IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III
No. 290484 Consolidated with

No. 290751

STATE OF WASHINGTON, Respondent,

v.

DAVID EUGENE RICHARDS, Appellant.

BRIEF OF APPELLANT

Andrea Burkhart, WSBA #38519
Attorney for Appellant
Burkhart & Burkhart, PLLC
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630

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I. INTRODUCTION

David Richards was convicted of second degree murder and first degree manslaughter for his role in the death of Michelle Kitterman. Richards' case was joined for trial with co-defendant Tansy Mathis. Both defendants had made statements to investigators that were divergent, thus incriminating both. Further, while Richards was held in custody, his trial was continued several months over his objection and past the deadline for a speedy trial for the sole purpose of keeping the matter joined with co-defendant Mathis.

At trial, the court allowed the State to introduce statements made by Richards to law enforcement without proper *Miranda* warnings, after the law enforcement officers had used the threat of arresting him on a warrant to coerce his statements. Upon eventually receiving *Miranda* warnings, Richards stated that he did not want to give up his rights. Notwithstanding his invocation, questioning did not immediately cease and the statements obtained were used against him at trial.

The State's theory of the case was that Kitterman was having an affair with a married man, Daniel Pavek, and became pregnant by him. Pavek's wife, Lacey Hirst, enlisted Mathis to get rid of Kitterman and her unborn child. Mathis, in turn, contacted Richards and asked him to help

her take care of a snitch. Despite this straightforward theory of the murder as the product of a woman scorned, the trial was permeated with testimony about the defendants' drug use and drug dealing, as well as his propensity to carry knives, which were not relevant to the State's theory of the case and served little purpose beyond depicting Richards as a dangerous law-breaker and an individual of low moral character.

The State was also permitted to introduce a number of hearsay statements made by Hirst, although Hirst did not testify and was not subject to cross-examination. The trial court allowed the testimony as statements of a co-conspirator, even though the evidence did not establish Richards' complicity with Hirst's objective and even though several statements were not made in furtherance of the conspiracy.

Finally, in its instructions to the jury regarding the aggravating circumstances charged, the court incorrectly instructed the jury that its verdict on the aggravating circumstances must be unanimous.

In light of the multitude of errors affecting the trial, the process cannot be relied upon as producing a just result that fairly and objectively evaluated Richards' guilt based solely on the strength of the evidence. Because the errors collectively resulted in a trial that was impermissibly

inflammatory, Richards' convictions should be reversed and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to sever Richards' case from Mathis' case.
2. The trial court erred in finding that Richards' statement to police that "Hollywood did it" was spontaneous and voluntary.
3. The trial court erred in finding that Richards knowingly and voluntarily waived his *Miranda* rights when the testimony established that Richards invoked his rights.
4. The trial court erred in admitting out-of-court statements made by Hirst that did not fall within the exception for statements of a co-conspirator in furtherance of a conspiracy.
5. The trial court erred in allowing extensive irrelevant testimony about Richards being a drug dealer and carrying a number of knives and an ice pick, contrary to ER 404(b).
6. The trial court incorrectly instructed the jury on the sentencing enhancement.
7. Cumulative error deprived Richards of a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court's refusal to sever the co-defendants' cases violate Richards' right to a speedy trial?
2. Did the trial court err in concluding that Richards' statement to officers that "Hollywood did it" was spontaneous when the officer who heard the statement testified that they were involved in a conversation in which the officer stated that he considered Richards a witness and wanted him to talk?
3. Did the trial court err in concluding that Richards voluntarily waived his rights under *Miranda v. Arizona* when Richards stated unequivocally that he did not want to give up his rights and felt that he was being blackmailed into speaking?
4. Did the trial court err in admitting out-of-court statements by Hirst under the co-conspirator statement exception, when there was no evidence that Richards had any contact with Hirst or had any intention of helping her "get rid of" her husband's girlfriend?
5. Did the trial court err in admitting statements by Hirst that were not made in furtherance of any conspiracy?
6. Did the trial court err in admitting substantial and pervasive testimony about Richards' involvement in using and selling

methamphetamine and his history of carrying knives and an ice pick without making findings as to the evidence's relevance or prejudicial effect?

7. Did the trial court err in instructing the jury that its decision on the sentencing enhancement had to be unanimous?
8. Did the cumulative effect of these errors deprive Richards of a fair trial?

IV. STATEMENT OF THE CASE

Michelle Kitterman was found dead on the morning of March 1, 2009. Clerk's Papers ("CP") 1043. A medical examiner determined that she died from multiple puncture wounds to the chest and back, as well as blunt impact injuries to the head. IX-B Verbatim Report of Proceedings ("RP") 1433. The medical examiner also observed that Kitterman was in the early stages of pregnancy at the time of her death. IX-B RP 1449-51.

After Kitterman's body was identified, law enforcement officers learned from her roommate that Kitterman was having an affair with Daniel Pavek and was pregnant with his child. V RP 753, 761-62; CP 1040. Investigators learned that Lacey Hirst, Pavek's wife, had contacted the Oroville Police Department to report that Kitterman was not complying with her conditions of release on a drug charge and that she

was consuming methamphetamine while pregnant. V RP 763; VII RP 1001, 1008-09. Hirst also made several other complaints to the Oroville Police about Kitterman. VII RP 1012.

The investigators also learned that Hirst worked at Sunrise Auto and contacted several of her co-workers. V RP 767. They learned that Hirst kept a file on Kitterman at her office. VII RP 1018-19. Hirst was having performance problems because of her husband's affair and had made statements about having Kitterman taken care of or eliminated, and bringing in people from Spokane to make Kitterman disappear. VII RP 1016-17. Other co-workers and acquaintances of Hirst reported hearing her make similar statements about taking care of Kitterman. VII RP 1032, 1062-63.

