67746-2

67746-2 KW

No. 67746-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

WARREN RICHARDSON II,

Appellant.

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

BRIEF OF APPELLANT

COURT OF APPEALS
STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

1. Mr. Richardson did not receive a fair trial because the jury was mistakenly given a prejudicial exhibit during deliberations that had not been admitted at trial.

2. The trial court erred by concluding it could not give Mr. Richardson an exceptional sentence below the standard sentence range based upon his failed diminished capacity defense.

3. The trial court erred by admitting Mr. Richardson's statement to Detective Mellis.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is reversible error for the court to allow items that were not admitted into evidence to go to the jury for their consideration during deliberations. Mr. Richardson was charged with two counts of bank robbery, and the trial court redacted the portions of Mr. Richardson's tape-recorded statement to Detective Mellis that referenced Mr. Richardson's four prior bank robbery convictions, and the redacted statement was admitted as evidence. Unknown to the court and parties, however, a CD containing the un-redacted confession was given to the jury in lieu of a different exhibit, and the jury therefore had access to the un-redacted CD in the jury room. Must Mr. Richardson's conviction be reversed because the

defense had no opportunity to counter the un-redacted statement and it prejudiced Mr. Richardson's diminished capacity defense?

2. The court may sentence an offender below the standard sentence range if it finds a mitigating factor by a preponderance of the evidence and the mitigating factor is a substantial and compelling reason to justify the downward departure. RCW 9.94A.535(1)(e) lists the defendant's diminished capacity to understand the wrongfulness of his conduct or to conform his conduct to the requirements of the law as a mitigating factor, but excludes the voluntary use of alcohol or drugs. The sentencing court found that Mr. Richardson was suffering from delirium caused by hyponatremia when he committed the two robberies. This condition was caused by Mr. Richardson's lack of food or water, the court but concluded she could not give him an exceptional sentence because the medical condition was caused by his excessive use of alcohol. Was the sentencing court's legal conclusion that an exceptional sentence was forbidden by statute erroneous?

3. The state and federal constitutions guarantee a suspect the right not to incriminate himself. U.S. Const. amend. V, XIV; Const. art. I, § 9. Prior to admission of a defendant's custodial

statement, the court must determine if the defendant knowingly, intelligently and voluntarily waived his constitutional rights to remain silent and to consult with an attorney. Mr. Richardson was interviewed in the intensive care unit of a hospital while he was recovering from a disease which caused delirium. He informed the detective that he had low sodium levels and his brain was not working right, and he was unable to answer many of the detective's simple questions about the crimes.

a. In light of Mr. Richardson's diminished ability to reason, did the State prove that Mr. Richardson's wavier of his constitutional right to remain silent was knowing and intelligent and voluntary?

b. A law enforcement officer may not interview a suspect, obtain a confession, and then inform him of his constitutional rights and take another statement. Missouri v. Seibert, 542 U.S. 604 (2004). Detective Mellis utilized this question-first technique and did not inform Mr. Richardson that his initial oral statements could not be used against him. Given this improper interrogation technique, did the State prove that Mr. Richardson's wavier of his constitutional right to remain silent was knowing and intelligent and voluntary?

C. STATEMENT OF THE CASE

Warren Richardson II appeals from his sentence and convictions for two counts of bank robbery occurring on November 6, 2009, in North Bend and on November 9, 2009, in the Ballard area of Seattle. CP 86-96.

Mr. Richardson is an electrician who had been sober for many years while he raised his family, but relapsed in 2007.[1] 4RP 555-556, 558, 624. In the summer of 2009, Mr. Richardson reacted to the death of his father and his step-mother and resulting problems with his wife and brother by drinking heavily. 4RP 559-61, 564-65; CP 106-07.

By the end of October and early November, Mr. Richardson was so intent on drinking alcohol that he had stopped eating or consuming any other fluids. 4RP 565-67. Mr. Richardson's adult son Harold stayed with his father because his physical symptoms became so extreme that Harold feared his father was going to die.[2] 4RP 567-68, 571-72, 573-74, 575-76, 588, 608. Mr. Richardson was shaking uncontrollably, having convulsions, talking and behaving

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[1] During the summer of 2008 and the beginning of the summer of 2009, Mr. Richardson did not drink because he worked for a company located in a native Alaskan village where no alcohol was available. 4RP 557, 559. 596-97.

