

67746-2

67746-2

No. 67746-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

WARREN RICHARDSON II,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

---

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. **Mr. Richardson's conviction must be reversed because the jury considered an exhibit that contained information that was not admitted as evidence and was prejudicial to the defense**

Exhibit 27 is a CD which purports to be the surveillance video from one of the Frontier Bank. Ex. 27. The exhibit, however, contains additional information that was not admitted as evidence, including the un-redacted version of Warren Richardson's statement to a police detective and the written report of the hospital security guard who was present when police detective began the interview. This information prejudiced Mr. Richardson, and his conviction must therefore be reversed.

In Mr. Richards's opening brief, appellant counsel asserted Exhibit 27 was the un-redacted audio recording of Detective Mike Mellis's interview with Mr. Richardson in the intensive care unit of Harborview Hospital. Amended Brief of Appellant at 13-14 (hereafter ABOA). Portions of the interview had been redacted by the court upon agreement by the prosecutor that the information was too prejudicial to the defendant. 1RP 7-9; 2RP 147-49.

In her response brief, the prosecuting attorney states that Exhibit 27 contains several folders, which include the Frontier Bank

footage and the un-redacted interview with Mr. Richardson. Brief of Respondent at 41 n.9 (hereafter BOR). The prosecutor is correct.<sup>1</sup> Thus, in addition to access to the Frontier bank photographs, Exhibit 26 contains three items that were not admitted as evidence:

- (1) The re-redacted version of Detective Mellis's interview with Mr. Richardson;
- (2) The written statement of Harborview Security Guard Craig Compton; and
- (3) The safety sheet produced by the company that manufactures the "Dye-Pac" used in the Frontier Bank robbery.

Ex. 26. This information bolsters Mr. Richardson's argument that his conviction must be reversed because the jury considered prejudicial information that was not admitted as evidence.

The prosecutor does not argue that the information unknowingly contained in the exhibit was not prejudicial to Mr. Richardson or claim that the information was "subject to objection, cross-examination, explanation or rebuttal." State v. Pete, 152 Wn.2d 546, 555, 98 P.3d 803 (2004) (quoting State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994)). In a novel reading of the

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<sup>1</sup> Appellate counsel viewed the exhibit on her office computer and was only able to access the un-redacted interview. After receiving the prosecutor's response brief, counsel used a different computer to view the exhibit at the Court of Appeals and was able to access the information referred to by the prosecutor. Counsel apologizes for any confusion created by her error.

controlling cases, the State instead claims that Mr. Richardson cannot prove the jury actually considered the information that was not admitted at trial. BOR at 40-43. The relevant question before the court is whether “the introduction of these documents into the sanctity of the jury room” prejudiced the defendant. Pete, 152 Wn.2d at 555; accord, State v. Rinkes, 70 Wn.2d 854, 863, 425 P.2d 658 (1967); State v. Boggs, 33 Wn.2d 921, 933, 207 P.2d 743 (1949), overruled on other grounds, State v. Parr, 93 Wn.2d 95 (1980).

The State’s argument that Mr. Richardson must prove that the jurors actually used the inadmissible information during their deliberations creates an impossible hurdle. Jury deliberations are secret. The trial court denied Mr. Richardson’s request that the jury view Exhibit 27 in the courtroom because the court did not want any part of the jury deliberations to take place in open court. 3RP 385-88; 4RP 699. A litigant therefore can show the jury had access to the exhibits, not whether they actually used them in their deliberations. It is hardly fair to require Mr. Richardson to prove the jurors were exposed to the portions of Exhibit 27 that were not admitted as evidence when the parties would have prevented that from happening if the court had adopted Mr. Richardson’s request that the jurors view the exhibit in open court.

Moreover, the State's argument relies upon Balisok, a case involving juror misconduct where the defendant produced an affidavit from the jury foreperson in support of his argument that the jurors' reenactment of the crime was improper. Balisok, 123 Wn.2d at 117. Mr. Richardson does not claim jury misconduct, and this court's analysis is therefore found in the cases that address the issue presented here – whether the defendant's conviction should be reversed where the court mistakenly provided the jurors with information that had not been admitted at trial. See Pete, 152 Wn.2d at 555 (situation was “no win” for defendant who could not object to or explain the extrinsic information and finding error even when bailiff instructed jurors not to consider it); Rinkes, 70 Wn.2d at 863 (“[W]e will not speculate at great risk to the defendants. We feel compelled to assume that the requisite balance of impartiality was upset”); Boggs, (“[I]t is reversible error to allow physical objects not admitted as evidence to go into the jury room.”).

