemed his role in a separate burglary inherently sufficient to establish his culpability as a matter of law.

This Court should address the application of the inferior degree offense doctrine to a felony murder case based on the lack of available law and the substantial importance of this issue.

2. The trial court impermissibly commented on the evidence by affirmatively answering a key factual question the jury had to resolve.

a. The constitution prohibits a judge from commenting on the evidence.

Article IV, section 16 prohibits a judge from "conveying to the jury his or her personal attitudes toward the merits of the case" or commenting on "matters of fact" when a case is tried to a jury. *State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006); Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.").

"[A]ny remark that has the *potential* effect of *suggesting* that the jury need not consider an element of an offense could

qualify as judicial comment. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (emphasis added).

b. The court's answer to the jury's question resolved a key factual question before the jury.

The jury had to decide whether the prosecution proved Mr. Hoskins was participating in a burglary when someone to whom he was an accomplice shot and killed Ms. Tam. CP 115. The prosecutor argued to the jury Mr. Hoskins was guilty of this offense because he committed burglary by stealing cannabis.

While the jury was deliberating, it asked the court:

> In reference to Instruction No. 8 [defining burglary], is it a crime to steal marijuana when it was illegal to grow and possess in your home?

CP 131. Over Mr. Hoskins' objection, the court answered, "Yes." CP 132. It also gave the jury a new instruction defining theft, with no further explanation or argument from the parties. CP 130, 132.

The court's answer to the jury question settled the question of whether Mr. Hoskins committed burglary. It essentially told the jury Mr. Hoskins is a thief. The emphatic statement, "Yes," implied the court supported a verdict of guilt.

Mr. Hoskins objected to this answer. 11/15RP 1214, 1216. He argued the court would be commenting on a factual issue before the jury. 11/15/RP 1216. By answering, "yes," the court would be "relieving" the jurors "of their function" and "directing a verdict." 11/15RP 1216-17. Mr. Hoskins suggested the court tell the jury to review their instructions but the court refused. 11/15/RP 1214, 1226. The jury reached its verdict almost immediately after getting this information from the court.

The court's answer endorsed the very arguments the prosecution made to the jury, signaled the court agreed with the prosecutor, and resolved a factual question the prosecution needed to prove.

The Court of Appeals failed to appreciate the impact on the deliberating jury when a judge voices affirmative support for the prosecution's theory of culpability when answering a question. During deliberations, the parties have no ability to further explain their arguments. The court must avoid the suggestion that it favors a party's theory of the case. But the Court of Appeals decision endorses such judicial intervention.

This Court should grant review of this constitutional violation.

3. Where Mr. Hoskins expressed his desire to end his custodial interrogation, the police violated his right to remain silent by continuing to press him to answer their questions.

a. The police must honor a person's expressed desire to end a custodial interrogation.

Police officers must advise arrested suspects of the right to remain silent if they want to use the suspects' subsequent responses to questioning as evidence against them. *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); U.S. Const. amend. V; Const., art. I, § 9. A person's

right to cut off questioning is a "critical safeguard" of the privilege against self-incrimination. *Michigan v. Mosley,* 423 U.S. 96, 103, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975) (citing *Miranda,* 384 U.S. at 474).

If an individual's right to cut off questioning is not "scrupulously honored," then statements obtained after the suspect invoked his right to silence may not be used against him and must be suppressed at trial. *Mosley,* 423 U.S. at 104.

An accused person must invoke the Fifth Amendment right to remain silent unambiguously. *Berghuis v. Thompkins*, 560 U.S. 370, 381, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). But if the accused has made "some statement that can reasonably be construed to be an expression of a desire for [silence]," questioning must end. *Id.* A suspect's statement "that he did not want to talk," would "invoke[] his right to cut off questioning." *Thompkins,* 560 U.S. at 382.

The right to remain silent may be invoked by conduct, such as remaining silent when faced with questions, or by a

comment indicating a desire to not speak further to the police. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003).

b. Once Mr. Hoskins indicated he wanted to end the interrogation, the police were required to honor that request.

Here, Mr. Hoskins repeatedly asserted his desire to stop speaking with the detective. He told her, "I just wanna go home" when the detective said he needed to answer the questions more directly because she knew he was part of the incident. Pretrial Ex. 1 at 64. The detective acknowledged she knew he wanted to leave but, rather than pausing or even clarifying Mr. Hoskins' request to go home, the detective persisted with her questions, demanding he "start" by explaining who was with him. Pretrial Ex. 1 at 64.

Mr. Hoskins answered by repeating his desire to end the interview, saying "I just wanna go to jail," but the detective instead pressed him to "Start with something easy," and tell "your side of this," and said if he was up front about what happened perhaps he would not go to jail. *Id*.

Mr. Hoskins again repeated that he wanted to go home, and the detective said she knew he wanted to leave but she needed to know more for the victims' "babies," and "her children," and said, "come on. Tell me what went wrong." Pretrial Ex. 1 at 65; *see also Id*. at 180.

