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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

PHILLIP VICTOR HICKS, APPELLANT
RASHAD DEMETRIUS BABBS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 01-1-02238-7
No. 01-1-02239-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court treat the trial court's findings on the CrR 3.5 hearing as verities when Hicks presents no argument as to why the findings are unsupported by the record?
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11. Have defendants failed to show that they are entitled to relief under the doctrine of cumulative error when they have failed to show any prejudicial error, much less an accumulation of it?

B. STATEMENT OF THE CASE.

1. Procedure

On April 25, 2001, the Pierce County Prosecutor's office charged appellant PHILLIP VICTOR HICKS, hereinafter "Hicks," with crimes

stemming from a shooting on March 22, 2001. HCP 1-5. Ultimately, Hicks went to trial on a corrected amended information charging him with premeditated murder in the first degree with aggravating circumstances (aggravated murder) or, alternatively, with first degree felony murder predicated on robbery or attempted robbery in the first or second degree, attempted first degree murder and unlawful possession of a firearm. HCP 81-84. The victim on the murder charge was Chica Webber and the victim on the attempted murder was her husband Jonathan Webber. Id. The State alleged firearm enhancements on the murder and attempted murder counts. Id.

The Pierce County Prosecutor's office also charged appellant RASHAD BABBS, hereinafter "Babbs," with these crimes. Ultimately, Babbs went to trial on a corrected amended information charging him with premeditated murder in the first degree with aggravating circumstances (aggravated murder) or, alternatively, with first degree felony murder predicated on robbery or attempted robbery in the first or second degree, attempted first degree murder and unlawful possession of a firearm. BCP 138-141. The State alleged firearm enhancements on the murder and attempted murder counts. Id. Prior to trial, Babbs entered a guilty plea to the firearm charge. BCP 51-54

The case was assigned to the Honorable Thomas J. Felnagle for trial. After a hearing pursuant to CrR 3.5, the court found that Hicks' statements to detectives would be admissible. The court entered findings

on this ruling. HCP 10-20. (Appendix A). Hicks and Babbs were tried jointly.

After hearing the evidence, the jury could not reach a verdict on the aggravated murder charge or the attempted murder charge but convicted both defendants of felony murder in the first degree and found the firearm enhancement. RP (5/14) 13-24. The jury also convicted Hicks of the firearm charge. Id.

The retrial on the attempted murder charge was assigned to the Honorable Brian Tollefson. After hearing the evidence in the second trial, both defendants were found guilty of attempted murder in the first degree with a firearm enhancement. RP 2192.

Judge Felnagle imposed sentence on all convictions in a single hearing. The court imposed a standard range sentence on Hicks for a total of 776 months in the department of corrections. HCP 120-131. The court imposed a standard range sentence on Babbs for a total of 734 months in the department of corrections. BCP 183-195.

Defendants each filed a timely notice of appeal from entry of their judgment. HCP 132; BCP 199-200.

2. Facts

Jonathan Webber testified that he when was released from the Pierce County Jail around 7:30 the evening of March 22, 2001, he was met by his wife Chica and they walked to a friend's house at 21st and Fawcett.

RP 1164-1166.¹ They left there around 11:00 p.m. to walk to his mother's house and 12th and State. RP 1166. When they got to 15th and M Streets, they were approached by two men; one of them made a comment referring to drugs. RP 1167-1171. One of the men was in a puffy beige coat with a black striped hood and a beanie on his head; the other was in dark clothing including a black leather jacket with a hood. RP 1168. One of them asked Webber about his gang affiliation. RP 1171-1172. Webber told them he did not know anything about drugs and that he was too old to "bang." Id. He and his wife walked away. RP 1172. The men followed; as the Webbers approached the corner of 15th and Sheridan, one of the men told them to empty their pockets. RP 1173. This demand was repeated about three times. RP 1173. When Webber got to the corner, he told the men that he was broke and that he had just gotten out of jail; he showed them his court papers. RP 1173-1174. The man in the beige coat told them to empty out their pockets or one of them was going to die "tonight." RP 1174. Webber saw a small revolver in the man's hand; the man in black was standing just off to the side. RP 1174-1175. Webber grabbed his wife's hand and started to cross the intersection diagonally across 15th

¹ As noted by opposing by opposing counsel the testimony was largely consistent from one trial to the next. The citations in the statement of facts are to the second trial. However, in the argument sections the State has provided citations to the record in both trials when the issue raised pertains to both trials.

Street. RP 1175. Webber and his wife got about 10 feet away when he heard a hail of gunfire. RP 1175-1176. Webber felt his wife's hand slipping out of his and she fell to the ground. RP 1176-1178. He heard more shots, then he fell to the ground when he was hit. RP 1176-1178. From the sound of the shots, it sounded like two guns were in use. RP 1177. Webber tried to check on his wife; he saw the two men run off through an alley. RP 1178-1179. Neither of the men approached them as they were on the ground or took anything from them. RP 1195. Webber sought assistance from a passing motorist, who left after looking at Mrs. Webber; the police arrived a short time later. RP 1179-1180. The first officer on the scene just happened upon it. RP 522-526. She contacted Mr. Webber and got a description of the suspects and a direction of flight then broadcast this information to other officers. RP 528-530.

Webber was taken to the Tacoma General Hospital where he was treated for three gunshot wounds. RP 869. He had three through and through wounds: one in the abdomen, another in the forearm and a third in the calf. RP 869-874. He had some bullet fragments in his body but they were not removed. RP 875. He remained hospitalized for four days. RP 875.

Chica Webber was pronounced dead at the scene. RP 931, 963. The autopsy of her body revealed that she had been shot twice in the head with a .22 caliber and once with a 9mm bullet. RP 912-923, 1004. Chica Webber had facial abrasions that were consistent with someone falling

forward and hitting the ground without any attempt to break her fall. RP 928-930. The wound that entered closest to the top of the head would have caused loss of function in less than a second, such that Ms. Webber would have gone limp and fallen. RP 926. This shot was a fatal wound. RP 941. The other two wounds were not necessarily fatal. RP 941.

In the evening of March 22, 2001, Wayne Washington was in his home at 1417 South Sheridan watching television when he saw a muzzle flash and heard several gunshots from the street outside his home. RP 1752-1762. The first gunshots had a deeper sound, indicating a larger caliber weapon. RP 1753. After these initial shots, he heard several shots that sound like they were made by a .22 caliber weapon. RP 1753-1754. He estimates he heard about seven shots total. RP 1754. The shots from the smaller gun followed closely behind the shots from the larger gun. RP 1754-1755. He and his wife hit the floor after the second muzzle flash so he did not see the shooters. RP 1751, 1755-1756, 1762. He did hear one of the bullets hit his window frame. RP 1754. After the shots ended, he looked out the window and saw a body in the middle of the street and a man trying to flag down a passing car. RP 1755. Before he could get out his front door, police were arriving on the scene. RP 1755.

Officer Brooks of the Tacoma Police Department was responding to the call of "shots fired" at 15th and Sheridan when he saw a person in all dark clothing running down an alleyway between Cushman and Ainsworth; the person matched the description being broadcast over the

radio. RP 678-682. Brooks had his partner stop the prowler car at the alleyway; Brooks saw the subject disappear into some bushes. RP 683-684. Upon investigating down the alleyway, Brooks discovered an opening in some bushes to allow access to a walkway to a house. RP 684. A bright light came on and went off; when Brooks moved forward the light came on and went off again; Brooks realized it was a motion sensor light that both he and the suspect had activated. RP 684. This area was about a block away from the Alaska Street reservoir park. RP 685. Officer Brooks called out his location and asked for back up; other units began to arrive in the general area, shining their lights into the shrubbery and other dark areas, trying to contain the area. RP 687-688. A canine unit was brought to the area as well. RP 690. The dog hit on a small snub nosed revolver and Officer Brooks watched it until it was taken into evidence. RP 691-692.

The dog track also led to the recovery of a brown glove, a black leather jacket, a knit hat and a blue sweatshirt, but did not lead to a suspect. RP 752-759. A set of keys found inside the black jacket belonged to Collette Babbs, Rashad Babbs' sister. RP 1443.

Dana Duncan was living with her mother at 2106 South Wilkeson in March of 2001 with a telephone number of (253) 272-3536. RP 1115-1116. One night in March she was asleep in her room, when there was a pounding on the window. RP 1116. There was a black male there, insisting that he knew her older brother Akiki, who asked to come in. RP

1116-1117. Akiki would sometimes live at his mother's house. RP 1117. The man seemed slightly out of breath, sweaty, and hyperactive; he was wearing a short-sleeved, white T-shirt and blue jeans; his hair was braided. RP 1119-1122. This man asked Ms. Duncan for a ride and she agreed to give him one. RP 1123. She drove him over toward the Tacoma Mall following his directions of where to turn. After driving about 10-15 minutes she dropped him near the post office on 38th Street. RP 1124. He gave her twenty dollars. RP 1125. When she returned home, her mother was awake asking where she had been. RP 1124. The phone rang; it was the man thanking her for the ride. RP 1125. On her way home, Ms. Duncan noticed there was police activity in her area; police were shining bright lights into the trees in the reservoir park across the street. RP 1126. When she was later contacted by the police, Ms Duncan identified a photograph of the person to whom she had given the ride. RP 1132-1134. At trial, Ms. Duncan identified Rashad Babbs as this person. RP 1135-1136.

Cell phone records for a Toni Miles, the live in girlfriend of Kareem Babbs, Rashad's older brother, showed that on March 22, 2001, there was a call made from her phone at 2:38 in the afternoon; the next activity was ten hours later at 1:00 in the morning. RP 1452-1453. The one o'clock call was to 305-0115, the number at Brenda Watkins's home at 1318 South 25th Street. RP 1452-1454, 1495. The records also showed that at 1:45 in the morning on March 23, 2001, the same phone made a

call to 272-3536, the phone number at the home of Lynette Stenerson at 2106 South Wilkerson, whose children are Akiki and Dana Duncan. RP 1454-1455.

Webber worked with a police sketch artist to develop a sketch of the assailant in the beige coat. RP 1181-1182,1712-1720. Webber described the man as a light black male, 18-20 years old, 5'7"-5'8", 140-180 pounds, husky build with hazel or brown eyes. RP 1716. The suspect was not wearing glasses and had no visible scars or tattoos, but having a large flattened nose. RP 1716-1717. He described the suspects as wearing a two-toned (beige and black) down-type jacket. RP 1717. The artist worked with Webber to produce a sketch which was admitted into evidence. RP 1182,1718-1719. Webber was shown some montages and he made a qualified selection, as the person who looked most like the second assailant; he was not certain of his pick. RP 1184-1188; 1530-1533. Babbs' photograph was in this montage but was not the one Webber selected. RP 1532. Webber was shown a second montage and tentatively identified Hicks' photograph as looking most like the assailant that was closest to him. RP 1534-1536.

