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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35476-8-III

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STATE OF WASHINGTON, Respondent,

v.

DONNA REBECCA PERRY, Appellant.

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**APPELLANT'S BRIEF**

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## I. INTRODUCTION

Donna Perry<sup>1</sup> was accused and convicted of committing three aggravated first degree murders in 1990 as part of a common scheme or plan. The cases had gone cold and were revived when new DNA technology produced a match that circumstantially linked Perry to two of the three homicide victims. A fingerprint found near the victim's belongings purportedly linked Perry to the third.

After obtaining the preliminary DNA identification, police obtained a warrant for Perry's DNA and sought to interview her. At least six times, Perry invoked her right to counsel, and police acknowledged that she had invoked her right to counsel. However, when police continued to engage her and told her she was a suspect in a murder investigation, then refused to give her any more information unless she waived her rights, Perry signed a waiver of her *Miranda* rights and gave a statement, providing police with information that was later used against her at trial.

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<sup>1</sup> Because the homicides occurred when the defendant was biologically male and living as Douglas Perry, and the later investigation and prosecution occurred after the defendant had undergone gender reassignment and became known as Donna Perry, this brief will use the male pronoun "he" when describing the defendant before 2000 and the female pronoun "she" when describing the defendant after reassignment. No disrespect is intended by this usage.

Before trial, Perry moved to sever the three homicides from each other based upon differences between the offenses and the strength of the evidence as to each offense. Concluding that the evidence was sufficient to establish a common scheme or plan uniting the three murders, the trial court denied the motion and the charges were tried in a single proceeding.

The trial court announced that it would give the preliminary instructions and introduce the case to the jurors in the jury lounge, rather than in the courtroom. It did not conduct a *Bone-Club* analysis before making this decision. When one of the jurors voiced opposition to the death penalty, the trial court announced to the panel that it was not a death penalty case. Perry moved for a mistrial, but the trial court concluded that it could remedy the error with an instruction and denied the motion.

At trial, the State did not present evidence or a coherent theory of the murders that united them under an overarching plan. The evidence tended to show that the murders were similar in some respects and different in others. Nevertheless, the jury convicted Perry of three counts of aggravated first degree murder.

These errors, individually and cumulatively, deprived Perry of a fair trial. No costs should be awarded on appeal due to Perry's indigence.

## II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in concluding that Perry's statements to police were admissible after she invoked her Fifth Amendment right to counsel.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in denying Perry's motion to sever the counts when there were significant differences in the strength of the evidence as to each count and the evidence in each case would not be cross-admissible in separate trials.

ASSIGNMENT OF ERROR 3: Insufficient evidence supports the "common scheme or plan" aggravating circumstance.

ASSIGNMENT OF ERROR NO. 4: By conducting a portion of *voir dire* in the jury lounge rather than in the courtroom without conducting a *Bone-Club* analysis, the trial court failed to conduct a public trial.

ASSIGNMENT OF ERROR NO. 5: The trial court erred in denying Perry's motion for a mistrial after it erroneously informed the jury that the case was not subject to the death penalty.

ASSIGNMENT OF ERROR NO. 6: Cumulative error deprived Perry of a fair trial.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

ISSUE NO. 1: Whether Perry unequivocally invoked her right to an attorney when she said she needed a lawyer and when the detectives understood her statements to be an invocation of her right to counsel.

ISSUE NO. 2: Whether Perry initiated subsequent contact with the detectives when they repeatedly left the room and returned to continue discussing the warrant with her.

ISSUE NO. 3: Whether the detectives' actions in selectively answering Perry's questions and telling her they could speak more freely if she waived her rights constituted "interrogation."

ISSUE NO. 4: Whether Perry initiated the conversation about the crime when she waived her *Miranda* rights after the detective invited her to contact him if she decided she wanted to talk.

ISSUE NO. 5: Whether the State's case was similarly strong for each of the three murders when physical evidence established a clear link to Perry only for one of them.

ISSUE NO. 6: Whether the general commonalities between the three crimes rose to the level of a unique signature, such that the murders would be cross-admissible to establish identity.

ISSUE NO. 7: Whether, when significant differences existed between the crimes and the State failed to proffer a unifying theory that would tend to show they resulted from a single strategy, rather than a mere propensity, sufficient evidence established that the murders occurred as part of a common scheme or plan.

ISSUE NO. 8: Whether removing a portion of the *voir dire* from the courtroom to the jury room constituted a court closure to which the public trial right attached.

ISSUE NO. 9: Whether the trial court's error in informing the jury panel that the case was not subject to the death penalty was cured by an instruction that the jury may not consider any resulting punishment.

ISSUE NO. 10: Whether a mistrial was manifestly necessary to ensure Perry received a fair trial when the trial court's advisement to the jury panel that the case did not involve the death penalty created a risk that the jury would take its responsibilities and the case less seriously.

ISSUE NO. 11: Whether the combined effect of these errors served to undermine the fairness of the trial.

#### **IV. STATEMENT OF THE CASE**

Over a three month period in 1990, three women were murdered in Spokane. CP 1-2. All three women worked as prostitutes to support drug addictions and were acquainted with each other. II RP 467, 470. Yolanda Sapp was last seen on February 21<sup>st</sup> when she met with a bail bondsman to ask about borrowing money. II RP 440, 441-43. On the morning of February 22, 1990, her nude body was recovered from the bank of the Spokane River near Upriver Drive. IV RP 459-60, 761, V RP 855, VII RP 1377-78. She had been killed by three gunshot wounds to her back from a small caliber handgun. VII RP 1378-80, 1384.

About a month later, in the early morning of March 25, a runner found a woman's body between two bridges over the Spokane River. IV RP 669-70. The woman was clothed, but her pants had been pulled down and her shirt up, completely exposing her front. IV RP 671. The body was leaning up against a guardrail in an inverted position, with the head and shoulders on the ground and her feet in the air. IV RP 671. She had died from a single gunshot wound to the middle of her chest that severed her aorta. IV RP 1387, 1391. The bullet had torn her clothing, indicating that she was normally dressed when she was shot. IV RP 1385-86. Police recovered the bullet that had killed her and identified it as .22 caliber. IV RP 693-94, VI RP 1062-63, VII RP 1389.

The second woman was identified as Nickie Lowe. IV RP 767. Her boyfriend at the time, Gordon Lucas, was the last person to see her. II RP 358, III RP 460. Lowe had told him she was going to meet a regular customer, and he had dropped her off on Sprague near a tavern. III RP 460, 463. She did not return to be picked up when she was supposed to, and he learned from police the following morning that she had been killed. III RP 461. Lowe had told Lucas after Sapp was killed that she would be next, but he never learned why she said that. III RP 469.

The third woman, Kathleen Brisbois, was found on the afternoon of May 15 by two high school students working on a school project near the Spokane River. II RP 389, IV RP 431, IV RP 680-83, V RP 856. They first saw several articles of clothing thrown about the dirt road that ran along the river and as they looked down the embankment toward the river, they saw a woman's dead body. IV RP 682-83. She was nude and had been struck at least eight times about the head with a blunt object while she was still alive. V RP 861-62, VII RP 1392, 1394-95, 1396. She had also been shot in the middle of her forehead at very close range, and there were two other gunshot wounds to her body. VII RP 1394, 1397-98, 1399. Police recovered .22 caliber bullet fragments during her autopsy. IV RP 695, VII RP 1399.

