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DIVISION II

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STATE OF WASHINGTON

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NO. 31645-5-II
(consolidated)

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

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP VICTOR HICKS,

Appellant.

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

The Honorable Thomas Felnagle, Judge
The Honorable Brian Tollefson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE OMITTS THE FACTS RELEVANT TO MR. HICKS' DIMINISHED CAPACITY DEFENSE.

The state's presentation of facts omits all of the facts supporting Mr. Hicks' diminished capacity defense. Brief of Respondent (BOR) 4-15. These facts are set out in Mr. Hicks' opening brief at 8-13. They should be considered in deciding the issues on appeal, in particular in deciding the relevance of evidence and in deciding that the errors that occurred were not harmless.

2. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE CASE WAS NOT A DEATH PENALTY CASE.

The trial court in this case, after a prospective juror indicated concern that his beliefs about capital punishment, among other beliefs, might conflict with his jury service, instructed the entire jury panel that the case was not a death penalty case. RP(4/22) 73-74. The trial court did this in spite of the clear holding in State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001), that (a) such an instruction is improper and (b) the rule against instructing the jury that a case is not a capital case is so well-established and long-

standing that defense counsel was ineffective for not objecting to it.

The trial court could have properly instructed the jurors, as it would later instruct them at the close of the evidence, that they had "nothing whatever to do with any punishment that may be imposed in case of a violation of law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful." CP 99. Or, instead of instructing the entire jury that the death penalty was not involved, the court could simply have allowed the parties to conduct an individual voir dire of the juror and offer reassurance, if appropriate, at that time. The juror raised several concerns and the panel need not have known what took place in the individual voir dire. Individual voir dire is a well-established means of questioning prospective jurors who might taint the entire panel with their responses.

The identified prejudice of informing the jury that the case does not involve the death penalty is that jurors "may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know

that execution is not a possibility." Townsend, at 846 (citing Shannon v. Unites States, 512 U.S. 573, 579, 129 L. Ed. 2d 459, 114 S. Ct. 2419 (1994), and Rogers v. United States, 422 U.S. 35, 40, 45 L. Ed.2d 1, 95 S. Ct. 2091 (1975)).

The identified prejudice is present in this case where the jury failed to continue deliberating to a verdict on Count II. Jurors may well have felt that it was less imperative to deliberate to a conclusion since Mr. Hicks was not at risk for a death sentence. Given that the jurors found that Mr. Hicks lacked the capacity to premeditate the death of Chica Webber, they might well have acquitted him of Count II had they felt more deeply committed to deliberate to a verdict. See AOB 23-24.

The state asks this Court to follow, not Townsend, but the decision in State v. Mason, 127 Wn. App. 554, 573, 110 P.3d 245 (2005), holding that it is permissible to instruct that a case is not a capital case if a juror brings up the subject. This invitation should be rejected. Essentially the court, in Mason, second-guessed the holdings of the Washington and United States Supreme Courts about the rationale for the rule. The Mason court

reasoned, instead, that it is helpful to the defendant to have the jurors instructed about the death penalty. Mason, at 573. The controlling authority should be honored, rather than an inconsistent decision.

The trial court erred in instructing the jury that the case was not a capital case. The trial court could have simply reassured the juror, as set out in the Court's Instruction No. 1, that they would not have to consider punishment; or, as an alternative, simply conducted an individual voir dire of the juror. The error was not harmless in this case, given the jury's failure to reach a verdict on Count II.

3. THE TRIAL COURT ERRED IN DENYING MR. HICKS' MOTION TO SUPPRESS HIS CUSTODIAL STATEMENTS.

Mr. Hicks moved at trial to suppress his custodial statements. On appeal he challenges the trial court's denial of his motion. The motion to suppress should have been granted because the police acted to create a coercive situation which was tantamount to questioning him. The three homicide detectives came to the scene of Mr. Hicks' drug arrest by other officers and escorted him in an unmarked patrol car knowing that this would

inevitably lead to Mr. Hicks asking if he was in custody for something more than a suspected drug delivery and very likely lead him to make other statements suggesting that he knew why the detectives were there. When the detectives did read him his Miranda warning, it was too late to undo the damage of his already having made incriminating statements.¹ All of Mr. Hicks' custodial statements should have been suppressed. The state concedes, as well, that his statement made to Detective Webb in response to a question from Webb, made after Mr. Hicks requested an attorney, should have been suppressed. Because the error in admitting the statements was constitutional error and not harmless, the erroneous admission of the statements should result in reversal of Mr. Hicks' convictions.

a. Pre-Miranda statements.

