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NO. 31645-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

RASHAD BABBS,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY [Signature]

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

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

BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

PIERCE COUNTY IT'S CLIENT
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

[Signature] 5-6-05
Name Done in Seattle, WA Date

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A. ASSIGNMENTS OF ERROR

First Trial

1. Appellant was denied his constitutional right to effective representation when, for no legitimate strategic reason, his own attorney agreed the court could tell jurors that this was not a death penalty case.

2. Jury instruction 23 omitted from the jury's consideration the required elements for first-degree felony murder, thereby violating appellant's due process rights.¹

3. Jury instruction 25 also omitted from the jury's consideration the required elements for first-degree felony murder, thereby violating appellant's due process rights.²

4. The information charging appellant with first-degree felony murder is constitutionally deficient.³

Second Trial

5. The State violated appellant's equal protection rights when it excluded an African-American from his jury and the prosecutor could not articulate a race-neutral reason supported by the record.

¹ Instruction 23 is attached to this brief as appendix A.

² Instruction 25 is attached to this brief as appendix B.

³ The State's "Corrected Amended Information" is attached to this brief as appendix C.

6. The State committed prosecutorial misconduct during closing argument.

7. Under RAP 10.1(g), appellant hereby adopts arguments 5-7, and the corresponding assignments of error, from the "Opening Brief of Appellant" in State v. Phillip Hicks, also filed under COA No. 31645-5-II and consolidated with this case for purposes of argument and disposition.

Issues Pertaining to Assignments of Error

1. In a first-degree murder case, it is error to instruct the jury that the death penalty is not at issue because that information is prejudicial to the accused. It makes jurors less careful during deliberations. Here, appellant's own attorney agreed the court could instruct jurors that this was not a death penalty case. Where there was no legitimate tactical reason for this grievous mistake, did appellant receive ineffective assistance of counsel?

2. Appellant was convicted of felony murder predicated on an attempted robbery. A person commits attempted robbery when, with intent to commit robbery, he does any act that is a substantial step toward the commission of robbery. Instruction 23, which defined attempted robbery for appellant's jury, defined a different crime. It told the jury that a person commits attempted robbery when, with intent to commit attempted robbery, he does any act that is a substantial step toward attempted robbery. In other

words, it defined the crime as an attempt to commit an attempt. Does this violation of appellant's due process rights require a new trial?

3. In addition to attempted robbery, the State charged completed robbery as a predicate to felony murder. But rather than indicate that appellant had to commit a completed robbery for felony murder, instruction 25 told jurors they need only find that appellant "was committing" a robbery, a term that deviates from statutory requirements and was not defined in the jury instructions. Did this language, which requires proof of something less than a completed crime, also violate appellant's due process rights?

4. To pass constitutional muster, an information charging a criminal offense must notify the defendant of every essential element of that offense. Is reversal required where the information misstated an element of first-degree felony murder?

5. Appellant is African-American. There were few African-Americans on the jury venire and only one such individual who made it into the jury box. The State used a peremptory challenge against that juror and could not provide a race-neutral reason supported by the record. Was this a violation of appellant's equal protection rights?

6. Prosecutors must not misstate the law, misstate the facts, or urge a guilty verdict on improper grounds. At appellant's trial, the prosecutor violated each of these prohibitions when he used evidence admitted solely to impeach the credibility of a witness as substantive evidence of appellant's guilt. Did this misconduct deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County Prosecutor's Office charged Rashad Babbs and Phillip Hicks in count 1 with aggravated first-degree murder or, alternatively, first-degree felony murder predicated on a completed or attempted robbery. Count 2 charged both men with attempted first-degree murder.⁴ CP 138-140; 2RP⁵ 11-13. A jury convicted Babbs of first-degree felony

⁴ Both Babbs and Hicks were also charged with unlawful possession of a firearm. CP 140-41. Babbs pled guilty to this offense prior to trial to avoid its consideration by the jury and the resulting prejudice. 2RP 24-27, 117-121. His conviction for that offense is not at issue in this appeal.

⁵ This brief refers to the verbatim report of proceedings as follows: 1RP - 4/14/03; 2RP - 4/21/03; 3RP - 4/22/03; 4RP - 4/23/03; 5RP - 4/24/03; 6RP - 4/25/03; 7RP - 5/1/03; 8RP - 5/5/03; 9RP - 5/6/03; 10RP - 5/7/03; 11RP - 5/12/03; 12RP - 5/29/03; 13RP - 1/26/04; 14RP - 1/26/04; 15RP - 1/27/04; 16RP - 1/28/04; 17RP - 1/29/04; 18RP - 1/30/04; 19RP - 2/2/04; 20RP - 2/3/04 (morning); 21RP - 2/3/04 (afternoon); 22RP - 2/4/03; 23RP - 2/5/04; 24RP - 2/9/04; 25RP - 2/10/04; 26RP - 2/11/04; 27RP - 2/12/04; 28RP - 2/13/04; 29RP - 2/17/04; 30RP - 2/18/04; 31RP - 4/16/04.

murder, but could not reach a verdict on attempted murder. CP 146, 148; 14RP 19. At a second trial, a different jury convicted him of that charge. CP 158.

The Superior Court imposed a composite standard range sentence of 734 months, which included firearm enhancements. CP 189. Babbs timely filed his Notice of Appeal. CP 199-200.

2. Substantive Facts

a. *First Trial Voir Dire*

Attorney Bryan Hershman represented Rashad Babbs at both trials and attorney Rodney DeGeorge represented Phillip Hicks at the first trial. 1RP 3; 13RP 3. During jury voir dire, juror number 9 expressed concern that her religious beliefs could interfere with her ability to serve. 3RP 73. Juror 9 was Catholic and, among her concerns, she feared the case might involve capital punishment. 3RP 73-74.

Upon hearing that concern, the court asked to see the attorneys at sidebar. 3RP 74. The court suggested that it tell the venire this case did not involve the death penalty and both Hershman and DeGeorge indicated they had no objection. 4RP 3-4. The court then informed the entire venire of this fact.

Court: The thing I was talking to the attorneys about
is I wanted to let all of you know with regard

to this particular case, you heard me say it's an aggravated murder in the first degree case. This is not a death penalty case. So that issue is one that I suppose could come in conflict with your religious beliefs, but it is not one that is at issue in this case. So that may remove some of your problem. I don't know, you need to tell me whether you think your religious beliefs might get in the way of your ability to follow the law as I give it to you. That's the area I have some concern about. Do you think you could follow the law as I give it to you?

Juror 9: Uh-huh, I think so.

Court: Okay. Any other concerns, Juror No. 9?

Juror 9: No, I just wanted to know.

3RP 74-75.

That this was not a death penalty case became a frequent topic for the litigants. Addressing juror 9, the prosecutor raised the subject again. A question about whether it would be too difficult for juror 9 to sit in judgment of another elicited the following exchange:

Juror 9: No. I feel I try not to make a mistake, because -- because of, strange as it seems to be, but months ago, a lot of people -- not a lot -- some people were executed, then they found out they were innocent afterwards.

