

67746-2

NO. 67746-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

WARREN RICHARDSON II,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE HOLLIS HILL

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

AMY MECKLING  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

2012 OCT -3 PM 3:07

COURT OF APPEALS  
STATE OF WASHINGTON

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	4
1. THE CRIMES .....	4
a. Sterling Savings Bank Robbery In North Bend .....	4
b. Frontier Bank Robbery In Ballard .....	5
2. THE INVESTIGATION .....	6
3. THE TRIAL .....	14
a. Pretrial Motions .....	14
b. The Defense .....	15
4. THE SENTENCE .....	17
C. <u>ARGUMENT</u> .....	19
1. RICHARDSON'S STATEMENTS WERE PROPERLY ADMITTED AT TRIAL .....	19
a. Richardson Has Not Properly Preserved The Argument That Detective Mellis Deliberately Utilized An Improper Two-Step Interview Procedure .....	20
b. Even If This Court Considers The Argument For The First Time On Appeal, Detective Mellis's Interview Was Proper .....	23
i. Richardson was not in custody .....	24

ii.	Even if Richardson was "in custody," the interview was not an improper two-part interrogation .....	30
c.	The Trial Court Properly Determined That Richardson's Statements Were Voluntarily Made .....	35
2.	RICHARDSON HAS FAILED TO ESTABLISH THAT THE JURY CONSIDERED EXTRINSIC EVIDENCE .....	39
3.	THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED RICHARDSON'S REQUEST FOR AN EXCEPTIONAL SENTENCE .....	43
D.	<u>CONCLUSION</u> .....	47

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Beckwith v. United States, 425 U.S. 341,  
96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976) ..... 25

Berkemer v. McCarty, 468 U.S. 420,  
104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) ..... 24, 25

J.D.B. v. North Carolina, \_\_\_ U.S. \_\_\_,  
131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) ..... 25

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602,  
16 L. Ed. 2d 694 (1966) ..... 15, 19, 20, 22-26, 30-33, 35

Missouri v. Seibert, 542 U.S. 600,  
124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) ..... 30, 31, 35

Oregon v. Elstad, 470 U.S. 298,  
105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) ..... 31, 32

Stansbury v. California, 511 U.S. 318,  
114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) ..... 25

United States v. Barrett, 703 F.2d 1076  
(9th Cir.1983) ..... 20

United States v. Bassignani, 575 F.3d 879  
(9th Cir. 2009) ..... 27, 28, 29

United States v. Williams, 435 F.3d 1148  
(9<sup>th</sup> Cir. 2006) ..... 31

Yarborough v. Alvarado, 541 U.S. 652,  
124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) ..... 24, 25

Washington State:

<u>Halverson v. Anderson</u> , 82 Wn.2d 746, 513 P.2d 827 (1973).....	39
<u>Richards v. Overlake Hosp. Med. Ctr.</u> , 59 Wn. App. 266, 796 P.2d 737 (1990) .....	39
<u>State v. Allert</u> , 117 Wn.2d 156, 815 P.2d 752 (1991).....	45
<u>State v. Balisok</u> , 123 Wn.2d 114, 866 P.2d 631 (1994).....	39
<u>State v. Baxter</u> , 68 Wn.2d 416, 413 P.2d 638 (1966).....	20
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	40
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	35
<u>State v. Butler</u> , 165 Wn. App. 820, 269 P.3d 315 (2012).....	26
<u>State v. Ferguson</u> , 76 Wn. App. 560, 886 P.2d 1164 (1995).....	24, 28
<u>State v. Garcia-Martinez</u> , 88 Wn. App. 322, 944 P.2d 1104 (1997).....	43, 44
<u>State v. Grayson</u> , 154 Wn.2d 333, 111 P.3d 1183 (2005).....	43
<u>State v. Heritage</u> , 152 Wn.2d 210, 95 P.3d 345 (2004).....	30
<u>State v. Hickman</u> , 157 Wn.2d 767, 238 P.3d 1240 (2010).....	31, 34
<u>State v. Kelter</u> , 71 Wn.2d 52, 426 P.2d 500 (1967).....	26

<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	21, 23
<u>State v. Kirwin</u> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	20
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	24, 25, 26, 27, 29
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992).....	21, 23
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	20, 21, 22, 32
<u>State v. McGill</u> , 112 Wn. App. 95, 47 P.3d 173 (2002).....	44
<u>State v. Pete</u> , 152 Wn.2d 546, 98 P.3d 803 (2004).....	39, 40
<u>State v. Post</u> , 118 Wn.2d 596, 826 P.2d 172, <u>amended</u> , 837 P.2d 599 (1992).....	24, 26
<u>State v. Rafay</u> , 168 Wn. App. 734, 285 P.3d 83 (2012).....	35, 36
<u>State v. Robinson</u> , 171 Wn.2d 292, 253 P.3d 84 (2011).....	21
<u>State v. S.J.W.</u> , 149 Wn. App. 912, 206 P.3d 355 (2009), <u>aff'd on other grounds</u> , 170 Wn.2d 92, 239 P.3d 568 (2010).....	28
<u>State v. Sargent</u> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	30
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	21
<u>State v. Unga</u> , 165 Wn.2d 95, 196 P.3d 645 (2008).....	36

<u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001).....	21
<u>State v. WWJ Corp.</u> , 138 Wn.2d 595, 980 P.2d 1257 (1999).....	21, 22, 32

Statutes

Washington State:

RCW 9.94A.535 .....	18, 44, 46, 47
---------------------	----------------

Rules and Regulations

Washington State:

RAP 2.5.....	20
--------------	----

**A. ISSUES PRESENTED**

1. Appellant Richardson robbed two banks. One week after the second robbery, the investigating detective received information that Richardson was a suspect, and that he was in the hospital. Richardson was in the hospital due to an electrolyte imbalance, brought on by heavy drinking. The detective visited Richardson in the hospital. During their conversation, Richardson was awake, alert, made eye contact, appeared to understand the detective with no difficulty, and made coherent, rational statements. Did the trial court properly find that Richardson's statements were voluntary?

2. The only argument in support of his motion to suppress his statements that Richardson raised in the trial court was a claim that they were involuntary due to his weakened mental condition. Has he waived an argument raised for the first time on appeal that the detective deliberately engaged in a constitutionally impermissible two-part interrogation process?

3. Richardson was in the hospital due solely to his own physical condition. At the time the detective met with him and took a recorded statement, he was not under arrest, not actively guarded by the police or hospital security, a nurse had directed the

detective to his room indicating that Richardson was alert enough to converse, the interview was not aggressive, and Richardson was specifically told that he was not under arrest when the interview began. Was Richardson "in custody" at the time he made the statements?

