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CLERK OF SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT NO. _____
NO. 31645-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RASHAD BABBS,

Appellant.

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COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

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

STATE OF WASHINGTON
BY _____
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DIVISION II
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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Rashad Babbs, the respondent below, asks this Court to review the Court of Appeals partially published decision, referred to in Section B.

B. COURT OF APPEALS DECISION

Babbs requests review of the Court of Appeals decision in State v. Philip Hicks and Rashad Babbs, Court of Appeals Nos. 31645-5-II and 31743-5-II, filed August 4, 2006. The opinion is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Petitioner is African-American. The State used a peremptory challenge to remove the only African-American juror slated to make it into the jury box. In State v. Rhodes,¹ Division One held that the State's removal of the only African-American from a panel is sufficient to establish a prima facie case of discrimination. Consistent with Rhodes, the trial judge in Babbs's case found a prima facie case. On appeal, however, Division Two expressly disagreed with Rhodes and held that the removal of the only African-American juror cannot establish a prima facie case of discrimination. In light of this conflict between Divisions One and Two, is review appropriate under RAP 13.4(b)(2)?

¹ State v. Rhodes, 82 Wn. App. 192, 917 P.2d 149 (1996).

2. In State v. Townsend,² this Court imposed a strict prohibition against informing jurors that the death penalty is not an option in the case because this information only serves to make jurors less attentive, less careful, and more willing to compromise on a verdict rather than hold out for an acquittal. In petitioner's case, Division Two found that Babb's trial attorney performed deficiently when he allowed jurors to learn that the death penalty was not an option. But the Court went on to hold that there can be no prejudice where the jurors ultimately fail to convict on the most serious charge. Is review appropriate under RAP 13.4(b)(1) where this *per se* rule of harmlessness is inconsistent with Townsend?

D. STATEMENT OF THE CASE

1. Trial Proceedings

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) in connection with the shooting death of Chica Webber. Count 2 charged both men with attempted first-degree murder in

² State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001).

connection with the shooting of Chica's husband, Jonathan Webber.³ CP 138-140; 2RP⁴ 11-13.

The facts surrounding the shootings are discussed in detail in Babbs's opening brief filed with the Court of Appeals. See Brief of Appellant, at 10-17. In summary, Jonathan and Chica Webber were shot while walking in downtown Tacoma on the evening of March 22, 2001. Philip Hicks, accompanied by a second individual, confronted the Webbers and demanded that they empty their pockets. 23RP 1164-1167, 1172-1174. When the couple walked away, Hicks and the second man fired multiple shots. 23RP 1175-1178. Jonathan Webber survived his injuries. 6RP 8, 28. Chica Webber did not. 4RP 115; 8RP 27-28.

Hicks confessed to being one of the shooters, explaining to police that he was under the influence of PCP at the time. 7RP 147-48, 151, 168-

³ 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.

⁴ This petition 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.

171. Based on information Hicks provided, police eventually arrested Babbs, believing him to be the second man involved. 9RP 60-62.

Whether Babbs was in fact the second shooter was hotly contested at trial. Jonathan Webber was unable to identify Babbs from a photomontage, instead indicating that another individual (who appeared somewhat Asian) looked most like the second shooter. 9RP 85-86. No one saw Babbs at the scene. Therefore, the State was forced to rely on circumstantial evidence placing him there. This included evidence that he was seen with Babbs earlier on the day of the shootings and a sweatshirt found near the shootings containing a mixture of DNA, some of which was consistent with Babbs's profile. 6RP 33-40; 9RP 157, 163-164; 25RP 1492-93.

There were two trials. At the first trial, the jury convicted Babbs of first-degree felony murder, but could not reach a verdict on attempted murder. CP 146, 148; 14RP 19. At the second trial, a different jury convicted Babbs of attempted murder. CP 158. The Superior Court imposed a composite standard range sentence of 734 months. CP 189.

Both issues Babbs seeks to raise in this Court arose during jury voir dire.

a. Voir dire at second trial -- Batson

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. Babbs's attorney, 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 questions from Mr. Hicks's

attorney, 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 removal of the lone African-American. 18RP 496. The prosecutor offered 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 these reasons. 18RP 498.

b. *Voir dire at first trial -- death penalty*

During voir dire at the first trial, 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 defense counsel for both defendants

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, Mr. Hicks's attorney 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.

Mr. Babbs's attorney 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. Counsel 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.

2. The Court of Appeals

a. Batson challenge

On appeal, Babbs argued that the State’s exclusion of the only African-American juror slated to make it into the jury box violated equal protection. Brief of Appellant, at 37-43.

Babbs pointed out that 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). In Division One, a prima facie case can be established where the defendant is African-American and the State removes the only African-American from the panel. See Rhodes, 82 Wn. App. at 201.

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.

Babbs argued that the trial court properly found a prima facie case of purposeful discrimination when the State removed the only African-American from the venire. Brief of Appellant, at 39-40. He also argued at length why each of the supposedly race-neutral reasons supplied by the State failed -- the record either did not support them or directly contradicted them. Brief of Appellant, at 40-43.

Division Two never reached the legitimacy of the State's reasons. Instead, the Court held that where the defendant is African-American, removal of the only African-American on the panel is insufficient to create a prima facie case of racial discrimination. Slip Op., at 14. Division Two expressly rejected Division One's contrary opinion in Rhodes. Slip Op., at 15 n.6.

b. Death penalty

Citing this Court's opinion in State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), Babbs also argued that his trial attorney was ineffective at the first trial when he permitted jurors to learn that his case did not involve the death penalty. See Brief of Appellant, at 21-24.

Division Two agreed that counsel's failure to object on this point constituted deficient performance. Slip. Op., at 23. But the Court found that Babbs had not suffered prejudice. Citing Division One's opinion in State v. Murphy, 86 Wn. App. 667, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002 (1998), the Court reasoned that the only risk associated with telling jurors the death penalty does not apply is that it will make them more likely to convict on the most serious charges. Because, reasoned the Court, jurors did not convict Babbs of the most serious charges at the first trial (aggravated murder concerning Chica and attempted murder concerning Jonathan), there was no prejudice. Slip. Op., at 24.

Babbs now seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Batson Challenge

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.⁵ Batson v. Kentucky, 476 U.S. 79,

⁵ 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."

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).

More than a decade ago, in State v. Rhodes, Division One properly held that the State's dismissal of the only African-American eligible for the jury can be sufficient to establish a prima facie case of discriminatory intent. Rhodes, 82 Wn. App. at 201 (citing United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 1487, 134 L. Ed. 2d 687 (1996) ("the significance [of a challenge to a black juror] may differ if the venire consists mostly of blacks or of whites")); see also State v. Wright, 78 Wn. App. 93, 101, 896 P.2d 713 ("The fact that the deputy prosecutor dismissed the only eligible African-American juror is a factor which could raise an inference of discrimination."), review denied, 127 Wn.2d 1024 (1995).

When reviewing the trial court's determination that a prima facie case has been established, that determination "will not be set aside unless clearly erroneous." Wright, 78 Wn. App. at 99 (quoting State v. Burch, 65

Wn. App. 828, 841, 830 P.2d 357 (1992)); accord State v. Luvene, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

In Babbs' case, consistent with Rhodes, the trial court concluded that the removal of the only eligible African-American juror established a prima facie case of discrimination. That determination should have been upheld on appeal since it was not clearly erroneous. Indeed, on appeal the State had not even challenged the trial court's prima facie finding. See Brief of Respondent, at 46-50.