After the detective made clear Mr. Hoskins could not end the interview or leave without answering the detective's insistent questions, he began explaining some of his interaction with Mr. Lee, while saying he only knew "bits and pieces." Pretrial Ex. 1 at 65. Mr. Hoskins then again said, "I just wanna go ma'am." Pretrial Ex. 1 at 77. The detective told him, "You gotta tell me everything from top to bottom first buddy." *Id*.

Mr. Hoskins' statements indicated his intent to remain silent. *See Thompkins*, 560 U.S. at 382. Yet the police did not honor his request as required by the Fifth Amendment and article I, section 9.

The detective's questions were reasonably likely to elicit statements from Mr. Hoskins. Consequently, Mr. Hoskins' later statements to the police were not validly obtained.

c. Article I, section 9 expressly bars the police from failing to honor Mr. Hoskins' invocation of his right to remain silent.

By continuing to question Mr. Hoskins and press him for information despite his numerous statements that he wished to leave the interrogation, the police violated not only the established protections of Fifth Amendment, but the more protective requirements of article I, section 9 of the Washington Constitution.

Addressing this issue only in a footnote, the Court of Appeals refused to entertain the possibility that article I, section 9 is different from the Fifth Amendment despite the *State v. Gunwall*, 106 Wn.2d 54, 65, 720 P.2d 284 (1986) analysis presented. Slip op. at 18 n.8; *see* Opening Brief at 39-47 (*Gunwall* analysis).

Instead, the Court of Appeals contended that *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008) and *State v. Mendes*, 180 Wn.2d 188, 194, 322 P.3d 645 (2014), foreclose any independent analysis under the state constitution. Slip op. at 18 n.8. But neither *Unga* nor *Mendes* contained any mention of *Gunwall* and did not address a separate claim involving the operation of the state constitution. Those cases do not resolve this issue.

Shortly after this Court decided *Mendes*, this Court decided *State v. Piatnitsky*, 180 Wn.2d 407, 412 n.3, 325 P.3d 167 (2014), where the appellant argued article I, section 9 must be independently construed when a person indicates they wish to end police questioning. This Court declined to resolve the issue because it had not been raised in the Court of Appeals or petition for review. *Id*. If this issue had been resolved in *Unga* or *Mendes*, this Court would have said so in *Piatnitsky*. Instead, *Piatnitsky* reserved the issue for a later date.

This case is an appropriate vehicle to address whether article I, section 9 precludes the police from pressing forward with an interrogation despite a person's repeatedly expressed statements indicating they wish to end the interview, without at a minimum clarifying the person's desire. This Court should grant review.

4. The change in the law directing that most juvenile adjudications do not count in felony adult sentencing applies to Mr. Hoskins and requires resentencing.

The legislature recently forbid courts from counting most prior juvenile felony adjudications in a person's offender score calculation. Laws of 2023, ch. 415, § 2.[4] The law took effect on July 23, 2023. Because it is remedial, it applies prospectively and precludes the court from using Mr. Hoskins' prior juvenile adjudications in his standard range.

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4 https://leg.wa.gov/CodeReviser/documents/sessionlaw/2023pam2.pdf. The exceptions are for first and second degree murder along with class A felony sex offenses.

Mr. Hoskins' offender score included eight prior non-violent juvenile adjudications. CP 134, 276. These juvenile adjudications increased Mr. Hoskins' offender score by four points and significantly raised the governing standard range. CP 271; *see* RCW 9.94A.525.

The Court of Appeals relied on its own recent decision in *State v. Troutman*, 30 Wn. App. 2d 592, 598, 546 P.3d 458, *rev. denied*, 3 Wn.3d 1016 (2024), to rule that this statute does not apply to Mr. Hoskins. Slip op. at 21-22.

But a statutory amendment applies prospectively when the precipitating event for application of the statute occurs after its effective date. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). "[A] newly enacted statute or court rule will only be applied to proceedings that occurred far earlier in the case if the triggering event to which the new enactment might apply has not yet occurred." *State v. Jefferson*, 192 Wn.2d 225, 246, 429 P.3d 467 (2018) (cleaned up).

Washington courts "generally hold that when the new statute concerns a postjudgment matter like the sentence or revocation of release" the "triggering event" for the statute's application is the future sentencing. *Id*. at 247 (cleaned up). "In such a case, the new statute or court rule will apply to the sentence … while the case is pending on direct appeal, even though the charged acts have already occurred." *Id*.

The legislature determined that juvenile adjudications should not score in subsequent felony adult court sentences. The legislature enacted this change to remedy unfairness it found in the sentencing laws. Laws of 2023, ch. 415, § 1,

The amendment should apply to Mr. Hoskins' sentence, which is pending on direct appeal. *Jefferson*, 192 Wn.2d at 24. The change in the law applies prospectively to a triggering event that has not yet occurred (the termination of the appeal). Mr. Hoskins is entitled to benefit from the change in the law.

This Court should grant review and address the application of this remedial law to Mr. Hoskins.

E. CONCLUSION

Petitioner Jonnathan Hoskins respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 4415 words and complies with RAP 18.17(b).

DATED this 29th day of January 2025.

