NO. 84939-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JONNATHAN HOSKINS,

Appellant.

APPEAL FROM KING COUNTY SUPERIOR COURT

THE HONORABLE NICOLE GAINES-PHELPS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. In this felony-murder prosecution, did the trial court properly decline to instruct the jury on a lesser-included offense of second-degree burglary?

2. Did the trial court properly answer a jury question about the law without commenting on the evidence? Was any error harmless?

3. Did the trial court properly admit Hoskins' statements to police because Hoskins did not unequivocally invoke his right to silence? Do the state and federal constitutions provide identical protection in this context?

4. Did Hoskins' offender score properly include prior juvenile convictions because recent changes in the law are not retroactive?

5. Should this Court remand for the ministerial task of striking the Victim Penalty Assessment from the judgments and sentence?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

In November 2018, Kam Tam lived in South Seattle with her husband, Yiu Chung Lau, and their 16-year-old son, Martin. 10/12RP 920, 964-65. Their house was divided horizontally into two separate living units — a front unit facing the street and a rear unit facing the backyard. 10/12RP 923-24, 967. Tam and her family lived in the rear unit, accessible by a side door at the end of a narrow path along the south side of the house. Id. at 931. The property, including a cement parking area in front, was enclosed by a fence. Id. at 931-32, 968. The backyard had a shed, also inside the fence. Id. at 932, 968.

In the front of the property, two gates allowed access — a small gate to push open and walk through and a second gate that rolled aside to allow cars into the parking area. Id. at 935-36, 970-71. Both gates were padlocked. Id. at 971-72.

About 10:30 p.m. on November 22, 2018, Martin returned home to find neither of his parents' cars there.

10/12RP 940-41. He went to his room to listen to music, but soon heard a loud bang in the backyard and thought he heard faint crying. Id. at 941-43. Martin was scared and looked out the windows but did not see anything. Id. at 942-43. Martin called his mother's phone, but she did not answer. Id. at 943. He called his father, but when he answered, Martin did not want to worry him, so he just asked his father when he would be home. Id. Martin stayed inside and did not open the door. Id. at 943-44.

Martin's father, Yiu Lau, came home shortly after 11 p.m. 10/12RP 976. He saw that his wife's car was parked in its usual spot in front of the house, inside the gated fence. Id. Lau discovered that the smaller gate was pushed open and the lock was missing, and then saw his wife on the ground at the end of the path along the side of the house. Id. at 977-78.

Lau banged on the door and yelled to Martin for help. 10/12RP 944, 979. They took Tam inside and called 911, thinking she had fainted. Id. at 944-45, 979. Firefighters

arrived and performed CPR. 10/13RP 1003; 10/26RP 195. They discovered a small, round puncture in Tam's abdomen, consistent with a gunshot wound. 10/13RP 1004; 10/26/RP 207-08, 226. Tam died at the scene. 10/26RP 337.

During Tam's autopsy, the medical examiner discovered a hollow-point bullet in Tam's abdomen that had lacerated Tam's aorta, causing a quick death by internal bleeding. Id. at 331-34, 337.

Police at the scene found a window screen lying below one of the back windows of the house and a set of security bars lying in the grass. 10/13RP 1008; 10/17RP 65, 138. Another set of security bars, still on the window, was crooked, as if tampered with. 10/13RP 1008; 10/26RP 211.

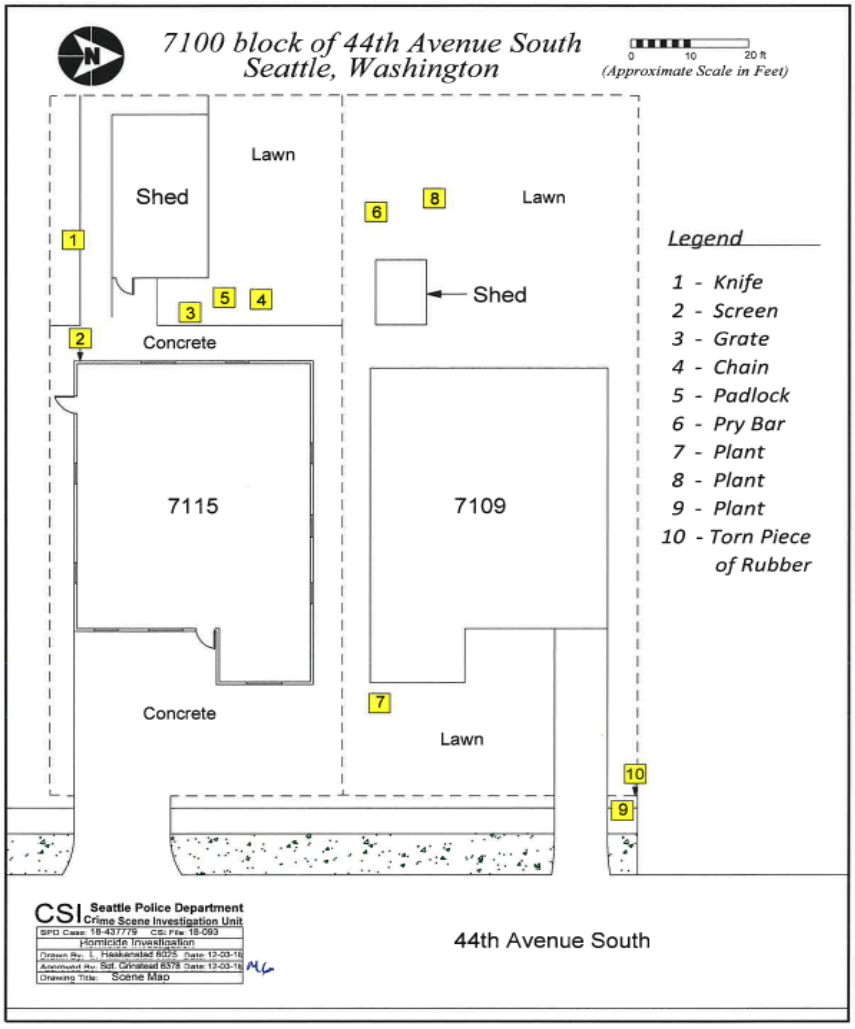
The police also found a length of chain and a cut padlock in the backyard. 10/17RP 85-86, 139-40. A crowbar was found in the neighboring yard. 10/17RP 70-71, 86, 140; 10/26RP 232-33. A fixed-blade knife was found along the property's south fence, next to the shed. 10/17RP 81-84.

Several cannabis plants were discovered in front and back of the neighboring yard. 10/17RP 76-76, 80; 10/26RP 232-33.

Officers could smell cannabis wafting from the shed, which had a heavy chain and padlock on the door. 10/26RP 1008. The shed had been partitioned into several rooms and contained cannabis plants in various stages of growth. Ex. 9; 10/17RP 31-33, 37, 93-100, 161.