Nonetheless, Division Two used Babbs's case to create a wholesale change in the law. The Court specifically rejected Division One's opinion in Rhodes and held, as a matter of law, that the removal of the only eligible African-American juror cannot by itself establish a prima facie case of racial discrimination.

As it now stands, a defendant's (and a juror's) equal protection rights vary depending on the Court of Appeals division in which the case is tried. Division Three offers lesser protections than Division One. Review is clearly appropriate under RAP 13.4(b)(2).

2. Death Penalty

Division Two properly found that defense counsel performed deficiently when he allowed jurors in the first trial to learn that the death penalty was not a sentencing option.

But the Court erred when it reasoned that a defendant could never be prejudiced where jurors fail to convict on the most serious charge. Contrary to Division Two's reasoning in Babb's case, the jury's failure to convict on the most serious charge at the first trial (aggravated murder) does not mean jurors were not influenced by knowledge that the death penalty was off the table.

As this Court recognized in Townsend, "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. These concerns are not unique to the most serious offense charged. They apply whether the charge is aggravated murder or "merely" another version of first-degree murder.

The record in Babbs's first trial supports a finding of prejudice. As discussed in the Court of Appeals, jurors would have struggled mightily with the sufficiency of the evidence against Babbs because, among other reasons, (1) *no one* saw him at the scene; (2) Jonathan Webber believed the person with Hicks was partly of Asian ancestry and indicated that someone else's photo looked more like the person than Babbs's photo did; (3) a prosecution witness who knew Babbs well testified that he did not recognize the person with Hicks the day of the shooting; and (5) the shooter and Babbs

differed in height and clothing, including their shoes. See Brief of Appellant, at 23-24.

The prejudice is this: jurors who were otherwise inclined to hold out for acquittal on the first-degree felony murder charge would have necessarily been less careful knowing that Babbs would not be killed. Jurors who entertained reasonable doubt that he was the second shooter would have felt more comfortable compromising and ultimately voting for conviction on that charge. Townsend, 142 Wn.2d at 847. Because there is a reasonable probability that jurors were affected -- sufficient to undermine confidence in the outcome -- Division Three erred when it found that Babbs had not suffered prejudice when his attorney allowed jurors to learn that the death penalty did not apply.

Division Three's conclusion that there can be no prejudice when jurors fail to convict on the most serious murder charge conflicts with this Court's decision in Townsend. Babbs's jury would have been influenced in its deliberations on first-degree felony murder. Review is appropriate under RAP 13.4(b)(1).

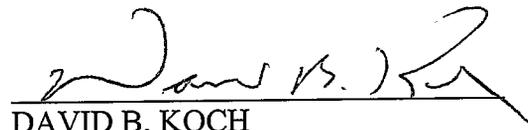
F. CONCLUSION

For the reasons stated above, Babbs respectfully requests that this Court grant review of his case, reverse the decision of the Court of Appeals, and remand his case for a new trial on the first-degree felony murder and attempted murder charges.

DATED this 15th day of September, 2006.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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

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APPENDIX

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP VICTOR HICKS and RASHAD D.
BABBS,

Appellants.

No. 31645-5-II / 31743-5-II

UNPUBLISHED OPINION

PENOYAR, J. — Phillip Victor Hicks and Rashad Demetrius Babbs appeal their convictions for first degree felony murder, attempted murder, and unlawful possession of a firearm. They claim error because their attorneys allowed the trial court to tell the jury that their case was non-capital. They also claim improper information and jury instructions, improper use of prior recorded testimony, jury tampering, prosecutorial misconduct, and improper denial of their *Batson*¹ challenge. Furthermore, Hicks claims that the trial court should have suppressed his incriminating statements and that it improperly allowed evidence that he was given antipsychotic medication in jail to control his behavior. We affirm the convictions.

¹ *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

FACTS

I. BACKGROUND

A. The shooting

Jonathan Webber and his wife, Chica, were walking from a friend's house at about 11:00 P.M. on March 22, 2001. Two men approached them and asked them about drugs. One man wore a beige coat with a black striped hood and the other wore a black leather jacket with a hood. Jonathan² got a better look at Hicks, the man in beige.

The Webbers kept walking, telling the men that they did not have any drugs. The men followed the Webbers and told them several times to empty their pockets. Jonathan stopped on a street corner and told the men that he was broke and that he had no money. Hicks told Jonathan to empty his pockets or he was going to die.

Jonathan noticed Hicks was holding a revolver, so he grabbed Chica's hand and started to cut across the street. The Webbers had only gone a few feet when Hicks and Babbs started shooting at them. The Webbers fell to the ground. Chica was killed and Jonathan sustained wounds in his leg, wrist, and the left side of his back. Jonathan later testified that he believed the gunshots came from more than one gun because one gun was louder than the other. Neither assailant approached the Webbers when they were on the ground or took anything from them.

Wayne Washington was sitting on the couch with his wife watching TV when they heard the gunshots outside their house. Washington, whose grandfather used to take him to the firing range, testified that he heard shots fired from two different weapons. He said the first gunshots

² We use first names where necessary to avoid confusion. No disrespect is intended.

he heard sounded like they came from a larger, heavier gun. Right after the shots from the larger gun, he heard the shots from a smaller caliber gun, which he thought was a .22. He thought he heard a total of about seven shots from both guns. He looked out the window once the shooting had stopped but he did not see the shooters.

After the shooting, the assailants ran off through an alley. Police officers surrounded the area and brought in a K-9 unit to search. The search recovered a revolver, a brown glove, a black leather jacket, a knit stocking cap, and a sweatshirt. This clothing was similar to clothing the suspects were wearing earlier in the evening. DNA on the sweatshirt was consistent with Babbs's DNA.

Inside the black leather jacket was a set of keys belonging to Babbs's sister, Collette Babbs. The jacket's pocket also contained a receipt with Alana Stubblefield's phone number handwritten on the back. Stubblefield is Babbs's cousin. She testified that she used to see Babbs all the time and every time she saw him she would give him her phone number. Lenard Masten's name was on the receipt. Stubblefield testified that she used to date Masten.

Dana Duncan was a teenager sleeping in her room at her mother's house when a man started pounding on her window the night of the shooting. He convinced her that he knew her brother and she eventually let him in. Duncan had never seen the man before. He was wearing a T-shirt, but no jacket.

Duncan agreed to give the man a ride and she let him off near the Tacoma Mall. Shortly after she arrived home, Duncan received a call from the man to thank her. Phone records showed that the call came from the cell phone of Toni Miles, Babbs's brother's girlfriend. Although she did not recognize Babbs at the first trial, Duncan came to believe that he was the man who came to her window.

Jonathan was able to describe Hicks to the police sketch artist but he did not get a good enough look at Babbs to describe him. Police showed Jonathan photo montages containing pictures of Hicks and Babbs. Jonathan was not able to identify Babbs from the montage, but he said Hicks looked most like the man he saw even though he could not be sure.