[2] Harold Richardson is referred to by his first name to distinguish him from his father.

erratically; eventually he was incontinent and incapable of taking a few steps without falling. 4RP 567-68, 571-72, 573-76, 580-82, 604-06. Increasingly disconnected from reality, Mr. Richardson refused to seek medical attention. 4RP 588-89, 636-37.

Eventually, Mr. Richardson was nonresponsive after a severe convulsion, and Harold called 911 from a pay telephone. 4RP 583, 589, 594, 634. An ambulance found Mr. Richardson nude outside the motel room where the two had been staying.[3] 4RP 497, 583-84. Mr. Richardson was taken to the Stevens Hospital emergency room on November 14, 2009. CP 102.

Hospital test results revealed that Mr. Richardson was dehydrated and depleted of necessary electrolytes; he had very low levels of sodium (hyponatremia), chloride (hypochloremia), and potassium (hypokalemia). 4RP 499. The dehydration and loss of electrolytes was probably related to Mr. Richardson's use of alcohol and the related vomiting and inability to eat or drink. 4RP 499-500. Mr. Richardson had no alcohol in his blood, but a urine test was positive for cocaine and opiates. 4RP 498.

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[3] Harold had been washing his father's clothes because Mr. Richardson had soiled them. 4RP 583-84, 594-95, 606.

As a result of these physical problems, Mr. Richardson suffered from delirium. He had difficulty with decision-making, was not aware of his environment, had a hard time staying focused, and may have suffered from psychosis. 4RP 500-01, 501-02.

A Sterling Savings Bank in North Bend was robbed on November 6, 2009. 2RP 185. A man approached teller Christine McCartney and told her he was there to rob her. 2RP 185. Ms. McCartney asked if he was kidding, and the man told her to just give him the money. 2RP 185-86, 211. Ms. McCartney tried to stall and had difficulty getting the money because her hands were shaking, but when the man warned her not to make him get his gun out she put the cash on the counter. 2RP 186-88, 199-201. The man was surprised how little cash there was, but she explained it was Friday night and that was all that was left. 2RP 188, 205, 213-14. The man took the money and left. 2RP 188. Ms. McCartney described the man as about 55 years old with gray hair and a stubby beard but did not identify Mr. Richardson as the robber. 2RP 191.

The Ballard branch of Frontier Bank was robbed on November 9, 2009, when a man entered the bank and asked teller Krisna Mohler to give him all of her 10's, 20's and all of your

money.[4] 3RP 287-90, 301, 320-22. The man was between the ages of 50 to 60 and he had white tape on his fingers. 3RP 288, 292. Bank manager Tamara Berft described him as "scruffy." 3RP 330, 332. Ms. Mohler gave the man her 100's, 50's, 20's, and 10's, which included bills that trigger the bank alarm system and a set of 20's that contained a dye pack. 3RP 296-97, 302-03. The bank robber quickly left, one of the employees observed the dye pack go off when he was in the parking lot. 3RP 325. Ms. Mohler and Ms. Berft identified Mr. Richardson as the robber. 3RP 312, 332.

In the course of investigating the North Bend bank robbery, King County Sheriff's Detective Mike Mellis obtained photographs from a Ballard bank robbery from an FBI task force because of similarities between the persons depicted in surveillance photographs from the two robbers. 3RP 397, 399-400. Because the Ballard photographs were of good quality, the detective had them published in the North Bend area. 3RP 400-02. He received several possible names for the person depicted in the photograph, and one of the names was Mr. Richardson's. 3RP 363.

On November 16, Detective Mellis located Mr. Richardson asleep and attached to an IV in the intensive care unit of

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[4] The Frontier Bank is now a Union Bank. 3RP 287.

Harborview Hospital.[5] 2RP 275-76; 3RP 403-04, 447, 541. Mr. Richardson had noticeable abrasions and bruising, and he complained of chest pain and a hurt knee. 3RP 440-41. The detective found no evidence of burns caused by a dye pack. 3RP 440.

The detective told Mr. Richardson that he was confident that Mr. Richardson had robbed two banks, but wanted to clarify whether Mr. Richardson was armed or threatened to use a weapon. 3RP 406, 435-36. Detective Mellis referred to this technique as "a ruse" because he was simply there to see if Mr. Richardson looked like the men in the photographs. 3RP 406-07. According to the detective, Mr. Richardson admitted he robbed two banks, one in North Bend and one somewhere in north Seattle. 3RP 407.