Brenda Watkins, Hicks' foster mother, testified that Babbs was with her son the day and night of the shooting. RP 1491-1492. She recalls seeing them together twice. RP 1493. The first time was somewhere around noon-1:00 p.m. RP 1494. She returned home, to 1318 S. 25th Street, from a doctor's appointment and saw them both standing

out front. Id. They waved at her, got into their car, and drove away; she parked her car in the vacated spot and went inside. RP 1494-1495. Her other son, Willie Watkins was inside. RP 1495. She also saw Hicks again later in the evening, sometime after 8:30, because her other children were in bed. RP 1496. She testified that she was on the computer and that her son Willie was still at the house when Hicks arrived in a car with Babbs. RP 1496-1498. Willie went outside and had a conversation with them. RP 1498-1499. Hicks and Babbs did not come inside, but their car remained parked in the driveway; Ms. Watkins was not sure where they went. RP 1499-1500. About 45 minutes to an hour later, Ms Watkins was frightened by a very hard and rapid knocking on her door. RP 1500. Hicks was at her front door; he was glistening with sweat, smelled musty and his eyes were bulging. RP 1501-1503. Ms. Watkins was concerned about Hicks' behavior so she started to call Willie. RP 1503-1504. When she did that, Hicks began crying, fell to the floor and kept repeating "Momma, pray for me." RP 1504. Hicks then told his mother that he had been shot at. RP 1504. Ms. Watkins called Willie and asked him to come over to talk to Hicks. RP 1505. She testified that Willie came over and talked to Hicks in the bathroom. RP 1505. Ms. Watkins has no doubt that Babbs was the person she saw twice with Hicks earlier that day. RP 1506-1507.

Willie Watkins, Hicks' foster brother, knows Rashad Babbs as well. RP 821-823. Willie recalled a night that he received a late call from

his mother, awaking him; she asked him to come home because something was going on with his brother (Hicks). RP 825-826. Willie also recalled that he had seen his brother a couple of times earlier in the day. The first time had been around noon, over at his mother's house, and his brother had been with someone. RP 826-827. He saw his brother at his mother's again, later on that night, around 11:00 in the evening, and he was with someone then too. RP 828-830, 835, 841-842. Willie denied ever identifying this person to detectives as Babbs. RP 831. Willie testified that he could not be sure that he saw the same person with his brother both times he saw him that day. His brother and this other person were still at his mother's house when he left to go home. RP 843-845. When he went to his mother's house later that night after she had called, his brother was there. RP 845. Willie stayed at his mother's for about half an hour, talking to his brother who seemed "wired and just like scared." RP 845. After he left his mother's house he went to 15th and Sheridan, which was about 10 blocks away; there was police activity in the area. RP 846-847.

On April 24, 2001, Hicks was arrested on unrelated charges. RP 696. Several detectives working the Webber homicide, including Tom Davidson, went out to the location of his arrest and took custody of him, hoping to talk to him about the murder. RP 696-697. After being put in Detective Webb's car, and without being asked any questions, Hicks began to talk. RP 697. He asked how had he been discovered and if the arrest was the only thing they had on him. RP 697-698. Because he was

so talkative, the detectives stopped the car and advised him of his rights. RP 698. After being advised of his rights, Hicks indicated that he was willing to talk to the detectives. RP 698. When Detective Davison told him that he was in more trouble than what he had been arrested for, Hicks said "I was there but I didn't do it. My mom knows." RP 700. Detective Davidson told him that he was a suspect in a homicide. RP 700. Hicks told Davidson: "You know that I know what happened," then expressed fear for the safety of his mother and younger sister. RP 700. He told the detective that he didn't hurt people. RP 700. By this time they had arrived at the County-City Building and Hicks was taken to an interview room. RP 701-702. Hicks indicated that he would not be surprised if his fingerprints were found on the recovered .22 caliber revolver. RP 703. He indicated that someone had given him a "sharmed" cigarette, which means that it was dipped in PCP, and that the "shit" happened after he smoked it. RP 704. He asked the detectives what kind of weapon the woman had been shot with, but said that he did not shoot anyone. RP 704-705. Hicks told them that he was in fear for his life when it happened and that the other guy told him to shoot. RP 705. He told the detectives that he and the "other guy" had approached the couple on the street and asked them if they wanted to buy dope. RP 705. When they said no, Hicks told them that they needed to give him money. RP 705. The other guy confirmed it was a "jack" and told them to give him their money. RP 705. Hicks recalled the other guy saying something about someone dying if

they didn't give up the money. RP 706. Hicks told the detectives that the other guy held a gun to his head and told him "Fool, quit being a bitch. This is for the hood." RP 706. Hicks said that it was clear to him the other guy was trying to make him shoot at the two victims, so he closed his eyes and shot. RP 706. Hicks said he could hear the other guy firing shots. RP 706. Hicks maintained that he had not shot anyone but also said that if he did, he had been forced to do it. RP 707. Hicks acknowledged that the recovered gun was his and that he had thrown it in some bushes as he fled the scene. RP 708. Hicks said he ran to his mother's house at 1318 South 25th Street after the shooting. RP 709.

Detective Webb took Hicks from the interview room to the Pierce County Jail. RP 1537. Hicks asked Webb which bullet killed the girl and the detective replied that he didn't know. RP 1538. Hicks stated "I bet it was the .22." Id. When Detective Webb asked him why he thought that, Hicks said "Because I was the closest." RP 1539

An expert in firearms from the Washington State Crime Lab analyzed the .22 revolver, six .22 caliber cases found in the gun and four 9 mm cases found at the scene and two fired .22 caliber bullets and one fired 9 mm bullet recovered from the Chica Webber's body. RP 541-543, 546-550, 636, 922-923, 938, 971-994. The trigger pull on the .22 revolver was nearly five pounds for single action and 12 to 12 ½ pounds for double action. RP 998. The expert testified that the .22 cartridges had the same

firing pin characteristics as those test fired from the gun, but he could not say conclusively that the cartridges had been fired from the gun. RP 1001-1002. Nor could he exclude the gun as a source of the spent cartridges. RP 1002. He testified that the recovered .22 bullets were too badly damaged for a conclusive determination, but they bore similar rifling as bullets shot from the recovered gun. RP 1003-1004. The four 9 mm cases were all fired from the same gun. RP 1005-1006.

DNA evidence showed that DNA found on the sweatshirt recovered during the canine track was consistent with Babbs' DNA. RP 1442-1443, 1492-1497, 1506, 1583-1585. The probability of finding another person randomly in the community with the same DNA profile was one in 620 billion. RP 1585.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED HICKS' STATEMENTS TO POLICE.

a. This court should treat all the findings as verities on appeal.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those

findings are also binding upon the appellate court. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Hill, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The court entered findings of facts and conclusions of law pertaining to its ruling on defendant's statements to law enforcement officers. HCP 10-20. In applying the above law to the case now on appeal, the court should treat all the findings of fact as verities. Defendant Hicks has assigned error to several findings. See Assignment of Error No. 4, Hicks' Brief at p. 1. There is no argument in the brief, however, as to how these findings are unsupported by the evidence. In Henderson Homes, Inc v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude

consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; see also, State v. Jacobson, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

In this case, defendant makes no effort to properly present argument regarding challenged findings or to even comply with the law as to the type of finding that may be challenged. Defendant assigns error to finding No. 13 as to disputed facts, which is a finding regarding the trial court's credibility determinations. HCP 10-20. Such a finding is not subject to appellate review. While the trial court's credibility determinations undoubtedly hamper defendant's likelihood of success on his challenge to the admission of his statements, he cannot avoid this impact simply by assigning error to a finding with which he disagrees. Because the defendant has failed to support his assignment of error to the trial court's findings of fact with argument, citations to the record, and citations to authority, this court should treat the assignment as being without legal consequence. The findings should be considered as verities upon appeal.

- b. The court properly found that Hicks' custodial statements were admissible in the State's case-in-chief.

There is no requirement under the Fifth Amendment that law enforcement stop a person who wishes to confess to a crime or offers any

other statement as “[v]olunteered statements of any kind are not barred by the Fifth Amendment.” Miranda v. Arizona, 384 U.S. 436, 478, 16 L.Ed.2d 694, 726, 86 S. Ct. 1602 (1966).

Miranda involves the protection of an individual's privilege against self-incrimination when taken into custody. Miranda v. Arizona, 384 U.S. at 478. Prior to any custodial interrogation an individual must be warned he has the:

right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 479.

Miranda warnings are not required unless the individual is in custody. A person is in custody if his freedom of action is curtailed to a “degree associated with formal arrest.” State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989); State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986); citing, Berkemer v. McCarty, 468 U.S. 420, 82 L.Ed.2d 317, 104 S. Ct. 3138, 3151 (1984). The relevant inquiry becomes “how a reasonable man in the suspect's position would have understood his situation.” State v. Watkins, 53 Wn. App. 264, 274, 766 P.2d 484 (1989). Once the Supreme Court adopted the Berkemer standard, many tests that had been employed previously to determine the necessity of *Miranda* warnings became obsolete. It became irrelevant: 1) whether the police had

probable cause to arrest the defendant; 2) whether the defendant was a “focus” of the police investigation; 3) whether the officer subjectively believed the suspect was or was not in custody; or even, 4) whether the defendant was or was not psychologically intimidated. State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997); see also, State v. Sargent, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988).

A defendant may waive his right to remain silent provided such waiver is made knowingly, voluntarily and intelligently. Miranda, 384 U.S. 436. “A valid waiver may be expressly made by a suspect or implied from the facts of custodial interrogation.” State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986).

The Supreme Court has not required an express statement by the accused for an effective waiver, but rather has forbidden the presumption that an intelligent waiver was made simply from the fact that a statement was eventually extricated from the accused after he was warned of his rights. Some additional showing is required that the inherently coercive atmosphere of custodial interrogation has not disabled the accused from making a free and rational choice.

State v. Adams, 76 Wn.2d 650, 671, 458 P.2d 558 (1969).

The State must establish a knowing, voluntary and intelligent waiver by a preponderance of the evidence. State v. Gross, 23 Wn. App. 319, 323, 597 P.2d 894 (1979). The determination of waiver must be made on the basis of the whole record before the court. State v. Cashaw, 4 Wn. App. 243, 247, 480 P.2d 528 (1971). A trier of fact may draw all

reasonable inferences from the evidence and circumstances. State v. Gross, 23 Wn. App. at 324.

Defendant assigns error to the admission of his custodial statements. Defendant made pre-Miranda statements, post-Miranda statements and statements made after an unequivocal request for an attorney. The court admitted all of these statements for various reasons. HCP 10-20. The statements were admitted in the State's case-in-chief in both trials. RP (5/1) 113-115,126-134,146-154; RP (5/6) 81; RP 697-710, 1538-1539. The trial court's ruling should be affirmed.

i. Pre- Miranda Statements.

The court found that the statements the defendant made in the patrol vehicle prior to being given Miranda warnings were unsolicited and not the result of questioning. Undisputed Finding of fact Nos. 4, 6, and 7; HCP 10-20. The court concluded that these statements were admissible as they were not the product of any interrogation. On appeal, defendant does not present any argument that would undermine this determination, but argues that he should have been advised of his rights sooner. No case has held that Miranda rights must be given in the absence of interrogation. Perhaps knowing this, defendant tries to invoke the rights given under CrR 3.1 which attach upon arrest, rather than interrogation. CrR 3.1 states in the relevant part:

The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a

committing magistrate, or is formally charged, whichever occurs earliest.

CrR 3.1(b)(1). The rule goes on to state that when “a person has been arrested he or she shall as soon as practicable be advised of the right to a lawyer.” CrR 3.1(c)(1). The rule goes beyond what is required by the constitution. State v. Templeton, 148 Wn.2d 193, 211, 59 P.3d 632 (2002). As such alleged violations of this procedural rule must be raised in the trial court or they will not be preserved for appeal. State v. Guzman-Cuellar, 47 Wn. App. 326, 734 P.2d 966, review denied, 108 Wn.2d 1027 (1987); see also, State v. Williams, 137 Wn.2d 746, 975 P.2d 963(1999)(failure to comply with provision of CrR 3.5 could not be raised for first time on appeal as it was not of constitutional dimension).