Prosecutor: So your issue has to do with capital punishment; is that right?

Juror 9: Yeah.

Prosecutor: So because that's not an issue, you are okay with sitting as a juror, sitting and making a determination of guilty or innocence; is that right?

Juror 9: Yes.

3RP 154-55.

Both defense attorneys also raised the subject again. While attempting to convey to jurors the need to be careful because of the serious consequences a conviction would trigger, DeGeorge reminded jurors that this was not a death penalty case, but cautioned them to be careful anyway given what they could surely surmise would be a serious penalty. The prosecutor objected and the court instructed venire members that they had nothing to do with punishment and should not consider punishment except to make them careful. 4RP 43.

Hershman raised the issue while discussing the dangers of an erroneous conviction with juror 33. Juror 33 said, "I recall it was a law professor that said to me in a conversation we had, he says, 'I'd rather see 10 guilty people on the street than one innocent person in the electric chair.'" 4RP 63-64. Hershman answered, "Okay. All right. Again, we are not heading toward the death penalty in this case, but I understand." 4RP 64. The juror responded, "Right. Of course." 4RP 64.

The State excused juror 33. 4RP 79. But both the defense and the prosecution allowed juror 9 on the panel. And all of the remaining jurors had been present for the repeated comments -- from the court and counsel -- that this was not a death penalty case. 4RP 75-82.

Moreover, the trial deputy reminded jurors this was not a death penalty case during closing argument. Contrasting Hicks's situation with the deceased victim, she told jurors, "at least he has a life. At least he can choose whether or not he's going to grow old to a ripe old age. He can choose whether he wants to see his friends or his family." 11RP 31.

b. Second Trial Voir Dire

The venire for Babbs's second trial did not have a large number of African American members, a point defense counsel made when the State successfully removed an African-American man from the group for cause. 16RP 140, 142.

In fact, the State successfully removed all African-American jurors from the panel ultimately selected. Specifically, the State used its second peremptory challenge against juror 9, the only African-American slated to make it into the jury box. 18RP 490, 495.

Juror 9 said relatively little during voir dire. 18RP 491. In response to brief questioning by the prosecutor, she indicated she could

follow the law on burden of proof and proof beyond a reasonable doubt and would not make it harder on the State simply because the case involved a serious charge. 17RP 394. She also stated that she worked for Social Security and -- in response to a hypothetical -- indicated she would be willing to fire one of her colleagues for misconduct were she in a supervisory role. 17RP 452.

In response to questions from Mr. Hershman, juror 9 indicated she would not have a problem deciding the defendants' guilt or innocence. 17RP 424. Nor would she hold Babbs's decision not to testify against him. 17RP 476. And in response to defense counsel Michael Clark -- who represented Hicks at the second trial -- she indicated that she could separate sympathy for the victims from what happened in the case. 17RP 460.

The court ruled that the defense had established a prima facie case of discrimination under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and required the prosecutor to provide race neutral reasons for his peremptory challenge. 18RP 496. The prosecutor provided three: (1) juror 9 had a master's in education (and the prosecutor believed educators are "forgiving, nurturing types"), (2) she is a social worker (an alleged "red flag for a prosecutor"), and (3) a friend or relative had been arrested and served jail time. 18RP 496-97. The court denied the defense

Batson challenge without expressly addressing or determining the credibility of the prosecutor's stated reasons. 18RP 498.

c. *Facts surrounding the shootings*⁶

On the evening of March 22, 2001, Jonathan Webber and his wife, Chica, were walking on 15th Street in Tacoma when Phillip Hicks and a second individual approached them. 23RP 1164-67. According to Webber, of the two men, Hicks did all of the talking. 24RP 1234-35, 1238.

Hicks asked "where the work was at." Although Webber wasn't sure, he believed Hicks was interested in selling or buying drugs. 23RP 1167. Webber responded that he did not know where to find drugs and he and Chica continued to walk. 23RP 1171. Hicks then asked Webber about his gang affiliation, to which Webber responded that he was too old to be in a gang. 23RP 1172.

Hicks and the second man followed the Webbers and Hicks told them to empty their pockets. Webber responded that he had just been released from jail and had no money. He showed Hicks his court papers. 23RP 1172-73. Hicks replied that if they did not empty their pockets, one

⁶ The evidence presented at the first and second trials was largely consistent. But some witnesses testified in more detail in one trial or the other. To provide this Court with the most accurate recitation of the facts, Babbs relies on testimony from both trials.

of them would die. At this point, the individual with Hicks was standing back and to the side. 23RP 1174.

Webber noticed that Hicks had a small revolver in his hand. 23RP 1174. As he and Chica attempted to hurry across 15th, Webber heard shots from two guns, one louder than the other. 23RP 1175, 1177. Both Webber and his wife were hit. 23RP 1176-78. Hicks and the second man then ran away through a nearby alley. 23RP 1178-79.

Coincidentally, just as a neighbor called 911, a Tacoma Police Officer spotted the Webbers in the middle of the road. 4RP 96-97. Chica was shot in the head and face three times and pronounced dead at the scene. 4RP 115; 8RP 27-28. Jonathan Webber sustained gunshot wounds to the right forearm, lower chest/upper abdomen, and left calf. 6RP 8, 28. The gunshots were "through-and-through," meaning the slugs exited his body. 6RP 8.

Webber pointed to the alley where the two men had run and the responding officer provided the information to dispatch. 4RP 112. A K-9 officer and his dog tracked the suspects' scent. 5RP 38-41. The dog eventually lost the scent, but before doing so led officers to many items of interest, including a .22 pistol and several articles of clothing. 5RP 41-

54, 67. Another officer momentarily spotted one of the suspects, but lost him when he ran through a hedge. 7RP 102-04.

Five days after the shootings, Webber provided his description of Hicks to a police artist, who composed a sketch. 8RP 7-17. Webber could not provide a sufficient description of the second suspect to compose a sketch. 8RP 18-19.

Approximately a month later, police arrested Hicks on unrelated charges and questioned him about the shootings. 7RP 112-113. Hicks admitted he was present, but indicated he "didn't do it." 7RP 131. Later, Hicks wanted a deal -- he would tell police what happened in exchange for a reduced sentence. Detectives responded that although they could make no promises, they would note his cooperation when they spoke to prosecutors. 7RP 146.

At that point, Hicks indicated that he had been at the wrong place, at the wrong time, and with the wrong person, claiming he was "basically a hostage" to the second suspect, who put a gun to his head and told him to shoot. 7RP 147, 149-150. He told police that he closed his eyes and fired. 7RP 151. He also indicated that it was probably the .22 revolver that killed Chica because he was the closest to her. 9RP 81. Hicks indicated police would find his fingerprints on the .22. 7RP 148, 152.