During the course of the investigation, police discovered that Hirst had rented a vehicle from her employer on February 26, 2009 and returned it sometime after Sunrise Auto closed on Saturday, February 28, 2009 and before it reopened the following Monday. VI RP 931-33. Hirst stated that she needed the vehicle to take her husband to rehab in Yakima. VII RP 982. Police retrieved the vehicle and searched it, finding that the cargo area was wet and smelled of cleaning agents. V RP 769. They also

discovered some stains that were later determined to be Kitterman's blood. V RP 771, VIII RP 1187, 1241-42.

A few days after Kitterman's body was found, an officer stopped Tansy Mathis' vehicle and asked her to talk. IX-A RP 1322-23. Mathis told the officer that Hirst had rented the vehicle for her, so that she could drive to Chelan and Bellingham. IX-A RP 1325-26. Mathis admitted driving to Spokane in the vehicle as well as Republic. IX-A RP 1327, 1330. At another point, she also claimed driving to Bellingham and back. IX RP 1335. She admitted calling Hirst at about 1:00 in the morning from Republic but denied that she had gone to Kitterman's house. IX-A RP 1330-31. She admitted vacuuming and cleaning the rental car. IX-A RP 1335.

On March 15, 2011, police spoke with Brian Hohman, an associate of both Mathis and Richards. VIII RP 1108, 1110, 1142. Hohman said that Mathis had called him asking for help because she was being investigated for a murder. VIII RP 1111. According to Hohman, Mathis told him that they were going to pick Kitterman up because Kitterman was going to rat her out. VIII RP 1113-14. Mathis revealed other details about Kitterman's death and asked Hohman to contact another witness to tell her to keep her mouth shut. VIII RP 1116-17, 1119-21. Mathis also asked

Hohman to get rid of Hollywood, aka Brent Phillips, whom she told Hohman had stabbed Kitterman to death. VIII RP 1130, 1165. Hohman told the police that the weapon used in the killing was an ice pick, and that Richards was known to carry an ice pick. CP 1043.

The investigators learned that Phillips and Mathis had gone to a residence in Spokane after the murder. III RP 272. When they went to the home, the resident identified himself as David Richards. Upon discovering that there was an outstanding warrant for his arrest, the officers handcuffed Richards and took him to the police station. III RP 273-74. Although one officer testified that Richards was under arrest on the warrant, he also told Richards that if he cooperated in talking about the murder, they would allow him to take care of his warrant on his own. III RP 276. The officers did not advise Richards of his *Miranda* rights at that time. III RP 277, 292.

Richards told the officers that he did not want to be a snitch. III RP 278. The officers then began walking Richards to the jail to book him on the warrant. III RP 278. On the way to the jail, one of the officers told Richards, "We consider you a witness and we'd like you to talk to us." Richards responded, "Okay, I'll talk. Hollywood told me he did it." III RP 279. The officers then walked Richards back to the interview room

and advised him of his *Miranda* rights. III RP 280. Richards stated that he did not want to give up his rights and that he thought he was being blackmailed into talking. III RP 281. He subsequently gave a statement. III RP 303. In his statement, Richards told the officers that on the Wednesday before Kitterman's death, he discovered that his ice pick was missing. Hollywood, who was staying with Richards, was gone for the weekend with Mathis and admitted that he had taken the ice pick. Hollywood told Richards that things went bad, it was bloody, they killed a girl, burned their clothes and the ice pick in a fire and threw what was left in the river. CP 1042. After making his statement, Richards was allowed to leave. III RP 297.

A few days after Richards' interrogation, police interviewed Phillips at the Okanogan County Jail. Phillips claimed that Richards approached him to go somewhere and took him to Mathis' house, where Richards and Mathis talked. After they left, Richards told Phillips that they wanted him to take out a chick who was snitching on people. Richards wanted Phillips to go with him to do it. CP 1043.

Phillips claimed that he rode with Mathis and a Mexican drug dealer while Richards rode in a separate vehicle. After several hours they arrived at Kitterman's house, where Mathis asked Phillips to get

Kitterman to go to the casino with them. Kitterman rode with Mathis and Phillips. During the drive, Phillips claimed they passed Richards' car on the side of the road. Richards told Phillips to get Kitterman out of the car. When they got out of the car, Phillips grabbed Kitterman by the neck and strangled her, throwing her into the car and onto the ground. He claims that he stopped and got into the car where he experienced breathing problems. Mathis then yelled at Richards to finish it. Phillips claimed that he saw Richards kneeling over Kitterman but did not see what he did. He also saw Mathis grab Kitterman by the shoulders while Richards grabbed her legs. Kitterman was screaming. Mathis and Richards moved Kitterman to the side of the road and they left the area. CP 1044.

Based on Phillips' statement, the State ultimately charged Richards with aggravated first degree murder, first degree felony murder, first degree manslaughter, and first degree kidnapping, and obtained a warrant for his arrest. CP 692-97, 1038. The State moved to join Richards' case for trial with Mathis'.[1] CP 982-83. Richards opposed the joinder on the grounds that the defendants' divergent statements were incriminating. II RP 161. The trial court granted the State's motion and joined the cases for trial. II RP 163.

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[11] Phillips and Hirst were also charged for their involvement in Kitterman's death, but their cases were not joined with Mathis and Richards. *See* I RP 98.