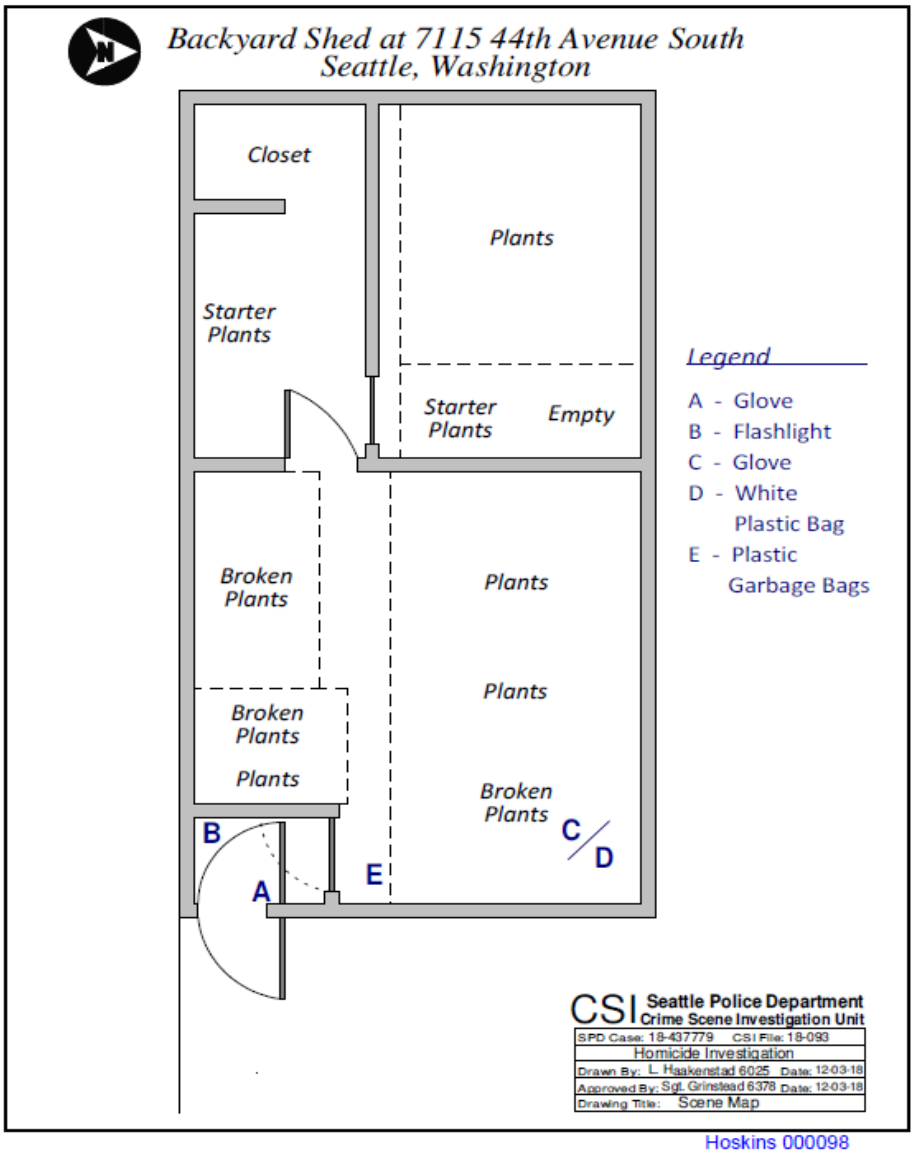
Police found a blue rubber glove and flashlight in the entryway of the shed. 10/17RP 90, 92-93, 147-50. They found another rubber glove deeper inside the shed, next to a plastic bag. Id. at 102, 104. The second glove was torn, with a piece missing. Id. at 151-52. A torn piece of blue rubber consistent with the torn glove was found next to a broken cannabis plant on the northeast side of the neighboring home. 10/17RP 81, 153-54; 10/27RP 464. Drying racks holding cannabis were found in the front unit of Tam's house. 10/17RP 163-64.

Exhibit 8 of the evidence in this case is a to-scale diagram of Tam's house (7115 44th Avenue South), and the neighboring property, depicting where evidence was found. 10/12RP 920, 964-65; 10/17/RP 30-31.



Hoskins 000094

Exhibit 9 is a to-scale diagram of the interior of Tam's shed and the items discovered inside. 10/17RP 31-32.



Hoskins 000098

Detectives did not find a shell casing. 10/13RP 1054-55; 11/7RP 523-26. In canvassing the neighborhood for security-video footage, they collected relevant video from two cameras at the house across the street from Tam's and a camera at a house at the end of the block, on the corner of 44th Avenue and South Myrtle Street. 10/13RP 1055-56, 1058, 1065-68, 1088-89; 11/7RP 526.

One of the cameras from the house across the street captured video at 10:11 p.m. showing a person walking back and forth in front of Tam's house. Ex. 7; 10/13RP 1098-1100. Then, at 10:18 p.m., the Myrtle Street camera captured a vehicle parked with its headlights off, then a person got out of the car holding something with a light. Ex. 7; 10/13RP 1090, 1093-98. Video showed that person and another walking south from the car along 44th Avenue toward Tam's house. Ex. 7; 10/13RP 1096-97. Seconds later, the camera across the street from Tam's house captured those same people, one carrying a lighted object, walking into the camera's view from the

direction of the parked car. Ex 7; 10/13RP 1101-02. The camera showed that both had entered the gated area in front of Tam's house within a minute. Ex. 7; 10/13RP 1103.

About 17 minutes later, at 10:36 p.m., one of the cameras across the street showed Tam's car pull up to the house, the gate open, and Tam's car park in front of the home inside the gated area. Ex. 7; 10/13RP 1104-06, 1111. The camera showed that at 10:38:04 p.m., someone (presumably Tam) walked from the driver's side of Tam's car toward the south side of the house. Ex. 7; 10/13RP 1106. Yelling and a gunshot was recorded on the camera just before 10:39 p.m. Ex. 7; 10/13RP 1107, 1112.

Meanwhile, the camera from the house on Myrtle Street showed that at 10:37:58 p.m., the parked car turned around and drove south on 44th Avenue. Ex. 7; 10/13RP 1115. It was then seen on the cameras across from Tam's house passing in front of Tam's house two seconds later, at 10:38 p.m. Ex. 7; 10/13RP 1106-07, 1111. Then, immediately after the gunshot,

the same car passed back in front of Tam's house again, going the other direction. Ex. 7; 10/13RP 1112-14. The car stopped and backed up, and a person carrying something large ran toward it from alongside the neighboring house directly north of Tam's house (the neighboring house shown on the above diagram, Ex. 8). Ex. 7; 10/13RP 1108-09, 1112-14. The car then drove north on 44th and turned left onto Myrtle Street. Ex. 7; 10/13RP 1116.

At 11:02 p.m., the camera across the street from Tam's house showed Yiu Lau returning home, parking his car, and entering the gate. Ex. 7; 10/13RP 1124-25. The video showed the fire department arriving at 11:13 p.m. Ex. 7; 10/13RP 1126.

Hoskins' DNA was found on both gloves and the torn glove piece found at the northeast corner of the neighboring home — the same spot where the video showed someone running with a large item to the waiting vehicle. Ex. 8; 10/13RP 1108-09, 1112-14; 10/17RP 146-48, 151-54; 10/26RP 279-81, 288-89, 297-97; 10/27RP 405-09, 429-40.

Hoskins was arrested in April 2019 after the DNA match and was interviewed by Seattle Police Detective Patricia Hayden. Ex. 53 (transcript); Ex. 54 (video and audio recording); 11/8RP 633.

Hoskins denied recognizing Tam, her family, or her house, and denied having any reason to have been at the house on 44th Avenue. Ex. 53, at 7-10. When Hayden told Hoskins that someone was hurt during a burglary and that surveillance placed him there, Hoskins then said that he could not say for sure whether he was ever there. Id. at 19-20.

When told that the burglary happened on Thanksgiving, Hoskins insisted he was with his family and kids the entire day and evening. Ex. 53, at 23, 25-27, 38-39, 52-53. Hoskins claimed that he never heard anything about Tam's house containing cannabis. Id. at 36. He insisted he had never been to the home and never heard about a burglary. Id. at 37.

Detective Hayden finally told Hoskins that Tam was dead, and said she knew Hoskins had been there. Ex. 53, at 61-

62. Hayden told Hoskins, "No more bullshit," and asked him how "it was supposed to go" and "how it went wrong." Id. at 62. When Hayden told Hoskins that she knew he had not acted alone, Hoskins said that he had received a call about the house as a place to "hit," and had agreed to go and "scope" it out. Id. at 64-67. Hoskins remained evasive, but finally admitted he had walked back and forth by Tam's house and saw a padlock on the front gate. Ex. 53, at 71-76, 78-79. Hoskins said that he went to the back of the house, through a church parking lot behind the home, and looked over the back fence.[1] Ex. 53, at 80-81. Hoskins heard "buzzing" and became sure that the house was a "weed house." Id. at 82.

Hoskins said he hopped the fence into the backyard. Ex. 53, at 82. He put his head to the back window of the house to see if anyone was home. Id. at 85-86. Hoskins claimed he

[1] The back fence was wooden, unlike the rest of the enclosure that was chain-link, and thus see-through. Ex. 53, at 113; 10/17RP 63-64, 67.

called and told a "friend" that no one was home but then left. Id. at 87. Hoskins denied going into the shed. Id. at 83-85. Hoskins claimed that this "friend" came and stole cannabis but later falsely told Hoskins there was hardly anything there and gave him only $300 for his efforts. Id. at 87-90. Hoskins claimed he later saw a news article about the killing, and his "friend" told him that he "didn't mean to." Id. at 92.

Detective Hayden confronted Hoskins and told him that she knew he had been inside the shed because of the DNA evidence. Ex. 53, at 93-94. Hoskins admitted he lied and admitted going into the shed to cut and bag cannabis. Id. at 94-97. Hoskins then named Stanley Lee as the person Hoskins called to say the coast was clear. Id. at 97, 131.

Hoskins said that Lee and Branden Cerna arrived through the front gate after cutting the padlock.[2] Ex. 53, at 98-101. Hoskins said that he saw Lee with a gun and described it as

[2] Hoskins said that Lee's girlfriend drove Lee and Cerna and waited for them in the car. Ex. 53, at 130, 168-71.

black and "compact." Id. at 157-58. Hoskins said that Lee was always armed when not at home. Id. at 159. Hoskins said that Cerna carried a gun when he had one, but often sold his guns to Lee when he needed money. Id. at 160.