Chica's autopsy revealed that she was shot three times in the head. Fragments from all three bullets were recovered during the autopsy. Two bullets were .22 caliber and one was a larger caliber. The .22 caliber bullets were too badly damaged to determine if they came from the revolver recovered during the search. The larger bullet probably came from a 9 mm Ruger semiautomatic pistol.

B. Hicks's statements to police

When Hicks was arrested for drug dealing on April 24, 2001, three homicide detectives picked him up from his drug arrest scene. Riding in the car to the station with the detectives, Hicks asked, "Tell the truth, answer one question, am I through?" RP (03/08/02) at 28; 6 RP (02/03/04) at 697. He also asked, "Are deliveries the only thing you've got me on?" RP (03/08/02) at 28. He made statements about how he was willing to work with the police. Hicks testified at his CrR 3.5 hearing that he made these statements without the detectives questioning him.

The detectives decided to warn Hicks of his *Miranda*³ rights immediately and not wait until they got to the police station. They pulled the car over, advised Hicks of his rights, and removed his handcuffs to allow him to sign the acknowledgement form.

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

Hicks said that he understood his rights. While in the car, Detective Davidson told Hicks that he was in trouble for more than just deliveries. Hicks replied that he knew what the detectives were talking about, that "I was there but I didn't do it," and that "my mom knows." RP (03/08/02) at 30, 47; 6 RP (02/03/04) at 700. Detective Davidson told Hicks that they were aware that he was involved in a murder. Hicks responded, "You know that I know what happened." RP (03/08/02) at 47; 6 RP (02/03/04) at 700.

After Hicks arrived at the police station, detectives informed him that they wanted to discuss the Webber shooting. Hicks said, "Maybe I need a lawyer." RP (03/08/02) at 48. The detectives told Hicks that if he was asking for an attorney, they would stop questioning him. Hicks said that he was willing to help and that he was not asking for an attorney, but that he was also concerned that if he helped the police it might hinder any potential plea bargain. The detectives told Hicks that they had no control over any potential deals for his cooperation. The detectives asked him specifically if he was asking for an attorney, and Hicks said no.

Detectives told Hicks that the male victim had survived the shooting and had identified him. Hicks responded, "How did you know it was me?" 6 RP (02/03/04) at 702. Hicks said that the police should allow him to go contact the other person so that he could prove his innocence. Hicks said, "I was basically a hostage," and "This is my fault for being in the wrong place at the wrong time with the wrong person." 6 RP (02/03/04) at 703. Hicks acknowledged that his fingerprints were probably on the .22 revolver, even though police were not able to recover any fingerprints.

Hicks also said that he had smoked marijuana laced with PCP before the shooting and that he did not remember exactly what took place. He remembered approaching the Webbers, trying to sell them drugs, and then demanding money. Hicks said that the other assailant had put

a gun to his head and told him to shoot, so he closed his eyes and shot. Hicks heard other shots being fired. He remembered throwing the gun in some bushes as he ran away.

After some questioning, Hicks stated that he did not want to answer any more questions without having his attorney present. The detectives testified that they stopped questioning at that point.⁴

After the interview ended, the detectives took Hicks to the Pierce County jail for booking. At the jail, Detective Webb told Hicks to wait on the bench in the booking area until they were ready. According to Webb, Hicks got off the bench at least twice and came over to him and asked about the case. Detective Webb warned Hicks that he had already invoked his rights and that he should wait on the bench and remain silent. Hicks responded that the police could not use anything he said because he had invoked his rights. Webb told Hicks to sit back down and remain silent, but Webb did not advise Hicks specifically that these statements could be used against him.

Hicks asked Webb if he knew what bullet killed the girl. When Webb responded that he did not know, Hicks said, "I bet it was the .22." RP (03/08/02) at 18; 11 RP (02/10/04) at 1538. Webb asked Hicks why he thought that, and Hicks responded, "Because I was the closest." RP (03/08/02) at 18; 11 RP (02/10/04) at 1539.

In its findings of fact and conclusions of law, the trial court determined that the statements Hicks made in the car before being advised of his *Miranda* rights were admissible

⁴ Hicks's testimony at the CrR 3.5 hearing contradicted the detectives' account. Hicks claimed that, instead of ceasing questioning, the detectives showed him graphic crime scene pictures and took notes on his responses. He claimed that, after calling an attorney for him, the detective told Hicks, "I talked to your attorney and, you know, he wishes that you should invoke your rights to talk [sic]. . . but you know that you need to help yourself." RP (03/08/02) at 63-64. Hicks said the detectives then asked more questions about the homicide.

because they were unsolicited and not pursuant to interrogation. The trial court also found knowing, intelligent, and voluntary waiver of rights as to the statements Hicks made in the car after being advised of his *Miranda* rights.

The trial court found that Hicks's first mention of an attorney was an "equivocal request." CP (04/30/04) at 17. When detectives asked if he was requesting an attorney, Hicks responded that he did not wish to have an attorney present. The trial court then admitted Hicks's subsequent statements because Hicks expressed "a clear willingness to speak to the detectives without an attorney being present." CP (04/30/04) at 19-20. Finally, the trial court admitted statements Hicks made at the jail during booking because the statements were unsolicited.

II. PROCEDURAL HISTORY

A. Charges

For Chica Webber's death, the State charged Hicks and Babbs with aggravated first degree murder and, in the alternative, first degree murder and first degree felony murder, with first or second degree robbery as the predicate felony. The court instructed the jury on the lesser included offenses of second degree murder and first and second degree manslaughter.

The State also charged Hicks and Babbs with attempted murder of Jonathan Webber and unlawful possession of a firearm. Babbs pleaded guilty to the firearm charge before trial.

At the first trial, the jury convicted Hicks and Babbs of first degree felony murder in Chica Webber's death. The jury also convicted Hicks of unlawful possession of a firearm. The jury could not reach a verdict on the attempted murder of Jonathan Webber, so the court declared a mistrial. A second trial was held on the attempted murder charges.

B. Instructing the jury that the case did not involve the death penalty

During voir dire at the first trial, juror number nine expressed concern that her religious beliefs may affect her ability to decide the case. When the trial court asked her to think of an area where there might be a conflict with her church's teachings, she mentioned capital punishment. The trial court immediately held a sidebar with the attorneys outside the jury's presence. The trial court then informed the jury that "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." RP (04/22/03) at 74-75. The juror then said that she could follow the law as the court gave it to her.

Later during voir dire, the prosecutor asked juror number nine whether she would feel uncomfortable having to make a decision about the guilt or innocence of another human being. The juror responded, "No. I feel I try not to make a mistake, because . . . some people were executed, then they found out they were innocent afterwards." RP (04/22/03) at 155. The prosecutor then verified that, because capital punishment was not an issue, the juror was able to serve.

C. Testimony of Willie and Brenda Watkins

Brenda Watkins (Brenda), Hicks's foster mother, testified at both trials that she saw Hicks and Babbs together at her house during the afternoon before the shooting. Willie Watkins (Willie), Brenda's son, was also at the house at the time.

Brenda saw Hicks and Babbs together again when they stopped by her house later that night. She said that Willie was at home at that time, too, and that Willie went outside and spoke with Hicks and Babbs for a few minutes.

Willie also testified about seeing Hicks at Brenda's house on the day of the shooting. He could not be sure whether Hicks was with someone. He saw Hicks again around 11:00 P.M. Willie testified that Hicks was with someone but that he never saw the other person.

