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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DONNA PERRY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

AMENDED BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether detectives violated Ms. Perry's Fifth Amendment rights by questioning her, without counsel, where any invocation of the right to counsel was equivocal?
2. Assuming her request for counsel was unequivocal, did detectives violate Ms. Perry's Fifth Amendment rights by questioning her, without counsel, after Ms. Perry told them, "Let's talk"?
3. If detectives questioned Ms. Perry in violation of the Fifth Amendment, was the admission of her statements harmless beyond a reasonable doubt?
4. Whether the trial court manifestly abused its discretion in denying the defendant's motion to sever the three counts of aggravated murder?
5. Whether the State presented sufficient evidence of the "common scheme or plan" aggravating circumstance where the State established the defendant was a "serial killer who use[d] the same plan or formula over an extended period of time to kill multiple victims?"
6. Whether the defendant has demonstrated that a courtroom closure occurred when the court conducted pre-voir-dire introductions and gave pre-voir-dire instructions in the jury room, and whether, under these circumstances, if a closure occurred, the violation was de minimis?
7. Whether the defendant has established that she was prejudiced by the trial court's declaration to the jury that the defendant's trial did not involve the death penalty, where the trial court thereafter instructed the jury it may not consider punishment except insofar as it made the jurors careful?
8. Whether reversal is required under the doctrine of cumulative error where the defendant has failed to show that several errors occurred during her trial which, when combined, deprived her of a fair trial?
9. Whether this Court should decline to impose appellate costs upon an indigent defendant and whether this Court should grant Ms. Perry's request to strike the criminal filing fee imposed at sentencing?

II. STATEMENT OF THE CASE

A. FACTUAL HISTORY

The defendant was charged in the Spokane County Superior Court with three counts of premeditated first-degree murder with aggravating circumstances – that the murders were committed as part of a common scheme or plan involving more than one victim. CP 284-85, 382-83. The matter proceeded to a jury trial.

1. Introduction.

Yolanda Sapp, Nickie Lowe and Kathleen Brisbois were all prostitutes who worked in Spokane in 1990. The women knew each other, at times worked together, and were all drug users. RP 458, 467-70, 467-68.¹ Between February and May 1990, each woman was murdered; each was last seen the day before her body was found. RP 441-42, 450-51, 460-61, 871-72. When the women were found, no money was found among their personal effects. RP 1451. Law enforcement believed the murders to be connected due to other similarities: the bodies were nude or partially nude; they were dumped near the Spokane River; and each was shot with a small caliber firearm. RP 774, 855, 859, 862. Eventually, police exhausted all

¹ The report of proceedings consists of ten consecutively paginated volumes from various dates, and will be referred to as “RP.” A separate, 12-page report of proceedings from the first day of voir dire will be referred to as “6/6/17 RP.”

leads; the investigations became “cold cases.” RP 770, 860-61, 877, 1311.

Douglas Perry² lived in Spokane in 1990. RP 899. He frequented prostitutes and had a relationship with a prostitute named Clairann Galloway, who lived with him. RP 926, 1350. Perry was also friends with three brothers: Bruce, Mark and Glen Massengale and lived with them prior to the murders; during that time, Bruce Massangale purchased guns for Perry. RP 900, 1350, 1355, 1460, 1467. In 2000, Perry travelled abroad to undergo gender reassignment and became Donna Perry. RP 1102.

In 2009, after Perry’s DNA was matched through CODIS³ to DNA found under Ms. Brisbois’ fingernails, she became a suspect in all three murders. In a police interview in 2012, Perry denied killing the women, but admitted that she might have slept with them, and that “Donna has killed nobody,” but that she could not speak for Douglas. Ex. P1, P4. After more investigation, additional connections between Perry and the victims were developed, and after receiving inculpatory information from Perry’s prison confidant, Perry was charged with three counts of premeditated first-degree

² For the ease of the reader, this brief will follow appellant’s brief and refer to Perry as “Douglas Perry” or “he” before the year 2000, and as “Donna Perry” or “she” after the year 2000.

³ CODIS is the “Combined DNA Index System” and houses DNA profile that are generated from crime scenes, as well as DNA from individuals who qualify to have their DNA placed into the database. RP 647-48. CODIS routinely searches against new profiles that are placed into the system. RP 648.

murder with aggravating circumstances – that the murders were committed as part of a common scheme or plan involving more than one victim.

2. Yolanda Sapp.

On the morning of February 22, 1990,⁴ Yolanda Sapp's naked body was found near 4100 East Upriver Drive, on the north side of the Spokane River. RP 730-31, 759, 760-61. A floral blanket, a green army blanket, and a wig were also recovered near her body. RP 731, 761. An autopsy was conducted by former medical examiner, Dr. George Lindholm. RP 1375. Ms. Sapp had suffered three gunshot wounds to her back, accompanied by abrasions and scrapes. RP 1378-79. The bullets had travelled through her chest causing damage to her internal organs and heart, and then exited through the front of her body. RP 1379, 1380. Her wounds indicated small caliber bullets were used, but no bullets were recovered.⁵ RP 1379.

In 2000, forensic scientist, Amy Jagmin, tested evidence collected from Ms. Sapp. RP 522. She was provided a reference sample of Ms. Sapp's blood. RP 516. She tested several items, but was unable to locate any DNA evidence of interest. RP 519-21. Then, in 2008, Ms. Jagmin was asked to test the floral blanket, along with other items not previously tested. RP 531.

⁴ Ms. Sapp was last seen on February 21, 1990, by a bail bondsman, when she and her boyfriend asked him for money. RP 443-44.

⁵ A solid nose .22 caliber bullet can travel through and exit the human body. RP 1070, 1074.

Ms. Jagmin identified Ms. Sapp's DNA on the blanket, and determined there was also an indication that male DNA was also present. RP 532-33, 549, 553-54, 556. Because of the limited amount of male DNA in the sample, Ms. Jagmin believed the sample could be suitable for Y-STR⁶ testing. RP 556. That testing was later conducted by Lorraine Heath, a Washington State Patrol forensic scientist, as discussed below; the Y-STR profile obtained from the floral blanket matched Donna Perry.⁷ RP 1664.

3. Nickie Lowe.

On Sunday, March 25, 1990,⁸ Ms. Lowe's body was found under the Greene Street Bridge at 3200 East South Riverton in Spokane, near the

⁶ Ms. Jagmin's lab performed autosomal (or STR) DNA testing, but not Y-STR testing. Autosomal testing is "total DNA" testing, which analyzes all chromosomes in the DNA. Y-STR DNA testing looks only at specific genetic markers present in male DNA. Y-STR testing is used in criminal investigations where a mixture of male and female DNA is located, and allows scientists to target only the male DNA for testing. Unlike autosomal testing, Y-STR testing is unique to a paternal family line, rather than to a specific individual. RP 507-08, 1661. Y-STR DNA cannot be searched in databases, and it is necessary to have a reference sample to which a comparison may be made. On the other hand, autosomal DNA may be searched in databases as it is specific to an individual. RP 509.

⁷ The Y-STR profile that was observed was not expected to occur more frequently than one in 3300 male individuals. RP 1664. This statistic means, "at worst" one in 3300 males would have a similarly matching profile; the statistic provided by Ms. Heath is conservative, so the actual occurrence of this profile may be rarer. RP 1665. Assuming a Spokane population of 330,000, this statistic would indicate that 50 or fewer men in the area could have the same genetic Y-STR profile. RP 1666.

⁸ Ms. Lowe's significant other testified that she "worked the streets" and that he dropped her off for work on Sprague Avenue at approximately 7:30 p.m. and returned to pick her up at 11:30 p.m. on the evening before her body was found; he waited for her return until 4:30 or 5:00 the following morning, and when she did not return, he went to her mother's house to look for her. RP 457-61.

south side of the Spokane River. RP 368-69, 374, 671, 777. Her body had been positioned⁹ with her legs upon the guardrail and her back upon the ground; her pants were pulled down to her knees, exposing her genital area; her shirt had been pulled up, exposing her abdomen. RP 370, 379; Ex. P34, P35, P38, P39. Her backside had obvious markings and bruising which suggested she had been dragged to the location.¹⁰ RP 371; Ex. P38. Ms. Lowe had suffered a bullet wound to her chest. RP 672, 778.

Soon thereafter, detectives learned that clothing had been located in a dumpster near Sprague Avenue. Detective Graves searched the dumpster, and found a wallet containing Ms. Lowe's driver's license and other items bearing her name. RP 465-66, 481-82, 822-23. He also collected among other things, a container of lubricating jelly, a small glass jar and a jar of Carmex. RP 825-32, Ex. P47, P51, P53, P55, P57. Ms. Lowe was known to carry a jar of Carmex while working – she filled it with lubricating jelly. RP 479, 482. Julie Brownfield, a forensic scientist, lifted fingerprints from a number of the items found in the dumpster along with Ms. Lowe's property, including the tube of lubricating jelly. RP 1131.

⁹ Approximately 20 to 40 feet from Ms. Lowe's body, a portion of the guardrail was missing, suggesting to detectives that Ms. Lowe had been purposefully displayed on the guardrail, rather than suggesting she had been left there in an unsuccessful attempt to dump her body over the guardrail. RP 376, 381-82, 384.

¹⁰ Her significant other testified that when he dropped Ms. Lowe off for work, she did not have any marks on her back. RP 474.

The autopsy confirmed Ms. Lowe had been shot just below her rib cage; the bullet travelled through her diaphragm, her liver, her aorta, and then struck her spine, where it came to rest. RP 1387. The bullet was recovered and placed in evidence. RP 1387, 1421; Ex. P49.¹¹ The entrance wound was similar in size to Ms. Sapp's wounds. RP 1389. Ms. Lowe suffered abrasions and scrapes, and striations on her back were consistent with drag marks. RP 1390. It appeared she had died within 24 hours preceding her discovery. RP 1391.

In 2012, after Perry had become a suspect, Kristin Storment, a forensic scientist, conducted a latent fingerprint comparison between the print found on the tube of lubricating jelly found in the dumpster and Perry's known fingerprints. She was able to positively identify that a latent print on the lubricating jelly matched Perry's right index finger. RP 1161-67.

4. Kathleen Brisbois.

In the evening of May 15, 1990,¹² Ms. Brisbois' body was found

¹¹ This bullet is referred to by its police property item number 21, RP 693, or by its exhibit number, Ex. P49; a photograph of the bullet recovered at autopsy, Ex. P95, was compared with Exhibit P49.

¹² Ms. Brisbois was last seen on May 14 or 15, 1990. Retired Detective John Grandinetti believed that he saw Ms. Brisbois in the morning of May 14 or 15, 1990, when a prostitute who looked like Brisbois approached him on Sprague Avenue near the Evergreen Club, an establishment Perry was known to frequent, and talked with Grandinetti about drugs. RP 449-52. Ms. Brisbois' apartment manager also padlocked her apartment on May 14, 1990, after she left for the day. RP 871-72.

near Trent and Pines in Spokane, near the Spokane River. RP 388-89, 395; Ex. P62. Detectives located clumps of hair near her body, indicating she had been carried or dragged to that location.¹³ RP 393, 400. Ms. Brisbois was also naked and items of her clothing were found near her body. RP 423-27. Ms. Brisbois had suffered gunshot wounds and her head was severely beaten. RP 861-62. Like the wounds sustained by Ms. Lowe and Ms. Sapp, Ms. Brisbois' gunshot wounds were made by small caliber bullets. RP 862.