The detective then turned on a tape recorder and informed Mr. Richardson of his constitutional rights to remain silent. 2RP 266-67; 3RP 407-08. The detective again pretended to be interested in whether Mr. Richardson was armed and obtained details about the two robberies. 3RP 408-09, 412; Ex. 31 at 3-4, 8-9. During the course of the interview, Mr. Richardson explained

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[5] Mr. Richardson was transferred from Stevens to Harborview Hospital because of concerns he may have suffered a subarachnoid hemorrhage. CP 103.

that he was in the hospital for low sodium levels and apologized that his brain was not working right. Ex. 31 at 11, 12, 14, 16. The detective had to provide certain details and show Mr. Richardson photographs in order to complete the statement. 3RP 436-37. Mr. Richardson was unable to provide simple information such as the name of either bank, the location of the second robbery, and what he was wearing. 3RP 436-37, 438-39, 449-50; Ex. 31 at 5-6, 9, 10-11, 14.

Detective Mellis later located and searched the RV Mr. Richardson said he had used to get to the robberies. 3RP 427. The detective did not locate cash or clothing similar to that seen in the bank photographs. 3RP 429. Later forensic testing revealed the presence of the type of red dye used in the bank's dye pack on a swab Detective Mellis took from a chair and the bathroom sink. 3RP 46, 466-67.

At a trial before the Honorable Laura Gene Middaugh, Mr. Richardson raised a diminished capacity defense through psychiatrist Steven Juergens and Mr. Richardson's son Harold. 4RP 494-638. The jury convicted Mr. Richardson as charged. CP 48-49; 4RP 701. Mr. Richardson requested an exceptional sentence below the standard sentence range based upon his failed

diminished capacity defense, but the court found the mitigating factor was not available because Mr. Richardson's condition was caused by his voluntary use of alcohol. CP 76-85, 97-115; 4RP 724-28. Mr. Richardson was sentenced to concurrent 129 month terms for each robbery. CP 70. This appeal follows. CP 86-96.

D. ARGUMENT

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

The Washington Supreme Court has consistently held it is reversible error for the court to allow items that were not admitted as evidence to go to the jury room for their consideration during deliberations. State v. Pete, 152 Wn.2d 546, 554-55, 98 P.3d 803 (2004) (defendant's written statement and a law enforcement officer's written report); State v. Rinkes, 70 Wn.2d 854, 425 P.2d 658 (1967) (newspaper editorial decrying leniency of county superior court judges' sentencing practices); State v. Boggs, 33 Wn.2d 921, 933, 207 P.2d 743 (1949) (bullet removed from deceased's clothing and rifle allegedly used by defendant), overruled on other grounds, State v. Parr, 93 Wn.2d 95 (1980). During its deliberations, the jury was provided with a CD of Mr. Richardson's un-redacted statement to Detective Mellis which was

not admitted at trial because of the prejudice to the defense. Through this exhibit, the jury learned for the first time that Mr. Richardson had robbed several banks in 2000, was convicted, went to prison, and was on parole. Mr. Richardson's conviction must therefore be reversed and remanded for a new trial.

a. During deliberations, the jury had access to a CD of Mr. Richardson's un-redacted statement that was not admitted at trial. Prior to trial, the court found that Mr. Richardson validly waived his constitutional rights to counsel and to remain silent prior to making a tape-recorded statement to Detective Mellis at Harborview Hospital. 2RP 145-47. The State, however, agreed with defense counsel's motion to redact portions of the statement where Mr. Richardson referenced prior robbery convictions. 1RP 7-9; 2RP 147-48. The trial court granted the motion.[6] 2RP 148-49.

The State prepared an exhibit based upon the redactions requested by defense counsel, and the statement was admitted as evidence and played to the jury. 2RP 167-68; 3RP 388-90, 416-17; Ex. 29. Upon hearing the exhibit, however, defense counsel moved for a mistrial based upon ineffective assistance of counsel because

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[6] The court denied the defense motion to exclude the portions of the statement where Mr. Richardson discussed being careful that he only committed a "robbery three." 2RP 167-68, 170-71.

she had missed two references to the prior robberies and being in jail before when she provided her proposed redactions to the prosecutor. 3RP 418-22. The court denied the motion for a mistrial, but agreed that the statements should have been redacted. 3RP 422-23. The State then made the additional redactions to a new CD, marked as Exhibit 29, which was provided to the jury in deliberations. 4RP 643-44, 699; Ex. 29.[7] The court informed the jury that there had been an error in the exhibit they had listened to in court and instructed the jury to ignore information not in the new exhibit. 4RP 659-60; CP 47.