Defendant acknowledges that he did not raise this argument below and so can not raise it for the first time on appeal. Hicks' Brief at p. 25. However, he argues that this is evidence of the detectives bad intent stating “the detectives were acting in violation of a well-known, unambiguous requirement of the law in not advising Mr. Hicks at the time they took him into their custody.” Id. This statement is misleading because defendant was already arrested by other officers at the point the detectives took control. RP (3/8) 7, 26,42. None of these officer involved in this initial arrest testified at the hearing. It is very possible that one of them informed Hicks of his right to an attorney in compliance with CrR 3.1. However, this record was not developed because the issue was not

raised below. The court should not draw negative inferences from a silent record when there was no need to develop the record on this point. Defendant has presented no legal authority to undermine the rationale of the trial court in ruling that defendant's pre-Miranda statements were admissible.

ii. Post-Miranda statements.

The trial court found that defendant was advised of his Miranda rights and made a knowing voluntary and intelligent waiver of those rights. Undisputed Findings of Fact Nos. 9, 10, 11; HCP 10-20. The court concluded these statements were admissible. Conclusions of Law Nos. 2 and 3, HCP 10-20. Again, defendant makes no argument that will undermine the decision of the court with regards to defendant's post-Miranda statements. Defendant cites to Missouri v. Seibert, ___ U.S. ___, 124 S. Ct. 2601, 159 L. Ed. 2d 643, (2004), as a reason to suppress these statements. In Seibert a suspect was questioned for 30 to 40 minutes and confessed to her role in the crime of second-degree murder. She was given a 20-minute break and was only then given Miranda warnings. After receiving these warnings, she signed a waiver and the questioning resumed. During the post-Miranda questioning, she was confronted with her pre-warning statements, and was made to repeat the information she had given before. The interrogating officer in Seibert testified that he made a "conscious decision" to use "an interrogation technique he had been taught: question first, then give the warnings, and then repeat the

question ‘until I get the answer that she's already provided once.’”

Seibert, 124 S. Ct. at 2606. Although five members of the Court held the post-warning confession inadmissible under these circumstances, the case did not produce a majority opinion. “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977)(quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)(opinion of Stewart, Powell, and Stevens, J.)).

A close reading of the separate opinions in Seibert reveals at least some common legal ground. A plurality of the Court held that Miranda warnings given mid-interrogation, after a suspect has already confessed, are generally ineffective as to any subsequent, post-warning incriminating statements. Seibert, 124 S. Ct. at 2605. The plurality held that the police interrogation technique known as “question first” did not serve Miranda's purpose of informing suspects about their constitutional rights: “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, 124 S. Ct. at 2610. When police question first and warn later, the threshold inquiry, according to the plurality, is “whether it would be reasonable to find that in these circumstances the warnings could

function 'effectively' as Miranda requires." Id. The plurality was skeptical: "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." Id. This is because a suspect who had just admitted guilt "would hardly think he had a genuine right to remain silent." Id. at 2611.

Seibert provides no relief for defendant, however, because he was not questioned prior to the giving of Miranda. Here the Miranda warnings did not come in the middle of the interrogation, but at the outset. The court did not err in admitting these statements.

iii. Post invocation of his right to an attorney².

The trial court entered findings that the detectives did not question defendant after he invoked his right to an attorney. Uncontested Findings of Fact Nos. 24, 25, 26, 27, 28; Findings as to Disputed Facts Nos. 9, 10, and 11; HCP 10-20. The court concluded that statements made after this invocation of rights were admissible as unsolicited by the detective who booked him into jail. Conclusion No. 4; HCP 10-20.

² The court found that defendant made an equivocal and an unequivocal request for an attorney. This section pertains to the statements made after the unequivocal request for an attorney.

When an accused in custody requests the assistance of counsel the Fifth Amendment requires that all “interrogation must cease until an attorney is present.” Miranda v. Arizona, 384 U.S. at 474. To ensure that officials scrupulously honor this right, The Supreme Court created in Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the stringent rule that an accused who has invoked his Fifth Amendment right to assistance of counsel cannot be subject to official custodial interrogation unless and until the accused “initiates” further discussions relating to the investigation. An accused's initiating statement and any subsequent statements are admissible if it is voluntary and not made in response to interrogation, Edwards, 451 U.S., at 485-486. In a plurality decision, the Court has indicated that any subsequent responses to *interrogation* are admissible only if the accused has, after the initiation, made a knowing and intelligent waiver of the right to counsel. Oregon v. Bradshaw, 462 U.S. 1039, 1044-1046, 77 L. Ed. 2d 405, 103 S. Ct. 2830 (1983).

On appeal defendant points out that at the end of many volunteered, post-invocation statements, the detective asked one question in response to something Hicks has said. Hicks brief at pp. 29-30. Hicks had opined that he “bet” the victim had been killed by a .22 caliber bullet and the detective asked him why he thought that. RP (3/8)18. Hicks responded “Because I was the closest.” Id. In ruling the post-invocation statements admissible, the court did not distinguish between the

volunteered statements and the one made in response to the detective's question. Thus the court did not make a determination that this statement was made after a knowing and voluntary waiver of his right to counsel.

But even assuming that such a finding is necessary any error in admitting this statement in the State's case-in-chief was harmless. At the time the State adduced³ this challenged statement, the jury had already heard evidence that defendant made statements acknowledging that: this was a robbery situation; his prints were likely to be on the .22 caliber gun found near the scene; and, he had used this gun to fire several shots at the victims. RP (5/1) 148-152; RP 703-707. Thus, his involvement in the crime was well established by these earlier statements that were properly admitted. The challenged statement adds only that he was standing closer to the homicide victim at the time of the shots. This fact describes his location but does not prove whose bullet killed Chica Webber. His position to the homicide victim at the time he fired his gun, relative to that of his accomplice, does not make him any more or less culpable for the offense. Beyond a doubt, any error in admitting this statement did not affect the verdict.

³ The challenged statement was admitted in the first trial at RP (5/6) 81 and in the second trial at RP 1538-1539

With the possible exception of one statement, the trial court properly admitted Hicks' statements to detectives. Any error in admitting the one statement made in response to interrogation after he had invoked his right to an attorney is harmless beyond a reasonable doubt as it is, at most, cumulative of the content of his other, properly admitted statements.

2. THE COURT IN THE FIRST TRIAL DID NOT ERR IN RELIEVING A POTENTIAL JUROR'S CONCERN THAT SHE WOULD BE UNABLE TO FOLLOW THE COURT'S INSTRUCTIONS BY INFORMING HER THAT IT WAS A NON-CAPITAL CASE; ANY ERROR UNDER TOWNSEND WAS HARMLESS.

In State v. Townsend, 142 Wn.2d 838, 840, 15 P.3d 145 (2001), The Supreme Court held that it was error to inform the jury during venire that the case is not a death penalty case. In that case, the trial court had decided that it would inform the jury at the outset that the case did not involve the death penalty. When the prosecutor brought the subject up in voir dire, the court informed the jury of this fact as it had intended. Townsend asserted his attorney had been ineffective for not objecting to the court's instruction. The Supreme Court found that this was deficient performance. The Court reasoned that as where the jury has no sentencing function then it should not be informed of matters that relate solely to sentencing. The Court concluded that "[t]his strict prohibition against informing the jury of sentencing considerations ensures impartial juries.

and prevents unfair influence on a jury's deliberations." Id. at 846. The Court could see no legitimate trial strategy or tactic in failing to object to the trial court's instruction. Id. at 847. While the Court found deficient performance, it also found the error to be harmless. Townsend was convicted of murder in the first degree, arson in the second degree and first degree theft. The court noted that Townsend made no argument as to how the instruction would have had affected the arson and theft convictions; nor did he contend that the jury would have acquitted him. Id. at 848. He asserted that the jury might have convicted him of second degree rather than first degree. The court found ample evidence of premeditation in the record and concluded that the error had been harmless. Id. at 848-849.

Division I of the Court of Appeals found that a similar error was harmless when the jury acquitted the defendant of the first degree murder and returned a verdict of murder in the second degree. State v. Murphy, 86 Wn. App. 667, 672-673, 937 P.2d 1173 (1997).

In both Townsend and Murphy, the trial courts had informed the jury about the case being non-capital *sua sponte*. A different consideration comes into play when the issue is raised by a potential juror. State v. Mason, 127 Wn. App. 554, 110 P.3d 245 (2005). In Mason, a potential juror indicated that he did not think he could follow the law with regard to the death penalty. The court, with full awareness of the Townsend decision, informed the jury of the fact that it was not a death

penalty case. Id. at 571. The court had been very concerned about this issue because he thought it likely that people who were against the death penalty would naturally be pro-defense and that such people might disqualify themselves from the jury, which would be harmful to the defendant. Id. at 573. The appellate court found this situation distinguishable from Townsend and held that the appellate court did not err in responding to the potential juror's statement as it did. Id.

The facts presented in the instant case are similar to Mason. Here, the court did not inform the jury of the fact that it was a non-capital case at the outset of jury selection; the issue was raised by a potential juror. Juror No. 9 was concerned that her religious beliefs might interfere with her ability to be a juror. RP (5/22) 73-74. When the court asked her what areas she thought might present a conflict between the law and her church's teachings, the juror brought up capital punishment. RP (5/22) 74. The court held a side bar with the attorneys, then informed the juror that the case was not a death penalty case. RP (5/22) 74-75. Having giving her that information, the court asked her whether she now thought that her religious beliefs would interfere with her ability to follow the law as the court gave it to her. RP (5/22) 75. She indicated that she could follow the instructions. Id. There was never any objection made to the fact that the court imparted this information or to the manner in which it did so. Juror No. 9 ultimately sat on the jury and participated in deliberations. BCP 203-205.

This case, like Mason, is a situation where a potential juror, whom the defense is interested in seating on the jury, may disqualify themselves from such duty unless informed of the fact that the case does not involve the death penalty. The potential jurors in this case had filled out questionnaires. RP (5/22) 48. Defense counsel had considerable information about Juror No. 9 at the time she raised her concerns. Since she ultimately sat on the jury, they must have looked favorably on this information. In such a situation, defense counsel would want the court to eliminate her concern about her ability to follow the law and be fair so that she was not subject to being excused for cause. The court below did not take this step without checking with counsel in a sidebar. It is clear that neither defense counsel objected to this information being imparted. As in Mason, the court did not act improperly.

Even if this court finds that the actions of the trial court were erroneous under Townsend, any error was harmless. A harmless error is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” Townsend, 142 Wn.2d at 848. The concern is that a jury unconcerned with the death penalty may be prone to convict. However, in this case the jury could not agree on the premeditated first degree murder charge or the charge of attempted murder; it convicted both defendants of felony murder in the first degree and Hicks of unlawful possession of a firearm. RP (5/14) 22-25; HCP 85; BCP 142. This

indicates a jury who carefully weighed the evidence, testing the State's case on premeditation; it is clear from the verdicts that some of the jurors found the proof of premeditation lacking and refused to convict. This is not reflective of a jury prone to convict with out proper consideration of the evidence. On the other hand there was overwhelming evidence that Chica Webber was killed in the course of an attempted robbery. As outcome of this case was not affected, any error is harmless.

