

87-111
STATE OF WASHINGTON
CLERK OF SUPERIOR COURT
CLARK COUNTY

NO. 35897-2-II
Clark County No. 06-1-02418-4

STATE OF WASHINGTON,
Respondent,
vs.
JERRY MARTIN HAVENS
Appellant.

BRIEF OF APPELLANT

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PM10-1-07

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A. ASSIGNMENTS OF ERROR

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C. STATEMENT OF THE CASE

The Clark County Prosecuting Attorney charged Jerry Martin Havens (Sr.) with Possession of a Controlled Substance-Methamphetamine. CP 1. A jury trial commenced on January 31, 2007. Report of Proceedings, Volume I. The trial court commenced Voir Dire, making introductory remarks which included introducing both attorneys, as well as Mr. Havens, and asked the prospective jurors if any of them knew or recognized the names of any of the parties or the witnesses. RP I, 10-11. The trial court informed the panel that Mr. Havens was charged with possession of a controlled substance-methamphetamine. RP I, 12.

The trial court did not ask the prospective jurors whether any of them had heard of this case prior to being summoned as a juror. Report of Proceedings, Volume I.

The attorneys questioned the panel of prospective jurors, but neither of them asked any of the prospective jurors whether they had heard of this case. RP I, 13-35. A prospective juror by the name of Mr. Lockhart told the prosecutor, in response to his questions, that his sister had a history of drug abuse and that his brother was a sheriff's deputy assigned to the jail. RP I, 19-20. He stated, during these preliminary questions, that he could be an impartial juror. RP I, 20.

After the attorneys finished questioning the prospective jurors the court removed the entire panel of prospective jurors from the courtroom. I RP 35. He did this because he feels that the process of picking a jury should not be conducted in the presence of the prospective jurors. I RP 38. After the attorneys selected a jury panel, the bailiff, apparently utilizing the list of chosen jurors, separated the prospective jurors, while they were still outside the courtroom, into two groups: The selected jurors, along with an alternate, and the jurors who had not been selected¹. I RP 47, 67, 95-96. Among the selected jurors was Mr. Lockhart. I RP 40. While in the jury room for the selected jurors, Mr. Lockhart made

¹ Interestingly, it appears the judge was not aware that his bailiff had separated the jurors into two groups. I RP 65 (bottom of page)-66 (top of page), 68 (bottom of page).

several comments which became the subject of an inquiry by the court about whether they may have tainted the jury panel. I RP 44-104.

After the attorneys chose the prospective jury panel, a prospective juror (who was set to be the alternate juror (I RP, 59-60)), by the name of Ms. Berlson advised the bailiff that another juror (Mr. Lockhart) had made a comment in the jury room which she described as follows:

I overheard a gentleman talking about being at a different trial a couple times. And he said, well, what can you do when there's three cops as witnesses; I mean, c'mon. And then he also stated...He stated his brother is a cop here, and somebody said, well, I wonder are we going to be called again tomorrow? And he said no, no, uhm, I already talked to my brother, we're not, but in two more weeks there is a big murder trial. So, just be glad you didn't get called.

I RP, 45-46.

Ms. Berlson said that Mr. Lockhart made these comments in the presence of three or four people as well as herself. I RP 46. When asked how she knew that these comments were made among those jurors who were chosen to serve, she indicated that her group had been separated from the rest of the panel. I RP 47. The prosecutor asked her why Mr. Lockhart's comments bothered her, and she replied: "It's not fair. There was—in my opinion...there's a preconceived favoritism for the law, a man in uniform...Being more honest than a criminal." I RP 48. She elaborated further on Mr. Lockhart's conversation with the other jurors:

They were comparing the different trials they've been on. And he said that he'd been a juror two or three times before, and this one lady said, well, mine was a murder and, you know, the evidence. They were talking about the evidence, and then the guy said, well, the one I was on, uhm, I mean what can you do? There's three cops as a witness, and then the man accused of a crime...He—I think he's just—he has a built-in opinion because he might know more or, you know, there's a lot of trust. And, of course, you always want to believe a police person over anyone. But, uhm, it just struck me as being judgmental. Very judgmental.