An autopsy was conducted, revealing gunshot injuries, as well as blunt injuries, abrasions and lacerations. RP 1391. Ms. Brisbois suffered a close-range gunshot wound to the center of her forehead, and seven lacerations to her head, consistent with a blunt object. RP 1394-95, 1398. Due to the amount of bleeding associated with these injuries, it appeared that Ms. Brisbois was alive when they were inflicted. RP 1396. The bullet that passed through her skull and damaged her brain was recovered inside her skull. RP 1399. She also sustained close-range gunshot wounds to her chest and to her right shoulder – one bullet shot through her shoulder and pierced her right lung. RP 1421-22, 1424-25. Similar to Ms. Lowe, Ms. Brisbois had scraping on her back, consistent with being dragged. RP 1424.

¹³ After Ms. Brisbois' death, officers searched her apartment at the Spokane Street Motel, which had previously been secured by a padlock on May 14, 1990; they found no evidence that the murder had occurred at that location. RP 871-72.

During autopsy, fingernail clippings were collected and two bullet fragments were recovered.¹⁴ RP 865, 868.

In 2009, forensic scientist, Mariah Low, tested several items of evidence taken from Ms. Brisbois. RP 627-28, 630. Ms. Low located blood under three of Ms. Brisbois' fingernails; there were two contributors to the DNA profile, one of which was Ms. Brisbois. RP 642, 647. Ms. Low was able to isolate the male component of the DNA found under her fingernails, and ran that profile through CODIS. RP 647. Eventually, CODIS identified a potential match. RP 648. That individual was later identified as Douglas or Donna Perry. RP 650. Ms. Low requested that law enforcement obtain a known reference sample from Perry. RP 652, 1343.

A reference sample was obtained and was later analyzed by forensic scientist, Lorraine Heath. RP 652. Heath performed STR and Y-STR testing on the fingernail clipping taken from Ms. Brisbois, Y-STR testing on a vaginal smear from Ms. Brisbois, and Y-STR testing on the blanket cutting from the Sapp case.¹⁵ RP 1664.

¹⁴ The bullet fragments were both included in State's Exhibit P69. RP 867-68. One fragment within Exhibit P69 was identified as Item number 11, and the other was identified as Item number 13, corresponding with the police property numbers assigned to the items. RP 867-68. Ballistics experts referred to these items as either P69 collectively or "Item 11" and "Item 13." RP 1056.

¹⁵ See n. 7. The Y-STR sample taken from the blanket associated with Ms. Sapp's murder, which also included Ms. Sapp's DNA, matched Donna Perry to the extent

With regard to the vaginal smear taken from Ms. Brisbois, Heath determined that a partial Y-STR profile obtained from the smear matched Donna Perry; however, since the sample was partial, it would not be expected to appear more frequently than one in three males. RP 1668. Heath considered this to be “an association, but not super strong.” RP 1668.

Heath determined that both the STR and Y-STR profiles obtained from Brisbois’ fingernail clipping matched Donna Perry’s known DNA sample. “The combined probability of selecting [an] unrelated individual that randomly matches that combined profile is one in 790 sextillion.”¹⁶ RP 1668. Heath concluded that, to a reasonable degree of scientific certainty, Perry’s DNA was on Brisbois’ fingernail. RP 1668.

5. Firearms Evidence.

In 1990, Forensic Scientist Gaylan Warren tested the .22 bullet recovered from Ms. Lowe. RP 105, 1421; Ex. P49. Its size and configuration indicated it was .22 long rifle caliber. RP 1053-54. He also tested the two distorted bullet fragments which had been recovered from Ms. Brisbois. RP 1055. He then compared them to the intact .22 caliber bullet taken from Ms.

that no more than 1 in 3300 males in the population would be expected to share the same profile. RP 1666.

¹⁶ Only an approximate 7 billion people inhabit our planet, and is denoted as the number seven followed by nine zeros. RP 1668. *One* sextillion is denoted as the number one followed by twenty-one zeros.

Lowe. RP 1056. One of the fragments had the same class characteristics as the intact bullet, suggesting the bullets could have come from the same barrel. RP 1057. The other fragment had different characteristics from the other fragment recovered from Ms. Lowe and from the intact bullet recovered from Ms. Brisbois, which suggested that the bullets were fired from different barrels – either two barrels from the same gun or two guns. RP 1058. The two fragments were also remnants of .22 caliber bullets. RP 1059. Warren also evaluated photographs of the bullet wounds sustained by Ms. Sapp, Ms. Brisbois, and Ms. Lowe, determining they were all consistent with a .22 caliber bullet.¹⁷ RP 1062-64.

In 1994, Detective Alan Quist procured a search warrant for Perry's residence as part of an unrelated investigation.¹⁸ RP 967-68. He and other officers removed approximately 33 firearms from Perry's residence.¹⁹ RP 968, 973. One of those firearms was a Ruger 10/22 .22 caliber rifle. RP 977-78; Ex. P142.

¹⁷ Warren reviewed exhibits P80 and P173, photographs of the Sapp autopsy; P91, a photograph of the Lowe autopsy; and P125 and P126, photographs of the Brisbois autopsy.

¹⁸ ATF Agent Lance Hart was also present and spoke with Perry. Perry told Hart that he was a woman trapped in a man's body, that he worked on Sprague Avenue as a prostitute, and that was how he made his money to purchase his guns. RP 973-74.

¹⁹ Among the firearms removed from Perry's house in 1994, there were three .22 caliber firearms: A Ruger 10/22 .22 caliber rifle, a Stevens Model 84C .22 caliber rifle, and a Ruger Mark II .22 caliber pistol. RP 977-78; Ex. P142.

In 2012, after Perry became a suspect in the murders, ATF agent Michael Northcutt traced the Ruger 10/22 and found that it had been sold by a Coeur D'Alene retailer to Bruce Massangale in May of 1989.²⁰ RP 995. Unfortunately, the guns earlier seized from Perry's house were either sold, destroyed, donated or auctioned. Ex. P142. The Ruger was never located. RP 1489.

In 2013, Glenn Davis, a forensic scientist with the Washington State Patrol Crime Lab, analyzed the bullets associated with this case. Although the bullets were damaged, he determined that each bullet had the same number of lands and grooves and the same twist; in other words, their rifling characteristics were similar. RP 1081, 1085. Microscopically, the bullets were similar, but, because of their damage, they could not be conclusively identified or eliminated as having been fired by the same gun. RP 1082, 1085. Davis reviewed the list of the guns seized by law enforcement from Perry's home in 1994, Ex. P142, and observed that Perry's Ruger 10/22 rifle (seized in 1994) could have produced the observed rifling characteristics. RP 1086-1087.

6. Additional Evidence.

Officers confirmed that Douglas Perry lived in the Spokane area in

²⁰ This firearm fired a .22 caliber bullet. RP 996.

1990.²¹ RP 914. They determined that Perry was romantically involved with a prostitute named Clairann Galloway, who lived with him. RP 908, 915, 1463. He also was good friends with three brothers – Mark, Bruce, and Glen Massangale – and lived with them for some time. RP 905-06. Perry bought and sold cars frequently, and officers found that in 1990 Perry had at least three different vehicles, one of which was never located during their investigation.²² RP 901-03.

Detectives determined that Ms. Galloway was booked into jail on January 21, 1990, February 15, 1990, February 21, 1990, and May 15, 1990. RP 912, 1357. Two of those dates coincided with two of the homicides – February 21, 1990 was the day before Ms. Sapp’s body was located and May 15, 1990 was the date Ms. Brisbois’ body was found.²³ RP 1358.

Prior to the murders, Perry lived with the Massangale brothers for approximately two to three months.²⁴ RP 1459. While Perry lived with the

²¹ Mr. Lucas, Ms. Lowe’s significant other, also recognized Perry, having seen him near Sprague Avenue after Ms. Lowe’s death. RP 473.

²² After Perry became a suspect, officers located two of Perry’s known vehicles from the 1990s. Neither contained any evidence of value, other than a .22 caliber cartridge that was found in Perry’s former International Scout. RP 932. Fiber samples were taken from the two vehicles that were recovered and were compared to the fibers found on the victims in 1990, but none were similar. RP 1443.

²³ Ms. Brisbois was discovered in the afternoon or evening. RP 390, 684.

²⁴ Perry became acquainted with Bruce and Glen Massangale at the Evergreen Club on Sprague Avenue; Perry was homeless at the time and the Massangales offered him a place to stay. RP 1458.

Massangales, Bruce Massangale purchased guns for Perry, to include a Ruger .22.^{25, 26} RP 1460, 1467; Ex. P177. Mark Massangale recalled that when Ms. Galloway was arrested, Perry would bail her out of jail: “[Perry] was able to get her out of jail. I don’t know how, but – because Social Security isn’t too good.” RP 1475.

Law enforcement officers interviewed Perry on November 15, 2012. RP 1355; Mot. Ex. P1, P4.²⁷ During the interview, Perry agreed that she lived with Clairann Galloway.²⁸ Ex. P4 at 16, 18. She admitted that she dated other prostitutes “no more than a couple of times a month” and “was careful enough not to have [Clairann] in the house at the time when another girl was there.” Ex. P4 at 19, 31. She also admitted to having the prostitutes in her Scout vehicle, and sometimes “in the car.” Ex. P4 at 30. She denied “dating” black girls, and denied recognizing any of the victims’

²⁵ “He handed me the money. I paid for the guns. I gave it to him.” RP 1461. Massangale did not specifically recall purchasing the Ruger for Perry, but when confronted with documentation of the purchase, he agreed, “I guess it was a Ruger .22.” RP 1466-67.

²⁶ In 2009, Perry also possessed a gun that was purchased by Mark Massangale. Ex. P176.

²⁷ Defendant has designated these exhibits as admitted at the CrR 3.5 hearing. They are identical to those admitted at trial. For consistency’s sake, the State will refer to the exhibits as “P1” (videotape) and “P4” (transcript); the interview was admitted at trial as Exhibits P151 and P152.

²⁸ During the interview, Perry first refers to Clairann as “Claire.” Ex. P4 at 16.

photographs. RP 1361; Ex. P150; Ex. P4 at 30.²⁹ However, Perry later claimed the Massangales “set her up” to take the blame for the murders. Ex. P4 at 43. She again changed her story and admitted that she may have slept with the victims, and that she would not be surprised if her fingerprints and DNA were found on the women, but that she did not kill them – that she “turned them loose” or “released” them. Ex. P4 at 18, 45, 46. Perry admitted that the Massangales bought her guns and ammunition. Ex. P4 at 43, 47. When asked “What made Donna stop?,” she replied, “Douglas didn’t stop. Donna stopped it. The gender change operation.” Ex. P4 at 46. She claimed that she did not know if Douglas had killed anyone, but that she “got rid of violence with the sex change operation.”³⁰ Ex. P4 at 47, 51, 53, 55.