3. THE INFORMATION WAS NOT DEFICIENT AS IT INCLUDED ALL ESSENTIAL ELEMENTS OF THE CRIME OF MURDER IN THE FIRST DEGREE .

All essential elements of an alleged crime, including statutory and court-imposed elements, must be included in the charging document in order to afford the accused notice of the nature of the allegations so that a defense can be prepared. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). If a charging document fails to allege each element, the remedy is dismissal without prejudice. State v. Vangerpen, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995). The standard of review for evaluating the sufficiency of a charging document is determined by the timing of the motion challenging the sufficiency. State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d 245 (2002); State v. Taylor, 140 Wn.2d 229, 237, 996 P.2d 571 (2000). When a charging document is challenged for the first time after the verdict, it is to be "liberally construed in favor of validity." Kjorsvik,

117 Wn.2d at 102. In contrast, however, when an information is challenged before the pretrial "the charging language must be strictly construed." Taylor, 140 Wn.2d at 237.

For the first time on appeal, defendants allege that the portion of the information charging them with felony murder in the first degree was deficient. The relevant portion of the information read as follows:

That PHILLIP VICTOR HICKS and RASHAD DEMETRIUS BABBS, acting as accomplices, in Pierce County, on or about the 22nd day of March, 2001, did unlawfully and feloniously, while committing or attempting to commit the crime of robbery in the first or second degree, and in the course of or in furtherance of such crime or in the immediate flight therefrom, either the defendant or another participant, causes [sic] the death of a person other than one of the participants, to wit: Chica Webber....

HCP 81-84; BCP 138-141. Defendants contend that the use of the phrase "while committing or attempting to commit the crime of robbery" does not adequately put them on notice that they must defend against a charge of felony murder stemming from a completed robbery as opposed to an attempted or incomplete robbery. Babbs' Opening Brief at pp 35-37.

In Washington, the elements of the underlying predicate felony are not elements of the crime of felony murder. State v. Bryant, 65 Wn. App. 428, 438, 828 P.2d 1121, review denied, 119 Wn.2d 1015, 833 P.2d 1389 (1992); State v. Hartz, 65 Wn. App. 351, 354, 828 P.2d 618 (1992).

Although the underlying crime itself is an element in felony murder, the defendant is not actually charged with that crime. And the information

does not have to set forth the elements of a predicate felonies to be sufficient. Id.

Felony murder in the first degree may be predicated upon an attempted or completed crime of burglary in the first degree or of rape, robbery, arson, and kidnapping in either the first or second degree. RCW 9A.32.030(1)(c). Thus, taking into account attempted crimes, completed crimes and the different degrees, there are a total of eighteen possible predicate felonies that will support the charge of felony murder in the first degree. While an information must allege the existence of at least one of these predicate felonies, the State can find no Washington case holding that all of the possible predicate felonies must be alleged in order for the charging language to be sufficient. Rather, the general practice is to allege the predicate felonies that the prosecution intends to prove and omit ones that are irrelevant to the facts of the case. Courts have long approved charging language that alleges some, but not all, of the predicate felonies for felony murder. See, State v. Fillpot, 51 Wash. 223; 98 P. 659 (1908)(finding legally sufficient language charging first degree murder predicated on robbery and burglary); State v. Hartz, 65 Wn. App. at 354-355 (robbery). This practice promotes the constitutional goal of putting the defendant on notice as to what he must prepare to defend against.

Returning to the defendants' claim of error in this case, essentially they contend that the charging language was insufficient to give notice that the State was alleging felony murder predicated on a completed

robbery. Without conceding the validity of this argument, at most it results in a conclusion that the language of the information was not wholly insufficient, but only charged felony murder predicated on attempted robbery in the first or second degree. The predicate felony element is not missing or omitted, it is just limited to two of the possible predicate crimes that will support the charge.

However, this result does not provide defendants with any basis for relief. The information does allege two proper predicate felonies to support the charge of murder in the first degree so the information is not deficient. Moreover, this is consistent with the evidence in the case. There was never any evidence of a completed robbery, only that one was attempted. A robbery requires a taking of personal property from the victim. RCW 9A.56.190; State v. Tvedt, 153 Wn.2d 705, 714-716, 107 P.3d 728 (2005); State v. Brown, 75 Wn.2d 611, 612, 452 P.2d 958 (1969)(one of the elements of robbery is the taking of personal property, without regard to its value. The evidence in this case was that the defendants demanded money from the victims, but the victims did not relinquish any property to them or have any taken by force. RP(5/2) 14-22, 35; RP 1167-1179, 1194-1195. As there was no evidence of a taking by force, there was no evidence of a completed robbery produced at trial. Both defense counsel were well aware that the evidence did not support a completed robbery and argued as much to the jury. RP(5/9) 14; RP (5/14) 46, 49-50, 113. The defendants did not have to defend against evidence of

a completed robbery as a predicate felony supporting the felony murder charge, so any lack of notice as to this charge in the information was harmless.

At the very minimum, the language in the information was sufficient to allege that defendants committed a felony murder predicated on the crime of attempted robbery in the first or second degree. Defendants have failed to meet their burden of showing a deficient information. Defendants suffered no prejudice as they were tried and convicted of committing a felony murder predicated on attempted robbery.

4. THIS COURT SHOULD NOT REVIEW THE CLAIMED ERRORS REGARDING JURY INSTRUCTIONS AS THEY WERE INVITED AND/OR WAIVED IN THE TRIAL COURT; THE "TO CONVICT" INSTRUCTION PROPERLY STATED THE LAW WITH REGARD TO THE ELEMENTS OF FELONY MURDER IN THE FIRST DEGREE.

Defendants raise challenges to instructions given in the first trial regarding the definition of attempted robbery (Instruction No 23) and to the "to convict" for felony murder (Instruction No. 25 for Babbs, Instruction No 26 for Hicks). As will be more fully discussed below, the court should refuse to consider any of these challenges under the doctrine of invited error. Additionally, any challenge to Instruction 23, a definitional instruction, was waived in the trial court by a failure to object on the same basis asserted on appeal. Similarly, defendants have failed to

show any constitutional defect in the “to convict” instruction that may be raised for the first time on appeal.

- a. Defendant’s challenges to the jury instructions are precluded by the doctrine of invited error; except for the inclusion of language “or an accomplice” in the instructions, defendants proposed the same wording as that in the challenged jury instructions.

The invited error doctrine provides that a party may not request an instruction and then later complain on appeal that the requested instruction was given. State v. Gentry, 125 Wn.2d 570, 646-647, 888 P.2d 1105 (1995). There is a distinction between the failure to except to an erroneous instruction and “actually proposing an erroneous instruction; the former is a failure to preserve error, the latter is error invited by the defense.” Id. A defendant who affirmatively assents to an instruction also has invited error as to that instruction, should it be erroneous. State v. Studd, 134 Wn.2d 533, 547, 973 P.2d 1049(1999). In Gentry, this court took the opportunity to clarify whether it would review instructional error in a capital case.

We will adhere to our normal use of the invited error doctrine, but will review any invited instructional error in connection with an ineffectiveness of counsel argument; this will ensure that any error which was indeed prejudicial could be grounds for reversal.

Gentry, at 646-647. If any instructional error was invited and the defendant does not assert an ineffective assistance of counsel claim, then the claim as to the instructional error is not reviewable. State v. Elmore, 139 Wn.2d 250, 280, 985 P.2d 289 (1999).

During the hearing when the court took exceptions to the jury instructions, Counsel for Babbs stated:

At the outset of the trial I informed the Court, on the record, that I would wait to receive the State's instructions and that—to avoid duplication of services, [sic] take them home and look at the ones that I agreed with, and not resubmit those identical instructions. That's what I did.

We adopt the State's submissions as our own, with the exceptions of the changes that I'm stating on the record right now.

RP (5/9) 8. His attorney took exception to the inclusion of the phrase “or an accomplice” in any of the instructions, to the giving of the accomplice liability instruction (Instruction 14), and to the giving of Instruction 18.⁴

RP (5/9) 5-14. Counsel for Hicks took similar exceptions, objecting to the inclusion of the language “or an accomplice” in any of the instructions, and taking exception to the give in of Instruction 18.⁵ RP (5/9) 14-21.

Counsel for Hicks also adopted the wording of the State's proposed instructions as his own, other than for the exceptions he made on the record. RP (5/9) 21-22.

⁴ None of these exceptions have been pursued on appeal.

⁵ None of the exceptions have been pursued on appeal.

Neither counsel took exception to wording that is now challenged on appeal in the definitional instruction of attempted robbery (Instruction No. 23) or to the “to convict” instructions on felony murder (Instruction Nos. 25 and 26). The only challenge to these instructions in the trial court was to the inclusion of the phrase “or an accomplice” - a claim that has been abandoned on appeal. Thus, each counsel represented to the court that he was adopting the State’s proposed language as to the remainder of the instructions as his own. Because defendants asked the court to instruct the jury using the language which the court ultimately employed, defendants are now precluded from raising any challenge to this wording on appeal. Any error in the wording of the instructions was invited. This court should refuse to review the claimed instructional error.

- b. Defendants did not take exception to Instruction No. 23 on the same basis they now assert on appeal and, therefore, failed to preserve this issue for review.

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing, State v. Jackson, 70

Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963). Failure to except to instructions on same basis raised on appeal will also constitute a waiver. Nord v. Shoreline Savs. Ass'n, 116 Wn.2d 477, 486, 805 P.2d 800 (1991).

A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. State v. Dent, 123 Wn.2d 467, 478, 869 P.2d 392 (1994). RAP 2.5(a) provides, in part:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right. . . .

Under this rule, an appellate court generally will review only those issues properly raised in the trial court. State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The Washington Supreme Court has noted that application of this rule is well settled in the context of jury instructions:

As long as the instructions properly inform the jury of the elements of the charged crime, *any error in further defining terms used in the elements is not of constitutional magnitude*. See State v. Lord, 117 Wn.2d 829, 880, 822 P.2d 177 (1991); State v. Fowler, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990); Scott, at 689-91; State v. Ng, 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988). Even an error in defining technical terms does not rise to the level of constitutional error. Lord, at 880; Scott, at 689-90.

State v. Stearns, 119 Wn.2d 247, 250, 830 P.2d 355 (1992)(emphasis added).

In the first trial the court gave the following definitional instruction:

Instruction No. 23

A person commits the crime of attempted Robbery in the First Degree when, with intent to commit that crime, he or an accomplice does any act which is a substantial step toward the commission of that crime

A person commits the crime of attempted Robbery in the Second Degree when, with intent to commit that crime, he or an accomplice does any act which is a substantial step toward the commission of that crime

HCP 25-80; BCP 82-137. This wording of this instruction, including the challenged language, was taken from the pattern instruction WPIC 100.01. See, 11A Washington Pattern Jury Instructions, WPIC 100.01, at 218 (West 1994). As noted above, the only exception taken to this instruction below was to the inclusion of the words “or an accomplice.”

Defendants now assert that used of the phrase “with intent to commit that crime” in this instruction misstates the definition of attempted robbery. However, this is a challenge to a definitional instruction of a term referred to an element in the “to convict.” Under Stearns, it does not present a claim of constitutional error that maybe raised for the first time on appeal. Defendants did not preserve this claim of error in the trial court and this court should not review it.

- c. The “to convict” instruction properly set forth the elements of felony murder, conformed to the information and was supported by the evidence.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). A trial court has broad discretion in determining the number and wording of jury instructions. State v. Dana, 73 Wn.2d 533, 536, 439 P.2d 403 (1968).