I RP 48-49.

The court initially planned on questioning only the female jurors whom he recalled as having served on a prior jury. I RP 56-57. The first juror he questioned was Ms. Burke-Justin. I RP 57. The court asked her if she engaged in a conversation with anyone else about the “believability of police officers” or about being a former juror. I RP 57. She indicated that she was not involved in any conversation about being a former juror or about the believability of police officers. I RP 57-58.

At that point the court took up the issue of Mr. Lockhart's continued viability as a juror. Defense counsel challenged Mr. Lockhart for cause. I RP 59. The court, without questioning Mr. Lockhart, granted the motion because he believed Mr. Lockhart had withheld information during jury selection. I RP 59. The court and the parties were reluctant to question each of the jurors individually, evidently fearing that it might taint the rest of the panel. I RP 58-64.

The prosecutor argued that the only way to address this potentially serious problem was to question each of the jurors individually to ascertain what, if anything, they heard and whether it affected their impartiality. I RP 65, 67 70. The court suggested, and the attorneys agreed, that Mr. Lockhart would be called out first and summarily dismissed without being questioned. I RP 66-67, 68. Regarding the questioning of the remaining jurors, the prosecutor reiterated that the court should question the jurors individually, particularly since Ms. Burke-Justin had already been questioned individually. I RP 67, 70. The defense attorney, Mr. Kurtz, wanted to have them all brought out together to save time. I RP 68. The prosecutor also advised the court that it should conduct the questioning of the remaining jurors in the same manner it questioned Ms. Burke-Justin. I RP 70.

The court first questioned Ms. Kirkpatrick. I RP 71. The court asked: "Did you observe a conversation that occurred between a gentleman and a couple of the other potential jurors that involved questions of believability of police officers or things of that sort?" I RP 72. She replied "no," and said she had been reading. I RP 72. The court did not instruct Ms. Kirkpatrick not to discuss the court's questions of her with the other jurors. I RP 72.

The court next questioned Mr. Mobley. I RP 72. The court asked “When you were back in the jury room...did you observe or hear a conversation between one gentleman and some other potential jurors about believability of police officers or what have you?” I RP 73. He replied “no,” but added that one gentleman said that his brother-in-law worked in the Sheriff’s Department. I RP 73. He said “I didn’t hear a specific conversation about believability doesn’t strike me as something that happened.” I RP 73. He said he believed he could be fair and impartial. I RP 74. The court instructed Mr. Mobley not to discuss this inquiry with any of the jurors when he returned to the jury room. I RP 75.

The court next questioned Ms. Dobbins. I RP 75. The court asked “When you were back in the jury room, when you were all crowded together while we were selecting a jury panel, that first time we crowded you into that room, did you observe any conversations between a gentleman and some of his fellow jurors regarding police officers, former juror service, things of that sort?” I RP 76. She replied “no,” and said she had been reading a book. The court instructed her not to discuss this inquiry with the other jurors. I RP 76.

The court next questioned Mr. Garland. I RP 77. The court asked “[W]hen we sent you out of the room and we crowded you into that jury room with all those fellow jurors, did you observe any conversations

between a gentleman juror and a couple of the other jurors involving police officers, former juror service, things of that sort?" I RP 77. Mr. Garland replied "A little bit, yes." I RP 77. He explained that he heard a woman saying that this was this was the first time she had ever served on a jury, that he heard a gentleman say something about his brother being a police officer, and that the gentleman said he was surprised he was picked for the jury. I RP 78. He said he was only half paying attention, but that he believed about half the people in the room overheard the gentleman's comments and that a small fraction of them engaged in conversation with him. I RP 79. He said he did not hear this gentleman make any comment about having served on a prior jury, or make any comment about the veracity of police officers. I RP 79. He stated he could still be fair and impartial. I RP 80. The court instructed Mr. Garland not to discuss this inquiry with the other jurors. I RP 80.