Brenda testified that Hicks returned to her house about 45 minutes to an hour later. He was sweating, his eyes were bulging, and he no longer wore his coat. When she asked Hicks about what was wrong, he started crying and said, "Momma, pray for me." 11 RP (02/10/04) at 1504.

Detective Webb impeached Willie's testimony by saying that Willie reported seeing Hicks and Babbs together twice in the hours before the shooting — once in the afternoon and again later that night. Webb testified that Willie refused to be taped because he feared retaliation from Babbs's family. Before the detective testified, the trial court instructed the jury that the detective's testimony about Willie's statements should be considered only as it related to Willie's credibility and should not be used as substantive evidence to prove the charges against the defendants.

D. Testimony about medicating jail inmates

At both trials, Hicks called Dr. David Moore to give an expert opinion regarding Hicks's mental ability to form the intent to commit the crimes charged. Moore testified that the Pierce County jail's medical staff had prescribed Hicks Seroquel, which is used to treat psychosis and schizophrenia. Moore did not know Hicks's actual diagnosis.

In rebuttal, the State called Dr. Murray Hart from Western State Hospital to testify regarding his efforts to evaluate Hicks's mental condition. Hart said he obtained Hicks's jail mental health record to review, and he spoke with a mental health professional at the Pierce County jail. On cross examination in the first trial, defense counsel established that Hicks was

on Seroquel when he came to Hart and asked Hart, “[What] is the only thing that Seroquel is prescribed to treat?” RP (05/08/03) at 109. Hart responded that the Pierce County jail uses psychotropic medication to control inmate behavior.

At the second trial, Hicks’s counsel referred to Department of Corrections records showing that Hicks had been on Seroquel and asked Hart on cross-examination if “maybe they determined that there was psychosis in the past?” 14 RP (02/13/04) at 2009. Hart said that he did not know what they might have determined.

On redirect, the prosecutor asked Hart if he had received from the Pierce County jail patients who are prescribed antipsychotic medication but are not diagnosed as psychotic. Hart responded that Western State Hospital receives people from the Pierce County jail who come to the hospital on antipsychotic medications, although the reason that the jail physician placed them on these medications is not always obvious. When asked whether the jail’s physicians ever prescribed antipsychotic medication purely for behavior control, Hart responded that they did. Hicks objected to this testimony.

In closing at the second trial, counsel for Hicks argued that the jury should infer that Hicks had psychoses because “the State” had given him an antipsychotic drug. In response, the prosecutor referred to Hart’s testimony that the jail uses antipsychotic medications to control behavior issues and essentially told the jury that it could not infer diminished capacity from that fact. Hicks did not object to this argument.

E. *Batson* challenge

Before the second trial, Hicks and Babbs objected when the State used one of its peremptory challenges to remove the only remaining African American juror from the venire. They argued that, because the prosecutor had not asked this juror any questions, race must have

been the reason for removing her. The trial court finally determined, “[O]ut of an abundance of caution, I find a prima facie case [of discrimination].” 5 RP (01/30/04) at 496.

The prosecutor then gave his reasons for exercising the challenge:

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

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

Further, [the juror] also indicated that somebody in her family, either a friend or relative, has been arrested and served time.

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

5 RP (01/30/04) at 496-97.

The trial court allowed defense counsel to respond. After hearing arguments from both sides, the court stated simply, “Okay. The *Batson* challenge is denied.” 5 RP (01/30/04) at 498.

F. Contact with a juror

Part way through the second trial, one of the jurors told the bailiff that he believed that one of Jonathan Webber’s friends tried to communicate with him. Defense counsel initially moved to excuse the juror but the trial court decided to hear directly from the juror first.

The juror said:

[A]t the end of the day as I was leaving, why, as I went out the front door, why, the -- Mr. Webber was there with some people. And I was crossing the crosswalk to go over and then I go down to the bus stop, and as I went across, why, one of these people that I had seen in the courtroom and was with him --

...

[I]t was a situation where I walked out, he came up beside me, turned the corner with me and there was absolutely no one else on the sidewalk, and I can’t say that he was talking directly to me but he was F something or the other, and he was -- he was within I’d estimate six to eight feet from me, closer to six feet. And there’s no one else around. And he’s -- I mean, I just got the feeling that he knew

who I was and I knew who he was, but I didn't say a word. And once I made -- once I saw him I just kind of watched out of the corner of my eye and I walked -- I walked on down.

And then when I got down to the bus stop, why, he had stopped. And so I thought, you know, maybe it's purely coincidence, and it may have been purely coincidence. I turned and took a couple of steps back to see if I could see where he'd gone just to see if he'd cut back, and there was a car there and you could see that he was -- had the door open and was there at the car.

12 RP (02/11/04) at 1602-03.

The juror said that he was not intimidated and that he could still be fair and impartial. He promised not to discuss the incident with the other jurors.

G. Prosecutor's closing arguments

In rebuttal closing at the second trial, the prosecutor argued, "You've got Brenda and Willie Watkins seeing the defendants together on the evening of this incident." 15 RP (02/17/04) at 2165-66. The defense objected because Willie had not identified Babbs. The trial court responded, "[I]t'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." 15 RP (02/17/04) at 2166. The prosecutor continued: "Brenda and Willie Watkins encountered Rashad Babbs and Phillip Hicks. Brenda tells us that was the two people together because she recognized Rashad Babbs when she saw them." 15 RP (02/17/04) at 2166-67.

After the second trial, the jury convicted Hicks and Babbs of attempted murder of Jonathan. They now appeal both the felony murder and the attempted murder convictions.

ANALYSIS

I. *BATSON* CHALLENGE

Hicks and Babbs claim that the trial court erred in denying their *Batson* challenges. They argue that the prosecutor's reasons for excusing the African American juror were pretextual, even if the reasons were race neutral. They also claim that the trial court failed to perform the third step of *Batson*'s three-part analysis. Therefore, they argue that the record does not support the trial court's denial of their *Batson* challenge.

The party raising the *Batson* challenge must first establish a prima facie case of purposeful discrimination. *State v. Evans*, 100 Wn. App. 757, 763-64, 998 P.2d 373 (2000) (citing *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995)). A prima facie case exists if two criteria are met. *Evans*, 100 Wn. App. at 764. First, the challenge must be exercised against a member of a "constitutionally cognizable" group. *Evans*, 100 Wn. App. at 764. Second, that fact and "other relevant circumstances" must raise the inference that the challenge was based on the juror's membership in the group. *Evans*, 100 Wn. App. at 764. "Relevant circumstances" may include a pattern of strikes against members of the group or the particular questions asked during voir dire.⁵ *Evans*, 100 Wn. App. at 764.

⁵ Courts have refined the concept of "other relevant circumstances" to include actions such as: (1) striking a group of jurors that are "otherwise 'as heterogeneous as the community as a whole,' sharing race as their only common characteristic;" (2) disproportionate use of strikes against a group; (3) the level of a group's representation in the venire as compared to the jury; (4) race of the defendant and the victim; (5) past conduct of the state's attorney in using peremptory challenges to excuse all African-Americans from the jury venire; (6) type and manner of the state's questions and statements during venire; (7) disparate impact, all or most of the challenges used to remove minorities from jury; (8) similarities between those individuals who remain on the jury and those who have been struck. *Evans*, 100 Wn. App. at 769-770.