The last person who reported seeing Brisbois alive was a retired law enforcement officer who was in the Sprague street neighborhood for a DARE graduation. III RP 447-48. Sometime before noon on May 15, he was approached by a woman who appeared to be intoxicated and who he suspected of being a prostitute. III RP 449, 451. She said something about drugs and they spoke briefly, then she walked away. III RP 449. Several years later, he was involved in compiling a photo book of known prostitutes and he came across a photo of Brisbois that he recognized as the woman who had approached him in the parking lot. III RP 449-50.

Although some forensic evidence was recovered from all three homicides, it was not immediately successful in identifying the perpetrator. A blanket found near Sapp's body was collected. IV RP 761, 763. An unnamed individual gave police a wallet containing Lowe's driver's license, and police searched a dumpster in the area and recovered, among several other items, several pieces of clothing, a tube of lubricating jelly, a small glass jar of lip balm, and an empty Carmex jar. IV RP 795-96, V RP 822-32, 834-35. In addition, fingernail clippings as well as oral, vaginal, and anal swabs were taken from the bodies. III RP 519, IV RP 630, V RP 864.

Police investigated several possible connections to other murders, including the Green River killer and Robert Yates, both of whom had also killed prostitutes during the same time frame. V RP 849-50, 878. Ultimately, 100 suspects or more were investigated. VIII RP 1310. The case went cold in the mid 1990's when the investigative leads ran out. VII RP 1311.

In the mid-2000s, detectives revived the case and decided to send several items to the crime lab for DNA analysis due to advances in the technology. IV RP 718-20, VII RP 1333, 1336. An analyst was able to develop a male DNA profile from Brisbois's fingernail and entered it into CODIS, a comprehensive DNA database. IV RP 638, 642, 647-48. At some later point, the database matched the sample from Brisbois's fingernail with a sample from Douglas Perry. IV RP 648, 650, VII RP 1343.

Despite the extensive investigation, police were not familiar with Douglas Perry and began to look for background information about him. VII RP 1343-44. They learned that in 1998, when police were more active in contacting prostitutes because the Yates killings were ongoing, a prostitute who had been picked up by Perry had been disturbed by the encounter and reported it to a police officer. V RP 983-85, VII RP 1344.

The officer stopped Perry's car and patted him down for weapons, locating two knives and a stun gun. VI RP 1024, 1027-28. Perry allowed him to search the car and the only items of interest located were papers indicating that Perry had a gender psychosis disorder and was taking steps to obtain a sex change operation. VI RP 1028.

That same year, a different police officer stopped Perry for a traffic violation, observed that he was hostile and armed with a four-inch knife and a stun gun on his belt, and upon questioning, denied involvement in prostitution activity. V RP 987, 990. None of the officers involved in investigating the homicides had heard of Perry. V RP 875, 888, 894.

Police also learned about Perry's relationships at the time from ATF agents. VII RP 1349-50. Perry had been convicted of a federal felony in 1988 and ATF agents received a complaint in 1994 that led them to execute a search warrant on Perry's house. V RP 948-49. They recovered 33 firearms, mostly rifles, including a .22 caliber pistol and 2 .22 caliber rifles. V RP 973, 977. Perry was extremely knowledgeable about firearms. V RP 974. When questioned about how he had the financial means to acquire so many firearms, Perry stated that he was a woman trapped in a man's body and he would dress up as a woman to prostitute himself on Sprague Avenue. V RP 973-74. Perry eventually

underwent a gender reassignment surgery in 2000 and thereafter lived as Donna Rebecca Perry. VI RP 1102, CP 1.

Later, an agent ran a trace on one of the .22 rifles and learned it had been purchased by Bruce Massengale. V RP 995. At the time of trial, the rifle was gone, and no records existed to establish what had happened to it. IV RP 1720. Ballistics analysis showed that one of the bullet fragments recovered during Brisbois's autopsy had different class characteristics than the other two fragments, indicating they had not been fired from the same barrel. VI RP 1054-55, 1057. Additionally, the bullet recovered from Lowe could not be positively identified as matching the bullet fragments recovered from Brisbois. VI RP 1073, 1082.

Police interviewed three Massengale brothers and learned that Perry had lived with a woman named Clairann Galloway in 1990. V RP 905-06, 908, VII RP 1349-50. Galloway was known to be a prostitute at that time. VII RP 1355. Further investigation revealed that Galloway had been booked into jail on January 21, February 15, February 21, and May 15 of 1990, the latter two of which were close in time to the Sapp and Brisbois killings. V RP 913.

Additional DNA analysis developed male DNA from the blanket recovered at the Sapp murder scene, but there was not enough present to

develop a profile at the time. III RP 546, 556. Later analysis of the sample developed a Y-STR<sup>2</sup> profile consistent with Perry's that also appeared in about 1 out of every 3300 males. IX RP 1664. During the original investigation, a forensic technician lifted a fingerprint from the tube of lubricating jelly found in the dumpster near Lowe's wallet. VI RP 1110, 1130-31. Analysts later matched the print to Perry. VI RP 1159. However, other fingerprints and DNA profiles recovered from the evidence were not matched, including several male DNA profiles recovered from the body and fingernails of Lowe. III RP 543, VI RP 1176, 1178, 1182, VII RP 1223-45, IX RP 1693.

Police were also able to identify and locate a residence Perry had lived in and vehicles he had owned at the time of the homicides. V RP 900, 903, VII RP 1315, VIII RP 1440, 1442. Although police searched and collected items during those searches, no evidence was recovered linking the vehicles or Perry's prior or current residences to the homicides. V RP 904, VII RP 1312-15, 1353-55, VIII RP 1441-44. A .22 caliber cartridge recovered from the vehicle search was compared to the bullets

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<sup>2</sup> Y-STR DNA analysis is limited to the Y chromosome and is therefore specific to male contributors. III RP 507. However, Y-STR profiles are shared along paternal bloodlines and cannot positively identify an individual as the contributor. III RP 508, 572.

recovered from Lowe and Brisbois and was found to be dissimilar. VI RP 1090-91, VIII RP 1441.

In 2012, ATF agents executed a search warrant for Perry's home and recovered 12 firearms as well as ammunition. V RP 992-93. Perry was thereafter imprisoned in federal custody. V RP 997. Police obtained a warrant for her DNA and arranged to interview her. VII RP 1360. At the beginning of the interview, when police told her that they wanted to talk to her about some old cases from the 90's and needed to advise her of her rights, Perry stated, "I should probably have an attorney here if you're going to question me about something." Ex. P4 at 5. The police then read through her rights and asked if she wanted to answer questions, and Perry replied, "I think I should have a lawyer here if you're going to ask questions." Ex. P4 at 6.

After this second invocation, the interviewing officer indicated that she had invoked her right to counsel and asked her to sign the paperwork, which she did. Ex. P4 at 6. The officer then told her that he had a warrant for her DNA and requested a sample. Ex. P4 at 6. Perry asked what it was in conjunction with, and the officer replied, "[s]ome old cases that we're investigating." Ex. P4 at 6-7. Perry asked for clarification, and the officer responded, "Well, I want to make sure that you want to talk to me

about this, okay?” Perry repeated, “Well, I should have a lawyer here if you’re going to take DNA and all of this.” Ex. P4 at 7. She was told that her lawyer did not get to be there when they served the warrant and she did not have a choice in the matter. Ex. P4 at 7.

After leaving the room for a few minutes, the officers returned with the warrant, which they told her was for first degree murder. They told her they had information that she might know some things about a murder. Ex. P4 at 7. Perry asked if they were accusing her of murdering somebody and when it was supposed to have taken place, and the officer said, “And again, you wanted a lawyer so I can’t talk to you. If you want to talk to us then . . .” Perry replied, “Yeah, I need a lawyer for something like this . . . Yeah, I think I better have a lawyer. This is crazy.” Ex. P4 at 8.