On November 9, 2009, the trial court continued the trial date beyond Richards' speedy trial deadline, over Richards' objection. I RP 111, 131,135-36. The court again continued the trial date on Mathis' request, over Richards' objection. II RP 216, 228, 234. Mathis requested another continuance, at which time Richards objected and questioned whether the cases should continue to be joined. II RP 243, 246. The court granted Mathis' motion and also continued Richards' trial beyond his speedy trial deadline so that the matters could remain joined. II RP 254-55. In its findings of fact and conclusions of law, the trial court held that "[j]udicial economy outweighs Defendant Richards [sic] speedy trial date." CP 850.

Richards challenged the admissibility of the statements he made to the officers when he was first arrested on the outstanding warrant. CP 840. After the hearing, the trial court suppressed the first statement but found that Richards' statement that "Hollywood did it" was spontaneous and admissible at trial. III RP 340-41. Likewise, the trial court found that even though Richards expressly stated that he did not want to give up his rights and that he felt he was being blackmailed, he nevertheless knowingly, intelligently and voluntarily waived his rights. III RP 345-48. His later statements were admitted at trial. IX-A RP 1298-99. His first

statement, given without *Miranda* warnings, was allowed to be used against him at trial for impeachment. XIII RP 1986.

Prior to trial, Richards moved in limine to suppress any evidence of prior bad acts arising under ER 404(b). CP 784. The State sought to introduce evidence of drug transactions under ER 404(b), arguing that "drug transactions were interwoven and pervasive throughout the lead up and commission of the crime." CP 766, 769. Although the State's theory of the case had nothing to do with drug use or drug transactions – rather, the State alleged that Hirst had brainstormed Kitterman's murder because of Kitterman's affair with Hirst's husband – at trial, substantial and repeated references were made to Richards and Mathis being drug dealers and engaging in drug use. V RP 648-49, 652, 655, 661; *see, e.g.,* VI RP 793-94 (Phillips referring to Richards as a meth dealer and explaining how he was paid in drugs for being Richards' "tax man"[2]); X RP 1595, 1602-02 (witness Erin Schibel describing obtaining methamphetamine from Richards and Phillips and her methamphetamine addiction). Mathis also implicated herself and Richards in drug use and drug dealing to establish her defense that she had tried to help Hirst by giving Kitterman methamphetamine to leave Pavek alone. V RP 669-70; *see generally* V

[2] A "tax man," according to Phillips, is somebody who uses force or scare tactics to collect money owed. VI RP 793.

RP 665-82 (opening statement of Mathis). At no time did the trial court weigh the probative value of the evidence of drug dealing and drug use against its prejudicial effect. The trial court's sole consideration of the issue was a statement that "they can admit some of this drug stuff 'cause it's kind of part and parcel of this, but they can't beat the drug drum." IV RP 460. No cautionary instruction was given beyond a bare advisement that evidence of a witness's conviction for a crime is admissible only for evaluating the credibility of the witness. CP 624.

Phillips reached a deal with the State before trial and pled guilty in exchange for a sentence of 312 months. VI RP 802-03. He testified against Richards and Mathis at trial. *See generally* VI RP 791 *et seq.* Phillips recanted his previous statement that Richard was present and actually involved directly in Kitterman's death. VI RP 800-01. Instead, his story was that after leaving Mathis' house, Richards told him "there was a snitch that might need to be taxed." VI RP 797-98. Richards then attempted to obtain a gun from a lady named Lily. VI RP 798-99. When Lily did not have the gun, Richards was upset and went to sleep, and Phillips went to Mathis' house alone. VI RP 799. Phillips claimed that Richards was supposed to go with them, but did not. VI RP 800. Phillips understood that they were to be paid $1000 to beat Kitterman up and scare her, and $500 "if anybody else was there that got in the way." VI RP 805.

On the night of Kitterman's death, Mathis picked Phillips up from Richards' house. VI RP 805-06. She had with her an item Phillips said belonged to Richards, described as an "ice pick" but actually a three-sided file attached to a handle. VI RP 807. They drove to a babysitter's house and picked up a large quantity of methamphetamine. VI RP 812-14. After they smoked some, Mathis and Phillips continued driving to Kitterman's house. VI RP 814-16. Mathis told Phillips that there could be more money involved, $10,000 plus $5,000 for anybody additional in the way if things did not go right and somebody had to be killed. VI RP 816.

Upon arriving at Kitterman's house, Mathis and Phillips smoked methamphetamine with Kitterman. VI RP 818. When they asked Kitterman if she wanted to go to the casino, she initially declined and they left the house. A few minutes later, Kitterman called Mathis and they went back to pick Kitterman up. VI RP 819. At one point during the drive, Mathis pulled over to the side of the road, telling them they could not smoke methamphetamine in the rental car. VI RP 821. When Mathis told him Kitterman was the snitch, Phillips grabbed Kitterman by the neck and slammed her against the vehicle. VI RP 822. Phillips described choking Kitterman repeatedly while Mathis stabbed Kitterman in the stomach with Richards' ice pick. VI RP 824-25. Mathis yelled at Phillips

to finish it and handed him the ice pick. Phillips stabbed her several more times. VI RP 826. Phillips and Mathis picked Kitterman up and threw her off the side of the road. They drove away. VI RP 827.