The court next questioned Ms. Henry. I RP 80. The court asked: "When you were sent out of the room with the crowd and jammed into that little tiny jury room were you—did you observe or hear any conversations between a gentleman and any of the other jurors concerning his—someone being related to a police officer? Believability either one way or the other on police officers, or whether he was selected or

surprised he was selected...?” Ms. Henry replied “Yes, I did.” I RP 81.

She explained:

I just heard that we were kind of surprised that he was picked as a juror because he does have a relative that works at the jail. And also he was—had a sister was also and on drugs, had a real problem with her, and just basic. We just sit—you know, we were kind of surprised they kept him.

I RP 81. She said that she did not engage the gentleman in conversation and that she could be fair and impartial. I RP 81-82. The court instructed her not to discuss this inquiry with the other jurors. I RP 82.

The court next questioned Mr. Kristie. I RP 82. The court asked: “Sir, when I sent the whole panel, all the jurors in the room, to be squeezed into that little tiny jury room, did you overhear any conversations between a gentleman and fellow jurors concerning his relatives who are police types, he was surprised he was selected, believability of police officers one way or the other, or any conversations like that?” I RP 83. Mr. Kristie replied that he had heard a conversation between one gentleman and some other jurors questioning why this gentleman was picked for jury duty when his brother was a police officer. I RP 83-84. He also heard this gentleman talk about having spoken to his brother about his luck in not having to serve on the jury which would hear a murder trial, set to convene the following week. I RP 85-86. The court also asked him if he had heard any conversation about the believability of

police officers and he said “no.” I RP 83. Mr. Kristie said he could still be an impartial juror. I RP 84. He was instructed not to discuss this inquiry with the other jurors. I RP 86.

The court next questioned Mr. Whistey. I RP 87. The court asked: “Mr. Whistey, when I sent the whole panel, that was when everybody left and you all got crowded in that little room, and you were in there, did you observe or hear any conversations between one of the jurors, a gentleman, and several other jurors, about his brother being a police officer, that, you know, believability of police officers one way or the other, or about upcoming trials or anything of that sort?” I RP 87. He said that the gentleman mentioned he was surprised he was picked for the jury because his brother was a police officer or worked with the court. I RP 87. He also said the gentleman had spoken with his brother and he was glad there were no big trials coming up during this jury term. I RP 88. He said he believed he could be fair and impartial. I RP 88. The court instructed him not to discuss this inquiry with the other jurors. I RP 89.

The court next questioned Ms. Batton. I RP 90. The court asked: “Ms. Batton, when I sent the whole panel out of the room to go back in the jury room...[d]id you observe or hear or engage in any kind of conversation with one of your fellow jurors, a gentleman who was discussing his brother is a police officer, believability of police officers,

upcoming cases, or anything of that sort?” She replied “No. I was on the other side of the room.” When pressed further, she said “I just heard him say he was surprised that he was chosen being he said he had a brother that was in the police.” I RP 90. She did not recall anything else he may have said, and said she did not believe her ability to be impartial was affected. I RP 90-91. She was instructed no discuss this inquiry with anyone when she returned to the jury room. I RP 91.

The court next questioned an unidentified juror. He asked this juror: “When I sent all the jurors out of the room...do you recall hearing any conversations or engaging in any conversations with any of your fellow jurors, particularly a gentleman who was talking about his brother’s [sic] being police officers, he was surprised he was picked, upcoming murder cases, believability of police officers one way or the other, or any of that?” I RP 92. She replied “There was—no. Well, let’s see, there was—there was a gentleman who said that his brother was a sheriff, but he said that in here, too.” I RP 92. When asked if she heard anything else, she said “Not what you—not the last part of what you said, no.” I RP 92. The court then asked “Were you affected by any way about any conversation in that jury room?” I RP 92. She said she could be fair and impartial. I RP 92. She was instructed not to discuss this inquiry with anyone else in the jury room. I RP 93.