4. When the investigating detective went to visit Richardson in the hospital, his goal was to see for himself whether Richardson matched the suspect in the surveillance photographs. When the detective arrived and saw the clear resemblance, he told Richardson that the investigation "was over," and that he just wanted to get a statement about the details of the crime. When Richardson immediately admitted involvement, the detective advised him of his rights before getting a detailed, recorded statement. Assuming that Richardson was "in custody," did the detective deliberately delay advising Richardson of his rights in an attempt to get a confession?

5. During the deliberations, the jury asked to listen to Richardson's recorded statement. They were provided with a copy of the recording that had been redacted to remove all references to Richardson's prior bank robbery convictions. Later, they asked to view the surveillance video from the bank. The exhibit containing

the surveillance video also contained a copy of Richardson's un-redacted recorded statement. There is nothing in the record that indicates that the jury actually listened to the un-redacted statement. The timing of their request for the surveillance video and the verdict is inconsistent with the jury having listened to the un-redacted statement. Has Richardson failed to establish that the jury considered extrinsic evidence?

6. Richardson requested an exceptional sentence based upon the mitigating factor that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The voluntary use of drugs or alcohol is specifically excluded under this mitigating circumstance. Richardson's expert opined that he was "delirious" at the time of the offenses, due to a severe electrolyte imbalance brought on by heavy drinking and its attendant consequences of vomiting and not eating. Did the court properly determine that mitigating circumstance was barred by Richardson's voluntary drug and alcohol use?

**B. STATEMENT OF THE CASE**

**1. THE CRIMES.**

a. Sterling Savings Bank Robbery In North Bend.

On November 6, 2009, a man walked into the Sterling Savings Bank in North Bend, walked up to the counter, and told teller Christine McCartney, "I'm here to rob you." 3RP 184-85.<sup>1</sup> Ms. McCartney was shocked and responded, "Are you kidding?" 3RP 186. Because she was nervous and had trouble opening her drawer, the man told her, "Don't make me get my gun out." 3RP 186, 196, 200-01.

Although the man appeared that he may have been slightly intoxicated, his voice was serious and firm and his speech was not slurred. 3RP 186, 204. Scared, time stood still for Ms. McCartney. 3RP 200. When she placed some small denomination bills on the counter, the man looked at her with disbelief, and said, "Is that all you have?" 3RP 188. Ms. McCartney told the man that was all the money she had left in her drawer, seeing that it was late in the day on a Friday. 3RP 188, 197, 214. The man took the money and

---

<sup>1</sup> The Verbatim Report of Proceedings consists of 5 volumes and will be referred to as follows: 11/5/10 (1RP), 7/6-7/7/11 (2RP), 7/11-7/12/11 (3RP), 7/13-7/14/11 (4RP), and 7/19-7/20/11, 8/12/11, 9/23/11 (5RP).

walked out of the bank quickly and deliberately. 3RP 188, 197-98, 214.

Personal Banker Mary Fairbrook was also present at the Sterling Savings Bank that afternoon. 3RP 209. She overheard the interaction between Ms. McCartney and the robber, so she activated the bank's silent alarm. 3RP 211-13, 228. Ms. Fairbrook described the man to police as a "well-weathered" white male about fifty years old, five-six to five-seven in height, with grayish, shoulder-length hair beneath his hat. 3RP 227.

b. Frontier Bank Robbery In Ballard.

Three days later, on the afternoon of November 9, 2009, a man in his 50s or early 60s walked into the Frontier Bank in Ballard, with his hands deep into his front pockets. 4RP 289-90, 321. Teller Krisna Mohler greeted him in the foyer of the bank, commenting on the cold day. Id. She quickly became nervous, due to the man's intense focus on getting right up to her open teller's window. 4RP 290. As she asked how she could help the man, he said, "Give me all your tens, twenties, and all your money." 4RP 290.

The branch manager, Tamara Berft, had noticed the man walk in. 4RP 290-91, 321-23. She saw that he had tape on all of

his fingers, instinctively knew that something was wrong, and asked Ms. Mohler if she could assist her in helping the man. Id.

Ms. Mohler mouthed the word, "robbery" to Ms. Berft. 4RP 291. Ms. Berft triggered the silent alarm. 4RP 324. Ms. Mohler opened her drawer and began to pull out money to give the man. 4RP 292. She gave him her "alarm bill," which triggered a silent alarm when it was removed from the drawer. 4RP 296. She also gave the man a "dye pack," an explosive device made to look like a pack of bills, emitting pepper spray, dye and smoke when it is removed from the bank. 4RP 297.

As she gave the man money, Ms. Mohler observed that he had white electrical-style tape on the tips of each of his fingers. 4RP 292-93. He put the money in his pocket, turned and walked briskly to the door, and then ran quickly through the parking lot. 4RP 293-94.

Ms. Mohler observed that during the incident, the robber appeared focused, determined and goal-oriented, with no coordination problems or slurred speech. 4RP 299-302.

## **2. THE INVESTIGATION.**

King County Sheriff's Detective Mike Mellis was assigned to investigate the North Bend robbery. 4RP 397, 399. He had copies

of surveillance photographs from Sterling Savings Bank, though they were not particularly clear. 4RP 399. Mellis forwarded the information he had to the FBI's Bank Robbery Task Force. 4RP 400. A few days later, he received information from one of the task force detectives that there had been a bank robbery in the Ballard neighborhood of Seattle, and that the suspect resembled the North Bend suspect. Id.

Surveillance video from the Ballard Frontier Bank robbery was high quality and showed the robber with clarity. 4RP 400. Detective Mellis distributed still photographs from the Ballard robbery to the police in North Bend, as well as a small local North Bend newspaper. 4RP 401.

On November 15, 2009, King County Sheriff's Deputy Robert Henry was flagged down in the North Bend Safeway parking lot by a man named John Provo. 4RP 362. Provo told Deputy Henry that he had seen the surveillance photographs in the local paper and recognized the bank robber as Warren Richardson. 4RP 363. Provo told Deputy Henry that he had sold Richardson a motorhome several months earlier. Id. According to Provo,

Richardson's son, Harold Richardson,<sup>2</sup> had called Provo that morning. Id. Provo told Deputy Henry where Richardson was currently located. 4RP 364. Deputy Henry passed the information along to Detective Mellis. Id.

On November 16, 2009, after he learned that Richardson was at Harborview Medical Center, Detective Mellis decided to go and see for himself if Richardson looked like the individual in the surveillance photographs. 4RP 401-03. Mellis arrived at Harborview at approximately 8:00 a.m., and was directed to Richardson's room by the nurse, who told him that Richardson was awake and alert. 4RP 404. Mellis also asked for a hospital security guard to accompany him to Richardson's room. 4RP 405.

Harborview Security Officer Craig Compton accompanied Detective Mellis to Richardson's room and stayed in the hall while Mellis first made contact with Richardson; Compton was later present inside the room as a witness to a portion of the conversation. 3RP 263-66. When Detective Mellis first arrived at Richardson's room, Richardson was lying in bed, either sleeping or

---

<sup>2</sup> To avoid confusion with Appellant Richardson, Harold Richardson will be referred to by his first name.

resting.<sup>3</sup> 2RP 65; 4RP 405. Richardson immediately responded when Mellis came in and said hello. 4RP 406. Mellis could see that Richardson closely resembled the robber in the surveillance photographs. Id.

