No. 32268-8-III

IN THE COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent

v.

ERIC M. HARRIS

Appellant

BRIEF OF RESPONDENT

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I.

DEFENDANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in denying Harris's CrR 3.5 motion to suppress statements.
2. The trial court erred in entering finding of fact 2.4 that Harris's request for counsel was equivocal.
3. The trial court erred in excluding defense witness testimony that was relevant to rebut the testimony of an inmate witness that Harris was not remorseful about the shooting.
4. The trial court erred in finding Harris suffered from a chemical dependency that contributed to the offense, and imposing affirmative obligations to enter treatment and submit to random urinalysis based on that finding.

II.

ISSUES PRESENTED

1. Did Harris make an unequivocal request for his attorney when initially advised of his Miranda rights? NO.
2. Did the trial court properly exclude defendant's out of court, self-serving, hearsay statements? YES.

3. Did the trial court have a factual basis for entering a finding that he suffers from a chemical dependency? YES.

III.

STATEMENT OF THE CASE

Respondent accepts Appellants Statement of the Case, for purposes of this appeal.

IV.

ARGUMENT

A. ISSUE ONE: DID HARRIS MAKE AN UNEQUIVOCAL DEMAND FOR AN ATTORNEY PRIOR TO POLICE QUESTIONING? NO.

Any waiver of a suspect's *Miranda* rights must be knowingly, voluntarily, and intelligently made. The State need not prove that the suspect's confession was made when he was totally rational and for the proper motives. Coercive police activity is the necessary predicate to finding that a confession or the waiver of a right is not "voluntary" within the meaning of the Fourteenth Amendment. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515, 520-21 (1986); *State v. Braun*, 82 Wn.2d 157, 509 P.2d 742 (1973).

The defendant need not understand the legal consequences of giving an incriminating statement, possible defenses available, or the risks involved in speaking to

the police without counsel present. *See State v. McDonald*, 89 Wn.2d 256, 264, 571 P.2d 930 (1977), *overruled in part by State v. Sommerville*, 111 Wn.2d 524, 531, 760 P.2d 932 (1988). A defendant's ignorance of the full consequences of his decision does not vitiate the voluntariness of custodial statements. Thus, the detectives accurate statement that the statute of limitations for rendering criminal assistance had run, did not override the defendant's independent decision-making process or coerce her into giving a statement that was ultimately used in her murder prosecution. *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496, *review denied*, 172 Wn.2d 1012

The test for the waiver is the "**totality of the circumstances**." *See, e.g., Dutil v. State*, 93 Wn.2d 84, 606 P.2d 269 (1980)(emphasis added). The court must look to the **totality of the circumstances**, including the setting in which the statements were obtained, the details of the interrogation, and the background, experience, and conduct of the accused. *United States v. Carroll*, 710 F.2d 164 (4th Cir.), *cert. denied*, 464 U.S. 1008 (1983) (citing *Schenckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 93 S. Ct. 2041, 2047 (1973)); *State v. Robtoy*, 98 Wn.2d 30, 36, 652 P.2d 284 (1982). Waiver may be in writing or oral. *State v. Rupe*, 101 Wn.2d 664, 678, 683 P.2d 571 (1984) (validity of waiver is not dependent upon signed written waiver form)(emphasis added).

Once a suspect expresses a desire to remain silent, the police **must** scrupulously honor the request and cease questioning. Police may, however, after the passage of a significant period of time and the provision of a fresh set of *Miranda* warnings, reapproach the defendant and resume questioning. *See, e.g., Michigan v. Mosley*, 423

U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). A shorter break may be sufficient if, after fresh *Miranda* warnings, officers limit their questioning to a different crime than the one at issue when the suspect initially expressed a desire to remain silent. *State v. Brown*, 158 Wn. App. 49, 240 P.3d 1175 (2010), *review denied*, 171 Wn.2d 1006 (2011) (two hour break). Suspect's invocation of the right to remain silent must be unequivocal. *United States v. Burns*, 276 F.3d 439, 441-42 (8th Cir. 2002); *Simmons v. Bowersox*, 235 F.3d 1124, 1131 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 280 (2001); *cf. Davis v. United States*, 512 U.S. 452, 458-59, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994) (right to counsel). A significant body of federal law indicates that an officer who is confronted with an equivocal or ambiguous request to remain silent may simply proceed with questioning. *See, e.g.,Simmons v. Bowersox*, 235 F.3d 1124, 1131 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 280 (2001); *Bui v. DiPaolo*, 170 F.3d 232, 239 (1st Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000); *United States v. Mills*, 122 F.3d 346, 350-51 (7th Cir.) (citing *United States v. Banks*, 78 F.3d 1190, 1196-97 (7th Cir. 1996)), *cert. denied*, 118 S. Ct. 637 (1997); *Medina v. Singletary*, 59 F.3d 1095, 1100-01 (11th Cir. 1995), *cert. denied*, 517 U.S. 1247 (1996).