The officers then read her the warrant and obtained a swab of her DNA. Ex. P4 at 8-9. Perry again asked if she was being accused of murder and they told her she was the prime suspect in multiple murders. Ex. P4 at 9. When Perry said she did not understand what was going on, she was told, “Again, Donna. We can’t talk to you. You’ve asked for a lawyer. Unless you tell us you want to sit down and talk.” Ex. P4 at 9.

The other officer added that the rights were hers, and she had the right to talk or not talk. They again left the room for a few minutes. Ex. P4 at 9.

Upon returning to the room to discuss the warrant return paperwork, Perry asked additional questions about who she was accused of murdering and what the evidence was. Ex. P4 at 10. Perry stated she was scared, and then begged, "Tell me what's going on. I don't understand a thing. I need a lawyer or somebody to explain what actually is going on." Ex. P4 at 11. They told her that in 1990, three prostitutes were murdered in Spokane and DNA recovered from one of them came back as a match to her. Ex. P4 at 11. After a short conversation about whether she would be arrested and charged, Perry advised that she was "in a total panic mode" and police said, again, that they wanted to respect her rights and had about a thousand questions, and it was her right to decide that she wanted to discuss it; but until then, they were not comfortable asking her anything about it or giving her any more information. Ex. P4 at 12-13.

After yet another brief exit from the room, when the officers returned to give Perry a business card, Perry talked about deserving to die and asked the officer to leave his pistol there with one round and then step out, saying she'd finish it. Ex. P4 at 13-14. Giving her the business card,

the officer told her to take it with her and “If you decide you want to talk to me . . .” Perry then said, “Let’s talk. Let’s sit down and work this out of my head.” Ex. P4 at 14. The officers then readvised Perry of her *Miranda* rights, and she said she understood and would try to answer their questions. Ex. P4 at 15.

During the subsequent interrogation, Perry admitted picking up prostitutes occasionally and having relationships with Galloway and the Massengales. Ex. P4 at 16, 18, 21, 24-25. She denied knowing any of the women shown to her in photos, except for Galloway. Ex. P4 at 16-18, 44. Later she said that she didn’t kill them, but might have slept with them. Ex. P4 at 46, 49. One of the officers asked her what made Donna stop, and she stated, “Douglas didn’t stop. Donna stopped it. The gender change operation . . . There’s no more testosterone to fuel the anger.” Ex. P4 at 47. Shortly afterward, she said, “I’m not going to admit I killed anybody. I didn’t. Donna has killed nobody.” When asked if Doug did, she then said, “I don’t know if Doug did or not. It’s 20 years ago and I have no idea whether he did or didn’t.” Ex. P4 at 48. Later, she said, “I got rid of violence with the sex change operation.” Ex. P4 at 52. When she was told they were going to search her old house, Perry denied having any guns; the officers then denied having ever told her the girls were shot. Ex. P4 at 52-53. She repeated that she did not know if Doug did or did not

kill the women, and then said, "I will say this, in my own defense. I'd rather go live in a mental hospital, be under a Doctor's care. Now, can you help me with that guys?" Ex. P4 at 54. She then said, "I didn't kill these bitches, period." Ex. P4 at 54. Later, she said, "And I probably had sex with them, but I did not kill them." Ex. P4 at 58.

Subsequently, police received additional information from a federal prisoner, Chero Everson. VII RP 1319, VIII RP 1446-18. Everson told them that she met Perry in prison, and Perry tried to recruit her to be a killer. VIII RP 1504, 1507, 1515. During these conversations, Perry told her many things about her personal life, including that she had dated a prostitute named Claire and had regular interactions with other prostitutes, and described the Massengales. VIII RP 1517-18. Perry also talked about killing people and said she was diagnosed as a sociopath because she had no feelings of remorse about killing people. VIII RP 1519. She claimed to be a contract killer and described various ways of killing people with bare hands or weapons. VIII RP 1520.

Everson said Perry initially told her she had killed at least nine prostitutes, and later increased the number to 20 to 30. VIII RP 1521. The killings took place in a vehicle by a river around Spokane, when she was in her 30's and 40's and still male. VIII RP 1522. Perry killed the women

with a firearm and then kicked the bodies out of the car, leaving them by a river. VIII RP 1526. His preferred weapons were Walter PPK .380 and a 9 mm handgun. VIII RP 1544. At one point, law enforcement had seized some of her guns but didn't know they had been used to kill somebody and had destroyed them. VIII RP 1527-28. Perry told her that becoming a woman was a disguise to avoid suspicion, because nobody would try to catch an elderly lady with mental illness. VIII RP 1517.

Based on Everson's statement, police then referred the case to the prosecuting attorney, who charged Perry with three counts of aggravated murder in the first degree based upon allegations that the murders were committed as part of a common scheme or plan. VIII RP 1449, CP 167-71. However, the State did not pursue the death penalty. I RP 112, CP 32.

Before trial, Perry moved to sever the counts for separate trials. CP 38, 51. The trial court denied the motion, concluding that there was similarly strong evidence supporting each count, the evidence as to each count was intertwined, the defenses were the same, and the jury would be instructed to consider each count separately. CP 176-77. Perry renewed the motion at the beginning of trial as well as at the close of the State's case, but the trial court did not alter its ruling. II RP 265-66, IX RP 1732, 1741.

Also before trial, the State moved to admit the statements Perry made in the interrogation. CP 83. The trial court concluded that “Perry was properly advised of her rights and . . . she freely and voluntarily waived those rights and chose to speak to law enforcement.” CP 206. It entered findings of fact and conclusions of law supporting its conclusion. CP 204-07. In addition, it incorporated the transcript of its ruling as additional conclusions. CP 207. In that transcript, the trial court acknowledged that when it appeared that Perry was requesting counsel, the detectives acknowledged that they could not speak to her further and would conclude the discussion. CP 216.

The case was tried to a jury. At the commencement of the case, the judge advised the parties that it would give the initial instructions and introduce the case to the jury panel in the jury lounge. II RP 222. No objection to this announcement was noted, and no *Bone-Club* analysis was conducted.

During general questioning of the jury as part of the selection, a juror voiced an objection to the death penalty. II RP 272, 273. The court stated that it was not a death penalty case. II RP 273. After the jury was excused, Perry advised the court that it was error to inform the jury that the death penalty was not raised. II RP 275, 276. Counsel advised that in

a previous case in which the issue had come up, the remedy the judge had employed was to strike the panel. II RP 276. After preliminary discussions, the defense moved for a mistrial. II RP 290. The State agreed that it was erroneous to inform the jury that the death penalty was not being sought but deferred to the court as to the proper remedy, indicating it was not sure whether a curative instruction would suffice. II RP 291, 295. The trial court concluded that a curative instruction informing the jury that it had nothing to do with punishment that may be imposed in the case would be adequate and denied the motion. II RP 297-98. It gave the instruction shortly after welcoming the jury back into the courtroom. II RP 304-05.

At trial, the State introduced the videorecorded police interview with Perry. VII RP 1364-65, 1366, Ex. P4. In addition to the evidence already described, the State proffered several other witnesses, including:

- Gordon Lucas, Lowe's former boyfriend, identified the clothing retrieved from the dumpster near her wallet and the jar of petroleum jelly as items associated with her. III RP 464-65. He also identified the tube of lubricant as the kind of thing she would put into Carmex containers so she did not have to carry the whole bottle around. III RP 479, 482. He agreed that lubricant was

popular in the area and could not identify the tube as something that had been in her possession that night. III RP 483, 484.