Because Mellis felt that Richardson looked so similar to the robbery suspect, he made the quick decision to tell Richardson that the investigation was over, that he knew Richardson was the robber, and that he wanted to get a statement from him about the details of the crime; Mellis's goal was to gauge Richardson's reaction. 2RP 49-50, 67; 4RP 406-07.

Richardson paused for a moment and then admitted that he had robbed the banks. 4RP 407. Mellis had a short conversation with Richardson, during which time they discussed the stress that Richardson had in his life at the time of the robberies. 2RP 67; 4RP 435. Mellis then called Security Officer Compton into the room and turned on his tape-recorder. 3RP 266; 4RP 407.

After the recorder was on, Mellis advised Richardson of his constitutional rights. Ex. 31, pgs. 2-3. Mellis told Richardson that because he was not under arrest, under normal circumstances

---

<sup>3</sup> Security Officer Compton recalled Richardson sitting up in bed eating breakfast when they arrived. 4RP 266.

Mellis would tell Richardson that he was free to walk away from the conversation, but that because Richardson was in the hospital, Mellis was going to read him his rights anyway. Ex. 31, pg. 1.

During the advisement, Mellis told Richardson:

[Y]ou know, a lot of people think it's black and white. Either they talk to the cops or they don't talk to the cops. But the truth is right there, number six. It's, it's up to you when you talk and when you don't talk. You can start talking, stop talking. It's up to you. Do you understand?

Ex. 31, pg. 2-3. Richardson agreed to give Detective Mellis a statement. Ex. 31, pg. 3-4.

During their conversation, Mellis evaluated Richardson's level of alertness. 4RP 409. He specifically looked to see if Richardson was staying awake, making eye contact, paying attention, and understanding the conversation. 4RP 410. Mellis testified that he could clearly understand Richardson and that Richardson appeared to understand with no difficulty what Mellis was saying to him. Id.

According to Security Officer Compton, Richardson had no difficulty communicating on the morning of November 16, 2009. 2RP 31; 3RP 271-72. Compton felt that Richardson seemed very rational, and that his answers to Detective Mellis's questions made

sense. 2RP 31. Compton observed Richardson eating breakfast during the conversation, feeding himself with no difficulty.

2RP 31-32.

During the taped conversation, Detective Mellis asked Richardson what led up to his decision to rob the bank in North Bend. Ex. 31, pg. 5. Richardson responded with: "Okay. I'll tell you exactly what led me up to it. Place is a cake walk. Anybody could rob that thing." Id. Richardson also described his motivation for the crime:

I thought I'd put on a hat, you know. And I mean I didn't, I was in a hurry. I said, I needed some money now. We're absolutely broke.

Ex. 31, pg. 6. Richardson later told Detective Mellis how the teller had "chumped him good" by giving him all ones and fives. Ex. 31, pg. 6. Richardson recalled that he received a grand total \$335 for his efforts. Ex. 31, pg. 7. When asked if he remembered what he said to the teller in North Bend, Richardson said, "I remember exactly what I said because I wanted to make damn sure I kept it simple." Ex. 31, pg. 8. Richardson talked about how he did not use a "note" and did not have a gun. Ex. 31, pg. 9.

Richardson told Detective Mellis how his sons, Warren Jr. and Harold, were angry with him that he was planning to rob a

bank. Ex. 31, pg. 9-10. He said that they did not want any part of it and that they tried to talk him out of it. Ex. 31, pg. 10. However, Richardson did not listen because he “thought [he] was gonna get a bunch of money.” Id.

Richardson told Detective Mellis that after the North Bend robbery he used a portion of the proceeds to rent a motel somewhere in north Seattle, along a major north/south arterial. Ex. 31, pg. 12. He admitted that he had robbed a Frontier Bank, but could not remember exactly where it was located. Ex. 31, pg. 14. He also did not remember what he was wearing at the time of the Frontier Bank robbery. Id.

Despite his lack of memory as to the location of the bank, his recall of noteworthy facts about the crime was quite detailed. He remembered that he had received more money than in North Bend, and told Detective Mellis how they “threw a joker in the deck,” referring to the dye pack that the teller had given him. Ex. 31, pg. 14-15. Richardson recalled how the dye pack had exploded in his hands while he was “hauling ass, running trying to get away.” Ex. 31, pg. 15. He remembered riffling through the money afterward, saving the bills that were not burned. Id.

Richardson and Detective Mellis also had a conversation about why Richardson was in the hospital:

DET: And then how long have you been here at the hospital?

SUS: This'll be going on my second day.

DET: Okay. And are you here just for, just kind of review or it's just for evaluation?

SUS: No; I'm here for a sodium deficiency, which had me act crazy. And ah, and ah, they keep checking my, my chemical stats.

DET: Um hum.

SUS: Human beings have to have a certain amount of sodium in 'em, and mine got way too low. And it makes you dangerously ah, defunct mentally.

DET: Okay.

SUS: I wish I could claim that happened before I did the robberies.

DET: Well, so this was driven by just being broke, desperation? Is that true?

SUS: Yes; it was. I tried to get a job. I tried everywhere to get a job. I mean I'd rather work any day.

Ex. 31, pg. 16. Detective Mellis also asked Richardson what he thought should happen to him, and Richardson replied, "What should happen to me is I go to jail, and ah, face up for two counts of

robbery three. That's what I deserve. I mean I made sure I, I tailored it to be robbery three." Ex. 31, pg. 17.

After Detective Mellis spoke to Richardson in the hospital, he spoke to his supervisor, and a decision was made to place Richardson under arrest. 4RP 427. Because Richardson was in the hospital, that decision meant that he would be guarded until he was physically able to be released from Harborview and booked into jail. Id.

Detective Mellis later executed a search warrant on Richardson's RV, and discovered that there were reddish pink stains on the entry door handle, bathroom sink and captain's chair. 4RP 427-29. Swabs from the sink and chair stains were analyzed by Forensic Scientist Martin McDermot, who found them to contain the same red dye that was listed on the Materials Safety Data Sheet for the dye pack that exploded outside the Ballard bank. 4RP 430-31, 459-60, 464, 467-68.

### **3. THE TRIAL.**

#### **a. Pretrial Motions.**

Richardson filed a motion to suppress his statements to Detective Mellis. CP 7-16. Detective Mellis and Security Officer Compton testified during a pretrial hearing. 2RP 20-41, 43-92.

Richardson did not testify or present other evidence in support of his motion to suppress. 2RP 94.

Following the pretrial testimony, Richardson argued that his statements were involuntary as a result of his medical condition and the way in which Detective Mellis advised him of his Miranda<sup>4</sup> rights. 2RP 99-104. Richardson argued that Mellis spoke too fast, did not show him a written copy of his rights, and inappropriately “embellished” and clarified certain rights in a manner that inappropriately encouraged him to make a statement. Id.