Moreover, this issue goes to the heart of Mr. Richardson's due process right to a jury trial and to confront the witnesses against him in open court. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The information the jury had access to was not admitted at trial and Mr. Richardson had no opportunity to challenge it. In

this circumstance, the appropriate standard of review on appeal is the constitutional harmless error standard. State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012) (right to confront witnesses); State v. Irby, 170 Wn.2d 874, 885-86, 246 P.3d 796 (2011) (right to be present); State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (right to present a defense); State v. Linehan, 147 Wn.2d 638, 653-54, 56 P.3d 542 (2002) (right to have jury instructed it must find every element of crime beyond a reasonable doubt), cert. denied, 538 U.S. 945 (2003). Under this standard, “the State must show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Jasper, 174 Wn.2d at 117 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)). The burden is thus on the State, not Mr. Richardson, to prove that the jury did not consider the prejudicial information found in Exhibit 27. The State has not done so, and Mr. Richardson’s robbery convictions must be reversed and remanded for a new trial.

2. **The trial court erroneously concluded it could not grant an exceptional sentence based upon Mr. Richardson’s failed diminished capacity defense**

Mr. Richardson argues the trial court based its decision not to give a sentence below the standard range on an incorrect reading Richardson may not appeal a standard range sentence “unless the court refuses to exercise its discretion at all.” BOR at 43 (citing State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005) and State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), rev. denied, 136 Wn.2d 1002 (1998)). The State misreads Washington law. Washington has long permitted a defendant to challenge on appeal the procedure by which a standard range sentence is imposed. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719, 719 P.2d 796, cert. denied, 479 U.S. 980 (1986). The Garcia-Martinez Court explained a defendant has the right to appeal from the court’s decision not to impose an exceptional sentence below the standard range sentence on the basis that the trial court refused to exercise its discretion or relied upon an impermissible basis to refuse to do so. Garcia-Martinez, 88 Wn. App. at 330.

Mr. Richardson committed the two crimes while under delirium caused by the low levels of sodium, chloride, and potassium in his body. 4RP 497-501, 508. As a result, Mr. Richardson had no judgment or ability to control his own actions or

even understand he needed medical attention. 4RP 509-10, 535-36. While the condition began as a result of Mr. Richardson's use of alcohol, it was the delirium that diminished his ability to reason. Tests at the hospital, for example, revealed no alcohol in Mr. Richardson's system. CP 103.

The trial court erred by holding RCW 9.94A.353(1)(e) prevented the court from ordering a sentence below the standard sentence range. Because the court stated she would have imposed an exceptional but for the statute, Mr. Richardson's sentence must be vacated and the case remanded for a new sentencing hearing. State v. Bunker, 144 Wn. App. 407, 422, 183 P.3d 1086 (2008), affirmed on other grounds, 169 Wn.2d 571 (2010).

**3. Mr. Richardson did not knowingly, intelligently, and voluntarily waive his constitutional privilege against self-incrimination because (1) Mr. Richardson was in the intensive care unit of a hospital due to mental disorientation, and (2) the investigating detective utilized an unconstitutional two-step interrogation process**

a. The trial court concluded that Miranda warnings were required. The requirement that police officers administer Miranda warnings prior to interrogation applies to any suspect who "has been taken into custody or otherwise deprived of his freedom of action in

any significant way.” Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The trial court found that Detective Mellis was required to advise Mr. Richardson of his constitutional rights before questioning him. CP 117. The State argues for the first time on appeal that the trial court was incorrect and Miranda warnings were not required because Mr. Richardson was not in police custody. BOR at 24-30.

The State first argues the trial court did not really address the custody issue because it was not argued by the parties and the court’s conclusion that Miranda warnings were required can be ignored. BOR at 23. The prosecutor had the burden of proof at the CrR 3.5 hearing and, as the prevailing party, prepared the findings of fact and conclusions of law. CP 116; Brown v. Illinois, 422 U.S. 590, 605, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975) (“[T]he burden of showing admissibility rests, of course, on the prosecution.”); Miranda, 384 U.S. at 475. The trial court’s conclusion that warnings were required necessarily includes a conclusion that Mr. Richardson was in custody. To the extent that the trial court’s ruling does not specifically address Mr. Richardson’s custody status, the absence of a direct finding on the issue must be construed against the party

with the burden of proof, in this case the State. Smith v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986).