Hoskins said Lee had tried to get into the house by prying off the window bars. Ex. 53, at 162-64, 167. But Hoskins told Lee the cannabis was in the shed, so the trio entered the shed to take the cannabis. Id. at 104-05.

Hoskins claimed that after he filled a bag, he told the others it was time to go, but Lee wanted more. Ex. 53, at pg. 107. Hoskins admitted he saw the motion-detector light come on and heard a female voice yelling with a Chinese accent. Id. at 110-12, 125-26. Hoskins claimed he told the others to "come on," tossed his bag of cannabis over the fence, followed it over himself, and headed for his car. Id. at 109-14, 125. Hoskins was vague about the timing but said that at some point after he left the backyard, he heard a "pow," which he knew was a gunshot. Id. at 117, 119, 134.

At trial, Hoskins admitted that he was the first person seen in the security video stopping in front of Tam's house. 11/14RP 1085, 1098. He identified the car parked by Myrtle Street as Lee's, identified the two people who walked toward Tam's house as Lee and Cerna, and told the jury that Lee's girlfriend was driving the car. Id. at 1095-96, 1098.

Hoskins admitted he had gone into Tam's backyard and shed without permission and that he had called Lee and told him no one was home. 11/14RP 1086-87, 1104-05. Hoskins admitted he made the call knowing that Lee wanted to steal cannabis and would come there, and that he, Lee, and Cerna all went into the shed and cut and bagged up cannabis to steal. Id. at 1089, 1110-12.

Hoskins told the jury that when his bag was full, he said, "Let's go," but Lee and Cerna continued to take cannabis. 11/14RP 1090. Hoskins said that as he was "leaving," he saw the motion-detector light come on and heard a female

"Cantonese" voice. Id. He claimed that while he was "on his way" to his car, he heard a "pow." Id. at 1091.

At trial, Hoskins denied having any idea during the burglary that Lee had a gun and claimed he only learned about it afterwards. 11/14RP 1098, 1102, 1112. But he admitted he had told Detective Hayden that he knew at the time that Lee was armed, and he admitted he told Hayden that he knew Lee to always be armed when not at home. Id. at 1103, 1106, 1111-12. He also admitted that he told Detective Hayden that Cerna carried a gun whenever he could and would commonly sell his guns to Lee when he needed money. Id. at 1108-09.

2. PROCEDURAL FACTS.

A King County jury found Hoskins guilty of first-degree felony murder with a firearm enhancement. CP 103-04. At sentencing, the court concluded that Hoskins had an offender score of nine, based on eight prior juvenile convictions and five previous adult convictions. CP 151; 1/30RP 1262. The court imposed a low-end, standard-range sentence of 471 months.

CP 273; 1/30RP 1296. Hoskins filed this timely appeal. CP 280.

C. ARGUMENT

1. HOSKINS WAS NOT ENTITLED TO A SECOND-DEGREE BURGLARY INSTRUCTION.

Hoskins claims the trial court should have given an instruction on a lesser-included offense, arguing the jury could have found him guilty of second-degree burglary and not first-degree murder. This Court should reject Hoskins' legal analysis and his avoidance of the evidence.

Even if the jury believed that Lee (and not Hoskins) killed Tam, under any analysis of the evidence, Hoskins was criminally responsible because the killing occurred "in the course of," "in furtherance of," or "in immediate flight from" a first-degree burglary that Hoskins and Lee committed together. Hoskins was not relieved of accomplice liability for felony murder by fleeing the scene as Tam arrived home to be shot by Lee. There was simply no evidence that would allow the jury

to reject first-degree felony murder in favor of second-degree burglary. The trial court did not err in refusing the lesser-offense instruction.

a. Relevant Legal Standard.

A defendant "may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged." RCW 10.61.006. A defendant is entitled to a lesser-included-offense instruction if: (1) each of the elements of the lesser offense is a necessary element of the charged offense (legal prong); and (2) the evidence supports an inference that the lesser crime was committed (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Under the factual prong, a defendant is entitled to a lesser-included-offense instruction when a jury could reasonably find that the defendant committed only the lesser offense. State v. Coryell, 197 Wn.2d 397, 400-01, 483 P.3d 98

(2021). A jury might have a reasonable doubt about whether the charged crime was committed but conclude that the defendant was guilty of the lesser crime. "The test was never intended to require evidence that the greater, charged crime was *not* committed — only that a jury, faced with conflicting evidence, could conclude the prosecution had proved only the lesser or inferior crime." Id. at 414-15 (emphasis in original).

A trial court's conclusion that a lesser-included instruction is not warranted under Workman's factual prong is reviewed for abuse of discretion. State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). Here, the trial court's conclusion as a matter of fact that the evidence did not support an inference that Hoskins committed only second-degree burglary is reviewed for abuse of discretion.

b. There Was No Evidence Under Which a Jury Could Have Concluded That Hoskins Committed Second-Degree Burglary and Not First-Degree Felony Murder.

To prove first-degree felony murder, the State had to prove that Hoskins committed first-degree burglary and that he, or an accomplice to that burglary, caused the death of Kam Tam in the course of or in furtherance of the burglary or in immediate flight from it. RCW 9A.32.030(1)(c)(3); CP 115.

A person commits first-degree burglary if they enter or remain unlawfully in a building with the intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight, that person or an accomplice in the crime is armed with a deadly weapon. RCW 9A.52.020(1)(a); CP 116. Second-degree burglary occurs when the defendant or an accomplice is not so armed. RCW 9A.52.030(1).

A person is an accomplice of another person in the commission of a crime if, with knowledge that it will promote

or facilitate the commission of the crime, he or she solicits, commands, encourages, or requests such other person to commit it, or aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3)(a)(i), (ii); CP 121. A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. WPIC 10.50; State v. Jackson, 137 Wn.2d 712, 731, 976 P.2d 1229 (1999).

An accomplice need not have knowledge of each element of the principal's crime to be convicted as an accomplice; general knowledge of "the crime" is sufficient. State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000), as amended on denial of reconsideration (2001). Indeed, the state supreme court has held that a defendant can be convicted as an accomplice to first-degree robbery without proof that the defendant knew that the principal was armed with a deadly weapon during the commission of the crime. State v. Davis, 101 Wn.2d 654, 655, 682 P.2d 883 (1984). "Having agreed to

assist in the criminal act, an accomplice runs the risk of having the primary actor exceed the scope of the preplanned activity." Id. at 658.

Davis recognized the valid legislative interest in discouraging the use of deadly weapons during robberies. Davis, 101 Wn.2d at 659. This Court has found this same interest "equally applicable" to burglaries. State v. Randle, 47 Wn. App. 232, 237, 734 P.2d 51 (1987).

Here, Hoskins said that he heard that there was cannabis growing at Tam's house and went there to "scout it," and "make sure no one was there." Ex. 53, at 95; 11/8RP 767; 11/14RP 1084-86, 1111. Hoskins admitted he called Lee and told him that no one appeared to be home, and that he did so because he knew that Lee was interested in stealing cannabis from Tam's house. 11/14RP 1087, 1104, 1110-11. Hoskins said that he knew Lee was going to join him as soon as Lee knew no one was home. Ex. 53, at 97; 11/8RP 770; 11/14RP 1111. Hoskins admitted that he unlawfully entered the fenced property and

shed. Ex. 53, at 94-95; 11/8RP 766-67; 11/14RP 1103-05. Hoskins said that Lee and Cerna showed up and that the three of them went into the shed, gathered cannabis, and stole it. Ex. 53, at 104-05; 11/8RP 779-80; 11/14RP 1084, 1088-89, 1104-05, 1111.

Hoskins admitted seeing a motion-detector light activate and heard a female voice yelling with a "Cantonese" accent. Ex. 53, at 111-12, 125; 11/8RP 787-88, 808; 11/14RP 1090-91. He knew then that he was "in trouble," and claimed he hopped over the fence and ran to his car. Ex. 53, at 109, 112; 11/8RP 784, 788; 11/14RP 1092-93. Hoskins said he heard a gunshot while fleeing. 11/14RP 1091. Hoskins told the jury he had not known Lee was armed and did not expect "any guns or shootings or anything like that." Id. at 1098, 1106, 1111-14, 1116.

From Hoskins' own testimony and his statements to police — and in the light most favorable to him[3] — a jury could not conclude that he committed second-degree burglary instead of first-degree felony murder. Hoskins committed *first-degree* burglary because he entered and remained unlawfully in the fenced yard and shed with the intent to steal cannabis, and during that burglary, either Hoskins or an accomplice was indisputably armed with a deadly weapon.