Once a party makes a prima facie case, the burden shifts to the party exercising the peremptory challenge to give a neutral explanation related to the particular case to be tried. *Evans*, 100 Wn. App. at 764 (citing *Luvane*, 127 Wn.2d at 699). The third and final step requires the trial court to consider the proffered explanation to determine whether there is a discriminatory purpose behind the exercise of the peremptory challenge. *Evans*, 100 Wn. App. at 764.

Here, we do not address whether the trial court properly performed *Batson's* third step or whether the prosecutor's argument was pretextual because Hicks and Babbs failed to establish a prima facie case of racial discrimination.

The only reason Hicks and Babbs gave for objecting to the prosecutor's peremptory challenge was that the prosecutor removed the last African American left in the jury pool. A mere challenge to a person of color does not constitute a prima facie case of discrimination. *Evans*, 100 Wn. App. at 770. Hicks and Babbs fulfilled only part of the prima facie showing by establishing that the struck juror was a member of a cognizable racial group. They also had to show that "other relevant circumstances" raised an inference that the strike was based on the juror's status as a member of a constitutionally cognizable group. *See Evans*, 100 Wn. App. at 769. This part they failed to show.

Even if the challenged juror is the only African American on the panel, this factor in and of itself does not create a prima facie case of racial discrimination. *See State v. Wright*, 78 Wn. App. 93, 102, 896 P.2d 713 (1995) (courts are hesitant to find a discriminatory motivation based on numbers alone). We acknowledge that striking the only member of a particular group provides some evidence of a discriminatory motivation and may be considered along with other factors. *See Wright*, 78 Wn. App. at 101-02. However, the party challenging the strike does not

meet its burden simply by pointing out that the challenged juror is the venire's only member of a particular group. In our diverse communities, a venire may have one potential juror from each of several different constitutionally cognizable groups. A court need not entertain a *Batson* every time a struck juror is the lone representative from his or her particular group.⁶

In this case, the trial court said it found a prima facie case "out of an abundance of caution." 5 RP (01/30/04) at 496. It never identified other relevant circumstances to suggest that the strike was racially motivated, nor do we see evidence from the record that racial discrimination motivated the strike.

Because Hicks and Babbs never made a prima facie case, the trial court should not have required the prosecutor to state race-neutral reasons on the record. *State v. Wright*, 78 Wn. App. at 100-01.⁷ Therefore, we hold that the trial court did not err in denying the *Batson* challenge. *See Reece v. Good Samaritan Hosp.*, 90 Wn. App. 574, 578, 953 P.2d 117 (1998) (we may affirm the trial court on any grounds that the record supports).

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

⁶ On this point, we depart from the Division One case *State v. Rhodes*, 82 Wn. App. 192, 201, 917 P.2d 149 (1996) (holding that the trial court improperly denied a *Batson* challenge when exercised against the only African American in the Venire).

⁷ However, the State putting its race-neutral explanation on the record did not render the prima facie issue moot. *Wright*, 78 Wn. App. at 101.

II. HICKS'S STATEMENTS TO POLICE

A. Right to counsel under CrR 3.1

Hicks claims for the first time on appeal that police violated his right to counsel under CrR 3.1⁸ by not informing him of his right to an attorney immediately upon arrest. He may claim error for the first time on appeal only if it is a manifest error involving a constitutional right. RAP 2.5(a)(3); *State v. Roberts*, 142 Wn.2d 471, 500, 14 P.3d 713 (2000).

Washington courts have held that CrR 3.1 is not a rule of constitutional dimension. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 334, 734 P.2d 966 (1987). Like Hicks, Guzman tried to argue, based on CrR 3.1, that his constitutional right to counsel arose as soon as he was taken into custody. *Guzman-Cuellar*, 47 Wn. App. at 333. Division One rejected his argument, holding that the Sixth Amendment and article I, section 22 of the Washington Constitution provide the constitutional right to counsel only at a critical stage and not immediately upon arrest. *Guzman-Cuellar*, 47 Wn. App. at 334 (citing *Heinemann v. Whitman County*, 105 Wn.2d 796, 800, 718 P.2d 789 (1986)). Because Hicks claims violation of only a court rule and does

⁸ CrR 3.1 provides in part:

(b) Stage of Proceedings.

(1) The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.

(2) A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review. . . .

(c) Explaining the Availability of a Lawyer.

(1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

not allege an error affecting a constitutional right, we will not address his claim for the first time on appeal. *Guzman-Cuellar*, 47 Wn. App. at 334.

B. Pre-*Miranda* statements

Hicks claims that he was in custody when he was placed in the detectives' car and that they should have read him his *Miranda* warnings immediately. He says that being in the car with three detectives was a coercive environment that the detectives should have known would elicit an incriminating response. He argues that the trial court should have excluded the pre-*Miranda* statements he made in the car, even though he made the statements without the police officers directly questioning him.

Hicks assigns error to the trial court's legal conclusion that his pre-*Miranda* statements were admissible because they were unsolicited and not pursuant to the detectives' interrogation. We review the trial court's conclusions of law de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

A suspect is in custody when his freedom of action is curtailed to a degree associated with formal arrest. *State v. Lorenz*, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004); *State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989). In this case, Hicks was in custody while he was in the patrol car. However, the police did not interrogate him at this time. Therefore, his pre-*Miranda* statements are admissible because they did not result from police interrogation. See *State v. Birnel*, 89 Wn. App. 459, 467, 949 P.2d 433 (1998).

For an in-custody interview or discussion with a suspect to be a police interrogation, there must be some degree of compulsion. *Birnel*, 89 Wn. App. at 467 (citing *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995)). An officer's statements or actions will not constitute

an interrogation if they are not reasonably likely to elicit an incriminating response from the suspect. *Birnel*, 89 Wn. App. at 467 (citing *Rhode Island v. Innis*, 446 U.S. 291, 302, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). The officer's statements must reflect a measure of compulsion *above and beyond that inherent in custody*. *Birnel*, 89 Wn. App. at 467.

We hold that Hicks's pre-*Miranda* statements were properly admitted because they did not result from police interrogation. Granted, custody itself can create a coercive atmosphere. *See Birnel*, 89 Wn. App. at 467-68 (police detention was somewhat coercive due to its length and the suspect's physical weakness from lack of sleep and a hand injury). However, police officers must take affirmative actions before custodial interrogation takes place and *Miranda* warnings are required. *See Birnel*, 89 Wn. App. at 467-68. Arresting a suspect and putting him into a car does not in and of itself equate to custodial interrogation.

C. Post-*Miranda* statements

Hick argues that because the detectives did not give the *Miranda* warnings in time, the court should also have excluded the statements he made after he received the belated warnings.

We hold that Hicks's post-*Miranda* statements were properly admitted because he waived his *Miranda* rights by talking with the police. A suspect may waive his *Miranda* rights if the waiver is knowing, voluntary, and intelligent. *See State v. Parra*, 96 Wn. App. 95, 96, 977 P.2d 1272 (1999). Waiver must be determined on the particular facts and circumstances surrounding the case, including the accused's background, experience, and conduct. *Parra*, 96 Wn. App. at 99-100 (citing *North Carolina v. Butler*, 441 U.S. 369, 374-75, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)).

