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SUPREME COURT
STATE OF WASHINGTON

NO. 79143-1

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**SUPREME COURT OF THE
STATE OF WASHINGTON**

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STATE OF WASHINGTON, RESPONDENT

v.

RASHAD BABBS, PETITIONER
PHILLIP HICKS, PETITIONER

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

No. 01-1-02239-5

No. 01-1-02238-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO GRANT OF REVIEW.

1. Have defendants failed to show either prong of the Strickland test for ineffective assistance of counsel when there was a tactical reason for informing the jury that the case did not involve the death penalty and when there has been no showing of actual prejudice?
2. Should this court affirm the trial court's denial of defendants' Batson challenge when the court viewed the defendant's evidence of racial motivation as being weak and the prosecutor's reasons for his peremptory challenge as a legitimate and race-neutral justification?

B. STATEMENT OF THE CASE.

Petitioners PHILLIP VICTOR HICKS, hereinafter "Hicks," and RASHAD BABBS, hereinafter "Babbs," went to trial on amended informations charging each 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; BCP 138-141. 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. 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. 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.

Hicks and Babbs appealed their convictions. On August 4, 2006, Division II affirmed their convictions in an unpublished opinion. This court granted review on whether Hicks and Babbs received ineffective assistance of counsel when they allowed the judge to inform the jury in the first trial that it was not a death penalty and whether the trial court erred in denying a Batson challenge during jury selection for the second trial.

The facts underlying the convictions have been fully set forth in the State's response brief filed below. The Court is referred to that briefing for information regarding the evidence adduced at the trials. Facts relevant to the issues raised in the petition for review will be set forth in the argument sections below.

C. ARGUMENT.

1. DEFENDANT'S HAVE FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL AS TRIAL COUNSEL HAD A TACTICAL REASON FOR INFORMING THE JURY THAT THE CASE DID NOT INVOLVE THE DEATH PENALTY AND THERE HAS BEEN NO SHOWING OF ACTUAL PREJUDICE.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also, State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also, Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of

demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

In State v. Townsend, 142 Wn.2d 838, 840, 15 P.3d 145 (2001), this Court held that it was error to inform the jury during venire that the case was not a death penalty case. The trial court in Townsend 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. This 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 this 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.

A decision from 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 case arising out of Division I has again brought this topic before the court. State v. Mason, ___ Wn. 2d ___, ___ P.3d ___ (2007)(2007 Wash. LEXIS 553; Supreme Court Case No. 77507-9, issued July 19, 2007). 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 venire of the fact that it was not a death penalty case. Id. at 571. Prior to the juror raising the topic, the trial court had been very concerned about this issue because the judge 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 trial court had raised its concerns with counsel and asked for suggestions on wording as to how the venire would be informed that it was a non-capital case should the need for an instruction arise. The Court of Appeals, Division I, noting the thoughtfulness of the judge on the issue, concluded that the trial judge did not err. This court took review and held that it was error to inform the venire that it was a non-capital case under Townsend. However, the court went on to state:

If this court was incorrect in Townsend then, upon a proper record, our decision should be challenged in a truly adversarial proceeding. If our reasoning was flawed in Townsend, and there are legitimate strategic and tactical reasons why informing a jury about issues of punishment would advance the interest of justice and provide a more fair trial, then counsel should zealously advance those arguments.

Mason, ___ Wn.2d at ___ (2007 Wash. LEXIS 553, 27-28). Ultimately the court found that the error was harmless noting that defense counsel's objection was lukewarm and may have offered encouragement rather than discouragement to the judge. Additionally, the Court noted that there was no objection advanced to the selection of any juror or to the panel.

The record in the case now before the court shows that the trial court did not inform the jury of the fact that it was a non-capital case at the outset of jury selection; rather, the issue was raised by a potential juror. RP

(5/22) 42-56. 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 given 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. There was never any objection made to the fact that the court imparted this information or to the manner in which it did so. Later in jury selection, counsel for Hicks returned to the topic of punishment which prompted an objection from the prosecutor. RP (4/23) 43. The court sustained the objection and instructed the venire that it had nothing to do with the penalty imposed upon a guilty finding and that any thought of punishment should be limited to making them careful in their deliberations. Id.