Case law has held that the following are examples of equivocal assertions of the right to remain silent:

- A suspect's reply of "Nope" to the investigating officer's inquiry about making a formal statement was not an unequivocal assertion of the suspect's right to remain silent which required an end to further questioning. *James v. Marshall*, 322 F.3d 103 (1st Cir. 2003).
- A suspect's refusal to answer a question after agreeing to answer certain specific questions was not a clear and unequivocal assertion of his right to remain silent to subsequent questions. *United States v. Hurst*, 228 F.3d 751 (6th Cir. 2000).

- "I just don't think that I should say anything" and "I need somebody that I can talk to" do not constitute an unequivocal request to remain silent. *Burket v. Angelone*, 208 F.3d 172 (4th Cir.), *cert. denied*, 530 U.S. 1283 (2000).
- Silence in response to certain question not an unequivocal assertion of right to remain silent. *United States v. Mikell*, 102 F.3d 470, 476- 77 (11th Cir.1996); *State v. Hodges*, 118 Wn. App. 668, 77 P.3d 375 (2003).
- "I refuse to sign that [the waiver of rights form] but I'm willing to talk to you" not an unequivocal assertion of the right to remain silent. *State v. Parra*, 96 Wn. App. 95, 99-100, 977 P.2d 1272, *review denied*, 139 Wn.2d 1010 (1999); *accord State v. Manchester*, 57 Wn. App. 765, 771, 790 P.2d 217, *review denied*, 115 Wn.2d 1019 (1990).
- "I don't want to talk about it" and "I'd rather not talk about it" are not unequivocal invocations of right to silence. *Owen v. State*, 862 So. 2d 687, 696-98 (Fla. 2003), *cert. denied*, 543 U.S. 986(2004).
- "Just take me to jail" is not unequivocal invocation of right to silence. *Ford v. State*, 801 So. 2d 318, 319-20 (Fla. 1st DCA 2001), *review denied*, 821 So. 2d 295 (Fla. 2002), *cert. denied*, 537 U.S. 1010 (2002).
- Act of tearing up waiver form is not unequivocal invocation of right to silence. *Sotolongo v. State*, 787 So. 2d 915 (Fla. 3d DCA 2001), *review denied*, 816 So. 2d 129 (Fla. 2002).
- "I can't say more than that. I need to rest." was not an unambiguous invocation of the right to remain silent. *Dowthitt v. Texas*, 931 S.W.2d 244, 257 (Tex. Crim. App. 1996)

On the other hand, case law establishes that the following are examples of unequivocal assertions of the right to remain silent:

- Sixteen year old suspect's statement "I don't want to talk about it. I don't want to remember it . . . ." was an unequivocal assertion of her right to remain silent. *McGraw v. Holland*, 257 F.3d 513 (6th Cir. 2001).
- An arrested individual's statement to a police officer that "I plead the Fifth" was an unequivocal invocation of the right to remain silent. *Anderson v. Terhune*, 516 F.3d 781 (9th Cir. 2008).
- A suspect's statement that "I have nothing else to say" or "I have nothing further to add" was a sufficiently clear invocation of his right to remain silent. *United States v. Reid*, 211 F. Supp. 2d 366, 372 (D. Mass. 2002); "); *People v. Douglas*, 8 A.D.3d 980, 778 N.Y.S.2d 622, 623 (N.Y. App. Div. 2004)), *appeal denied*, 818 N.E.2d 675, 3 N.Y.3d 705, 785 N.Y.S.2d 33 (N.Y. 2004).
- "I don't want to talk to you m----- - f------" is a sufficiently clear invocation of the suspect's right to remain silent. *United States v. Stewart*, 51 F. Supp. 2d

1136, 1142-45 (D. Kan. 1999), *reconsidered in part*, 51 F. Supp. 2d 1147, 1162 (D. Kan. 1999), *affirmed*, 215 F.3d 1338 (10th Cir. 2000) (unpublished opinion)

- Suspect's statement, "I don't want to tell you guys anything to say about me in court," is an unambiguous and unequivocal invocation of right to remain silent. *State v. Day*, 619 N.W.2d 745, 750 (Minn.2000).