In addition to the CD of Mr. Richardson's statement, the court admitted a CD of the surveillance video from Frontier Bank as Exhibit 27. 3RP 335-37; 469. Mr. Richardson objected to providing the jury with unlimited access to Exhibits 27 and 29 and asked that the jury only be permitted to view or hear the exhibits in open court. 3RP 385-86. The court denied this request and allowed the jury to ask the bailiff for the exhibits and a CD player so that they could view the exhibits in the jury room. CP 46-47; 3RP 385-88; 4RP 698.

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[7] Exhibit 31 is a transcript of Exhibit 29 which was admitted as an illustrative exhibit. 4RP 645. It will be designed to this Court for the court's convenience.

Unknown to the parties, however, Exhibit 27 does not contain the bank surveillance footage, but is an un-redacted copy of Mr. Richardson's statement to Detective Mellis.[8] Thus, the jury heard Mr. Richardson's discussion of his past bank robberies and learned that he had been in prison and on parole for those crimes, even though the information had been redacted upon agreement of the parties and order of the court. Ex. 27 at Track #1, 05:20-05:55; 12:00-12:05; 13:22-13:31; 24:32-25:02; 26:58-27:06; 27:30-27:42; at Track #2, 03:02-03:20; Pretrial Ex. 2 at pages 5, 10, 11, 18, 20, 24.[9] The references include: (1) Mr. Richardson's committed four bank robberies in 2000 and was caught in 2001 (Ex. 27, Track #1 at 05:20-05:55; Track #2 at 03:02-03:20); (2) Mr. Richardson's statement that he avoided putting his hands in his pockets or pointing a finger at the teller "because that's what got me in trouble the last time (Ex. 27, Track #1 at 12:00-12:05); (3) Mr. Richardson's statement that he expected to get more money from the robberies because "I used to get a bunch of money" (Ex. 27, Track #1 at 13:22-13:31); (4) that Mr. Richardson tailored the crime to be a "robbery three" based upon his prior experience and his review of the

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[8] The exhibit is marked, "KCSO 09-276-995, DPA Copy, Frontier Bank Video," and the parties were not present when the jury viewed it.

[9] PreTrial Ex. 2 is a transcript of the complete recorded statement.

sentencing guidelines while in prison (Ex. 27, Track #1 at 24:32-25:02); (5) that Mr. Richardson's parole officer made it very clear he could never own a firearm (Ex. 27, Track #1 at 26:58-27:06); (6) that Mr. Richardson had not done any crimes since he "got out of the joint" on a "previous robbery spree" (Ex. 27, Track #1 at 27:30-27:42).

b. Exhibit 27 prejudiced Mr. Richardson's defense, and his conviction must be reversed. In Pete, the jury was inadvertently given copies of the defendant's written statement and a written statement of the officer who transported the defendant to the police station after his arrest although neither statement had been admitted at trial. Pete, 152 Wn.2d 553. The bailiff noticed the mistake and eventually removed both of the statements and told the jury to disregard them, but not until some of the juror had seen or read the documents. Id. at 550-51.

Pete was charged with first degree robbery, and he defended on the basis that he was not a participant in the crime, relying upon the crime victim's testimony and not himself testifying. Pete, 152 Wn.2d at 549, 554. In his written statement, however, Pete said he had taken some beer from the victim and his co-defendant was the one who beat the victim. Id. at 553. Concluding the two statements

were harmful to Pete's defense, the Supreme Court reversed his conviction. Id. at 554-55.

> The submission of the two documents to the jury seriously undermined this defense and nothing short of a new trial can correct the error. We conclude that the introduction of these documents into the sanctity of the jury room did prejudice Pete . . .

Id.

Mr. Richardson was similarly prejudiced by the jury's access to the un-redacted copy of his recorded statement to Detective Mellis. Through the exhibit, the jury learned for the first time that Mr. Richardson had robbed four banks in 2000, gone to prison for the crimes, and was on parole. A defendant's prior convictions are not admissible to show his character or his propensity to commit the charged crime. ER 404; State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012) (ER 404(b) is "categorical bar" to admission of evidence to prove person's character or to show he acted in conformity with that character); State v. Everybodytalksabout, 145 Wn.2d 456, 464, 39 P.3d 294 (2002). A the court ruled, the prior robbery convictions were inadmissible.