A defendant is not entitled to a lesser-included instruction merely because a jury could ignore some of the evidence. Coryell, 197 Wn.2d at 406-07. To satisfy Workman's factual prong, there must be some evidence by which the jury could reject the greater charge and return a guilty verdict on the lesser. State v. Avington, __ Wn.3d __,

[3] When determining if the evidence at trial was sufficient to support a lesser-included instruction, the supporting evidence is viewed in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

536 P.3d 161, 163 (2023) (quoting Coryell, 197 Wn.2d at 407). Because Tam's death occurred in the course of or in furtherance of a first-degree burglary, or in immediate flight from it, a jury could *not* find Hoskins guilty of second-degree burglary instead of first-degree felony murder.

Tellingly, Hoskins does not argue that the State was required to prove that he *knew* Lee or Cerna was armed in order to commit first-degree burglary, and as outlined above, the State did not need to prove that he did. Davis, 101 Wn.2d at 655; Randle, 47 Wn. App. at 237. Only by ignoring the evidence could the jury have concluded that Hoskins committed *second-degree* burglary even if it could determine that Hoskins committed only burglary and not felony murder.

Hoskins argues on appeal that he was entitled to the lesser-included instruction because he "ended his involvement in the burglary before the shooting occurred and did not know about or expect any violence." Brf. of App. at 19. But he cites no persuasive authority for his apparent claim that a person

evades liability for an accomplice's slaying of someone during a burglary simply by fleeing when the homeowner has returned to catch them in the act.

Hoskins insinuates that the evidence in his case would meet the statutory defense to felony murder — which he did not ask for and that is irrelevant to his claim that he was entitled to a lesser-included-offense instruction. Hoskins also misstates the statutory requirements of the defense, which were not met anyway.

The defense to felony murder requires proof of each of the following by a preponderance of the evidence:

> The defendant (1) did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof,
> (2) was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury,
> (3) had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance, *and*
> (4) 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) (emphasis added). Hoskins ignores the third and fourth statutory requirements that a defendant have *no reasonable grounds to believe* an accomplice was armed or intended violence and supplants them with a nonexistent requirement that a defendant merely "end their involvement in the felony before the killing occurs." Brf. of App. at 19. Adopting Hoskins' argument that a defendant is entitled to a lesser-included-offense instruction merely by testifying that he left the scene of a burglary before his accomplice killed someone would effectively broaden the narrow statutory defense in cases of felony murder predicated on first-degree burglary.

Nor could Hoskins satisfy the less demanding test for withdrawal as an accomplice — which he did not argue below but seems to implicitly invoke on appeal by claiming that he "ended his involvement" in the burglary. RCW 9A.08.020(5)(b) states that a person is not an accomplice in a crime committed by another person if they terminate their

complicity prior to commission of the crime and either give timely warning to the authorities or otherwise make a good faith effort to prevent its commission. But this Court has upheld a trial court's refusal to give such a "withdrawal" instruction on facts very similar to the evidence here:

> We are unwilling to sanction as the law of this state that a defendant can first, by words and actions, put in operation a difficulty, or aid and abet in the commencement of it, and, after having by his course of conduct brought the principal actors into a deadly contest, that he can then flee from the scene of the struggle and thereby relieve himself absolutely from the results of such fatal difficulty. Such is not the law of this state, and the court very properly refused the instructions requested upon that subject.

State v. Dudrey, 30 Wn. App. 447, 455, 635 P.2d 750 (1981).

Hoskins' claim that he "ended his involvement" in the burglary before Tam was killed is a distraction. Hoskins was charged with felony murder based on a first-degree burglary during which Tam died. If, as Hoskins seems to imply, he committed only a burglary that ended when he jumped the fence and ran away (in other words, a burglary that was over

before Tam was killed), then there would be no evidence to support burglary as a lesser-included-offense of the charged felony murder. Hoskins effectively argues that he committed a separate, *uncharged* burglary — not the burglary that formed the predicate for Tam's felony-murder.

Hoskins cites to State v. Lyon, 96 Wn. App. 447, 450, 979 P.2d 926 (1999), where a defendant who was charged with felony murder predicated on assault was entitled to a lesser-included second-degree assault instruction. But in that case, there was evidence that the victim's death resulted from an act unrelated to the assault committed by Lyon. 96 Wn. App. at 450. Here, there is simply no evidence that Tam was killed during a separate, unrelated burglary. She died during the burglary put in motion and committed by Hoskins.

There was no evidence presented from which the jury could reject a felony-murder charge in favor of second-degree burglary. If Hoskins committed burglary at all, he committed first-degree burglary. And because Tam was killed by either

Hoskins or an accomplice during the course of or in immediate flight from that burglary, the jury could not have convicted Hoskins of burglary but not felony-murder. The trial court did not err in refusing Hoskins' proposed lesser-included-offense instruction.

2. THE COURT DID NOT IMPROPERLY OR PREJUDICIALLY COMMENT ON THE EVIDENCE WHEN IT ANSWERED A JURY QUESTION.

Hoskins claims he is entitled to a new trial because the trial court answered "yes" to the jury's question about whether it is a crime to steal illegally grown cannabis. This Court should reject Hoskins' argument because the trial court did no more than correctly answer a legal question and did not convey an opinion on any disputed issue of fact. And even if the court's answer was improper, any error does not require reversal when Hoskins admitted to "stealing" cannabis from Tam's shed, and the illegality of such an act was not in dispute.

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. WASH. CONST. art. IV, § 16. To constitute a comment on the evidence, it must readily appear that the court's attitude toward the merits of the case have been conveyed to the jury. State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d 289 (1999). The jury must be able to infer that the judge "personally believed or disbelieved the testimony in question." State v. Ratliff, 121 Wn. App. 642, 646, 90 P.3d 79 (2004).

A jury instruction can be a comment on the evidence if it reveals the court's attitude toward the merits of the case or the court's evaluation of a disputed issue. State v. Hermann, 138 Wn. App. 596, 606, 158 P.3d 96 (2007). But a jury instruction that does no more than accurately state the law is not an impermissible comment. State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). Whether certain remarks amount to an impermissible comment on the evidence is determined by

looking at the circumstances of the entire case. State v. Jacobsen, 78 Wn.2d 491, 477 P.2d 1 (1970).

This Court reviews de novo whether an instruction amounts to a comment on the evidence. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Here, the jury wanted to know if it was a crime to steal something that is illegal to grow/possess. CP 131. The court's answer of "yes" was a neutral, accurate statement of the law in respect to the jury's question. Considering the entire circumstances of this case, the court did not indicate what weight the jury should give to the evidence. It did not promote the State's interpretation of the evidence when there was no issue or dispute regarding whether it is a crime to steal illegally grown cannabis. It was a neutral, accurate statement of the law and did not readily convey the court's opinion as to a disputed issue.

In State v. Jain, 151 Wn. App. 117, 126, 210 P.3d 1061 (2009), a money laundering case, the jury was tasked to

determine whether the defendant knew that he was dealing with the proceeds of "specified unlawful activity." The State presented evidence that the unlawful activity at issue was delivery of controlled substances. Id. at 120. The court instructed the jury that "'specified unlawful activity' means commission of the crime of Delivery of a Controlled Substance." Id. at 130. On appeal, this Court rejected the defendant's claim that the instruction improperly commented on the evidence. The instruction was "a straightforward legal definition and was not improper when neither party presented evidence or argument that a different crime constituted 'specified unlawful activity.'" Id.

As in Jain, neither party here presented evidence or argument on the issue of whether it is a crime to steal illegal cannabis. The court's instruction did not direct the jury to find that Hoskins *had* stolen illegal cannabis, only that it *is* a crime to steal illegal cannabis.

The case relied on by Hoskins, State v. Painter, is distinguishable. There, the defendant, a small female with health issues shot and killed a larger and stronger but unarmed male who had previously abused and threatened her. 27 Wn. App. 708, 709-10, 620 P.2d 1001 (1980). The court instructed the jury on justifiable homicide but defined "great bodily harm" to require injury more serious than "an ordinary striking with the hands and fist." Id. Threatened striking with hands and fists was the only evidence Painter had produced by which to justify the homicide. Id. This Court determined that by restricting the definition of great bodily harm in such a manner, the court clearly indicated to the jury that the evidence produced at trial was insufficient to support Painter's theory of self-defense. Id.

To the contrary here, Hoskins did not present a theory that it was not illegal to steal from an illegal cannabis grow. The instruction he complains of did not indicate to the jury how it should resolve Hoskins' theory of the case.