Respectfully submitted,

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APPENDIX A

FILED
12/30/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JONNATHAN RAY HOSKINS, Appellant.	No. 84939-5-I DIVISION ONE UNPUBLISHED OPINION

CHUNG, J. — Hoskins was convicted of murder in the first degree pursuant to RCW 9A.32.030(1)(c) (felony murder), predicated on burglary in the first degree. The charges were based on the shooting of Kam Tam and the burglary of a shed in her backyard, which contained a "marijuana grow operation." On appeal, Hoskins challenges the trial court's refusal to give an instruction regarding the lesser included offenses of burglary in the second degree and criminal trespass. Hoskins also assigns error to the court's response to a question from the jury, claiming it was an improper comment on the evidence. Further, he challenges the trial court's admission of his statements to police, claiming he had invoked his right to remain silent. Finally, he challenges the trial court's consideration of his juvenile adjudications in calculating his offender score and the imposition of the victim penalty assessment (VPA) in his judgment and sentence. We conclude there was no error and affirm Hoskins's conviction but remand to the trial court to strike the VPA from his sentence.

FACTS

On November 22, 2018, Yiu Lau arrived home around 11:00 p.m. and noticed that the gate to the backyard was open. He found his wife, Kam Tam, lying at their front door. Believing that Tam had passed out, Lau shouted for his son to help get her inside and to call 911. Paramedics responded to the scene and administered CPR on Tam. They discovered a puncture wound on her abdomen before declaring her deceased. An autopsy revealed that Tam was killed by a gunshot wound to the abdomen.

Seattle Police Department (SPD) also responded to the scene and found a "marijuana grow operation" in a shed located in the backyard of Tam's house. SPD also discovered safety bars pried off the house's back window, a crow bar, broken cannabis debris in the shed, a cannabis plant in the yard next door, and latex gloves.[1] Upon testing, DNA found in the gloves was linked to Hoskins.

SPD obtained video footage from the night of the shooting that showed persons walking toward the backyard of Tam's home and a car drive past her house several times. This footage also showed Tam arriving home and walking toward the side of the house near the backyard, followed by the sound of a gunshot.

[1] As the Washington Supreme Court has noted, the use of the term "marijuana" is rooted in racism, and for this reason, the Washington legislature has enacted a law to replace the term in statutes with the term "cannabis." State v. Fraser, 199 Wn.2d 465, 469 n.1, 509 P.3d 282 (2022) ("The transition from using the scientific 'cannabis' to 'marijuana' or 'marihuana' in the early 20th century stems from anti-Mexican, and other racist and anti-immigrant, sentiments and efforts to demonize cannabis."). Thus, we use the term "cannabis" in this opinion, unless quoting another source.

At trial, Hoskins testified that he learned that Tam's house contained a cannabis grow operation and that he went to the address alone to check if anyone was home. Hoskins explained that he walked by the front of Tam's house and noticed a lock on the fence, so he proceeded to the back of the house and hopped over the fence. He explained that he discovered the grow operation in a shed in the backyard and contacted his friend Stanley Lee to inform him that no one was home. Lee subsequently arrived at Tam's home with Brandon Cerna. Hoskins testified that he initially entered the shed by himself while Lee and Cerna attempted to pry the bars from the window of Tam's house, but that he redirected them to the cannabis plants. The three men then entered the shed and began to take the plants. Hoskins testified at trial that at that time, he did not have any knives or firearms and that he did not see Lee or Cerna with any weapons. However, he had told the police previously that he saw Lee with a gun that night.

Hoskins testified that he collected the cannabis plants in bags and began to leave, but "as I'm leaving, I see the light come on, the motion light . . . [and] I hear like a – a voice of some sort." Then, as Hoskins was on his way to his car, he heard a "pow" and proceeded to go home. The following day Lee called Hoskins and asked him to come over to his house, where Lee showed him a newspaper article about "a marijuana house and a murder," and that Hoskins asked what had happened. Hoskins further testified that he was unaware Lee had a firearm until he spoke with him the next day.

On April 15, 2019, SPD officers arrested Hoskins and brought him in for questioning. Detective Patricia Hayden read Hoskins his Miranda[2] rights, and he confirmed that he understood them. During the course of questioning, Detective Hayden explained that she had surveillance footage and other evidence that suggested Hoskins was at Tam's house. Throughout the nearly five-hour interrogation, Detective Hayden and Hoskins discussed topics including his knowledge that Tam's house contained a cannabis grow operation and his involvement in the burglary of her home. About 65 minutes into the interview, when Detective Hayden prompted Hoskins that a woman had died on the evening of the burglary and that she needed his honesty, the following exchange occurred:

> HOSKINS: I just wanna go home.
>
> DET. HAYDEN: I realize that. She'd wanna go home, but she doesn't have that choice anymore. Who was there with you? Start with that.
>
> HOSKINS: I just wanna go to jail.
>
> DET. HAYDEN: I'm not sure you—you're supposed to be going to jail. That's why I'm askin' for your side of this. I don't wanna put the wrong person in jail. You were there. You know who was there.

Hoskins informed Detective Hayden that he had "every intention of leavin[g]" the police station and that he did not know what happened to Tam or what "went wrong." Eventually, Hoskins divulged what he knew about the events that had taken place.