Detectives learned that, in 2007 or 2008, Ms. Perry had dealings with a DSHS financial services specialist. RP 1621. During that time, Perry told the financial specialist that before her sex change operation, her life had “gotten out of control,” and that she had been involved in “shooting people,”

²⁹ During the interview, Defendant was shown individual photographs of prostitutes. RP 1360-61. These photographs were admitted as Exhibit P150. The number that is written next to each photograph in Exhibit P150 corresponds with the number on the individual photograph Detective Dresback showed Ms. Perry. RP 1361. Thus, Ms. Brisbois was depicted in photograph number 3, Ms. Sapp in photograph number 6, and Ms. Lowe in photograph number 9. Ex. P150; Ex. P4 at 16-17.

³⁰ She also asked the detectives, “what kind of life does Mr. Yates have?” Ex. P4 at 59.

and that she “knew [she] was going to end up dead or in prison again if [she] didn’t do something about it, so [she] had the surgery, just like you geld a horse, and [she] got her life back under control.” RP 1625-28.

In 2013, an inmate named Chero Everson³¹ was housed in Carswell Federal Prison along with Perry³² and the two became friends. RP 1510-11, 1514. Perry disclosed details to Everson about her life – that she had undergone a sex change operation, that she had previously dated a prostitute named “Claire,” that she had formerly interacted with other prostitutes, that she was friends with a “Mr. Massangale,” and that she was interested in guns and “killing people.” RP 1516-18.

By the end of Perry’s first week at Carswell, she had also disclosed to Everson that she had killed at least nine prostitutes.³³ RP 1521. Perry admitted that the killings occurred when she was in her 30s³⁴ or 40s in the Spokane area. RP 1522. Perry described the prostitutes to Everson: “they were nothing. They were nobodies. They were pond scum”; Perry also

³¹ Everson was not promised, nor did she receive, any consideration in exchange for providing information to police. RP 1497, 1511.

³² Perry was imprisoned on unrelated charges. Ex. P4 at 5.

³³ This number changed over time; Perry claimed at one point that she had killed as many as 20 or 30. RP 1521.

³⁴ Ms. Perry was born in 1952. CP 1. Therefore, in 1990, she would have been 38 years old.

indicated she was jealous of their ability to “breed” or have families.³⁵ RP 1522, 1546. Perry told Everson that she had killed the prostitutes in a vehicle, by a river, with a firearm, and would then push their bodies out of the vehicle. RP 1522, 1526, 1548. Perry described to Everson that she would pick a target, study her movements and then would “execute” her. RP 1526. Perry felt no remorse, but claimed to have had a sex change operation to avoid being caught by police. RP 1523, 1517, 1534. Perry also stated that when law enforcement confiscated and destroyed her guns, “they didn’t ... know that some of the guns had been used to kill somebody.” RP 1527-28. Eventually, Everson feared Perry, and was moved to a different unit in the prison. RP 1530.

In 2014, after Perry was charged with the murders, law enforcement officers travelled to Texas to return her to Spokane for trial. RP 1560, 1567. To one officer, Perry voluntarily remarked, “I’m never going to get out of this,” “instead of jail, I hope they take me to Eastern State Hospital,” “[w]ell, whatever happened to Yates?” “[y]ou know, I’m on medication now,” and “I’m not violent now.” RP 1562-63. To another, Perry observed that the airplane ride would be the last time she would be outside of concrete

³⁵ Each of the victims had what appeared to be a caesarean section scar. RP 1392 (Lowe), RP 1393 (Sapp), RP 1428 (Brisbois). Ms. Sapp was a mother to two children, Ms. Lowe was a stepmother to two children, and Ms. Brisbois was a mother to three children. RP 353, 358, 362.

walls, that “they might as well dig a hole and put her in it,” and that “by the time [she] learned to control [herself] it was too late.” RP 1569-70.

Later in 2014, Perry was evaluated at Eastern State Hospital. The evaluator concluded that she was “malingering,” or feigning symptoms of a mental disorder or impairment. RP 1584. She told one professional that “the only reason she was caught was because DNA evidence was found under her fingernail.” RP 1295.

B. PROCEDURAL HISTORY

1. CrR 3.5 Hearing.

The court held a CrR 3.5 hearing to determine the voluntariness of Ms. Perry’s statements during a November 15, 2012 interview.³⁶ Prior to informing Ms. Perry of her *Miranda* warnings, Detective Dresback told Ms. Perry that she had been brought in for an interview to “help clear some things up” about some “old cases” from the 1990s. Ex. P4 at 5. Detective Dresback told Ms. Perry “I do need to advise you of your rights. You know you don’t have to talk to me. You can have an attorney. You’re familiar with that stuff, right?” *Id.* Ms. Perry replied, “I probably should have an attorney if you’re going to question me about something.” *Id.*

Ms. Perry was advised of her *Miranda* warnings and she indicated

³⁶ The court also held CrR 3.5 hearings regarding defendant’s other extrajudicial statements, but none of those statements are at issue in this appeal.

that she understood. Ex. P4 at 6. When asked, “With these rights in mind, do you want to answer my questions,” Ms. Perry replied, “I think I should have a lawyer here if you’re gonna ask me questions.” *Id.* Detectives asked no further questions at that time. Ex. P4 at 6-7.

Detectives then served a search warrant on Ms. Perry for her DNA, “in conjunction with some old cases.” Ex. P4 at 6-7. Ms. Perry asked them to tell her about the old cases, to which Detective Dresback stated, “I want to make sure that you want to talk to me about this.” Ex. P4 at 7. Ms. Perry replied, “Well I should have a lawyer here if you’re going to take DNA and all of this.” *Id.* Detective Dresback informed her she did not have a right to a lawyer during the DNA search. *Id.* Detectives stepped from the room to retrieve the necessary buccal swabs, leaving Ms. Perry with the search warrant. Ex. P4 at 7. Upon their return, Ms. Perry asked if she was being accused of murder; Detective Burbridge responded that the search warrant served to help eliminate her as a suspect. Ex. P4 at 8.

Ms. Perry continued to ask detectives questions about the details of the allegations, reiterating that “I need a lawyer for something like this.” Ex. P4 at 8. She also stated, “I think I better have a lawyer here.” Ex. P4 at 8. After detectives read her the search warrant, Ms. Perry asked, “Am I being accused of murder or something?” Ex. P4 at 9. Detectives then informed her that she was the prime suspect in several murders, but declined

to answer her other questions because she had asked for a lawyer. Ex. P4 at

9. Detective Dresback reiterated:

[Y]ou do understand that the rights of your having an attorney and your right to remain silent, these are your rights. All they do is restrict me. They don't restrict you in any way. You have the right to talk and you have the right not to talk ... so I'm absolutely gonna honor your right to an attorney at this time. Which is why we're not really freely discussing this whole thing with you.

Ex. P4 at 9.

Detectives left the room. *Id.* Upon their return,³⁷ they provided Ms. Perry with the search warrant return, and Ms. Perry then again asked a series of questions about the allegations, asking officers whether she was to be formally charged “now.” Ex. P4 at 10. Detectives told her that she was not being formally charged at that time and that the investigation dated back 20 years. *Id.* Ms. Perry stated, “my head's completely exploded. I thought I was scared... Tell me what's going on. I don't understand a thing. I need a lawyer or somebody to explain what is actually going on.” Ex. P4 at 11. Detectives then told her that, in the 1990s, three prostitutes had been murdered, that DNA was recovered from one of the victims, and that CODIS indicated the DNA matched a profile for Ms. Perry. *Id.*

Ms. Perry threatened to commit suicide upon returning to her cell. Ex. P4 at 12. Detective Dresback again told Ms. Perry that he wanted to

³⁷ Detectives left Ms. Perry alone for about 5 minutes. Ex. P1 at 21:32 to 26:58.

respect her rights and that he wanted to answer her questions, reiterating that she could “at any time decide that you want to discuss this,” but that he was not comfortable answering her other questions unless she decided she wanted to talk to him. *Id.* Detectives again left Ms. Perry alone. Ex. P4 at 13. Upon their return,³⁸ Detective Dresback gave her his business card, in the event she later decided to talk to him. Ex. P4 at 13-14.

Ms. Perry then stated, “Let’s talk. Let’s sit down and work this out of my head. I’ll go back to the cell and kill myself... [P]lease somebody tell me what I did wrong.” Ex. P4 at 14. Detectives re-read Ms. Perry her *Miranda* warnings; she again indicated she understood and would “try to answer [their] questions.” Ex. P4 at 14-15. Detective Dresback advised Ms. Perry that she could pick and choose which questions to answer, and to ask for clarification if necessary. Ex. P4 at 15.

The court made several findings of fact and conclusions of law with respect to the voluntariness of the defendant’s statements to the interviewing detectives. CP 204-07, 211-17.³⁹ Specifically, the trial court found that the detectives advised Ms. Perry of her *Miranda* rights on a number of occasions during this interview. CP 205 (FF 6). The court found

³⁸ Detectives left Ms. Perry alone for about six minutes. Ex. P1 at 36:20 to 42:15.

³⁹ The court’s oral ruling was incorporated by reference into the written findings of fact and conclusions of law, and was filed along with the written order. CP 207, 211-17.

that initially Ms. Perry stated that she thought she should consult with an attorney. CP 205 (FF 7). Given her request for a lawyer, the court found that detectives did not question Ms. Perry, but retrieved her DNA pursuant to the search warrant. CP 205 (FF 8). The court found that Ms. Perry continued to ask detectives questions, but that the detectives were concerned about answering her questions because she had wanted a lawyer; instead, detectives provided Perry their business card if she wanted to contact them in the future. CP 205 (FF 9), 216 (ll. 4-10).⁴⁰ Upon being told that she would be taken back to jail, the trial court found that Ms. Perry stated, “No. You don’t need to do that. I want to talk to you, let’s talk.” CP 205 (FF 10).⁴¹ The court orally ruled that, in making this statement, Ms. Perry “clearly indicat[ed]” and “unequivocally stated” her desire to talk to the detectives. CP 216 (l. 9), 217 (l. 1). The court determined that the detectives re-*Mirandized* Ms. Perry and she agreed to waive her rights. CP 205 (FF 11).

The court found that Ms. Perry “was properly advised of her rights

⁴⁰ The court observed that “early on in the interview, Ms. Perry seems to suggest that she should have a lawyer, but then she starts asking the detectives to tell her what this is all about. She says she wants a lawyer, but then she’s prompting the detectives to advise her what the entire scenario pertains to.” CP 215 (ll. 10-15). The court found that detectives told her that she was a suspect in a murder investigation but they “can’t talk to her about it because she seems to be saying that she wants a lawyer.” CP 215 (ll. 18-21).