Afterwards, they went to a house where somebody named Brian lived and smoked more methamphetamine. VI RP 833-34. Mathis and her boyfriend Steve began cleaning the rental vehicle, vacuuming it out and spraying it with bleach and cleaner. VI RP 836. They left and returned in a different car, Mathis' minivan. VI RP 838. Mathis took Phillips to Colville and found a lady to give him a ride back to Spokane. VI RP 839. Mathis gave Phillips an envelope with cash and some methamphetamine. Phillips assumed it was for Richards and asked for more methamphetamine instead. Mathis took the money back and gave Phillips about five grams of methamphetamine. VI RP 840.

Phillips went back to Richards' house, where Richards questioned him about what happened. Phillips initially told him nothing had happened, then later told him "the shit happened." VI RP 841-42. Richards asked if Phillips had anything for him from Mathis, and Phillips gave him the methamphetamine. VI RP 842. According to Phillips, Richards was upset, saying, "This is it?" VI RP 843.

Over Richards' objection, the trial court allowed the State to introduce a number of statements Hirst made to third parties. Hirst did not testify. The statements were deemed admissible against both defendants as statements of a co-conspirator or statements against penal interest. VII RP 981-82 (Bernica, statements about Hirst wanting the rental vehicle to take her husband to rehab in Yakima); VII RP 985 (Bernica, statements by Hirst that Kitterman was found dead and everybody was blaming her); VII RP 990-93 (Walts, statements by Hirst looking for Pavek and Kitterman and saying that it would all be taken care of by Monday and everything should be back to normal); VII RP 1016-1017 (Ramin, statements by Hirst that she was going to get Kitterman thrown in jail, taken care of, removed, disappear, and that she knew some people in Spokane that would take care of it for her); VII RP 1062-64 (Orlando, Hirst asking if she knew anybody who would beat up Kitterman and make her lose the baby and saying she would be willing to pay for it);

Besides Phillips, at trial only eight of the State's 49 witnesses testified about Richards' involvement:

- Sergeant Joseph Peterson testified that Richards told him he had introduced Mathis and Phillips and that his ice pick

was stolen a week before Kitterman's death. IX-A RP 1294-95.

- Detective Kip Hollenbeck testified that Richards told him Hollywood told Richards about stabbing Kitterman. IX-A RP 1298-99.
- Another officer testified about an encounter he had with Richards a night or two before Kitterman's death, when Richards had chased someone who had stolen a VCR from his house. IX-A RP 1313. The officer found three knives and an ice pick on Richards' person. IX-A RP 1312-13. The ice pick did not match the weapon that Phillips described using to stab Kitterman – Richards' ice pick was cylindrical, while Phillips' ice pick was a three-sided file attached to a handle. VI RP 807, IX-A RP 1316.
- Richards' cousin, Jeffrey Boughter, said Richards told him he had something important to do with Mathis and Hollywood the weekend of Kitterman's death, but did not specify what it was other than mentioning that he would be paid. VIII RP 1247-48, 1251. Boughter also confirmed that Richards' ice pick was cylindrical, not a three-sided file. VIII RP 1249-50.

- Bobby Peden, a friend of Richards, spoke to Richards when the warrant was issued for his arrest. IX-B RP 1379. Richards told him that somebody came to him about taxing somebody, there was a lot of money involved, and he tried to stay out of it. IX-B RP 1382-83. Peden described seeing Richards the weekend of the murder trying to avoid some people who were looking for him. IX-B RP 1396-97. Ultimately, Peden helped Richards turn himself into the police. IX-B RP 1389-90.
- Detective Murray testified that a number of phone calls or texts had been placed between Mathis and Hirst in the days leading up to and shortly after Kitterman's death, as well as some calls or texts between Mathis and Richards during the same time frame. X RP 1532-59; XI RP 1740-41. Murray also testified about the statements Richards made at the police statement relating Hollywood's involvement. XI RP 1749-51.
- Rene Peak testified that Richards told her about having to go out of town to tax a snitch. XI RP 1584. According to Peak, Richards told her he was being paid "five grand" and had hired some people to help him out. XI RP 1585. She

also talked to Richards after Kitterman was killed, and he told her he couldn't go for moral reasons when he found out she was pregnant. XI RP 1588.

- Deborah Beyhmer testified that Peden said Richards told him he had given "them" the ice pick. XI RP 1722.

None of the State's witnesses established any direct connection between Richards and Hirst or Richards and Kitterman.

In his defense, Richards presented testimony from an inmate named Robert Storm, who had been housed with Phillips. Storm testified that Phillips had admitted Richards had nothing to do with Kitterman's death and he lied about Richards' involvement to get less time. XII RP 1830-31. Richards also chose to testify. He admitted that Phillips was living at his house and that he was selling meth he obtained from Mathis. XIII RP 1938-39. One weekend, Mathis asked him to go on a road trip to pick up drugs. He agreed, but he fell asleep and did not go. XIII RP 1940.

Mathis also testified in her own defense. She stated that she met Phillips through Richards when she was at Richards' house. XII RP 1849. Mathis claimed that she made the trip at the end of February to drop off some drugs and to talk to Kitterman about leaving Pavek. XII RP 1850.

Richards was supposed to accompany her to make sure she was safe. XII RP 1851. When the time came, Phillips showed up and told her Richards was asleep at a woman's house and he would go with her instead. XII RP 1852.

Mathis claimed she and Phillips went to Kitterman's house looking for Pavek to drop off some drugs for him. XII RP 1854-55. Kitterman left with them to go to the casino. XII RP 1858-59. When they stopped the car to urinate, Phillips grabbed Kitterman out of the car and began to fondle her. XII RP 1859-60. Matthis claimed that he threw her to the ground and began to punch her. XII RP 1860-61. He grabbed the ice pick and began to stab her, then threw her off to the side of the road. XII RP 1862-63. Mathis testified that Richards had nothing to do with the killing. XII RP 1880.