The court found that the statements were voluntarily made after an appropriate advisement of rights. CP 116-21; 3RP 145-47. The parties agreed to redact the portions of the taped interview that referred to Richardson's prior robbery convictions. 3RP 147-49.

b. The Defense.

As part of his defense at trial, Richardson called his son Harold to testify about the days and weeks surrounding the bank robberies. 5RP 551-85. Harold testified that Richardson was drinking heavily and that by late October 2009, he had stopped eating almost entirely, vomiting frequently. 5RP 564-67. Harold testified about a day where Richardson picked him up in North

---

<sup>4</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Bend in his RV and told him that they were going somewhere. 5RP 570-71. Richardson wanted to leave North Bend all of a sudden and go to Seattle. 5RP 571.

Harold testified that they drove to the "Fremont Ballard area" and parked the RV. 5RP 572-73. Richardson sent Harold to the store for beer, and they stayed there several days. 5RP 572. Harold said Richardson was having dizzy spells during this time, but that he was still drinking alcohol. 5RP 574. During this time, Harold was not with Richardson all of the time, leaving him alone for short periods of time. 5RP 573. One day, Harold returned to find Richardson and the RV gone. 5RP 575.

When Richardson came back, he told Harold that they were "moving" again. 5RP 577. Richardson had a red residue on his hands and on his jacket. 5RP 579, 628. Richardson drove them away erratically, getting the RV high-centered in the road. 5RP 577-78. They left the RV behind, spent the night on the street, and then rented a motel in Lynnwood the next day. 5RP 579, 603, 629-31. They were at the motel for approximately one week. 5RP 589, 603.

According to Harold, while at the motel, Richardson's condition worsened to the point where he could not "even hold

down alcohol anymore.” 5RP 582. Harold said he went out to find a pay phone to call an ambulance, and when he returned Richardson was gone. 5RP 584. Apparently, Richardson was found by concerned citizens who called the medics; Richardson was taken to Stevens Hospital. 5RP 507-08. This occurred on November 14, 2009. 5RP 507.

Dr. Stephen Juergens, a psychiatrist, testified that at the time of the robberies, Richardson was in a “delirium” caused by electrolyte abnormalities. 5RP 494, 499. Juergens testified that due to Richardson’s heavy ingestion of alcohol and ingestion of cocaine and heroin, combined with a lack of food, he had developed a severe hyponatremia [sodium deficiency] that caused him to be “delirious.” 5RP 504, 507-08. Juergens’s testimony was that the “delirium” translated into cognitive impairment and “poor judgment.” 5RP 509.

Although the court instructed the jury on diminished capacity and voluntary intoxication, the jury rejected Richardson’s defense and found him guilty of robbing the two banks. CP 41-42, 48-49.

#### **4. THE SENTENCE.**

Richardson requested an exceptional sentence below the standard range, based upon the statutory mitigating factors found

in RCW 9.94A.535(1)(e) and (g). CP 76-85. Submitting Dr. Juergens's report in support of his request, Richardson argued that his capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law was significantly impaired. CP 77-81, 100-15. He also argued that the standard range, when combined with his age (sixty), was excessive and not a "frugal use of the State's resources." CP 82. Finally, he argued that because his four prior bank robberies (each occurring on different dates in 2001) were resolved under the same cause number, scoring them separately was too harsh. CP 83.

The court stated that it had reviewed Dr. Juergens's report "many times," and that Juergens was clear that Richardson's "delirium" was a result of an electrolyte imbalance directly related to his alcohol intake. Id. As a result, the court found that the mitigating factor cited by the defense, which specifically excludes voluntary use of alcohol and drugs, was unavailable as a basis for an exceptional sentence. 5RP 726. The court sentenced Richardson to a standard range sentence of 129 months incarceration. CP 67-71. Richardson appealed. CP 86-87.

**C. ARGUMENT**

**1. RICHARDSON'S STATEMENTS WERE PROPERLY ADMITTED AT TRIAL.**

Richardson argues that the trial court improperly admitted his statements to Detective Mellis. He contends that the statements were (1) involuntary due to his mental condition at the time they were made, and (2) that Detective Mellis deliberately employed an improper two-step interrogation procedure designed to undermine the requirements of Miranda. Brf. of Appellant at 20-30.

Richardson did not raise an argument in the trial court that Detective Mellis's technique was a deliberate two-part interrogation. Rather, he focused his argument entirely on a claim that Detective Mellis capitalized on his weakened mental condition by advising him of his rights in such a manner that rendered his statements involuntary. Therefore, he has waived the right to raise the "two-part interview process" argument on appeal. Moreover, even if this Court considers that argument, Miranda was not applicable to the interview, as Richardson was not in custody. Nevertheless, Detective Mellis advised Richardson of his constitutional rights in a

manner that was not a deliberate attempt to thwart the requirements of Miranda.

Finally, the trial court properly found that despite Richardson's hospitalization, and his physical and mental condition, he was not coerced by Detective Mellis, and that his statements were made knowingly, intelligently and voluntarily. The statements were properly admitted.

- a. Richardson Has Not Properly Preserved The Argument That Detective Mellis Deliberately Utilized An Improper Two-Step Interview Procedure.

Generally, an issue raised for the first time on appeal is not subject to review unless it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Kirwin, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). Nor may a defendant, for the first time on appeal, assert a theory that is significantly different from that underlying his pretrial suppression motion. United States v. Barrett, 703 F.2d 1076, 1086 n.17 (9th Cir.1983) (court refused to address grounds for suppression not raised at trial level); State v. Baxter, 68 Wn.2d 416, 423, 413 P.2d 638 (1966).

To meet the exception for manifest errors affecting constitutional rights, Richardson must identify a constitutional error and show how the alleged error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Not all constitutional errors are “manifest.” State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). The exception is a narrow one. Kirkman, 159 Wn.2d at 934-35. To demonstrate “manifest” error, an appellant must show actual prejudice. Id. at 935 (citing State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001)). This requires a plausible showing that the claimed constitutional violation had “practical and identifiable consequences.” State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

The purpose of this rule is to encourage “the efficient use of judicial resources.” Scott, 110 Wn.2d at 685. “Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.” State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84, 89-90 (2011) (citing Scott, 110 Wn.2d at 685). See also McFarland, 127 Wn.2d at 333 (allowing appeal of unraised issues

undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources).

Additionally, when a defendant argues a new and different theory of suppression for the first time on appeal, the State may not have had the opportunity to establish the record for the newly raised claim, and the trial court has not had the opportunity to consider the issue. When the record from the trial court is insufficient to review the claim, the claimed error is not manifest and review is unwarranted. WWJ Corp., 138 Wn.2d at 602 (citing McFarland, 127 Wn.2d at 333).