The court next questioned Ms. Ristine. I RP 93. The court asked “When I sent you out of the room, the whole jury panel, and we crowded you into that little tiny jury room for the first time, did you recall or did you observe or engage in any conversation with your fellow jurors, particularly a gentleman, that involved his brother being in the police department, or the Sheriff’s Department, information about upcoming murder trials, believability of police one way or the other, or any kind of conversation?” I RP 93. She replied “Yes.” I RP 93. She said that she was not engaged in conversation but was just listening. I RP 93. When asked to elaborate on what she heard, she said that Mr. Lockhart was expressing his surprise at having been chosen for the jury and stated that he had spoken to his brother that morning and was told that a big murder trial was coming up that would likely last much longer than the one or two days they would have to commit to this case. I RP 94. She said that she was not affected by what she heard. I RP 94.

It was at this point, apparently, that the court and attorneys became aware not only that the jurors already knew who had been chosen for the panel, but that Mr. Lockhart’s comments were made in the presence of the chosen jurors and not the panel at large. I RP 94-96. Defense counsel wanted to know how it was that Mr. Lockhart knew he had been left on the jury, and Ms. Ristine stated “Well, they had already chosen 12 of us.”

I RP 94. Defense counsel asked “How do you know that?” I RP 95. Ms. Ristine replied “Because they came in and read off the names and chose 12 of us to stay and one alternative, and the rest were told to come into here.” I RP 95. When pressed by the court and defense counsel about whether Mr. Lockhart made his comments in front of the entire panel or the twelve chosen jurors, Ms. Rister became flustered and said she didn’t know. I RP 95. She confirmed, however, that Mr. Lockhart made his comments after the twelve jurors had been separated and given their numbers. I RP 96. The transcript seems to suggest that the court was uncomfortable with this line of questioning and said “Mr. Kurtz, we’ll talk about that. Go on to something else.” I RP 96. Ms. Rister was instructed not to discuss this inquiry with anyone else in the jury room. I RP 96.

The court next questioned Mr. Work. I RP 97. The court asked “[W]hen I sent you out of the room with all of your fellow jurors...or when other people came out of that room and 12 or 13 folks were still left in the room, do you recall any conversation involving a gentleman juror with other jurors involving questions about his brother being a police officer, surprised he was picked, believability of police officers one way or the other, or any other conversation like that?” I RP 97. Mr. Work replied that he heard Mr. Lockhart say he was surprised he had been picked. I RP 97. He did not hear anything else due to the background

noise in the room I RP 98. He could not recall if the comment was made before or after the group was whittled down to thirteen. I RP 98. The court asked him if he could remain impartial, at which point Mr. Work advised the court and the parties that he had read about Mr. Havens' case in the Columbian (the newspaper for the Vancouver area), and recalled thinking that Mr. Havens' was "a real idiot for doing that." I RP 99. He stated this article appeared in the Columbian shortly after the arrest. I RP 99. He revealed that he knew the salient facts of the case. I RP 99. He further revealed that the Columbian article concluded that Mr. Havens had called 911 when he realized he his drug transaction had been witnessed, in an effort to cover-up his guilt. I RP 100. Mr. Work thought he could still remain impartial, but expressed reservations. I RP 100. He was instructed to return to the jury room and not to discuss the matter with anyone. I RP 101.

The court next questioned the last juror, Ms. Allison. The court asked her whether she recalled hearing or participating in a conversation "between one of the jurors, a gentleman, about how his brother is a police officer or sheriff's deputy, and whether or not police are believable or not, or upcoming murder cases, and he was surprised he was selected, things of that sort?" I RP 101-102. She replied "Yes." I RP 102. When asked if it occurred in the larger group or the smaller group, Ms. Allison replied that

she thought it was in the smaller group. I RP 102. Recalling Mr. Lockhart's comments, she said he expressed surprise he was chosen for the jury, both because of his sister's prior drug use and his brother's status as a law enforcement officer. I RP 103. She also stated:

He said that, uhm, he may even have heard about this Defendant. And that he had actually seen his brother as he pulled into—not that he had, but he wouldn't be surprised if he had heard about this Defendant actually, when he came in.