The trial court instructed the jury on the charged crimes as well as the lesser-included offenses of second degree murder and second degree felony murder. CP 610-15. As to the sentencing enhancement for use of a deadly weapon, the trial court incorrectly instructed the jury that its verdict had to be unanimous. CP 630.

The jury ultimately convicted Richards of second degree felony murder, a lesser-included offense, and first degree manslaughter,

acquitting him of the remaining charges. CP 634, 636-37. The jury also found Richards was armed with a deadly weapon for both convictions. CP 632. Richards was sentenced to 216 months on the first count and 130 months on the second, with the two sentencing enhancements adding an additional 48 months to the length of his sentence. CP 553, XV RP 2250-51. Richards timely appeals. CP 544.

V. ARGUMENT

A. The trial court abused its discretion in continuing Richards' case with Mathis' case instead of severing Richards' case for trial.

Under CrR 4.3(b)(3), two defendants can be joined in a single charging instrument:

> 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.

Although properly joined, cases should be severed on the request of the defendant when severance is necessary to protect a defendant's right to a speedy trial. CrR 4.4(c)(2)(i). While Richards opposed the original joinder, he did not argue for severance until the trial court continued his

trial, over his objection and nearly two months beyond his speedy trial deadline, to accommodate the request of his co-defendant.

A decision to join cases for trial is reviewed for an abuse of discretion. *State v. Torres*, 111 Wn. App. 323, 332, 44 P.3d 903 (2002). When a defendant's speedy trial rights conflict with a decision to consolidate matters, the trial court should generally sever the cases. *Id.* (citing *State v. Eaves*, 39 Wn. App. 16, 691 P.2d 245 (1984)). However, a defendant must point to specific prejudice before a decision to consolidate will be overturned. *Id.*

In this case, unlike in *Torres*, Richards objected to the continuance at the time it was requested and argued that Richards was prejudiced by the fading memories of witnesses over the preceding year. II RP 246, 252. Moreover, the State had already charged two other defendants involved in Kitterman's death – namely, Phillips and Hirst[3] – who were not joined for trial. The State presented no justification why Mathis' case could not have been continued and joined for trial with Hirst, allowing Richards to be tried separately within the time allowed. Moreover, while the State's argument for judicial economy was its intention to call in excess of 50

[3] *See, e.g.,* II RP 166 (December 15, 2009 hearing referring to Hirst's bail and her first degree murder charges).

witnesses for trial, only eight those witnesses testified about Richards' involvement. CP 850.

While in *Torres*, the defendant did not oppose consolidation and did not argue he was prejudiced, here Richards did oppose it and did argue prejudice. Considering that there were multiple defendants, some of whom were being tried separately, and considering that relatively little of the State's evidence spoke to Richards' involvement, the trial court failed to give due consideration to the reasons why severance was appropriate. The trials should have been severed so that Richards could be afforded a speedy trial.

B. The trial court erred in its ruling on Richards' motion to suppress statements under CrR 3.5

Under *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), suspects must be warned of their constitutional rights, including their right to remain silent, right to the presence of an attorney, and right to appointed counsel, before they can be subjected to custodial interrogation. Failure to provide proper warnings during custodial interrogations renders incriminating statements and confessions made by defendants inadmissible at trial. *Id.*

The trial court entered findings of fact and conclusions of law supporting its rulings on Richards' confession hearing pursuant to CrR 3.5. Finding of Fact No. 8 states, "Prior to arriving at the jail, the defendant spontaneously and voluntarily stated 'I will tell you what I know, I will talk, Hollywood did it.'" CP 834. Richards assigns error to this finding on the grounds that the statement was the product of a custodial interrogation; consequently, *Miranda* warnings were required.

Findings of fact entered after a CrR 3.5 hearing are reviewed for substantial evidence. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). A finding that a statement was voluntary if there is sufficient evidence in the record from which the trial court could find by a preponderance of the evidence that the defendant's will was not overcome. *State v. Burkins*, 94 Wn. App 677, 694, 973 P.2d 15 (1999). Whether a statement was voluntary depends on the totality of the circumstances. *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996).

In the present case, the officers who arrested Richards and took his statement admitted the following facts:

- Police informed Richards that if he cooperated with their request to interview him, they would let him take care of his warrant on his own. III RP 276.

- Richards was not initially advised of his *Miranda* rights. III RP 277.
- The officers concluded the interview when Richards stated that he did not want to be a snitch, and began walking him to the jail to book him on the warrant. III RP 278.
- The police continued to converse with Richards on the walk to the jail, stating "We consider you a witness and we'd like you to talk to us." III RP 279.
- As they approached the jail, Richards made the statement that Hollywood did it.

Based on the testimony of the officers involved, the trial court's finding that Richards' statement was spontaneous is not supported by substantial evidence. To the contrary, the record reveals that the police continued their efforts to get him to talk while walking him to the jail to book him into custody. While volunteered statements do not implicate the Fifth Amendment, statements that are the product of words or actions on the part of the police that are reasonably likely to elicit an incriminating response are obtained by custodial interrogation and *Miranda* protections apply. *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L.Ed.2d 297 (1980). Police pressure to make a statement is clearly likely

to elicit an incriminating response, even if no direct question is posed. As a result, by the officer's own admissions, Richards was still being subjected to interrogation on the walk to the jail when he made the statement that Hollywood did it. Because his statement was in response to ongoing interrogation, it was not spontaneous and voluntary and the trial court's finding that it was is clearly erroneous.