In this case, Hicks testified at his CrR 3.5 hearing that he understood his *Miranda* rights when the police officers explained them to him in the car. Nevertheless, he continued talking

about the shooting. Therefore, the trial court did not err in admitting Hicks's post-*Miranda* statements because they resulted from a knowing, voluntary, and intelligent waiver of his rights. *See Parra*, 96 Wn. App. at 100.

D. Statements after Hicks invoked his right to counsel

Hicks also claims that Webb "questioned" him after he invoked his right to counsel when Webb asked him during booking why he believed that a .22 bullet killed Chica Webber. Hicks argues that he never waived his rights knowingly and voluntarily and, therefore, the trial court should have suppressed his statement about how he was the closest.

Once a suspect has asserted the right to counsel, custodial interrogation must cease unless the suspect initiates further communication. *Birnel*, 89 Wn. App. at 468. This rule is designed to protect an accused in police custody from badgering by police officers. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983). Before police can further interrogate a suspect after he requests an attorney, the suspect himself must initiate dialogue with the authorities. *Bradshaw*, 462 U. S. at 1044.⁹

⁹ A plurality of the Supreme Court went on to say:

There can be no doubt in this case that in asking, "Well, what is going to happen to me now?", respondent "initiated" further conversation in the ordinary dictionary sense of that word. While we doubt that it would be desirable to build a superstructure of legal refinements around the word "initiate" in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in [*Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)].

In *Birnel*, a suspect who had invoked his right to counsel interrupted the detective who was explaining the booking procedure and began making statements about the crime. *Birnel*, 89 Wn. App. at 468. This initiation constituted a waiver, and the suspect's later statements were admissible. *Birnel*, 89 Wn. App. at 468. This also happened here.

Hicks initiated further discussion about his case by coming over to Webb and asking questions. Therefore, he waived his right to counsel and the statements he made to Webb, including the statement in response to Webb's question, were properly admitted.

III. INFORMATION CHARGING FIRST DEGREE FELONY MURDER

Hicks and Babbs claim that the information charging them was deficient because it affirmatively misrepresented the elements of felony murder. Specifically, they cite the information charging them with first degree murder, which said:

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 (07/01/04) at 139. They claim that the "while committing" language was erroneous and the information should have alleged that they "committed" robbery.

Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation.

Bradshaw, 462 U. S. at 1045-46.

An information sufficiently charges a crime if it apprises accused persons of the accusations against them with reasonable certainty. *State v. Leach*, 113 Wn.2d 679, 694-95, 782 P.2d 552 (1989). The focus is whether all essential elements of an alleged crime have been included in the charging document. *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

We do not agree that this information is deficient. According to statute, a person is guilty of first degree murder when “He or she commits or attempts 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 . . . causes the death of a person other than one of the participants.” RCW 9A.32.030(1)(c). The plain statutory language provides that a person commits the crime charged, first degree murder, by killing while engaged in certain felonies. *See* RCW 9A.32.030(1)(c). One does not have to complete the underlying felony to meet the statutory definition of first degree murder. *See* RCW 9A.32.030(1)(c).

We also note that in Washington, the elements of the underlying felony are not elements of the crime of felony murder. *State v. Bryant*, 65 Wn. App. 428, 438, 828 P.2d 1121 (1992). Although the underlying crime is an element in felony murder, the defendant is not actually charged with the underlying crime. *Bryant*, 65 Wn. App. at 438. Therefore, the information does not have to set forth the elements of the predicate felonies to be sufficient. *Bryant*, 65 Wn. App. at 438.

IV. INFORMING THE JURY THAT THE CASE WAS NOT A DEATH PENALTY CASE

A. Informing the jury

Hicks and Babbs claim that the trial court erred in informing the jury that the case was not a death penalty case. *State v. Townsend*, 142 Wn.2d 838, 840, 15 P.3d 145 (2001) (a trial court may not inform the jury during voir dire that the death penalty is not an option in the case). Because Hicks and Babbs failed to object to the error at trial, they cannot now claim on appeal that the trial court erred.¹⁰ *See State v. Fire*, 145 Wn.2d 156-57, n.3, 34 P.3d 1218 (2001).

B. Ineffective assistance

Hicks and Babbs also claim that they received ineffective assistance of counsel because their attorneys failed to object on the record to the trial court informing the venire that the case was non-capital.

Washington has adopted the *Strickland*¹¹ test to determine whether a defendant had constitutionally sufficient representation. *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). First, the defendant must show that counsel's performance was deficient. *Cienfuegos*, 144 Wn.2d at 226. To prove deficient performance, a defendant must demonstrate that the representation fell below an objective standard of reasonableness under professional norms. *Townsend*, 142 Wn.2d at 843-44.

¹⁰ As we explained in Part I, a party may claim error for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). Hicks and Babbs did not argue on appeal that this was a manifest constitutional error. Therefore, we will not consider this claim on appeal. *See* RAP 10.3(a)(5); *Keever & Assocs v. Randall*, 129 Wn. App. 733, 119 P.3d 926 (2005) (when an issue is not argued, briefed, or supported by citation to the record or authority, it is generally waived).

¹¹ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Second, the defendant must show that the deficient performance prejudiced him. *Cienfuegos*, 144 Wn.2d at 227. Hicks and Babbs bear the burden of showing that, but for the ineffective assistance, there is a reasonable probability that the trial's outcome would have differed. *Cienfuegos*, 144 Wn.2d at 227 (citing *Strickland*, 466 U.S. at 694). "Deficient performance is not shown by matters that go to trial strategy or tactics." *Cienfuegos*, 144 Wn.2d at 227 (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

In any claim of ineffective assistance of counsel, the "courts engage in a strong presumption counsel's representation was effective." *Townsend*, 142 Wn.2d at 843. Competency of counsel is determined based on the entire record below. *Townsend*, 142 Wn.2d at 843.

1. Deficient performance

The *Townsend* court held that an attorney's conduct falls below prevailing professional norms when counsel fails to object to the jury being told that the case was noncapital. *Townsend*, 142 Wn.2d at 847. The court said that this information "would only increase the likelihood of a juror convicting the petitioner." *Townsend*, 142 Wn.2d at 847. Applying *Townsend*, we hold that defense counsels' performance was deficient in so far as they did not object to the trial court informing the entire jury that the case was noncapital.

2. Prejudice

Even though counsel performed deficiently in allowing the entire jury to learn that the case was non-capital, we hold that any error was nonprejudicial. *See Townsend*, 142 Wn.2d at 847.

An error is prejudicial only when there is a reasonable probability that, but for counsel's unprofessional errors, the trial result would have differed. *Townsend*, 142 Wn.2d at 847.

Because Hicks and Babbs cannot show that the results at trial would likely have differed, they have not satisfied the *Strickland* test's second prong. *Townsend*, 142 Wn.2d at 847.

Hicks's confession provided ample evidence of his involvement so that a guilty verdict was likely even if the jury had no information regarding the death penalty. Babbs argues that the jury might have acquitted him if they thought the death penalty was on the table because the evidence against him was only circumstantial. However, the jury seems to have properly disregarded sentencing considerations because it did not convict Babbs of either the most serious or the least serious crimes charged. *See State v. Murphy*, 86 Wn. App. 667, 673, 937 P.2d 1173 (1997).