Similar to the right to remain silent, if a suspect invokes his right to have contact with counsel, they must do so clearly and unequivocally. Once a suspect requests counsel, police ***must*** cease questioning the suspect and cannot try again until counsel has been made available or the suspect himself reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981).

Suspect's request for counsel must be unequivocal. *Davis v. United States*, 512 U.S. 452, 458-59, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994). "Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* A request is equivocal if further questions are needed to determine if the suspect has made a request. *State v. Smith*, 34 Wn. App. 405, 408-09, 661 P.2d 1001 (1983). "Context", however, will not transform an unambiguous invocation of the right to counsel into open-ended ambiguity. *State v. Nysta*, No. 65774-7-I, ___ Wn.2d ___, ___ P.3d ___ (May 7, 2012). An officer who is confronted with an equivocal or ambiguous request for counsel may simply proceed with questioning. *Davis v. United States*, 512 U.S. 452, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994); *State v. Radcliffe*, 164 Wn.2d 900, 194 P.3d 250 (2008) (repudiating the rule adopted in *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982).

Cases have established that the following constitutes ambiguous requests for counsel:

- Suspect's statement "maybe I should talk to a lawyer," was ambiguous, and hence was not a request for counsel. *Davis v. United States*, 512 U.S. 452, 458-59, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994).
- Suspect's statement that he did not know how much trouble he was in and did not know if he needed a lawyer was an equivocal request for an attorney. *State v. Radcliffe*, 164 Wn.2d 900, 194 P.3d 250 (2008).
- A suspect's statement that he *might* want to talk to a lawyer constitutes an equivocal request for an attorney. *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985).
- Suspect's question, "[b]ut excuse me, if I am right, I can have a lawyer present through all of this, right?, was an equivocal request for an attorney. *United States v. Younger*, 398 F. 3d 1179, 1187-88 (9th Cir. 2005).
- An inquiry whether the police officer thinks that the interrogated person in custody needs an attorney does not constitute even an equivocal request for a lawyer. *Norman v. Ducharme*, 871 F.2d 1483, 1486 (9th Cir. 1989)."
- Do I need a lawyer?" or "do you think I need a lawyer" does not rise to the level of even an equivocal request for an attorney. *United States v. Ogbuehi*, 18 F.3d 807, 814 (9th Cir. 1994).
- "What time will I see a lawyer?" not an unambiguous request for counsel. *United States v. Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999).
- "Maybe [I] ought to see an attorney" not a clear and unambiguous request for counsel. *United States v. Doe*, 60 F.3d 544, 546 (9th Cir. 1995).
- "Go ahead and run the lawyers" not a clear and unambiguous request for counsel. *Mincey v. Head*, 206 F.3d 1106, 1132 (11th Cir. 2000), *cert. denied*, 532 U.S. 926 (2001).

On the other hand, the following requests were found to be unambiguous:

- "Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?" was an unambiguous request for counsel. *Smith v. Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988).
- Suspect's questions "(1) Can I get an attorney right now, man? (2) You can have attorney right now? and (3) Well, like right now you got one?" constituted an unambiguous request. *Alvarez v. Gomez*, 185 F.3d 995, 998 (9th Cir. 1999).
- "My attorney does not want me to talk to you" in tandem with a refusal to sign written waiver of right to attorney form was an unambiguous request for counsel. *United States v. Cheely*, 36 F.3d 1439, 1448 (9th Cir. 1994).

- A suspect's statement during a custodial interrogation that "shit man I gotta talk to my lawyer," is an unequivocal invocation by the suspect of his right to an attorney. *State v. Nysta*, No. 65774-7-I, ___ Wn.2d___, ___ P.3d ___ (May 7, 2012).