I RP 103. Ms. Allison stated that her ability to be fair and impartial would not be affected by what she heard. RP I 103. She was instructed not to discuss this inquiry with the other jurors. RP I 104.

At this point, defense counsel made two motions: The first was a challenge to Mr. Work because of his pre-trial exposure to an unfavorable newspaper article about Mr. Havens' case. I RP 104. This motion was granted. I RP 110. Defense counsel also asked to have the panel dissolved and a new panel constituted due to the conduct of Mr. Lockhart. I RP 105. The court denied the motion and then seated an alternate juror to replace Mr. Work. I RP 107, 111-112.

The uncontroverted evidence presented by the State established that Mr. Havens possessed a baggie of methamphetamine at the Star House restaurant in Vancouver, Washington on December 18th, 2006. Report of Proceedings, Volume II. Mr. Havens raised the defense of

necessity. Report of Proceedings, Volume III. Mr. Havens testified that he received this methamphetamine from his son's pregnant girlfriend, and that he requested she bring it to him so that he could set her up to be arrested. III RP 312-326. His motivation for doing this, according to his testimony, was so Ms. Fabrizio (his son's girlfriend) would be incarcerated and would be unable to expose her unborn child to drugs. III RP 312-326.

During the course of the trial another juror, Ms. Dobbins, recalled that she had read an article on the internet, and/or saw a report on television, about Mr. Havens' case. III RP 259. Ms. Dobbins indicated that the report suggested Mr. Havens had called 911 to "cover up his guilt." III RP 260. Ms. Dobbins indicated she had reservations about the conclusion offered by the media and she remained on the jury after indicating she could still try the case fairly. III RP 261-262.

The court, at Mr. Havens' request, instructed the jury on the defense of necessity. CP 19. The jury rejected this defense and found Mr. Havens guilty. CP 22. Mr. Havens was given a standard range sentence. CP 27. This timely appeal followed. CP 46.

D. ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING THE DEFENSE'S REQUEST TO PICK A NEW JURY, THEREBY DENYING MR. HAVENS A FAIR TRIAL.

At the conclusion of the court's inquiry of the selected jury panel about the suspected juror misconduct which may have occurred in the jury room, Mr. Havens asked the court to dissolve the jury panel and allow the parties to pick a new jury. Mr. Havens' counsel noted that jeopardy had not yet attached as the selected jury had not been sworn. The trial court erroneously denied this request because the trial court's inquiry of the selected jury panel was inadequate to protect Mr. Havens' right to a fair trial. The court's inquiry was inadequate for the following reasons: (1) the trial court released Mr. Lockhart, the juror who made the comments which precipitated the inquiry, without questioning him; (2) the questions posed by the trial court were inadequate to ascertain whether Mr. Lockhart may have tainted the jury panel; and (3) the trial court did not instruct each juror not to discuss the court's inquiry with the other jurors upon returning to the jury room.

Here, the trial court abused its discretion when it denied defense counsel's motion to dissolve the jury panel, which at that point had been selected but not sworn. Further, it appears from the record that the remaining members of the panel who had not been selected were still in attendance, having not yet been released by the court. Other than delay, it is inconceivable the harm that the trial court felt it was avoiding by simply

erring on the side of caution and allowing the parties to select a new panel from the remaining prospective jurors.

The trial court erred, in the first instance, by not questioning Mr. Lockhart, who was the subject of this problem. In *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005) the Supreme Court ruled on the propriety of replacing a juror when other jurors allege that he/she is attempting to nullify the law, but where the juror may actually have a disagreement with the other jurors about the merits of the case. In that case, the trial court removed a juror who was allegedly attempting jury nullification based on the allegations of two other jurors, without questioning the suspect juror. *Elmore* at 775. The Court observed that the trial court departed from generally accepted procedure in several ways, including its failure to question the juror who had allegedly engaged in misconduct before deciding on a course of action. *Elmore* at 775.