The trial court further erred in entering Finding of Fact No. 14, which reads, "The defendant understood these rights and knowingly, intelligently and voluntarily waived these rights." CP 834.

When an individual in any manner and at any time invokes his or her right to remain silent, police must cease questioning. *State v. Walker*, 129 Wn. App. 258, 273-74, 118 P.3d 935 (2005) (citing to *Miranda*, 384 U.S. at 473-74). The invocation of the right to remain silent or the right to counsel "must be clear and unequivocal (whether through silence or articulation) in order to be effectual," and authorities do not have to ask clarifying questions in response to unclear and equivocal statements. *Walker*, 129 Wn. App. at 276; see also *Berghuis v. Thompkins*, 560 U.S. ____, 131 S.Ct. 33, 177 L.Ed.2d 1123 (2010); *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L.Ed.2d 362 (1994). Whether statements obtained from an individual after he has invoked his

constitutional rights are admissible depends on whether his "right to cut off questioning' was 'scrupulously honored." *Walker*, 129 Wn. App. at 273-73 (citing *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)).

Equivocal statements by a defendant do not constitute an invocation of his or her constitutional rights. In *Walker*, the defendant told police that "he did not want to say anything that would make him look guilty or incriminate him." 129 Wn. App. at 274. He did not tell police that he wished to remain silent, did not stop talking, and did not say that he did not want to talk to police anymore. *Id.* The court held that the defendant's statement, together with his continued willingness to speak, did not clearly or unequivocally invoke his constitutional rights, and accordingly, his statements were admissible. *Id.* at 276.

In contrast, an unequivocal statement like that made by the defendant in *State v. Grieb*, 52 Wn. App. 573, 573-74, 761 P.2d 970 (1988), is a sufficient invocation of one's constitutional rights. The defendant in *Grieb*, while held in custody, was read his *Miranda* rights and asked if he wanted to waive those rights. He responded that he did not want to waive his rights, but that he was willing to talk to police. *Id.* at 574. The court held that it was "clear" that "Mr. Grieb asserted his

Miranda rights by stating that he did not want to waive them." *Id.* at 576. The court held further that at the point Greib had made this statement, "his rights should have been 'scrupulously honored' and the interview should have immediately terminated." *Id.* For this reason, suppression of Grieb's incriminating statements was required.

The different outcomes of *Walker* and *Grieb*, which arose from very similar sets of factual circumstances, are reasonable in light of the objective intent of each defendant when speaking to police. In *Walker*, the defendant's statement that he did not want to say something incriminating was neither a clear comment on his constitutional rights, nor consistent with his subsequent decision to talk to police and make incriminating statements. His statement evinced merely a desire not get into trouble, rather than a desire to exercise his rights. Thus, it is unsurprising that the court found his statement to be unclear and ambiguous.

The defendant in *Grieb*, on the other hand, clearly had his constitutional rights in mind when he told police that he did not want to waive them. Additionally, the fact that he said he would talk to police, and went on to talk to police and give incriminating statements, does not contradict his expressed desire not to waive his rights—the defendant believed that he could speak to the police without waiving his rights. In

short, a statement such as that made by the defendant in *Grieb*, one that objectively represents to officers that the defendant does not want to waive his rights, constitutes an unequivocal invocation of constitutional rights.

Just like the defendant in *Grieb*, Richards made a clear and unequivocal statement to officers that he did not want to waive his constitutional rights. In the trial court's 3.5 hearing, the court specifically found that Richards told police officers, following advisement of his Miranda rights, that he "did not want to give up his rights but he wanted to talk." CP 834. Not wanting to "give up" your rights is equivalent to not wanting to "waive" them. The officers' warning that Richards had the right to remain silent and the right to an attorney, together with Richards' clear statement that he did not want to give up those rights, presents identical circumstances to those found in *Grieb*. And like *Grieb*, Richards' offer to speak with the officers did not contradict or render ambiguous his expressed intention not to give up his rights; it merely showed that Richards believed that he could speak with officers without waiving his rights.

For these reasons, *Grieb* is controlling. At the time that Richards announced that he did not want to waive his rights, the officers should have terminated the interview. Because the officers did not honor

Richards' invocation of his rights, Richards did not "knowingly, intelligently, and voluntarily" waive his rights as found by the trial court.

The State may argue that Richards waived his rights after making the initial invocation. When a defendant has invoked his constitutional rights, he can subsequently waive those rights under certain circumstances. See *State v. Wheeler*, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). Whether a defendant validly waives his previously asserted right depends on: (1) whether the police scrupulously honored the defendant's right to cut off questioning; (2) whether the police continued interrogating the defendant before obtaining the waiver; (3) whether the police coerced the defendant to change his mind; and (4) whether the subsequent waiver was knowing and voluntary. *Id.* Police "scrupulously honor" a defendant's invocation of his rights by immediately ceasing the interrogation, resuming the interrogation only after a significant time has passed, and providing a fresh set of *Miranda* warnings. *Michigan v. Moseley*, 423 U.S. 96, 104-106, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

A defendant's knowing and voluntary waiver of his rights, with or without a prior invocation, can occur either implicitly or explicitly. "Our courts have found '[i]mplied waiver...where the record reveals that a defendant understood his rights and volunteered information [and] where

the record shows that a defendant's answers were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights." *State v. Campos-Cerna*, 154 Wn. App. 702, 226 P.3d 185 (2010).