Jury instructions must clearly set forth the elements of the crime charge. State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). A “to convict” instruction must contain all of the essential elements; the jury should not be required to search the other instructions to

see if another element should be added to those listed. State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). A “to convict” instruction which purports to be a complete statement of the law and yet omits an element creates a constitutional error. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Even constitutional instructional error pertaining to an omitted element is subject to harmless error analysis. State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). The Brown court determined that an instructional error could be found harmless if, beyond a reasonable doubt, “the error complained of did not contribute to the verdict obtained.” 147 Wn.2d at 341 (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)(quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967))). Such an inquiry requires the appellate court to “ask[] whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” Neder v. United States, 527 U.S. at 19. “When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence.” Brown, 147 Wn.2d at 341 (citing Neder, 527 U.S. at 18).

Defendants challenge their “to convict” instructions on the felony murder. The jury was instructed on the elements as follows:

To convict the defendant, [defendant's name] of the crime of Felony Murder in the First Degree as alternatively charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt;

(1) That on or about 22nd day of March, 2001, Chica Webber was killed;

(2) That the defendant or an accomplice was committing or attempting to commit Robbery in the First or Second Degree;

(3) That the defendant or an accomplice caused the death of Chica Webber in the course of and in furtherance of such crime or in immediate flight from such crime;

(4) That Chica Webber was not a participant in the crime; and

(5) That the acts occurred in the State of Washington.

HCP 25-80 (Instruction No. 26); BCP 82-137 (Instruction No. 25). The wording of this instruction, including that challenged by defendants, is taken from the standard instruction WPIC 26.06. See, 11 Washington Pattern Jury Instructions, WPIC 26.06, at 289 (West 1994).

Defendants do not assert that the “to convict” omits an element of the crime of felony murder. Defendants focus their challenge on element (2) and the phrase “the defendant or an accomplice was committing or attempting to commit Robbery....” They acknowledge that the wording properly sets forth the law with regard to an attempted robbery but assert that the word “committing” does not properly convey the concept of a completed crime. Babb’s Opening Brief at 33-35. Defendants present an

unusual argument. While acknowledging the evidence at trial did not support a finding of a completed robbery, they complain that the “to convict” instruction is deficient for not setting forth the law properly on a completed robbery as a predicate felony. Where the evidence does not support giving instruction on a completed robbery, defendants cannot be harmed by the failure to give such an instruction.

Defendants assert that they were prejudiced because the phrase “was committing” was not defined for the jury and this would leave the jury free to define it as being something less than an attempt. Many terms in the “to convict” instruction are left undefined. The fact that a term is undefined does not mean that jurors will attach absurd or unreasonable meanings to the terms. The law assumes that the jury will use its common understanding of that undefined term. Webster’s defines “commit” as “to do or perform: perpetrate” as in “commit a felony.” *Webster’s II New College Dictionary* (1995). A lay person or juror using his common understanding would interpret “committing robbery” as meaning “in the process of robbing.” It conveys a sense that one is in the middle of committing the crime - well past the point where the crime of attempt is complete⁶ but still within the ambit of the inchoate crime rather than the

⁶ The word “complete” here is used in the legal sense that it has become a chargeable offense and not in the sense that the crime is over or ended.

completed offense. Under the law, the crime of attempt is complete when a person who has formulated the intent to commit a crime takes a substantial step toward the commission of the crime. RCW 9A.28.020(1); State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)(attempt crime possible even when the complete crime is an impossibility). A person may be guilty of attempted murder, for example, by forming the intent to commit murder (mens rea) and offering money to an assassin to perform the act (substantial step). Upon solicitation of the assassin, the attempt crime has been completed regardless of whether the assassin accepts the offer or takes any harmful action toward the intended victim. See, State v. Harris, 121 Wn.2d 317, 849 P.2d 1216 (1993). While this person has committed the crime of attempted murder, it is inconceivable that a juror would describe this act of solicitation as “committing” murder. An attempted crime will be complete well before the perpetrator is in the “middle” of the offense. A juror using their common understanding of the word “committing” would not construe this word to mean something less than an attempt, but as something more.

The crime of attempted robbery is an included offense of robbery. RCW 10.61.003. Legally, it is not possible for a person to have committed a felony murder predicated on robbery without also having committed a felony murder predicated on attempted robbery. The jury was told that it could find defendants guilty if it found that defendants were in the process of committing a robbery and that defendants caused

the death of a non-participant in the course of and in furtherance of or in the immediate flight from that attempted robbery. This is a correct statement of the law and it was supported by evidence. It does not matter whether defendants were in the beginning stages of their efforts to commit a robbery or nearing the completion of the crime in order for them to be legally liable for the death of Chica Webber. Defendants have failed to show that the instruction is a misstatement of the law.

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENSE CHALLENGE TO THE STATE'S EXERCISE OF ITS PEREMPTORY CHALLENGES.

In Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. Six years later in Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L.Ed.2d 33 (1992), the court extended this principle to peremptory challenges exercised by a criminal defendant as well, reasoning, “[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same-- in all cases, the juror is subjected to open and public racial discrimination.” Id. at 49.

Batson and its progeny utilize a three-part test to determine whether a peremptory challenge is race based:

[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L.Ed.2d 834 (1995).

In deciding whether the second step has been shown the trial court is guided by the following cautionary instruction: "The second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett, 514 U.S. at 767-68; see also, State v. Vreen, 143 Wn.2d 923, 927, 26 P.3d 236 (2001). While the proponent must have legitimate reasons for exercising the strike, this is not the same as stating that the proffered reason must make sense; the constitution requires only that it be a reason that does not deny equal protection. Purkett, 514 U.S. at 768-769 ("Unless a discriminatory intent is inherent in the . . . explanation, the reason offered will be deemed race neutral.").

Should the prosecutor volunteer a race-neutral explanation before the trial court rules on whether the defendant has made out a prima facie case, and the trial court then rules on the ultimate question of racial motivation, the preliminary prima facie case evaluation is unnecessary. Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed.

2d 395 (1991); State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

One division of the Court of Appeals has established circumstances for the court to consider in making its determination: (1) striking a group of jurors sharing race as the only common characteristic; (2) disproportionate use of strikes against a group; (3) the level of the group's representation in the venire as compared to the jury; (4) race of the defendant and the victim; (5) past conduct of the prosecutor; (6) type and manner of the prosecutor's voir dire questions; (7) disparate impact of the challenges; and (8) similarities between the individuals who remain on the jury and those stricken. State v. Evans, 100 Wn. App. 757, 769-70, 998 P.2d 373 (2000).

A trial court's determination is accorded great deference on appeal, and will be upheld unless clearly erroneous. Hernandez, 500 U.S. at 364; Luvene, 127 Wn.2d at 699.

Defendants assert the State use of a peremptory challenge upon Juror No. 9, Sylvia Donovan violated the principles set forth in Batson. The argument in the brief creates the impression that Juror No. 9 was the second African-American juror upon whom the State exercised a peremptory. Hicks Brief at p.30. The first challenge, to Juror No. 17, was for cause because he knew many of the witnesses and thought that his knowledge would impact his assessment of their credibility. RP123-142. The court granted this challenge for cause and that determination is

not challenged on appeal. A valid challenge for cause cannot be held against the State as being indicative of some improper motive. This challenge has no relevance to the issue before the court.

Although the trial court was concerned about whether the defendants had truly established a prima facie case under Batson, it found that one existed “out of an abundance of caution” and asked the prosecutor to disclose his reasons. RP 496. The prosecutor responded:

Ms. Donovan has a master’s in education. Whether it’s science or not, people who are educators tend to be non-state type jurors that tend to be more forgiving, nurturing types, that necessarily aren’t going to look for reasons to excuse behavior. She also happens to be a social worker, which is another red flag for a prosecutor.

Whether it’s science or not, those two criteria are the reasons why the State would not want somebody with that background and history to be on the jury.

Further Ms. Donovan also indicated that somebody in her family, either a friend or relative, had been arrested or served time.

That’s another reason why I considered not keeping her as a juror; those three reasons.

RP 496-497. All of these reasons are race-neutral. The trial court found no purposeful discrimination and denied the defendants’ motion. RP 498.

On appeal, defendants present no argument that the reasons proffered were not a valid basis for exercising a peremptory challenge. Defendants argue that the court should find these reasons to be a pretext because, if real, the State would have exercised a peremptory on Juror No

14 whose brother had been in jail and thought of defense attorneys as “fair, strong wise.” Hicks brief at 31, 35-36. While the record is silent as to whether the prosecution ever considered exercising a peremptory against Juror No 14, it is clear that Defendant Hicks exercised his third peremptory challenge as to that juror. HCP 135-136. Once that was done, it became unnecessary for the State to do so. Defendants fail to identify any other social workers or teachers that remained on the jury to support their claim that the proffered reasons were a pretext.

The trial court found no improper motive and that determination is to be given great weight. Defendants have presented no reason to doubt the court’s ruling on this issue.

6. THE FOLLOWING LAW IS APPLICABLE TO THE EVIDENTIARY ISSUES RAISED BY DEFENDANTS.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of

discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

The Sixth Amendment, applied to the states through the Fourteenth Amendment, guarantees criminal defendants a fair opportunity to present exculpatory evidence free of arbitrary state evidentiary rules. Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L.Ed.2d 37 (1987), Washington v. Texas, 388 U.S. 14, 18, 23, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992); In re Twining, 77 Wn. App. 882, 893, 894 P.2d 1331, review denied, 127 Wn.2d 1018 (1995). Limitations on the right to introduce evidence are not constitutional unless they affect fundamental principles of justice. Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L.Ed.2d 361 (1996)(stating that the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L.Ed.2d 798 (1988))). Similarly, the Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. State v. Knapp, 14 Wn. App. 101, 107-08, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. State v.

Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); State v. Kilgore, 107 Wn. App. 160, 184-185, 26 P.3d 308, (2001).

In the case now before the court, defendants claim that the trial court made errors in its evidentiary rulings in the second trial. These claims will be discussed in detail in the following sections with citations to cases applicable to that particular issue. However, the general principles stated above apply to all of defendants' evidentiary claims.

7. HICKS' CLAIM OF IMPROPERLY ADMITTED
HEARSAY IN THE SECOND TRIAL IS
MERITLESS.

Hearsay is generally inadmissible at trial. ER 803. The definition of hearsay is found in ER 801(c):

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801 further provides a definition of "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a).

Hicks alleges that court improperly admitted hearsay evidence in the second trial during the State's presentation of rebuttal evidence. This claim only pertains to the second trial. Contrary to the assertion in Hicks' brief, the State did not elicit the challenged evidence in the first trial; it was adduced on cross-examination of the State's rebuttal witness. RP(5/8)

109-110. There was no motion to strike or objection lodged regarding the evidence; the claim was no preserved for review in the first trial.

In the second trial the challenged evidence came out during the re-direct of the State's rebuttal witness. Hicks had called a psychologist, Dr. Moore to give an opinion regarding Hicks' ability to formulate an intent at the time of the crime. RP 1241-1426. Dr. Moore testified that he reviewed Hicks' prison medication records, but not his prison diagnostic records, which showed that he had been prescribed Seroquel, which is prescribed for psychosis and schizophrenia. RP 1286-1287. Dr. Moore indicated that Hicks was still on the drug in the Pierce County Jail. RP 1288. Dr. Moore acknowledged that, despite several previous evaluations, Hicks had never been diagnosed as suffering from a psychotic disorder until he did so. RP 1377.