Moreover, the jury learned of this evidence during deliberation. It was thus too late for the defense to object, explain the evidence, or cross-examine Detective Mellis about it.

Additionally, because the parties and court were unaware the jury received the wrong CD, the court could not provide a curative instruction, as it had done with the CD that was played in court. See, Pete, 152 Wn.2d at 555 (jury's receipt of evidence after close of evidence was "no win" situation for defendant).

Mr. Richardson raised a viable diminished capacity defense that was undermined by the improper evidence of his bad character that the jury learned through the un-admitted exhibit. Mr. Richardson's convictions must be reversed and remanded for a new trial. Pete, 152 Wn.2d at 555.

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

The Sentencing Reform Act of 1985 (SRA) creates a grid of standard sentencing ranges based upon the offender's "offender score" and the "seriousness level" of the current offense. RCW 9.94A.500; RCW 9.94A.530(1); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The court, however, may order a sentence below the standard sentence range if it finds a mitigating factor by the preponderance of the evidence that constitutes a substantial and compelling reasons to justify the departure. RCW 9.94A.535. The Legislature has provided illustrative mitigating factors that

include a failed diminish capacity defense. RCW 9.94A.535(1)(e); State v. Jeannotte, 133 Wn.2d 847, 851-55, 947 P.2d 1192 (1997); State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993).

> The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences: . . .
>
> (e) The defendant's ability 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.

RCW 9.94A.535(1)(e).

Mr. Richardson presented a diminished capacity defense based upon his physical condition during the time the robberies occurred. Psychiatrist Steven Juergens testified that Mr. Richardson was suffering from an electrolyte imbalance due to his very low levels of sodium, chloride, and potassium (hypokalemia, hypochloremia, and hyponatremia) which was documented by Stevens Hospital. 4RP 497-500. Because Mr. Richardson's body was so severely out-of-balance, he suffered from delirium, a cognitive impairing causing him to have difficulty making sound decisions, be less aware of his surroundings and have difficulty focusing. 4RP 500-01. Mr. Richardson also showed signs of

psychosis. For example, he wanted to talk to his deceased father on the telephone and expected to easily talk to a former neighbor who resided in another state. 4RP 501. This medical condition was caused by Mr. Richardson's failure to consume the food and water he needed over a period of time, his withdrawal from alcohol and the long-term effects of alcohol upon his liver. 4RP 500, 504, 507-08.

Dr. Juergens opined that Mr. Richardson was delirious at the time of the two robberies due primarily to the electrolyte imbalance. 4RP 508. As a result he could not govern his own actions and had no judgment about what he was doing or even an understanding that something was wrong with him. 4RP 509-10, 535-36. Although the jury rejected Mr. Richardson's diminished capacity defense, he sought an exceptional sentence below the standard range on this basis, providing the court with Dr. Juergens' written report. CP 76-85, 97-115; 4RP 718-20, 722-24.

The trial court found that Mr. Richardson was suffering from delirium related to hyponatremia when he committed the two robberies. 4RP 725. But the court concluded that the condition was caused by Mr. Richardson's use of alcohol, and it could not support an exceptional sentence due to RCW 9.94A.353(e)'s exclusion of the

voluntary use of drugs and alcohol. 4RP 725-28. "[I]f there was a basis for mitigating that was not precluded by the statute, I would give a lower sentence . . ." 4RP 728.

The trial court's reasoning was flawed. Mr. Richardson's ability to perceive the nature of his acts was diminished by his physical condition – delirium caused by the lack of necessary electrolytes. CP 113, 114. Mr. Richardson's long-term use of alcohol was a contributing factor, but only because it led to his inability to drink fluids or eat and caused problems with his liver. In fact, when Mr. Richardson reached the emergency room, there was no alcohol in his system, and his son confirmed he was too ill to drink alcohol. CP 103; 4RP 582, 636-37. Mr. Richardson did not commit the robberies because he was drunk or under the influence of drugs he did so because he had lost the ability to reason clearly due to his electrolyte imbalance. Thus, his ability to appreciate the wrongfulness of his act was significantly impaired, as required by RCW 9.94A.535(1)(e).

