FILED

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NO. 29048-4-III
Consolidated with
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IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

TANSY FAY-ARWEN MATHIS &

DAVID EUGENE RICHARDS,

APPELLANTS,

V.

STATE OF WASHINGTON

RESPONDENT

BRIEF OF RESPONDENT

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

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B. STATEMENT OF THE CASE

On the morning of March 1, 2009, a young woman's body was found alongside a driveway near Stalder Road. RP Vol. V, 686-687. The victim was found sitting on her shirt and jacket RP Vol. V, 701. The victim was later identified as Michelle Kitterman. RP Vol. V, 706. The evidence indicated a struggle had started near the junction of the driveway and Stalder Road, and Ms. Kitterman had then walked up the driveway approximately 125 feet to the location where her body was ultimately found. RP Vol. V, 708.

Ms. Kitterman was involved in a romantic relationship with Daniel Pavek. RP Vol. V, 720, 742. Mr. Pavek was married to Lacey Hirst at the time. RP Vol. V, 721. Ms. Kitterman was the mother of a five year old boy, and at the time of her murder was pregnant with Daniel Pavek's child. RP Vol. V, 721, 734.

Ms. Kitterman was living at Janna Mason's house, and on the night of her murder was there babysitting . RP Vol. V, 751-752.

Up to the time of Ms. Kitterman's murder, Brent Phillips lived in Spokane with David Richards. RP Vol. VI, 792. Mr. Phillips acted as Mr. Richards "tax man" to collect money owed for drug sales. RP Vol. VI, 793. Mr. Phillips was a heavy methamphetamine user and was frequently compensated in meth rather than money. RP Vol. VI, 794. Mr. Phillips met Tansy Mathis, who he knew as "Kim", through Mr. Richards. Ms. Mathis supplied drugs to Mr. Richards. RP Vol. VI, 795.

Mr. Richards told a friend, Rene Peak, shortly before the murder that he had to go and tax someone because they were going to roll on his friend. He said he was getting paid and was hiring a friend to help him out. He stated he was to receive

$5,000. After Ms. Kitterman's murder, Richards told Ms. Peak the person taxed had died, and that he didn't go for "moral" reasons because she was pregnant by another woman's husband. RP Vol. XI, 1584-1588.

Mr. Richards approached Mr. Phillips in February 2009 about accompanying him and Ms. Mathis to pick up drugs and to assist in taxing a "snitch". RP Vol. VI, 797. "Snitch" referred to someone who was telling the cops about somebody selling meth. RP Vol. VI, 806.

Prior to being asked to assist, Mr. Phillips went with Mr. Richards to Ms. Mathis' house in Spokane, where Mr. Richards met with Ms. Mathis, Steve (Pina), and a Hispanic male (later identified as Adolfo Palomares). RP Vol. VI, 798.

In preparation for taxing the snitch, Mr. Richards unsuccessfully sought to obtain a gun from a woman they knew as Lily. RP Vol. VI, 798-799, 890. Mr. Richards remained at Lily's house and Mr. Phillips left and met with Ms. Mathis. RP Vol. VI, 799. Ms. Mathis told Phillips she would pick him up later to from Mr. Richards' house and that he should be ready. RP Vol. VI, 804-805. Mr. Phillips was initially told the job was worth $1000 to beat up and scare the snitch, and an there would be an additional $500 if anyone else got in the way. RP Vol. VI, 805-806.

Several weeks before Ms. Kitterman's murder, Ms. Hirst told Marcella Raymer that she had hired four people to take care of Michelle and the unborn child, and that she planned to drug Daniel Pavek to prevent him from going to meet Michelle. RP Vol. VII, 1032-1033

On February 26, 2009, Lacey Hirst rented a blue 2008 Chevy Trailblazer from her employer, Sunrise Auto. RP Vol. VI, 923-926. When she picked up the rental Hirst was accompanied by a Hispanic male and a "dishwater blonde" female. RP Vol. VI, 928.

Ms. Mathis later admitted to police,(who contacted her on March 7) that she and Adolfo Palomares where the ones who went with Hirst to get the rental vehicle; that they drove the vehicle off the lot; and then she switched cars with Ms. Hirst. She stated that she drove the rental vehicle to Spokane with Mr. Palomares. RP Vol. IX, 1327. She said they went out to dinner in Spokane, then returned to the Okanogan area and that she dropped Palomares off near Riverside. She then drove to Connie Gallas' home and dropped off her daughter. RP Vol. IX, 1327-1328. She then stated she contacted Steve Pina sometime between 12:30 and 1:30 am, before driving to Republic. She made no reference to Brent Phillips or the name Hollywood. In fact, Mathis told Theresa Bertrang (who had seen Mathis and Phillips at the Mike Felton's residence in Republic shortly after the murder) that if Ms. Bertrang was contacted by police, she should not mention that Hollywood (Phillips) was there. RP Vol. IX, 1289.

In the lead up to the murder, Ms. Hirst told co-worker Robert Ramin, on several occasions that she was going to have the woman who was involved with her husband taken care of, eliminated, removed, and made to disappear. She said that she knew some people in Spokane that were going to come take care of it for her. RP Vol. VII, 1016-1017.

Shortly before the murder, Ms. Hirst told Jasmine Walts that she had people, including one referred to as "Tansy", coming over and that Michelle would be taken care of. She said things would be back to normal. In the conversation. Ms. Hirst sought the

assistance of Ms. Walts' boyfriend to keep tabs on Ms. Kitterman in order to determine if Danny Pavek was with Ms. Kitterman. RP Vol. VII, 991-993, 996.

On the day leading up to the murder of Ms. Kitterman, Ms. Mathis picked Mr. Phillips up from David Richards' house in the rented blue Trailblazer. Ms. Mathis stated her friend had rented if tor her. RP Vol. VI, 806; P Vol. VI, 923. When she arrived to pick up Phillips, Ms. Mathis had an ice pick with her. The homemade pick was described as a small diameter sharpened file with a wooden handle and a wooden sheath. The pick belonged to Mr. Richards. RP Vol. VI, 807-808; 870, 886-887. The pick was reported to be Mr. Richards' favorite weapon and he carried it on his person. RP Vol. VI, 808.

Ms. Mathis asked Phillips to give the pick to Mr. Richards. When Mr. Phillips indicated he did not know where Mr. Richards was, Ms. Mathis kept the pick in the vehicle. RP Vol. VI, 808. Ms. Mathis then drove Mr. Phillips to her house where she picked up her young child and Mr. Palomares. They went to a restaurant and then drove in the rental car to the Okanogan area. RP Vol. VI, 809-810. During the trip, Mr. Phillips ingested methamphetamine that Ms. Mathis gave him. RP Vol. VI, 810-810. Mathis dropped Mr. Palomares off before dropping her child off with Connie Gallas. RP Vol. VI, 811. At the Gallas home, Ms. Mathis retrieved a large quantify of meth. RP Vol. VI, 813-814. During the trip, and up to the time they went to find Michelle Kitterman, Ms. Mathis was using her phone frequently, in part to find out to where Ms. Kitterman was staying. RP Vol. VI, 815. When they arrived at Ms. Kitterman's location , Mathis told Phillips that there could be a lot more money than $1000; that there could be $10,000 with an additional $5,000 for anyone else who gets in the way. Mr. Phillips

understood this to mean the job would not simply involve physical assault, but killing. RP Vol. VI, 816.

Ms. Mathis asked Mr. Phillips to provide Ms. Kitterman with meth, so Ms. Kitterman would not know it came from Ms. Mathis. Ms. Mathis said the reason was Ms. Kitterman was a "snitch". RP Vol. VI, 819. Mathis told Ms. Kitterman they were going to the casino and asked if she would like to go with them. RP Vol. VI, 820. Ms. Mathis then drove to the location on Stalder Road and stopped the vehicle, telling Kitterman and Phillips they couldn't smoke in the rental vehicle. After Phillips and Ms. Kitterman got out of the vehicle, Phillips came over to Mathis to see what was taking her so long to exit the car. Ms. Mathis told Phillips "This is the snitch". RP Vol. VI, 821-822.

Phillips got back out of the vehicle and grabbed Ms. Kitterman by the neck and slammed her against the vehicle, telling her she "You shouldn't be snitching." Phillips threw Ms. Kitterman to the ground and began choking her. RP Vol. VI, 822-823. Mathis came over to Phillips and Ms. Kitterman and began stabbing Ms. Kitterman in the abdomen with the pick. RP Vol. VI, 825

About that time Mathis and Phillips noticed lights in the distance. RP Vol. VI, 826. A nearby resident on Stalder Road, Tom Call, testified that he was out checking his calving cows around 1:30 am that morning, when is dogs became upset. He quieted the dogs, and heard a car sitting and idling. He shined his light down the roadway toward the location that he had heard the vehicle. RP Vol. VIII, 1172-1173.

When they noticed the light, Mathis ran to the rental vehicle and shut off the vehicle's lights. At that time, Ms. Kitterman started to scream. Mathis told Phillips to "finish it". Phillips asked her "how", and Mathis retrieved the pick and tossed it to

Phillips. RP Vol. VI, 826. Phillips then stabbed Ms. Kitterman repeatedly in the hip, shoulder, back, and neck. The last stab to the neck caused the metal part of the pick to become detached from the handle. RP Vol. VI, 826, 829, 831. Mathis and Phillips moved Ms. Kitterman further off the side of the road. Phillips heard Ms. Kitterman making gurgling noises. Mathis and Phillips then drove off, leaving Ms. Kitterman lying there. RP Vol. VI, 827. Phillips believed Ms. Kitterman would die from the injuries inflicted. RP Vol. VI, 829.

Ms. Kitterman ultimately died from multiple puncture wounds to the chest and back. The stab wounds were inflicted with a rod like weapon. RP Vol. IX, 1443, 1446. Of the multiple stab wounds inflicted, five of the stab wounds were to Ms. Kitterman's abdomen. She also suffered blunt impact injuries to the head. RP Vol. IX, 1443, 1447.