Hicks also claimed that someone had given him a "sharmed"⁷ cigarette that made him crazy. 7RP 147-48. And, contrary to Jonathan Webber's statements, Hicks told police the individual with him demanded that the Webbers give up their money. 7RP 149-150.

Based on information police had gathered, they attempted to locate Rashad Babbs. 9RP 60. He was arrested shortly after arriving in Illinois roughly five months after the shootings. 9RP 61-62.

Police showed Webber two photomontages. One contained a photo of Hicks and one a photo of Babbs. 9RP 83. When shown the montage containing Hicks's photo, Webber told police that Hicks most resembled the individual who shot his wife, but he was not absolutely certain. 9RP 87. Webber believed the person with Hicks was probably a mixture of African-American and Asian. 23RP 1212. When Webber examined the montage containing Babbs's photo, he indicated that another individual -- who appeared somewhat Asian -- looked most like the second suspect. He did not select Babbs. 9RP 85-86.

Forensic testing revealed that two of the bullets that struck Chica were from a .22 caliber revolver and one was from a larger, medium caliber, gun and consistent with a .9 mm slug. 8RP 53-56. Police

⁷ A cigarette is "sharmed" when laced with PCP. 7RP 168-171.

recovered four .9 mm shell casings at the scene. 5RP 111-113. They never found a .9 mm weapon, however. 8RP 157.

No one saw Babbs at the scene. Therefore, at trial, the State relied largely on circumstantial evidence to convince jurors that Babbs was the second shooter.

The State called Brenda Watkins, Hicks's foster mother, who testified that she had known Babbs back when he was in middle school. Although it had been almost a decade since she had seen him, she testified that she saw him with Hicks at her house the afternoon and evening of the shootings. 6RP 33-40; 25RP 1492-93.

Three other State's witnesses did not work out as planned. The State called Brenda Watkins's son, Willie Watkins. Willie knew Babbs very well. 6RP 71-73. And prosecutors expected that he would confirm his mother's testimony that Hicks and Babbs were together prior to the shooting. 6RP 77. Instead, Willie testified that he could not identify the man who was with Hicks at his mother's house that day. 6RP 75-76.

The State also called Alana Stubblefield. Among other items, the police K-9 found a black leather jacket while searching for the suspects. 5RP 46-47, 180. Webber told police the man with Hicks wore a black

leather jacket.⁸ 10RP 179. Inside the jacket was a receipt with the name "Lenard Masten" printed on it. 5RP 182. Masten was Stubblefield's ex-boyfriend. 5RP 12. On the back, Stubblefield had written "Alana" and provided two phone numbers. 5RP 12. Prosecutors expected Stubblefield to testify that she recalled giving Babbs her phone numbers on this piece of paper. 5RP 13-14. But at trial, she testified that she did not recall giving Babbs the receipt. 5RP 13.

To help establish Babbs's presence, the State also called Dana Duncan, a high school student in 2001, who lived with her mother on South Wilkerson Street -- not far from where police had searched for the suspects. 5RP 50-51, 118-19. One evening, while she lay in bed, a black male knocked on her bedroom window, said he knew her brother, and asked to come inside. He seemed "panicky" so Duncan let him in and then drove him to a location near the Tacoma Mall. 5RP 119-121, 146. When she returned home, she saw police activity nearby. 5RP 125-26. The person to whom she gave the ride called her shortly thereafter to thank her. 5RP 124-25.

⁸ Unfortunately, the crime lab never did residue testing on the jacket or a pair of gloves that were found. A forensic scientist admitted that had the shooter been wearing these items, testing would have more likely than not revealed gunshot residue on them. 8RP 196-99.

But the individual Duncan encountered that evening wore distinctive light baby blue "Lugz" style boots and denim blue jeans. He was about 6 feet tall. 5RP 122-24, 142; 9RP 67. In contrast, Webber described the man with Hicks as somewhere between 5' 6" and 5' 9" tall. He was wearing dark shoes and black jeans, and Webber testified that had the second assailant worn light blue shoes, he certainly would have noticed. 4RP 113; 10RP 179-180, 185, 190; 23RP 1214.

Moreover, Duncan conceded she could not say when this incident occurred. She may have given the individual a ride as late as May 21, 2001 -- two months *after* the shootings. 5RP 139-140. When the prosecutor asked Duncan during direct examination to look at Babbs in court and identify him, she could not. 5RP 130. During the prosecutor's redirect, however, Duncan was suddenly able to do so and pointed to Babbs as the individual in her room. 5RP 151.

In an attempt to bolster its case against Babbs, the State also relied on physical evidence suggesting his presence. Inside the black leather jacket, police found several key rings, one of which belonged to Babbs's sister, Collette Babbs. 5RP 183; 9RP 18-23. Moreover, Webber indicated that the man with Hicks was wearing a hooded black sweatshirt. 10RP 184-85. Police never found such a sweatshirt. They did, however, locate a

bright blue sweatshirt without a hood. 7RP 78; 9RP 164. Laboratory testing on that garment revealed a mixture of DNA, some of which was consistent with Babbs's profile. 9RP 157, 163.

Babbs's main defense at trial was mistaken identity. The State had failed to prove beyond a reasonable doubt that he was the second shooter. 11RP 58-88. The defense also argued that even if jurors believed Babbs was present, the State had failed to prove an intent to kill or rob the victims. Rather, the act of firing could have been nothing more than a reflex. 11RP 46-48. Alternatively, Babbs may have merely been a witness who fled after the shootings out of fear. 11RP 80.

d. *Prosecutorial Misconduct During Second Trial*

In light of Willie Watkins's testimony that he did not recognize the individual with Hicks the day of the shootings and Alana Stubblefield's denial that she remembered giving Babbs the receipt with her phone numbers, the State sought to impeach both witnesses with prior inconsistent statements to detectives. 8RP 4, 99-105, 120-123.

Babbs's attorney, Mr. Hershman, expressed great concern that jurors would not be able to distinguish between impeachment (merely undercutting the witnesses' credibility) and substantive evidence (using the prior statements for their truth). Hershman was particularly concerned given the

subject matter of the offered impeachment, i.e., the impeaching evidence concerned one of the main trial issues -- whether Babbs was present for the shooting. 8RP 105-119. Hershman argued that a limiting instruction would be ineffective in ensuring jurors used the evidence solely for its impeachment value. 8RP 123-24.

The court allowed the evidence, and indicated it would give a limiting instruction. 8RP 125-29.

At Babbs's first trial, Seattle Police Detective John Ringer testified that when he interviewed Alana Stubblefield, Stubblefield remembered giving the receipt and phone numbers to Babbs. 9RP 28-29. Seattle Police Detective William Webb testified that when he interviewed Willie Watkins, Watkins provided him the name of the person he saw with Hicks the day of the shooting. 9RP 77-79. A limiting instruction was given prior to Detective Ringer's testimony and at the end of trial. 9RP 28; CP 91.