- A social worker from Eastern State Hospital testified that Perry had to be redirected from talking about the case, and said the only reason she was caught was because DNA was found under her fingernail, but she slept with eight other people that day turning tricks. VII RP 1290-91, 1293, 1295.
- Bruce Massengale and Mark Massengale testified about previously buying some guns for Perry. VIII RP 1453, 1460, 1470, 1481.
- Two law enforcement officers who had accompanied Perry on a transport flight described statements Perry made to them during the trip. VIII RP 1559-61, 1565-68. One reported Perry saying that she was never going to get out of this, hoped they would send her to the hospital instead of jail, asked whatever happened to Yates, and said she's not violent now that she's on medication. VIII RP 1562-63. The other recalled Perry saying this would be the last time she would see outside concrete walls, there was no way of getting out of this, and by the time she learned to control herself it was too late. VIII RP 1569-70.

- Dr. Nathan Henry, a forensic psychologist from Eastern State Hospital, testified that he evaluated her and concluded she was malingering. VIII RP 1573, 1576, 1584.
- A former DSHS employee described weekly contact with Perry between 2007 and 2009. IX RP 1621-22. During their conversations, Perry told her that things got out of control before her sex change and said something once about shooting people during her gun-running days. IX RP 1625-27. Perry said she was going to end up dead or in prison so she got the sex change. IX RP 1627.

Perry did not testify, and the defense rested without presenting any evidence. IX RP 1753.

The jury convicted Perry of all three counts and found as an aggravating circumstance that each was committed as part of a common scheme or plan. X RP 1886-87, CP 348-56. The court imposed three life sentences without the possibility of parole and ran them consecutive. CP 396, X RP 1929. Perry now appeals and has been found indigent for that purpose. CP 409, 411.

## V. ARGUMENT

Multiple errors affecting the evidence and the trial process deprived Perry of a fair trial. Accordingly, the convictions should be reversed and the case remanded for a new trial.

1. Because invocation of the right to counsel differs from invocation of the right to silence, police may not reinitiate questioning by re-advising the defendant of the *Miranda* rights unless the defendant has had an opportunity to consult with counsel.

In the present case, the record plainly establishes that Perry repeatedly and unequivocally requested an attorney before conversing with police about the case, and that police understood her statements as an invocation of the right to counsel. Nevertheless, the officers continued to engage her in conversation, expressed their desire to question her, and subsequently obtained a written waiver of her *Miranda* rights and statements that were used against Perry at trial. Because the interrogating detectives failed to provide the additional safeguards required when a suspect invokes the right to counsel, the statements were not the product of a voluntary waiver of counsel, and the introduction of those statements at trial prejudiced Perry's defense.

Perry challenges the trial court's conclusion that her statements followed a knowing, intelligent, and voluntary waiver of her *Miranda* rights and were therefore admissible. A trial court's conclusions of law following a CrR 3.5 hearing are reviewed *de novo*. *State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025 (2012).

Before initiating a custodial interrogation of a suspect, police must warn the suspect that she has the right to remain silent and the right to have an attorney present during questioning. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).<sup>3</sup> If the accused requests counsel, the interrogation may not continue until an attorney is present. *Id.* at 474. This rule arises due to the “inherently compelling pressures which work to undermine the individual’s will to resist and compel him to speak where he would not otherwise do so freely.” *Id.* at 467.

Unlike invocation of the right to silence, invocation of the right to counsel raises a presumption that he is unable to proceed without the assistance of an attorney. *Arizona v. Roberson*, 486 U.S. 675, 683, 108 S.

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<sup>3</sup> This right arises under both the Fifth Amendment to the U.S. Constitution and article I, § 9 of the Washington Constitution. See *State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008).

Ct. 2093, 100 L. Ed. 2d 704 (1988). Thus, although police may allow time to pass, issue new warnings, and interrogate a suspect about an unrelated matter after the suspect has invoked his right to silence, the same rule does not apply to the invocation of counsel. *Id.*

An invocation of the right to counsel occurs when the defendant makes a statement that can reasonably be construed as expressing a desire for the assistance of an attorney. *Davis v. U.S.*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). An ambiguous reference to counsel that a reasonable officer would have understood only as a possible invocation of the right is insufficient. *Id.* When the officer does not know whether the suspect wants a lawyer, or if the suspect is indecisive in the request, the interrogation can continue. *Id.* at 460. However, in the absence of conditional, limiting, or obfuscating words such as “maybe” or “if,” an invocation is unequivocal and must be scrupulously honored. *See State v. Nysta*, 168 Wn. App. 30, 42, 275 P.3d 1162 (2012), *review denied*, 177 Wn.2d 1008 (2013); *Pierce*, 169 Wn. App. at 545-47 (holding that conditional language constituted an unequivocal request for counsel when the condition had already been satisfied).

Here, not only did Perry make an unequivocal request for counsel, police actually understood her statements as an invocation of her rights.

At the outset, Perry stated, "I should probably have an attorney here if you're going to question me about something." Ex. P4 at 5. After being read her rights, she stated, "I think I should have a lawyer here if you're going to ask questions." Ex. P4 at 6. Because police had already expressed their intent to question her, the condition was satisfied and her use of conditional language is sufficient, under *Pierce*, to constitute an unequivocal invocation of counsel. Furthermore, although her invocations at this point might arguably be equivocal, the detective plainly understood them as an invocation of her right and documented it. Ex. P4 at 6.

Police then advised her of the warrant for her DNA, responded to her question about what it was about by saying they wanted to make sure she wanted to talk to them about it, and she said, "Well, I should have a lawyer here if you're going to take DNA and all of this." Ex. P4 at 7. After they advised her that she did not have the right to have an attorney present for execution of the DNA warrant, they left the room so she could "ponder that for a minute." Ex. P4 at 7.

Returning to the room, they reviewed the warrant with her. Perry asked if they were accusing her of murdering somebody and when it was supposed to have taken place, and the following exchange occurred:

Burbridge: And again, **you wanted a lawyer** so I can't talk to you. If you want to talk to us then ...

Perry: **Yeah, I need a lawyer for something like this.**

Burbridge: Then you need to tell me that.

Perry: This is crazy. Oh, there went my blood pressure. Oh, God.

Dresback: This is the hardest part, opening this little box up.

Perry: Yeah, I think I better have a lawyer. This is crazy.

Ex. P4 at 8 (emphasis added). From this exchange, it is clear that even if her previous statements could have been regarded as equivocal, the detectives understood them as an invocation and Perry unequivocally clarified that she needed a lawyer to assist her. Consequently, at that point, the detectives were required to terminate the interrogation.

“Interrogation” is not limited to express questioning by police. *Rhode Island v. Innis*, 446 U.S. 291, 298-99, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). This is because psychological ploys and persuasive techniques are part and parcel of the coercive pressure placed on a custodial suspect to overcome her will. *Id.* at 299. Thus, to prevent police from making an end-run around *Miranda* requirements by simply pressuring a suspect indirectly, “interrogation” is understood to include

any words or actions that are reasonably likely to elicit an incriminating response. *Id.* at 301.

Accordingly, once a suspect has unequivocally invoked her right to have an attorney present, the interrogation must cease and response to subsequent questioning, even following an advisement of rights, does not establish a valid waiver of the right. *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Only if the suspect “initiates further communication, exchanges, or conversations with the police” may the interrogation resume. *Id.* at 484-85.