The most serious charges against Hicks and Babbs were aggravated first degree murder of Chica and attempted murder of Jonathan. The jury at the first trial did not convict Hicks and Babbs of either crime. The potential danger with jurors learning that the death penalty was not an option was the risk that this information would make the jury more likely to convict on the most serious charges. *Murphy*, 86 Wn. App. at 673. Because the jurors did not convict on the most serious charges, the risk posed by informing the jury appears not to have manifested itself here. Therefore, Hicks and Babbs have presenting nothing to show that sentencing considerations influenced the jury's deliberations.¹² *Murphy*, 86 Wn. App. at 673. Hicks and Babbs have not met their burden of showing that the results at trial would likely have differed.

¹² In declaring a mistrial on the attempted murder charges, the trial court said:

[The jurors] have deliberated pretty steadily through two days. They worked pretty much through lunch both times. They did break for lunch, but a shortened lunch, and the presiding juror was pretty clear and pretty adamant, I thought both by what he said and the way he said it, that they were not going to benefit from further deliberation, and we have to remember they had sent out a question earlier that seemed to indicate that they were already at impasse, and they've had a good

V. TESTIMONY ABOUT MEDICATING JAIL INMATES

Hicks claims that the trial court erred in allowing Hart to testify in rebuttal that medical staff at the Pierce County jail used Seroquel to control inmates' behavior. Hicks argues that Hart's comments were hearsay testimony of the jail staff and were improperly admitted in both trials to undermine his diminished capacity defense. Hicks claims that admitting the testimony violated his constitutional right to confrontation.

We review a trial court's decision to admit evidence for abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). A witness is supposed to testify to matters about which the witness has personal knowledge. *See* ER 602. Testimony that relies on the practical experience and acquired knowledge of an expert may be admitted. *State v. Stenson*, 132 Wn.2d 668, 717, 940 P.2d 1239 (1997). Expert opinion may rely on hearsay. ER 703: *Sunbreaker Condominium Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 374, 901 P.2d 1079 (1995).

In this case, Hart was testifying as an expert in the field of psychology. Admittedly, he was not testifying as an expert in the medicating practices of county jails. Nonetheless, in the course of his work as a doctor at a state psychiatric institution, Hart treated numerous patients who arrived from the Pierce County jail. To treat those patients, Hart needed to know what medications his patients had already received and why the medical staff at the jail administered those particular medications.

bit of time since then to try to break that impasse with no apparent movement whatsoever.

RP (05/14/03) at 21. This demonstrates that the jurors focused on the job and stood firm on their beliefs.

Through his work in treating his patients, Hart learned about the Pierce County jail's practice of giving inmates antipsychotic medication for behavior control. Therefore, Hart's testimony was based on the practical experience and acquired knowledge of a medical professional and it was not inadmissible hearsay. *See Stenson*, 132 Wn.2d at 717. The trial court did not abuse its discretion in admitting this testimony.

VI. CONTACT WITH A JUROR

Hicks and Babbs claim that the trial court erred in not dismissing the juror who thought Webber's friend followed him. They claim the contact was "presumptively prejudicial" and compromised their right to an impartial jury. They say the contact was not shown to be harmless beyond a reasonable doubt.

We review a trial court's decision to replace a juror with an alternate for abuse of discretion. *State v. Ashcraft*, 71 Wn. App. 444, 461, 859 P.2d 60 (1993). This is consistent with Washington's practice of giving trial courts control over all aspects of the docket and the cases that come before them. *Ashcraft*, 71 Wn. App. at 461.

Communicating with jurors constitutes misconduct. *State v. Murphy*, 44 Wn. App. 290, 296, 721 P.2d 30 (1986). Once established, it gives rise to a presumption of prejudice that the State has the burden of disproving beyond a reasonable doubt. *Murphy*, 44 Wn. App. at 296 (citing *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654 (1954); *State v. Rose*, 43 Wn.2d 553, 557, 262 P.2d 194 (1953)). However, this presumption is not conclusive and may be overcome if the trial court determines that such misconduct was harmless to the defendant. *Murphy*, 44 Wn. App. at 296.

Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . It is virtually impossible to shield jurors from

every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

United States v. Olano, 507 U.S. 725, 738, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (quoting *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)).

In this case, the trial court questioned the juror about the incident and satisfied itself that nothing had happened that would affect the juror's ability to be fair and impartial. Hicks and Babbs do not claim that the juror voluntarily engaged in improper communication. The juror said that he was not intimidated and that the incident would not affect his ability to be fair and impartial. We hold that the trial court did not abuse its discretion in allowing the juror to continue to serve.

VII. PRIOR RECORDED TESTIMONY OF UNAVAILABLE WITNESS

Hicks and Babbs claim that the trial court erred in allowing the transcript of Wayne Washington's testimony from the first trial to be read into the record at the second trial when Washington was not available. On cross examination, Washington had described the pacing of the gunshots as "pow, pow, pow" and then "a bunch of pop, pop, pop, pop.." RP (04/23/03) at 103. Hicks and Babbs claim that the former testimony is misleading because the words cannot convey the original testimony's meaning. Hicks also objected at trial because he had different counsel at his second trial who wanted to be free to cross examine the witness in a different manner.

The admission and exclusion of relevant evidence is within the trial court's sound discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). We will not reverse the trial court's decision absent a manifest abuse of discretion. *Swan*, 114 Wn.2d at 658. Furthermore, an unavailable witness's former testimony is admissible under ER 804(b)(1).

We hold that the trial court did not abuse its discretion in allowing Washington's entire testimony to be read at the second trial. Granted, whenever transcripts of prior testimony are read, the inflection will differ from the original. That the original speaker's inflections could not be reproduced affects the weight the jury will give the testimony but does not affect its admissibility.

VIII. PROSECUTORIAL MISCONDUCT

Hicks and Babbs claim that the prosecutor committed misconduct at the second trial by telling jurors during closing arguments that Willie Watkins's statements established that Babbs was with Hicks prior to the shootings. They claim this was inappropriate because the prosecutor was using impeachment evidence for its substantive value. They claim that the court's prior limiting instruction for the impeachment evidence was inadequate.

To establish prosecutorial misconduct, the defendant has the burden of establishing the conduct's impropriety as well as its prejudicial effect. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). We review allegedly improper comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *Bryant*, 89 Wn. App. at 873. Reversal is required only if "there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." *Bryant*, 89 Wn. App. at 874 (quoting *Luvene*, 127 Wn.2d at 701).

In this case, Hicks and Babbs have not met their burden of showing misconduct. Brenda testified that she saw Hicks and Babbs together that evening before the shooting. She testified that Willie was there and that Willie spoke with Hicks and Babbs as well. Even though Willie did not corroborate Brenda's testimony, the jury was free to discard Willie's testimony based on the impeachment evidence and believe all of Brenda's testimony. Credibility determinations are for the trier of fact. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In light of Brenda's testimony at trial, the prosecutor's argument was not improper.