Juror No. 9 ultimately sat on the jury and participated in deliberations. BCP 203-205. 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. This jury also convicted Hicks of the firearm charge. Id.

This case presents a scenario that shows why there might be tactical reasons for a defense counsel to want the venire to be informed that death penalty is not involved. Potential jurors may disqualify themselves from jury duty unless informed of the fact that the case does not involve the death penalty. Here there was a potential juror, who was unable to commit to following the court's instructions unless she could be certain the case was not a death penalty case. 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. This presents a legitimate tactical reason for the attorney's performance. The court should not find deficient performance on these facts.

Nor can defendants show that they were actually prejudiced by the jury being informed that it was not a death penalty case. Defendants argue that the jury was less careful in determining guilt because it knew the death penalty would not be imposed. The record does not support this

argument. The jury in question did not convict of the more serious charge of aggravated (premeditated) murder or on the attempted murder charge, which also required a finding of premeditation. RP (5/14) 13-24; CP 25-80. Instructions Nos. 15, 16, 40, 41,42. The verdicts of the first jury showed that it wrestled with the question of whether the evidence showing premeditation was sufficient. It was unable to agree on this question, but did agree that Chica Webber was killed in the course of an attempted robbery and returned a verdict of felony murder. RP (5/14) 13-24. The evidence that the homicide occurred during the course of an attempted robbery, based upon the testimony of Jonathon Webber, was compelling and uncontested. Defendant argues that it might have made the jury less careful with regard to proof of defendant being one of the shooters. However, this issue did not arise in the retrial on the attempted murder charge and that second jury convicted both defendants of that crime. Thus, the record indicates that the evidence of identity, showing the defendants to be the shooters, was compelling to both juries. Defendants have failed to show either prong of the Strickland test for ineffective assistance of counsel.

2. THE TRIAL COURT'S DENIAL OF THE DEFENSE BATSON CHALLENGE IS ENTITLED TO GREAT DEFERENCE; IT SHOULD BE UPHELD AS DEFENDANTS HAVE NOT SHOWN IT TO BE CLEARLY ERRONEOUS.

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).

The United State Supreme Court gave other courts some flexibility in establishing the exact procedures to follow when a Batson challenge is raised in a trial court. “We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor’s challenges.” Batson, supra, 476 U.S. at p. 99; Johnson v. California, 545 U.S. 162, 168 (U.S. 2005) (“States do have flexibility in formulating appropriate procedures to comply with Batson.”). This means that, to some extent, lower courts have been left with the task of determining the type and quantum of proof necessary for a defendant to establish a prima facie case.

In determining whether the first step has been met, the party raising the Batson challenge must make a prima facie case “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” Batson, 476, U.S. at 93-94.

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).

The third step requires the trial court to determine “whether the opponent of the strike has proved purposeful racial discrimination.” Purkett v. Elem, 514 U.S. at 767. It is in this third step where the court makes credibility assessments. See, Johnson v. California, 545 U.S. at 171, n.7. While this three step process includes shifts in the burden of production of evidence, the burden of persuasion never shifts and is always on the party raising the Batson challenge. Batson, 476 U.S. at 93; Johnson v. California, 545 U.S. at 170-171. 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.

One division of the Court of Appeals surveyed decisions from other jurisdictions for circumstances those courts have considered in making its determination of whether a prima facie case has been established; it found the following: (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. Wright, 78 Wn. App. 93, 99-100, 896 P.2d 713, review denied, 127 Wn.2d 1024 (1995); see also, State v. Evans, 100 Wn. App. 757, 769-70, 998 P.2d 373 (2000). This court has yet to adopt this criteria.