This litany of events repeated itself during the second trial. Willie Watkins testified he did not recognize the person with Hicks the day of the shooting and he denied ever saying otherwise. 21RP 831-835; 22RP 840-41. Moreover, he would have recognized the individual had it been Babbs. 22RP 855. And Alana Stubblefield once again denied telling detectives that

she remembered giving the receipt and phone numbers to Babbs. 23RP 1111-1112.

As in the first trial, over defense objection, the court permitted the State to impeach Watkins and Stubblefield and provided a limiting instruction. 25RP 1431-34, 1450, 1539-1540. Again, Detective Ringer testified that Stubblefield remembered giving the receipt to Babbs. 25RP 1450-51, 1486-87. And Detective Webb testified that Willie Watkins admitted seeing Babbs with Hicks the day of the shooting. 25RP 1539-1542.

During closing argument at the second trial, Hirsch reminded jurors that the evidence concerning Willie Watkins and Alana Stubblefield's prior statements was to be used solely when assessing their credibility. 29RP 2110-2111. But, unlike the first trial, the prosecutor undercut this argument during his rebuttal closing remarks.

Specifically, the deputy pointed to Willie Watkins's statements to detectives as substantive evidence proving that Babbs was with Hicks the day and evening of the shootings:

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 -- absolutely not what the evidence indicated. Willie Watkins had an instruction delivered to this jury limiting the use of that testimony. Willie Watkins does not identify my

client with Mr. Hicks earlier in the evening. That's what counsel just said.

MR. McCANN: May I continue?

THE COURT: Mr. Hershman, it's the memories of the jurors that's important.

MR. HERSHMAN: 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.

THE COURT: Mr. Hershman, 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.

29RP 2165-66. The prosecutor then continued, arguing that Brenda and Willie Watkins had encountered Babbs at Brenda Watkins's home the day of the shooting. 29RP 2166-67.

Babbs now appeals to this Court.

C. ARGUMENT

1. BABBS'S ATTORNEY WAS INEFFECTIVE FOR ALLOWING THE COURT TO TELL JURORS THAT THIS CASE DID NOT INVOLVE THE DEATH PENALTY.

The law is well established in Washington. "The question of the sentence to be imposed by the court is never a proper issue for the jury's

deliberation, except in capital cases." State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). Consequently, in a first-degree murder case, it is error to tell jurors the death penalty is not involved. State v. Townsend, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001); State v. Murphy, 86 Wn. App. 667, 668, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002 (1998).

This is a "strict prohibition" that "ensures impartial juries and prevents unfair influence on a jury's deliberations." Townsend, 142 Wn.2d at 846. Specifically, "if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Townsend, 142 Wn.2d at 847.

In Babbs's case, his own attorney agreed that the court could tell the jury that he did not face the death penalty. 4RP 3-4. Although that fact might raise the specter of invited error, invited error is trumped by ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). And that is precisely what this case presents.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1,

§ 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

No reasonable attorney would have allowed jurors to learn that the death penalty did not apply. In Townsend, defense counsel failed to object when the court informed jurors of this fact. Addressing that failure, the Supreme Court recognized that, considering the longstanding prohibition against revealing that information, the failure to object fell below prevailing professional norms. Townsend, 142 Wn.2d at 847. The Court also rejected any argument that revealing this information was part of a legitimate strategy:

There was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner.

Townsend, 142 Wn.2d at 847. Similarly, there was no tactical advantage when Babbs's own attorney permitted jurors to learn that the case did not involve the death penalty.

Moreover, Babbs suffered prejudice. There is a reasonable probability that the mistake affected the jury's verdict on first-degree murder. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94).

A passing reference to the inapplicability of the death penalty would have been bad enough. But at Babbs's trial, the subject permeated voir dire. The Court instructed jurors on it. 3RP 74-75. The prosecutor mentioned it. 3RP 154-55. Both defense attorneys mentioned it. 4RP 43, 64. And the prosecutor alluded to it again during closing argument. 11RP 31 ("at least [Hicks] has a life. At least he can choose whether or not he's going to grow old to a ripe old age.").

This was a close case in which jurors would have struggled over reasonable doubt. The State's case against Babbs had several significant holes. For example, (1) no one saw Babbs at the scene; (2) Webber believed the second suspect was partly of Asian ancestry and believed a photo of such a person resembled the second shooter more than a photo of

Babbs; (3) the one witness who claimed to have seen Babbs with Hicks -- Brenda Watkins -- had not seen Babbs for almost a decade; (4) Willie Watkins knew Babbs well, but testified he did not recognize the individual he saw with Hicks the day of the shooting; and (5) the State believed that after shooting the Webbers, Babbs got a ride from Dana Duncan, yet the shooter and Babbs differed in height and in clothing, including their shoes (bright baby blue versus black).

Alone or in combination, these weaknesses could have established reasonable doubt in jurors' minds. But by informing jurors that the case did not involve the death penalty, the court and the parties made the jurors less careful. And less careful jurors are necessarily more prone to convict based on shaky, uncertain, or incomplete evidence. They are less likely to hold out for acquittal. Townsend, 142 Wn.2d at 847.

Babbs was denied the effective assistance of counsel. His conviction for first-degree felony murder should be reversed and his case remanded for a new trial.

2. BABBS'S CONVICTION FOR FELONY MURDER VIOLATES DUE PROCESS BECAUSE THE JURY INSTRUCTIONS RELIEVED THE STATE OF ITS DUTY TO PROVE ALL ELEMENTS BEYOND A REASONABLE DOUBT.

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); City of Seattle v. Norby, 88 Wn. App. 545, 554, 945 P.2d 269 (1997), overruled on other grounds, State v. Robbins, 138 Wn.2d 486, 980 P.2d 725 (1999). The jury must be instructed on each element of a criminal offense. Instructions that relieve the State of its burden to prove an element may be challenged for the first time on appeal. State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

As charged in this case, a person is guilty of first-degree felony murder if he commits or attempts to commit robbery in the first or second degree and, while doing so, he or another participant causes the death of another person. RCW 9A.32.030(1)(c)(1); CP 138-141.

As discussed below, there were two serious errors in the instructions pertaining to this charge. First, the instructions misstated the elements of attempted robbery in the first or second degree, significantly easing the

State's burden of proof. Second, the instructions replaced the need for a completed robbery with proof that a defendant merely "was committing" a robbery -- a standard for which jurors were not provided a definition or other guidance.

a. Instruction 23 Misstated the Elements of Attempted Robbery.

A person commits attempted robbery when, with the intent to commit robbery, he does any act that is a substantial step toward the commission of a robbery. RCW 9A.28.020(1). "A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation." CP 107; Washington Pattern Jury Instructions, WPIC 100.05, at 222 (West 1994); see also State v. Workman, 90 Wn.2d 443, 449, 584 P.2d 382 (1978) (preparation not enough).

The State proposed a jury instruction defining the crimes of attempted robbery in the first and second degrees -- predicates for the felony murder charge. This instruction, which became the court's instruction 23, told the jury:

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.