While an offender is not entitled to an exceptional sentence below the standard sentence range, he is entitled to ask the court to consider such a sentence. State v. Bunker, 144 Wn.2d 407, 421, 183 P.3d 1086 (2008), affirmed on other grounds, 169 Wn.2d 571

(2010). A trial court's incorrect belief that it lacks the discretion to grant an exceptional sentence downward is an abuse of discretion warranting appellate review. Id. The sentencing court erred by concluding it could not impose an exceptional sentence based upon Mr. Richardson's mental incapacity to appreciate the wrongfulness of his conduct. His prior use of alcohol contributed to his physical problems, but it was his severe physical condition that caused him to suffer delirium and rob the banks. His sentence must be reversed and remanded for a new sentencing hearing. Bunker, 144 Wn.App. at 422.

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. Mr. Richardson's constitutional right not to incriminate himself is protected by the requirement of *Miranda* warnings. The federal and state constitutions provide an accused the right not to incriminate himself.[10] U.S. Const. amends. V, XIV; Const. art. I, §

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[10] The Fifth Amendment provides that no person "shall be compelled in any criminal action to be a witness against himself." The Fifth Amendment is

9. Due to the coercive nature of police custody, police officers must advice a suspect of this constitutional right prior to questioning. Miranda v. Arizona, 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The suspect must be unequivocally advised of his right to remain silent, that anything he says may be used against him in court, that he has the right to have an attorney present if he chooses to make a statement, and that an attorney will be appointed for him if he cannot afford one. Miranda, 384 U.S. at 479. The Miranda warnings are a bright-line constitutional requirement. Dickerson v. United States, 530 U.S. 428, 442-44, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

An individual may knowingly and intelligently waive his constitutional rights and answer questions or provide a statement to the police. Miranda, 384 U.S. at 479. The issue is not one of form, but of whether the suspect in fact knowingly and voluntarily waived the rights to remain silent and to counsel. Fare v. Michael C., 442 U.S. 707, 724, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); North

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applicable to the States through the Fourteenth Amendment. Miranda, 384 U.S. at 463-64.

Article 1, section 9 of the Washington Constitution states, "No person shall be compelled in any criminal case to give evidence against himself." Washington courts have given article 1, section 9 the same interpretation as the United States Supreme Court has given the Fifth Amendment. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

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, 384 U.S. at 444; accord Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Detective Mellis spoke to Mr. Richardson about the robberies, but then advised him of his Miranda rights once he turned on a tape recorder to record their conversation. 1RP 49-52; Pretrial Ex. 2 at 2-3. The detective noted that Mr. Richardson was a captive audience, as he was in a hospital bed attached to at least one IV or monitor. 1RP 51; Pretrial Ex. 2 at 1-2. The court concluded that Mr. Richardson was in custody and Miranda warnings were thus required. Supp.CP __ at 2, Conclusion of Law 3(a) (Findings of Fact and Conclusions of Law as to [CrR] 3.5 and 3.6 (sub. no. 119, 3/9/12) (ruling "Miranda was applicable.").

If a suspect waives his constitutional rights and interrogation continues without an attorney, "a heavy burden rests on the government to demonstrate that the defendant knowingly and

intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Miranda, 384 U.S. at 475. The government must establish that the defendant was aware of the "nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). The court must review the totality of the circumstances -- including the defendant's background, experience, and conduct -- to ascertain if the respondent's waiver of his constitutional rights was in fact knowing and voluntarily. Butler, 441 U.S. at 374; Miranda, 384 U.S. at 475-7; see Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

b. Due to his significant health problems, Mr. Richardson was not mentally capable of understanding the *Miranda* warnings or executing an intelligent, knowing, and voluntary waiver of his constitutional rights. Detective Mellis located Mr. Richardson asleep in the intensive care ward of Harborview Hospital sleeping. 1RP 22, 49, 65. Mr. Richardson had visible injuries and was attached to an IV. 1RP 51, 77. The detective woke Mr. Richardson, helped him drink some juice, and spoke to him about the two bank robberies. 1RP 49, 65-66. Mr. Richardson did not know how he got

to the hospital, but had learned he had low sodium levels and possible seizures. 1RP 77. He told the detective that his brain was not working right. 1RP 77.