Notably, Painter also found reversible error because the trial court's instruction on great bodily harm was *legally erroneous*. By instructing the jury that an injury resulting from the "ordinary striking of the hands or fists" was insufficient to constitute great bodily harm, the trial court "injected an impermissible objective standard into the instructions." 27 Wn. App. at 712-13. The court noted striking with hands and fists *could* inflict grave injury or death depending on the size, strength, age, and other factors of the individuals involved. Id. In State v. Walden, 131 Wn.2d 469, 476-77, 932 P.2d 1237 (1997), the state supreme court expressly agreed and held that the instruction given by the trial court in Painter was an inaccurate statement of the law. Painter is inapt here.

This case is more like State v. Frederick, where the jury asked during deliberations, "Does the law preclude a knife of less than three inches of being a deadly weapon," and the court answered, "No." 32 Wn. App. 624, 625, 648 P.2d 925 (1982). This Court rejected the defendant's argument that the trial court

had improperly conveyed to the jury that a knife with a blade *greater* than three inches (which was in evidence) *was* a deadly weapon. 32 Wn. App. at 626. Likewise, the court here did not comment on the evidence by answering "yes" to the jury's question about whether it is a crime to steal something that is illegal.

Even if this Court determines that the instruction was improper, Hoskins is not entitled to a new trial. When a trial court comments on the evidence, the error is presumed to be prejudicial, and reversal is required "unless the State shows that the defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted." State v. Hartzell, 156 Wn. App. 918, 937, 237 P.3d 928 (2010).

Here, the trial court twice instructed the jury to disregard any remark by the court that appeared to indicate the court's personal opinion of the evidence — once before presentation of the evidence and again at the close of the case. CP 108; 10/12RP 864. Such an instruction to disregard apparent

comments on the evidence can cure any error because the jury is presumed to obey the court's instructions. Hizey v. Carpenter, 119 Wn.2d 251, 271, 830 P.2d 646 (1992); State v. Kirkman, 159 Wn.2d 918, 937, 155 Wn.2d 125 (2007).

Contrary to Hoskins' argument, the court's answer to the jury's question did not resolve a key factual issue. The jury's question was an attempt to ascertain the law relating to the "intent to commit a crime" element of burglary. But Hoskins conceded that he illegally entered and remained in Tam's fenced yard and shed with the purpose of stealing cannabis. 11/14RP 1084, 1103-05. He did not dispute the "intent to commit a crime element" of burglary and admitted that he had committed theft of cannabis. 11/14RP 1182, 1186, 1188.

Hoskins places great import on the fact that the jury's question referenced "instruction eight," which defined first-degree burglary. He argues that "the question of whether [he] committed burglary was the central issue for the jury to resolve." Brf. of App. at 28. That is technically correct. But

the only element of burglary that Hoskins disputed related to the "armed with a deadly weapon prong." He focused his entire defense around a theory that he had not acted as an accomplice to Lee or Cerna's possession of a weapon and/or their shooting of Tam. 11/14RP 1182-83, 1186, 1188.

As noted above, Hoskins admitted that he entered Tam's property unlawfully and committed theft of cannabis. If the court's answer to the jury question was an improper comment, it was not prejudicial because the element referenced by the jury's question (intent to commit a crime) was uncontroverted.

3. THE TRIAL COURT PROPERLY ADMITTED HOSKINS' STATEMENTS TO POLICE BECAUSE HE DID NOT UNEQUIVOCALLY ASSERT HIS RIGHT TO SILENCE; DETECTIVE HAYDEN HAD NO OBLIGATION TO CLARIFY.

Hoskins argues that his recorded interview with Detective Hayden should have been suppressed because he unequivocally asserted his right to remain silent. This argument must be rejected. The totality of circumstances,

including Hoskins' words, conduct, and demeanor, all show that Hoskins did not unequivocally invoke his right to silence. Nor has Hoskins demonstrated that article I, section 9 provides greater protection than the Fifth Amendment and limited Detective Hayden to clarifying any equivocal statements. The trial court properly admitted the recorded police interview.

a. Relevant Facts.

Hoskins participated in a lengthy audio- and video-recorded interview with Detective Hayden. 9/28RP 82-83; Pretrial Ex. 3; Pretrial Ex. 4, at 6. Hoskins' demeanor is apparent on the video recording — he is calm, responsive, cordial, and articulate. Pretrial Ex. 3. When Hayden told Hoskins that she was going to read him his rights, he asked her if he was being arrested. Pretrial Ex. 4 at 6. Hayden said she wanted to ask Hoskins some questions, so she needed to read him his rights. Id. Hoskins told her he had asked because he thought his girlfriend was in the building waiting for him. Id.

But he told Hayden, "No, no rush." Pretrial Ex. 3, at 12:06:01 p.m.

Hayden read Hoskins his rights and asked him if he understood them. Pretrial Ex. 4, at 7. Hoskins replied, "Yes, Ma'am." Id. Hoskins went on to answer Hayden's questions and volunteer information about himself and his family. Id. at 7-15. After a few minutes, Hayden offered Hoskins a snack, and Hoskins said, "I just want to figure out what's going on," implying that he was in a hurry, and telling Hayden he was supposed to spend the day with his children. Id. at 15-16. Hoskins told Hayden that he knew the interview was important, but he had obligations to his children when they got out of school. Id. at 16.

Hoskins continued to answer Hayden's questions, and when she told him that someone had been hurt at the burglary she was investigating, Hoskins was interested to know what Hayden knew. See Pretrial Ex. 4, at 20 (Hoskins asked, "They hurt bad?" and "So there's surveillance showing like I was

there?"); Id. at 21 (Hoskins asked, "Pretty sure I was there?" and "So that's why I was detained?"). He continued to answer Hayden's questions. Id. at 21-61.

Later in the interview, after Hoskins denied any knowledge of the burglary, Hayden told him that a woman had died and that she needed him to be honest:

HOSKINS: *I-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 goin' 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: I just…

DET HAYDEN: Start with somethin' easy. Tell who was there with you. I wanna see if you're gonna be up front with me. I know a lot

about this already. I wouldn't be sittin' here talkin' about it if I wasn't. How was it supposed to go down and how did it go wrong?

HOSKINS: *I don't know how it-it went wrong*.

DET HAYDEN: Okay. Well tell me…

HOSKINS: (Unintelligible).

DET HAYDEN: about it. I-I know this isn't you. I haven't been talkin' to you that long and I know this isn't you. We were just talkin' about moms. This is a mother. Okay? I know you don't want that weighin' on you. You don't need that weighin' on you. What was the plan supposed to be? Jonnathan.

HOSKINS: *I just wanna go home.*

DET HAYDEN: I know you do.

HOSKINS: I wanna…

DET HAYDEN: I need…

HOSKINS: (unintelligible).

DET HAYDEN: I need—I…

HOSKINS:	*I don't wanna leave but…*
DET HAYDEN:	I need to find…
HOSKINS:	I…
DET HAYDEN:	out for her babies. Okay?
HOSKINS:	*I (unintelligible)*[4] *wanna*…
DET HAYDEN:	I need to find out…
HOSKINS:	*leave*…
DET HAYDEN:	for her children.
HOSKINS:	(unintelligible).
DET HAYDEN:	Okay?
HOSKINS:	Ma'am.
DET HAYDEN:	I just need the truth about it.
HOSKINS:	I just need you to understand. (Unintelligible).
DET HAYDEN:	Okay. Well and you-you—come on. Tell me what went wrong.

[4] Although the transcript reads "unintelligible," it appears from the audio that Hoskins repeated, "I *don't* wanna leave." Pretrial Ex. 3, at 1:07:50pm-1:07:58pm.

HOSKINS: *I just need you to understand that I have every intention of leavin' here ma'am by whatever means*.

DET HAYDEN: You have every intention of leaving here by way or means. What does that mean?

HOSKINS: By whatever means.

DET HAYDEN: Whatever means? What happened to her? What happened that night? I think it was just supposed to be a burglary. Get the weed and go. So what happened? What went wrong?

HOSKINS: I don't know that part. What went wrong.

DET HAYDEN: Well what did you see?

HOSKINS: I do…anything that has to do with weed, everybody's told me. Everybody knows about all the same moves ma'am. Everybody.

DET HAYDEN: Okay.

HOSKINS: You know?

DET HAYDEN: Well I'm askin' you. I'm not askin'…

HOSKINS: I'm just…

DET HAYDEN: the streets…

HOSKINS: I'm just…

DET HAYDEN: or everybody. I'm askin'…

HOSKINS: I'm just..

DET HAYDEN: you. I know…

HOSKINS: *I'm just tellin' you ma'am*.

DET HAYDEN: I know for a…

HOSKINS: *I'm just telling you*.

DET HAYDEN: fact you were there. I know for a fact. Okay? I know that and that's why I'm givin' you this chance.