CP 106 (emphasis added); Washington Pattern Jury Instructions, WPIC 100.01, at 218 (West 1994); Supp. CP ____ (Plaintiff's Proposed Instructions, no. 18, filed 4/21/03).

The problem is found in the underlined language. Rather than refer to "that crime," the instruction should have referred to the specific crime attempted. Here, that would be robbery in the first or second degree. By using "that crime" instead, the elements are changed. Specifically, "that crime" can only refer to *attempted* robbery, rather than robbery, since it is the only crime mentioned within the instruction preceding the words "that crime."

Therefore, instruction 23 told Babbs's jury:

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

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

Rather than requiring the jury to find Babbs intended to commit robbery, the jury was told it need only find that Babbs intended *an attempt*

to commit robbery. And rather than requiring that Babbs take a substantial step toward robbery, the instruction merely required that he take a substantial step toward *an attempt* to commit robbery. Stated another way, it required a substantial step toward a substantial step. Instruction 23 defined a far more inchoate offense than that charged.⁹

This error is similar to the error in State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997). Like Babbs, Smith's conviction involved proof of an inchoate crime -- conspiracy to commit first-degree murder. Instead of telling the jurors that the State had to prove Smith conspired with others to commit first-degree murder, the "to convict" instruction required jurors to find that Smith conspired to commit *conspiracy to* commit murder. In other words, the jury merely had to find that Smith conspired to conspire -- much like the attempt to attempt here. Smith, 131 Wn.2d at 261-62.

⁹ The pattern instruction, WPIC 100.01, encourages this mistake. It reads:

A person commits the crime of attempted _____
(fill in crime)
when, with intent to commit that crime, he or she does any
act which is a substantial step toward the commission of that
crime.

Washington Pattern Jury Instructions, WPIC 100.01, at 218 (West 1994). To the reader of this blank WPIC, it would be apparent that "that crime" is the same crime used to fill in the blank -- for example, "robbery." But to jurors, "that crime" appears to refer to "attempted robbery" because they were not privy to the original form.

The rest of the jury instructions at Smith's trial correctly set out the law, including the instructions defining first-degree murder and the term "conspiracy." Smith, 131 Wn.2d at 261. Moreover, both defense counsel and the prosecutor argued the proper elements of the offense to the jury. Smith, 131 Wn.2d at 261, 264. Still, the Supreme Court reversed. It reasoned that where a jury instruction "purports to be a complete statement of the law yet states the wrong crime," the jury "is not required to search other instructions to see if another element should be included in the instruction defining the crime.'" Smith, 131 Wn.2d at 263-64 (quoting State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995)).

Babbs's case requires the same result because the State cannot demonstrate that the instructional error was harmless. A constitutional error is harmless only if the State can demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 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)).

Instruction 23 purported to be a complete statement of the law defining the elements of attempted robbery, yet mistakenly required only

that Babbs intend to attempt the crime and that he merely commit a substantial step toward an attempt of that crime.

Under that standard, the jury could find that Babbs possessed the requisite mens rea for robbery (and hence felony murder) if at some point he merely intended any act that would be a substantial step toward robbery, yet never actually intended to rob Chica Webber. That would constitute an intent to attempt robbery. Indeed, by its own terms, an "intent to attempt" means that the defendant specifically did not intend to complete the crime.

Moreover, the jury would have concluded that Babbs satisfied the actus reus for the offense in the absence of a substantial step toward robbery. Instruction 35 merely required a substantial step toward an attempt (meaning a substantial step toward a substantial step). Almost any act would satisfy that standard. Indeed, it is difficult to imagine what would not have qualified as a substantial step toward a substantial step. Any degree of preparation would suffice; perhaps even mere presence.

The instructions for count 2 -- attempted murder in the first degree -- only heightened the chance of juror error for count 1. Unlike instruction 23, the instruction for count 2 defining attempted murder in the first degree

used the proper language, specifically listing the precise crime intended.

It provides, in pertinent part:

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

CP 122 (emphasis added).¹⁰ Jurors would have naturally noticed the different language in instructions 23 and 39 and logically presumed a different standard.¹¹

The point is this: in light of instruction 23, there was no need for the jury to assess the proper elements when deciding Babbs's guilt on the murder charge. The instruction required a conviction for conduct well below the requisite standard of proof for felony murder based on attempted robbery.

As in Smith, the State may point out that other jury instructions correctly stated the law. Instruction 19 indicated:

A person commits the alternative crime of Felony Murder in the First Degree when he or an accomplice commits or attempts to commit the crime of Robbery in First or Second Degree and in the course of or in furtherance of such crime or in immediate flight from such crime he or

¹⁰ Instruction 39 is attached to this brief as appendix D.

¹¹ Notably, during the first trial jurors could not reach a verdict on count 2 when properly instructed on the definition of an attempted crime.

another participant causes the death of a person other than one of the participants.

CP 102. Moreover, instruction 25, the "to convict" instruction for felony murder indicated in element 2 that the State had to prove, "That the defendant or an accomplice was committing or attempted to commit Robbery in the First or Second Degree." CP 108.

While instructions 19 and 25 correctly indicate that a person commits felony murder when he attempts to commit the crime of Robbery in First or Second Degree, neither provides the elements of attempted Robbery in the First or Second Degree. They are found *solely* in the erroneous instruction 23.

In any event, as in Smith, the mere possibility jurors could have somehow divined the proper standard does not change the outcome. Where the possibility exists that the defendant was convicted based on an erroneous jury instruction, appellate courts will not infer that the jury reached its verdict under a correct standard. Reversal is required. See State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001); see also State v. Brown, 147 Wn.2d 330, 343, 58 P.3d 889 (2002) (in light of erroneous instruction, possibility jurors applied proper standard insufficient to save attempted murder conviction). This has long been the law. See McClaine v. Territory, 1 Wash. 345, 353, 25 P. 453 (1890) (instruction misstating

elements cannot be cured by other instructions); State v. Rader, 118 Wash. 198, 204, 202 Pac. 68 (1922) (same); State v. Hilsinger, 167 Wash. 427, 434, 9 P.2d 357 (1932) (same).

b. Instruction 25, The "To Convict" Instruction, Replaced A Completed Robbery With Something Far Less.

As noted above, felony murder in this case had to be predicated on a completed or attempted robbery. Instruction 23 ensured that jurors were provided an incorrect standard for attempted robbery. And, unfortunately, instruction 25 -- the "to convict" for felony murder -- provided an incorrect standard for a completed robbery.

Specifically, instruction 25 was based on the State's proposed "to convict" instruction. CP 108; Supp. CP ____ (Plaintiff's Proposed Instructions, no 20, filed 4/21/03). Rather than require a completed robbery as a predicate to felony murder, element 2 in the instruction merely required that Webber was killed while a defendant or an accomplice "was committing" a first or second degree robbery.¹² CP 108.