In *Edwards*, the suspect invoked his right to counsel and police initially terminated contact, but then returned the next day, told him they wanted to talk, and readvised him of his *Miranda* rights. *Id.* at 486-87. At that point, the defendant agreed to talk and made an incriminating statement. *Id.* at 487. Because the statement was made without access to counsel after he invoked his right, and occurred at the instance of the police, the subsequent waiver was invalid and the statement was inadmissible. *Id.* The Court distinguished a situation where the accused himself initiated the second meeting and police merely listened to his voluntary, volunteered statements. *Id.* at 485-86.

Here, after acknowledging Perry's invocation of her right, the detectives nevertheless continued to engage with her and express their desire to talk to her if she would agree to waive her rights. On two separate occasions, the officers left the room and then returned to reinitiate communication about the warrant. Ex. P4 at 7, 9. When Perry asked questions about the basis for the warrant and the nature of the investigation, the detectives fed her small amounts of information and then denied that they could tell her more unless she was willing to waive her rights. Ex. P4 at 7-9, 10-12. Eventually, when Perry told them she had "a million questions," the detective said that he had a thousand, and it was her right to decide that she wanted to discuss it, but until that point, he was not comfortable asking her questions about it. Ex. P4 at 12-13. He then asked if she had any other questions, and refused to give her an answer. Ex. P4 13. Finally, they left the room for a third time and returned for a third time to give her a business card. Ex. P4 at 13. Perry made comments about killing herself and the detective again directed her attention to his card, saying, "Okay, this is who I am. Take this with you. If you decide you want to talk to me ..." At that point, in response to the invitation, Perry stated, "Let's talk. Let's sit down and work this out of my head." Ex. P4 at 14.

The circumstance presented is entirely unlike the exceptional circumstance identified in *Edwards* where the accused reinitiates contact and volunteers statements to police. First, the officers, not Perry, repeatedly reinitiated the contact. They chose to continue engaging with her about the warrant, using the process to initiate conversation, then leaving the room and returning to re-initiate the contact. Second, they placed continued pressure on her to waive her rights by selectively withholding information and telling her that if she waived them, they could speak more freely. This tactic was reasonably calculated to elicit incriminating responses from her by exploiting their informational asymmetry, feeding her just enough information to emphasize the seriousness of the allegations and then hinting that a waiver would allow them to speak more freely about the case. This indirect pressure to provide information is exactly the type of coercive tactic identified in *Innis* that constitutes interrogation, even in the absence of a direct question.

Lastly, and significantly, Perry's decision to speak was not spontaneous and self-initiated but came in response to the detective's invitation to contact him if she wanted to talk. Before this point, Perry expressed no interest or desire to answer questions, only to ask them. Yet the officers continued to pursue the interrogation by telling her that if she

waived her rights, they would continue the conversation. Eventually, Perry succumbed to the pressure and agreed to give them what they wanted. This is exactly the harm contemplated in *Miranda*.

Under the facts present here, Perry unequivocally invoked her right to counsel. Subsequently, police continued to reinitiate contact with her and applied indirect pressure to waive her rights and speak to them, without providing her with an attorney or an opportunity to consult with one. Under these circumstances, *Edwards* controls and the trial court erred in concluding the statements were admissible.

This error is presumed to be prejudicial, and the State bears the burden of proving it harmless. *Nysta*, 168 Wn. App. at 43. If there is any reasonable chance that the use of the evidence was necessary to reach a guilty verdict, the conviction will be reversed. *Id.*

“A defendant’s confession is probably the most probative and damaging evidence that can be admitted against him.” *Arizona v. Fulminante*, 499 U.S. 279, 292, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (White, J., dissenting). Here, the detectives elicited multiple statements from Perry that probably contributed to the outcome at trial, including her statements that she denied knowing the women and could not explain the presence of her DNA in their vicinity, and her statements about Donna

stopping the violence that Doug had done, denying that Donna killed anybody but denying knowledge of what Doug might have done. Indeed, the prosecuting attorney relied heavily upon these statements in its closing argument. IX RP 1781.

Absent these statements that tended to show consciousness of guilt, the jury could have reasonably inferred that Perry's DNA and fingerprint were in the vicinity because she was also prostituting in the area at the time, as was her girlfriend, who was acquainted with two of the victims. V RP 973, VII RP 1355. The ballistics evidence did not establish that the same firearm was used or that any of the firearms involved belonged to Perry. And the statements to Everson were inconsistent with the killings in many respects. VIII RP 1521 (first saying there were nine victims, then 20); VIII RP 1522 (stating they were killed in the car, when Brisbois was not); VIII RP 4532-33 (identifying a hedge fund lawyer as one of his victims and identifying all of the victims as white except for random killings selected from a phone book, when Sapp and Brisbois were both women of color); VIII RP 1544 (weapons of choice were Walter PPK .380 and 9 mm handguns, neither of which were used to kill Sapp, Lowe, or Brisbois). Thus, it is reasonably likely that this evidence alone, without the bolstering provided by Perry's statements, would not have overcome

the presumption of innocence and satisfied the State's burden of proof beyond a reasonable doubt.

Because the statements were not the product of a voluntary waiver of *Miranda* rights and because their admission was not harmless beyond a reasonable doubt, the convictions must be reversed and the case remanded for a new trial.

2. Differences in the commission of the three homicides and the strength of the evidence for each count required severance.

When the State joins multiple charges against a defendant in a single charging instrument, the trial court must consider whether allowing a single trial on all of the charges will result in undue prejudice to the defendant and, if so, the offenses may not be joined. *State v. Bluford*, 188 Wn.2d 298, 302, 310, 393 P.3d 1219 (2017). Judicial economy, while an important consideration, cannot outweigh the potential for prejudice to the defense. *Id.* at 311.

When undue prejudice will result from a single trial, the defendant may file, and the court must grant, a motion to sever offenses in order to "promote a fair determination of the defendant's guilt or innocence of each offense." *State v. Watkins*, 53 Wn. App. 264, 268, 766 P.2d 484

(1989) (quoting CrR 4.4(b)). Such prejudice results when a single trial invites the jury to cumulate the evidence to find guilt on the multiple charges, or to infer a criminal disposition. *Id.*

While a trial court's refusal to sever charges is reviewed for an abuse of discretion, joinder of offenses may not be used to prejudice the defendant. *State v. Harris*, 36 Wn. App. 746, 749-50, 677 P.2d 202 (1984). A defendant is prejudiced when joinder of the offenses may interfere with his ability to present separate defenses to the charges, when the jury may use evidence of one crime to infer a criminal disposition to commit the others, or consider the evidence cumulatively to find guilt when the same outcome would not result from considering the charges singly. *Id.* at 750. Joinder of multiple offenses also creates a risk of engendering hostility toward the defendant. *Id.* This prejudice can be mitigated only if the State has strong evidence as to each count, the defenses to each count can be clearly presented, the jury is properly instructed to consider the evidence, and the evidence of the other crimes would have been admissible even if tried separately. *Id.*

Here, the State did not possess similarly strong evidence as to each count due to the vast differences in the physical evidence between the homicides. Without considering the physical evidence, the State's case

consisted of little more than general admissions by Perry that Doug used to be violent before Donna stopped it, and she claimed to have killed some prostitutes in Spokane – although not necessarily these prostitutes – within the same decade or so. The physical evidence provided the link between Perry and these specific prostitutes that tended to suggest that her statements to Everson referred to these killings. And that linkage was not uniformly strong in each case.