Phillips discarded the two parts of the pick at the scene and as they drove away. RP Vol. VI, 831. As they drove, Ms. Mathis was using her phone to call, including a call to the person that Mathis said was paying the other half of the money. RP Vol. VI, 831, 833.

Mathis drove to Mike Felton's house near Republic. RP Vol. VI, 833. Mathis left in the rental vehicle and later returned with Steve Pina. Mathis and Pina then vacuumed and cleaned the interior of the rented Trailblazer. They used cleaners, including a spray that smelled of bleach. 836-837. Mathis and Pina then left Mr. Felton's house in the Trailblazer, and returned later driving Mathis' personal vehicle. RP Vol. VI, 838.

In the time leading up to and after the murder there was a substantial volume of calls between Hirst and Mathis, and between Mathis and Richards. RP Vol. X, 1558-

1559.[1] March 1st at approximately 1:03 am there was a phone call made between Mathis and Hirst. At approximately 1:38 am there was a phone call made between Mathis and Richards. Both calls were off the Tonasket phone tower, which was the near the murder scene. RP Vol. X, 1551. There were no more calls made by Ms. Mathis for another 40 minutes, at which time she called Daniel Pavek's phone. At 4:23 am another call is made from Mathis to Hirst, this time off the Republic phone tower. RP Vol. X, 1551-1552.

Prior to returning to Spokane, Mathis handed Philips an envelope containing approximately $500 to give to Mr. Richards. Phillips thought Richards wanted meth, so Mathis took the case back and gave Phillips meth to give to Richards. RP Vol. VI, 840. Upon returning to Spokane, Mr. Phillips met with Richards, who asked Phillips to tell him what happened. Upon receiving the meth that Phillips had brought from Mathis, Richards said "this is it?" and asked if Mathis had given him money. RP Vol. VI, 843. Richards also asked Phillips where his pick was. RP Vol. VI, 845.

A few days later, Phillips checked into a detox facility in Spokane. He was then transferred to a Seattle facility, where he was ultimately arrested. RP Vol. VI, 847, 848.

After the murder, Ms. Mathis returned to Spokane and contacted Brian Hohman. Mathis described that she and Hollywood (Mr. Phillips's nickname) went to contact a woman who was going to "rat" on Mathis. She told Hohman, that she heard the woman get stabbed; that she heard the woman gurgling; and that they left the woman lying on a back road; that they drove on back roads to Republic, and that they cleaned up the car. RP Vol. VIII, 1114, 1116, 1119, 1121. Mathis told Hohman an ice pick was used to

[1] For example, between February 25, 2009 and March 1, 2009, there were approximately 148 calls from Ms. Hirst's phone to Ms. Mathis's phone. After 4:38 pm on March 1st through the evening of March 3rd (the end of the phone records) there were no additional calls. RP Vol. X, 1558-1559.

stab the woman. RP Vol. VIII, 1119. Mathis asked Hohman to contact the woman who rented the car and tell her to keep her mouth shut, and that the woman was a "loose end". Mathis also told Hohman that Hollywood needed to be taken care of. RP Vol. VIII, 1115, 1116, 1118, 1146. Mathis described that the woman who rented the car, and said the woman's husband was having an affair with the girl that was killed. RP Vol. VIII, 1153-1156, 1161-1162. After his conversation with Mathis, Mr. Hohman contacted police to report the murder. RP Vol. VIII, 1169-1171.

At a later meeting with Mathis and Palomares, Hohman led Mathis to believe he had Hollywood. Mathis asked Hohman to "make it look like and overdose." RP Vol. VIII, 1130.

Hohman testified that during the weekend that the murder occurred, he was unable to reach Mr. Richards, and could only reach "Bubba" (Jeffrey Boughter). RP Vol. VIII, 1124. Mr. Boughter, who is Mr. Richards' cousin, testified that Mr. Richards was upset that the others had left without him, because he felt he was not going to get paid. RP Vol. VIII, 1248.

At the time of his arrest, Mr. Phillips believed Mr. Richards was "snitching" on him, so Phillips initially told police that he had choked Ms. Kitterman, and that Mr. Richards actually stabbed her. RP Vol. VI, 801. Mr. Phillips subsequently confessed to his involvement, including stabbing Ms. Kitterman. Phillips pled guilty to First Degree Premeditated Murder, Manslaughter in the First Degree, Kidnapping in the First Degree, and Tampering with Physical Evidence. RP Vol. VI, 802.

The rented Chevy Trailblazer, was seized by police on March 9, 2009. The rear cargo area was still wet and smelled of cleaners. The interior of the vehicle had been

wiped down. RP Vol. V, 767-770; RP Vol. VI, 923. A blood swab taken from the interior of the vehicle matched the DNA of Michelle Kitterman. RP Vol. VIII, 1242

On March 24, 2009, Spokane PD Detective Kip Hollenbeck went with Det. Murray to Richards' home and made contact with Richards. It was revealed Richards had an outstanding warrant on an unrelated matter. Clerk's Papers – Mathis (hereinafter "CPM") 832.

Richards was transported to Spokane PD and interviewed by Det. Murray. At the time Richards was not a suspect in the murder. CPM 833. Richards was not formally placed under arrest, but the trial court found he was effectively in custody for purposes of *Miranda*, based on the unrelated warrant. Det. Hollenbeck advised Richards that if he was truthful he would be able to resolve his warrant. CPM 833. The defendant was not Mirandized at the time of the initial contact. CPM 833. Police ended the initial interview when Richards stated he did not want to be a "snitch." Id.; RP II pg. 278. During the initial interview, Richards did not make any admission or incriminate himself in involvement in the murder. RP II pg. 292, 303.

Detective Hollenbeck then walked Richards to the jail, and on the way Richards stopped and spontaneously said "I will tell you what I know", "I will talk". Richards then said: "Hollywood (Phillips) did it." CPM 834. Det. Hollenbeck indicated to Richards that Det. Murray would probably want to speak with him, and then walked Richards back to the police department. CPM 834.

Once back in the interview room, Detective Hollenbeck advised the Richards of his Miranda warnings, which Richards indicated he understood. Richards signed a rights card and indicated he understood and that he voluntarily wanted to waive his

rights and answer questions. CPM 834. At a later point, Richards stated he did not want to "give up his rights", but wanted to talk. CPM 834. At no point did the Richards specifically tell Det. Hollenbeck or Det. Murray that he did not want to talk to them, that he wished to remain silent, or that he wanted an attorney. CPM 834; RP Vol. II 281, 287

During the interview, Det. Murray again advised Richards of his Miranda warnings. Richards stated he understood his rights and wanted to talk to Det. Murray. The defendant again denied that he had any involvement in the murder and was only a witness. CPM 834; RP Vol. II 281. At the conclusion of the interview, Richards was released.

Richards was subsequently identified as a suspect in the murder. On April 5, 2009, Richards surrendered himself to Spokane PD. CPM 834; RP Vol. II 281. The defendant indicated he wanted to speak with Sgt. Peterson. Peterson advised Richards of his Miranda warnings, and Richards knowingly and voluntarily waived his rights. He then provided a statement to Sgt. Peterson. CPM 835. Richards told Peterson that his pick was stolen a week before the murder of Ms. Kitterman occurred. RP Vol. IX, 1295. However, Spokane Police Officer Eric Kannberg had contact with Mr. Richards on the afternoon of February 28, 2009 in connection with a burglary/assault call. Kannberg removed several knives and an ice pick from Mr. Richards' person during the contact. Kannberg then returned the knives and pick to Mr. Richards at the completion of his contact. RP Vol. IX, 1310, 1313.

A CrR 3.5 hearing was also held on February 2, 2010, and February 17, 2010, concerning statements made by Richards. Clerk's Papers – Richards (hereinafter "CPR") 832. The court found that the Richards' spontaneous statement on March 24,

his second interview statement on March 24, and his April 5 statement were admissible. The court found Richards' interview statements were made knowingly, intelligently, and after a voluntary waiver of his rights. CPR 836.

On January 7, 2010, defendant Mathis' moved for a two month trial continuance in order to obtain additional DNA testing was heard. RP Vol. II, 216; see also CPM 485-491. Neither the State nor Mr. Richards joined in the motion to continue. RP Vol. II, 216-228. At the time Mr. Richards' time for trial expired on February 11, 2010. RP Vol. II, 231. Judge Chris Culp granted a one month continuance to February 9, 2010. The continuance was within the Mr. Richards' time for trial. Mr. Richards acknowledged that there was not prejudice to him from the continuance. Id.at 232.

On January 19, 2010, defendant Mathis filed a Motion for Revision of the ruling, seeking a two month continuance. . CPM 395-396. The State filed a response, arguing the motion was not valid or timely. The State also argued that if a continuance was granted, the co-defendant Richards' case should also be continued because the evidentiary issues for both defendants were similar. The State also noted that the failure of Mr. Richards' counsel to consider the issues raised by Mathis, and to conduct interviews, risked creating a claim of ineffective assistance of counsel. CPM 325-378.

The motion was heard on February 2, 2010, by Judge John Hotchkiss. RP Vol. II, 243. Richards orally opposed the continuance, but filed no written motion to sever the cases. *Id.* at 251. Defendant Richards indicated there was no specific prejudice other than the age of the case and that "memories fade". RP Vol. II, 252.

The court considered continuing the trial to either March or April. That State advised that a March trial date would not work due to the attorneys for the State being unavailable at differing times when the trial would be held. RP Vol. II, 253.

The court set the trial to begin on April 6, 2010. RP Vol. II, 254. The court also entered Findings of Fact and Conclusions of Law, finding that defendant Richards had shown no specific prejudice to the presentation of his defense resulting from the continuance. The court concluded that judicial economy outweighed the continuance beyond defendant Richards February 11, 2010 time for trial. CPM 321-324.