The State called Dr. Murray Hart from Western State Hospital to testify regarding his efforts to evaluate Hicks' mental condition and other evidence the jury could use in assessing Hicks' diminished capacity defense. RP 1903-2044. On direct, Dr. Hart indicated that he had spoken with Jim Jorgenson, the mental health professional at the Pierce County jail, regarding Hicks and that he had gotten the jail mental health record to review. RP 1948, 1956-1958. Dr. Hart did not discuss Seroquel on direct. On cross-examination, Hicks counsel adduced that Hicks was on court-ordered medication of Seroquel while he was at Western State Hospital and that this medication is prescribed, among other reasons, to treat the

symptoms of psychosis. RP 1964-1965, 2007-2008. Dr Hart testified that he could find no evidence in the jail records of any psychosis from the point of Hicks arrest until that day that would connect to the administration of Seroquel, but that he could not testify that Hicks had never suffered from psychosis. RP 2008. Defense counsel then referenced records from the department of corrections that Hicks had been on Seroquel there and asked “[S]o you don’t know if maybe they determined that there was psychosis in the past?” RP 2008-2009.

On redirect , there was the following exchange:

PROSECUTOR: Do you know whether or not the jail ever prescribed antipsychotic medication purely for the purpose of behavior control?

HICKS’ COUNSEL: Objection, no foundation. Calls for hearsay. And relevance.

COURT: He can answer yes or no.

...

DR. HART: Yes, I do. My answer is yes.

PROSECUTOR: And do they?

DR. HART: Yes.

RP 2026-2027.

In closings, counsel for Hicks argued that the jury should infer that Hicks had psychoses in the past because “the State” had given him an antipsychotic drug. RP 2154. The prosecutor made the following responsive argument:

PROSECUTOR: Counsel indicates that Hicks was on Seroquel and therefore you should make the quantum leap that he must have been diagnosed with a psychotic disorder. Well, you heard from Dr. Hart and Dr. Moore that, quite frankly, the jails will use antipsychotic medications to control behavior issues, and that Dr. Moore didn't look at the jail records or the Department of Corrections records to determine why Phillip Hicks had Seroquel.

RP 2181. Dr. Moore testified to that he knew of instances where the Department of Corrections had used Seroquel to control behavior as opposed to treating psychoses. RP 1382-1383.

There are many problems with Hicks' claim of improperly admitted hearsay. First, the question to which he lodged an objection called for a "yes or no" answer as to whether the witness had knowledge of something. It does not call for the witness to relate an out-of-court statement. The court properly overruled this objection and allowed the witness to answer. The next question is the one that called for the doctor to relate the substance of his knowledge. There was no objection to this question or to his answer, so any claim of error was waived in the trial court.

Even if this court were to find that the earlier objection "carried over" to the next question, the answer still does not contain an out-of-court statement as defined by ER 801(a). Hicks, evidently aware of this problem, claims that the answer was "backdoor hearsay" which was phrasing the response in such a way as to eliminate a direct quote. Hicks'

Brief at p. 38. Counsel argues that Dr. Hart's basis of knowledge was "admittedly based on conversations with jail medical staff" so therefore the information was based on hearsay. Id. The record does not support this claim. Dr. Hart testified that Western State Hospital would receive inmates from the Pierce County Jail on antipsychotic medications, but the reason why would not be clear. RP 2026. He then stated:

We have struggled with the jail to try to get some communication around this issue. It's been more or less successful.

RP 2026. This answer does not articulate how the desired information was now arriving at Western State Hospital. Without that knowledge, it is impossible to know whether the information was based on inadmissible hearsay or was delivered in a manner, such as in medical records, for which there is an applicable exception. See, State v. Garrett, 76 Wn. App. 719, 887 P.2d 488 (1995). If there was an applicable exception, then the information would not constitute "backdoor hearsay." The record is not developed sufficiently on the basis of Dr. Hart's knowledge to make any sort of determination. Thus, Hicks cannot show an abuse of discretion.

Moreover, the evidence was largely cumulative of evidence testified to by the defendant's own witness, Dr. Moore, who knew that the department of corrections would sometimes use antipsychotic medication for behavior control. Any prejudice stemming from the admission of Dr. Hart's testimony was minimal.

Finally, Hicks' assertion that Dr. Hart's testimony adduced "testimonial hearsay" in violation of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), is without merit. In Crawford, the Court held that an out-of-court *testimonial statement* may not be admitted against a criminal defendant unless the declarant testifies at trial or is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Crawford, 124 S. Ct. at 1374. The decision in Crawford was restricted the use of testimonial hearsay, but "left for another day any effort to spell out a comprehensive definition of 'testimonial.'" Crawford, 124 S. Ct. at 1374. The Court, however, gave guidance on the issue by noting various formulations of the "core class" of testimonial statements at which the Confrontation Clause was directed. These include (1) "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 124 S. Ct. at 1364. None of these descriptions fit the evidence at issue here. Hicks has failed to demonstrate any violation of Crawford.

For the above reasons, this court should reject Hicks claim of improperly admitted hearsay in the second trial.

8. THE COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING A JURY TO HEAR PRIOR TESTIMONY DESCRIBING THE TIMING OF THE GUNSHOTS.

Under ER 804 (b)(1)⁷, the former testimony of an unavailable witness is not excludable as hearsay if the other party had a full opportunity to cross-examine the witness at the time the witness testified. In the second trial, the court admitted⁸ the testimony of Wayne Washington from the first trial pursuant to this rule. RP 1710-1711, 1727-1728. Prior to the testimony being read into the record the court administered an oath to the readers of the transcript and read an agreed instruction explaining to the jury what it was about to hear and how it should consider the sworn testimony. RP 1744-1746, 1748-1749.

⁷ ER 804 (b)(1) states:
b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

⁸ The testimony was adduced at RP 1750-1762.

On appeal, defendants do not challenge the admission of this evidence in general. Rather, defendants argue that the court abused its discretion in allowing a portion of the former testimony to be read in which the witness and a defense attorney cross-examined the witness on the timing of the shots that the witness heard. RP 1761-1762. The question was phrased, "Was it a pop-pop-pop, or was it pop, pop, pop, pop?" RP 1761. The response was, in part: "I'd say pow, then pow, and pow." Id. This exchange was followed by additional questions and answers describing the series of gunshots heard that night. RP 1761-1762. Similar testimony had been adduced on direct. RP 1753-1755. Defendants contend that this former cross-examination testimony should have been excluded because it was unknown exactly how the question was read and how the answer was given. Defendants' cite no authority to support their contention. An appellate court need not consider any argument for which no authority is cited. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

Additionally this court should reject defendants' suggestion as ultimately being harmful. It would become an exception that would eventually swallow the rule. Defendants' claim that the series of "pops" and "pows" cannot be read so as to insure that the same information is conveyed as it was in the first trial. Indeed, the same thing could be said about any type of former testimony. It is unlikely that the readers of the former testimony will be able to discern from the written word the

witness's emotion, inflection, or vocal timbre - much less be able to duplicate it. Indeed, the ability of different people to interpret the same written words in a different manner is a primary reason that Shakespeare aficionados will keep seeing different productions of the same play. This director's vision or that actor's interpretation may bring new insights. If this were the standard for admitting former testimony, very little would be admissible. Defendants propose a new rule that has no limits in its application. It undermines the very purpose of the rule itself and should be rejected.

The court found that the rule clearly allowed for the introduction of the testimony. The jury is going to understand that the person reading the former testimony is not the actual witness and therefore hampered by the situation. An attorney is free to point out this limitation in argument. Defendants have failed to demonstrate any abuse of discretion in the admission of this evidence.

9. THE TRIAL COURT PROPERLY
INVESTIGATED AN INCIDENT OF JUROR
CONTACT AND CORRECTLY ALLOWED THE
JUROR TO REMAIN WHEN IT WAS CLEAR
THAT THE INCIDENT WAS NOT PREJUDICIAL
TO DEFENDANTS.

A trial court's decision on the removal of a juror is reviewed for an abuse of discretion. State v. Ashcraft, 71 Wn. App. 444, 461, 859 P.2d 60 (1993). CrR 6.5 allows the court to replace a juror with an alternate juror,

before the submission of the case to the jury, if the juror becomes unable to serve. Although CrR 6.5 does not specifically require a hearing, some sort of formal proceeding is contemplated by the rule. Ashcraft, 71 Wn. App. at 462. A proceeding is only required when the case has already gone to the jury and the alternates have been temporarily excused. State v. Johnson, 90 Wn. App. 54, 72, 950 P.2d 981 (1998).

The United States Supreme Court has summarized the law on “intrusions” on the jury as follows:

‘Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . It is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.’

United States v. Olano, 507 U.S. 725, 738, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993), quoting Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). The Court noted that the ultimate inquiry is: Did the intrusion affect the jury’s deliberations and thereby its verdict? Olano, 507 U.S. at 739.

If a juror communicates with a third person about an ongoing trial this constitutes misconduct; it warrants a new trial only if such communications prejudice the defendant. State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986); see, State

v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968); see also, State v. Saraceno, 23 Wn. App. 473, 474-75, 596 P.2d 297 (1979). At a minimum, a juror must discuss the pending case with a non-juror to create misconduct. State v. Brenner, 53 Wn. App. 367, 372, 768 P.2d 509 (1989). Once misconduct is shown, prejudice is presumed. The State has the burden to overcome this presumption by proof beyond a reasonable doubt. Murphy, at 296. Courts have found no prejudice even where the juror has discussed the case with a third party or a witness. See, e.g., State v. Theobald, 78 Wn.2d 184, 186, 470 P.2d 188 (1970); State v. Lemieux, 75 Wn.2d at 90-91. When the State can establish that the juror did not discuss the case with a third party, then it has met its burden of showing beyond a reasonable doubt that no actual prejudice occurred. State v. Brenner, 53 Wn. App. 367, 376, 768 P.2d 509 (1989).

The party who asserts juror misconduct bears the burden of showing that the alleged misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). The determination of whether misconduct has occurred lies within the discretion of the trial court. State v. Havens, 70 Wn. App. 251, 255-56, 852 P.2d 1120, review denied, 122 Wn.2d 1023 (1993).

Here defendants claim that there was improper communication with a juror, prior to deliberations, and that the court erred in not excusing this juror from the case. The record shows that no error occurred.

During the course of a trial, a juror reported to the judicial assistant that he had had some limited contact, outside the courtroom, with a person whom the juror believed was associated with the victim. RP 1220-1221, 1588-1592. Prior to hearing the juror's recount of the incident, counsel for Hicks moved to have the juror excused from further service. RP 1590. The court determined that it needed to have a colloquy with the juror to determine exactly what happened. RP 1590.

Juror No. 13, the first alternate, was called into court separately from the other jurors. RP 1601. He described an incident where, while leaving the courthouse for the day and walking to his bus stop, a person who had been with the victim in the courtroom, came within six feet of him and muttered something to the effect of "What the f*** do you want me to f***." RP 1603-1604. He muttered some other things that the juror could not hear. RP 1606. The juror could not be sure that this was directed at him, but he saw no one else around. RP 1603-1606. The juror continued on his way and the man did not follow. RP 1603. When the juror looked back, the man was standing at a car with the door open. Id. The juror said that he was not intimidated by this encounter and that it would not affect his ability to be fair and impartial. RP 1604. The juror said that he reported it to court staff because of the frequent admonitions from the court not to have any contact with people associated with the case. RP 1605. The juror had not mentioned the incident to other jury members and the court instructed him not to do so. RP 1604, 1605.

After hearing from the juror, none of the parties asked the court to excuse him from further service. RP 1606. The court was satisfied that nothing had happened that would impact his ability to be fair and impartial. RP 1606. At the time of the colloquy, this juror was in the position of being the first alternate. RP 1591. One of the sitting jurors, Juror No. 3, was later excused from service and this alternate juror moved into the vacated position on the jury. RP 2045-2046, 2070. No one objected to his participation in deliberations at that time. Id. There was another alternate available who ultimately did not participate in deliberations. RP 2184.