Here, Richardson complained at trial that due to his weakened mental condition, Detective Mellis “overcame his will” by advising him of his rights in a manner that improperly enticed him to speak. He did not argue that Detective Mellis deliberately engaged in an improper two-part interrogation process designed to thwart the requirements of Miranda. Because Richardson’s theory of suppression differed in the trial court, this Court should not consider the new grounds for the first time on appeal.

Richardson has not acknowledged his failure to raise this claim in the trial court, nor has he made any attempt to demonstrate “manifest” constitutional error, which requires a showing of actual

prejudice. Kirkman, 159 Wn.2d at 934-35. He has not met his burden to show how his perceived constitutional violation had “practical and identifiable consequences.” Lynn, 67 Wn. App. at 345. Thus, this Court should refuse to consider his claim.

b. Even If This Court Considers The Argument For The First Time On Appeal, Detective Mellis’s Interview Was Proper.

Even if this Court considers Richardson’s new theory, his statements were still admissible. First, Richardson was not in custody at the time he made the statements. The trial court’s conclusory determination that “Miranda was applicable,” was based on the fact that the parties did not make argument to the contrary. There was no argument about whether Richardson was “in custody,” nor did the court enter a specific oral or written conclusion to that effect. In fact, such a conclusion would be unfounded given the circumstances of the interview. Because a suspect’s custodial status for Miranda purposes is subject to *de novo* review, this Court should conclude that Richardson was not in custody and hold Miranda was inapplicable.

Moreover, because the evidence does not demonstrate that Detective Mellis deliberately delayed advising Richardson of his

rights until after he confessed, this Court should reject Richardson's argument.

i. Richardson was not in custody.

Miranda warnings are required when there is custodial interrogation by a state agent. State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172, amended, 837 P.2d 599 (1992). A trial court's custodial determination is reviewed *de novo*. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

An objective test is used to determine whether a defendant was in custody. "The issue is not whether a reasonable person would believe he or she was not free to leave, but rather whether such a person would believe he was in police custody of the degree associated with formal arrest." State v. Ferguson, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995) (internal quotations removed); see also Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); Post, 118 Wn.2d at 607 (holding that defendant must show some objective facts indicating his freedom of movement or action was restricted or curtailed).

The psychological state of the person being questioned is irrelevant to determining if his freedom of movement was restricted. Yarborough v. Alvarado, 541 U.S. 652, 667, 124 S. Ct. 2140,

158 L. Ed. 2d 938 (2004). By limiting analysis to objective circumstances, the test avoids burdening police with the task of anticipating each suspect's idiosyncrasies and divining how those particular traits may affect that suspect's subjective state of mind. J.D.B. v. North Carolina, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2394, 2402, 180 L. Ed. 2d 310 (2011).

Further, a police officer's expectation of whether the defendant is going to be taken into custody and his subjective belief that the defendant is the focus of the investigation are also irrelevant to the issue. Beckwith v. United States, 425 U.S. 341, 347, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976). Likewise, it is also irrelevant whether the police have probable cause to arrest a defendant (before or during the interview). Berkemer, 468 U.S. at 442.

Thus, in order for Miranda rights to be implicated, a trial court must conclude that the defendant was objectively restrained to a degree associated with formal arrest. Lorenz, 152 Wn.2d at 36-37. To make this determination the court must "examine all of the circumstances surrounding the interrogation." Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994).

Whether a defendant is physically restrained is significant to the determination of custody. Post, 118 Wn.2d at 607; Lorenz, 152 Wn.2d at 36-37. Custody requires the defendant's movement be restricted at the time of questioning, "and necessarily that the police restricted that movement." State v. Butler, 165 Wn. App. 820, 827, 269 P.3d 315 (2012) (citing Lorenz, 152 Wn.2d at 36-67).

Washington courts have held that a suspect's confinement to a hospital bed does not by itself constitute custody. In State v. Kelter, the state supreme court determined that a suspect who had not been arrested or otherwise restrained by the police, but was restricted to a hospital room by his own injuries, was not in custody. 71 Wn.2d 52, 54, 426 P.2d 500 (1967). Likewise, in Butler, the court determined that Miranda did not apply to a situation where the hospitalized defendant was not under guarded arrest when a detective came to interview him in his hospital room after being advised by the defendant's nurse that he was well enough to speak. 165 Wn. App. at 825, 827-28.

Here, like the facts of Butler, Richardson was confined to a hospital bed due to his physical condition when Detective Mellis interviewed him there. Detective Mellis was in plainclothes. 2RP 64. Prior to speaking with Richardson, Detective Mellis

approached the nurse and asked about Richardson's condition. 2RP 49. She directed him to Richardson's room. Id. Detective Mellis had hospital security officer Compton initially accompany him to the room, but Compton left during the interview. 2RP 22, 30, 49. Richardson was not under guarded arrest. 2RP 92. The circumstances under which Richardson made the statements do not reflect that he was restrained by the police at all, much less to a degree associated with formal arrest.

Additionally, what the police say to a defendant is also used to determine whether or not a reasonable person would believe he was in police custody. Lorenz, 152 Wn.2d at 37-38; United States v. Bassignani, 575 F.3d 879, 883 (9th Cir. 2009). Here, Richardson was specifically told that he was not under arrest. Detective Mellis said:

Now you're in kind of a unique position where generally if I'm just visiting a guy and I haven't placed him under, under arrest, I don't have to read you your rights. I would generally say, dude, you're free to walk away from this conversation. But since we're in a hospital and you're laying here, I'm gonna read you your rights anyway.

Ex. 31, pg. 1. This statement would convey to a person in Richardson's position that he was not currently under arrest. Because it is apparent that he was not ordered to speak with police,

a reasonable person in Richardson's position would understand that he was not in custody.

The tone and nature of the interview is also a factor that courts should consider in determining custody. State v. S.J.W., 149 Wn. App. 912, 928, 206 P.3d 355 (2009), aff'd on other grounds, 170 Wn.2d 92, 239 P.3d 568 (2010); Ferguson, 76 Wn. App. at 568. Where police are aggressive or accusatory in nature, courts consider that as a factor that weighs in favor of custody. Bassignani, 575 F.3d at 884. However, even if officers confront a defendant with accusations, if they take an open or friendly tone, and the defendant is an active participant in the conversation, this factor weighs against finding he was in custody. Bassignani, 575 F.3d at 884-85.

Here, although Detective Mellis made it clear from the beginning that he believed Richardson was the correct suspect, he presented himself as approachable and open, just wanting to find out Richardson's side of the story. CP 123-47. In fact, during the interview Mellis found a straw for Richardson to assist him with drinking, and specifically reassured Richardson that even if he was ultimately arrested, he would not be manhandled. CP 135, 143; 2RP 89. Richardson was likewise an active participant in the

conversation and volunteered much information absent any intensive probing. CP 123-47. Therefore, the entire tone of the interview would signal to a reasonable person in Richardson's position that he was not in custody.