⁴¹ The court’s oral ruling recited Ms. Perry’s verbatim statement, “let’s talk; let’s sit down and work this out of my head.” CP 216 (ll. 8-10).

and that she freely and voluntarily waived those rights and chose to speak with law enforcement.” CP 206 (CL 5). It found that the officers treated Ms. Perry with utmost respect and courtesy. CP 214 (ll. 3-4). It found no coercion or threats by the officers. CP 217 (ll. 4-5). Therefore, the court deemed Ms. Perry’s statements admissible under CrR 3.5. CP 206 (CL 5).

2. Jury Selection.

Prior to trial, the trial court set forth its plan for conducting jury selection from the over-100-member venire. RP 221-24, 230. The court planned to “do the initial introduction of the case in the jury lounge” to include “initial juror instructions” wherein the court would admonish the potential jurors to not discuss the case with anyone. RP 221-22. The court indicated it would also discuss “a number of prerequisites that [he] introduce[s] in every case when [there is no] individual voir dire” and planned to “do it all over again once we’ve got the jurors that we’ve selected in the courtroom.” RP 222. The court anticipated “ending [his] presentation ... with explaining to [the jury] the questionnaire process.” RP 222, 242.

The court followed its plan. On June 6, 2017, in the jury orientation room, the court made appropriate introductions, provided a brief description of the case, and then instructed the venire regarding completion of the questionnaire. 6/6/17 RP 1-12. The court reiterated that individual voir dire would occur in the courtroom. 6/6/17 RP 10.

During general voir dire in the courtroom, the court asked the venire “[w]ould any of you be unable to assure the Court that you will follow the Court’s instructions on the law regardless of what you think the law is or what you think it ought to be?” and “[i]s there anything about this case that you haven’t expressed to us previously that would cause you to begin this trial with any feelings or concerns one way or another that you would like to let us know.” RP 273. One juror expressed that he had an objection to the death penalty, “so if this is a death penalty case, [he] would not be able to [assure the court that he could follow the instructions].” RP 273. The court replied, “[t]hanks for letting me know... Not a death penalty case.” RP 273.

Before the court proceeded with any additional questions of the venire, defense counsel raised concerns with the court’s response that the case did not concern the death penalty. RP 276. The court observed that it felt that it would be inappropriate to leave the juror’s comment “hanging out there” without a response. RP 277. The State recommended the court provide the venire with a limiting instruction reminding them that they were not to consider sentencing at any point in the proceeding. RP 278.

After a recess, defense counsel requested a mistrial. RP 290. The State conceded that it was error for the court or the parties to inform the jury that capital punishment was not sought, but that the error was subject to harmless error analysis on appeal; such an error may be remedied by a

curative instruction. RP 291-92. “Satisfied that this particular misstep ... [could] be addressed with a curative instruction,” the court denied the request for a mistrial. RP 297. Before continuing jury selection, the court instructed the jury:

[Y]ou will have nothing whatever to do with any punishment that may be imposed...You may consider the fact that punishment may follow conviction, only insofar as it tends to make you careful.

RP 305.

A jury was empaneled, the trial proceeded, and the jury convicted the defendant of all three counts as charged, also finding beyond a reasonable doubt that the murders were a part of a “common scheme or plan.” CP 348-56. The defendant was sentenced to life without the possibility of parole on each count, with the sentences to be served consecutively. CP 396. The defendant timely appealed.

III. ARGUMENT

A. THE COURT PROPERLY ADMITTED THE DEFENDANT’S 2012 STATEMENTS TO LAW ENFORCEMENT BECAUSE EVEN IF MS. PERRY UNAMBIGUOUSLY INVOKED HER RIGHT TO COUNSEL, SHE REINITIATED CONTACT WITH DETECTIVES; IF ERROR OCCURRED, IT IS HARMLESS.

The defendant argues the trial court erred in admitting her statements to law enforcement during the November 2012 interview. She claims that she unambiguously invoked her right to counsel prior to questioning, and therefore, she claims, law enforcement subsequently took

her statement in violation of the Fifth Amendment. Br. at 23. She further challenges the trial court's conclusion that her statements to law enforcement followed a knowing, voluntary and intelligent waiver of her *Miranda* rights. Br. at 24.

The court's CrR 3.5 findings of fact are verities on appeal if the defendant does not assign error to those findings. *State v. Hughes*, 118 Wn. App. 713, 722, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039, 95 P.3d 758 (2004). This Court reviews the trial court's conclusions of law de novo. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). Here, the defendant has not assigned error to any of the court's findings of fact; therefore, they are verities. Br. at 3, 23 (defendant only assigns error to the trial court's conclusion that the statements were admissible and followed a knowing, intelligent and voluntary waiver of *Miranda* rights).

Prior to any custodial interrogation, a suspect must be informed of her right to remain silent, that her statements may be used against her in court, that she has the right to the presence of an attorney and that if she cannot afford an attorney, one will be appointed for her prior to questioning. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Any waiver of a person's *Miranda* rights must be knowing, voluntary and intelligent. *State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). A suspect's Fifth Amendment privilege against self-

incrimination and the corresponding right to be informed of his or her rights attaches when custodial interrogation begins. *Miranda*, 384 U.S. at 479.

Law enforcement officers must immediately cease questioning a suspect who has unequivocally asserted his or her right to have counsel present during custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); *Radcliffe*, 164 Wn.2d at 906. Even where a defendant invokes this right to counsel,⁴² questioning may resume where “the accused himself initiates further communication, exchanges, or conversations with the police.” *Edwards*, 451 U.S. at 485; *see also, State v. Earls*, 116 Wn.2d 364, 382-83, 805 P.2d 211 (1991) (once a defendant has asserted the right to counsel, a waiver of that right is valid only if the police scrupulously honored the request, the defendant initiated further relevant conversation, and the defendant’s waiver was knowing and voluntary). “Courts indulge every reasonable presumption against waiver of constitutional rights.” *Earls*, 116 Wn.2d at 383.

⁴² This case involves the Fifth Amendment right to counsel, which is distinguished from the Sixth Amendment right to counsel. Under federal and state case law, the right to counsel is a procedural safeguard ancillary to the Fifth Amendment. *See, State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002) (citing *Miranda*, 384 U.S. at 469, and *State v. Stewart*, 113 Wn.2d 462, 478, 780 P.2d 844 (1989) (“The Fifth Amendment right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during in-custody interrogation”). The Sixth Amendment right to counsel is not implicated here because Ms. Perry was not formally charged at the time of this questioning.

In this case, the defendant’s invocation of her right to an attorney was equivocal, at best; even if unequivocal, Ms. Perry then reinitiated contact with law enforcement after she “invoked” her right to counsel.

1. Ms. Perry’s Request for Counsel Was Equivocal.

It is well-established that *Miranda* rights must be invoked unequivocally.⁴³ *Davis*, 512 U.S. at 459; *Radcliffe*, 164 Wn.2d at 906. Either a statement is “an assertion of the right to counsel or it is not.” *Davis*, 512 U.S. at 459. The inquiry is objective – an invocation must be sufficiently clear “that a reasonable officer in the circumstances would understand the statement to be a request for an attorney.” *Id.* If the statement fails to meet the requisite level of clarity, *Edwards* does not require that officers stop questioning the suspect. *Davis*, 512 U.S. at 459.

Statements such as “maybe I should contact an attorney” and “[m]aybe I should talk to a lawyer,” are equivocal requests. *Radcliffe*, 164 Wn.2d at 907-08. Similarly, statements such as “if I’m going to be charged [I will need an attorney],” “if it goes farther [I will need an attorney],” and “I should have a lawyer ‘if this is going to get into something deep’” are

⁴³ The court does not draw distinctions between the invocation of any of the *Miranda* rights. *State v. Piatnitsky*, 180 Wn.2d 407, 413, 325 P.3d 167 (2014). “[T]here is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel.” *Berghuis v. Thompkins*, 560 U.S. 370, 381, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).

equivocal or conditional statements of future intent; they are not unambiguous requests for counsel. *State v. Herron*, 177 Wn. App. 96, 103, 318 P.3d 281 (2013), *aff'd* 183 Wn.2d 737, 356 P.3d 709 (2015); *State v. Lewis*, 32 Wn. App. 13, 15-16, 20, 645 P.2d 722 (1982). “Maybe,” “perhaps” and “if” are all conditional or obfuscating words. *See, e.g., State v. Nysta*, 168 Wn. App. 30, 275 P.3d 1162 (2012), *as amended* (May 31, 2012). The court does not consider statements in isolation, but rather, in the context of the other statements made by a defendant. *Piatnitsky*, 180 Wn.2d at 411-12.⁴⁴

Here, the trial court specifically found that Ms. Perry initially “stated that she thought she should consult with an attorney.” CP 205 (FF 7); *see also*, RP 75 (“Ms. Perry seems to suggest that she should have a lawyer”). Neither of those findings of fact have been challenged by the defendant, and are verities on appeal. The record is consistent with the trial court’s finding that Ms. Perry only “suggested” or “thought” she should have an attorney.

Despite Perry’s mention of the potential need for an attorney six times early in the interview, none of these instances constituted an

⁴⁴ In *Piatnitsky*, the defendant was subjected to custodial interrogation during a murder investigation. He argued that his statement “I don’t want to talk right now, man” was an unequivocal invocation of his right to silence. However, the Court declined to look at this statement in isolation, but rather in light of the other statements the defendant made: he said, “I just write it down man. I can’t do this. I just write it, man... I don’t want to talk right now, man.” 180 Wn.2d at 411-12.

unequivocal invocation of her right to counsel:

- (1) “I should *probably* have an attorney here *if* you’re going to question me about something.” Ex. P4 at 5 (emphasis added).
- (2) “I *think* I should have a lawyer here *if* you’re gonna ask questions.” Ex. P4 at 6 (emphasis added).
- (3) “Well I *should* have a lawyer here *if* you’re going to take DNA and all of this.” Ex. P4 at 7 (emphasis added).
- (4) “Yeah. I need a lawyer for *something like this*.” Ex. P4 at 8 (emphasis added).
- (5) “I *think* I better have a lawyer here.” Ex. P4 at 8 (emphasis added).
- (6) “I need a lawyer *or somebody to explain what is actually going on*.” Ex. P4 at 1 (emphasis added).

With the exception of the fourth and sixth instances when she mentions counsel, each statement is made in “conditional” or “equivocal” terms, by the use of the terms “I think,” “I should,” and the qualifying term “if.” Here, there is no material distinction between the conditional and equivocal nature of these statements and those made in *Herron* and *Radcliffe*. Regarding the fourth statement, the qualifying term “something like this” renders this request ambiguous because it is unclear whether it constitutes a demand for counsel before *police questioning*, or before her DNA was to be taken (as the previous invocation demanded), or the general fact that she is being investigated for a homicide, all of which are discussed shortly before Ms. Perry made that statement, and all of which must be

considered in determining the objective meaning of the defendant's statement. Ex. P4 at 7-8. The final time Ms. Perry mentions her desire for an attorney, it is for purposes of explaining "what is going on," rather than for purposes of the interrogation.