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

The State charged Hoskins with murder in the first degree predicated on burglary in the first degree during which he or one of his fellow participants caused the death of Kam Tam in violation of RCW 9A.32.030(1)(c) (felony murder). The jury convicted Hoskins as charged and also returned a special verdict finding that Hoskins was armed with a firearm at the time of this crime.

The court sentenced Hoskins to 471 months of incarceration and imposed a $500 VPA. Hoskins timely appeals.

DISCUSSION

Hoskins challenges the following on appeal: (1) the trial court's refusal to provide a lesser included offense instruction to the jury; (2) the trial court's answer to a jury question as an impermissible comment on the evidence; (3) the trial court's admission of his statements to police officers; (4) the trial court's use of his juvenile adjudications in calculating his offender score; and (5) the trial court's imposition of the VPA despite his indigency.

I. Denial of Lesser Included Offense Instruction

At trial, Hoskins requested a lesser included offense jury instruction that stated, "If, . . . you are not satisfied beyond a reasonable doubt that the defendant is guilty of Burglary in the First Degree, then you will consider if the defendant is guilty of a lesser crime of Burglary in the Second Degree." He also sought an instruction for criminal trespass.[3] However, the court rejected these requested instructions. Instead, it provided a "to convict" instruction only on

[3] The following analysis regarding a lesser included instruction for burglary in the second degree also applies to criminal trespass because unlike both of those crimes, as charged here, burglary in the first degree required proof that the defendant was armed with a deadly weapon.

felony murder predicated on burglary in the first degree, as well as an instruction defining burglary in the first degree. The court reasoned it was not "appropriate to instruct the jury on a lesser regarding the burglary charge [because] Mr. Hoskins [was] charged with murder in the first degree – specifically, felony murder," and during Hoskins's interrogation with Detective Hayden, he admitted being at the Tam house, taking cannabis plants, and "knowing that . . . Stanley Lee had a gun with him." Therefore, the court reasoned that "burglary in the second degree, just like criminal trespass, are not lessers to the [charge of] Murder I."

Hoskins contends that he is entitled to a new trial because the trial court erred by refusing to provide the requested lesser included offense instructions. He argues that burglary in the second degree is necessarily an inferior degree of burglary in the first degree, and, therefore, it is a lesser included offense of felony murder in the first degree predicated on burglary, and such instruction is factually supported by the evidence.

RCW 10.61.006 provides that "the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information."[4] Thus, a defendant is entitled to an instruction for a lesser included offense when (1) all elements of the lesser offense are necessary elements of the charged offense (legal prong) and (2)

[4] RCW 10.61.003 provides that "the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense." A defendant can request an instruction for a lesser *included* offense or a lesser *degree* offense (inferior degree offense). State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

The difference between the two instructions is that " '[u]nlike a lesser *included* offense, an [inferior] *degree* offense may have an element that is not an element of the greater offense.' " State v. Coryell, 197 Wn.2d 397, 411, 483 P.3d 98 (2021) (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.11 cmt. at 99 (4th ed. 2016) (WPIC)).

where the evidence supports an inference that the lesser offense was committed (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).[5] In other words, "if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime." State v. Berlin, 133 Wn.2d 541, 546 n.1, 947 P.2d 700 (1997) (quoting State v. Frazier, 99 Wn.2d 180, 191, 661 P.2d 126 (1983)). "A lesser offense will seldom satisfy every statutory alternative means of committing the greater offense." Berlin, 133 Wn.2d at 548. Therefore, we apply "the lesser included offense analysis . . . to the offense[] as charged and prosecuted, rather than to the offense[] as [it] broadly appear[s] in [the] statute." Id.

On appeal, the standard of review for jury instructions depends on the basis for the trial court's decision. State v. Condon, 182 Wn.2d 307, 315, 343 P.3d 357 (2015). A trial court's decision based on a factual determination is reviewed for an abuse of discretion, while a legal determination is reviewed de novo. Id. at 315-16. When determining if the evidence was sufficient to support the instruction, the appellate court should view the supporting evidence in the light most favorable to the party that requested the instruction. State v. Henderson, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015). "[A] requested jury instruction on a lesser included or inferior degree offense should be administered 'if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.' " State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting State v. Warden, 133 Wn.2d 559,

[5] The State does not directly respond to Hoskins's argument as to the legal prong under Workman and focuses instead on the factual prong.

563, 947 P.2d 708 (1997)). Thus, we review a determination on the second Workman prong, whether the evidence supports an inference that the defendant committed the lesser offense, for abuse of discretion. Condon, 182 Wn.2d at 316.

Hoskins was charged with felony murder predicated on burglary in the first degree under a theory of accomplice liability. A person is guilty of felony murder, that is, murder in the first degree pursuant to RCW 9A.32.030(1)(c), when they commit a burglary in the first degree and "in the course of or in furtherance of such crime or in immediate flight therefrom, [they], *or another participant*, causes the death of a person." (Emphasis added.)[6] A person is guilty of burglary in the first degree when:

> with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor *or another participant* in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020 (emphasis added). By contrast, a person is guilty of burglary in the second degree when, "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030.

