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DIVISION II
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STATE OF WASHINGTON
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No. 33952-8-II

DIVISION II OF THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

WHITNEY J. MURRAY,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 05-1-01035-7

REPLY BRIEF

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ORIGINAL

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STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in his opening brief.

ARGUMENT

I. DEFENSE COUNSEL OBJECTED TO THE GIVING OF INSTRUCTION NO. 25.

Exceptions shall be sufficiently specific to apprise the trial judge of the points of law or questions of fact in dispute. Roumel v. Fude, 62 Wn.2d 397, 383 P.2d 283 (1963). The rule is well established that this court will not consider matters not presented to the trial court, nor will this court review a case on a theory different from that in which it was presented at the trial level. State v. Reano, 67 Wn.2d 768, 409 P.2d 853 (1966). However, these rulings do not prevent review in this case, because the court was sufficiently advised of the exceptions to instruction number 25. The prosecution even conceded that these exceptions would likely result in appellate review.

The transferred intent instruction was prompted by a question regarding intent posed by the jury. RP 677:13-16. In response, the prosecution requested a transferred intent jury

instruction. RP 677:13-16. The defense warned that the addition of this jury instruction could be prejudicial to the defense by changing the instructions to the jury after they have already received the instructions. RP 678:1-8.

Defense counsel specifically articulated that the first degree statute did not contemplate a transferred intent jury instruction. Mr. Hayes stated,

> "The actual statute does not indicate on first degree assault that you have any transferred intent. I think that's not properly before the Court. You have to give the jury instruction according to what the law is. This is not the specific law for first degree assault, it is not part of that statute. I just think that it's improper and we would object to it.

RP 678:14-20.

The prosecution stated that he believed the jury instruction was an accurate representation of the law and that the appellate unit was confident in defending this issue on appeal. RP 677:16-20. The suggestion that the issue was not preserved is not well taken. Moreover, given that it changed the law of the case after closing arguments, it prejudiced Mr. Murray's right to a defense.

II. THE TRIAL COURT FAILED TO ADEQUATELY ASSURE THAT MR. MURRAY'S STATEMENTS WERE VOLUNTARY.

The court assesses the voluntariness of statements under the "totality of the circumstances", including the police conduct in eliciting the confessions and the susceptibility to coercion of the particular defendant. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 5 L.Ed.2d 290 (1978).

The Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.' Miranda v. Arizona, 384 U.S. 436, 488, 86 S.Ct. 1602 (1996). Blackburn v. State of Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242 (1960).

As the facts indicate it is clear that based upon the totality of the circumstances Mr. Murray's will to resist was overcome. Mr. Murray was told that he very well could be going to prison for a long time. RP 24:4-7.

Mr. Murray explained that he felt trapped, stating, "... I told him I am telling the truth but you're calling me a liar. He's telling me

that if I tell the truth then I will be basically - basically I will be looking at less time." RP 89:10-14.

Mr. Murray was a young man, alone in a room with officers threatening to send him away to prison. This undue coercion violated Mr. Murray's rights and necessitated the exclusion of his "confession". Mr. Murray was coerced into saying what the officers wanted to hear.

III. MR. MURRAY WAS NOT PROVIDED EFFECTIVE ASSISTANCE AT TRIAL.

The Supreme Court of the United States has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), *aff'd* 458 F.2d 1406 (2nd Cir. 1972).

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

a. Mr. Hayes did not provide effective assistance at the 3.5 hearing.

It was not just that Mr. Hayes failed to adequately raise the issue of voluntariness at the CrR 3.5 hearing that was deficient. Mr. Hayes appeared to not even understand the purpose of a 3.5 hearing. This deficiency caused his representation to fall below that of a reasonable practitioner.

At the 3.5 hearing the prosecution attempted to keep Mr. Hayes on task rather than allowing him to roam into matters unrelated to the 3.5 hearing. RP 45:20-23.

Mr. Hayes had to be warned by the court as to the purpose of a 3.5 hearing. "So all we want to do is find out whether your client made these statements voluntarily, knowingly, intelligently, after waiving his Miranda rights." RP 58:11-15.

Mr. Hayes' performance fell below an objective reasonable standard because he failed to address the issue of whether Mr. Murray's statements were voluntary. This issue was crucial because without Mr. Murray's statements, the prosecution had no evidence linking Mr. Murray to the crime. The transcripts of the 3.5 hearing

reveal an attorney that was either not prepared or did not understand the purpose of the 3.5 hearing. Effective Assistance of Counsel means counsel that can aid in the proper function of the adversarial process. Mr. Hayes did not aid in the adversarial process. Instead, he confused the issues, and prevented a just result.

b. Mr. Hayes was not making tactical decisions when he agreed to stipulate to Mr. Murray's Prior Record. Mr. Hayes did not even understand the decision he was making.

Mr. Hayes was not making tactical decisions when the decision to admit Mr. Murray's prior record was made. He did not even understand the nature and quality of his actions.

The prosecution asserts that Mr. Hayes was concerned that the jury would speculate to the nature of the defendant's prior convictions, and therefore wanted to stipulate to prevent speculation. Prosecution's Brief, pg. 36. The record, however, does not support such a reasoned and thoughtful process regarding the stipulation. Instead it is clear that Mr. Hayes simply did not understand what he was doing when he agreed to stipulate. Moreover, Mr. Hayes appeared to have

forgotten that he agreed to stipulate. When the stipulation was entered Mr. Hayes stated "Okay, I don't understand - I can't make an objection, we already signed for." RP 303: 11-12. Mr. Hayes did not understand the nature and quality of his actions. It is ludicrous to assert that he was making a valid tactical decision when it appears that he did not even understand the consequences of that decision.

c. The Prosecution's assertion that Mr. Lara was not being called as an alibi witness is not well taken.

Defense counsel failed to secure the attendance of Mr. Lara at trial. The prosecution asserts this is not ineffective assistance of counsel for two reasons. First the prosecution asserts that Mr. Lara did not testify therefore we can not be assured that Mr. Lara's testimony would have been favorable. Second, the prosecution asserts that nothing in defense counsel's statement indicate that Mr. Lara was an alibi witness.

The prosecution asserts "Defense counsel merely indicated that Lara was with the defendant at the time of the shooting, not that the

defendant did not still participate in the shooting." Prosecution's Response Brief, p. 38. The prosecution's assertion begs the question "If Mr. Lara was not an alibi witness, why was he being called?"

Mr. Hayes did nothing other than issue a subpoena to secure Mr. Lara's presence at trial. His failure to follow up and secure the alibi witness at trial was deficient.

CONCLUSION

Based upon the above, defendant Murray respectfully requests the court reverse and remand this case.

RESPECTFULLY SUBMITTED this 4 day of August, 2006.

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By: _____
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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Whitney Jamal Murray
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Washington Corrections Center
P. O. Box 900
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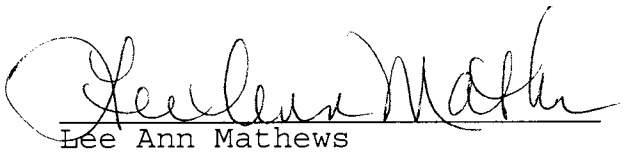
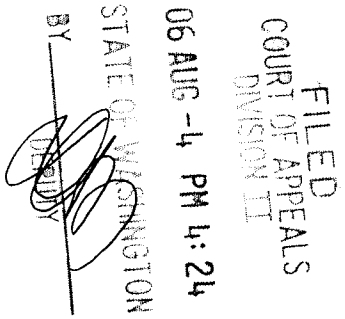
Signed at Tacoma, Washington this 4th day of August, 2006.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