This record shows that there was no misconduct by the juror. He did not voluntarily engage in improper communication with a third person about the case. After relaying what occurred, none of the parties thought there was a problem with his continued participation in the case. No one moved for his removal or objected when his status changed from an alternate to a seated juror. The court properly investigated the situation and concluded that defendants' fair trial was not jeopardized by the incident. This record supports that determination. The trial court did not abuse its discretion.

10. DEFENDANTS HAVE FAILED TO SHOW THAT
THE PROSECUTOR COMMITTED
MISCONDUCT IN THE REBUTTAL
ARGUMENT OR THAT THERE WAS ANY
RESULTING PREJUDICE.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 93 L.Ed.2d 599, 107 S. Ct. 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985)(citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” Beck

v. Washington, 369 U.S. 541, 557, 8 L.Ed.2d 834, 82 S. Ct. 955 (1962). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87.

Defendants assert that the prosecutor engaged in improper argument during rebuttal. At the outset it should be noted that only Babbs objected to the argument. RP 2166. On appeal, Hicks adopted the argument presented in Babbs' brief on this issue, but has a higher burden to meet due to the failure to preserve error in the trial court. Hicks also faces another difficulty in adopting Babb's argument. In addition to showing the remarks were improper, he must show that the remarks prejudiced the defense. As will be seen from the discussion below, the challenged argument pertains exclusively to Babbs' case and whether the State had sufficient proved his identity as the second shooter. Even if Hicks were able to show the prosecutor committed "flagrant and ill-intentioned" misconduct, he cannot show how it had any effect on his case. Hicks has tried to adopt a claim upon which he cannot prevail.

It is important to review the substance of a couple of witnesses in order to put the challenged argument into context. Willie Watkins

testified that he was Hicks' foster brother and had known him 11 years, ever since he came to live with him and his mother, Brenda Watkins. RP 821-822. He has known Babbs a slightly shorter period of time. RP 822-823. Babbs and Hicks would do things together and he assumed they were friends. RP 823. Willie recalled a night that he received a late call from his mother, awaking him; she asked him to come home because something was going on with his brother (Hicks). RP 825-826. Willie also recalled that he had seen his brother a couple of times earlier in the day. The first time had been around noon, over at his mother's house, and his brother had been with someone. RP 826-827. He saw his brother at his mother's again, later on that night, around 11:00 in the evening, and he was with someone then too. RP 828-830, 835, 841-842. Willie denied ever identifying this person to detectives as Babbs. RP 831. Willie testified that he could not be sure that he saw the same person his brother both times he saw him that day. His brother and this other person were still at his mother's house when he left to go home. RP 843-845. When he went to his mother's house later that night after she had called, his brother was there. RP 845. Willie stayed at his mother's for about half an hour, talking to his brother who seemed "wired and just like scared." RP 845. After he left his mother's house he went to 15th and Sheridan, which was about 10 blocks away; there was police activity in the area. RP 846-847.

The State later called a detective to the stand to impeach Willie's testimony. Detective Webb testified that Willie told him that he had seen

Babbs with Hicks on the day of the shooting. RP 1539-1542. The court instructed the jury that it could only use this evidence to assess Willie's credibility and not as substantive evidence. RP 1539-1540.

Brenda Watkins, Hicks' foster mother, testified that Babbs was with her son the day and night of the shooting. RP 1491-1492. She recalls seeing them together twice. RP 1493. The first time was somewhere around noon-1:00 p.m. RP 1494. She returned home, to 1318 S. 25th Street, from a doctor's appointment and saw them both standing out front. Id. They waved at her, got into their car, and drove away; she parked her car in the vacated spot and went inside. RP 1494-1495. Her other son, Willie Watkins was inside. RP 1495. She also saw Hicks again later in the evening, sometime after 8:30, because her other children were in bed. RP 1496. She testified that she was on the computer and that her son Willie was still at the house when Hicks arrived in a car with Babbs. RP 1496-1498. Willie went outside and had a conversation with them. RP 1498-1499. Hicks and Babbs did not come inside, but their car remained parked in the driveway; Ms. Watkins was not sure where they went. RP 1499-1500. About 45 minutes to an hour later, Ms Watkins was frightened by a very hard and rapid knocking on her door. RP 1500. Hicks was at her front door; he was glistening with sweat, smelled musty and his eyes were bulging. RP 1501-1503. Ms. Watkins was concerned about Hicks' behavior so she started to call Willie. RP 1503-1504. When she did that, Hicks began crying, fell to the floor and kept repeating

“Momma, pray for me.” RP 1504. Hicks then told his mother that he had been shot at. RP 1504. Ms. Watkins called Willie and asked him to come over to talk to Hicks. RP 1505. She testified that Willie came over and talked to Hicks in the bathroom. RP 1505. Ms. Watkins has no doubt that the person she saw twice with Hicks earlier that day was Babbs. RP 1506-1507.

During his closing, counsel for Babbs attacked the State’s evidence to prove that Babbs was the person with Hicks at the time of the homicide/attempted murder. RP 2106-2112. He argued that the State was relying on “bookends” evidence – evidence that showed Babbs was with Hicks before and after the shooting in order to prove that he was the one with him during the shooting. Counsel discussed the testimony of Willie and Brenda Watkins. RP 2111-2112. Counsel argued that Willie testified that he couldn’t identify who he saw with Hicks earlier in the day, reminded the jury that the impeachment evidence couldn’t be used as substantive evidence, and concluded:

BABBS’ COUNSEL: So Willie Watkins is nullified. He is not even circumstantially able to prove Rashad Babbs was with was with Phillip Hicks.

RP 2111. The State began to respond to this argument and drew the following objection:

PROSECUTOR: You’ve got Brenda and Willie Watkins seeing the defendants together on the evening of this incident. Brenda wasn’t able to pinpoint the time frame. She knows it was after –

BABBS' COUNSEL: Your Honor, I object, that is absolutely not what the evidence indicated. Willie Watkins had an instruction delivered to this jury limiting the use of that testimony. [sic] Willie Watkins does not identify my client with Mr. Hicks earlier in the evening. That's what counsel just said.

PROSECUTOR: May I continue?

COURT: [Counsel], it's the memories of the jurors that's important.

BABBS' COUNSEL: Your Honor, you read an instruction to the jury as to how they were to consider that evidence. And if the Court Backs off that instruction at this point, in my opinion it renders the entire process moot. The testimony was what the testimony was. I'm asking that counsel be restricted to argue from the facts.

COURT: [Counsel], it's the memory of the jurors that's important, and they've been instructed on how to use their memory and what the law is.
...Proceed please.

PROSECUTOR: Thank you, Your Honor.

Brenda and Willie Watkins encountered Rashad Babbs and Phillip Hicks. Brenda tells us that was the two people together because she recognized Rashad Babbs when she saw them. The two of them, Phillip Hicks and Rashad Babbs leave mere blocks from the shooting late in the evening....around 8:00 or 8:30.... That Phillip Hicks returned within the hour.....

RP 2166-2167.

Defense counsel argued to the jury that Willie Watkins testimony was useless to the State because he had not identified the person he saw with his brother as Babbs. The prosecutor was entitled to rebut this

argument. While Willie did not identify Babbs, he did describe events that were also the subject of the testimony by Brenda Watkins. Brenda Watkins corroborated Willie's testimony as to Hicks being at her house the day and evening of the shooting and that he was there with another person. She did identify Babbs as the person who had been with her son that day. The jury could consider Willie's testimony in conjunction with that of his mother's and conclude that the person Willie had seen with his brother at his mother's house was Babbs and the prosecutor was free to argue that inference.

The wording of the challenged argument is important. The prosecutor *did not* represent that Willie had identified Babbs as the person who had been with his brother. The prosecutor *did not* refer to the impeachment testimony and argue that it provided evidence that Willie had identified Babbs. Either of these arguments would have been improper. The prosecutor stated only that "[y]ou've got Brenda and Willie Watkins seeing the defendants together on the evening of this incident" and that "Brenda and Willie Watkins encountered Rashad Babbs and Phillip Hicks." These statements are completely supported by Brenda Watkins testimony. These statements reflect the testimony presented and the reasonable inferences that flow from that evidence. It is not misconduct to argue based on the evidence and the reasonable inferences. State v. Ranicke, 3 Wn. App. 892, 897, 479 P.2d 135 (1970) (in closing argument, prosecuting attorney permitted reasonable latitude in

drawing inferences from the evidence). Defendants have failed to meet their burden of showing that the challenged argument was improper. This court should reject the claim of prosecutorial misconduct.

11. DEFENDANTS ARE NOT ENTITLED TO RELIEF UNDER THE DOCTRINE OF CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” Neder v. United States, 119 S.Ct. 1827, 1838, 144 L.Ed.2d 35 (1999)(internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” Brown v. United States, 411 U.S. 223, 232, 36 L. Ed. 2d 208, 93 S. Ct. 1565 (1973)(internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a

conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); State v. Coe, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); see also State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”).

The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S. Ct. 2004, 131 L.Ed.2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and non-constitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. See, Id. Conversely, non-constitutional errors have a lower harmless error test and weigh less on the scale. Id. Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless

because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. See, e.g., Johnson, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. See, e.g., State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that *no* prejudicial error occurred.”)(emphasis added).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error) and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, see, e.g., State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against

defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, see, e.g., State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, see, e.g., State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See Stevens, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendants have failed to establish that their trial was so flawed with prejudicial error as to warrant relief. Defendants have failed to show that there were any errors in the trial. They have failed to show that there was any prejudicial error

much less an accumulation of it. Defendants are not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions below.

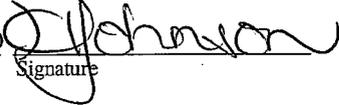
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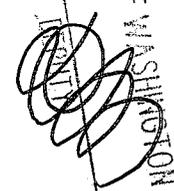
GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

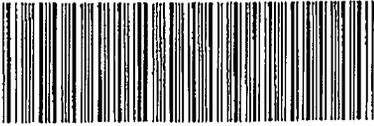
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/2/05 
Date Signature

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DIVISION II
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STATE OF WASHINGTON
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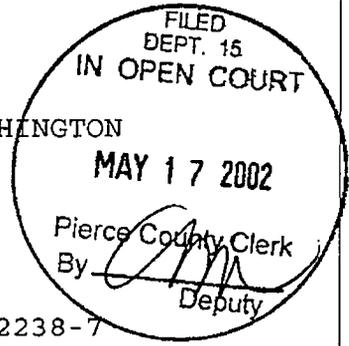
APPENDIX “A”

*Findings of Fact and Conclusions of Law
Admissibility of Statement, CrR 3.5*



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

PHILLIP VICTOR HICKS,

Defendant.

CAUSE NO. 01-1-02238-7

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
ADMISSIBILITY OF STATEMENT,
CrR 3.5

This matter having come on for hearing before the honorable JUDGE THOMAS FELNAGLE on the 8TH day of MARCH, 2002, and the court having ruled orally that the statements of the defendant are admissible, now, therefore, the court sets forth the following Findings of Fact and Conclusions of Law as to admissibility.

UNDISPUTED FACTS

- 1. On April 24, 2001, defendant, Phillip Hicks, was arrested for unlawful delivery of a controlled substance.

FINDINGS OF FACT AND
CONCLUSIONS, CrR 3.5 - 1

96-1-04295-3

1
2 2. Shortly thereafter, Hicks was contacted by Detectives J. Ringer,
3 T. Davidson, and W. Webb of the Tacoma Police Department.
4

5 3. Hicks was placed in the backseat of an unmarked patrol vehicle.