Additionally, the length of the interrogation, while not determinative, is a factor that federal courts have considered in this inquiry. Bassignani, 575 F.3d at 883. In general, an interview that exceeds two and a half hours may support a finding of custody, but a 45-minute or "over an hour" interview will weigh against custody. Id. at 886. However, even a five hour interview may be found non-custodial if other factors weigh against custody. Lorenz, 152 Wn.2d at 36.

The entire recording at issue here is approximately 37 minutes. CP 123, 147. Mellis spoke to Richardson in his room for just a few short minutes before turning the recording on. 2RP 26. This length is on the shorter end of the spectrum and thus weighs against a finding of custody.

In sum, the totality of the circumstances demonstrates that a reasonable person in Richardson's position would not have felt that he was being restrained to a degree associated with formal arrest. Therefore, this Court should find that, despite the trial court's

determination that "Miranda was applicable," Richardson was not in custody when interviewed by Detective Mellis in the hospital. As such, his statements were properly admitted.

- ii. Even if Richardson was "in custody," the interview was not an improper two-part interrogation.

Richardson argues that Detective Mellis deliberately used an improper "two-part" interrogation process designed to thwart the requirements of Miranda. As demonstrated above, Richardson was not in custody, and as such, Detective Mellis was not required to advise him of his constitutional rights. However, even assuming that Detective Mellis was required to do so, he advised Richardson in an appropriate manner.

The police must advise a suspect of his constitutional rights prior to custodial interrogation. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citing State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988)).

In Missouri v. Seibert, interrogating officers deliberately conducted custodial questioning without advising the suspect of her Miranda rights, received a confession, and then stopped, advised her of her rights and went on to acquire a second, post-waiver confession. 542 U.S. 600, 604-06, 124 S. Ct. 2601, 159 L. Ed. 2d

643 (2004). In Seibert, the interrogating officer testified that he had intentionally employed such a “two-part” interview process. 542 U.S. at 605-06. He testified that he had been taught the procedure—ask questions first, give the warnings, and then repeat the questions until he received the same answers given prior to the warnings. Id.

From a fragmented opinion, the rule to be gleaned from Seibert is that “confessions made after a deliberate, objectively ineffective mid-stream warning” are to be excluded.” State v. Hickman, 157 Wn.2d 767, 776, 238 P.3d 1240 (2010) (quoting United States v. Williams, 435 F.3d 1148, 1157-58 (9<sup>th</sup> Cir. 2006)) [emphasis supplied]. In determining whether the police deliberately withheld the warnings, courts “are to consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the Miranda warning.” Williams, 435 F.3d at 1158.

Where the court finds no deliberateness, the admissibility of the post-warning statements are governed by Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). Seibert, 542 U.S. at 622 (Kennedy, J., concurring). Under Elstad, if the

post-warning statements are non-coerced and voluntary, they are admissible. Elstad, 470 U.S. at 318.

It is clear from the available objective evidence that Detective Mellis did not deliberately attempt to sidestep his responsibilities under Miranda.<sup>5</sup> When he went to the hospital to see Richardson, his goal was to compare Richardson's appearance with the surveillance photographs he had received. 2RP 67. Once he arrived and saw the distinct resemblance, Mellis made the quick decision to see how Richardson would react if Mellis acted as if his investigation were complete. Id. When Richardson immediately admitted his involvement in the robberies, Detective Mellis decided to get further details, specifically about whether Richardson was armed or not, during a tape-recorded interview. CP 126; 2RP 52, 72-73.

The pre-warning questioning period lasted only a "couple of minutes." 2RP 26. In fact, only ten minutes passed from the time Detective Mellis arrived at Richardson's room until the time he had

---

<sup>5</sup> However, because Richardson did not raise this issue in the trial court, it is fair to assume that the State did not develop the record to the extent it would have, had Richardson raised the claim. This illustrates why this Court should refuse to address this claim raised for the first time on appeal. "If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted. WWJ Corp., 138 Wn.2d at 602 (citing McFarland, 127 Wn.2d at 333).

completed advising Richardson of his rights on tape. CP 126. Prior to turning on the tape, Detective Mellis had told Richardson that he wanted to get a statement about additional details, including whether he was armed or not. CP 126. Also prior to turning on the recorder, Detective Mellis chatted with Richardson about the “stresses in his life.” CP 123; 2RP 66-67. The questioning that followed the advisement of rights was much lengthier and detailed, lasting 37 minutes. CP 123-47.

Richardson’s state of mind after being advised of his rights is also telling. After Mellis turned on the recorder and went through the constitutional rights, and when initially asked if he was willing to give a statement, Richardson responded with, “I’ve been debating about it all through this conversation.” CP 126. This is a clear signal that the warnings were an effective advisement, despite Richardson having made some earlier admissions.

The totality of the objective evidence leads to a conclusion that Mellis’s interview process was not deliberately segmented into two parts in an attempt to thwart the requirements of Miranda.

Moreover, the subjective evidence leads to the same conclusion. Detective Mellis specifically testified that Richardson

was not in custody, and that he only advised him of his rights as a precaution. 2RP 91. Mellis testified:

Mr. Richardson was not in custody. It was very clear to me that I didn't know what was going to happen with it. And even if he confessed to the world about robbing ten banks, my state of mind at that time was that if we can't arrange for – well, there's just as equal a chance that he will be left to lie there in his hospital bed, as he might get booked or guarded, pending booking after his release. And I wasn't going to make that decision until after consulting with my supervisor, which didn't occur until after the statement was taken.

2RP 92.

State v. Hickman, upon which Richardson relies, is distinguishable. During an investigation for failing to register as a sex offender, the detective specifically told Hickman that he would interview him in two parts; the first part was “an administrative interview” to get him properly registered, and the second was an interview regarding the criminal investigation. 157 Wn.2d at 770. During the administrative interview, Hickman was asked his current address (which was necessarily an admission that he had not properly registered). Id. It was only after the “administrative” interview that the detective deliberately moved to the “criminal” portion of the interview and advised Hickman of his rights. Id.

For all of the reasons noted above, Detective Mellis did not deliberately attempt to withhold the advisement of Miranda warnings in order to gain a confession. It is of no consequence that Richardson did in fact initially make some inculpatory remarks; rather, it is the officer's deliberate attempt to avoid Miranda that renders such statements inadmissible. Seibert, 542 U.S. at 615-16.

- c. The Trial Court Properly Determined That Richardson's Statements Were Voluntarily Made.

A trial court's findings of fact entered after a hearing on the admissibility of a defendant's confession are verities on appeal if supported by substantial evidence in the record. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

"Consequently, when reviewing a trial court's conclusion of voluntariness, an appellate court determines 'whether there is substantial evidence in the record from which the trial court could have found that the confession was voluntary by a preponderance of the evidence.'" State v. Rafay, 168 Wn. App. 734, 757-58, 285 P.3d 83 (2012) (quoting Broadaway, 133 Wn.2d at 129).