Defendant claims that under *State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012), her requests for counsel were unambiguous. Br. at 26. This case is unavailing. In *Pierce*, after police *had already accused* the defendant of murder, the defendant stated, "If you're ... trying to say I'm doing [sic] it I need a lawyer. I'm gonna need a lawyer because it wasn't me." *Id.* at 544 (alteration in original). Defendant cites *Pierce* for the proposition that "because police had already expressed their intent to question [Perry], the condition [precedent to needing a lawyer] was satisfied and her use of conditional language is sufficient, under *Pierce*, to constitute an unequivocal request for counsel." Br. at 26. This argument disregards the true holding of *Pierce*: the court specifically held, without regard to the first clause ("if you're trying to say I did it, I need a lawyer") that the defendant's statement, "I'm gonna need a lawyer because it wasn't me" was unequivocal. 169 Wn. App. at 546. Even *Pierce* acknowledges that a defendant's use of the words "if," "or," "maybe," or "perhaps" will usually indicate an equivocal request. *Id.* at 545. Defendant instead relies on the *Pierce* court's musings that the statement the first half of the defendant's

invocation of counsel “might” have been found to be equivocal had the police not already accused the defendant of murder. However, this statement was obiter dictum – the court specifically held that the potentially ambiguous or conditional clause was “coupled” with an unambiguous demand for counsel, making it unambiguous.

Ultimately, reconciling this case with *Pierce* is unnecessary. While, under some circumstances the phrase “I should probably have a lawyer if you’re going to question me” could fall within *Pierce* and be characterized as a conditional request for which the condition precedent has already been satisfied, such is not the case here.

A reviewing court must consider the *entire* context in which the defendant’s statements were made, as did the trial court. RP 24 (trial court noted it had reviewed the video in its entirety). Therefore, it had the opportunity to view the defendant’s demeanor during the interview. Specifically, the trial court was able to view the defendant’s manifested histrionics early in the interview, and compare that behavior with the immediately cool demeanor she exhibited after ultimately consenting to the interview. The court could rationally conclude, based on its review of the video, that Ms. Perry’s requests were only “suggestions” that she should have counsel, rather than unequivocal demands. The court could also rationally conclude that Ms. Perry’s actions during the early part of the

interview reflect that she was merely probing law enforcement in a tactic to gather information about the potential charges she faced.

Lastly, defendant claims that detectives “actually understood her statements as an invocation of her rights” and, therefore, the statements were unambiguous. Br. at 25. Even if the detectives believed her statements were unequivocal, they never testified as to their subjective beliefs, nor did the trial court make any such findings of fact. *See* RP 27-34; CP 205.⁴⁵ Therefore, this assertion is outside the record. This Court should decline to accept the defendant’s invitation to speculate as to the detectives’ subjective beliefs when those facts were not established below. *See* RP 27-34.

It is irrelevant that the detectives *acted as though* Ms. Perry’s statements constituted an invocation of her right to counsel. What is relevant

⁴⁵ The trial court found:

Initially, Ms. Perry stated that she thought she should consult with an attorney. *The detectives did not question Ms. Perry, given her request.* The detectives did retrieve her DNA pursuant to the search warrant. Ms. Perry continued to ask questions of the detectives. The detectives advised that they couldn’t speak with her regarding her concerns because she had wanted a lawyer. The detectives provided Ms. Perry with their business card if she wanted to contact them in the future. Upon telling Ms. Perry that she would be transported back to the jail, Ms. Perry stated, “... I want to talk to you, let’s talk.”

CP 205 (FF 7-10) (emphasis added).

None of these findings indicate whether detectives subjectively believed that Ms. Perry had made an unequivocal request for counsel, or whether, since they were engaged in a triple homicide investigation, they decided to cease questioning in an abundance of caution.

in this inquiry is whether a reasonable police officer in the same circumstances would understand the statement to be a request for an attorney. *Davis*, 512 U.S. at 459. After all, law enforcement officers must “scrupulously honor” a defendant’s invocation of rights, and, when in doubt, should err on the side of caution. That is precisely what detectives did here – as the trial court found, they “did not force or coerce the interview on November 15, 2012. They remained professional for the entirety of the interview” and “treated Ms. Perry with the utmost respect and courtesy.” CP 205; RP 214.

2. The Defendant Reinitiated Contact with Law Enforcement.

Even assuming, arguendo, that one or more of the above statements were an unequivocal request for counsel, the defendant’s argument still fails. Even where a defendant unequivocally invokes the right to counsel, questioning may resume where “the accused himself initiates further communication, exchanges, or conversations with the police.” *Edwards*, 457 U.S. at 485; *see also Earls*, 116 Wn.2d at 382-83. In other words, law enforcement is not barred from *ever* interviewing a suspect where the suspect has previously invoked the right to counsel; officers may do so where the subsequent conversation is initiated by the suspect.

Here, the trial court determined that even after the defendant initially indicated that she wanted counsel present before any questioning, Ms. Perry

subsequently evidenced her desire to speak with law enforcement. Defendant has not assigned error to this finding of fact; it is therefore, a verity. Specifically, the court orally ruled:

And when it appeared that perhaps she was requesting counsel, the detectives ... were clear that they would not and could not talk to Ms. Perry further, and they would be concluding the discussion.

That's when you can see ... the detective handing or attempting to hand [her] his business card and I'm satisfied, at that point in time, *Ms. Perry clearly and unequivocally stated, No; at this point you don't need to do that; I want to talk to you; let's talk. That's exactly what she said.*

RP 77 (emphasis added); *see also* CP 205 (FF 9-10).

Without any prompting or provocation (other than being told the interview was to be concluded), Ms. Perry said, "*Let's talk. Let's sit down and work this out of my head. I'll go back to the cell and kill myself... [P]lease somebody tell me what I did wrong.*" In doing so, Ms. Perry clearly reinitiated the conversation. Pursuant to *Edwards*, therefore, detectives could resume questioning. 451 U.S. at 488; *see also, State v. Elkins*, 188 Wn. App. 386, 407, 353 P.3d 648 (2015) (the uncontroverted testimony established that the defendant himself "changed the direction of the conversation from a casual conversation [unrelated to the investigation] to one focused on the crime"). As in *Elkins*, Ms. Perry clearly changed the direction of the interview – which had been terminated by officers who were merely leaving her with their business card – and evidenced her desire to

talk. Thus, even if she had earlier demanded counsel, detectives respected that right until she, alone, wanted to resume discussions.

3. Assuming the Court Erred in Admitting the Defendant's Statements, Any Error Was Harmless Beyond a Reasonable Doubt.

Admission of a confession obtained in violation of *Miranda* is subject to harmless error analysis. *State v. Reuben*, 62 Wn. App. 620, 626-27, 814 P.2d 1177 (1991) (citing *Arizona v. Fulminante*, 499 U.S. 279, 292 & n.6, 111 S.Ct. 1246, 113 L.Ed.2d 302, *reh'g denied*, 500 U.S. 938 (1991)). Such an error must be harmless beyond a reasonable doubt. *Fulminante*, 499 U.S. at 295; *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). In order to determine that such an error is harmless beyond a reasonable doubt, the court must conclude, after examining the entire record, that the verdict would have been the same without the error. *See, e.g., State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The only truly inculpatory statements made by Ms. Perry during the 2012 interview regarded law enforcement's ultimate question, "what made Donna stop?"⁴⁶ Perry's response was that Donna stopped the killing, and she could not say whether Douglas had killed or not. These statements,

⁴⁶ Much of the 2012 interview involved Perry's family history and her other criminal history.

while inculpatory, were cumulative with other properly admitted evidence. Ms. Perry has not claimed that her other statements to Chero Everson, the DSHS employee, or the two officers who transported her from Texas to Washington to stand trial were erroneously admitted. Therefore, the following testimony was properly admitted against Ms. Perry, and was both cumulative with, and of even greater inculpatory value than, the inculpatory statements she made during the 2012 interview:

- Ms. Perry volunteered to one police officer during the flight from Texas to Washington, “You know, I’m on medication now,” and “I’m not violent now.” RP 1562-63.
- To another officer, Perry observed that “by the time [she] learned to control [herself] it was too late.” RP 1569-70.
- In 2007 or 2008, Ms. Perry confessed to the DSHS financial specialist, that before her sex change operation, her life had “gotten out of control,” and that she had been involved in “shooting people,” and that she “knew [she] was going to end up dead or in prison again if [she] didn’t do something about it, so [she] had the surgery, just like you geld a horse,⁴⁷ and [she] got her life back under control.”

⁴⁷ “A gelding is a castrated horse or other equine... Castration, as well as the elimination of hormonally-driven behavior associated with a stallion, allows a male horse to be calmer and better-behaved, making the animal quieter, gentler and potentially more suitable as an everyday working animal.” Wikipedia, the Free

RP 1625-28.

- To Chero Everson, she confessed killing at least nine prostitutes, RP 1521; that she had killed the women in a vehicle, by a river, with a firearm, and then pushed their bodies out of the vehicle, RP 1522, 1526, 1548; and then claimed to have had a sex change operation to avoid police detection, RP 1523, 1517, 1534.

Lastly, and a compelling detail not disclosed in *any* of her other statements, to include the 2012 interview with police,⁴⁸ Perry told her confidant, Ms. Everson, that when law enforcement confiscated and destroyed her guns, “they didn’t ... know that some of the guns had been used to kill somebody.” RP 1527-28. This statement was, of course, consistent with the investigation conducted by Spokane law enforcement which determined that the Ruger 10/22 .22 caliber rifle seized from the defendant’s home in 1994, originally purchased by one of the Massangale brothers and given to the defendant, could have inflicted the victims’ injuries.

The defendant’s statements to the detectives during the formal interview were cumulative with the statements she made to numerous other

Encyclopedia, *Gelding*, available at <https://en.wikipedia.org/wiki/Gelding> (last accessed January 28, 2019).

⁴⁸ And, conversely, not disclosed to Perry by law enforcement in 2012.

individuals over the course of many years. Based on the litany of other inculpatory statements, this Court may be assured that the admission of the formal interview, if error, was harmless beyond a reasonable doubt – the jury did not convict Perry based upon that interview, but rather, it convicted her upon the wealth of other evidence, testimony, and her other properly admitted statements.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING AGAINST SEVERANCE OF THE THREE MURDER COUNTS.

Defendant next assigns error to the trial court’s denial of her motion to sever the three counts of aggravated murder.⁴⁹ CrR 4.4(b) provides that offenses should be severed if doing so “will promote a fair determination of the defendant’s guilt or innocence of each offense.” A trial court’s decision to deny a motion to sever counts will only be reversed if the decision was a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). The defendant bears the burden of demonstrating that a trial involving the multiple counts would be so manifestly prejudicial as to outweigh concern for judicial economy. *Id.* at 718. Separate trials are disfavored. *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994).

⁴⁹ Defendant moved for severance both before trial as well as during trial after the State’s case in chief. RP 265, 1732; *see* CrR 4.4(a) (1), (2) (a party must generally move for severance pretrial and renew a denied pretrial motion for severance before or at the close of the evidence).