Hoskins argues that burglary in the first degree and second degree are lesser included offenses to felony murder because burglary in the first and

[6] Under this statute, a defendant who is not the only participant in the crime may argue as a defense that they (i) did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and (ii) were not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and (iii) had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and (iv) had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury. RCW 9A.32.030(1)(c)(i)-(iv).

second degrees share the same elements, except for the additional element for burglary in the first degree that the person be "(a) armed with a deadly weapon, or (b) assaults any person." RCW 9A.52.020. Therefore, Hoskins asserts, because all of the elements of burglary in the second degree are necessary to prove burglary in the first degree, they also are necessary to prove the predicate offense for felony murder as charged, so a lesser included offense instruction was required. Hoskins is correct that each of the elements of burglary in the second degree are "necessary element[s]" of burglary in the first degree.

However, under the factual prong of the Workman analysis, the evidence must support an inference "that *only* the lesser offense was committed, to the exclusion of the greater, charged offense." Condon, 182 Wn.2d at 316. Hoskins contends that viewed in the light most favorable to him, there is "some evidence" supporting an inference that he committed only the lesser crime of burglary in the second degree. Specifically, he testified that he had heard there was cannabis at this home and initially did not plan on committing a theft, but once there, he entered the shed and stole cannabis and also called Lee to tell him the Tam home appeared vacant. According to Hoskins, Lee and Cerna arrived separately and tried to break into the house before going to the shed, but Hoskins did not aid them in this endeavor and left after taking cannabis from the shed. Hoskins claims Lee and Cerna did not leave when he did, even though he told them they should go also. He claims he was on his way to his car when he heard a "feminine" voice and a "pow," but did not learn about the shooting or that Lee was armed until the next day.

The State responds that even when viewing the evidence in the light most favorable to Hoskins, a jury would not conclude that he committed only burglary in the second degree rather than felony murder because "either Hoskins or an accomplice was indisputably armed with a deadly weapon," which is required for the predicate offense. We agree with the State.

One of the elements required to prove Hoskins committed the predicate crime of burglary in the first degree was that he—or an accomplice in the crime—was armed with a deadly weapon. Though Hoskins knew that Lee was usually armed with a firearm, he claims on the night of the shooting, he did not know Lee had a gun. The State's theory was that Hoskins was an accomplice to Lee, who shot Tam and caused her death in the course of committing burglary in the first degree. To be convicted as an accomplice, the defendant need not have knowledge of each element of the principal's crime. State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). When an accomplice agrees "to participate in a criminal act, [they] run[] the risk of having the primary actor exceed the scope of the preplanned illegality." State v. Davis, 101 Wn.2d 654, 658, 682 P.2d 883 (1984) (affirming conviction for first degree robbery despite defendant's asserted lack of knowledge that the principal was armed with a deadly weapon, because such knowledge was not needed to prove accomplice liability). Thus, the defendant need not know that the principal is carrying a weapon to be convicted as an accomplice to burglary in the first degree.

Nevertheless, Hoskins argues that when there is some evidence to show that the defendant "committed a predicate felony but was not involved in that

offense at the time [the] death occurred," they are entitled to a lesser included offense instruction, citing State v. Lyon, 96 Wn. App. 447, 450-52, 979 P.2d 926 (1999). In Lyon, the defendant admitted to assaulting the victim and was charged with murder in the second degree of the victim, but requested an instruction for assault in the second degree based on his evidence that a different person proximately caused the victim's death. 96 Wn. App. at 449. The trial court refused to give the assault in the second degree instruction. Id. We reversed the trial court, holding that while felony murder cases typically do not satisfy the factual prong of Workman, the jury could have concluded that the victim's death resulted from an assault by an unrelated third party and not the defendant's assault of the victim. Id. at 450-51. Therefore, we held that the court erred by refusing the lesser included instruction for assault in the second degree. Id. at 451.

Hoskins's reliance on Lyon is misplaced. Unlike in Lyons, where the evidence indicated that the victim's death may have been caused by a third party during a separate assault from the one to which Lyon admitted, here, the evidence does not support an inference that Tam was killed during a separate, unrelated burglary committed by someone other than Hoskins or an accomplice. Rather, Hoskins admitted he unlawfully entered Tam's backyard and shed and called Lee to tip him off that no one appeared to be at the home. He also admitted to being at Tam's house with Lee and Cerna and that they all stole cannabis from the shed. Hoskins further testified that he saw the motion-activated light and heard a woman's voice, then heard a "pow" as he was going

to his car. To be liable as an accomplice, a person " 'need not be physically present at the commission of the crime . . . [if the accomplice] did something in association with the principal to accomplish the crime.' " State v. Jackson, 137 Wn.2d 712, 731, 976 P.2d 1229 (1999) (quoting State v. Boast, 87 Wn.2d 447, 455-56, 553 P.2d 1322 (1976)). No rational jury could find from this evidence that Hoskins committed his own separate burglary rather than act in association with Lee, when after Hoskins arrived at Tam's home, he called Lee, and Lee and Cerna joined him in entering Tam's shed and removing cannabis plants. By agreeing to participate in the burglary, Hoskins "r[a]n[] the risk of having [Lee] exceed the scope of the preplanned illegality." Davis, 101 Wn.2d at 658.