It is undisputed that Mr. Hicks was in custody at the time all of his statements to the police were made. The state's arguments that Miranda warnings were not required while Mr. Hicks was in custody with three homicide detectives are: (a) that Mr. Hicks was not interrogated prior to being given his

¹ Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A. L. R. 3d 974 (1966).

warnings; and (b) that Mr. Hicks possibly had been read his Miranda warnings by someone other than the detectives. BOR 20-21. Both arguments should be rejected.

First, the state ignores completely Mr. Hicks' authority that "interrogation" includes not only "express questions, but also . . . any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980); State v. Willis, 64 Wn. App. 634, 637, 825 P.2d 357 (1992).

Here, the record demonstrates that three homicide detectives purposefully went together in an unmarked car to the scene of Mr. Hicks' drug arrest. RP(3/8) 7-9, 26-27, 42. This is entirely inconsistent with their not wanting to interrogate him until he arrived at the police station. RP(3/8) 8. If that had been their intent, they would have simply had an officer at the scene transport him and bring him to an interview room at the police station. Instead, as they hoped, Mr. Hicks responded to being escorted by the three homicide detectives by asking if the delivery was the only

thing they had him on and then if he was "through." RP(3/8) 28. They knew that Mr. Hicks had previous experience with the police and would understand that something was at stake beyond his arrest for selling drugs. Detective Ringer was ready and taking notes before Miranda warnings were given. RP(3/8) 27.

It was this intentionally-created coercive atmosphere that required the giving of Miranda warnings. The existence of a well-known court rule CrR 3.1(c)(1), which requires that a person be immediately advised of his right to an attorney, further supports the inference that the detectives were not simply giving Mr. Hicks a ride downtown to be questioned there. They knew that he should have been given his warnings immediately and advised of his right to counsel.

Second, there is absolutely nothing in the record to suggest that Mr. Hicks had already been read his Miranda rights, and it is not appropriate to speculate on matters beyond the record. See State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968) (holding that an appeal must be decided on the record made at trial and that if several officers are present at an interview with the defendant and the state does not call one of the officers, it may

be presumed that that officer would have testimony favorable to the defense). Moreover, from the record it is clear that if the detectives believed Mr. Hicks had already been read his rights, they would not have stopped the car and Mirandized him. RP 8. The state had every opportunity to introduce evidence that Mr. Hicks had already been read his warnings prior to being transported by the homicide detectives, and did not do so. The issue of when Mr. Hicks was read his Miranda warnings and why they were not read earlier was very much at issue at the CrR 3.5 hearing. The detectives explained that they did not read Mr. Hicks his warnings because they did not intend to question him during the drive to the police station and that they stopped and gave him warnings after he made several statements. RP(3/8) 8. At no time did they testify that they did not read him his rights because they either knew or assumed he had already been given his Miranda rights. As held in Davis, the state's failure to call the arresting office should be construed, if construed at all, as unfavorable to the state.

It was, as the state agrees, the state's burden to establish the voluntariness of Mr. Hicks' statements prior to introducing them at trial.

State v. Gross, 23 Wn. App. 319, 323, 597 P.2d 894 (1979). When, as here, the statements are custodial, Miranda warnings are integral to that determination. The state cites no authority for shifting the burden to Mr. Hicks.