Two days earlier Mr. Richardson was brought to the Stevens Hospital Emergency Room when he was seen walking naked outside his motel room. CP 102; 4RP 579, 583-84. Mr. Richardson's mental state was altered due to severe hyponatremia, hypokalemia, and hypochloremia. These conditions caused extreme mental confusion. CP 103; 4RP 579, 581, 583.

Mr. Richardson's mental state had not returned to normal when the detective interviewed him. Mr. Richardson had difficulty providing simple information, such as his date of birth. PreTrial Ex. 2 at 21. He could not provide simple details of the crime, such as the name and location of the banks, or what he was wearing. PreTrial Ex. 2 at 4, 6-7, 14, 15, 23-24. He even informed the detective that he was suffering from a sodium deficiency was having trouble thinking. PreTrial Ex. 2 at 12, 15, 17 ("they ought to sell me to the junk yard. My brain ain't working [unintelligible] any more."), 17 ("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."), 24 ("My brain ain't working very good right now.").

Detective Mellis further took advantage of Mr. Richardson's weakness to obtain the confession by utilizing interview techniques that can easily lead to false confessions. Police have long been trained not to "contaminate" a confession by providing a suspect with information about the crime but rather to ask open questions. Brandon L. Garrett, The Substance of False Confessions, 62 Stan. L. Rev. 1051, 1066-68 (2010) (hereafter False Confessions) (citing Fred E. Inbau et. al, Criminal Interrogation and Confessions (4th ed. 2001)). Detective Mellis, however, provided Mr. Richardson with information about the crimes which Mr. Richardson then adopted as his own. PreTrial Ex. 2 at 4, 6-7, 8, 10, 14, 15. The detective also purposefully did not record the first 10 to 15 minutes of the interrogation, so there is no record of what the two said before the detective turned on the tape recorder. 1RP 25-26, 49-50, 52; Garret, False Confessions at 1079-83.

In addition, Detective Mellis deliberately used the ruse of telling Mr. Richardson that he already knew Mr. Richardson was guilty and just needed to know if he was armed with or threatened to use a weapon. 1RP 54, 67, 72-73, 75; Garret, False Confessions at

1097-99. He also did not push Mr. Richardson for details for parts of his recitation of the events that did not seem plausible. 1RP 78-82.

Given Mr. Richardson's depleted mental and physical condition, the State did not prove that he knowingly, intelligently and voluntarily waived his constitutional rights.

c. Because Detective Mellis used a question-first interview process, Mr. Richardson's waiver of his constitutional rights was not knowing and intelligent. Detective Mellis spoke privately to Mr. Richardson before informing Mr. Richardson of his right to remain silent. Hospital security guard Craig Compton waited in the hall for about 15 minutes until the detective waived him into Mr. Richardson's room and asked permission to turn on the tape recorder. 1RP 26, 33, 36. By the time Mr. Compton entered the room, Mr. Richardson was "resigned," like he had been caught. 1RP 26-27. It was only then that the detective advised Mr. Richardson of his Miranda rights and obtained a waiver. 1RP 28; Pretrial Ex. 1-3.

Detective Mellis utilized a question-first process in which he interviewed Mr. Richardson and obtained a confession and only later advised Mr. Richardson of his Miranda rights and obtained a

more detailed taped statement. See Missouri v. Seibert, 542 U.S. 604, 654, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (Souter, J., plurality opinion). This procedure, however, is unconstitutional because it renders the Miranda warnings impotent. "The object of question-first is to render Miranda warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." Seibert, 542 U.S. at 654.

A suspect who has just given an incriminating statement without the benefit of Miranda warnings would not understand the prior statement was inadmissible or believe he had a genuine right to remain silent. Seibert, 542 U.S. at 654-55.

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind of knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail.

Id. at 655-56. Thus, when Miranda warnings are inserted in the middle of police interrogation, "they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to

understand the nature of his rights and the consequences of abandoning them.'" Id. at 613-14 (quoting Burbine, 475 U.S. at 424).

The Supreme Court did not reach a majority opinion concerning how sequential interrogations should be evaluated. While the plurality held the use of the question-first technique necessarily renders the suspect's waiver uninformed, Justice Kennedy believed the harm created by the technique could be cured and thus statements are only presumptively inadmissible when the question-first strategy is deliberately employed by law enforcement to circumvent Miranda. Seibert, 542 U.S. at 618-22 (Kennedy, J., concurring in judgment); United States v. Williams, 435 F.3d 1148, 1156-57 (9th Cir. 2006). The Ninth Circuit and Division Two of this Court have concluded that the controlling constitutional rule of Seibert requires suppression of confessions "obtained during a deliberate two-step interrogation where the midstream Miranda warning – in light of the objective factors and circumstances – did not effectively apprise the suspect of his rights." Williams, 435 F.2d at 1157; State v. Hickman, 157 Wn.App. 767, 774, 238 P.3d 1240 (2010) (adopting Williams analysis).