We conclude that Hoskins failed to present some evidence upon which a jury could rationally find that he committed only the lesser crime of burglary in the second degree or criminal trespass, and, therefore, was not an accomplice to burglary in the first degree as a predicate for felony murder. The trial court did not err in refusing to grant Hoskins's request for a lesser-included instruction.[7]

II. Court's Answer to Jury Question

Hoskins argues that the trial court impermissibly commented on the evidence in violation of article IV, section 16 of the Washington Constitution when it answered a jury question that included factual information that was for the jury to resolve. He further contends that because this error was not harmless, he is

[7] Hoskins makes two tangential arguments. First, he implies that because he ended his involvement and did not expect violence he could not be convicted of burglary in the first degree. Hoskins does not provide authority to support this argument, so we need not consider it. RAP 10.3(a)(6). Second, Hoskins suggests that although he did not request it, his case would have satisfied the statutory defense to felony murder, because he was not armed, did not encourage violence, and ended his involvement before a death occurred. But Hoskins did not assert this statutory defense at trial. Therefore, we do not consider it on appeal. RAP 10.3.

entitled to a new trial.

A judge is not permitted to "charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH. CONST. art. IV, § 16. Additionally, a judge impermissibly comments on the evidence when they convey "a personal attitude toward the merits of the case," such that the jury can infer that the judge believed the evidence or testimony. State v. Ratliff, 121 Wn. App. 642, 646, 90 P.3d 79 (2004). Judges are also prohibited from "instructing a jury that 'matters of fact have been established as a matter of law.' " State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). So, a comment that "has the potential effect of suggesting that the jury need not consider an element of an offense" could constitute an impermissible judicial comment. Id.

For example, in Becker, the trial court gave the jury a special verdict form that stated that a particular facility was a "school," for purposes of a sentencing enhancement. 132 Wn.2d at 65. Given that the defendant had presented "considerable evidence" that the facility was not a "school," id. at 58, the Washington Supreme Court held that the special verdict form was an improper comment on the evidence because it removed a disputed issue of fact from the jury's consideration. Id. at 65.

However, when a jury instruction is merely an accurate statement of the law, it is not an impermissible comment. State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). For example, in State v. Jain, we held that a jury instruction stating that " 'Specified unlawful activity' means the commission of the crime of

Delivery of a Controlled Substance" was not an impermissible comment on the evidence. 151 Wn. App. 117, 130, 210 P.3d 1061 (2009). Rather, it was a straightforward legal instruction that did not "direct the jury to find that specified unlawful activity had occurred, only that the specified unlawful activity at issue . . . was delivery of a controlled substance." Id. Similarly, in State v. Frederick, the trial court did not impermissibly comment on the evidence by answering "no" to a jury question that asked, "Does the law preclude a knife of less than three inches of being a deadly weapon?" 32 Wn. App. 624, 625-26, 648 P.2d 925 (1982). We reasoned that because the response "was legally correct" and "suggested no additional or improper meaning," it was not improper. Id. at 626.

Here, while the jury was deliberating, it submitted a written question to the court asking, "In reference to [jury] instruction no. 8, is it a crime to steal mariju[a]na when it is illegal to grow and pos[s]ess in your home?" Instruction No. 8 stated, "A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon." The State asked the court to respond "yes," arguing that this question was a legal question and that it was permissible for the court to answer. Hoskins asked the court simply to refer the jury to their instructions. He argued that the jury was trying to make a factual determination about whether the act was a theft and that responding "yes" was "relieving [the State] of its

function"—i.e., its burden to prove each element beyond a reasonable doubt. The court followed the State's suggestion and responded "yes," reasoning that it was its duty to "ensure that the jury understands the law" and that referring the jury back to its instructions was not sufficient when the jury misunderstands the law.

On appeal, Hoskins argues that whether he committed a burglary, including whether he had the intent to steal cannabis, was a central issue for the jury to determine, pointing in support to the prosecutor's question to Hoskins on cross-examination, "So you know it's not likely that the owners of a marijuana grow operation are going to call the police about someone trying to steal their marijuana, correct?" By contrast, the State argues that the trial court's response to the jury's question was "a neutral, accurate statement of the law" and that in the context of the whole case, because it was undisputed that stealing illegally grown cannabis is a crime, the court's answer did not promote the State's theory of the case.

We agree with the State. The court's response to the jury question was a legally correct response to a legal question. While the jury question itself asked, "is it a crime to steal mariju[a]na when it is illegal to grow and possess [it] in your home," the factual question for the jury to determine, as stated in instruction no. 8, was whether Hoskins "enter[ed] or remain[ed] unlawfully in a building with intent to commit a crime against a person or property therein." Like the special verdict form in Jain, 151 Wn. App. at 130, the jury's question here did not "direct the jury to find that specified unlawful activity had occurred," but rather, that stealing cannabis was the specified crime that the State alleged Hoskins had the

intent to commit. As in Frederick, 32 Wn. App. at 625-26, where the jury's question mentioned a fact that was not required to be proven—a blade of less than three inches—here, the response "was legally correct" and "suggested no additional or improper meaning." Answering "yes" did not suggest that the State was required to prove that it was illegal for Tam to grow and possess cannabis in the shed.