Mr. Hicks' pre-Miranda statements should have been suppressed. They were custodial and the detectives engaged in tactics and actions designed to obtain incriminating statements from him.

b. Post-Miranda statements

As the state concedes in its brief, the U.S. Supreme Court held, in Missouri v. Seibert, _____ U.S. _____, 159 L. Ed. 2d 643, 124 S. Ct. 2601, 2605 (2004), "that Miranda warnings given mid-interrogation, after a suspect has already confessed, are generally ineffective as to any subsequent, post-warning incriminating statements." BOR 23. The state agrees that the plurality of the court suppressing the confession reasoned that: "It is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time

and similar in content." Seibert, 124 S. Ct. at 2605.

This is precisely what the three homicide detectives who came to the scene of his drug arrest and escorted him to police headquarters with them did. They created a coercive atmosphere that begged for explanation. They understood that Mr. Hicks would want to know what was going on and why they were involved. He not only asked, according to the testimony of the detectives, if the drug delivery was the only thing they had him on and if he was "through." RP(3/8) 28, 44. Under the circumstances, the detectives saw that Mr. Hicks had implicitly signaled that he knew why they wanted to question him and that he was "through." Once he had incriminated himself, they read him his Miranda warnings and immediately told him that he was being held for more than the deliveries. This elicited that he knew he was being held on another incident and that he was present but did not do it. RP(3/8) 11, 29-30, 47. As in Seibert, the warnings were ineffective to prepare Mr. Hicks for interrogation because of the immediately preceding interaction. As in Seibert, the post-Miranda statements should have been suppressed.

c. After request for an attorney

The state effectively concedes that Mr. Hicks' statement in response to a question by Detective Webb, after Mr. Hicks asserted his right to counsel, should have been suppressed. BOR 25-26.

4. THE TRIAL COURT ERRED IN DENYING MR. HICKS' BATSON CHALLENGE.

The Batson issue essentially comes down to the third step, whether the state's proffered reasons are "a pretext for racial discrimination."² Lewis v. Lewis, 321 F.3d 824, 830 (9th Cir. 2003). This is because, even if the prosecutor's reasons for excusing juror No. 9 can be deemed racially neutral, the reasons are pretextual.

Juror No. 9, as counsel for Mr. Babbs characterized her, was "middle aged . . . of appropriate intelligence" who had had little to say during voir dire. RP 491. The state's proffered reasons for excusing her, the only African-American remaining in the entire jury panel, were (a) that she had a master's degree in education and her type were "more forgiving" and "nurturing," (b) that she was a social worker, and (c) that someone in her

² Batson v. Kentucky, 475 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986).

family or a friend had been arrested and served time. RP 496-497. These reasons should be considered pretextual because the prosecutor did not seek to excuse a non-African-American juror who had even closer ties to someone who had served a sentence and who had generally an unfavorable opinion of prosecutors and a generous view of defense counsel.³ 107-110, 112-113. These views were specific and strongly held, in contrast to the theoretical and stereotypical views that educators and social workers are "nurturing." RP 496-407.

Juror No. 9 was the only remaining African-American juror in the venire. RP 490. The prosecutor's use of a peremptory challenge to remove her from the jury based on a stereotypical view of her was pretextual and improper and should result in the reversal of Mr. Hicks' conviction at the second trial. Stereotypes abound and the removal of virtually any prospective juror of color could likely be rationalized on the basis of a stereotype. That is why it is of critical importance to see if

³ While it is true that the defense exercised its third peremptory challenge to excuse this juror, juror No. 14, the state exercised its second challenge to excuse juror No. 9. CP 135-136. Thus, the state clearly elected to excuse the African-American juror over the other juror.

the prosecutor exercises challenges on the same claimed basis for non-minority jurors.

A peremptory challenge "may not be exercised to invidiously discriminate against a person because of gender, race, or ethnicity." State v. Evans, 100 Wn. App. 757, 763, 998 P.2d 373 (2000). The issue is of such importance that the discriminatory use of a peremptory challenge is structural error which is not amenable to harmless error analysis. United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996). The peremptory challenge here invidiously discriminated against juror No. 9, and requires reversal of Mr. Hicks' conviction for attempted first degree murder.