HOSKINS: And the fact of—under the fact that—the surveillance.

DET HAYDEN: Yeah.

HOSKINS: So…

DET HAYDEN: Yeah.

HOSKINS: (unintelligible).

DET HAYDEN: I n—that's-that's part of it. And I know there was other people there. I'm just trying to hear from you. I'm trying to give you the chance to be honest and up front with me about the other people that were there. Uh…

HOSKINS: *I…will tell you stuff I know*.

DET HAYDEN: Okay tell me the stuff you know.

Pretrial Ex. 3, at 1:02:48pm-1:10:00pm; Pretrial Ex. 4, at 64-67.[5]

Hoskins went on to give more information but was clearly minimizing and evasive. He insisted he had only "checked out" Tam's house and nothing more. Hayden pressed him:

[5] The State cites to the video-recorded statement (Pretrial Ex. 3) as well as the transcript (Pretrial Ex. 4) and encourages this Court to watch and listen to all relevant parts. As the prosecutor argued during the CrR 3.5 hearing, Hoskins' references to "just wanting to go home" must be considered in "full context." 9/28RP 101.

DET HAYDEN: Okay. Walk me…

HOSKINS: (Unintelligible).

DET HAYDEN: through what happened that night. I know you know what happened that night. Tell me how this…

HOSKINS: I only…

DET HAYDEN: woman died.

HOSKINS: ma'am—ma'am I only know bits and pieces.

DET HAYDEN: Okay. Give me the bits and pieces.

HOSKINS: Yeah. Me and this person don't talk about…we can talk about anything in the world but you know never really talked about this.

DET HAYDEN: Okay.

HOSKINS: You know? For so long I've been curious…

DET HAYDEN: Well…

HOSKINS: how it actually happened. But…

DET HAYDEN: well you gotta tell me what…

HOSKINS: I do…

DET HAYDEN: know about what happened.

HOSKINS: *um I'm going to*.

DET HAYDEN: Okay.

HOSKINS: *I want to.* Just gotta realize this is hard because…you know?

DET HAYDEN: It's a…

HOSKINS: I (unintelligible)…

DET HAYDEN: huge weight to carry.

HOSKINS: I'm a dad.

DET HAYDEN: Yeah. And she's a mom.

HOSKINS: Right.

DET HAYDEN: There's a baby…

HOSKINS: That's true.

DET HAYDEN: that ain't—doesn't have his mama anymore.

HOSKINS: Will never get the chance. I understand that.

DET HAYDEN: Okay.

HOSKINS: So…

DET HAYDEN: So walk me through it. Take your time.

HOSKINS: I told the person. He tells me to go s-s—um check it out.

DET HAYDEN: Okay.

HOSKINS: And that's what I did. I went and I checked it out. Yeah. But like I checked it out and *I'm gonna tell you everything that I did.*

DET HAYDEN: Okay.

HOSKINS: *From top to bottom*.

DET HAYDEN: Okay.

HOSKINS: *I just wanna go ma'am*.

DET HAYDEN: You gotta tell me everything top to bottom first buddy. You gotta get this off your chest. This is gonna weigh on your heart.

HOSKINS: Ma'am I…

DET HAYDEN: I gotta talk…

HOSKINS: (unintelligible).

DET HAYDEN: to—I gotta talk to this woman's baby and I gotta tell her what happened to his mom.

HOSKINS: I…

DET HAYDEN: I need you to tell me.

HOSKINS: *I totally understand that*.

DET HAYDEN: Okay. And I know you know where I'm comin' from. Okay?

HOSKINS: *Exactly*.

DET HAYDEN: Take your time. Walk me through it.

Pretrial Ex. 3, at 1:21:12pm-1:23:53; Pretrial Ex. 4, at 75-77.

Hoskins admitted to more involvement in the crime but continued to provide evasive answers. Hayden told Hoskins she knew that he had been inside the shed because his DNA was there. Pretrial Ex. 3, at 1:46:30pm-1:46:55pm; Pretrial Ex. 4, at 96. Hoskins then admitted that he had gone inside the shed and gave even more detail about the crime. Pretrial Ex. 3,

at 1:46:55pm-1:55:35pm; Pretrial Ex. 4, at 96-104. Hoskins said that he did not want to go to jail and that he would show that he was fully complying. Pretrial Ex. 3, at 1:55:35pm-1:56:15pm; Pretrial Ex. 4, at 105. Hoskins then answered questions for a lengthy period and spoke about the crime in detail. Pretrial Ex. 3, at 1:56:15pm-3:15:00pm; Pretrial Ex. 4, at 106-79.

After he had said as much as it appeared he was going to, Hoskins tried to convince Hayden not to arrest him and just let him go home, even indicating that he "would testify," and that "I just wanna go on my way home," and "I wanna go home to my wife." Pretrial Ex. at 3:15:30pm-3:16:51pm; Pretrial Ex. 4, at 178-80.

Hoskins asked if Hayden was going to drive him home, and Hayden responded that Hoskins was at least going to jail for burglary. Pretrial Ex. 3, at 3:50:25pm-3:51:35pm; Pretrial Ex. 4, at 185-86. Hoskins said he was happy that he "got it off his chest," but tried to convince Hayden to let him go home.

Pretrial Ex. 3, at 3:52:50pm-3:55:12pm; Pretrial Ex. 4, at 188-90. At one point, Hayden left the room and shut the door, and after she did, Hoskins said, "I ain't got nothin' else to say, ma'am, fuck that." Pretrial Ex. 3, at 3:55:15pm-3:55:33pm; Pretrial Ex. 4, at 191.

At a CrR 3.5 hearing, Detective Hayden testified that she did not interpret any of Hoskins' comments to be that he did not want to talk to her. 9/28RP 95-100; 9/29RP 134, 146. She testified that Hoskins was articulate throughout the interview and that she felt he was able to communicate the desire to remain silent if that had been his wish. 9/29RP 146-47.

Hoskins argued that he never explicitly waived his rights and that his statements about wanting to go home demonstrated that he would have done anything to leave. 9/29RP 158-59. He argued his statements were not given "with a nonassertion of rights." Id. Hoskins maintained it was "obvious" that Hoskins did not want to talk, and that his statement that he felt better

getting it off his chest did not demonstrate a valid waiver "in the beginning." Id. at 163.

The State argued that none of Hoskins' statements about wanting to go home and wanting to go to jail amounted to unequivocal indications that he was asserting his right to silence. 9/29RP 153, 164. Although it conceded that the statements might be interpreted that way, the State argued that it was "equally fair" to interpret them as Hoskins simply being uncomfortable with the fact that he was under arrest and that he wished the situation was not happening. Id. at 153-54.

After hearing argument and watching the entire interview, the trial court ruled that Hoskins had not unequivocally invoked his rights.[6] CP 349; 10/3RP 185. The

[6] The court found that Hoskins' statement, "I ain't got nothin' else to say, ma'am, fuck that," was made after Detective Hayden left the room, that she had not heard it, and that Hoskins did not invoke his rights in her presence and instead continued to talk to her when she returned. 10/3RP 185-86. Regardless, the State did not offer that statement at trial, or any statements made after that point. Ex. 53, 54.

court found Hoskins to be "calm," "chatty and cooperative." 10/3RP 181-82. The court noted that Hoskins did "most of the talking," going "into great detail about various topics," both related and unrelated to the crime. Id. at 182-83. The court determined that Hoskins' comments about wanting to go home and wanting to be with his children were not unequivocal statements that he did not want to talk: "instead, he continued engaging in conversation with [Hayden], explaining more details about the questions she had." Id. at 185-86.

b. Relevant Legal Standard.

The fundamental aim in designing Miranda[7] warnings was to assure that a person's right to choose between silence and speech remains unfettered throughout interrogation. Colorado v. Spring, 479 U.S. 564, 572, 107 S. Ct. 851, 856, 93 L. Ed. 2d 954 (1987). Any waiver must be knowing, voluntary,

[7] Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

and intelligent. State v. Radcliffe, 164 Wn.2d 900, 905-06, 194 P.3d 250 (2008). When a defendant unequivocally invokes his Miranda rights during custodial interrogation, all questioning must stop. Smith v. Illinois, 469 U.S. 91, 95, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984).

An invocation of Miranda is "unequivocal" so long as a "reasonable police officer in the circumstances" would understand it to be an assertion of the suspect's rights. State v. Piatnitsky, 180 Wn.2d 407, 411-12, 325 P.3d 167 (2014). To be unequivocal "requires the expression of an objective intent to cease communication with interrogating officers." Id. at 412. By contrast, merely announcing an intent not to say anything incriminating but demonstrating a willingness to continue speaking is not an invocation of the right to remain silent. State v. Walker, 129 Wn. App. 258, 274, 118 P.3d 935 (2005). Thus, the relevant test considers both the plain language used by the suspect and the context of the purported invocation.