Here, the initial report made by Ms. Berlson was quite serious. She directly heard Mr. Lockhart say "...well, the one I was on, uhm, I mean what can you do? There's three cops as a wit-as witnesses, and then the man accused of a crime." This comment can be construed in no other way than to suggest that one accused of a crime is not believable, or is less believable than other witnesses, based on the fact he has been accused of a crime. Unbelievably, the court did not question Mr. Lockhart about what,

specifically he said and to whom he said it. This failure is particularly difficult to understand in light of the fact that the court had already decided to remove Mr. Lockhart from the jury. This was not a situation, such as in *State v. Jordan*, 103 Wn.App. 221, 228, 11 P.3d 866 (2000), where questioning of the juror might have caused undue embarrassment or risked poisoning the juror against one of the parties. Here, Mr. Lockhart had already been removed. There would have no harm or risk in questioning him about what he said and to whom because it didn't matter if it embarrassed him or made him angry at one or both of the parties. Mr. Havens' interest in obtaining this information far outweighed any interest in expediency or saving Mr. Lockhart from embarrassment.

The trial court erred secondly by not asking sufficient questions about what Mr. Lockhart had actually said. A review of the questions posed by the trial court reveals that the court did not ask each of the prospective jurors whether Mr. Lockhart had made the comment attributed to him by Ms. Berlson, namely that when the testimony of one accused of a crime is pitted against a police officer the testimony of the police officer must be believed. To the extent that the trial court even touched on this issue, it characterized it as whether Mr. Lockhart made any comment about the "believability of police officers."

This generic term was inadequate as a fact-finding tool. It was inadequate because it asked the jurors to first characterize the comment before even confirming they had heard it. Thus, they had to accept the court's characterization of the comment in order to be able to answer the question. The proper characterization of this comment was not that it pertained to the believability of police officers, but that it suggested the non-believability of one who is accused of a crime. Rather than characterizing the comment at all, the better approach would have been to simply ask the jurors whether Mr. Lockhart made the comment that Ms. Burleson said he did. After all, he either made this extremely prejudicial comment which invited the jurors (particularly those who had never served on a jury before) to conclude that the testimony of an accused is inherently suspect; or he didn't make the comment and Ms. Burleson invented this accusation out of whole cloth. The court's questions should have been directed at ascertaining whether the comment was made, while leaving the question of how to characterize it for argument by the attorneys.

Further, the even if asking the jurors whether Mr. Lockhart talked about the "believability of police officers" was adequate to ascertain whether the jury panel had been tainted, the trial court did not even pose this question to every juror. When the trial court questioned Ms. Dobbins

and Mr. Garland, he simply asked whether they heard any discussion regarding police officers, former jury service, and “things of that sort.” The question the trial court posed to these two jurors did not even come close to touching on whether Mr. Lockhart had suggested the non-believability of one who is accused of a crime. Mr. Havens cannot be said to have received a fair trial where the trial court did not even employ any uniformity in its questions to the panel when trying to learn whether it had been tainted.

Last, the trial court did not instruct every juror not to discuss the subject of this inquiry. Ms. Berlson, Ms. Burke-Justin, and Ms. Kirkpatrick all were not advised not to discuss this matter with their fellow jurors. They also were the first three questioned, which increases the likelihood that they would have discussed the matter, or at least hinted at it, when they returned to the jury room. This failure rendered the entire inquisition by the court unreliable. The trial court should have granted defense counsel’s request to constitute a new jury panel, particularly since jeopardy had not attached and the only reason not to do so was the inconvenience associated with doing so. Mr. Havens was denied a fair trial and is should be granted a new trial.