5. THE TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE THAT THE PIERCE COUNTY JAIL STAFF TREAT INMATES WITH ANTIPSYCHOTIC MEDICATION JUST TO CONTROL THEIR BEHAVIOR.

Although the state argues that the testimony that Seroquel was used at the Pierce County Jail for behavior control was not hearsay, it clearly was. When defense counsel, on cross examination at the first trial, attempted to elicit from Dr. Hart that Seroquel has only one type of condition it is properly prescribed to treat, Dr. Hart began answering non-responsively about the uses to which

the Pierce County Jail put the drug. RP(5/8) 109. Dr. Hart indicated clearly that his answer about what the Pierce County Jail did was based on "numerous conversations." RP(5/8) 109. When defense counsel attempted to move on to other questions, the state intervened and asked that Dr. Hart be allowed to complete his non-responsive answer. RP(5/8) 109. As a result of the prosecutor's request, Dr. Hart continued and provided an answer based on information from "Dr. Sindorff." RP(5/8) 110. He said, "I've talked repeatedly with Doctor Dr. Sindorff and our staff has repeatedly discussed the fact that in the Pierce County Detention Corrections Center they prescribe psychotropic medications for behavior control." RP(5/8) 110. After this non-responsive answer which was given at the insistence of the prosecutor, defense counsel was able to get Dr. Hart to admit that he knew of no other use for Seroquel indicated by the manufacturer of the drug than for treating the symptoms of psychosis. RP(5/8/) 110. During oral argument, the state emphasized the importance of this hearsay evidence. RP(5/12) 163).

At the second trial, the state unambiguously asked Dr. Hart if he knew whether or not the jail

ever prescribed antipsychotic medication purely for behavior control and whether they do prescribe antipsychotic medications for behavioral control. RP 2026-2027. Dr. Hart responded "yes" to both questions. RP 2026-2027. In this way, Dr. Hart clearly testified that the jail did prescribe antipsychotic medication purely for behavioral control. The prosecutor argued in closing that the drug was used for behavioral control in the jail based on Dr. Hart's testimony. RP 2181. Since Dr. Hart's knowledge was based on out-of-court conversations, by his own admission at the first trial and as a matter of inference, it was clearly hearsay. Dr. Hart was permitted to answer over objections on hearsay and foundation grounds.

As set out in Mr. Hicks' opening brief, asking for "yes" or "no" answers cannot avoid the hearsay problem where the answer conveys information and is based on out-of-court statements. AOB at 38. If this were not the rule then, as here, the prosecutor could simply repeat the hearsay and ask the witness to confirm it.

Further, the state's argument that Dr. Hart may have relied on information from a non-hearsay source should not be well-taken. Defense counsel objected

to the testimony at the second trial and the state made no effort to justify the admission as non-hearsay. RP 2026-2027. It would be an odd rule that a proper hearsay objection was not sufficient to preserve error because the state failed to provide any reason why the testimony was not hearsay.

The hearsay testimony was obviously important to the case given Mr. Hicks' defense of diminished capacity. The state referred to the testimony in both trials in closing arguments. The testimony was on a topic on which Mr. Hicks clearly should have been entitled to cross-examination. The error in admitting the testimony was not harmless. In the second trial, it may well have prevented the jury from accepting Mr. Hicks' diminished capacity defense; it suggested both that he was not suffering from mental impairment, but that he was a disruptive person.

Moreover, the testimony was not only hearsay, it was testimonial hearsay under Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). The statements were made under circumstances in which an objective witness might

reasonably believe the statement would be used at a trial. Crawford, 124 S. Ct. 1364.

The admission of the testimony should require reversal of Mr. Hicks' convictions.

6. THE TRIAL COURT ERRED IN FAILING TO EXCUSE THE JUROR WHO WAS CONTACTED BY A FRIEND OF THE COMPLAINING WITNESS.

The record is clear in this case that juror No. 13 reported that he was approached by a person he had seen, on more than one occasion, with Jonathon Webber, the victim, and that the person made a comment to him, "something about this is messed up," inferentially referring to the case. RP 1590. The juror had seen Mr. Webber with the person who approached him in the courtroom. RP 1603. The juror felt the person knew who the juror was and that the person felt the juror knew who he was. RP 1603. The juror said the person who approached him said something like, "What the [F] _____ do you want me to [F]_____." RP 1604.