Plain language can be determinative. For instance, a suspect invoked his Miranda rights when he clearly stated, "I would rather not talk about it." State v. Gutierrez, 50 Wn. App. 583, 589, 749 P.2d 213 (1988) (emphasis omitted). By contrast, merely announcing an intent not to say anything incriminating is not an invocation of the right to remain silent. Walker, 129 Wn. App. at 274.

Context always matters. When a suspect says, "Maybe I should talk to a lawyer" and subsequently clarifies, "No, I'm not asking for a lawyer," the suspect has not invoked his rights and questioning may continue. Davis v. United States, 512 U.S. 452, 455, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). But a court may not rely on context arising *after* the suspect's invocation to retroactively cast doubt on a facially clear and unequivocal invocation. Smith, 469 U.S. at 99; State v. Wiebe, 195 Wn. App. 252, 260, 377 P.3d 290 (2016).

Whether a defendant unequivocally invoked his right to remain silent is a mixed question of law and fact reviewed *de*

novo. State v. Rankin, 151 Wn.2d 689, 709, 92 P.3d 202 (2004). The test is objective. Piatnitsky, 180 Wn.2d at 413. Because the test is very fact-dependent, subtle factual differences matter.

Caselaw demands that a request be "unequivocal" because it can be hard to know in the moment what a suspect is saying. Statements made in real time can be fluid, internally contradictory, or a contradiction of what the defendant has done or said previously. It can be difficult in the moment to ascertain the speaker's purpose. Lawyers and reviewing judges get to watch an audio and video recording over and over and pick it apart. Investigators, like Detective Hayden, often hear the statement in a matter of seconds.

c. Hoskins Did Not Unequivocally Invoke His Right to Remain Silent.

Hoskins' statements, taken with all the circumstances in mind, were equivocal. Detective Hayden could reasonably conclude that Hoskins never invoked his right to silence.

Hoskins was advised of his rights and advised that the interview was recorded. He told Detective Hayden that he understood his rights. He appeared calm, rational, articulate and cordial during the conversation. Hoskins told Hayden that although he was supposed to spend the day with his children, he recognized the interview was "important" and answered questions in detail. When Hayden told Hoskins that someone had been killed during the burglary, Hoskins said on several occasions, "I just wanna go home," or "I just wanna go to jail," but neither the plain language of those statements nor their context establishes that those were "expressions of an objective intent to cease communication with interrogating officers." They could just as reasonably be construed as statements by Hoskins lamenting his situation and wishing it was not happening.

Courts in other states have uniformly found such statements made in similar contexts equivocal. See, e.g., Commonwealth v. Durand, 475 Mass. 657, 664-66, 59 N.E.3d

1152 (2016) ("I can't take any more of this" and "I want to go home and I want to go to bed," did not indicate unwillingness to continue the interrogation and reasonable police officer in the circumstances would not have understood them to be unequivocal); Commonwealth v. Rosa-Roman, 485 Mass. 617, 626, 151 N.E.3d 863 (2020) (numerous statements about needing to "hurry up" or leave "soon" and return home to girlfriend, along with statements indicating a desire to help with the investigation and seeking to obtain information for himself were equivocal); State v. Markwardt, 306 Wis.2d 420, 439-40, 742 N.W.2d 546 (2007) ("Then put me in jail. Just get me out of here. I don't want to sit here anymore, alright. I've been through enough today," was equivocal as a matter of law because there are reasonable competing inferences to be drawn from such statements); People v. Curtis, 350 P.3d 949, 958 (Colorado 2014) (twice indicating the need to get home to wife without an express indication of not wanting to speak any further, and instead continuing to answer questions, not an

unequivocal invocation of silence); People v. Marko, 434 P.3d 618, 641-43 (Colorado 2015) (plain language of statement "I want to go home," does not show desire to assert right to silence or to end the interview). This Court should conclude the same here.

Because he did not unequivocally invoke, this Court can also look to behavior after Hoskins' equivocal statements to confirm his intent. Although Hoskins said he wanted to go home, or to jail, he also said he would tell Detective Hayden the "stuff he knew," told her he would tell her what he did from "top to bottom," and never stopped answering Hayden's questions. And toward the end of the conversation, Hoskins told Hayden that he was happy to get it "off his chest."

For all these reasons, the trial court correctly determined that Hoskins' statements were not a clear assertion of his right to remain silent. The recorded interview was properly admitted into evidence.

d. Detective Hayden Did Not Need to Clarify Any Ambiguous or Equivocal Statements.

Under the federal constitution, officers do not need to stop questioning and clarify equivocal statements. Davis v. United States, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 2356, 129 L. Ed. 2d 362 (1994). Hoskins argues that even if his statements were equivocal, article I, section 9 of the Washington Constitution required Hayden to stop questioning him, except to clarify his statements.

Hoskins engages in an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), to argue his right against self-incrimination is more broadly protected under the state constitution than it is under its federal counterpart. But a Gunwall analysis is unnecessary because the state supreme court has determined that article I, section 9 is coextensive with, not broader than, the Fifth Amendment. State v. Earls, 116 Wn.2d 364, 381, 805 P.2d 211 (1991).

And even if a Gunwall analysis is required,[8] the relevant factors do not support a more expansive meaning for article I, section 9 than the Fifth Amendment when a suspect equivocally invokes the right to silence.

The first two Gunwall factors compare the texts of the state and federal provisions. As to the constitutional provisions here, our state supreme court has determined the "difference in the language is without meaning."[9] Russell, 125 Wn.2d at 60.

The state supreme court has also rejected Hoskins' argument relating to the third Gunwall factor (state constitutional and common law history), because it relies solely on the textual differences between the two provisions —

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[8] A determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context. State v. Russell, 125 Wn.2d 24, 58, 882 P.2d 747 (1994).

[9] In fact, because the state supreme court (in Russell and Earls) has already analyzed the relevant constitutional provisions in other contexts (which do not favor broader state constitutional interpretation), this Court can adopt their analysis as to the first, second, third, and fifth Gunwall factors. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

already determined to not favor broader interpretation. See Russell, 125 Wn.2d at 59.

As for the fourth factor, Hoskins cites State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), as preexisting state law that supports broader state constitutional protection. But Robtoy based its holding on an interpretation of the Fifth Amendment that was rejected by the Supreme Court in 1994 when it decided Davis v. United States, supra. Robtoy is neither "state" law nor is it pre-existing.

The fifth factor supports an independent state constitutional analysis in every case because the difference in structure is a constant. Gunwall, 106 Wn.2d at 62, 66.

As for the sixth factor, the exclusionary rule is based on Miranda, which interprets the federal constitution and is not independently required by the state constitution. Russell, 125 Wn.2d at 61-62. The sixth factor thus weighs against an independent interpretation of article I, section 9.

On balance, article I, section 9 should not be interpreted more broadly than the Fifth Amendment when a suspect equivocally invokes his right to remain silent. Hoskins' claim that Detective Hayden was limited to clarifying questions under the state constitution should be rejected.[10]

4. NEW RESTRICTIONS ON COUNTING JUVENILE PRIOR CONVICTIONS APPLY TO CRIMES COMMITTED ON OR AFTER JULY 23, 2023; HOSKINS IS NOT ENTITLED TO RESENTENCING.

Hoskins claims that newly enacted restrictions on counting juvenile prior convictions in an offender score under LAWS OF 2023, ch. 415 (SB 1324) (amending RCW 9.94A.525), apply to crimes committed before July 23, 2023, i.e., the change in the law is retroactive. He is mistaken. These enactments are prospective only and apply to crimes committed on or after July 23, 2023. This conclusion follows from

[10] This Court has previously reached this conclusion in an unpublished opinion, State v. Randmel, No. 735314-I, 2016 WL 6680461 (2001).

pertinent statutes and controlling, well-established, and recently affirmed decisional law from the Washington Supreme Court. Also, the legislature plainly considered and rejected a proposal to make the new restriction apply to crimes committed before its effective date. Hoskins' argument should be rejected.

Under LAWS OF 2023, ch. 415, as of July 23, 2023, RCW 9.94A.525(2) provides that only juvenile adjudications of first- and second-degree murder and class A sex offenses will be included in an adult offender score. Hoskins, whose crime was committed in 2018, asserts that his prior juvenile convictions should not count in his offender score because the change in the law was intended to be retroactive. His argument is fatally flawed as a matter of law. Penal statutes are prospective unless expressly made retroactive, and Hoskins fails to demonstrate any express declaration of retroactivity.