The phrase "was committing" was not defined for jurors, but it is plainly not the same as "committed," which makes it clear that, consistent

¹² As with the mistake in the instruction defining the elements of attempted robbery, the erroneous "was committing" language is found in the standard pattern instruction. See Washington Pattern Jury Instructions, WPIC 26.06, at 289 (West 1994).

with statutory requirements, the crime had been completed. Rather, "was committing" smacks of something in the nature of an attempt, albeit without the requirement of a substantial step or any particular mens rea.

The evidence at trial did not support a completed robbery. And had jurors properly been asked to find a completed robbery, it is unlikely they would have done so. That instructional language would have mattered little. However, by using incorrect "was committing" language in place of a completed robbery, that language became very important. Much like the language in instruction 23, use of this incorrect language in the "to convict" instruction permitted jurors to find the predicate for felony murder based on a far more inchoate crime than the law permits. Jurors could have interpreted "was committing" to require almost nothing of Babbs -- perhaps mere preparation, presence, or even knowledge -- to find the predicate to felony murder satisfied. See State v. Allen, 101 Wn.2d 355, 362, 678 P.2d 799 (1984) (without proper statutory language, jurors tend to "hammer out a definition" on their own; it cannot be assumed the definition is correct).

Again, the State may point out that instruction 19, which defined the elements of felony murder, correctly included the "commits or attempts to commit" language. CP 102. But that cannot save the conviction where the "to convict" misstated the element. See Smith, 131 Wn.2d at 261; see

also Brown, 147 Wn.2d at 343; Stein, 144 Wn.2d at 247; Hilsinger, 167 Wash. at 434; Rader, 118 Wash. at 204; McClaine, 1 Wash. at 353.

3. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT.

Under both the Federal and Washington Constitutions, a charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amendment 10)¹³; State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); Norby, 88 Wn. App. at 558-59.

A challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. Kjorsvik, 117 Wn.2d at 102. Where, as here, the challenge is raised initially on appeal, this Court applies the "liberal construction" test. Under that standard, if the information is missing an essential element, it satisfies constitutional requirements only if the missing element is "fairly implied from language within the charging document." Kjorsvik, 117 Wn.2d at 104. Moreover, even if fairly implied, reversal is still required if the defendant can show that he suffered prejudice from the "inartful or vague language." Kjorsvik, 117 Wn.2d at 105.

¹³ U.S. Const. amend. VI provides, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation" Washington Const. art. I, § 22 provides, "In criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation"

The mistake in the information is similar to the mistake in instruction 25 concerning felony murder. Like that "to convict" instruction, which erroneously employed the language "was committing," the information substituted "while committing" for language indicating that the defendant "committed" robbery.

Specifically, the information provides:

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 immediate flight therefrom, either the defendant or another participant, caused the death of a person other than one of the participants, to wit: Chica Webber

CP 139 (emphasis added). Thus, like instruction 25, the information affirmatively misrepresents the elements of the offense.

And the fact that the information cites to the relevant statute does not save it. "The primary goal of a charging document is to give notice to the accused so that he or she can prepare an adequate defense, without having to search for the violated rule or regulations." State v. Armstrong, 69 Wn. App. 430, 433, 848 P.2d 1322 (citing Kjorsvik, 117 Wn.2d at 101-02), review denied, 122 Wn.2d 1005 (1993). Merely citing to the pertinent statute and naming the offense is insufficient unless that name informs the

defendant of each of the essential elements. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

Even if this Court were to find that Babbs could somehow glean a completed robbery from the "while committing" language, Babbs was prejudiced by the State's chosen charging language. As already discussed, similar language ("was committing") made it into the "to convict" instruction for felony murder, thereby diminishing the State's burden of proof to some unknown standard (maybe presence, maybe mere knowledge). This was clearly prejudicial as it eased the State's burden to prove Babbs's guilt.

For this additional reason, Babbs's conviction for first-degree felony murder must be reversed. See State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992) (proper remedy is reversal without prejudice to the State refiling the information).

4. THE STATE'S EXCLUSION OF AN AFRICAN-AMERICAN JUROR AT BABBS'S SECOND TRIAL VIOLATED EQUAL PROTECTION.

The prosecution's use of a peremptory challenge to exclude otherwise qualified and unbiased jurors on the basis of race violates a

defendant's right to equal protection.¹⁴ Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); State v. Burch, 65 Wn. App. 828, 834, 830 P.2d 357 (1992). Race-based peremptory challenges violate a defendant's equal protection rights as well as the equal protection rights of the excluded jurors, "who are denied a significant opportunity to participate in civic life." State v. Rhodes, 82 Wn. App. 192, 195, 917 P.2d 149 (1996).

A three-part test determines whether the State's use of peremptory challenges violates equal protection. The defendant must first make a prima facie case of purposeful discrimination. Such a case exists where the challenge is exercised against a member of a "constitutionally cognizable racial group," and if that fact and "other relevant circumstances" raise the inference that the challenge was based upon membership in the group. Rhodes, 82 Wn. App. at 196 (quoting Burch, 65 Wn. App. at 840). These "relevant circumstances" are many, and include the prosecutor's questions and statements during voir dire, race of the defendant and victim, and similarities between those struck and those left on the jury. State v.

¹⁴ U.S. Const., amend. 14 provides in part that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Washington State Constitution, art. 1, § 12, provides that "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

Wright, 78 Wn. App. 93, 99-100, 896 P.2d 713, review denied, 127 Wn.2d 1024 (1995).

Once the defendant establishes a prima facie case, the burden then shifts to the State to "articulate a neutral explanation related to the particular case to be tried." Batson, 476 U.S. at 98. A simple denial of discriminatory intent will not suffice. Rhodes, 82 Wn. App. at 196. Rather:

A venireperson's specific responses and demeanor during voir dire may constitute neutral explanations for exercising a preemptory challenge. Conversely, expressing an intention to exclude on the basis of group membership or on stereotypical assumptions about members of certain groups does not constitute a neutral explanation. In addition, the State's neutral explanation must be "clear and reasonably specific". Batson, 476 U.S. at 98 n.20.

Burch, 65 Wn. App. at 840 (citations omitted).

Finally, the trial court must decide if purposeful discrimination did occur. Rhodes, 82 Wn. App. at 196. This necessarily involves an evaluation of the prosecutor's demeanor and credibility. The trial court's ruling on the question of racial motivation is upheld unless clearly erroneous. Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); Rhodes, 82 Wn. App. at 196-97.

Step one is not at issue. Juror 9 was African-American. There were not many African-American jurors on the venire to begin with. 16RP 140. The prosecutor rid the venire of one with a challenge for cause. 16RP 142.

And although juror 9's responses to the attorneys' questions raised no concerns, the prosecutor rid the jury box of any and all African-Americans when he used his second peremptory challenge against her. The trial court properly found a prima facie case of discriminatory intent. 18RP 496.

Step two is not at issue, either. "An explanation is neutral unless a discriminatory intent is inherent therein." Burch, 65 Wn. App. at 840 (citing Hernandez, 500 U.S. 432). And looking solely at the face of the prosecutor's reasons, they do not necessarily rely on race for their legitimacy.