The juror's unsolicited comment that he "wasn't intimidated by it," just as clearly conveyed that he believed the purpose of the encounter was to intimidate him as a juror sitting on a case where the victim was his friend.

This was a contact with a third party about the case being tried. It was a contact meant to convey to the juror that the person was a supporter of Mr. Webber and that the juror had better find Mr. Hicks guilty of the crime charged against him. The contact was presumptively prejudicial and not shown to be harmless beyond a reasonable doubt.

The authority cited by the state is not on point. In State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993), and State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998), the issue was whether the trial court improperly removed jurors who became unavailable, either by plans for a vacation or nervousness about deliberating with other jurors. In State v. Lemieux, 75 Wn.2d 89, 448 P.2d 943 (1968), a older case, the issue was whether a witness's friendly remarks in front of the jury about having once been on a jury and having helped locate evidence had been prejudicial to the defendant and tainted the trial. In State v. Brenner, 53 Wn. App. 367, 768 P.2d 509 (1989), and State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970), the appellate courts considered exchanges unrelated to the case. In Theobald, the court considered a question and answer during a visit to

the scene; in Brenner, conversations between a juror and a police officer who has not connected to the case.

These cases do not involve, as Mr. Hicks' case does, intimidation of a juror by a friend of the victim. This was presumptively prejudicial conduct and not shown to be harmless beyond a reasonable doubt. Mr. Hicks' conviction for attempted first degree murder should therefore be reversed.

7. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO USE PRIOR RECORDED CROSS EXAMINATION OVER DEFENSE OBJECTIONS.

As set out in the opening brief of appellant, the trial court erred in allowing the state to introduce the former testimony of Wayne Washington describing, on cross examination, the pacing of the shots heard. AOB 41-42. This should not have been allowed since it was inherently misleading and unreliable on an issue of importance at trial.

While counsel has found no cases which specifically address the issue of using former cross examination testimony where that testimony cannot be accurately communicated, the underpinnings of virtually all of the rules of evidence is to exclude unreliable and misleading evidence. ER 403, for example, provides generally that even relevant

evidence may be excluded to avoid "confusion of the issues" or "misleading the jury."

Here, the issue of the pace or timing of the shots was important. The introduction of necessarily misleading testimony was error. This should be particularly true where the testimony at issue was elicited on cross examination. The introduction of the misleading testimony from the earlier trial denied Mr. Hicks the right to have his attorney decide how to present his defense. It interjected confusion and error into the case and should have been excluded.

8. CUMULATIVE ERROR DENIED MR. HICKS FAIR TRIALS.

As set out in the opening brief of appellant, the combined effects of error may require a new trial, even when those errors individually might not require reversal. AOB 41.

In this case all of the errors combined to enhance the unfair prejudice to Mr. Hicks, and his conviction should be reversed even if the errors individually would not require reversal. The improper contact with a juror, the erroneous admission of Mr. Hicks' custodial statements, the improper admission of hearsay evidence, and the

introduction of misleading former testimony each alone and together require reversal of both of Mr. Hicks' convictions and a remand for retrial. The Batson error alone should require reversal of Mr. Hicks' conviction at the second trial.

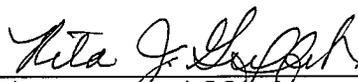
The cumulative error analysis in this case should resolve any doubt about the harmfulness of the trial errors that occurred in favor of reversal.

E. CONCLUSION

For all of the reasons set forth above and in the opening brief, appellant's convictions should be reversed and his case remanded for retrial.

DATED this 14th day of September, 2005.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 14th day of September, 2005, I caused a true and correct copy of Reply Brief of Appellant to be served on the following via prepaid first class mail:

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