In the case of Lowe, the physical evidence consisted of Perry's fingerprint on a tube of lubricant found in a garbage dumpster near Lowe's belongings. The tube could not be positively identified as belonging to Lowe, and other items in the dumpster apparently belonged to unrelated individuals. III RP 484, V RP 834-35, VII RP 1241-42. Moreover, there was no connection between the date when Lowe was killed and the dates when Galloway was booked into jail, which tended to undermine the State's theory that Perry committed the crimes when Galloway was away. V RP 912. And lastly, male DNA found under Lowe's fingernails, in her mouth, and on her belt did not match Perry. VII RP 1243. Considered independently, the evidence did not tend to strongly confirm that Lowe was one of the individual prostitutes referred to in Perry's statement to Everson.

Similarly, the physical evidence in the Sapp case was a male DNA profile shared by one out of every 3300 men, meaning as many as 50 individuals in Spokane could have contributed it. IV RP 1664, 1666. The DNA, moreover, was not recovered from Sapp's body but rather from a blanket found near her body by the river. III RP 550, 556, IV RP 761. Additionally, while Perry only admitted killing white victims, Sapp was African American. Ex. P4 at 16, 36, VII RP 1377, VIII RP 1532. As with Lowe, considered independently, this evidence does not tend to strongly corroborate Perry's statement to such an extent as to conclude that Sapp was probably one of the prostitutes she claimed to have killed.

In the case of Brisbois, by contrast, the physical evidence was stronger. The combined probability of matching the combined STR and Y-STR profiles recovered from beneath Brisbois's left middle fingernail was one in 790 sextillion. IX RP 1668. Moreover, the fact that the DNA was found under her fingernail along with blood tended to increase the likelihood that the DNA was deposited close in time to her death, and was not easily explained by the possibility that Perry might have solicited her and had sex with her. IV RP 638. Thus, the evidence that Perry had killed Brisbois was much stronger than the evidence in the other two cases.

The disparate weight of the evidence in each case is the kind of situation where a joint trial creates the risk that the jury will infer guilt in the weaker cases based upon the strength of another case. Moreover, this risk of cumulating evidence was heightened in Perry's case where the State's witnesses repeatedly referred to the murderer as a "serial killer," setting forth as fact the State's theory that the same person committed all three offenses. V RP 840-41, 845-46, 859, VI RP 1035. This logic not only permitted, but encouraged, the jury to infer that if Perry killed Brisbois, he also killed Sapp and Lowe.

In addition to the differences in the strength of the State's case on the various charges, the evidence of the other killings would not have been cross-admissible in separate trials. It is well established that evidence of other wrongs may not be used to establish criminal propensity, but may be used to establish the identity of the perpetrator.<sup>4</sup> ER 404(b); *State v. Russell*, 125 Wn.2d 24, 66, 882 P.2d 747 (1994). To establish identity, the evidence must tend to show a method of committing the crimes that is so

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<sup>4</sup> Although the trial court's order does not specifically identify identity as the purpose for which it found the evidence cross-admissible, identity and "common scheme or plan" were the primary purposes argued by the State in its briefing and argument. CP 158-59, 177, I RP 110. In evaluating whether evidence is admissible under ER 404(b), the trial court is required to identify the purpose for which the evidence is relevant. *Watkins*, 53 Wn. App. at 270. Its failure to identify the specific purpose for which the evidence could be admitted besides "commonalities" may be grounds to remand the case for clarification of the order. I RP 135. However, this court may also conclude that neither the identity nor the common scheme or plan exceptions would apply in this case.

unique that proof that the defendant committed one crime creates a high probability that he also committed the others. *Bluford*, 188 Wn.2d at 312. This requires a showing of “distinctive features” of the offenses that “establish signature-like similarity.” *Id.* at 312-13.

Additionally, other crimes may be cross-admissible to establish a common scheme or plan. *Harris*, 36 Wn. App. at 751. But this requires more than simply a showing of similar circumstances, or “commonalities” between the offenses. *Id.*; see I RP 135. A “plan” may arise either causally, where each crime is part of a larger plan, or where a plan is devised to repeatedly perpetrate multiple crimes. *State v. Lough*, 125 Wn.2d 847, 855, 889 P.2d 487 (1995). Caution is required in employing this exception. *State v. DeVincentis*, 150 Wn.2d 11, 18, 74 P.3d 119 (2003). Only where there is such a substantial similarity between the offenses that they are naturally to be explained as caused by a general plan may the evidence be admitted. *Id.* at 21. Evidence that a defendant simply seizes opportunities to commit a crime does not tend to establish a plan. *State v. Slocum*, 183 Wn. App. 438, 455, 333 P.3d 541 (2014). Instead, it must tend to show that the defendant has devised a manner of committing a crime and employed it more than once. *Id.* at 456.

Neither of these exceptions would allow the cross-admissibility of the evidence here because the offenses lack the high degree of similarity required to establish either identity or the existence of a common plan. Two victims were found nude and dumped downhill toward the river, while one was wearing clothes that had been arranged to display her breasts and genitals and had been deliberately placed in an inverted position on a guardrail. Sapp had been shot three times in the back, Lowe had been shot once in the chest, and Brisbois had been beaten and shot in the head as well as the body. Brisbois had been shot with .22 caliber bullets from two different barrels; Lowe had been shot with a single .22 caliber bullet that could not be matched to any of the Brisbois bullets; and Sapp had been shot with a small caliber weapon that may or may not have been .22 caliber. The victims were of varying ages and ethnicities. They were killed and their bodies discarded at different times of the day. While there were some similarities – all of the victims were drug-addicted prostitutes, all died of gunshot wounds, none had physical signs of sexual assault, and all were found near the Spokane River – these similarities are of a general nature, not a distinctive signature. *See Bluford*, 188 Wn.2d at 314.

Moreover, the similarities are not of such a marked and substantial nature as to lead to the conclusion that they resulted from a singular plan.

In cases where prior misconduct was admissible to show the existence of a plan, the evidence tended to show a common strategy for committing a crime, such as drugging women to rape them, grooming victims in a particular way, or purposefully isolating the victim to commit the crime. *Lough*, 125 Wn.2d at 861; *DeVincentis*, 150 Wn.2d at 22; *Slocum*, 183 Wn. App. at 455. By contrast, cases where the evidence tended to show that the defendant simply seized opportunities to commit a crime, or committed similar crimes within a short time frame, did not establish a “common scheme or plan.” *Slocum*, 183 Wn. App. at 455; *Harris*, 36 Wn. App. at 751 (rapes committed in a similar manner did not establish a common plan but only a propensity to rape).

Here, the commission of three somewhat similar but mostly different murders between mid-February and mid-May of 1990 fails to demonstrate an overarching plan or scheme. At no point did the State offer a coherent theory as to what the defendant’s plan was. *See generally* X RP 1835-36. It suggested that Perry committed the crimes when his girlfriend Galloway was booked into jail, but this theory is problematic for two reasons: (1) There was no evidence Galloway was booked into jail when Lowe was murdered, and (2) Since being arrested usually comes as a surprise, this would tend to show that, as in *Slocum*, the defendant simply seized an opportunity that presented itself rather than designed a

plan or strategy in advance. The suggestion that perhaps a financial motive existed is belied by the absence of any evidence that the victims were robbed or that Perry gained any financial benefit from the killings. The State suggested that Perry simply hated prostitutes, but also presented evidence that his girlfriend was one and that he had solicited another prostitute who, although apparently disturbed by their interaction, was unscathed and suffered no violence or even words indicating hatred. V RP 984-85. Finally, none of these possibilities explain why, during a short period in 1990, Perry would have started murdering women and then stopped, despite apparently being free until 1994 to continue killing.