The trial court's implied ruling that Mr. Richardson was in custody was correct. A suspect is in custody if, in light of the totality of the circumstances, a reasonable person would have felt he "was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L.Ed.2d 383 (1995); State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

In determining if a suspect is in custody, the reviewing court looks at "all of the circumstances surrounding the interrogation" to determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." J.D.B. v. North Carolina, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2394, 2402, 180 L. Ed. 2d 310 (2011) (quoting Thompson, 516 U.S. at 112). The court must "'examine all of the circumstances surrounding the interrogation,' including any circumstance that 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'" J.D.B., 131 S. Ct. at 2402 (internal citations omitted) (quoting Stansbury v. California, 511 U.S. 318, 322, 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)).

Mr. Richardson was in a hospital bed in the intensive care unit when Detective Mellis woke him up and interviewed him about two robberies. After an initial conversation, the detective decided to take a recorded statement and went over the Miranda rights with Mr. Richardson. Detective Mellis acknowledged that Mr. Richardson was not free to walk away and end the conversation. Ex. 31 at 1. The trial court thus found the Miranda warnings were required in this situation. CP 117.

The State implies that, because the test for custody status is an objective one, Mr. Richardson's depleted mental and physical condition is not relevant. BOR at 24-25. In J.D.B., however, the Supreme Court held that a child's age was an objective fact that must be considered in determining if a reasonable person in the suspect's position would believe he was free to leave. J.D.B., 131 S. Ct. at 2402-03. The court reasoned that a child's age "generates commonsense conclusions about behavior and perception" that are self-evident to any interrogating law enforcement officer or reviewing judge. Id. at 2303.

Precisely because childhood yields objective conclusions like those we have drawn ourselves – among others, that children are "most susceptible to influence," and "outside pressures," – considering age in the custody analysis in no way involves a

determination of how youth “subjectively affect[s] the mindset” of any particular child.

Id. at 2404-05 (internal citations omitted).

Similarly, any reasonable person knows that a patient in the intensive care unit of a hospital is vulnerable and needs 24-hours supervision and care. Such a patient is likely to be physically or psychologically incapable of removing police officers from his room or leaving himself.

The fact that the interrogation occurred in the intensive care ward rather than a police station is also not determinative of whether Mr. Richardson was in custody. Even suspects in their own home can be in a position that they reasonably believe they are in custody. See Orozco v. Texas, 394 U.S. 324, 326-27, 89 S. Ct. 1095, 22 L.Ed.2d 311 (1969) (custodial interrogation when officers questioned suspect in his boardinghouse); State v. Dennis, 16 Wn. App. 417, 419, 421-22, 558 P.2d 297 (1976) (defendants in custody in own home because officers conscribed their freedom of movement within the home). The Lorenz Court found the defendant was not in custody when police officers interrogated her on the front porch of her home and specifically told her she was not under arrest and was free to leave. State v. Lorenz, 152 Wn.2d 22, 27, 37-38, 93 P.3d 133 (2004).

Mr. Richardson was confined to a bed in the intensive care unit of a major hospital. He was being interviewed by police detective and a hospital security guard was present at the beginning of the tape-recorded interview; either or both may have been armed. As the detective noted, Mr. Richard could not walk away. Ex. 31 at 1. His movement was thus constrained.

Additionally, Mr. Richardson was advised of his Miranda rights and asked to waive those rights. Ex. 31 at 2-3. Most citizens are aware that the Miranda rights are read to suspects upon arrest. A reasonable person in Mr. Richardson's position would not have believed he was free to end the interview whenever he wanted.

b. Mr. Richardson did not knowing, intelligently or voluntarily waive his constitutional rights. Mr. Richardson was physically and mentally depleted when he was interviewed by Detective Mellis in the intensive care unit. The detective claimed Mr. Richardson was alert and able to communicate. Mr. Richardson's verbal statement, however, demonstrates otherwise. Mr. Richardson confessed to two separate robberies, but he did not know that one occurred in Ballard and could not provide the name of the other bank. Ex. 31 4-6, 10. He did not know what he was wearing on either occasion. Ex. 31 at 6-7, 9, 14, 22. He was not sure

what he did at the second robbery, but assumed it was the same as the first. Ex. 31 at 13.