Voluntariness depends on the totality of the circumstances, including whether there was any express or implied coercion, the exertion of any improper influence, the length and location of the

interview, the defendant's maturity, education, physical and mental condition, and whether the police have advised the suspect of his rights. Rafay, 168 Wn. App. at 758 (citing State v. Unga, 165 Wn.2d 95, 101, 196 P.3d 645 (2008)). If the decision to speak "is a product of the suspect's own balancing of competing considerations, the confession is voluntary." Rafay, 168 Wn. App. at 758 (quoting Unga, 165 Wn.2d at 102).

Substantial evidence in the record supports the court's finding of voluntariness. When Detective Mellis arrived at the hospital on November 16, 2009,<sup>6</sup> he first spoke to the nurse to determine "what [Richardson's] level of consciousness was." 2RP 48-49. When Mellis arrived at Richardson's room, Richardson was lying in bed, either sleeping or resting. 2RP 65. Mellis testified that as he introduced himself to Richardson and told him why he was there, he was "looking to see if [Richardson]'s awake, conscious, recognizes me, able to communicate with me." 2RP 50. He assessed Richardson's ability to communicate. Id.

Mellis testified that Richardson was awake and alert. 2RP 50. He could clearly understand Richardson and Richardson

---

<sup>6</sup> This was two days after Richardson was taken by ambulance to Stevens Hospital. 5RP 507.

appeared to have to no difficulty understanding Mellis. 2RP 50-51. Mellis did not have to ask Richardson to repeat himself, nor did Richardson repeatedly ask the same of Mellis. 2RP 51. Although Richardson was connected to an IV tube of some sort, he was engaging and had no trouble making eye contact. Id.

Security Officer Compton also testified that Richardson had no apparent cognitive issues. 2RP 31-32. Compton felt that Richardson seemed very rational, and that his answers to Detective Mellis's questions made sense. 2RP 31. Compton observed Richardson eating breakfast during the conversation, feeding himself with no difficulty. 2RP 31-32.

Richardson did not put on any evidence to rebut this testimony. Rather, he argued that the way in which Mellis advised him of his rights, combined with his weakened mental condition, rendered his statements involuntary. 2RP 99-104. In his argument to the trial court, Richardson cited to the same portions of the recorded interview as he does on appeal to argue that he was too confused to waive his rights.<sup>7</sup> 2RP 103. The court denied Richardson's motion to suppress, finding that Detective Mellis had

---

<sup>7</sup> Richardson points to statements he made during the interview, including how "his brain ain't working very good right now," and also points to details about the crimes that he could not remember. Brf. of Appellant at 24-25.

appropriately explained Richardson's constitutional rights to him, and that Richardson understood those rights. 3RP 145-46. The court found that, "When there was a question in the officer's mind as to whether a right was understood, he asked if [Richardson] needed it reread to him, and it was." 3RP 146. The court stated in its oral findings that although there was evidence that Richardson's memory was not "100 percent" as to certain details of the bank robberies, at the time the statement was made, he "was reasoning to the point where he could identify a possible defense and then decide . . . it couldn't be a defense because it hadn't occurred." 3RP 145-46.

The court also entered written findings of fact that stated, "The defendant was rational and coherent when he spoke to Detective Mellis in his hospital room." CP 121. The court found that Richardson had the capacity to understand and waive his rights, and that he did so voluntarily. Id. The court determined that Detective Mellis's actions did not coerce or overcome Richardson's will. Id.

The trial court's ruling was supported by substantial evidence, and this Court should hold the Richardson's statements were voluntarily made.

**2. RICHARDSON HAS FAILED TO ESTABLISH THAT THE JURY CONSIDERED EXTRINSIC EVIDENCE.**

Consideration of extrinsic evidence by a jury is misconduct and may be grounds for a new trial. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (citing State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994)). Extrinsic evidence is that which “is *outside all the evidence* admitted at trial, either orally or by document.” Balisok, 123 Wn.2d at 118 (emphasis in original) (citing Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990)). Extrinsic evidence is improper “because it is not subject to objection, cross-examination, explanation or rebuttal.” Balisok, 123 Wn.2d at 118 (citing Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973)).

However, “[a] strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” Balisok, 123 Wn.2d at 117-18 (citing Richards, 59 Wn. App. at 271-72).

Additionally, a new trial is only warranted when the defendant can demonstrate prejudice to the extent that only a new

trial can insure fairness. Pete, 152 Wn.2d at 552 (citing State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997)).

Richardson has failed to show that the jury actually considered extrinsic evidence. At trial, Richardson objected to the jurors being allowed unfettered access during deliberations to his recorded statement and the video surveillance from the robberies. 4RP 477-78. He asked that the jury be allowed to “watch the cd” only once, in the presence of the bailiff. 4RP 478. The court determined that the jury would be allowed to watch the video surveillance (Exhibit 27) and listen to Richardson’s redacted statement (Exhibit 29) only one time each. CP 170; 4RP 479. With respect to the video surveillance, Exhibit 27, the court provided the jury with a written instruction to that effect.<sup>8</sup> CP 46. Additionally, the court did not require the bailiff to be present when the jury considered the recordings, presuming that the jury would follow the court’s instructions. Id.

Exhibit 29 contains the properly redacted audio file of Richardson’s taped statement to Detective Mellis. Ex. 29.

---

<sup>8</sup> Although the court invited Richardson to draft jury instructions regarding the limitations on its consideration of this evidence, Richardson did not do so. 5RP 642. Thus, the trial court drafted its own, but apparently neglected to inform the jury it could only listen to Exhibit 29 one time. CP 45-47.

Although Exhibit 27 contains the video surveillance from the bank,<sup>9</sup> it also contains an audio file of the defendant's statement in un-redacted form. Ex. 27. More specifically, Exhibit 27 is a DVD that contains a folder entitled "Frontier Bank Ballard Branch video and stills." The bank's video surveillance is located within that folder. Ex. 27. Exhibit 27 also contains folders entitled "Digital StatementsWarren Richardson." Richardson's un-redacted recorded statement is contained in that folder. Ex. 27.

The jury asked to listen to Richardson's recorded statement (Exhibit 29) at 11:28 a.m. on July 20, 2011. CP 163. The jury then went to lunch at 12:00 p.m. Id. At 1:00 p.m., the jury resumed deliberations. CP 163. Then, at 1:32 p.m., the jury asked to view the surveillance video from the bank (Exhibit 27). Id. It was only 20 minutes later, at 1:52 p.m., that the jury told the bailiff that it had reached a verdict. Id.