The decision to sever offenses goes hand-in-hand with the initial decision to join the charges. Joinder of offenses is authorized by CrR 4.3(a)(2) when the offenses “are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.” Joinder is appropriate if these criteria are satisfied and a defendant is not prejudiced. Joinder of offenses carries the potential for prejudice if (1) the defendant may have to present separate, possibly conflicting defenses, (2) the jury may infer guilt on one charge from evidence of another charge, or (3) the cumulative evidence may lead to a guilty verdict on all charges when, if considered separately, the evidence would not support every charge. *State v. Smith*, 74 Wn.2d 744, 755, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934 (1972), *overruled on other grounds by State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975).

Several similar factors are considered to diminish the potential prejudice of joinder:

(1) the strength of the state's evidence on each count, (2) the clarity of defenses to each count, (3) the court properly instructed the jury to consider the evidence of each crime, and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined.

State v. York, 50 Wn. App. 446, 451, 749 P.2d 683 (1987) (quoting *Smith*, 74 Wn.2d at 755-56).

Even where evidence of one count would not be admissible in a

separate trial on another count, severance is not always required. *Bythrow*, 114 Wn.2d at 720. In order to demonstrate that the trial court manifestly abused its discretion in denying severance, the defendant must be able to point to specific prejudice. *Id.* That prejudice must also outweigh concern for judicial economy. *Id.* at 722; *see also State v. Kalakosky*, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993) (“In *Bythrow*, we considered the jury’s ability to compartmentalize the evidence, the strength of the State’s evidence on each count, the issue of cross admissibility of the various counts, whether the judge instructed the jury to decide each count separately, and we strongly weighed the concern for judicial economy”). Any residual prejudice must be weighed against the strong policy favoring joinder for purposes of judicial economy. *Kalakosky*, 121 Wn.2d at 539.

1. Strength of the State’s Case.

The trial court determined that the evidence supporting each count was “similarly strong.” CP 176. The trial court did not abuse its discretion in this determination. Defendant claims that because the Brisbois case had conclusive DNA evidence,⁵⁰ the Lowe and Sapp cases were weak in comparison and should have been severed. Br. at 36. Yet, the defendant does not claim insufficiency of the evidence on either the Lowe or Sapp

⁵⁰ The DNA under Ms. Brisbois’ fingernail matched Perry to a probability of one in 790 sextillion; there are not that many people on the planet Earth.

case – apparently agreeing that the evidence on each case was strong enough to independently support a conviction. While the Sapp and Lowe matters were more circumstantial than the Brisbois case, circumstantial evidence is no less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99(1980).

With regard to the Sapp matter, Y-STR DNA matching the defendant was found on the blanket, also covered in Ms. Sapp's DNA, that was left at the scene where her body was dumped. This is a strong connection from which the jury could find that the defendant had committed the murder. That connection was only strengthened by other evidence of guilt that would have been admissible in all three matters: the defendant possessed a weapon that could have caused Ms. Sapp's injuries and Ms. Perry acknowledged that law enforcement had earlier confiscated weapons she used to murder prostitutes without knowing they were murder weapons; Clairann Gallaway was booked into jail the day before Ms. Sapp was found dead and Perry associated with other prostitutes when Ms. Gallaway was unavailable to him; and most importantly, the testimony provided by Ms. Everson and others regarding the defendant's own admissions to having committed multiple murders of prostitutes after selecting his victims and

watching their movements.⁵¹

Similarly, despite defendant's protestations that the Lowe case was weak in comparison to the Brisbois case, the circumstantial evidence in that case was no less compelling. While no one could conclusively put the bottle of lubricant in Ms. Lowe's possession, she was known to use similar lubricant and carry it in a smaller container at work. She worked on the evening of her death, and her wallet was found in a dumpster along with other items she was known to carry – a Carmex container and a bottle of lubricant. The dumpster was located near Sprague Avenue, where prostitutes are known to work in Spokane. The defendant's fingerprint on the bottle of lubricant which was located in the same garbage dumpster with Ms. Lowe's other personal belongings was a compelling piece of circumstantial evidence, and again, its significance was only strengthened by the evidence that would have been admissible in all three matters, as above. This factor weighs against severance.

2. Clarity of Defenses.

The defendant did not claim conflicting defenses. She did not claim alibi, justification, or any other affirmative defense. She did not aver a desire

⁵¹ It is irrelevant that Perry only boasted about killing white victims and denied ever killing any African Americans – Perry did not admit to killing *any* of these particular victims, black or white, even when confronted with their photographs.

to testify regarding one count, but not on another. Her defense on *each* case was that the State could not prove that she had committed the murders beyond a reasonable doubt. CP 176 (trial court found that the defense to each count was “general denial”). To that end, Ms. Perry cross-examined the forensic scientists extensively about variances in their testing procedures and cross-examined law enforcement about how they handled relevant evidence, in an attempt to undermine the credibility of the forensic evidence tying her to each murder. This factor weighs against severance.

3. Instructions to the Jury.

The court properly instructed the jury that it must consider each charge separately. CP 325. The jury is presumed to follow the court’s instructions. *See, e.g., State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). As in *Bythrow*, there is no indication that Ms. Perry’s jury was unable to compartmentalize the evidence that was only relevant to a single count, as opposed to the evidence that was relevant to all three counts. This factor weighs against severance.

4. Cross-Admissibility of Evidence.

Defendant contends that the evidence of each murder would not have been cross-admissible in separate trials (had the offenses been severed). She asserts that the evidence neither established identity nor common scheme or plan, two non-character purposes for the admission of

other crimes, wrongs, or acts under ER 404(b). The State disagrees.

Here, each count of murder was charged with an aggravating circumstance – that the murder was committed as part of a common scheme or plan involving more than one victim. CP 284-85, 382-83. This aggravator is inextricably linked to ER 404(b) which allows evidence of the defendant’s other crimes, wrongs or acts in order to demonstrate “proof of motive, opportunity, intent, preparation, *plan*, knowledge, identity, or absence of mistake or accident.” ER 404(b). In order to prove the existence of the aggravating circumstance, the State was required to demonstrate, as discussed in detail below, a nexus between the killings or that a serial killer⁵² used the same formula over a period of time to kill multiple victims.

Prior to trial, the defendant moved the court to exclude evidence of her other crimes, wrongs, or acts pursuant to ER 404(b). Specifically, the defendant moved the court to “exclude all evidence of other acts or conduct, besides the alleged murders.” CP 75. The State argued that evidence of other crimes, wrongs, and acts, including evidence pertaining to *each* murder was

⁵² The defendant claims that the risk of “cumulating evidence” from one count of murder with the other counts was compounded by the “State’s witnesses repeatedly refer[ing] to the murderer as a ‘serial killer’ setting forth as fact the State’s theory that the same person committed against all three offenses.” Br. at 42. Despite this claim, the defendant did not assign error to the use of the term “serial killer,” nor did she object to its use during trial. If this claim is to be taken as an assignment of error, it is unpreserved, as such objections must be made at trial or are deemed waived. *Guloy*, 104 Wn.2d at 421.

cross-admissible to establish identity and common scheme or plan. CP 158, 161-63. The court denied the defendant’s motion, specifically finding, “it is not manifestly prejudicial to allow these charges to be tried together as amended and to introduce relevant evidence supporting the allegation that the defendant committed each of these murders as part of a common scheme or plan.”⁵³ RP 177. The defendant has not assigned error to the ER 404(b) ruling.

Therefore, this factor weighs against severance – evidence of each murder was determined to be cross-admissible for the purpose of establishing the aggravating circumstance.

5. Judicial Economy Considerations.

The trial court found “that the evidence in each count is so intertwined and interwoven that severing the counts would require three full trials with similar evidence, mostly the same witnesses and a significant amount of Court time for each case.” CP 177. This finding was not an abuse of discretion.

⁵³ The defendant asserts that the court’s order on the severance/ER 404(b) motion lacks specificity as to the purpose that the ER 404(b) evidence may be admitted. As above, the defendant does not assign error to the court’s findings, but merely makes this assertion in passing. Br. at 37. Because the defendant does not assign error to the ER 404(b) ruling, but only the severance ruling, this Court should decline to review that claim. In any event, this claim is belied by the record, as the trial court specifically found that the evidence of the defendant’s other crimes, wrongs and acts was admissible to establish “the allegation that the defendant committed each of these murders as a common scheme or plan.” CP 177.

The State was required to present significant evidence of the additional investigation law enforcement conducted to rule out other suspects because the defendant challenged the State's ability to prove beyond a reasonable doubt the identity of the killer. Because of the temporal proximity of these murders to each other, and to the murders committed by Robert Yates and the Green River killer, through its witnesses, the State explained the thorough investigation that was conducted into the offenses, and how multiple potential individuals were excluded as suspects.

Multiple witnesses were involved in more than one case. The Spokane Police Department and Sheriff's Department began a joint investigation once it became apparent that the murders could be related. Detective Kip Hollenbeck,⁵⁴ retired Sergeants Larry Adams⁵⁵ and Nicholas

⁵⁴ Hollenbeck began working the Sapp and Lowe "cold" cases in 2008. RP 718. He evaluated evidence that had been collected in both cases, and delivered items of interest to the WSP Crime Labs in Spokane and Seattle for testing. RP 718-19.

⁵⁵ Adams was present after Ms. Sapp's body was located, observed the blanket that was of interest in her case, and authenticated several photographs of the crime scene. RP 738. He was also present during the Lowe investigation and testified the two crime scenes are less than a mile from each other. RP 734-35.

Stanley,⁵⁶ and several retired detectives: Eugene Ziegler,⁵⁷ James Hansen,⁵⁸ Fred Reutsch,⁵⁹ Bill Grub,⁶⁰ Mark Grumbly,⁶¹ and Ben Estes⁶² were all involved in more than one investigation. Detective Lyle Johnston became involved in 2012, and gathered information on Donna or Douglas Perry – information which was independently relevant to all three cases.⁶³ Detective

⁵⁶ Stanley was involved in both the Sapp and Lowe investigations. He responded to both crime scenes, interviewed witnesses regarding the Lowe murder, searched dumpsters near Royal Upholstery because similar fibers were found on both Sapp and Lowe, and attended the Brisbois autopsy. RP 759-61, 767-69.

⁵⁷ Ziegler was involved in all three cases. RP 839. He believed that the murders were connected – all three women were prostitutes, their bodies were found along the river, they suffered similar gunshot wounds, and had similar fibers found on them. RP 841.

⁵⁸ Hansen searched Ms. Brisbois' apartment for evidence after her body was discovered, RP 871-72; interviewed witnesses relating to the Sapp and Lowe murders, RP 873-74; and worked with the Green River Killer task force, noting that none of the evidence from these murders appeared consistent with the Green River Killer cases, RP 878.

⁵⁹ Reutsch worked on the Spokane Serial Killer Task Force starting in 1997. RP 845. He reviewed the Sapp, Brisbois, and Lowe police reports for similarities to the 1997 murders. RP 846. He noted that the 1997 victims had all been shot in the head, and all involved a plastic bag being placed over the victim's head. RP 846-47. During the course of his investigation, Reutsch was able to determine that Robert Yates, the suspect in the 1997 murders, was in Germany in 1990 when Ms. Sapp, Ms. Lowe and Ms. Brisbois were murdered. RP 849-50.