But that is not the end of the inquiry. Step three is very much at issue. Steps two and three cannot be collapsed into a single step. State v. Evans, 100 Wn. App. 757, 769, 998 P.2d 373 (2000) (citing Purkett v. Elem, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)). Under step three, the court must decide whether the prosecutor's race-neutral reasons are to be believed. McClain v. Prunty, 217 F.3d 1209, 1220 (9th Cir. 2000); Rhodes, 82 Wn. App. at 196-97. This is not a duty that the court can abdicate by simply accepting the prosecution's stated reasons at face value. McClain, 217 F.3d at 1223.

At the very least, the trial court's failure to make this ultimate determination requires remand for further findings. McClain, 217 F.3d

at 1223 (citing United States v. Alvarado, 923 F.2d 253, 256 (2nd Cir. 1991)). But where the reasons clearly do not hold up under appellate scrutiny, the appellate court can simply reverse. See McClain, 217 F.2d at 1224 (ordering new trial); Burch, 65 Wn. App. at 844 (same).

At Babbs's trial, the court utterly failed to apply the third step of the analysis. Rather than address the prosecutor's stated reasons, the court simply said, "Okay. The Batson challenge is denied." 18RP 498. Had the court taken the time to fully and carefully consider the reasons, there was but one conclusion -- they were not supported by the record. They were pretextual. And any finding of non-discriminatory intent would have been clearly erroneous.

As the Ninth Circuit Court of Appeals has recognized, "[w]here the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised." McClain, 217 F.3d at 1221. Courts are not bound to accept "neutral" reasons that are either unsupported or refuted by the record. And "[t]he fact that one or more of a prosecutor's justifications do not hold up under judicial scrutiny militates against the sufficiency of a valid reason." McClain, 217 F.3d at 1221.

At Babbs's trial, the prosecutor proffered three excuses for his removal of the only black juror in the box: (1) juror 9 had a master's in education (and the prosecutor believed educators are "forgiving, nurturing types"); (2) she is a social worker (a "red flag"); and (3) a friend or relative had been arrested and served jail time. 18RP 496-97.

Examining each reason separately shows that they do not hold up. As to the first reason, the prosecutor never once asked how juror 9's advanced education degree might affect her tendencies for forgiveness. The closest he came was when he asked her whether she could fire her co-worker -- whom had been there longer than she -- assuming she learned that the co-worker had engaged in misconduct. Her response was unequivocally reassuring, as she declared that she could and would because it "comes with the job." 17RP 452. Thus, the record refutes this stated reason for juror 9's removal. There was nothing forgiving about her.

The second reason fares no better. The prosecutor indicated that juror 9's social work was a "red flag." Unfortunately, he did not elaborate further. Presumably, although not apparently, the prosecutor believed this to be further evidence of an unacceptable willingness to forgive. But juror 9's unflinching readiness to fire a co-worker for misconduct, and each of

her other answers during voir dire, undercuts any contrary stereotype. Again, the record belies the prosecutor's justification.

The third reason also fails. The fact that juror 9 had a friend or relative who was arrested and served jail time is meaningless without specific details. It is just as likely that juror 9 had good feelings about this experience as bad feelings. Had the prosecutor bothered to ask, juror 9 may have indicated that her friend/relative committed the crime, was treated fairly by the system, and is better off today. Juror 9 may have been sympathetic to the prosecution in that matter. In any event, there is certainly nothing in juror 9's answers to the questions she *was* asked indicating bad feelings or ill will based on the event.

The prosecutor's three race-neutral reasons are either not supported by the record or affirmatively contradicted by it. The court erred in not assessing those reasons at trial. The record reveals that they were pretextual. For that reason, Babbs's attempted murder conviction must be reversed.

5. PROSECUTORIAL MISCONDUCT DENIED BABBS A FAIR TRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440

P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Consistent with their duties, prosecutors must not misstate the law or otherwise mislead the jury. To do so is a serious irregularity. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Nor may prosecutors misstate the evidence or urge a guilty verdict on improper grounds. State v. Belgarde, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988); State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808 (citing State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955)), review denied, 116 Wn.2d 1026 (1991).

The prosecutor violated each of these prohibitions during his closing argument. As previously noted, the deputy told jurors that Willie Watkins's statements established that Babbs was with Hicks prior to the shootings. 29RP 2165-66 ("You've got Brenda and Willie Watkins seeing the defendants together on the evening of this incident."). Defense counsel's immediate objection was wholly appropriate. This was precisely the argument defense counsel fought so hard to avoid at the first and second

trials -- one that would invite jurors to use impeachment evidence for its substantive value. 8RP 105-119, 123-24; 25RP 1431-34.

Prosecutorial misconduct requires a new trial where there is a substantial likelihood that the conduct affected the jury's verdict. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). That standard is met here.

Used as substantive evidence, Willie Watkins's statements to detectives did not merely relate to some collateral issue. Identity was the main issue at both trials. At the second trial, Brenda Watkins was the only witness to testify that she saw Babbs and Hicks together shortly before the shootings. But her testimony was suspect. She had not seen Babbs for almost a decade; not since he was in middle school. 6RP 38; 25RP 1492-93. In contrast, Willie, who knew Babbs very well, testified that he would have recognized Babbs had he been the individual with Hicks. And he did not recognize that person. 21RP 831-835; 22RP 840-41, 855.

But by using Willie Watkins's prior statements to detectives as substantive evidence, the State was permitted to do that which it could not properly do under the rules of evidence -- bolster Brenda Watkins's testimony with evidence that had been admitted solely to impeach Willie Watkins's credibility.

The State will likely focus on the fact that jurors received an oral limiting instruction when Detective Webb testified. See 25RP 1539-1542. But the mere fact of a limiting instruction does not necessarily cure misconduct. Davenport, 100 Wn.2d at 763-64. And this is certainly true where, as here, the court's response to defense counsel's objection can only be described as "anemic." Rather than sustain the objection, the court merely reminded jurors that they should rely on their memories of the evidence and the law. 29RP 2165-66. Nothing about the court's response indicated that the prosecutor had acted improperly. Thus, jurors would have felt free to use Willie Watkins's statements to detectives as substantive evidence establishing Babbs's presence with Hicks.

In an otherwise close case (indeed, the jury hung at the first trial), this misconduct affected the outcome and requires reversal of Babbs's attempted murder conviction.

D. CONCLUSION

Defense counsel was ineffective for allowing jurors at the first trial to learn that the death penalty was not an option. Moreover, serious mistakes in the information and jury instructions denied Babbs a fair trial on the first-degree murder charge.

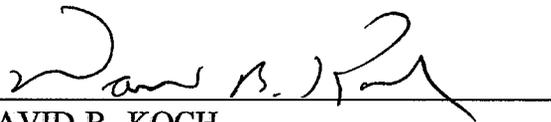
At Babbs's second trial, the State's use of a peremptory challenge to remove a black juror denied Babbs his right to equal protection of the law. Moreover, prosecutorial misconduct during closing argument denied him a fair trial.