The case law is inconsistent on whether the phrase "I think" will render a request for counsel equivocal. *Compare Shedelbower v. Estelle*, 885 F.2d 570, 571 (9th Cir. 1989) (the statement "you" know, I'm scared now. I think I should call an attorney," was a valid invocation of the suspect's right to an attorney); *Cannady v. Dugger,* 931 F.2d 752, 754 (11th Cir. 1991) ("I think I should call my lawyer" was an unequivocal request for counsel); *United States v. Perkins*, 608 F.2d 1064, 1066 (5th Cir. 1979) ("I think I want to talk to a lawyer" was an unequivocal request for counsel) *with Diaz v. Senkowski*, 76 F.3d 61, 63 (2d Cir. 1996) (suspect's statement "do you think I need a lawyer" was ambiguous within the meaning of *Davis*); *Burket v Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) ("I think I need a lawyer" does not constitute an unequivocal request for counsel).

Here, there was a discussion in which the defendant asked whether or not he needed an attorney (VRP 24-25). His initial statement was "**I don't know**, I think I should probably have an attorney present.... Telling you**, I mean, I don't know**" (VRP 24-25, emphasis added). He was advised that the determination was solely his to make. He never made any statements that would have arisen to an unequivocal demand for an attorney. Following a colloquy, in which the detectives allowed him to ponder his options, Mr. Harris responded "Lets just get it done" (VRP 25). The detectives, uncertain what he meant by that, clarified with him, asking him if he was waiving his

right to an attorney and was willing to speak with them, to which he responded "Yes" (VRP 26). Specifically, he stated that he did not want to speak with an attorney, and agreed that was the case both before and immediately at the end of the interview. The court should find that the defendant did not make a request for an attorney, and specifically waived that right in agreeing to speak with the detectives. His statement was ambiguous, as it was surrounded with "I don't know", before and after, clearly showing he was thinking about his response, but not yet ready to respond to the question. After a period of time, where he was allowed to think about it, he clearly waived his rights to an attorney and agreed to speak with the detectives. Given the totality of the circumstances, the initial statement was an ambiguous request, at best. The fact of the waiver was clarified once more, at the conclusion of the interview (VRP 48), resolving any doubt that this was a voluntary waiver, resolving any ambiguity in favor of a waiver.

B) ISSUE TWO: DID THE COURT PROPERLY EXCLUDE SELF SERVING HEARSAY WHICH IS NOT IMPEACHMENT? YES.

Evidence of out-of-court statements offered for proof of the matters asserted therein is hearsay; however, out-of-court admissions by a party, although hearsay, may be admissible if they are relevant. If such out-of-court statements are self-serving in that they tend to aid the party's case, then the statements are not admissible under the admission exception to the hearsay rule. State v. Haga, 8 Wash.App. 481, 507 P.2d 159 (1973).

Out-of-court admissions by a party, although hearsay, may be admissible **against the party** if they are relevant. 5 Meisenholder, Wash.Prac. s 421 et seq. (1965); C. McCormick, Evidence s 239 (1954). However, if an out-of-court admission by a party is self-serving, in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule. State v. King, 71 Wash.2d 573, 577, 429 P.2d 914 (1967); State v. Johnson, 60 Wash.2d 21, 31, 371 P.2d 611 (1962); Finally, out-of-court admissions of a party are not admissible as an exception to the hearsay rule when they are self-serving. *State v. Huff*, 3 Wash.App. 632, 636, 477 P.2d 22 (1970); ER 801(d)(2).

An opposing party may introduce the out of court statements of their opponent pursuant to ER 801(d)(2), when "the statement is offered against a party and is (i) the party's own statement..." *Statements by a party are admissible only when offered against that party.* "The rule does not allow a party to introduce his or her own out-of-court statements through the testimony of other witnesses. **If the rule were otherwise, a party could simply tell his or her story out of court, and then present it through the testimony of other witnesses without taking an oath and without facing cross-examination.**" See *State v. Finch* 137 Wash.2d 729, 975 P.2d 967 (1999), as cited in *Courtroom Handbook on Washington Evidence*, Karl B. Tegland, 2012-2013 Edition, West (2012) at 421.(emphasis added).

Additionally, Counsel for the Defendant is arguing that these statements are admissible as a prior inconsistent statement. However, counsel has was not trying to

elicit a different statement from the **declarant** witness at trial, there was nothing inconsistent about the declarant witnesses statement presented. In the present case, the declarant witness sought to be rebutted is Shane Lyng, not Stacy Vollendorf. The Defense may not rebut the statement of Shane Lyng through a witness who has not heard Shane Lyng give a prior inconsistent statement. The Defense intended to rebut Shane Lyngs testimony through the hearsay of Eric Harris, a party, introduced through Stacy Vollendorf. This is not the intent of the rule.