⁶⁰ Grub was assigned to the vice squad at the time of the murders; he interviewed numerous prostitutes, pimps, hotel clerks and others about the murders. RP 885-86.

⁶¹ After the murders, Grumbly was involved with interviewing prostitutes and others for intelligence and evidence. RP 892-93.

⁶² Estes was assigned to a serial killer task force several years after these murders occurred. RP 1035. He confirmed that Mr. Perry was not in Spokane from 1994 to 1997 when other local prostitutes were murdered. RP 1037.

⁶³ Johnston confirmed that in 1990, Perry lived at 544 East Dalton in Spokane and was contacted by police in 1990 in Spokane for soliciting a prostitute. RP 900, 914.

Michael Drapeau began investigating Perry as a suspect in all three cases in 2012. RP 1094. Retired property custodians Betty Konrad⁶⁴ and Kathleen Fritz⁶⁵ were involved in more than one of the investigations. Former Medical Examiner Lindholm was expected to testify regarding the autopsies he conducted in each case; however, he became ill. As a result, Dr. Howard reviewed Lindholm's work and presented his findings to the jury on all three cases. RP 937. Similarly, as described above, the ballistics experts provided evidence relevant to all three murders.⁶⁶

A number of other fact witnesses would have been required to testify at separate trials had the matters been severed. Chero Everson provided testimony relevant to all three murders, including the defendant's admission that she had killed prostitutes, in a car, with a gun, and then dumped their

He learned that Perry was associated with the Massengale brothers and took statements from the Massengales, RP 900, 902, 905; identified vehicles which belonged to Perry, RP 901-02; participated in the searches of those vehicles, RP 904; made attempts to locate Clairann Gallway, RP 908; and determined that two of the murders coincided with dates that Gallaway was booked into jail, RP 912.

⁶⁴ Konrad handled evidence relating to the Sapp investigation (the blanket), RP 690; evidence relating to the Lowe investigation (a bullet), RP 693; and evidence relating to the Brisbois investigation (e.g., fibers from nails, bullet fragment, swabs and blood), RP 694-95.

⁶⁵ Fritz handled evidence associated with Ms. Sapp, RP 708; Ms. Brisbois, RP 713; and the Perry DNA reference sample, RP 712.

⁶⁶ Although bullets were recovered from only two bodies, one expert examined the wounds on all three women, concluding they could be consistent with a small caliber firearm; the other ballistics expert reviewed the list of firearms in Perry's possession and testified regarding which firearms could have been used to commit the murders.

bodies by the river. The Massangale brothers established that Perry had the means to commit the murders – he possessed a .22 caliber firearm at the time of the murders. Everson established that Perry bragged that law enforcement had unknowingly confiscated and destroyed firearms used to commits murders. A prostitute with whom Perry engaged in 1998 testified that Perry petted her face and told her “I could never hurt you.” RP 985. The DSHS employee to whom Perry disclosed that, before her sex-change operation, her life was out of control, and that she had killed before, and so “[she] had the surgery, just like you geld a horse, and [she] got her life back under control”; evidence relevant to all three cases. RP 1621, 1625-28. Evidence provided by the two law enforcement officers who accompanied Perry on the return flight to Spokane was also relevant to all three charges, they testified that Perry admitted that by the time she learned to control herself, it was too late.

The court did not abuse its discretion in determining that the defendant would not suffer manifest prejudice by a joint trial. The jury was able to compartmentalize the evidence, the State’s evidence on each count was equally strong, significant evidence was cross-admissible for a variety of reasons, and the court instructed the jury to decide each count separately. Any potential residual prejudice was strongly out-weighed by the court’s concern for judicial economy given the sheer number of common witnesses,

many of whom had long-since retired. This claim fails.

**C. SUFFICIENT EVIDENCE EXISTS WHICH SUPPORTS THE
“COMMON SCHEME OR PLAN” AGGRAVATING
CIRCUMSTANCE.**

Here, the defendant was charged with the “common scheme or plan” aggravating circumstance under RCW 10.95.020(10).⁶⁷ The defendant disputes that the State presented sufficient evidence of this aggravating circumstance for the jury to find the existence of the circumstance, beyond a reasonable doubt, because “the evidence was insufficient to establish any overarching criminal purpose uniting the crimes.” Br. at 43. The State disagrees – the evidence was sufficient to prove the defendant had an overarching criminal purpose uniting the crimes; his criminal purpose was to murder prostitutes; and the murders were sufficiently similar to demonstrate a common scheme or plan.

The State must prove any charged aggravating circumstance beyond a reasonable doubt. In reviewing the sufficiency of the evidence, even on an aggravating circumstance, the court “review[s] the evidence in the light

⁶⁷ RCW 10.95.020(10) provides:

A person is guilty of aggravated first-degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist: ... (10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person.

most favorable to the State” to determine whether any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt. *State v. Yates*, 161 Wn.2d 714, 749, 168 P.3d 359 (2007), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

In sufficiency of the evidence review, appellate courts assume the truth of the State’s evidence; view reasonable inferences from the evidence in the light most favorable to the State; and deem circumstantial and direct evidence equally reliable. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). “Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). The credibility of witnesses is also the exclusive function of the trier of fact, and is not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trier of fact may draw inferences from the evidence so long as those inferences are rationally related to the proven facts. *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989).

The phrase “common scheme or plan” consists of commonly understood words, which require no additional jury instructions. *Yates*, 161

Wn.2d at 749. The common scheme or plan aggravator requires multiple murders with a “nexus between the killings.” *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995); *see also State v. Dictado*, 102 Wn.2d 277, 285, 687 P.2d 172 (1984); *State v. Grisby*, 97 Wn.2d 493, 501, 647 P.2d 6 (1982).

Under the rules of evidence, “common scheme or plan” may be proved by the situation where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan. *Pirtle*, 127 Wn.2d at 662 (citing *State v. Lough*, 125 Wn.2d 847, 855, 889 P.2d 487 (1995)). Thus, the common scheme or plan aggravator requires the killings to be connected by a larger plan. *Id.* Consistent with legislative intent, this aggravating circumstance also refers to, and may be satisfied by evidence of “serial killers who use the same plan or formula over an extended period of time to kill multiple victims.” *Yates*, 161 Wn.2d at 751.

Here, the State presented ample evidence to support the jury’s finding that the murders were committed against multiple victims as part of a common scheme or plan. The three murder cases shared a number of common features. Each woman was a prostitute. Each engaged in prostitution to support a drug habit. Each woman was familiar with the other victims, and knew Mr. Perry’s then-significant-other, Clairann Gallaway, a prostitute herself. At least two of the women were last seen near Sprague Avenue, where they were known to work. At least two of these women were

killed in temporal proximity to Clairann Gallaway being arrested and booked into jail. Each woman had at least one small caliber gunshot wound to their torso, and each wound was consistent with a .22 caliber gun. Each woman's body was abandoned near the Spokane River in an area where they were readily discovered and each was discovered within a day of their last known sighting. The three women were either nude or partially nude when their bodies were discovered. No money was found in the women's recovered personal effects.

Additionally, in her discussions with her confidant, Chero Everson, the defendant claimed to have murdered multiple prostitutes, and many of the details she shared were consistent with the murders of Ms. Sapp, Ms. Lowe and Ms. Brisbois. Perry described to Everson that she would pick a target, study her movements, and then would execute her. RP 1526. She relayed that she shot the women in her car, and then dumped their bodies near the Spokane River. These facts, like those in *Yates*, are sufficient to establish a common scheme or plan; the facts establish that the defendant used generally the same formula over an extended period of time to kill multiple victims – Ms. Sapp, Ms. Lowe and Ms. Brisbois. The jury was presented with more than sufficient evidence for it to find, beyond a reasonable doubt, that the State had proved the existence of the aggravating circumstance.

Defendant claims that under *Lough, Yates* and *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003), the State failed to demonstrate a “single criminal strategy to achieve a singular objective, repeatedly employed” and the State merely asserted that Perry committed similar, yet somewhat different murders, without “evidence of a uniting purpose.” Br. at 46. It appears from the defendant’s argument that, in order to prove common scheme or plan, she would require the victims to have been displayed in an identical manner, at the same time of day, with identical wounds. Br. at 46.

Defendant confuses the common scheme or plan aggravator with the “modus operandi” exception to ER 404(b) – where a defendant’s other or prior acts are “so unusual or distinctive as to be like a signature” or where there is “such a high degree of similarity as to mark [the act] as the handiwork of the accused” such that they may be admitted as proof of the identity of the perpetrator. *See, e.g., State v. Foxhoven*, 161 Wn.2d 168, 176-77, 163 P.3d 786 (2007). As explained above, the jury was presented with ample evidence establishing a common scheme or plan; evidence of modus operandi is not necessary to prove this aggravator. This Court should decline the defendant’s invitation to upset the jury’s verdict.

D. THERE WAS NO OPEN COURT VIOLATION WHEN THE TRIAL COURT CONDUCTED A PRE-VOIR DIRE EDUCATIONAL ADVISEMENT IN THE JURY LOUNGE.

The defendant attempts to cast the pre-voir dire introduction and

preliminary instructions to the jury as implicating the public trial right because it involves “jurors.” As a general proposition, jury selection – especially voir dire, implicates the right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). “However, ... the mere label of ‘jury selection’ does not mean the public trial right is automatically implicated.” *State v. Russell*, 183 Wn.2d 720, 357 P.3d 38, 42-43 (2015) (quoting *State v. Wilson*, 174 Wn. App. 328, 338, 298 P.3d 148 (2013)).

Here, no voir dire or questioning was had or discussed in the juror assembly room. There is no showing that anyone from the public was *excluded* from the juror assembly room. A court reporter was present for the proceedings. 6/6/17 RP at passim. The general voir dire occurred in open court. Immediately thereafter, the jury was properly sworn in. The juror’s oath, required by law, was administered in open court. RP 306;⁶⁸ *see* RCW 4.44.260.

As our Supreme Court has stated, the defendant has the burden of providing a record that demonstrates a courtroom closure occurred. *See State v. Koss*, 181 Wn.2d 493, 503, 334 P.3d 1042 (2014); *State v. Njonge*,

⁶⁸ The trial court observed that it would not swear the jury in on June 9, 2017, the first day testimony was presented because the jury was “already sworn in yesterday.” Presumably, this was at the conclusion of voir dire that occurred in open court but which defendant did not request to be transcribed. RP 305. The oath given at the conclusion of voir dire is distinguishable from the preliminary oath given to the venire prior to the venire completing the jury questionnaires.