In the case, many of the witness contacts with the defendants were solely based on drug transactions and drug use. The State advised the court of this issue in pre-trial hearings and that the information was admissible under ER 404. RP Vol. IV, 435-438, 460-461; 468-469; see also CPM 204-208 The court advised defense that is it should object to such evidence if it felt it was inadmissible. RP Vol. IV, 438. The defense sought to introduce evidence of drug use by witnesses Id. at 432-434. The State expressed no opposition to the court giving a proper limiting instruction and included one in its materials. RP Vol. IV, 460. Defense did not apparently propose or seek such a limiting instruction.

The court also ruled that statements by Lacey Hirst to co-workers Mr. Price, Mr. Neely and Ms. Tasker, were not admissible, as they were not sufficiently in furtherance of the conspiracy, and were not against Ms. Hirst's penal interest. RP Vol. VI, 904-905. Statements Ms. Hirst made to Robert Raymond were found to be admissible as a declaration against penal interest, and statements made to Jason Bernica were also found admissible as co-conspirator statements. RP Vol. VI, 905-907, 915-916; 953.

The jury found Mathis guilty of all counts, the aggravating circumstance, and that she was armed with a deadly weapon on each felony count. CPM 75-81.

Richards was convicted of Second Degree Murder and Manslaughter in the First Degree. He was also found to have been armed with a deadly weapon on each of those counts. CPR 632-637.

C. ARGUMENT[2]

1. THE DEFENDANT MAY NOT RAISE A CHALLENGE TO THE SPECIAL VERDICT JURY INSTRUCTION FOR THE FIRST TIME ON APPEAL.

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). A defendant may not object to an instructional error where it was not objected to below unless the error invades a fundamental right of the accused. *State v. Watkin*, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963). The Court of Appeals will not consider an issue raised for the first time

[2] Because Mr. Richards joined Ms. Mathis' challenge to the special verdict instructions, rather than providing separate briefing, the Respondent will primarily address the challenges raised by Ms. Mathis. Since the instruction challenges are virtually the same for both Appellants, the Respondent intends its references and its legal arguments to apply equally to Mr. Richards.

on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); *See State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009).

When no exception is taken to a jury instruction, that instruction becomes the law in the case. *State v. Salas*, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995).

In this case, neither the Appellant, nor the Court in *State v. Bashaw*, 169 Wash.2d 133, 234 P.3d 195 (2010) (relied upon by the Appellant), have identified a constitutional or statutory basis for a non-unanimous verdict.[3] *See, State v. Nunez,* 160 Wash.App. 150, 248 P.3d 103 (2011)(instruction which required unanimity to acquit defendant of the aggravating sentencing factors did not constitute manifest constitutional error; and defendant failed to identify a constitutional provision violated by the trial court's use of the instruction). *See also State v. Morgan*, __ Wn. App. __, __ P.3d __, 2011 WL 3802782 (No. 67130-8-I, August 29, 2011) (Error in jury instruction that required unanimity was not of constitutional magnitude, and thus defendant's failure to challenge the instruction in trial court amounted to a waiver of the issue on appeal; the rule that juror unanimity was not required to find the absence of a special finding was compelled by the common law). [4]

When an instruction, properly excepted to or not, is a correct statement of the law, no error has occurred. In such cases, even when an appellate court expresses a preference for different wording, the verdict stands. *See, e.g., State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007) (holding that WPIC 4.01 should be utilized in all future trials; affirming conviction where jury was instructed with the *Castle* instruction

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[3] *Bashaw* justified its expansion of the very fact specific *Goldberg* "rule" solely on policy grounds. *Bashaw* at 147-148.

[4] *Morgan* rejected the logic used in *State v. Ryan* 160 Wash. App. 944, 252 P.3d 895 (2011) that such an instructional error could be of constitutional magnitude. *Morgan*, pg. 5.

because it was constitutionally accurate);*State v. Labanowski*, 117 Wn.2d 405, 425, 816 P.2d 26 (1981) (holding that "unable to agree" instructions should be used in the future; affirming conviction where jury was instructed with a traditional "acquittal first" instruction because such an instruction was not wrong as a matter of law). No harmless error analysis is required, much less the constitutional harmless error test utilized by in *Bashaw*, 169 Wash.2d 133.

The defense relies on *State v. Bashaw* for its claim that the special verdict instruction was erroneous. 169 Wn.2d 133, 234 P.3d 195 (2010). However, the rule adopted in *Bashaw* is not constitutional. *Bashaw,* 169 Wn.2d at 146 n. 7. Rather, it is a common law rule. *Bashaw*, 169 Wn.2d at 146 n. 7. As such, this challenge cannot be raised for the first time on appeal.

In the instant case, no objection to this jury instruction was raised. There is no ruling from the trial court to be considered on appeal. As such, this Court should decline to address defendant's challenge to the special verdict instruction as it is not of a constitutional nature and is raised for the first time on appeal.

2. NEITHER THE STATE CONSTITUTION, NOR THE LEGISLATURE AUTHORIZE NON-UNANIMOUS ACQUITTALS AS TO SENTENCING FACTORS IN NON-CAPITAL CASES. ACCORDINGLY, INSTRUCTING A JURY THAT THEY MUST BE UNANIMOUS TO CONVICT OR ACQUIT DOES NOT RAISE CONSTITUTIONAL ERROR.

The state constitutional right to jury trial in criminal matters stems from Const. art. I, §§ 21 and 22. Const. art. I, § 21 which provides that "[t]he right of trial by jury shall remain inviolate...", preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. *See, e.g., Sofie v. Fiberboard Corp.*, 112

Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989). This right, in criminal cases, included the right to a twelve person jury, and a right to a unanimous verdict. *See, e.g., State v. Stegall*, 124 Wn.2d 719, 723-24, 881, P.2d 979 (1994); *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

While the Washington State Supreme Court has long held that a criminal defendant may waive the requirement of a 12 person jury, the Court has steadfastly rejected waivers of the unanimity requirement. *Compare Stegall*, 124 Wn.2d at 723-24, with *State v. Noyes*, 69 Wn.2d 441, 445-446, 418 P.2d 471 (1966). The court has also held that a criminal defendant does not have a constitutional right to have a jury instructed that it may render a verdict to a lesser charge when it is "unable to agree" upon the defendant's guilt as to a greater charge. *State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1981).

While recognizing Const. art. I, § 21's unanimity requirement, the Court held in *Labanowski* that Washington's trial courts should utilize "unable to agree" transition instructions, rather than "acquittal first" instructions. At the same time, the Court held that an "acquittal first" instruction was not wrong as a matter of law, and that convictions obtained in cases in which the instructions was used would not be set aside. *Labanowski*, 117 Wn.2d at 425.

In *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), the Court allowed a non-unanimous verdict with respect to an aggravating circumstance to serve as an acquittal. This result was consistent with the jury instructions that had been tendered in that case. The Court, however, did not indicate that Const. art. I, § 21 mandated such a

result or required the use of similar jury instructions in every single case. In fact, the Court cited to none of its prior decisions in support of its holding.

The State Supreme Court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function. *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). It is also the responsibility of the legislature to establish the sentencing process. *Id.* The Judiciary may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. *Id.* Otherwise, the Court may recommend or identify needed changes, but must then wait for the legislature to act. *See, e.g. State v. Pillatos*, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); *State v. Martin*, 94 Wn.2d 1 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether **a** defendant who plead guilty should receive the death sentence).

The legislature has enacted a number of sentencing enhancements. See, e.g., RCW 9.94A.825; RCW 9.94A.827. These enhancements require jury determinations. *Id.* In only *one* sentencing enhancement, RCW 10.95.080(2), does the legislature give force or meaning to a non-unanimous verdict. Thus, for all other sentencing statutes, consistent with the dictates of Const. art. I, § 21 as established by the State Supreme Court's prior opinions, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

Accordingly, an instruction to the jury that they must be unanimous to convict or acquit was a correct statement of the law, and did not create constitutional error.

3. THE JURY INSTRUCTION GIVEN IN THIS CASE REGARDING THE SPECIAL VERDICT WAS NOT ERRONEOUS

Jury instructions are proper where, read together, they correctly inform the jury of the applicable law, do not mislead the jury and, allow both parties to argue their theories of the case. See, e.g., *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Claimed errors of law in a jury instruction are reviewed de novo. *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521 158 P.3d 1193 (2007). Errors in jury instructions are subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Defendant Mathis challenges jury Instruction #51, which instructed the jury on how to enter a special verdict.

a. The Special Verdict Instruction Given In This Case Was Not An Incorrect Statement Of The Law.

State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), established that unanimity was only required for finding in the affirmative on a special verdict for a sentence enhancement. This decision was also applied by the court in *I*.

The trial courts in *Goldberg* and *Coleman* instructed their juries that:

"In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no"."

Goldberg, 149 Wn.2d 888, 893, *Coleman*, 152 Wn. App. at 565. In both cases, the jury returned non-unanimous "no" answers on the special verdict forms. *Goldberg*, 149 Wn.2d at 891, *Coleman*, 152 Wn. App. at 559. Each jury was polled, and upon finding that the jury was not unanimous, both trial judges instructed the jury to continue

deliberations in an effort to reach a unanimous verdict. *Goldberg*, 149 Wn.2d at 891, *Coleman*, 152 Wn. App. at 559.

The Washington Supreme Court in *Goldberg*, and the court in *Coleman*, held that it was error for the jury to be ordered to continue deliberations after returning a non-unanimous "no" answer on the special verdicts, because the non-unanimous "no" constituted a valid verdict when it is returned. *Goldberg*, 149 Wn.2d at 894, *Coleman*, 152 Wn. App. at 565.

Recently, the Washington Supreme Court upheld the *Goldberg* ruling, and clarified its holding that unanimity was only required in order to answer "yes" to the special verdict inquiry. *State v. Bashaw*, 169 Wn.2d 133, 145, 234 P.3d 195 (2010). In that case, the court instructed the jury, in their written instructions, that "[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict.". *Bashaw*, 169 Wn.2d at 139.