In sum, while the jury's question referenced facts from the case—"illegally grown marijuana"—the trial court's response was a correct statement of the law: it is a crime to steal cannabis, regardless of whether it is legally grown. We hold that the court's answer to the jury's question was not an impermissible comment on the evidence.

III. Right to Remain Silent

The trial court concluded that Hoskins did not unequivocally invoke his right to remain silent and made a voluntary, knowing, and intelligent waiver of those rights and admitted statements he made to Detective Hayden.

Hoskins argues that he is entitled to a reversal of his conviction because he indicated he wished to cease the interrogation, so the trial court improperly admitted his subsequent statements. Specifically, he argues that both the federal and state constitutions require police to honor a detained person's expressed desire to stop the interrogation, and the police failed to do so here. He further argues that article I, section 9 of the Washington Constitution goes beyond the federal constitution and requires police to clarify and honor an invocation of a

detained person's right to remain silent, which in this case, the State did not do. We disagree and hold that the trial court did not err by admitting his statements.

The federal constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Thus, when a person is subject to a custodial interrogation they must be advised of the constitutional right to remain silent. Miranda, 384 U.S. at 479. Once the detained person asserts their right to remain silent, the interrogation must stop. Id. at 473-74. If the police fail to "scrupulously honor" the detained person's invocation, the government cannot use any statements made after the invocation against them. Michigan v. Mosley, 423 U.S. 96, 103, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

A detained person must unambiguously invoke their right to remain silent for these protections to flow. Berghuis v. Thompkins, 560 U.S. 370, 381, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). The right to remain silent can be invoked by remaining silent "in the face of repeated questioning over a period of time," when "under the totality of the circumstances, the invocation is clear and unequivocal." State v. Hodges, 118 Wn. App. 668, 671-73, 77 P.3d 375 (2003). An invocation of the right to remain silent is unequivocal when a "reasonable police officer in the circumstances" would understand it as such. State v. Piatnitsky, 180 Wn.2d 407, 411-13, 325 P.3d 167 (2014) (quoting Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)). When evaluating whether an invocation was unambiguous, it is necessary that courts consider the plain language of the statement and the circumstances of the alleged invocation.

Smith v. Illinois, 469 U.S. 91, 98, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984). But if the detained person makes an equivocal or ambiguous statement, the police are not required to clarify if they intended to invoke or end the interrogation. Berghuis, 560 U.S. at 381 (holding that a detained person's statement that they "did not want to talk" would be a sufficient invocation).[8]

Additionally, a detained person can waive the right against self-incrimination when such waiver is voluntary, knowing, and intelligent. Miranda, 384 U.S. at 444. We review whether a defendant unequivocally invoked his right to remain silent de novo because it is a mixed question of law and fact. State v. Rankin, 151 Wn.2d 689, 709, 92 P.3d 202 (2004).

Hoskins contends that he expressed his desire to cease the interrogation by stating "I just wanna go home," and "I just wanna go to jail" in response to being questioned by Detective Hayden, but that this invocation was not honored. He asserts that his statements "I just wanna go home," "I just wanna got to jail," "I just wanna go ma'am," and "I ain't got nothin' else to say ma'am" all indicate that he wanted to remain silent. Further, he argues that he began to answer questions only because Detective Hayden failed to scrupulously honor his invocations and made it clear that he could not end the interrogation or leave

[8] Hoskins argues in the alternative that an analysis under State v. Gunwall, 106 Wn.2d 54, 65, 720 P.2d 808 (1986), leads to the conclusion that article I, section 9 of the Washington Constitution, which protects a person from being compelled "to give evidence against [them]," is more protective than the federal constitution. Hoskins contends that he "repeatedly convey[ed] his desire to go home, or go to jail," which indicated his intent to cease questioning, and that under the article I, section 9, Detective Hayden was permitted only to clarify this invocation. But our state Supreme Court has held that the protection provided by article I, section 9 "is coextensive with that provided by the Fifth Amendment." State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008); see also State v. Mendes, 180 Wn.2d 188, 194, 322 P.3d 791 (2014) ("we interpret these two constitutional provisions consistently") (citing Unga, 165 Wn.2d at 100). Therefore, no Gunwall analysis is necessary here.

without answering her questions. He also claims that under Mosley and Rhode Island v. Innis, the police had a duty not to attempt to elicit or encourage him to make additional comments or incriminating responses, and it did not satisfy this duty. See Mosley, 423 U.S. at 100 (explaining that Miranda bars any form of compulsion); Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (noting that Miranda protections can extend to words or actions that were reasonably likely to elicit an incriminating response).

The State contends Hoskins did not unambiguously invoke his right to silence because his statements were equivocal and the police did not have an obligation to explore equivocal statements to determine if he was invoking his right to remain silent. We agree with the State.