The defendant's un-redacted statement is approximately 37 minutes total, in two separate audio files. CP 123, 147; Ex. 27. Given the length of the defendant's un-redacted statement, and the

---

<sup>9</sup> Richardson claims in his brief that Exhibit 27 does not contain the video surveillance. Brf. of Appellant at 13. He is mistaken, as it does contain the video surveillance. Ex. 27. However, it also contains Richardson's un-redacted recorded statement, as well as the Materials Safety Data Sheet on the dye pack, and Security Officer Compton's statement. Ex. 27.

fact that it would have taken some time for the bailiff to retrieve the exhibit and a computer upon which to play it, it is highly unlikely that the jury actually considered the defendant's un-redacted statement, at least in its entirety.

A total of 20 minutes elapsed from the time that the jurors asked to see the video surveillance and when they notified the bailiff that they had reached a verdict. CP 163. It is fair to assume that the jury actually viewed the surveillance video that they were interested in and asked to see. That would have taken some time. In order for the jury to have considered the extrinsic evidence, it would have had to wait for the bailiff to retrieve the exhibit and computer, watch the surveillance video, listen to Richardson's un-redacted statement, fill in the verdict forms, and call for the bailiff, all within the 20-minute time period that the clerk's minutes reflect. Such a scenario is highly unlikely.

Regardless, there is nothing in the record, save for sheer speculation, that the jury actually heard or considered Richardson's un-redacted statement. Richardson's claims to the contrary<sup>10</sup> are

---

<sup>10</sup> Richardson states, "[T]he jury heard [his] discussion of his past bank robberies and learned that he had been in prison and on parole for those crimes." Brf. of Appellant at 13. He also claims that "through [exhibit 27] the jury learned for the first time that [he] had robbed several banks in 2000, was convicted, went to prison, and was on parole." Brf. of Appellant at 11.

not supported by any citation to the record. Should Richardson later be able to gather evidence outside the record that would support his claim, he is free to bring a personal restraint petition. However, he has failed on direct appeal to make the “affirmative and strong” showing of jury misconduct that is required to overcome the policy that favors stable and secure verdicts.

**3. THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED RICHARDSON’S REQUEST FOR AN EXCEPTIONAL SENTENCE.**

Richardson argues that the sentencing court erroneously believed that it did not have the ability to impose an exceptional sentence based on the mitigating factor that “his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired.” However, because any impairment on Richardson’s part was brought on by his voluntary use of drugs or alcohol, the sentencing court properly determined that was an inappropriate basis for an exceptional sentence.

Generally, a defendant may not appeal the imposition of a standard range sentence unless the court refuses to exercise its discretion at all. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005). See also State v. Garcia-Martinez, 88 Wn. App.

322, 330, 944 P.2d 1104 (1997) (a court refuses to exercise its discretion in rejecting a request for an exceptional sentence if it categorically refuses to impose an exceptional sentence under any circumstances).

Remand may be appropriate if the sentencing court erroneously believed that it did not have the discretion to impose an exceptional sentence, and it is unclear whether the court would have imposed the lesser sentence in the absence of its erroneous belief. See State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002) (remand appropriate when sentencing court expressed desire to impose an exceptional sentence but erroneously believed it could not legally do so). However, if the court properly considers whether there is a basis to impose a sentence below the standard range, and concludes that such sentence is factually or legally unsupportable, the defendant cannot appeal. Garcia-Martinez, 88 Wn. App. at 330.

RCW 9.94A.535(1)(e) allows the court to impose an exceptional sentence if it finds that:

The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

The voluntary use of alcohol, regardless of whether the defendant is an alcoholic, is not an appropriate basis for an exceptional sentence. State v. Allert, 117 Wn.2d 156, 815 P.2d 752 (1991). Additionally, the effects of alcohol combined with other conditions, such as depression, is an insufficient basis for an exceptional sentence if there is no evidence that the other condition(s), independently of the alcohol, caused the impairment. Id. at 166-67.

Here, the trial court pointed to Dr. Juergens's conclusion that Richardson's "delirium" was due to his electrolyte imbalance, which was secondary to alcohol intake, and decreased food intake and vomiting related to his alcohol use. CP 5RP 725. In fact, Juergens had specifically concluded:

I believe the patient did suffer from a delirium related to hyponatremia, hypokalemia, hypochloremia that occurred in the context of a lack of intake of food and heavy alcohol intake as well as the effects of use of cocaine and heroin. He is alcohol, heroin and cocaine dependent; however, I believe that it was the delirium related to the electrolyte abnormalities that was related to his lack of intake of food, the intake of alcohol and the vomiting that he had after drinking the alcohol that caused the delirium and this led to the behavior of the bank robberies.

CP 114.

In denying Richardson's request for an exceptional sentence, the court stated:

He's an alcoholic. He was drinking to excess and was not keeping food down, not taking food in, was choosing to drink instead of to eat, and was in a severe alcoholic kind of binge for a long period of time.

5RP 725-26. Later the court stated:

I don't think you can drink to the point where you have these physiological problems and then say, okay, if I was just drunk, I know this would not be a basis for an exceptional sentence downward, but because I drank so much that it affected me physically and caused me to have the hyponatremia, et cetera and so forth, now you should give me an exceptional sentence downward. . . . I think it's the same thing.

5RP 726.

It is clear from the record that the sentencing court determined that Richardson's voluntary use of alcohol was the cause of any physical or mental condition that may have impaired his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. 5RP 725-27. Therefore, under the statute, the basis for the exceptional sentence that Richardson relied on was improper. RCW 9.94A.535(1)(e).

On appeal, Richardson argues that the court failed to appreciate that it was his physical condition (electrolyte imbalance) that impaired his ability to act within the confines of the law. Brf. of Appellant at 17-19. His argument ignores that his physical (and

mental) condition was brought about by his voluntary use of drugs and alcohol. That is exactly the scenario contemplated by the legislature when it specifically excluded drug and alcohol use from the mitigating factor found in RCW 9.94A.535(1)(e).

It will necessarily always be a person's mental and/or physical condition that substantially impairs their ability to appreciate the wrongfulness of their actions or to conform their conduct to the requirements of the law. It is when that physical or mental condition is brought about by the voluntary use of alcohol and drugs that the circumstance ceases to be mitigating.

The court properly exercised its discretion when it found that Richardson's voluntary use of alcohol and drugs rendered the mitigating circumstance he cited inapplicable. The court properly denied his request for an exceptional sentence.

**D. CONCLUSION**

For the reasons stated above, this Court should find Richardson's statements to Detective Mellis were voluntarily made and properly admitted, that Richardson has failed to establish his claim that the jury considered extrinsic evidence, and that the

sentencing court properly denied his request for an exceptional sentence.

DATED this 3 day of October, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
AMY R. MECKLING, WSBA #28274  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

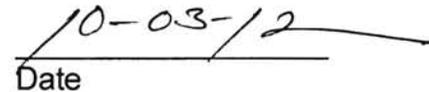
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. WARREN RICHARDSON II, Cause No. 67746-2-I, in the Court of Appeals, Division I, for the State of Washington.

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



\_\_\_\_\_  
Name  
Done in Seattle, Washington



\_\_\_\_\_  
Date