The issue before the court in *Bashaw* was whether "when a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make an additional finding that would increase the defendant's sentence beyond the maximum penalty allowed by the guidelines, must the jury's answer be unanimous in order to be final?" *Bashaw*, 169 Wn.2d at 145. The court's answer was that,

> "[a] nonunanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt."

Bashaw, 169 Wn.2d at 145.

The court noted that *Goldberg* had established that special verdicts do not need to be unanimous in order to be final. *Bashaw*, 169 Wn.2d at 146, citing *Goldberg*, 149 Wn.2d at 895. Thus, under *Goldberg*, a non-unanimous jury decision is nonetheless a

final determination that the State has not proved the special finding beyond a reasonable doubt. *Bashaw*, 169 Wn.2d at 146.

Because the instruction at issue in *Bashaw* contained different language from that issued in *Goldberg*, the court in *Bashaw* reaffirmed the rule in *Goldberg* without considering the specific language of the instruction given in that case. Rather the *Bashaw* court held that the jury instruction stating that all 12 jurors must agree *on the answer* to the special verdict was an incorrect statement of the law." *Bashaw*, 169 Wn.2d at 147.

The written instruction in *Bashaw* was akin to the oral order of the judge in *Goldberg* requiring the jury to return to deliberations after they had returned a valid special verdict answer, only the instruction in *Bashaw* was given preemptively. *Bashaw*, 169 Wn.2d at 147. According to the court, that is because the instruction given in *Bashaw* preemptively directs the jury to reach unanimity. *Bashaw*, 169 Wn.2d at 147.

Because the court in *Bashaw* did not consider the language of the instruction here, or the language of the instruction in *Goldberg*, none of the three cases, *Goldberg*, *Coleman*, or *Bashaw*, supports defendant's claim that the instruction in this case is deficient. In *Bashaw*, the offending jury instruction stated in part:

> "*Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.*" (emphasis added)

State v. Bashaw, 144 Wash.App. 196, 201, 182 P.3d 451 (2008); *State v. Bashaw*, 169 Wn.2d at 139. In the present case the Instruction #51 stated in part:

> "Because this i*s a criminal case, all twelve of you must agree in order to answer to the special verdict forms" (emphasis added).*

CPM 73. Unlike the instruction in *Bashaw*, this was not an incorrect statement of the law. The instruction in the present case did not require continued deliberation if the

jurors were not unanimous. If the jurors lacked unanimity, the instruction clearly directed the jurors they should not answer the special verdict forms. This non-unanimous decision would be final, and in accord with the holding in *Bashaw*. [5]

Similarly, the instruction complied with *Goldberg* and *Coleman*. The courts in *Goldberg* and *Coleman* held that the juries performed as instructed in returning non-unanimous answers to the special verdict inquiries. *Goldberg*, 149 Wn.2d at 894, *Coleman*, 152 Wn. App. at 565.

Here, the instruction did not tell the jury they were required to answer the special verdict form. This instruction left open the possibility that they could not reach a unanimous answer, in which case, under the instruction, they would not be able to enter anything on the form.

As such, under both *Goldberg* and *Coleman*, the instruction did not preemptively coerce the jury to return a unanimous verdict. Unlike the instruction in *Bashaw*, under the instruction here, if the jury could not reach a unanimous verdict, they should leave the verdict form blank.

b. The Issue In Goldberg Was The Trial Judge's Order That The Jury Return To Deliberations.

The error in both *Goldberg* and *Coleman* was the trial court's order that the jury return to deliberations after reaching a non-unanimous "no" answer on the special

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[5] The language that followed in instruction #51 stated:

> "*In order to answer the special verdict forms 'yes', you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer 'no'.*"

CPM 73. This portion of the instruction is also a correct statement of the law and does not conflict with Bashaw, 169 Wash.2d 133. It advised the jury they must be unanimous in order to answer "yes"; and that *if* they did unanimously have a reasonable doubt, that they must answer "no" - rather than return the special verdict without an answer.

verdict form. *Goldberg*, 149 Wn.2d at 894; *Coleman*, 152 Wn. App. at 565. Defendant does not raise this as an issue in this case.

This case is distinguishable from *Goldberg* and *Coleman* in that the jury did not return a non-unanimous verdict. *Goldberg*, 149 Wn.2d at 894; *Coleman*, 152 Wn. App. at 565. Thus, although there was error in *Goldberg* and *Coleman*, no such error occurred in this case.

c. The Jury Instructions Read as a Whole Were Not Misleading.

Instructions must be read as a whole. *State v. Dana*, 73 Wn.2d 533, 439 P.2d 403 (1968); *Roberts v. Goerig*, 68 Wn.2d 442, 413 P.2d 626 (1966). In reviewing claimed error, the court considers "the context of the instructions as a whole," rather than viewing each instruction as an isolated mandate. *State v. Benn*, 120 Wash.2d 631, 654–55, 845 P.2d 289 (1993). In order for jury instructions to be sufficient, they must be "readily understood and not misleading to the ordinary mind." *State v. Dana*, 73 Wash.2d 533, 537.

Thus, the appropriate inquiry is whether the challenged instructions, when read as a whole, led the jurors to a mistaken belief that a unanimous decision was required in order to collectively answer "no" on the special verdicts.

Instruction #50 informed the jurors that they "must fill in the blank provided in verdict form the words 'not guilty' or the word 'guilty', according to the decision you reach." CPM 69-72. The instructions go on to explain that the jury must be unanimous in order to enter either verdict. The special verdict forms had their own instruction stating:

> You will also be given a special verdict form for the crimes charged in Counts 1A, 1B, 2, and 3. If you find the defendant not guilty of these crimes do not use

special verdict forms. If you find the defendant not guilty of these crimes do not use special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and answer the question for each count that applies by filling in the blank with the answer "yes" or "no" according to the decision(s) you reach. Because this is a criminal case, *all twelve of you must agree in order to answer the special verdict forms*. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to the question, you must answer "no."

CPM 73 (emphasis added). The differences in the instructions and the order in which the forms must be used clearly delineated between the requirements for verdict forms and special verdict forms.

The jury instructions were not misleading when read in their entirety. The instructions clearly differentiated between verdict forms and special verdict forms, and there was a different instruction associated with each. The instructions for the verdict forms for the substantive counts required that the jury enter "guilty" or "not guilty" into the blank on the form; where the special verdict forms required that the jury enter "yes" or "no" into the blank. Moreover, the jury was instructed that they were not to use the special verdict forms unless and until they came to a unanimous guilty verdict on the verdict forms. After reading all the instructions as a whole, it is clear that the unanimity instruction for guilty and not guilty verdicts does not apply to the special verdicts. The unanimity instructions for special verdicts did not require unanimous "no" answers to be final.

The court here instructed the jury that they should each decide the case for themselves, and not change their mind solely for the purpose of reaching a unanimous verdict. *See* CPM 68 (Instruction # 49). This is in the same instruction as the instruction indicating that the jury should strive for a unanimous verdict. This indicated

to the jurors that unanimity is not so important as to warrant the jurors giving up their personal beliefs as to the evidence presented.

A jury is presumed to have followed the instructions given unless there is something in the record which overcomes this presumption. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010), *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The jury instructions in the instant case were neither incorrect nor misleading. It did not require the jury to enter a unanimous verdict, as under the instructions given, the jury would not enter anything onto the special verdict form if they were not unanimous.

Additionally, Instruction #10 stated in part:

> ...For any of the aggravating circumstances to apply the 12 defendant Tansy Mathis must have been a major participant in acts causing the death of Michelle Kitterman and the aggravating factors must specifically apply to the defendant's actions. The state has the burden of proving this beyond a reasonable doubt. If you have a reasonable doubt whether the defendant Tansy Mathis was a major participant you should answer the special verdict, "no."

CPM 29. Read in conjunction with Instruction # 51 (CPM 73) the jury was instructed if they had a reasonable doubt that the aggravating circumstances applied to Tansy Mathis as a major participant "they should answer 'no' "; and if they unanimously had a reasonable doubt as to the question, "they must answer 'no' ". Taking the instructions as a whole, the jury was not required to be unanimous on the special verdicts.

4. EVEN IF THE COURT WERE TO HOLD THE INSTRUCTION WAS ERRONEOUS, ANY SUCH ERROR WAS HARMLESS.

Only after the Court concludes that manifest constitutional error has occurred does the Court then engage in a harmless error analysis. *State v. O'Hara*, 167 Wn.2d

91, 99, 217 P.3d 756 (2009). In this case the claimed instructional error is not constitutional.

However, assuming arguendo, if this Court were to determine that the jury instruction regarding the special verdict forms contained an error, it is subject to a harmless error analysis. An error is harmless if the court concludes beyond a reasonable doubt that the jury verdict would have been the same absent the error. *State v. Bashaw*, 169 Wn.2d 133, citing *State v. Brown*, 147 Wn.2d at 341.

In this case, any error was harmless where the jury separately found the defendant Mathis guilty of First Degree Murder, Manslaughter in the First Degree and Kidnapping In the First Degree, and Tampering. CPM 80-81.

One of the two aggravating factors found in the Special Verdict Form was that "*The murder was committed in the course of or furtherance of, or in immediate flight from kidnapping first degree.*" CPM 76.

In *Bashaw*, 169 Wash.2d 133, the court expressed concern that it could not say with confidence what result the jury would have reached if it had been given a correct instruction. *Bashaw* at 148. However, under the particular facts of this case, and Mathis' conviction for Kidnapping in the First Degree, is unlikely that the outcome of the trial would have been different if the jury had been instructed differently as to the Special Verdicts Aggravating Circumstance of Kidnapping. Additionally the evidence was beyond a reasonable doubt that Mathis received the value of the rental vehicle and the promise of money for committing the murder.