Here, Richards did not "knowingly and voluntarily" waive his constitutional rights after initially invoking them. First, the officers did not "scrupulously honor" Richards' invocation. While they did provide new *Miranda* warnings, they did not cease the interrogation and did not allow a significant period of time to pass, but rather continued interrogating Richards. III RP 280-82. Second, Richards' statement that he did not want to give up his rights but wanted to talk to police reveals that he did not fully understand his rights—chiefly, that by speaking with police, he was waiving his right to remain silent and that anything he said to officers could be held against him. Lastly, the circumstances themselves were inherently coercive. The police effectively told Richards that if he talked, they would let him go; if he remained silent, he would go to jail. III RP 286-87. Given that (1) Richards invoked his rights, (2) his invocation was not scrupulously honored by police, (3) he did not understand his constitutional rights and that he was waiving them by speaking to the officers, and (4) the police used coercive measures to convince Richards to talk to them, it would be erroneous to conclude that

Richards knowingly, intelligently and voluntarily waived his constitutional rights after initially invoking them as found by the trial court. Because there was no valid waiver, Richards' statements to the police should have been suppressed.

C. The trial court erred when it admitted out-of-court statements made by Hirst under the co-conspirator exception to the hearsay rule.

At trial, the State presented a substantial quantity of evidence to establish that Hirst employed Mathis to help her "get rid of" Kitterman, including a number of out-of-court statements Hirst made to other people. However, the evidence of Richards' involvement established, at best, that Mathis had approached him for assistance to "tax a snitch," and Richards originally agreed before later declining to participate. The State therefore failed to show that Richards was involved in a conspiracy with Hirst because it failed to show that Richards shared her objective or took any action to eliminate her romantic rival.

Statements made in the course and furtherance of a conspiracy, by co-conspirators, fall within an exemption from the hearsay rule. ER 801(d)(2)(v); *State v. Palomo*, 113 Wn.2d 789, 783 P.2d 575 (1989). Before admitting a co-conspirator statement, the trial court must make an

independent determination that (1) a conspiracy existed, and (2) the defendant was a member of the conspiracy. *State v. Whitaker,* 133 Wn. App. 199, 222, 135 P.3d 923 (2006).

Under ER 801(d)(2)(v), the State needs to establish by a preponderance of the evidence a conspiracy within the dictionary definition, namely, an agreement by two or more persons confederating to do an unlawful act. *State v. Halley*, 77 Wn. App. 149, 154, 890 P.2d 511 (1995). The defendant must be a member of the conspiracy, such that the defendant participated in "a concert of action, all the parties working together understandingly with a single design for the accomplishment of a common purpose." *Whitaker*, 133 Wn. App. at 222-23 (citing *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669 (1997)). Applicability of the co-conspirator statements exception to the hearsay rule is reviewed for abuse of discretion. *Whitaker*, 133 Wn. App. at 223.

Here, the State presented a number of statements by Hirst that do not fall within the co-conspirator exception. Hirst's statement to Walts that everything would be taken care of and back to normal by Monday were not in furtherance of a conspiracy when Walts was not a party to the conspiracy and the statement served no ascertainable purpose in achieving the objective of the conspiracy – namely, the killing of Kitterman. VII RP 992-93. Similarly, Hirst's statements to her supervisor about her marital

problems and her desire to have Kitterman arrested did not tend to achieve the objectives of the conspiracy. VII RP 1016-17. And statements to Raymer that Hirst hated Kitterman because Kitterman was with her husband did not serve any apparent purpose in furthering a conspiracy to harm Kitterman. VII RP 1031-31. Because these statements were simply casual comments to outsiders and did not further the conspiracy, they do not fall within the ER 801(d)(2)(v) and should not have been admitted.

More fundamentally, however, the statements were introduced against Richards even though there was no evidence that Richards did anything to further Hirst's objective of eliminating Kitterman or getting her husband back. At best, the evidence established that Richards met with Mathis about "taxing a snitch"; in other words, intimidating somebody who has given information to the police. The purported conspiracy with Mathis bears no resemblance to Hirst's objective of getting her love rival and her love rival's unborn baby out of her husband's life. Richards and Hirst simply did not "work[] together understandingly with a single design for the accomplishment of a common purpose." *Barnes*, 85 Wn. App. at 664.

Consequently, because the State failed to show that the conspiracy Hirst promoted was the same conspiracy Richards participated in, Hirst's

statements should not have been introduced against Richards. ER 801(d)(2)(v) did not apply, and the admission of the statements was error.

D. The trial court erred in admitting substantial and pervasive testimony about Richards' drug use and drug dealing when it was not relevant to establish any disputed fact.

Richards' trial began with the State advising the jury that he was a drug dealer and the witnesses had drug use in common. V RP 652. Consequently, Richards and Mathis had little choice but to concede that they were drug dealers. Mathis even emphasized her role as a drug dealer to establish her defense that she had intended to buy Kitterman off with drugs rather than harm her. V RP 669. Yet the State's theory of the case had nothing to do with drug use or drug dealing. Quite simply, the State theorized that Hirst enlisted Mathis to get rid of her love rival, and Mathis likewise enlisted Richards to do the dirty work. Drug use and drug dealing were completely irrelevant to the case, yet the introduction of the testimony was highly prejudicial to Richards. Because the probative value of the evidence was substantially outweighed by its potential for prejudice, the evidence that Richards was involved in using and dealing methamphetamine should not have been permitted.