Two Washington statutes, RCW 9.94A.345 and RCW 10.01.040, expressly state the rule that the law in effect at the time of a crime must be applied to the imposition of sentence

for that crime. Washington appellate courts have consistently applied that rule, even as to the most serious offenses and punishments.

RCW 9.94A.345 provides, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." That chapter, 9.94A, is the Sentencing Reform Act (SRA), which governs sentencing for all adult felony convictions. RCW 9.94A.505(1). Pursuant to this statute, the defendant must be sentenced pursuant to the law in effect when his crimes were committed. State v. Coombes, 191 Wn. App. 241, 250, 361 P.3d 241 (2015).

RCW 10.01.040, the savings statute or savings clause, as discussed in the section pertaining to restitution interest, also requires that the crimes the defendant committed be punished pursuant to the statutes in force when they were committed. That statute provides in pertinent part:

> …. Whenever any criminal or penal statute shall be amended or repealed, *all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared* in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is *expressly declared* therein.

RCW 10.01.040 (emphasis added). There is no express provision in the 2023 legislation declaring intent for the amendment to apply retroactively.

Hoskins points to "strong words" in a legislative-intent statement in the legislation that "convey an intent by the legislature to have this law apply to all pending cases." Brf. of App. at 55. None of the phrases that Hoskins culls out expressly state that the amendment is to apply retroactively to *crimes committed before its effective date*. Nor do they expressly say the amendments should apply to pending cases. They express only that the legislature felt that the new

legislation is important and necessary. Hoskins cannot point to *any* statement in the new legislation that *expressly* states that the amendment is to apply to crimes committed before July 23, 2023, whether the case is pending or not. At best he interprets an implication, which is hardly an express declaration. Hoskins argues that it *should* apply retroactively "to end this harmful practice in all pending cases where the sentence is not final," but that is a policy argument that the legislature did not adopt. The critical date is the date the crime was committed, and there is no express declaration to the contrary. RCW 10.01.040.

An examination of the legislative history of the 2023 amendment confirms that the legislature did not intend that it apply retroactively. See State v. Hirschfelder, 170 Wn.2d 536, 546-47, 242 P.3d 876 (2010) (changes in bill from introduction to enactment evidenced legislative intent). As introduced, the bill granted a right to resentencing for any offender sentenced in the past whose offender score included a juvenile conviction.

H.B. 1324, § 3, 68th Leg., 2023 Reg. Sess. (Wash.).[11] The bill as enacted does not include that provision. LAWS of 2023, ch. 415.

Courts have repeatedly relied upon the directive of the savings statute in holding that amendments to the sentencing provisions of the Sentencing Reform Act do not apply to crimes that occurred before that amendment. State v. Jenks, 197 Wn2d 708, 487 P.3d 482 (2021) (removal of second-degree robbery as a most serious offense was prospective only); State v. Ross, 152 Wn.2d 220, 237-40, 95 P.3d 220 (2004) (holding amendment to RCW 9.94A.525(12), which decreased the offender score for most drug offenses, did not apply retroactively); State v. McCarthy, 112 Wn. App. 231, 237, 48 P.3d 1014 (2002) (same); In re Pers. Restraint of Hegney, 138 Wn. App. 511, 541-42, 158 P.3d 1193 (2007) (holding amendment to RCW 9.94A.540, which eliminated mandatory minimum terms for

[11] Available at https://lawfilesext.leg.wa.gov/biennium/2023-24/Pdf/Bills/House%20Bills/1324.pdf#page=1.

some juveniles tried as adults, did not apply retroactively); State v. Kane, 101 Wn. App. 607, 610-19, 5 P.3d 741 (2000) (holding amendment to former RCW 9.94A.120, which expanded eligibility for Drug Offender Sentencing Alternative, did not apply retroactively).

The savings statute does not require an express statement from the legislature that a statute is prospective — that would defeat the point of the statute. Jenks, 197 Wn.2d at 719. Rather, the saving clause created by the statute "is deemed a part of every repealing statute as if expressly inserted there, and hence renders unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute." Id. at 719 (quoting Ross, 152 Wn.2d at 237). Indeed, the opposite is true. If a statute is intended to be retroactive, there must be an express statement to that effect.

Equitable concerns of individual defendants or individual courts may not supplant these legal requirements. The court is required to sentence defendants with the correct offender score.

RCW 9.94A.421 provides that, "in no instance may the prosecutor agree not to allege prior convictions," and the Supreme Court has held, "[t]hus, the State cannot by a plea agreement agree to less criminal history than exists, and cannot agree to a reduced offender score in this way." In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). Tying punishment to the law in effect on the date of the crime rather than the date of sentencing ensures that like offenders are treated the same under the law. An individual defendant should not receive a shorter sentence simply because their case took longer to work its way through the system. In Hoskins' case, it would not be fair for him to have a lower offender score for a 2018 murder than another person convicted of a 2018 murder with similar adult and juvenile felony history whose case is long final. Determining sentence by the date of crime is fair. It would be decidedly unfair to count or discount juvenile prior convictions simply based on the preferences of individual courts.

The legislature could have made the changes applicable to cases pending after July 23, 2023, but specifically removed that section from the bill. There are sound reasons that the legislature would choose not to retroactively restrict inclusion of some prior juvenile convictions in the offender score. Retroactive application of the change would require resentencing in cases where the charging strategy of the State would have relied on the existing state of the law, and it would disturb settled plea negotiations that anticipated a certain sentence based on the defendant's criminal history.

5. THE STATE DOES NOT OBJECT TO A REMAND LIMITED TO STRIKING THE VICTIM PENALTY ASSESSMENT.

When Hoskins was sentenced in January 2023, imposition of the VPA was mandatory. RCW 7.68.035(1)(a) (2022). While this appeal was pending, the legislature amended RCW 7.68.035 to prohibit the imposition of the VPA "if the court finds that the defendant, at the time of sentencing, is

indigent as defined in RCW 10.01.160(3)." RCW 7.68.035(4); LAWS OF 2023, ch. 449, § 1 (effective July 1, 2023).

Appellate courts have concluded that the domestic violence penalty assessment is not a "cost" as defined in RCW 10.01.160, so the defendant's indigency is irrelevant to imposing that penalty. State v. Moreno, 14 Wn. App. 2d 143, 165, 470 P.3d 507 (2020), aff'd, 198 Wn.2d 737, 499 P.3d 198 (2021) (review limited to another issue); State v. Smith, 9 Wn. App. 2d 122, 127, 442 P.3d 265 (2019). The VPA also is a penalty assessment and not a cost under RCW 10.01.060.

However, it is still not clear whether an amendment to the standard for imposing the VPA would fall within the holding of State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), cited by Hoskins. In State v. Catling, our supreme court held that the 2018 amendment to the DNA collection fee statute (former RCW 43.43.7541 (2018)), which eliminated the DNA collection fee if a sample already had been collected, applied to cases pending on appeal when the amendment occurred. 193

Wn.2d 252, 259, 438 P.3d 1174 (2019); *accord* State v. Burke, 196 Wn.2d 712, 743, 478 P.3d 1096 (2021). The court cited Ramirez and did not distinguish the DNA collection fee from the costs at issue in Ramirez. Catling, 193 Wn.2d at 259.

It is unclear at this point how broadly the supreme court will define the term "costs" as to which the precipitating event is the final disposition of the direct appeal. Arguably, the VPA is not a cost because it does not relate to costs of the litigation, supervision, or obtaining a biological sample from the defendant, but instead funds services for victims in general. See RCW 7.68.035(6). However, under the current version of RCW 7.68.035, upon motion by a defendant, the trial court must waive any VPA imposed prior to July 1, 2023, if the defendant does not have the ability to pay it, and a defendant, by definition, does not have the ability to pay if they are indigent. RCW 7.68.035(5).

The State does not dispute that Hoskins is indigent and does not object to remand to strike the VPA from the judgment

and sentence as a ministerial task that does not require a hearing. See State v. Ramos, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) ("[W]hen a hearing on remand involves only a ministerial correction and no exercise of discretion, the defendant has no constitutional right to be present.").

D. CONCLUSION

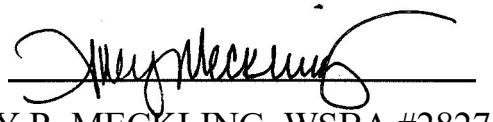
For all of the above reasons, the State respectfully requests this Court to affirm Hoskins' conviction and his sentence with the exception of a limited remand for the ministerial task of striking the $500 VPA.

I certify this document contains 11,821 words, excluding those portions exempt under RAP 18.17.

DATED this 10th day of JANUARY, 2024.

Respectfully submitted,

LEESA MANION (she/her)
King County Prosecuting Attorney

By: 
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