> Under ER 613, prior inconsistent statements are admissible for the limited purpose of attacking the credibility of a witness. [FN8. 5A K. Tegland, Evidence, Washington Practice, sec. 613.3 (1999); see also *State v. Johnson*, 40 Wn.App. 371, 377, 699 P.2d 221 (1985) (a factfinder may consider a prior inconsistent statement admitted to impeach a witness's testimony only for the purpose of evaluating that witness's credibility and not as substantive proof of the underlying facts).]
> A prior statement is 'inconsistent' when it has been compared with, and found different from, the witness' trial testimony. [FN9. *State v. Williams*, 79 Wn.App. 21, 26, 902 P.2d 1258 (1995).]The theory of attack by prior inconsistent statements is based on the notion that testifying one way on the stand and another way previously raises a doubt as to the truthfulness of both statements. [FN10. *Williams*, 79 Wn.App. at 26 n. 14 (quoting McCormick on Evidence, sec. 34 at 114)].To ensure that prior inconsistent statements are used only as impeachment evidence, trial counsel should request a limiting instruction. [FN11. *Johnson*, 40 Wn.App. at 377.] If no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought, the jury may consider the prior statements as substantive evidence. [FN12. *Cf. State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 110 (1997)] (absent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others). --105 Wash.App. 1060, (2001), (footnotes included in brackets).

The State fails to see how this statement can be used as "rebuttal" without having the statement go straight to the truth of the matter asserted. The only

circumstance in which this could be presented is if the witness was the same declarant sought to be impeached or rebutted had testified to something differently than as recollected or testified to at trial. Appellant's proposal is not the circumstance to which the rule was intended to apply. The Defendant himself may testify to these facts, but no other witness may testify as to what the defendant told them, unless in response to questioning by the State.

C) ISSUE THREE: DID THE TRIAL COURT HAVE SUFFICIENT INFORMATION TO ENTER THE FINDING THAT DEFENDANT SUFFERS FROM CHEMICAL DEPENDENCY? YES?

The trial court lacks authority to impose a community custody condition unless authorized by the legislature. *State v. Kolesnik*, 146 Wash.App. 790, 806, 192 P.3d 937 (2008). RCW 9.94A.505(8) provides, "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative condition as provided in this chapter." And under RCW 9.94A.703(3)(c)–(d), as a condition of community custody, the court is authorized to require an offender to "[p]articipate in crime-related treatment or counseling services" and in "rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community."

The SRA specifically authorizes the court to order an offender to obtain a chemical dependency evaluation and to comply with recommended treatment only if it finds that the offender has a chemical dependency that contributed to his or her offense:

> Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.
> RCW 9.94A.607(1).

If the court fails to make the required finding, it lacks statutory authority to impose the condition. The finding should be reviewed for abuse of discretion. Here, the record is replete with evidence that most of the people that were at the Harris residence the day of the shooting were either under the influence of drugs, or going there to try to obtain drugs. The motions to suppress prior or other bad acts by the defense shows clearly that drugs are the root of the issue in this case. The numerous sidebars held by the court in which the issue was raised, but repeatedly kept out of evidence, shows this clearly. Finally, the victim impact statements of Thomas Harris, and more importantly Jamie Harris, and the court's reference to them, show that the court considered them and their background, in entering the finding that Mr. Eric Harris did suffer from a chemical dependency. This chemical dependency clearly played a role in the present case. The sentencing condition should be maintained.

CONCLUSION

Mr. Harris did not make an unequivocal demand for an attorney prior to questioning, he merely thought out loud prior to waiving the right, and speaking with the detectives. The statements were properly admitted by the trial court.

Mr. Harris's statements to other people regarding his remorse are not admissible through the defense as self serving hearsay. The argument that they would be prior inconsistent statements frustrates the rule, as the statement is not of Shane Lyng. The suppression should be held proper. Even if not proper, the admission of this statement has such marginal relevance value, if any, it would not affect the outcome of the case.

The court did have a proper factual basis in entering the condition that the defendant engage in chemical dependency treatment. These conditions should be maintained.

Dated this 5 day of November, 2014.

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Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Respondent's Brief to the following listed addresses, on November 5, 2014:

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