No common thread was established between the killings that explained why they occurred, or even the manner in which the victims were identified and the murders committed. The State simply aggregated three offenses with some superficial similarities in outcome and, as in *Harris*, treated the existence of commonalities as a talismanic means to proffer the evidence. 36 Wn. App. at 751 (“[T]oo often this error leads to a lack of analysis and reliance on the exceptions as magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.”) (internal quotations omitted).

Consequently, the prejudice resulting to Perry from uniting the three murders in a single trial was overwhelming. Although evidence of the murders would not be cross-admissible, combining the cases allowed the State to rely on the strength of its DNA evidence in the Brisbois case and its allegations that the murders were “serial” in nature to aggregate the evidence and obtain convictions for the much weaker Sapp and Lowe cases, where the link to Perry was far more tenuous. These effects cannot be outweighed by concerns for judicial economy. *See Bluford*, 188 Wn.2d at 305 (“judicial economy can never outweigh a defendant’s right to a fair trial.”).

Under these circumstances, denying the motion to sever was an abuse of the trial court’s discretion and deprived Perry of a fair trial. The convictions should be reversed and the case remanded for new trials.

3. Insufficient evidence supports the “common scheme or plan” aggravator.

The State alleged as an aggravating circumstance that Perry committed the offense against multiple victims as part of a common scheme or plan, pursuant to RCW 10.95.020(10). As a result of the jury’s affirmative finding, the only sentence available to Perry was mandatory life without the possibility of parole. RCW 10.95.030(1). But because the

evidence was insufficient to establish any overarching criminal purpose uniting the crimes, the special verdicts must be vacated and the case remanded for resentencing.

In considering the sufficiency of the evidence, the reviewing court determines whether a rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt, considering both circumstantial and direct evidence and drawing all inferences from it in favor of the State. *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007).

As with the “common scheme or plan” analysis under ER 404(b), the aggravator requires proof of a nexus between the killings. *State v. Finch*, 137 Wn.2d 792, 835, 975 P.2d 967 (1999). This nexus may be established by showing that the murders are constituent parts of a larger plan, such as to further a criminal scheme, to obtain revenge for a bad drug deal, or in revenge for being fired. *Id.* at 835-36; *State v. Pirtle*, 127 Wn.2d 628, 663, 904 P.2d 245 (1995). Under this “overarching scheme” construction, the State need not prove that the defendant planned to commit multiple murders, but only that there was a plan, and the plan connected the killings. *Pirtle*, 127 Wn.2d at 663.

Alternatively, the aggravator can be established by proof that the defendant devised an overarching criminal plan and repeatedly uses it to perpetuate separate, but markedly similar, crimes. *Yates*, 161 Wn.2d at 749-50; *Lough*, 125 Wn.2d at 860. Under this alternative, the conduct in each case must be so similar in significant respects as to not be merely coincidental, but indicative of direction by design. *Lough*, 125 Wn.2d at 860. Similarity in results is insufficient; what is required is the kind of similarity that can only naturally be explained as individual manifestations of a general plan. *Id.*

In *Lough*, the evidence of similar crimes tended to show that the defendant, who had special expertise with drugs, had a plan to render his victims unconscious or disoriented in order to rape them. *Id.* at 861. In *Yates*, evidence from at least 12 separate homicides tended to show a plan to solicit and rob white or light-skinned prostitutes with dark hair by luring them into a car, shooting them and encasing their heads in plastic bags, finding and taking their money, and dumping their bodies in a secluded area. *Yates*, 161 Wn.2d at 732, 753, 770. And in *DeVincentis*, a common scheme or plan was established when the evidence established a plan to use available channels to gain access to children, isolate them in his home, acclimate them to nudity and physical contact, and ultimately molest them in the same manner. 150 Wn.2d at 22.

As discussed above in section 2, even viewed favorably to the State, the evidence in this case fails to demonstrate an overarching scheme that links the three murders. Unlike in *Lough*, *Yates*, and *DeVincentis*, here there was no evidence or even theory of a uniting purpose between the murders, only an assertion that Perry committed all three of them in a somewhat similar, yet somewhat different, fashion.

Also unlike those cases is the absence of similarity that tends to show a single criminal strategy to achieve a singular objective, repeatedly employed. Unlike in *Yates*, here the victims differed in age and race, were killed in different ways (i.e., three gunshots to the back vs. single gunshot to the chest vs. severe beating and gunshots to forehead and body), were disposed in different ways (i.e. nude and dumped down river bank vs. clothing opened and body displayed on guardrail), and occurred at different times of day (Lowe disappeared late at night, Sapp found in early morning, Brisbois disappeared and later found in afternoon). Also unlike *Yates* is the absence of evidence of any motive to rob the women, or indeed any singular motive. Finally, whereas in *Yates* there was evidence of the manner in which the victims were identified, lured into the car, and taken to an isolated place to be killed in a specific fashion for a specific reason, here there was no evidence tending to show why and how the

victims were identified, how they were abducted, or when and where they were killed.

The similarities that do exist between the crimes – the fact that the victims were all prostitutes, the killings all utilized a small caliber gun, and the bodies were all found near the Spokane River – are the kinds of generalized similarities that can result from coincidence, not the marked similarities that establish a single purpose or a single method of repeatedly committing a crime. Indeed, the State itself devoted little effort to attempting to explain what linked the murders beyond the similarities in outcome. X RP 1835-36. Even viewed in a favorable light to the State, the evidence cannot support a conclusion beyond a reasonable doubt that the murders were the product of a common scheme or plan. Accordingly, the special verdicts must be reversed and the case remanded for resentencing without the aggravators.

4. By conducting the initial instruction and swearing of the jury in the jury lounge rather than in the courtroom without conducting a *Bone-Club* analysis, the trial court failed to conduct a public trial.

Both the Sixth Amendment to the U.S. Constitution and Article 1, Section 22 of the Washington State Constitution guarantee a criminal defendant a public trial. *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d

310 (2009). This right extends to the process of jury selection. *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984)). “[O]penness of courts is essential to the court’s ability to maintain public confidence in the fairness and honesty of the judicial branch of government.” *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009).

In describing the importance of holding trial proceedings openly and publicly, the U.S. Supreme Court has observed:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

This openness has what is sometimes described as a “community therapeutic value.” Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to

account for their criminal conduct by jurors fairly and openly selected.

*Press-Enter. Co.*, 464 U.S. at 508-09 (internal citations omitted).

Conducting jury selection in chambers, outside of the courtroom, violates the public trial guarantee even when the process is recorded and transcribed. *State v. Frawley*, 181 Wn.2d 452, 460, 334 P.3d 1022 (2014); *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012); *State v. Wise*, 176 Wn.2d 1, 7-8, 288 P.3d 1113 (2012); *In re Morris*, 176 Wn.2d 157, 165, 288 P.3d 1140 (2012). While the public trial right is not absolute, certainly it is of sufficient significance that a compelling interest must be shown to justify impairing it, such that courts should resist closing proceedings to the public except in the most unusual circumstances. *Wise*, 176 Wn.2d at 10-11.