The State bears the burden of proving the admissibility of a defendant's confession, including the validity of the Miranda waiver and voluntariness of the confession. Seibert, 542 U.S. at 608 n.1. Thus, in a case involving question-first interrogation, the State bears the burden of demonstrating the police did not deliberately withhold Miranda warnings until after they had obtained a confession. Williams, 435 F.3d at 1158-59; Hickman, 157 Wn.App. at 775.

In Hickman, a police detective investigating Hickman for failing to register as a sex offender, told the suspect he needed to come to the sheriff's office to register. Hickman, 157 Wn.App. at 770. When Hickman complied, the detective conducted a two-part interview, providing Miranda warnings only after Hickman had signed a new registration form and answered questions about his current address. Id. The detective did not inform Hickman that his pre-Miranda statements could not be used against him. Id. at 775.

Because the pre-warned statement was a confession that Hickman had been in violation of his reporting requirements, the Court of Appeals concluded that the process placed Hickman in an impossible position and that the detective's procedure did not

inform Hickman of his constitutional rights, rendering his waiver invalid. Hickman, 157 Wn.App. at 776.

> Under the unique facts and circumstances, Detective Borden's mid-stream Miranda warnings, without a significant break in time or place and without informing Hickman that his pre-Miranda statements could not be used against him in a subsequent criminal prosecution, did not inform Hickman of his Fifth Amendment right to silence sufficiently to enable him to knowingly determine whether to exercise that right.

Id. Hickman's conviction was therefore reversed. Id.

Detective Mellis similarly gave mid-stream Miranda warnings with no significant break in time, no break in place, and without informing Mr. Richardson that his initial oral statements could not be used against him. Mr. Richardson therefore did not have the information he needed to knowingly, intelligently, and voluntarily waive his right to remain silent. The trial court erred in admitting Mr. Richardson's taped statement.

d. Mr. Richardson's convictions must be reversed. When a defendant's statements are admitted in violation of Miranda, the State must prove beyond a reasonable doubt the admission did not contribute to the guilty verdict. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Sergent, 27 Wn.App. 947, 951-52, 621 P.2d 209 (1980), rev. denied, 95 Wn.2d

1010 (1981). The harmless error test is designed to prevent the reversal of convictions for small errors or defects that have little likelihood of changing the result of the trial. Chapman, 386 U.S. at 22. An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the outcome of the trial would have been different if the error had not occurred. Id. at 24.

Mr. Richardson's confession was a critical piece of the prosecution's case, as the witnesses from the North Bend robbery did not identify Mr. Richardson as the robber. 2RP 184-232. The exhibit was also of vital importance in countering Mr. Richardson's diminished capacity defense. The prosecutor's closing argument, for example, pointing out the portions of the statement where Mr. Richardson explained thought process, tailoring the robbery so that it would only be a "robbery three," and provided details and motive. 664, 670- 73. The prosecutor even used the statement to argue that Mr. Richardson used the money he received to "party" and dance naked in the streets. 4RP 674, 697-98.

The trial court's error in admitting Mr. Richardson's custodial statement is not harmless beyond a reasonable doubt. His conviction for residential burglary must be reversed and remanded for a new fact-finding hearing. Sergent, 27 Wn.App. at 952.

E. CONCLUSION

Mr. Richardson's conviction must be reversed and remanded for a new trial because (1) the jury received an un-admitted exhibit during deliberations that prejudiced Mr. Richardson, and (2) the trial court incorrectly admitted Mr. Richardson's confession despite his physical and mental inability to validly waive his Miranda rights and the detective's use of the improper question-first technique.

In the alternative, Mr. Richardson's case must be remanded for a resentencing because the trial court incorrectly determined she could not order an exceptional sentence below the standard range because Mr. Richardson's use of alcohol contributed to his physical and mental breakdown.

Dated this 20th day of June 2012.

Respectfully submitted,

Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Appellant

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING 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:

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[X] WARREN RICHARDSON II 832356 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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X_____

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