Any error was also harmless as to the deadly weapon special verdicts for both defendants. In Instruction #52, regarding the special verdict the jury was instructed in pertinent part that:

> "For the purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Counts 1A, 1B, 2, and 3.
>
> If one person is armed with a deadly weapon, all accomplices are deemed so armed, even in only one deadly weapon is involved."

CPM 74. In addition to finding defendant Mathis guilty of all counts, she was also found to have been armed with a deadly weapon on each felony count.

Defendant Richards was convicted of Second Degree Murder and Manslaughter in the First Degree. He was also found to have been armed with a deadly weapon on each of those counts.

There was no question of fact that the crimes were carried out while one more of the participants was armed with a deadly weapon. Based on the convictions and the deadly weapon instruction, it is unlikely that the outcome of the trial would have been different if the jury had been instructed differently as to the Special Verdicts forms regarding the deadly weapon.

The defendants are unable to show that the jury's finding on the special verdicts would have been different under a different instruction, where the jury's special verdicts were consistent with their guilty verdicts. Because defendants are unable to demonstrate prejudice, any error in the jury instructions was harmless.

5. THE SPECIAL JURY INSTRUCTION FOR AGGRAVATING CIRCUMSTANCES SPECIFICALLY APPLIED TO MS. MATHIS' CONDUCT WHERE IT REQUIRED A FINDING THAT SHE WAS A MAJOR PARTICIPANT.

A defendant may be convicted of first degree aggravated murder based solely on an accomplice theory, but only when the State can prove major participation by the defendant in the acts giving rise to the homicide. *See State v. Roberts*, 142 Wn.2d 471, 505, 14 P.3d 713 (2000). In *Roberts*, the court found to apply the death penalty the jury must find (1) the defendant was a major participant in the acts that caused the death of the victim, and (2) the aggravating factors under the statute specifically apply to the defendant. *Roberts* at 509.

Instruction #10 was taken from WPIC 30.03 and contains the language required from the holdings in *State v. Roberts,* 142 Wn.2d 471; *In Re Howerton*, 109 Wash.App. 494, 36 P.3d 565 (2001); and *State v. Whitaker*, 133 Wn.App. 199, 135 P.3d 923 (2006).

Appellant's argument that the instructions in this case "*improperly allowed application of the aggravating factor without finding it specifically applied to the defendant"* is completely without merit in light of the plain language of Instruction # 10. The language in Instruction #10, requires the jury to find that the "*...the aggravating factors must specifically apply to the defendant's actions*."(emphasis added).

The jury was properly instructed and was not permitted to find the aggravating factor solely on the actions of an accomplice.

6. IF THE COURT DID FIND AN INSTRUCTIONAL ERROR THAT WAS NOT HAMRLESS, REMAND FOR A NEW TRIAL ON THE AGGRAVATING FACTORS IS THE PROPER REMEDY.

Even if the Court considers the issue and reverses any special verdicts; the usual remedy for erroneous jury instructions is remand for a new trial. *See, e.g., State v. Jackman*, 156 Wn.2d 736, 745, 132 P.2d 136 (2008); *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006). This reflects fundamental considerations of justice: Corresponding to the right of an accused to be given a fair trial, is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay where every accused was granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. *United States v. Tateo*, 377 U.S. 463, 466, 84 S. Ct. 1587, .12 L. Ed. 2d 448 (1964).

This observation is particularly applicable to the present case, where no objection was raised to the alleged error and the evidence was overwhelming. The sentences resulting from the special verdicts were substantial. It would not serve any purpose to permit defendants to stand by silently and obtain an outright dismissal of special verdicts when such a result could not have been obtained from a rational jury.

In *Bashaw*, the court set out policy reasons why the enhancement should not be retried after a jury fails to agree on the special verdict. The court said that allowing retrials would violate the "polices of judicial economy and finality." *Bashaw*, 163 Wn.2d at 146-47. When, however, a defendant successfully challenges his conviction, he loses any right to have that conviction treated as final. *See State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006). As for "judicial economy," it is not a waste of time for a court to determine whether a person deserves a sentence of life imprisonment, as in Ms. Mathis' case; or an additional 48 months, as in Mr. Richards' case. Any conclusion that

re-trial is an excessive "burden" can only rest on overt hostility to the legislature's enactment of those sentencing enhancements.

The State Supreme Court has determined that double jeopardy concerns are not implicated where retrial is authorized on aggravating factors unless the death penalty is at issue. *State v. Thomas*, 166 Wn.2d 380, 395, 208 P.3d 1107 (2009). The Appellant's assumption that *Bashaw* requires resentencing without the aggravating factors is misplaced. *Bashaw* made no such pronouncement, instead the court reversed the enhancements remanded the case to the trial court for further proceedings consistent with its opinion. 169 Wn.2d at 148.[6] If a unanimous jury finding of an aggravating factor is based on an improper verdict form, resulting in reversal, the proper remedy would be retrial on the aggravating factor with corrected instructions. *See e.g., State v. Powell* 167 Wash.2d 672, 687-688, 223 P.3d 493, 501 (2009) (double jeopardy protections are inapplicable to sentencing proceeding and permitting a jury to consider aggravating circumstances upon resentencing does not violate double jeopardy.)

This remedy is also consistent with the fact that reversal based on an instructional error is not equivalent to a reversal based on a finding of insufficient evidence.

7. JOINDER OF THE DEFENDANT'S CASES WAS PROPER UNDER CrR 4.3.

[6] Although Bashaw does discuss judicial economy, it is in reference to the rationale for permitting "unable to agree" verdicts (*State v. Labanowki*, 117 Wash.2d 405) and prohibiting re-trial that implicates double jeopardy (*State v. Wright*, 165 Wash.2d 783, 792–93, 203 P.3d 1027 (2009), and *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). *See Bashaw* at 146.

Joinder of the defendant's case is proper under Criminal Rule (CrR) 4.3, which states in part:

> (b) Joinder of defendants. Two or more defendants may be joined in the same charging document:
>
> (1) When each of the defendants is charged with accountability for each offense included;
>
> (2) When each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
>
> *(3) When, even if conspiracy is not charged and all of the defendants are not charged in each count*, it is alleged that the several offenses charged:
>
> (i) were part of a common scheme or plan; or
>
> (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

CrR 4.3 (emphasis added).

In the present case *each* of the defendants were charged with accountability for each felony offense, including: Aggravated Murder (in the alternative First Degree Murder); Manslaughter First Degree, and Kidnapping First Degree. In addition, defendant Mathis was charged with one gross misdemeanor count of Tampering with Physical Evidence. CPM 125-130; CPR 692-697.

Moreover, the crimes charged against each defendant were so closely connected in respect to time and place and occasion that it would have been difficult, if not impossible, to separate proof of one charge from proof of the others.

Separate trials are *not* favored in Washington, and defendants seeking severance have the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy. *E.g., State v. Philips*, 108 Wn.2d 627, 640-641 (1987) (citing *State v. Grisby*, 97 Wash.2d 493, 647 P.2d 6 (1982),

cert. denied, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983; *United States v. John Doe*, 655 F.2d 920 (1980)). It would be burdensome, as a matter of course, "to accommodate separate trials in all cases ... Separate trials should be required only in those instances in which an out-of-court statement by a codefendant expressly or by direct inference from the statement incriminates his fellow defendant." *Grisby* at 507 (quoting *State v. Ferguson*, 3 Wash.App. 898, 906, 479 P.2d 114 (1970)).[7]

The standard of review of the denial of a motion for severance is abuse of discretion. In order to support a finding that the trial court abused its discretion, the defendant must be able to point to specific prejudice. *Grisby*, at 507-508.

The burden is on the moving party to come forward with sufficient facts to warrant the exercise of discretion in his favor. *Id.* Severance is proper only when the defendant carries the difficult burden of demonstrating undue prejudice resulting from a joint trial. *Grisby* at 507-508 (quoting *United States v. Davis*, 663 F.2d 824, 832 (9th Cir. 1981)).

In the present case, defendant could show no prejudice from joining his case with the co-defendant. There was no prejudice that offset the need for judicially economy.[8]

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[7] The only objection raised by either Mr. Richards or Ms. Mathis at the time of joinder was to the *possibility* of admission of incrimination statements of one co-defendant against the other in the joint trial that would violate the rule in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). RP Vol. II, pg. 160-163. The State, however, did not seek to admit, nor did it offer, incriminating out of court statements made by Mathis or Richards about the other in its case in chief. *Id.*

In the hearing, the State recognized that (under CrR 4.4) incriminating out of court statements of a co-defendant may not be admissible in a joint trial. Separate trials are required only in those instances in which an out-of-court statement by a co-defendant expressly or by direct inference from the statement incriminates his fellow defendant. *Grisby*, 97 Wn.2d 493, 507 (1982); citing *State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970). It Is important to note, however, if the out-of-court statements of the co-defendant are otherwise admissible against the moving defendant, severance is not required. *State v. Dent*, 123 Wn.2d 467, 483 (1994); *State v. Mitchell*, 117 Wn.2d 521, 528, 817 P.2d 398 (1991) (admission of statements as against interest under ER 804(b)(3) did not warrant severance).

[8] Contrary to Mr. Richards' claim, during this hearing the State *did* provide "justification" why joinder with Mr. Phillips was not appropriate. RP Vol. II, pg. 162. The State is not aware of any authority

The fact that the defendants were charged with serious offenses is not prejudice in its own right and is not a basis to conduct separate trials.

Even in cases where there are different counts charged and where evidence against one defendant is not relevant to the other, the courts have strongly favored joint trials. In *State v. Philips*, the petitioners argued that because there were 16 counts, and some petitioners were charged on as few as 2 counts, the jury could not reasonably have compartmentalized the evidence as it related to each petitioner. The petitioners in *Phillips* repeatedly moved the trial court to sever their trial, alleging that the evidence introduced against other petitioners had a spillover effect which acted to their detriment. *Philips* at 640-641.