Here, under the objective standard outlined in Piatnitsky, 180 Wn. 2d at 411-13, a reasonable officer in the circumstances likely would not have understood Hoskins's statements "I just wanna go home," or "I just wanna go to jail," as an unambiguous invocation of his right to remain silent. At the CrR 3.5 hearing, Detective Hayden testified that Hoskins was "articulate enough in this interview" to have invoked his right to remain silent "if that's what he wanted to do." She further testified that she did not interpret Hoskins's statement that he wanted to go home as an indication that he did not want to speak with her.

In the trial court's unchallenged findings after the CrR 3.5 hearing,[9] it found that Hoskins was advised of and confirmed his understanding of his

[9] Hoskins does not challenge the trial court's findings of fact, so they are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (unchallenged findings are verities on appeal).

Miranda rights and that "[w]ithout requesting an attorney Mr. Hoskins voluntarily continued answering [Detective Hayden's] questions." Further, it found that although Hoskins made statements to the effect of "I just wanna go home," he never asked for an attorney and "did not cease speaking with Det. Hayden but instead remained engaged in the conversation and continued to answer questions." Additionally, the trial court found that the only time Hoskins stated that he had nothing else to say was after Detective Hayden left the room and that nothing indicated she heard the statement.

The interrogation transcript reveals that Detective Hayden and Hoskins were discussing his whereabouts on the night of Tam's death for over an hour before he first stated, "I just wanna go home," and "I just wanna go to jail." Three minutes later Hoskins again said, "I just wanna go home." Hoskins then proceeded to answer Detective Hayden's questions about the crime and the other participants for more than two hours before he said, "I just wanna . . . go on my way," and "I wanna go home to my wife." Then Hoskins again continued to answer clarifying questions for nearly forty minutes until Hayden left the room. At that point, although Detective Hayden was not present, Hoskins stated, "I ain't got nothin' else [to] say ma'am." However, several minutes later when Detective Hayden re-entered the room, Hoskins did not repeat his statement that he had nothing else to say, but again answered her clarifying questions for nearly 35 minutes until Detective Hayden concluded the interview. We hold that given the trial court's unchallenged CrR 3.5 findings, Hoskins knowingly and voluntarily waived his Miranda rights by responding to questions, and did not

unambiguously invoke his right to remain silent. Further, according to Berghuis, 560 U.S. at 381, Detective Hayden was not required to clarify his equivocal statements expressing the desire to go home. Therefore, the court did not err by admitting evidence of Hoskins's statements during the interview with Detective Hayden.

IV. Juvenile Adjudications in Calculating Offender Score

When the trial court calculated Hoskins's offender score, it counted Hoskins's eight juvenile adjudications. Hoskins argues that a recent change in the law that bars courts from using juvenile adjudications to calculate an adult offender score applies, so he is entitled to a resentencing hearing. We disagree.

On appeal, we review the calculation of an offender score de novo. State v. Schwartz, 194 Wn.2d 432, 439, 450 P.3d 141 (2019). The legislature recently amended RCW 9.94A.525 to provide that effective July 23, 2023, Title 13 RCW (juvenile adjudications), "which are not murder in the first or second degree or class A felony sex offenses," must not be considered in calculating an adult offender score. LAWS OF 2023, ch. 415, § 2. "Sentences imposed under the [Sentencing Reform Act (SRA)] of 1981, ch. 9.94A RCW, 'are generally meted out in accordance with the law in effect at the time of the offense. See RCW.9.94A.345; RCW 10.01.040.' " State v. Troutman, 30 Wn. App. 2d 592, 598, 546 P.3d 458 (quoting State v. Jenks, 197 Wn.2d 708, 714, 487 P.3d 482 (2021)), review denied, 3 Wn.3d 1016, 554 P.3d 1217 (2024).

This court has held that the amendment to RCW 9.94A.525 does not apply retroactively and that "under the SRA, RCW 9.94A.345, and the savings

clause, RCW 10.01.040, the law in effect at the time of the offense applies to [a defendant's] sentence." Troutman, 30 Wn. App. 2d at 599-600. Based on Troutman, we reject Hoskins's claim that the amended RCW 9.94A.525 applies. Because Hoskins's offense was committed in 2018, the law at the time of his sentence required the trial court to count juvenile adjudications in calculating his offender score.

V. VPA

Hoskins requests that we strike the VPA because he is indigent, and RCW 7.68.035 prohibits courts from imposing the VPA when the defendant is indigent pursuant to RCW 10.01.160(3). The State does not object. The 2023 amendment to RCW 7.68.035 took effect on July 1, 2023. LAWS OF 2023, ch. 449, § 1. The 2023 amendment, RCW 7.68.035(4), applies to matters pending on direct appeal. State v. Ellis, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). We therefore remand to strike the VPA from Hoskins's judgment and sentence.

CONCLUSION

We affirm Hoskins's conviction, but remand to strike the VPA from his judgment and sentence.

Chung, J.

WE CONCUR:

Coburn, J.

Hazelrigg, ACJ

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84939-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: January 29, 2025

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