6 4. As soon as the detectives entered the patrol vehicle, without
7 being questioned, Hicks began saying, "I'll work with you." He said,
8 "Tell the truth, answer one question. Am I through?" The detectives
9 did not engage in a conversation with the defendant.
10

11 5. It was the intent of the detectives to transport Hicks to the
12 police station before questioning.

13 6. Hicks, however, wanted to know how he had been discovered and if
14 he had been followed. Defendant asked, "Are deliveries the only thing
15 you got on me?" He further stated, "I'm not trying to go back to the
16 pen." Defendant questioned whether he had sold to an undercover
17 officer. He then stated, "You mother fuckers are good to catch me. I
18 don't even curb serve." The detectives did not respond.
19

20 7. As the defendant expressed a willingness to talk and was very
21 talkative, Detective Webb stopped the patrol vehicle alongside the
22 road.
23

24 8. Detective Davidson who was seated next to the defendant advised
25 Hicks of his Miranda rights from an Advisement of Rights Form.
26

27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 2

96-1-04295-3

1
2 9. Hicks was advised of his rights at 1348 hours.

3
4 10. Hicks signed the Advisement of Rights Form, acknowledging that he
5 understood his rights.

6 11. Hicks waived his rights and expressed a willingness to answer
7 questions. Defendant stated, "I don't hurt people. I'm a thief."

8
9 12. Hicks was transported to the Criminal Investigation Division of
10 the Tacoma Police Department. At the police station, in front of the
11 freight elevator, Hicks reached for Detective Davidson's hand and
12 shook it.

13 14. Hicks congratulated Detective Davidson, stating, "My sister is
14 not going to die, and I'll do life."

15
16 15. Hicks was taken into an interview room.

17 16. Hicks was asked if he wanted something to drink, and at
18 defendant's request, Detective Ringer left the room to get a bottle of
19 orange juice.

20 17. Hicks made an equivocal request for an attorney.

21
22 18. Detectives Ringer, Webb, and Davidson discussed the equivocal
23 request for an attorney amongst themselves outside the interview room.

24 19. They, thereafter, re-entered the interview room, and Detective
25

26
27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 3

96-1-04295-3

1
2 Davidson reminded the defendant that he had been advised of his
3 rights. Hicks replied, "Yes."

4
5 20. Detective Davidson asked Hicks if he had knowingly waived his
6 rights, and Hicks responded that he had.

7 21. Defendant wanted assurances that anything he said would help him
8 get time off any potential sentence.

9
10 22. Detective Davidson told Hicks that they, the detectives, could
11 not make any promises to him other than to inform the prosecutor's
12 office of his cooperation.

13 23. After Hicks made statements to the detectives, he was transported
14 to the Pierce County Jail by Detective Webb.

15
16 24. While waiting to be booked, Hicks was told to sit on a bench in
17 the reception area of the jail.

18 25. Hicks continued to get up and walk over to Detective Webb.

19 26. Hicks continued to make statements about the homicide.

20
21 27. Detective Webb repeatedly reminded Hicks of his invocation of
22 Miranda rights. Hicks responded, "I've already invoked my rights so
23 you can't use things I say now."

24 28. Detective Webb again advised Hicks to sit down and to remain
25 silent. Hicks, however, insisted on talking about the homicide.
26

27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 4

DISPUTED FACTS

1
2
3
4
5 1. Detectives testified that after Hicks was advised of his Miranda
6 rights and while still in the patrol vehicle, defendant was told by
7 Detective Davidson that he was in more trouble than just delivering
8 drugs. Defendant responded by exhibiting a "knowing look", stating,
9 "I was there, but I didn't do it." When Detective Davidson told Hicks
10 that he was involved in a murder, defendant expressed an exaggerated
11 confused look, stating, "You know that I know what happened." Hicks,
12 on the other hand, testified that nothing regarding the homicide was
13 mentioned until they arrived at the police station. Defendant
14 testified that the only topic discussed in the vehicle was the drug
15 deliveries.
16
17

18 2. Detectives testified that while Detectives Ringer and Webb were
19 out of the interview room and as Detective Davidson was about to leave
20 the room, Hicks stated, "Maybe I need a lawyer." Defendant, however,
21 testified that all three detectives were in the room when he stated,
22 "I think I need a lawyer." The detectives then all left the room.
23

24 3. Detectives testified that when they re-entered the interview
25 room, Detective Davidson questioned Hicks about his equivocal request
26

27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 5

96-1-04295-3

1
2 for an attorney. Detective Davidson testified that he asked Hicks if
3 he was requesting an attorney. Defendant, however, testified that he
4 could not recall being asked by Detective Davidson whether he was
5 asking for an attorney.
6

7 4. Detective Davidson reminded Hicks that he, Hicks, had mentioned
8 an attorney and that if he was asking for an attorney, the detectives
9 would end any questioning of him at that time. Detectives testified
10 that Hicks told the detectives he was not asking for an attorney but
11 was concerned about protecting his interest in "any potential deal" if
12 he helped the detectives by answering questions. Defendant testified
13 that he does not recall telling the detectives he was not asking for
14 an attorney, but does recall talking to the detectives about
15 protecting any potential deal if he helped by answering questions.
16
17

18 5. Detectives testified that Detective Davidson again asked if he,
19 Hicks, wanted an attorney present. Detectives testified that Hicks
20 did not wish to have an attorney present and that Hicks expressed a
21 desire to speak with the detectives. Defendant, however, testified
22 that he could not recall being asked by Detective Davidson if he
23 wanted an attorney present.
24
25
26

27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 6

96-1-04295-3

1
2 5. Defendant testified that when the detectives re-entered the
3 interview room, Detective Davidson asked for a name of an attorney and
4 that he, Hicks, gave the name of Rodney Degeorge. Detective Davidson
5 then left the room to contact Degeorge. The detectives, on the other
6 hand, testified that Hicks did not ask to have his attorney, Degeorge,
7 present for further questioning until 1600 hours, after the defendant
8 had given a statement about the homicide in question. When Hicks
9 asked to have Degeorge present, Hicks never stated that he did not
10 want to answer any more questions. Rather, Hicks hinted that he would
11 give a more complete statement when Degeorge arrived.
12
13

14 6. Defendant testified that after Detective Davidson left the room,
15 Detectives Ringer and Webb continued questioning him. They threw
16 photos on the table telling him to look at the photos. Detectives
17 Ringer and Webb testified, however, that they did not question the
18 defendant while Detective Davidson was out of the room.
19

20 7. Defendant testified that after Detective Davidson spoke with
21 Degeorge and he returned to the interview room, he told Hicks, "You
22 need to help yourself." Defendant was led to believe by Detective
23 Davidson that Degeorge had advised him to speak with the detectives
24 and had advised that it was in his best interest to do so. The
25
26

27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 7

96-1-04295-3

1
2 detectives, however, testified that they did not question Hicks while
3 they waited for DeGeorge to make contact. Detective Davidson
4 testified that when he spoke with DeGeorge, DeGeorge told him to
5 advise Hicks not to speak with the detectives.
6

7 CONCLUSIONS AS TO DISPUTED FACTS
8
9
10

- 11 1. After Hicks was advised of his Miranda rights, defendant was told
12 by Detective Davidson that he was in more trouble than just delivering
13 drugs. Defendant was told by Detective Davidson that he was involved
14 in a murder.
15
16 2. While Detectives Ringer and Webb were out of the interview room
17 and as Detective Davidson was about to leave the room, defendant made
18 an equivocal request for an attorney. Defendant stated, "Maybe I need
19 a lawyer."
20
21 3. When the detectives re-entered the room, defendant was questioned
22 about his equivocal request for an attorney. Defendant was reminded
23 by Detective Davidson that he, Hicks, had mentioned an attorney and
24 that if he was asking for an attorney, the detectives would end any
25 questioning of him at that time.
26

27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 8

96-1-04295-3

1
2 4. Thereafter, when Hicks was asked if he was requesting an attorney
3 by Detective Davidson, Hicks responded that he was not asking for an
4 attorney. Hicks did express his concern about protecting his interest
5 in any "deal" for helping the detectives.
6

7 5. Hicks was again asked by Detective Davidson if he wished to have
8 an attorney present. Hicks again replied that he did not wish to have
9 an attorney present.
10

11 6. Hicks clearly expressed his willingness to speak to the
12 detectives.

13 7. At approximately 1600 hours, after the defendant made statements
14 to the detectives regarding the homicide, defendant asked to have his
15 attorney, Rodney Degeorge present during further questioning.
16

17 8. Detective Davidson left the room to contact Degeorge.

18 9. While Detective Davidson was out of the room, Detectives Ringer
19 and Webb did not question Hicks.

20 10. After Detective Davidson returned, they waited for over an hour
21 for Degeorge to contact the detectives.
22

23 11. While waiting, the detectives did not question Hicks.

24 12. After speaking with Degeorge, Detective Davidson told Hicks that
25 he, the defendant, was advised not to speak with the detectives.
26

27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 9

96-1-04295-3

1
2 13. Credibility is resolved in favor of the police. The detectives
3 were consistent in their testimonies, and showed confidence in their
4 statements. They had also prepared reports detailing the statements
5 made by the defendant. Defendant's demeanor, on the other hand, showed
6 that he did not have a good memory of the encounter with the
7 detectives and it appeared as though the defendant was making it up as
8 he went along. Further, defendant was not consistent in his
9 testimony, and his version of the events was not credible.
10
11

12 CONCLUSIONS AS TO ADMISSIBILITY
13

14 1. Statements by the defendant in the patrol vehicle prior to being
15 advised of Miranda are admissible as the statements were unsolicited
16 by the detectives and not pursuant to an "interrogation" for purposes
17 of Miranda.
18

19 2. Statements by the defendant in the patrol vehicle after being
20 advised of Miranda are admissible as the statements were made after
21 the defendant made a knowing, intelligent, and voluntary waiver of
22 rights.
23

24 3. Statements by the defendant after the equivocal request for an
25 attorney are admissible as the questioning after the equivocal
26

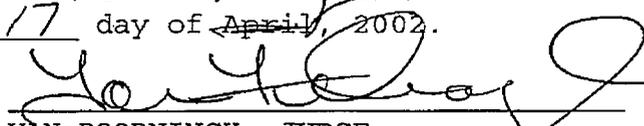
27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 10

96-1-04295-3

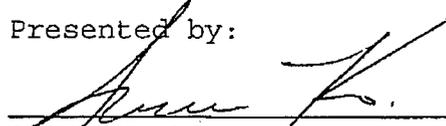
1 invocation was limited to clarifying the request and as the defendant
2 made a clear willingness to speak to the detectives without an
3 attorney being present.
4

5
6 4. Statements by the defendant at the jail during the booking
7 process are admissible as the statements were unsolicited by
8 detective Webb and as defendant's belief that his statements could not
9 be used against him because he had invoked his right to remain silent
10 is unfounded and erroneous.
11

12
13
14 DONE IN OPEN COURT this 17th May day of ~~April~~, 2002.

15
16 
~~VAN DOORNINK, JUDGE~~
Febro 96

17
18 Presented by:

19 
20 SUSAN Y. KO
21 Deputy Prosecuting Attorney
22 WSB # 20425



23 Approved as to Form:

24 
25 ROBERT DEPAN Rodney D. George
26 Attorney for Defendant
2099

27 FINDINGS OF FACT AND
28 CONCLUSIONS, CrR 3.5 - 11