In the case now before the court, defendants sought review on the grounds that the decision below from Division II created a split in authority with Division I in State v. Rhodes, 82 Wn. App. 192, 917 P.2d 149 (1996), as to whether striking the only African-American juror in a venire panel is sufficient, by itself, to make a prima facie case of racial discrimination. It appears to the State that this claimed "split" of authority is largely illusory. This court should note that in support of its determination that the defendants below had not established a prima facie case of discrimination, Division II cited to the Division I opinions in State v. Evans, 100 Wn. App. 757, 998 P.2d 373 (2000) and State v. Wright, 78 Wn. App. 93, 896 P.2d at 713 (1995). The Evans court cited to Rhodes with approval and the Rhodes court cited to Wright with approval. The court in Rhodes reaffirmed that it was "reluctant to find that exclusion of a single juror establishes a pattern of to find discriminatory motivation based

on number alone.” Rhodes, 82 Wn. App. at 201. And it cited to the Wright decision for support for this statement: “However, we have recognized that the prosecutor’s dismissal of the only eligible African-American juror *may* imply a discriminatory act or motive.” Rhodes, 82 Wn. App. at 201, citing State v. Wright, 78 Wn. App. at 101)(emphasis added). It does not appear that Division I *requires* trial courts to find or assume a discriminatory purpose is behind the dismissal of the only venire person from a constitutionally cognizable group; it merely allows that it may be a possibility.

Both Division I and Division II state that the first step of the Batson process requires: 1) a peremptory challenge exercised against a member of a constitutionally cognizable group and 2) other relevant circumstances which, taken together raises an inference that the challenge was based on the juror’s membership in the group. Rhodes, 82 Wn. App. at 196; Opinion below at p.13. It is also clear that the party raising a Batson challenge is not required to show *more* than one peremptory strike against a member of a constitutionally cognizable group before it can make the prima facie showing required in the first step. Johnson v. California, 545 U.S. at 169, n. 5. But the United State Supreme Court has always discussed the prima facie case of discrimination as being the “sum of the proffered facts.” See, Johnson v. California, 545 U.S. at 169, citing Batson, 476 U.S. at 94. This indicates that something more than the fact of the peremptory challenge is required to make a prima facie case; this is

what Division II held in the opinion below. The decision below is not a departure from the holdings of Division I or of the United State Supreme Court.

Turning now to the merits of defendants' Batson challenge. Defendants assert the prosecutor's use of a peremptory challenge¹ upon was Juror No. 9, Sylvia Donovan, violated the principles set forth in Batson.

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.

¹ The argument presented in one of the briefs filed below creates the impression that Juror No. 9 was the second African-American juror upon whom the State exercised a peremptory. Hicks COA 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.

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. This determination by the trial court is to be accorded great deference on appeal and will not be disturbed unless it is clearly erroneous. Rhodes, 82 Wn. App. at 197.

In their Court of Appeals briefing, defendants presented no argument that the reasons proffered were not a valid basis for exercising a peremptory challenge. Many lawyers carry strong viewpoints as to certain professions or occupations as being a negative in a potential juror. The trial judge acknowledged the pervasiveness of such thinking with his response to the prosecutor's statement of reasons: "he must have read the same version of the jury selection book that's been on my shelf for years." RP 497. But while striking accountants, teachers, social workers, career military, or other lawyers from jury service may be based upon stereotypes about the type of persons who pursue those careers, such challenges are not constitutionally impermissible because they are not race or gender based.

Defendant Babbs argued that the court did not engage in any meaningful assessment when conducting step three of the Batson

framework and denied the challenge perfunctorily. Babbs COA brief at p. 40-43. The record does not support this claim. What the record shows is that the court thought the defendants' prima facie case was extremely weak and that the prosecutor's reasons were credible and consistent with well known jury selection considerations. RP 490-497. The court heard argument from defense counsel that the third step required the court to consider demeanor and credibility, but heard no argument as to why the evidence showed the prosecutor's explanation was not credible. RP 497-498. The court then –erroneously- placed the burden on proof on the prosecutor and gave him the last opportunity to argue; after hearing that argument, the court denied the motion. RP 498. This shows the court reflected on its decision.

Defendant Hicks argued 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 COA 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 deference on appeal. Defendants have failed to meet their burden of showing that this ruling was clearly erroneous.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgments and sentences entered below.

DATED: JULY 30, 2007

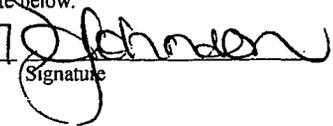
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Certificate of Service:

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.

to both D.C.'s

7/30/07 
Date Signature

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