Mr. Richardson was aware it was his second day in the hospital, but he did not know how he got there. Ex. 31 at 11, 16. And Mr. Richardson told the officer that he was “weak and screwed up” and said his brain was not working well and kept “trying to jump back to California.” Ex. 31 at 11, 12, 22.

In addition, medical records show that Mr. Richardson was in an altered mental state, suffering from severe hyponatremia, severe Hypokalemia, and hypochloremia. CP 103. The trial court’s conclusion that Mr. Richardson knowingly, intelligently and voluntarily waived his Miranda rights must be reversed.

c. Mr. Richardson may raise the detective’s improper interrogation process in this appeal. Mr. Richardson also argued his statement was inadmissible because the detective utilized the question-first interview technique found unconstitutional in Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004). This issue was not raised in the trial court. In Washington, however, an appellate may raise “a manifest error affecting a constitutional right” for the first time on appeal. RAP 2.5(a)(3).

Constitutional errors are presumed prejudicial, and they are given special treatment on appeal because they may result in a serious injustice to the accused and adversely impact public perception of the criminal justice system. State v. Scott, 110 Wn.2d 682, 686-87, 686 n.3, 757 P.2d 492 (1988). The appellate court will review a constitutional issue raised for the first time on appeal if it first determines the error is “truly of constitutional magnitude.” Scott, 110 Wn.2d at 688. If so, the court will examine the effect the error had on the trial in light of the constitutional harmless error standard. Id.

Mr. Richardson met this hurdle. First, he argued his constitutional rights were violated by use of an improper two-step interrogation process in order to avoid the requirements of Miranda. ABOA at 26-30 (citing inter alia U.S. Const. amends. V, XIV; Const. art I, § 9; Seibert, supra; Miranda, supra). Second he argued the State could not prove the erroneous introduction of his statement was harmless beyond a reasonable doubt. ABOA at 30-31 (citing Chapman, 386 U.S. at 24; State v. Sergeant, 27 Wn. App. 947, 621 P.2d 209 (1980), rev. denied, 95 Wn.2d 1010 (1981)).

The prosecutor nonetheless asserts that Mr. Richardson may not raise this issue because it was not raised as a basis for

suppression in the trial court. BOR at 20-23. The prosecutor's argument, however, reflects a basic misunderstanding of Washington criminal procedure. In Washington, the court must hold a hearing whenever the State wants to admit a defendant's statement to the police; the defendant need not make a motion to suppress the statement. CrR 3.5(a). This is consistent with the government's "heavy burden" to demonstrate that a defendant knowingly, intelligently, and voluntarily waived his constitutional rights to remain silent and to consult with an attorney. Miranda, 384 U.S. at 475; Brown, 422 U.S. at 605; State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973). The State, however, refers to the CrR 3.5 hearing in this case as a "suppression motion" and cites cases motions to suppress evidence on Fourth Amendment grounds. BOR at 20, 22 (citing United States v. Barrett, 703 F.2d 1076, 1086 n.17 (9<sup>th</sup> Cir. 1983) (in footnote, refusing to address argument attacking statements on the basis defendant was unlawfully detained); State v. Baxter, 68 Wn.2d 416, 413 P.2d 638 (1996) (pre-RAP case refusing to address argument defendant was unlawfully seized)). These cases are not relevant to Mr. Richardson's case.

Mr. Richardson raises a constitutional issue which was manifest in his case. The introduction of Mr. Richardson's

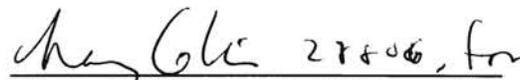
statement to Detective Mellis was the centerpiece of the prosecution's case, especially for the North Bend robbery where no witness identified Mr. Richardson. The statement was also used effectively by the prosecutor to counter his diminished capacity defense. Because the introduction of Mr. Richardson's statement was so important, he may argue on appeal that the detective's sequential interrogation process violated his constitutional rights. RAP 2.5(a).

**B. CONCLUSION**

For the reasons stated above and in the Amended Brief of Appellant, Mr. Richardson's robbery convictions must be reversed and remanded for a new trial. In the alternative, his case should be remanded for a resentencing.

DATED this 11<sup>th</sup> day of December 2012.

Respectfully submitted,

  
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Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67746-2-I
v.	)	
	)	
WARREN RICHARDSON II,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] AMY MECKLING, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] WARREN RICHARDSON II 832356 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF DECEMBER, 2012.

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