Babbs's convictions should be reversed and his case remanded for a fair trial.

DATED this 6th day of May, 2005.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

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.

APPENDIX B

INSTRUCTION NO. 25

To convict the defendant, RASHAD DEMETRIUS BABBS, 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.

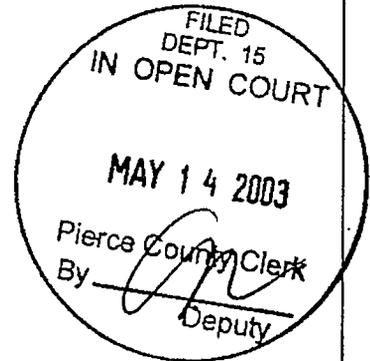
If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX C



01-1-02239-5



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 01-1-02239-5

vs.

RASHAD DEMETRIUS BABBS,

CORRECTED AMENDED INFORMATION

Defendant.

DOB: 06/27/1979

SEX: MALE

RACE: BLACK

PCN#: UNKNOWN

SID#: WA15846957

DOL#: WA BABBSRD211L7

CO-DEF: PHILLIP VICTOR HICKS

01-1-02238-7

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse PHILLIP VICTOR HICKS and RASHAD DEMETRIUS BABBS of the crime of AGGRAVATED MURDER IN THE FIRST DEGREE, committed 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, with premeditated intent to cause the death of another person, did shoot Chica Webber, thereby causing the death of Chica Webber, a human being, who died on or about the 22nd day of March, 2001, and

That further aggravated circumstances exist, to-wit: that the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of Robbery in the First Degree and/or that the defendants committed the murder to conceal the commission of that crime or to protect or conceal the identity of any person committing a crime, and in the commission thereof the defendant or an accomplice was armed with a firearm, to-wit: a .22 caliber revolver and/or a 9mm handgun, that

CORRECTED AMENDED INFORMATION - 1

ORIGINAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

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01-1-02239-5

1 being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW
 2 9.94A.310/9.94A.510, and adding additional time to the presumptive sentence as provided in RCW
 3 9.94A.370/9.94A.530, contrary to RCW 10.95.020(9), RCW 10.95.020(11)(a) and RCW
 4 9A.32.030(1)(a) and 9A.08.020, and against the peace and dignity of the State of Washington.

5 AND IN THE ALTERNATIVE

6 I, GERALD A. HORNE, Prosecuting Attorney aforesaid, do accuse PHILLIP VICTOR
 7 HICKS and RASHAD DEMETRIUS BABBS of the crime of MURDER IN THE FIRST DEGREE,
 8 committed as follows:

9 That PHILLIP VICTOR HICKS and RASHAD DEMETRIUS BABBS, acting as
 10 accomplices, in Pierce County, on or about the 22nd day of March, 2001, did unlawfully and
 11 feloniously, while committing or attempting to commit the crime of robbery in the first or second
 12 degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, either
 13 the defendant or another participant, caused the death of a person other than one of the participants, to
 14 wit: Chica Webber, and in the commission thereof the defendant or an accomplice was armed with a
 15 firearm, to-wit: .22 caliber revolver and/or 9 mm handgun, that being a firearm as defined in RCW
 16 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding additional time to
 17 the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, contrary to RCW
 18 9A.32.030(1)(c)(1) and 9A.08.020 and against the peace and dignity of the State of Washington.

19 COUNT II

20 And I, GERALD A. HORNE, Prosecuting Attorney aforesaid, do accuse PHILLIP VICTOR
 21 HICKS and RASHAD DEMETRIUS BABBS of the crime of ATTEMPTED MURDER IN THE
 22 FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct
 23 or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so
 24 closely connected in respect to time, place and occasion that it would be difficult to separate proof of
 25 one charge from proof of the others, committed 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, with intent to commit the
 crime of Murder in the First Degree, as prohibited by RCW 9A.32.030(1)(a), did take a substantial
 step toward the commission of that crime, and in the commission thereof the defendant or an
 accomplice was armed with a firearm, to-wit: a .22 caliber revolver and/or a 9 mm handgun, that
 being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW
9.94A.310/9.94A.510, and adding additional time to the presumptive sentence as provided in RCW

1 9.94A.370/9.94A.530, contrary to RCW 9A.280.020, against the peace and dignity of the State of
2 Washington.

3 The elements of Murder in the First Degree are unlawfully and feloniously, with a
4 premeditated intent to cause the death of another person causes the death of such person or of a third
5 person.

6 **COUNT III**

7 And I, GERALD A. HORNE, Prosecuting Attorney aforesaid, do accuse PHILLIP VICTOR
8 HICKS of the crime of UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, a
9 crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts
10 connected together or constituting parts of a single scheme or plan, and/or so closely connected in
11 respect to time, place and occasion that it would be difficult to separate proof of one charge from
12 proof of the others, committed as follows:

13 That PHILLIP VICTOR HICKS, in Pierce County, on or about on or about the 22nd day of
14 March, 2001, did unlawfully, feloniously, and knowingly own, have in his possession, or under his
15 control a firearm, he having been previously convicted in the State of Washington or elsewhere of a
16 serious offense, to wit: Residential Burglary, contrary to RCW 9A.040(1)(a), and against the peace
17 and dignity of the State of Washington.

18 **COUNT IV**

19 And I, GERALD A. HORNE, Prosecuting Attorney aforesaid, do accuse RASHAD
20 DEMETRIUS BABBS of the crime of UNLAWFUL POSSESSION OF A FIREARM IN THE
21 SECOND DEGREE, a crime of the same or similar character, and/or a crime based on the same
22 conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
23 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
24 proof of one charge from proof of the others, committed as follows:

25 That RASHAD DEMETRIUS BABBS, in Pierce County, on or about on or about the 22nd
day of March, 2001, did unlawfully, feloniously, and knowingly own, have in his possession, or under
his control a firearm, having been previously convicted in the State of Washington or elsewhere of a

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01-1-02239-5

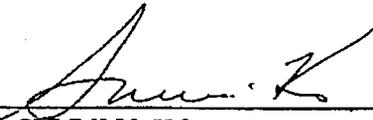
1 felony, to wit: Unlawful Possession of a Firearm in the Second Degree, contrary to RCW
2 9.41.040(1)(b), and against the peace and dignity of the State of Washington.

3 DATED this 16th day of April, 2003.

4 TACOMA POLICE DEPT CASE
5 WA02703

GERALD A. HORNE
Prosecuting Attorney in and for said County
and State.

6 syk

7 By: 
8 SUNNI Y. KO
9 Deputy Prosecuting Attorney
WSB#: 20425

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APPENDIX D

INSTRUCTION NO. 39

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

The elements of the crime of Murder in the First Degree are that a person, with premeditated intent to cause the death of another person causes the death of such person or a third person.