The mere fact that evidence admissible against one defendant would not be admissible against a codefendant if the latter were tried alone does not necessitate severance, nor does the fact that some defendants choose to testify in their defense while other codefendants invoke their Fifth Amendment rights. *Philips* at 640-641 (citing *State v. Walker*, 24 Wn. App. 78, 599 P.2d 533 (1979); *State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968), cert. granted, vacated in part on other grounds and remanded, 408 U.S. 934 (1972)).

In *Phillips*, the trial court did not abuse its discretion in denying petitioners' motions for separate trials. The *Phillips* court noted that the offending evidence was not highly prejudicial; rather it was merely irrelevant as to certain petitioners. *Philips* at 640-641. In *State v. Walker*, the court joined defendants, rejecting defendant's argument

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requiring justification for *not* joining other co-defendants' who have made incriminating statements against the defendants, or how it is relevant to the issue of joinder in the present cases. Nonetheless, the "justification" for not joining the cases with Ms. Hirst was similarly made known in the same hearing, where Ms. Hirst told police that she had rented the car for Ms. Mathis and that Ms. Mathis was responsible for the death of Michelle Kitterman. RP Vol. II, pg. 175

that drug evidence introduced in relation to a codefendant was irrelevant and prejudicial. *Walker*, 24 Wn. App. 78.

The mere fact that evidence may be admissible against one defendant and not against another is not by itself proof that the defendants cannot have a fair trial if tried together. *Walker*, 24 Wn. App. at 81-82 (citing *State v. Courville*, 63 Wn.2d 498, 387 P.2d 938 (1963); *State v. Kinsey,* 20 Wn. App. 299, 579 P.2d 1347 (1978). [9]

Mr. Richards claims that the trial court should sever cases when consolidation conflicts with one defendant's speedy trial rights. Mr. Richards' argument that his subsequent oral motion for severance based on time for trial justified severance is without merit. For this proposition, Mr. Richards cites *State v. Torres*, 111 Wn.App. 323, 44 P.3d 903 (2002) which relies upon *State v. Eaves*, 39 Wn.App. 16, 19, 691 P.2d 245 (1984)(when defendants are jointly charged, severance to protect the speedy trial right of one is not mandatory).[10] These cases do not support severance for purposes of speedy trial, over the strong interest in judicial economy.

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[9] Mr. Richards' argument that the number of overall witnesses who testified about their direct contacts with him was only a portion of all the witnesses called, and therefore is relevant to the issue of severance, is without legal authority or logic.

Notwithstanding the fact that Mr. Richards never objected to joinder on this basis, Mr. Richards appears to ignore the fact that many of the witnesses called (who had no knowledge of, or contact with, any of the defendants) were necessary to establish that the crimes of murder, manslaughter, and kidnapping actually occurred. These included lay witnesses who located the Ms. Kitterman's body, emergency personnel, multiple investigating police officers, multiple forensic experts, and witnesses to established Ms. Kitterman's activities prior to her death and the course of her pregnancy. These witnesses would have been similarly necessary in separate trials.

[10] *Eaves* indicates that the discretionary basis to severe to protect speedy trial arise from CrR 4.4 (c)(2)(i), which states:

> (2) The court, on application of the prosecuting attorney, **or on application of the defendant *other than under subsection (i),*** should grant a severance of defendants whenever:
>
> > (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant;... (emphasis added)

This language in CrR 4.4(c)(2) would seem to exclude pre-trial severance for speedy trial purposes when it is based solely on the defendant's motion.

Conversely, see *State v. Dent*, 123 Wash.2d 467, 869 P.2d 392 (1994), reconsideration denied 869 P.2d 392 (1994) (trial court did not abuse its discretion in refusing to grant defendant discretionary severance in prosecution of defendant and codefendant for conspiracy to commit first-degree murder on ground that delay of over two months, to allow codefendant's new counsel adequate preparation time, moved commencement of trial to date after end of defendant's speedy trial period; defendant had not alleged prejudice in presenting defense, and separate trial would have burdened court, jurors, and witnesses.); *State v. McKinzy* 72 Wash.App. 85, 863 P.2d 594 (1993) (granting codefendant continuance beyond defendant's speedy trial period did not require that defendant's motion to sever her trial be granted, in that administration of justice and lack of substantial prejudice to defendant justified brief delay of trial beyond defendant's speedy trial period); and *State v. Melton*, 63 Wash.App. 63, 817 P.2d 413 (1991), review denied 118 Wash.2d 1016, 827 P.2d 1011 (1992) (grant of codefendant's motion for continuance, resulting in trial date seven days past expiration of minor defendant's trial date, was not abuse of discretion; court was entitled to rely on State's policy favoring joint trials, there was no showing that continuance was motivated by inappropriate considerations, and severance was not mandatory even where defendant's speedy trial rights were at issue).

In the present case, the Mr. Richards could not demonstrate undue prejudice resulting from a joint trial, or from the continuance granted to his co-defendant. The decision to join the cases, and to deny Mr. Richards subsequent oral motion to sever was not an abuse of discretion.

8. THE TRIAL COURT PROPERLY ADMITTED DEFENDANT RICHARD'S SPONTANEOUS ADMISSION, AND STATEMENTS GIVEN AFTER MIRANDA.

Miranda warnings are designed to protect a defendant's right not to make incriminating statements while in the potentially coercive environment of custodial police interrogation. *State v. Harris*, 106 Wash.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). The *Miranda* rule applies when "the interview or examination is (1) custodial (2) interrogation (3) by a state agent." *State v. Post*, 118 Wash.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992) citing *State v. Sargent*, 111 Wash.2d 641, 649-53, 762 P.2d 1127 (1988).

Custody for the purpose of *Miranda* refers to a situation where the "suspect's freedom of action is curtailed to a ... 'degree associated with formal arrest.' "*State v. Mahoney*, 80 Wash. App. 495, 496, 909 P.2d 949 (1996) quoting *State v. Short*, 113 Wash.2d 35, 40, 775 P.2d 458 (1989) (quoting *State v. Harris*, 106 Wash.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). *Accord State v. Ferguson*, 76 Wash. App. 560, 886 P.2d 1164 (1995). Formal arrest entails imprisonment, handcuffs, being told you are under arrest, and other clear and dramatic indices of loss of freedom.

A suspect may be questioned without Miranda even if the police detain him. In *State v. Walton*, 67 Wash. App. 127, 834 P.2d 624 (1992) the court held that a suspect who is not free to leave during the course of an investigatory detention is not entitled to *Miranda* warnings. This was true even when the officer would have arrested him if he had tried to leave. *Accord State v. Ferguson*, 76 Wash. App. 560, 886 P.2d 1164

(1995). Even frisking, handcuffing, and placing a suspect in a patrol car may not rise to the level of an arrest. *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987).

In this case, the initial contact on March 24, with Richards was not as a suspect, but as a witness. Upon contact Richards was found to have a warrant. He was not formally placed under arrest. During the initial interview he was not Mirandized. Richards made a voluntary statement denying any knowledge or involvement in the murder. His statement was clearly intended to be exculpatory.

In non-custodial situations the right to remain silent must be asserted or it is deemed waived. *State v. Post,* 118 Wn.2d 596, 605 826 P.2d 172, (Wash. 1992) (generally a person must invoke the protection of the Fifth Amendment privilege against self-incrimination); *Accord State v. Jacobsen*, 95 Wn.App. 967, 977 P.2d 1250 (1999) (where defendant was not in custody, privilege against self-incrimination was not self-executing, waiver occurred by failing to assert right) citing *State v. Escoto*, 108 Wash.2d 1, 6, 735 P.2d 1310 (1987) *See also State v. Warness*, 77 Wash. App. 636, 893 P.2d 665 (1995) (*Miranda* rights do not exist in non-custodial situations).

The purpose of *Miranda* rights is to insure that police do not coerce false confessions from defendants who hope to avoid the penalties of custody. Those situations are remote from this case. There was no force and there was no confession by Richards in his statement made prior to *Miranda* warnings.

The defendant's statement when being walked to the jail was not the product of custodial interrogation. "Interrogation" involves express questioning, as well as all words or actions on the part of the police, other than those attendant to arrest and custody, that are likely to elicit an *incriminating* response. *Rhode Island v. Innis*, 446

U.S. 291, 301, 64 L. Ed.2d 297, 100 S. Ct. 1682 (1980); *State v. Johnson*, 48 Wn. App. 681, 739 P.2d 1209 (1987). The absence of *Miranda* warnings does not prevent police from having any conversing with a person in custody. Det. Hollenbeck's statement that the defendant was a witness or that they would like to speak with Mr. Richards, can in no way be construed as interrogation or words likely to elicit an *incriminating* response.

A suspect's invocation of the right to remain silent must be unequivocal. United *States v. Burns*, 276 F.3d 439, 441-42 (8th Cir. 2002; *Simmons v. Bowersox*, 235 F.3d 1124, 1131 (8th Cir. 2001), cert. denied, 122 S. Ct. 280 (2001).

A significant body of federal law indicates that an officer who is confronted with an equivocal or ambiguous request to remain silent may simply proceed with questioning. *See, e.g., Simmons v. Bowersox*, 235 F.3d 1124, 1131 (8th Cir. 2001), cert. denied, 122 S. Ct. 280 (2001); *Bui v. DiPaolo*, 170 F.3d 232, 239 (1st Cir. 1999), cert. denied, 529 U.S. 1086 (2000); *United States v. Mills*, 122 F.3d 346, 350-51 (7th Cir.) (citing *United States v. Banks*, 78 F.3d 1190, 1196-97 (7th Cir. 1996)), cert. denied, 118 S. Ct. 637 (1997); *Medina v. Singletary*, 59 F.3d 1095, 1100-01 (11th Cir. 1995), cert. denied, 517 U.S. 1247 (1996).