II. MR. HAVENS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY, KNOWING THAT MR. HAVENS’ CASE HAD BEEN THE

**SUBJECT OF PREJUDICIAL COVERAGE IN THE LOCAL
NEWSPAPER, FAILED TO ASK THE PROSPECTIVE
JURORS WHETHER ANY OF THEM HAD HEARD OF
THIS CASE.**

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Here, defense counsel was made aware that at least one unfavorable newspaper article had been printed in the local newspaper about Mr. Havens, and that possibly another article and/or a television report had been in the media as well. Mr. Work, who was initially picked to sit on the jury, as well as Ms. Dobbins, indicated that the reports they had read (or seen) suggested that Mr. Havens was guilty and that he had only called 911 (which was the crux of his necessity defense) to cover up his guilt. Defense counsel revealed, during the course of the court's

inquiry of Ms. Dobbins, that he believed there had been two newspaper articles about this case, and that the media was present for Mr. Havens' arraignment. III RP 258.

Knowing that there had been media reports about Mr. Havens' case, and knowing the reports suggested Mr. Havens was guilty and had only called 911 to fabricate a reason for having possessed methamphetamine, it was ineffective for him to have failed to question the prospective jurors about whether they had been exposed to these media reports. It is not as though these media reports simply reported the alleged facts; at least two jurors (one of whom was removed due to his exposure to this information) reported that the report(s) concluded that Mr. Havens was guilty and suggested a motive for him to fabricate his necessity defense.

No reasonable attorney, armed with this information, would fail to explore with the prospective jurors whether they had been exposed to this information. This pre-trial reporting was highly prejudicial and served to discredit the cornerstone of Mr. Havens' defense. In *State v. Hicks*, 41 Wn.App. 303, 312, 704 P.2d 1206 (1985), the Court of Appeals noted that when a defendant argues that a due process violation occurred based on juror exposure to extraneous material, prejudice might be presumed where

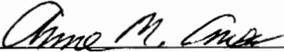
a “newspaper article attacked the defendant, expressed an opinion as to his guilt, or was a grossly unfair statement of the trial.” *Hicks* at 312.

In this case, there was no legitimate tactical reason for defense counsel’s failure to inquire the prospective jurors about whether they had heard of this case before. Contrary to the assumption made by defense counsel after the questioning of Mr. Works, the trial court *did not* ask the prospective jurors whether any of them had heard of this case. Perhaps trial counsel was accustomed to judges who typically ask this question and inexcusably assumed this question had been asked. A review of the record reveals, however, that it wasn’t. In a case with such unusual facts, where trial counsel knows there have been media reports, the failure to question the jurors on their exposure to media reports was both ineffective and prejudicial. Perhaps if these reports had simply suggested Mr. Havens lacked intelligence, the prejudice would not have been as apparent or strong. According to the jurors, however, the reports suggested that he had fabricated a story to cover up his guilt, thereby undercutting his necessity defense. Mr. Havens was denied effective assistance of counsel and he should be granted a new trial.

E. CONCLUSION

Mr. Havens should be granted a new trial because he was denied a fair trial and effective assistance of counsel.

RESPECTFULLY SUBMITTED this 1st day of October, 2007.



ANNE M. CRUSER, WSBA#27944
Attorney for Mr. Havens

07 OCT -4 PM 12:45
STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,)
) Court of Appeals No. 35897-2-II
) Clark County No. 06-1-02418-4
 Respondent,)
) AFFIDAVIT OF MAILING
 vs.)
)
 JERRY MARTIN HAVENS,)
)
 Appellant.)
 _____)

ANNE M. CRUSER, being sworn on oath, states that on the 1st day of October
2007, affiant placed a properly stamped envelope in the mails of the United States
addressed to:

Arthur Curtis
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Anne M. Cruser
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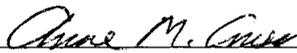
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Mr. Jerry M. Havens
12807 NE 100th St.
Vancouver, WA 98682

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) AFFIDAVIT OF MAILING

Dated this 1st day of October 2007,


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

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

Date and Place: October 1, 2007, Kalama, Washington

Signature: Anne M. Cruser