Not all actions shielded from immediate public scrutiny in the course of jury selection implicate the public trial right or constitute courtroom closures. For example, exercising peremptory challenges by sidebar conference does not implicate the public trial right. *See State v. Marks*, 185 Wn.2d 143, 145, 368 P.3d 485 (2016). And exercising challenges for cause at a sidebar conference that was held on the record in the presence of the court reporter does not violate the right to a public trial, where the process occurred in the courtroom where observers could

see it happen. *State v. Love*, 183 Wn.2d 598, 606-07, 354 P.3d 841 (2015). When it is unclear whether the public trial right is implicated by a particular proceeding, the court considers whether the place and process have historically been open to the public, and whether public access plays a significant positive role in the functioning of the process in question. *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012).

Here, by removing the general introduction of the jury panel and the preliminary instructions from the courtroom to the jury room,<sup>5</sup> the trial court closed the courtroom because the jury room is not generally accessible to spectators. *See Love*, 183 Wn.2d at 606. The general introduction of the process and the case and preliminary instructions to the jury panel are a portion of *voir dire* to which the public trial right attaches. *Id.* at 605; *State v. Slert*, 181 Wn.2d 589, 605, 334 P.3d 1088 (2014); CrR 6.4(b) (the trial court initiates *voir dire* by identifying the parties and their respective attorneys and briefly outlining the nature of the case). Accordingly, this portion of jury selection was required to occur in open

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<sup>5</sup> It should be noted that once the trial court makes a ruling that would constitute a court closure, the defendant does not have the burden of proving that the order was carried out; rather, that burden shifts to the State to overcome the presumption of closure. *State v. Brightman*, 155 Wn.2d 506, 516, 122 P.3d 150 (2005).

court, and its removal to the jury room failed to meet minimal constitutional requirements for a public trial.

Denial of a public trial is deemed to be a structural error that presumptively prejudices the defendant. *Strode*, 167 Wn.2d at 231. Accordingly, the appropriate remedy is remand for retrial. *Id.* (quoting *Orange*, 152 Wn.2d at 814).

5. The trial court's advisement to the jury panel that the case was not a death penalty case was improper and harmful, and a mistrial was necessary to cure the resulting prejudice.

It is error to instruct jurors in a noncapital case that the death penalty is not being sought. *See State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001). Telling the jurors that the death penalty is not available can improperly influence the jury's deliberation: "[I]f jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." *Id.* at 847.

Even when the information is immediately followed by an advisement that the jury is not to consider any punishment that may result

from the fact of a conviction, telling the jury the case does not involve the death penalty is error. *State v. Murphy*, 86 Wn. App. 667, 672, 937 P.2d 1173 (1997), *review denied*, 134 Wn.2d 1002 (1998). Indeed, such a combined instruction sends a confusing mixed message that the jury may not consider punishment, but may consider the fact that the death penalty will not be imposed. *Id.*

Here, after the trial court informed the jury that the case was not subject to the death penalty, defense counsel moved for a mistrial. The trial court denied the motion, concluding that a curative instruction directing the jurors not to consider punishment would eliminate any prejudice. Because the curative instruction could not mitigate the initial prejudice, the denial of the mistrial was erroneous.

The reviewing court considers the denial of a mistrial for abuse of discretion, reversing the decision when no reasonable judge would have reached the same decision and there is a substantial likelihood that the error affected the jury's verdict. *State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). When prejudice undermining the fairness of the trial results, the mistrial should be granted. *Id.* at 270.

Here, the trial court's determination that a curative instruction could alleviate the prejudice is inconsistent with the case law recognizing

that giving “a correct instruction along with one that is erroneous does not necessarily mitigate the prejudice caused by the erroneous one.” *Murphy*, 86 Wn. App. at 672 (rejecting the argument that giving the jury the same instruction utilized here necessarily cured the prejudice). Indeed, the instruction fails to acknowledge or address the real risk to the jury’s deliberations, which is not that it will pay undue attention to punishment but rather that it will fail to act with sufficient care and caution in evaluating guilt. Thus, the trial court’s conclusion that giving the standard instruction that the jury is not to consider punishment sufficiently rendered the trial fair was erroneous.

Moreover, in most cases where informing the jury that the death penalty was unavailable was found to be harmless, the defendants were acquitted of greater offenses, tending to show that the risk that the jury would be more likely to convict was not present. *Murphy*, 86 Wn. App. at 672-73; *State v. Hicks*, 163 Wn.2d 477, 488-89, 181 P.3d 831 (2008). Here, Perry was convicted of all aggravated murder charges. In *Townsend*, the evidence was overwhelming that the crime was premeditated. 142 Wn.2d at 848-49. Here, the evidence linking Perry to two of the three crimes was tenuous and the evidence supporting the “common scheme or plan” aggravators was essentially non-existent. And in *State v. Mason*, 160 Wn.2d 910, 930-31, 162 P.3d 396 (2007), counsel’s objection was

“lukewarm” and no objection to the panel was raised. Here, by contrast, counsel moved for a mistrial and also suggested striking the entire panel. II RP 276, 290. Moreover, the State itself indicated it was unsure whether a curative instruction would be sufficient. II RP 295.

Accordingly, in the present case, it was error for the trial court to deny the motion for a mistrial when the trial court’s error resulted in tainting the jury panel and creating a risk that the jury would take the case less seriously. The instruction was insufficient to cure the potential prejudice and the circumstances do not plainly show that these risks did not manifest. The risk that the error rendered Perry’s trial fundamentally unfair should have resulted in a new trial before a new jury panel, and the trial court abused its discretion in denying the motion for a mistrial.

6. Cumulative error warrants a new trial even if none of the individual errors, standing alone, does.

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, the multiple errors served to reinforce each other and increase the prejudice to Perry. Denying the motion to sever contributed to the unsubstantiated verdicts on the aggravating circumstance. Introducing

Perry's statements to police after her right to counsel was invoked and advising the jury that the case did not involve the death penalty discouraged the jury from examining the evidence supporting each charge critically and carefully. Likewise, removing a portion of the jury selection proceeding from the courtroom undermines the seriousness of the process and the accountability of the jury to the public. All of these errors combined rendered the trial fundamentally unfair, and a new one should be ordered.

7. If Perry does not prevail on appeal, appellate costs should not be imposed.

In the event Perry does not prevail in this proceeding, appellate costs should not be imposed. Perry has been found indigent for this proceeding, and that presumption continues throughout the appeal. RAP 15.2(f). Her report as to continued indigency is filed contemporaneously with this brief, as required by the court's General Order dated June 10, 2016. Absent a showing of a significant improvement in her financial circumstances since she was determined to be indigent, a cost award would be inappropriate under RAP 14.2.

**VI. CONCLUSION**

For the foregoing reasons, Perry respectfully requests that the court REVERSE her convictions for aggravated first degree murder, VACATE the special verdicts finding the murders to be part of a common scheme or plan, and REMAND the case for further proceedings.

RESPECTFULLY SUBMITTED this 17 day of August, 2018.

TWO ARROWS, PLLC

A handwritten signature in blue ink, appearing to read "Andrea Burkhart", written over a horizontal line.

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 Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class postage pre-paid, addressed as follows:

Donna Rebecca Perry, DOC #400378  
Washington Corrections Center for Women  
9601 Bujacich Road NW  
Gig Harbor, WA 98332

And, pursuant to prior agreement of the parties, by e-mail to the following:

Brian, O'Brien, Deputy Prosecuting Attorney  
SCPAAppeals@spokanecounty.org

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

Signed this 17 day of August, 2018 in Walla Walla, Washington.



Andrea Burkhart

**BURKHART & BURKHART, PLLC**

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