Mere silence in the face of questioning does not constitute an unambiguous invocation of the right to remain silent. In such cases, an officer may continue to question the suspect until he or she invokes. See *Berghuis v. Thompkins*, 130 S.Ct. 2250, 176 L. Ed. 2d 1098 (2010)(suspect, who after receiving Miranda warnings, never stated that he wanted to remain silent or that he did not want to talk with the police, and who was largely silent during the 3-hour interrogation, but near the end, answered "yes" when asked if he prayed to God to forgive him for the shooting, had not invoked his Fifth

Amendment rights; statement is admissible). Silence in response to certain question not an unequivocal assertion of right to remain silent. *State v. Hodges*, 118 Wn. App. 668, 77 P.3d 375 (2003).

Similarly, a suspect stating "I refuse to sign that [the waiver of rights form] but I'm willing to talk to you" is not an unequivocal assertion of the right to remain silent. *State v. Parra*, 96 Wn. App. 95, 99-100, 977 P.2d 1272, review denied, 139 Wn.2d 1010 (1999); accord *State v. Manchester*, 57 Wn.App. 765, 771, 790 P.2d 217, review denied, 115 Wn.2d 1019 (1990). A suspect's statement "I don't want to talk about it" and "I'd rather not talk about it" is not an unequivocal invocation of right to silence. *Owen v. State*, 862 So.2d 687, 696-98 (Fla. 2003), cert. denied, 543 U.S. 986 (2004).

Even where the trial court found the defendant's first statement to police was custodial for purposes of *Miranda*, the voluntary and exculpatory nature of the statement did not taint his spontaneous statement or his subsequent interview statements given after Miranda.

In order to preserve an individual's right against compelled self-incrimination under the Fifth Amendment, the police must inform a suspect of his rights before custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). The lack of a proper Miranda warning prior to an initial confession does not necessarily prohibit the use of a subsequent post- Miranda confession (emphasis added). *State v. Baruso*, 72 Wash.App. 603, 609, 865 P.2d 512, 515 - 516 (1993)

But more importantly, our courts have refused to apply this "cat-out-of-the-bag" doctrine to pre- Miranda statements that are *exculpatory*, as opposed to inculpatory. When

a suspect has not confessed, he is no longer concerned that it is too late to do anything about an initial confession. The cat is not out of the bag. *Baruso* at 611 (citing *State v. Rupe*, 101 Wash.2d 664, 682 n. 5, 683 P.2d 571 (1984)).

To be voluntary, a confession must be the product of a rational intellect and a free will. *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290 (1978). In determining voluntariness, the Court evaluates "all the circumstances of the interrogation". Mincey, at 401, 98 S.Ct. at 2418. In *State v. Rupe* 101 Wash.2d 664, 679, 683 P.2d 571, 581 - 582 (1984), the Court held that viewing the totality of the circumstances, the defendant's confession was voluntary where police tactics employed were neither overly zealous nor coercive, and consisted primarily of psychological appeals to defendant's conscience.

But even in cases involving the "cat out of the bag doctrine" (i.e., *inculpatory* pre-*Miranda* statement) the psychological impact of voluntary disclosure of a guilty secret does not qualify as state compulsion or compromise the voluntariness of a subsequent informed waiver. *E.g., Oregon v. Elstad,* 470 U.S. 298, 312, 105 S.Ct. 1285, 1294 (1985).

There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will, and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but non-coercive question. In *Elstad*, the court held: we must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. The court went on to say: that a subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned

statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights. *Elstad,* 470 U.S. at 314.[11]

In the present case, the defendant's initial statement to police was exculpatory. The defendant was taken from the interview room and on his way to booking, asked to speak with the detective. He then provided a second statement after he was given, and waived, his *Miranda* rights. The initial exculpatory statement did not limit the admissibility of the second statement given after *Miranda*. It is worth noting that the second statement was also an attempt to exculpate Richards of involvement in the murder and that he was released after the second interview.

Additionally, the third statement given at the time of the defendant's arrest, followed advisement and waiver of his *Miranda* rights. The third statement was also exculpatory.

9. THE ADMISSION OF CO-CONSPRIATOR STATEMENS OF LACEY HIRST WAS PROPER.

   a. Co-conspirator statements are not hearsay and are admissible even if they occurred before the defendant joined the conspiracy

[11] In *Elstad* the court also criticized holdings that sought to apply the Court's precedent relating to confessions obtained under *coercive* circumstances to situations involving wholly voluntary admissions, by requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. The Court said: Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. The Court stated: No further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver. The Court held that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings. *Oregon v. Elstad* 470 U.S. 298, 317-318, 105 S.Ct. 1285, 1297 - 1298 (1985)

The State introduced statements made by the a co-defendant/co-conspirator regarding claimed activities before, during, and after the murder, statements to non-law enforcement, and denials of involvement. The co-defendant's statements were are not testimonial and were not barred by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

The central question under *Crawford* is whether a statement is "testimonial." Although the Court acknowledged that its definition of "testimonial" was not exhaustive, *Crawford*, 541 U.S. at 68 n. 10, it did provide some guidance on the subject. First, the Court focused on narrow historical definitions of the words "witness" and "bear testimony." "Testimony," in this narrow Confrontation Clause sense, is limited to "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (italics added).

Crawford indicates that non-testimonial statements are not within the core concern of the Confrontation Clause, and thus, they are not covered by the new rule. Instead, non-testimonial statements remain subject to the reliability test of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). In assessing whether a statement is "testimonial," the knowledge or intent of the declarant is key; the identity or the role of the listener is secondary. Therefore, a defendant may not hang his hat on the fact that the statement was made to a police officer. The relevant question is not "to whom was it made," but "was it testimonial."

Firmly-rooted exceptions to the hearsay rules generally will not fall within the scope of this new rule, because most firmly-rooted hearsay exceptions concern statements made for some purpose other than litigation. Such firmly-rooted exceptions are "by their very

nature ... not testimonial." *Crawford*, 541 U.S. at 56. For instance, business records are admitted because they are prepared for a legitimate, routine purpose, not simply to prepare for litigation. *Crawford*, 541 U.S. at 56; *5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE* § 803.33 – 803.45 (4th ed.1999).

Another example of a non-testimonial statement explicitly referenced by the Court is a statement made to further a conspiracy. Statements made to further a conspiracy are simply defined as non-testimonial and non-hearsay because the statements are not made to build a case for trial; the statements are made to further the conspiracy. *Crawford*, 541 U.S. at 56; *5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE* § 801.58 – 801.66 (4th ed.1999).

ER 801(d) states in part:

> A statement is not hearsay if —...(2) The statement is offered against a party and is...(v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The Court of Appeals reviews the trial court's application of the rules of evidence to particular facts for abuse of discretion. *State v. Sanchez-Guillen*, 135 Wash.App. 636, 642, 145 P.3d 406 (2006).

A statement that is offered against a party and is a statement of the party's co-conspirator during the course of and in furtherance of the conspiracy, falls within firmly rooted exception to the hearsay rule, and thus does not violate a defendant's right of confrontation. *State v. Rangel-Reyes*, 119 Wash.App. 494, 81 P.3d 157 (2003).

Courts generally interpret broadly the "in furtherance" requirement, as element for admissibility as non-hearsay statements by co-conspirator of a party made during the course and in furtherance of the conspiracy. *State v. Israel* 113 Wash.App. 243, 54 P.3d

1218 (2003); reconsideration denied, review denied 149 Wash.2d 1013, 69 P.3d 874, review denied 149 Wash.2d 1015, 69 P.3d 874.

By its terms, ER 801(d)(2)(v) does not restrict its application only to criminal cases in which conspiracy has been charged. The general rule is that prior to admitting co-conspirator statements, the trial court must determine whether the State has shown a prima facie case of conspiracy, and at least slight evidence of defendant's participation. *State v. Dictabo*,102 Wash.2d 277, 687 P.2d 172 (1984); overruled on other grounds, State v. Harris, 106 Wash.2d 784, 789-90, 725 P.2d 975 (1986).

The conspiracy supporting the court's ruling on the evidence need not be integral to the crime charged. *State v. Halley*, 77 Wash.App. 149, 152, 890 P.2d 511 (1995). It need not be a formal agreement.

Once the State shows a conspiracy, even a slight connection by the defendant is enough to support admission of the statement. *State v. Brown*, 45 Wash.App. 571, 579, 726 P.2d 60 (1986). Statements of co-conspirators are admissible as substantive evidence. *State v. Barnes*, 85 Wash.App. 638, 665, 932 P.2d 669 (1997).

Admissions and Statements made in connection with flight and to avoid arrest are admissible under the rule. *See State v. Sanchez-Guillen*, 135 Wash.App. 693, 145 P.3d 406 (2006).

The State need not charge the crime of conspiracy to admit out-of-court statements of a defendant's co-conspirators. And the State need not meet technical requirements for proving the crime of conspiracy. *State v. Halley*, 77 Wash.App. 149, 153-54, 890 P.2d 511 (1995). Instead, it simply must prove the existence of 'the basic dictionary definition of a conspiracy, 'an agreement ... made by two or more persons confederating

to do an unlawful act.' " *Halley*, 77 Wash.App. at 154, 890 P.2d 511. So long as the trial court finds the defendant to be part of the conspiracy, even statements made by his co-conspirators prior to when the defendant joined the conspiracy are still admissible against the defendant. *See State v. Miller*, 35 Wash.App. 567, 568-69, 570-71, 668 P.2d 606, review denied, 100 Wash.2d 1032 (1983) (statements made months before defendant joined conspiracy admitted upon proof that conspiracy began before the proffered statements and upon proof that defendant joined the conspiracy by shooting the victim). In *Miller*, the statements were admissible to show the co-conspirators involvement in the formation of the conspiracy. *Id.* (citing *United States v. Brooklier*, 685 F.2d 1208, 1219 (9th Cir.1982), cert. denied, --- U.S. ----, 103 S.Ct. 1195, 75 L.Ed.2d 439 (1983); *United States v. Kutas*, 542 F.2d 527, 528 (9th Cir.1976), cert. denied, 429 U.S. 1073, 97 S.Ct. 810, 50 L.Ed.2d 790 (1977). The hearsay rule did not apply. *Miller* at 570.

b. Several of the statements made by Lacey Hirst were also admissible pursuant to ER 804(b)(3) as statements against interest.