IX. JURY INSTRUCTIONS

A. Instruction 23- Definition of attempted robbery

1. The jury instruction

Instruction 23 stated:

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 (07/01/04) at 106¹³ (emphasis added). Hicks and Babbs claim that, instead of referring to "that crime," the instruction should have referred to the specific crime of robbery. They argue that the phrase "that crime" can refer only to *attempted robbery*, rather than robbery. They argue that the instruction is erroneous because it required the jury to find that Hicks and Babbs attempted to commit only *attempted robbery*, not robbery itself. They also claim error because

¹³ This instruction is taken from WPIC 100.01.

no “to convict” instruction gave the elements of attempted first or second degree robbery.¹⁴ The jury had only instruction 23 as a definitional instruction.¹⁵

Hicks and Babbs cite *State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997). In that case, Smith was charged with conspiracy to commit murder. *Smith*, 131 Wn.2d at 260. The “to convict” instruction told the jury that it had to find Smith “agreed [with her co-conspirators] to engage in . . . the performance of conduct constituting the crime of conspiracy to commit murder.” *Smith*, 131 Wn.2d at 260-61. The court found this instruction was constitutionally defective because it stated the wrong crime as the underlying crime which the conspirators agreed to carry out. *Smith*, 131 Wn.2d at 263. The jury found only that Smith and others “agreed to conspire to commit murder” and not that they “agreed to commit murder.” *Smith*, 131 Wn.2d at 263. Hicks and Babbs ask us to adopt a similar rationale to hold that the instruction here was also defective. They raise this issue for the first time on appeal and claim that their attorneys’ failure to object or propose a correct instruction at trial was ineffective assistance of counsel.

The State argues that Hicks and Babbs requested the same language in the jury instructions, and so the doctrine of invited error bars them from raising the issue on appeal. The State also claims that Hicks and Babbs did not object to these instructions on the same basis they now assert,¹⁶ and so they failed to preserve the issue for review.

¹⁴ Other jury instructions defined first and second degree robbery, and “substantial step.”

¹⁵ Neither Babbs nor Hicks was charged with robbery or attempted robbery. The court gave the definitions because robbery was the predicate felony to the felony murder charge.

¹⁶ At trial, Hicks and Babbs took exception to the “accomplice” language in the instructions but have not pursued this on appeal.

2. Analysis

a. Invited error

The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally. *State v. Recuenco*, 154 Wn.2d 156, 163, 110 P.3d 188 (2005), *rev'd on other grounds*, *Washington v. Recuenco*, 2006 U.S. LEXIS 5164 (U.S. June 26, 2006). The doctrine has been applied to errors of constitutional magnitude, including where an offense element was omitted from the “to convict instruction.” *Recuenco*, 154 Wn.2d at 163. However, review is not precluded where invited error results from counsel’s ineffectiveness. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The standard of review for ineffective assistance is set out above in part III, B.

b. Raised for the first time on appeal

An objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude. *State v. Dent*, 123 Wn.2d 467, 478, 869 P.2d 392 (1994). Failure to properly instruct the jury on an element of a charged crime is an error of constitutional magnitude which may be raised for the first time on appeal. *See State v. Roggenkamp*, 153 Wn.2d 614, 620-21, 106 P.3d 196 (2005). This rule applies to errors in defining the terms in the “to convict” instruction as well as to the “to convict” instruction itself.¹⁷ *Roggenkamp*, 153 Wn.2d at 620. Because Hicks and Babbs claim that the jury instructions

¹⁷ The State cites to *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992) for the proposition that once the instructions inform the jury of the elements of the charged crime, “any error in further defining terms used in the elements is not of constitutional magnitude.” However, the cases *Stearns* cites deal with terms that are not defined at all in the jury instructions. In our view, *Roggenkamp* states the current rule for wrongly defined terms in jury instructions because it is a more recent supreme court case.

wrongly defined “attempted robbery,” we will consider the question for the first time on appeal. *See Roggenkamp*, 153 Wn.2d at 620.

We review the jury instructions given at trial de novo. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). An instruction that erroneously states the applicable law requires reversal when it prejudices a party. *Cox*, 141 Wn.2d at 442. An error is not prejudicial unless it presumptively affects the trial’s outcome. *Caldwell v. Washington Dep’t of Transp.*, 123 Wn. App. 693, 696-97, 96 P.3d 407 (2004). Even if misleading, an instruction is not grounds for reversal unless prejudice is shown. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). We presume, however, that a clear misstatement of the law is prejudicial. *Keller*, 146 Wn.2d at 249-50.

c. Prejudicial error

We hold that instruction 23 does not misstate the law. Concededly though, the definitions in instruction 23 are imprecise. In reading instruction 23, the phrases “Robbery in the First Degree” and “Robbery in the Second Degree” are capitalized. The word “attempted” is not. CP (07/01/04) at 106; Instr. 23. Other instructions define “Robbery in the First Degree” and “Robbery in the Second Degree” specifically. CP (07/01/04) at 103, 105; Instr. 20, 22. Because we do not presume that jurors leave their common sense at the door when they enter the jury room, a reasonable juror would only infer “that crime” to be robbery and not attempted robbery. The imprecise language did not prejudice Hicks and Babbs.

Because a more clearly worded instruction would not have changed the trial’s outcome, counsel’s failure to object or propose an alternate instruction was not prejudicial. Therefore, the ineffective assistance claim fails.

B. Instruction 25- Elements of felony murder

Instruction 25, the “to convict” instruction on the felony murder charge, told the jury it must find beyond a reasonable doubt:

(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;

CP (07/01/04) at 108; Instr. 25. Hicks and Babbs claim error because the jury was told to find that Chica Webber was killed while Babbs or an accomplice “was committing” a first or second degree robbery. They claim that felony murder must be predicated on either a completed or an attempted robbery. They argue that “was committing” is more inchoate than “attempting” and “jurors could have interpreted ‘was committing’ to require almost nothing.”

We hold that instruction 25 contains no error. It correctly states the law because it properly lists all the statutory elements of first degree felony murder. RCW 9A.32.030(1)(c); *State v. Meas*, 118 Wn. App. 297, 303 n.4, 75 P.3d 998 (2003). Furthermore, a juror using his or her common understanding would interpret “was committing. . . robbery” as meaning “in the process of robbing,” requiring something more than preparation or attempt. It does not matter whether Hicks and Babbs were in the beginning or ending stages in their efforts to commit a robbery when they killed Chica Webber.

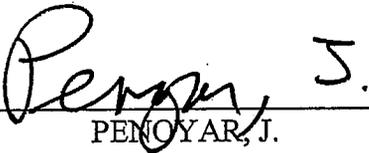
X. CUMULATIVE ERROR

Hicks and Babbs claim that cumulative errors denied them fair trials. The defendants bear the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re the Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964 (1994).

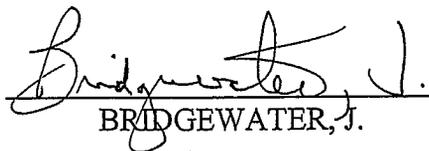
The only error that Hicks and Babbs were able to show was that their counsel allowed the court to inform the entire venire that the case was not a death penalty case. Because they were not able to show other errors, we hold that cumulative error has not denied Hicks and Babbs a fair trial.

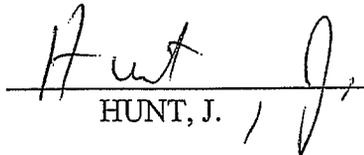
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


PENOYAR, J.

We concur:


BRIDGEWATER, J.


HUNT, J.