Under ER 404(b), admissibility of a defendant's prior wrongdoing is limited. When determining whether evidence is admissible under ER 404(b), the trial court engages in a four-step analysis: it must (1) determine, by a preponderance of the evidence, whether the prior bad act occurred; (2) determine the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged or to rebut a defense; and (4) balance, on the record, the probative value of the evidence and its prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). If this balancing is not reflected in the record, reversal is not required if the trial court carefully set forth its reasons for admission. *State v. Hepton*, 113 Wn.App. 673, 688, 54 P.3d 233 (2002), *review denied*, 149 Wn.2d 1018, 72 P.3d 762 (2003).

Evidence of drug use or drug addiction is generally inadmissible because of its significant prejudicial impact. *State v. Tigano*, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991) (citing *State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835 (1974)). In *State v. LeFever*, 102 Wn.2d 777, 690 P.2d 574 (1984), *overruled on other grounds in State v. Brown,* 113 Wn.2d 520, 782 P.2d 1013 (1989), the Washington Supreme Court held that it was reversible error to introduce evidence of the defendant's drug addiction to establish his motive to commit a robbery, on the grounds that

its probative value was limited compared to its enormous prejudicial effect.

Here, the trial court did not conduct any ER 404(b) balancing on the record; it simply observed that drug transactions were "kind of part and parcel of this" counseled the State not to "beat the drug drum." IV RP 460. The trial court did not even identify the purpose for which the testimony was relevant, let alone consider how a jury would react to a case involving some low-life drug dealers accused of murdering a beautiful young woman. *See Hepton*, 113 Wn. App. at 688. Indeed, no possible relevance can be ascertained, and no explanation can be proffered as to why the State's case as a murder-for-hire would have been any less damning had Richards not been depicted as an underworld criminal.

The trial court abdicated its responsibility as the gatekeeper of the evidence by failing to conduct even a cursory examination of the State's proffered drug testimony. Moreover, no possible relevance can be established on review that would outweigh the evidence's highly prejudicial nature. It was error for such testimony to be admitted.

In addition, the State presented extensive evidence that Richards was known to carry knives around, including a weapon described as an "ice pick." But Phillips' description of the ice pick used to kill Kitterman was different from the ice pick that belonged to Richards. The weapon

used to stab Kitterman was not identified. Thus, the only relevance to testimony that Richards carried a number of knives and an ice pick was to suggest that Richards possessed the weapon used to kill Kitterman, or that Richards was a dangerous person who was prepared to stab other people. Because there was no evidence that Richards' ice pick was the same one used to kill Kitterman (and, in fact, the State's evidence indicated it was not), the testimony about Richards' propensity to carry knives was far more inflammatory than probative. The evidence should have been excluded under ER 404(b), as Richards requested.

E. The trial court's instructions to the jury on the deadly weapon enhancement were legally erroneous.

The trial court incorrectly instructed the jury that its verdict on the deadly weapon enhancement was required to be unanimous. Co-defendant Mathis briefs this issue thoroughly in her Brief of Appellant at pp. 6-15, and Richards joins in Mathis' argument.

F. Cumulative error deprived Richards of a fair trial.

When possible errors, standing alone, might not warrant a new trial, a court can still order a new one when the accumulation of error warrants it. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Here, any one of the errors set forth above might be deemed harmless. Collectively, however, the numerous errors reveal that Richards was

simply depicted as a criminal who associated with criminals, and he never stood a chance of having his own remote and tenuous involvement closely evaluated on the merits. Instead, he was guilty simply because he associated with others who were. Absent the errors that resulted in extensive inadmissible evidence being used against Richards, a very different trial would have occurred. Because the current one cannot be relied upon as producing a just result, a new trial should be granted.

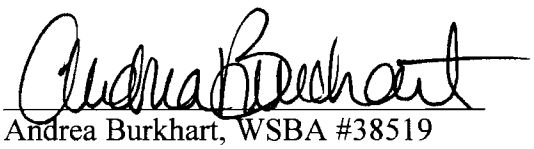
VI. CONCLUSION

This is a case of a man being judged by the company he kept. Richards, whose involvement in Kitterman's death was tenuous even as an accomplice, was prejudiced by a trial that portrayed him as more involved and more culpable than the evidence revealed him to be. Only Phillips, the confessed murderer, implicated Richards directly in conspiring to cause Kitterman's death and only after he had attempted to blame Richards for the killing itself. The State's other witnesses testified that, at best, Richards had agreed to "tax a snitch" but decided before Kitterman's death that he wanted nothing to do with it. But the joinder of Richards' case with Mathis' ensured that the overwhelming evidence of Mathis' conspiracy with Hirst to eliminate Kitterman would be imputed to Richards as well. In addition, the introduction of testimony that Richards

was a methamphetamine dealer by trade, who carried around knives and ice picks on his person, as well as statements given to the police in contravention of *Miranda* suggesting that Richards knew a lot of details about Kitterman's death, would have made it difficult for any jury to find Richards credible when he claimed that he simply was not involved in Kitterman's death.

Fairness requires that Richards' guilt be determined on the weight of the evidence against him, not the culpability of his co-defendants or his personal habits. The errors in this case collectively produced an impact that cannot be overlooked. The judgment of conviction should be reversed and the case remanded for a new and less inflammatory trial.

RESPECTFULLY SUBMITTED this 22 day of February, 2011.



Andrea Burkhart, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Brief of Appellant upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Karl F. Sloan
Jennifer R. Richardson
Deputy Prosecuting Attorneys
Okanogan County
PO Box 1130
Okanogan, WA 98840-1130

David Eugene Richards, DOC #340477
Washington Corrections Center
PO Box 900
Shelton, WA 98584

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

Signed this 22 day of February, 2011 in Walla Walla, Washington.

Andrea Burkhart