Under ER 804(b)(3) a hearsay statement against the declarant's penal interest may be admissible if the declarant is unavailable and the statement was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the

statement. A hearsay statement against penal interest is admissible if (1) the declarant is unavailable to testify, (2) the statement so far tends to expose the declarant to criminal liability that a reasonable person in the same position would not have made the statement unless convinced of its truth, and (3) corroborating circumstances clearly indicate the statement's trustworthiness. *State v. Anderson*, 112 Wash.App. 828, 51 P.3d 179 (2002).

Co-Defendant Hirst's statements exposed her to criminal liability that a reasonable person in the same position would not have made unless convinced of its truth and the corroborating circumstances clearly indicate the statement's trustworthiness. Ms. Hirst's case had not yet proceeded to trial at the time Mathis' and Richards' case was tried. Ms. Hirst was not available to testify and the statements she made against her penal interest were not excluded by the hearsay rule. See RP Vol. VII, 1005-1006.

10. TESTIMONY ABOUT DRUG DEALING AND POSSESSSION OF WEAPONS WAS PROPERLY ADMITTED AND RELEVANT TO ESTABLISH THE RELATIONSHIP BETWEENT THE DEFENDANTS AND THE MOTIVE AND MANNER IN WHICH MS. KITTERMAN. WAS MURDERED.

The State advised the court of the evidence it believed was admissible under ER 404. CPM 204-208. The State sought to admit evidence of other crimes, wrongs, and acts committed by defendants; specifically drug involvement, transactions and reports made to law enforcement by the co-defendant about the victim.

Evidence of other crimes or misconduct is admissible if the probative value of such evidence exceeds its potential unfair prejudice to the defendant. ER 404(b) provides as follows:

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

ER 404(b) codifies pre-rule law which allowed courts to admit evidence which was "essential to the establishment of the State's case" and whose probative value outweighed its potential prejudicial effect. *State v. Goebel*, 36 Wn.2d 367, 218 P.2d 300 (1950) and 40 Wn.2d 18, 240 P.2d 251 (1952).

In determining whether ER 404(b) evidence is admissible, the court must first identify the purpose for which the evidence is offered. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986), (citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Second, the court must determine whether the evidence is of consequence to the outcome of the action. *Smith*, 106 Wn.2d at 776 (citing *Saltarelli*, supra). Finally, the court must balance the probative value of the evidence against its potential prejudicial effect. *Smith*, 106 Wn.2d at 776 (citing *Saltarelli*, supra.); *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). The State must prove the misconduct evidence by a preponderance of the evidence. *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981).

ER 404(b) should not be considered in isolation. It should be read conjunction with other evidence rules, particularly ER 401, 402 and 403. *Saltarelli*, 98 Wn. 2d at 361.

ER 401 defines relevant evidence as follows: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 402 provides that evidence which is not relevant may be excluded, and ER 403 provides that relevant

evidence may be excluded if its probative value is substantially outweighed by, among other things, the danger of unfair prejudice.

Under ER 404(b) evidence is admissible to show, inter alia, identity, common scheme or plan, intent, knowledge, motive, opportunity, absence of misstate or accident, res gestae, and the elements of the crime charged. The rule's list of purposes is neither exclusive nor exhaustive. *State v. Kidd*, 36 Wn. App. 503, 505, 674 P.2d 1983).

For example, in criminal cases it is often extremely probative for the State to produce evidence about the defendant's conduct immediately preceding or following a criminal act. This is referred to as res gestae, or same transaction, evidence. Res gestae evidence is used "[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591 (1981) (quoting *E. Cleary, McCormick on Evidence* § 190, at 448 1972)).

The probativeness of the res gestae evidence increases when the prior incidents are proximate in time. *State v. Brunn*, 149 Wash. 522, 271 P.2d 330 (1928). Res gestae evidence of the defendant's acts towards witnesses and others after the crime is similarly probative of mental state. *In State v. McGhee*, 57 Wn. App. 457, (1990), for example, the court affirmed the trial court's admission of evidence that the defendant threatened a potential witness. The court rejected the defendant's argument that this evidence unfairly prejudiced him by suggesting he was a violent person.

Additionally, Washington courts have long recognized that motive evidence is probative of identity. *State v. Gaines*, 144 Wash. 446, 453, 258 P.2d 508, cert. denied,

277 U.S. 81 (1927). For example, evidence regarding the volatility of the defendant's relationship with the victim is admissible to prove that the defendant killed the victim. *State v. Terranova*, 105 Wn.2d 632, 716 P.2d 295 (1986). Similarly, that a murder victim had previously reported the defendant for theft or had been an adversary of the defendant is admissible evidence to show the defendant's motive to kill. *State v. Giffing*, 45 Wn. App. 369, 725 P.2d 445 (1986); *State v. Robinson*, 38 Wn. App. 871, 691 P.2d 213 (1984). Under certain circumstances, the gravity of the defendant's financial condition is admissible to show that he made misrepresentations in loan applications. *United States v. Shriver*, 842 F.2d 968 (7th Cir. 1988). *See generally K. Tegland, Washington Practice, Evidence* § 117, at 407-08 n. 4.

In the present case, drug transactions were interwoven and pervasive throughout the lead up and commission of the crime. Drugs were used, and offered as inducement, for cooperation of co-defendants and the victim. Co-defendant Mathis supplied drugs to the defendant's husband, the victim and other co-defendants. The defendant Hirst also sought to ply her husband with drugs in order to keep him away from the victim's residence before the murder.

The defendant Hirst also made reports to law enforcement alleging the victim was involved in drugs, and sought to have the victim arrested for violation of release conditions. The claim or belief that the victim would report ("snitch") on drug activities was an additional stated motivation for harming the victim.

The trial court did not abuse its discretion in admitting such evidence. The evidence was probative and not overly prejudicial.

When ER 404(b) evidence is admitted, the jury should be instructed as to its limited purpose. Because evidence of other crimes is typically admissible only for a specific purpose, a jury should be given an appropriate limiting instruction. *State v. Fitzgerald*, 39 Wn. App. 652, 594 P.2d 1117 (1985).

In the present case, the State suggested a limiting instruction in pre-trial motions; but the defense did not seek or propose such a limiting instruction. Moreover, the defendants offered similar evidence themselves throughout the trial. The defendants also did not object to the equivalent evidence offered by the State. The defendants have effectively waived any claimed error as to the admission of the evidence.

E. CONCLUSION

The claimed instructional error was not of constitutional magnitude and was waived by the failure to object at the trial court level. The instructions given regarding special verdicts did not require a unanimous answer by the jury in order to be final.

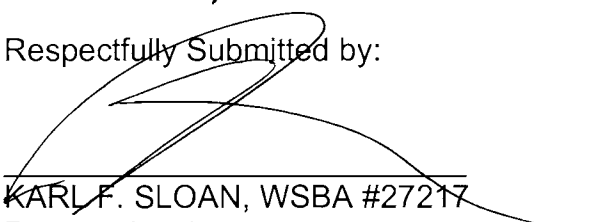
Even if there were error in the instructions, any error was harmless in light of the totality of the instructions, the substantial evidence, and the verdicts on the substantive charges.

The cases were properly joined in light of the strong preference for joint trials and judicial economy. No specific prejudice resulting from the joint trial was shown by the defendants.

Mr. Richards' statements were properly admitted after lengthy CrR 3.5 hearings. The trial court did not abuse its discretion in admitting either his statements, the co-conspirator's statements, or ER 404 evidence – which was similarly offered by the defendants.

Dated this 15 day of Sept 20 11

Respectfully Submitted by:



KARL F. SLOAN, WSBA #27217
Prosecuting Attorney
Okanogan County, Washington

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 / 237 Fourth Avenue North
Okanogan, WA 98840
(509) 422-7280
Fax: (509) 422-7290
TTY/Voice Use 1 (800) 833-6388

Criminal Division
Jennifer Richardson, Chief Criminal Deputy
Joseph M. Caldwell, Criminal Deputy
Felecia S. Chandler, Juvenile Court Deputy
David Gecas, District Court Deputy
Clayton Hill, District Court Deputy

Civil Division
Stephen Bozarth, Chief Civil Deputy
Dave Jorgensen, Child Support Deputy

Victim-Witness Assistance Program
Susan Hinger, Program Coordinator
Lona Fritts, Program Assistant

Office Administrator
Susan Hinger

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

September 19, 2011

COA NO. 29048-4-III Consolidated with 29075-1-III

NAME OF CASE: State of Washington v. Tansy Mathis & David Richards
Okanogan County Cause No. 09-1-00109-8 & 09-1-00104-7

I hereby certify under penalty and perjury of the laws of the State of Washington that on the **19th day of September, 2011,** I mailed the original and one copy of **Respondent's Brief and Motion to File an Over Long Brief** to the following court and one copy to counsel of record and/or other interested parties by depositing in the mails of the United States of America an addressed envelope with prepaid postage to the following:

The Court of Appeals, Div. III
Attn: Renee Townsley
500 N. Cedar Street
Spokane, WA 99201

Andrea Burkhart
Burkhart & Burkhart
PO Box 946
Walla Walla WA 99362-0274

Susan Gasch
Gasch Law Office
PO Box 30339
Spokane WA 99223-3005

David E. Richards
#340477
1313 North 13th Ave
Walla Walla WA 99362

Tansy Mathis
#340465
9601 Bujacich Rd NW
Gig Harbor WA 98332-8300

Ronda Watts

Ronda Watts, Legal Secretary
Prosecutor's Office
Okanogan County, WA