181 Wn.2d 546, 556, 334 P.3d 1068 (2014), *cert. denied*, ___ U.S. ___, 2014 WL 5502481 (2014). Ms. Perry has failed to provide a record establishing *any* type of closure – she has failed to establish that *anyone* was excluded from the juror assembly room during the time period when initial instructions given to the entire potential venire. Without a closure, there is no open court issue. *State v. Parks*, 190 Wn. App. 859, 865, 363 P.3d 599 (2015) (“On this record, nothing shows spectators were totally excluded from the swearing in of the venire. Nothing shows whether the door to the jury assembly room was open or closed”). This case is virtually indistinguishable from *Parks*, and defendant has failed to make any attempt to explain how the procedure used in her case violated the right to an open court when the *same* procedure in *Parks* did not.

Additionally, the defendant has failed to meet the experience prong of the open court “experience and logic test” as there is no showing that the pre-voir dire educational and informational advisement is a “proceeding” to which the open court doctrine applies.⁶⁹ In *Parks*, this Court noted that it

⁶⁹ Jurors are summoned by the county clerk and are educated regarding the process of jury service. RCW 2.36.095 (summons); CrR 6.2 (Jurors’ Orientation). There is no legal requirement that jurors be administered an oath or addressed by the judge prior to voir dire. *See* Note on Use and Comments to Oral Jury Instruction 1.01. Part 1 of the oral instruction is informational, concluding with an oath. The oath is not required by statute or case law. It only aids the potential jury by informing the venire before the trial begins and before voir dire, of what they can expect. All of this takes part before voir dire begins. The oath that jurors are *legally* required to

could not find any authority holding the pre-voir dire swearing in of the jury (which is not required by law) is a proceeding historically open to the public, especially where it is not a part of the jury selection process. 190 Wn. App. at 866. It also noted the preliminary instructions were educational and more analogous to an administrative component of the jury process to which the public trial right does not attach. *Id.* (citing *Wilson*, 174 Wn. App. at 342-47). In the instant case, the *pre-voir dire* delivery of administrative information or the delivery of an oath, not required by law, was an administrative function that is qualitatively different from “challenging a juror’s ability to serve as a neutral factfinder in a particular *case* (as in peremptory and for-cause challenges).” *Russell*, 183 Wn.2d at 730-31 (citing case law, court rules and statutes) (emphasis the Court’s).

In *Parks*, this Court also determined that the logic prong of the public trial right is not implicated:

Likewise, Mr. Parks cannot satisfy the logic prong. When considering this prong, courts should consider “the values served by open courts.” [*State v.*] *Sublett*, 176 Wn.2d at 74, 292 P.3d 715. Mr. Parks has not shown (1) public access plays a significant positive

receive occurs, as it did in the instant case, at the close of voir dire. *See* RP 306; *and see* RCW 4.44.260.

While *State v. Frawley*, 181 Wn.2d 452, 334 P.3d 1022 (2014), emphasizes that voir dire is a stage to which the open court doctrines apply, nothing in *Frawley* suggests that the same doctrines apply to juror educational processes occurring *before voir dire*. This pre-voir dire process is more administrative and educational than it is judicial.

role in the functioning of the swearing in a venire, (2) swearing in a venire is a proceeding similar to the trial itself, or (3) openness during swearing in would enhance the basic fairness of his trial and the appearance of fairness. *See Wilson*, 174 Wn. App. at 346, 298 P.3d 148.

190 Wn. App. at 867 (footnote omitted). As in *Parks*, Ms. Perry has failed to make any showing that the preliminary introductions of the identity of the parties and court officers, questionnaire instructions, and the optional pre-voir dire oath are affected by public access to the proceedings, or that openness during these proceedings would have enhanced the basic fairness of her trial. Therefore, this claim fails; Ms. Perry has not demonstrated a closure occurred, nor has she demonstrated that the public trial right was implicated by the procedure used by the court before voir dire began.

Furthermore, even if an open court violation occurred, it was de minimis and does not require reversal. In *State v. Schierman*, our Supreme Court considered an open court violation during a proceeding which “involved no witness testimony, no questioning of potential jurors, and no presentation of evidence,” but rather, a chambers conference with the lawyers during jury selection for the purpose of hearing argument and deciding six challenges for cause. __Wn.2d__, 415 P.3d 106, 193 (2018). To determine whether an open court violation is de minimis under *Schierman*, the court assumes that the public trial right is implicated by the proceeding, and then asks whether, in light of the particular facts presented

in the individual case, an unjustified closure actually undermine the purposes of the public trial right. *Id.* at 193. As discussed above, the purposes of the public trial right are “well established,” and serve “to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury”; it also affirms the legitimacy of the proceedings and promotes confidence in the judiciary. *Id.* at 194 (quoting *In re Det. of Morgan*, 180 Wn.2d 312, 325, 330 P.3d 774 (2014) (quoting, in turn, *State v. Sublett*, 176 Wn.2d at 72)).

To determine whether these purposes were undermined by a given courtroom closure, the court considers the record, and “may look to the length of time the courtroom was closed, the reason the courtroom was closed, whether the public actually learned what occurred during the closed proceeding, and whether the closed proceedings related to the ultimate question of guilt or innocence.” *Id.* “[N]o single factor is either necessary or sufficient.” *Id.* Here, the alleged “closure” was brief, the proceeding was recorded by a court reporter, and the proceedings had no bearing, whatsoever, on the ultimate determination of guilt or innocence. Even if it was error to hold the pre-voir dire educational advisement in the jury room, the error was de minimis.

E. THE DEFENDANT WAS NOT PREJUDICED BY THE COURT'S ASSERTION THAT THE CASE WAS NOT PUNISHABLE BY THE DEATH PENALTY.

The defendant next argues that she is entitled to a new trial because she was prejudiced by the court's statement that the case did not involve the death penalty. In *State v. Townsend*, 142 Wn.2d 838, 840, 15 P.3d 145 (2001), our Supreme Court held that it is error to inform the jury during the voir dire in a noncapital case that the death penalty is not involved. However, the court declined to reverse where the error was not prejudicial to the substantial rights of the party assigning it and in no way affected the outcome of the case. *Id.* at 848; *see also*, *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008) (defense counsel told the jury that capital punishment was not an issue and failed to object to the same by the prosecution and court; counsel was ineffective but the error was not prejudicial.)

The facts of this case are most similar to those presented in *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007). In *Mason*, during voir dire, the court asked whether any of the jurors would be unable to apply the law as instructed. A juror responded that "if it were the death penalty. I don't support the death penalty. I would have a hard time with that." *Id.* at 929. In response, the court instructed the jurors:

you should not concern yourselves with what penalty may be administered in the event the jury reaches a finding of guilty, except that the fact a penalty may follow conviction should make you

careful. In response to [the juror's] statement, I will respond by informing you that this is not a capital case.

Id. (addition the court's).

Our Supreme Court determined that it was error for the trial court to inform the jury that the death penalty was not involved; the policy behind this rule ensures that juries are impartial and are not unfairly influenced in their deliberations. *Id.* at 930. However, the Court concluded the error was harmless, noting that although defense counsel objected, the objection was “lukewarm” and the defendant made no objection to the selection of any specific juror to the panel itself. *Id.* at 930. As in *Mason*, although counsel requested a mistrial, the request was “lukewarm” – this request was only made after counsel concluded that it would be ineffective assistance to not make the request. Additionally, the defendant made no objection to the selection of any specific juror on this basis, and the record indicates that the two jurors who expressed difficulty with capital punishment or life without the possibility of parole were both stricken from the jury.⁷⁰

Where the court or a party erroneously informs the jury that the case

⁷⁰ Juror 84 expressed concern over the imposition of the death penalty; the court then informed the venire the death penalty was not involved. Juror 17 expressed concern over the imposition of life in prison without the possibility of parole. RP 273-74. After these statements by both jurors, the Court instructed the jury that it was not to consider punishment and then jury selection resumed. RP 105. Neither of these jurors was seated on Ms. Perry's jury. *See* CP 424-32 (final record of jurors, filed June 29, 2017), designated by the State on February 19, 2019.

is not a capital case, our Supreme Court ruled in *Hicks* that “the trial judge should state generally that the jury is not to consider sentencing.” 163 Wn.2d at 487. Here, after the court told the jury that the case did not involve the death penalty and recognized its error, it instructed the jury that it was not to consider punishment except insofar as it would make the jury careful. This comports with *Hicks*. The trial court also reiterated this directive in its final instructions to the jury. CP 322; RP 1760.

As in *Hicks*, *Mason*, and *Townsend*, Ms. Perry cannot demonstrate prejudice. In order to mitigate the effects of its misstatement during voir dire, the court informed the jury (before voir dire resumed) that it was not to consider punishment, and again at the conclusion of the case. The jury is presumed to follow the court’s instructions. *See, e.g., Dye*, 178 Wn.2d at 556. In this case, “[t]here is no indication that the jurors failed to take their duty seriously,” *Hicks*, 163 Wn.2d at 487, or that it failed to follow the court’s instructions. This claim fails because the error was harmless.

F. CUMULATIVE ERROR DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL.

Under the cumulative error doctrine, a court may reverse a defendant’s conviction when the combined effect of errors during trial effectively denied the defendant their right to a fair trial, even if each error standing alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149

P.3d 646 (2006); *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. *See Weber*, 159 Wn.2d at 279. Cumulative error will not be found where a defendant fails to demonstrate how each alleged instance of misconduct or how the combined effect of the instances of misconduct affected the outcome of his trial. *Id.* As discussed above, the several claimed errors did not occur during Ms. Perry's trial. Therefore, no cumulative error exists and this claim fails.

G. NO APPELLATE COSTS SHOULD BE IMPOSED; THE COURT SHOULD ORDER THE DNA FEE TO BE STRICKEN.

1. Appeal Costs.

The trial court determined the defendant to be indigent for purposes of her appeal on July 26, 2017, based on defendant's declaration. CP 406-10. The State is unaware of any change in the defendant's circumstances. Should her appeal be unsuccessful, this Court should only impose appellate costs in conformity with RAP 14.2 as amended.

2. Criminal Filing Fee.

Ms. Perry was ordered to pay a \$110 criminal filing fee. CP 398. The State agrees that under *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), because Ms. Perry's matter was pending appeal at the time that the legislature enacted its LFO reform in 2018 (which prohibits the imposition of the filing fee on an indigent defendant), she is entitled to the benefit of

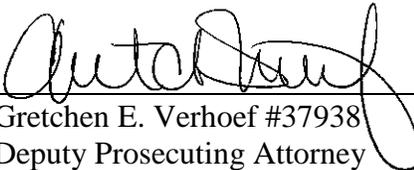
the statutory change. This Court should order this fee stricken, but the defendant's presence is not required for the trial court to make this correction. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (defendant's presence not required for ministerial correction).

IV. CONCLUSION

The State respectfully requests this Court affirm Ms. Perry's jury verdicts and judgment and sentence.

Dated this 6 day of March, 2019.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

DONNA PERRY,

Appellant.

NO. 35476-8

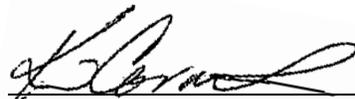
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on March 6, 2019, I e-mailed a copy of the Amended Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@2arrows.net

3/6/2019
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

March 06, 2019 - 9:45 AM

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