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DIVISION II

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STATE OF WASHINGTON

NO. 31645-5-II

BY

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

STATE OF WASHINGTON,

Respondent,

v.

RASHAD BABBS,

Appellant.

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

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

REPLY 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. *Rashad Babbs*
Pierce County Prosecutor / Rita Griffith
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

P. Mazovsky
Name

11-10-2005
Done in Seattle, WA Date

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A. ARGUMENT IN REPLY

1. BABBS'S ATTORNEY WAS INEFFECTIVE FOR PERMITTING JURORS TO LEARN THAT THIS WAS NOT A DEATH PENALTY CASE.

The Washington Supreme Court's decision in State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), is unequivocal: in a first-degree murder case, it is error to tell jurors the death penalty is not involved. This is a "strict prohibition" that ensures jurors' attention during trial, ensures their careful deliberation, and optimizes the chance one or more jurors will "hold out" rather than simply succumb to the majority's will. Townsend, 142 Wn.2d at 846-847.

The State asks this Court to carve out an exception to Townsend's "strict prohibition." Specifically, the State asks this Court to find that in a first-degree murder case, it is proper to tell jurors the death penalty is not involved whenever a prospective juror asks about the penalty. See Brief of Respondent, at 28. As its sole authority for this proposition, the State cites to an *unpublished* discussion found in State v. Mason, 127 Wn. App. 554, 110 P.2d 245 (2005).

The State should not be citing unpublished discussions. See RAP 10.4(h) ("A party may not cite as an authority an unpublished opinion of the Court of Appeals."). This was undoubtedly an honest mistake on

counsel's part -- a failure to discern that only a portion of the opinion had been published. But Babbs asks this Court to give the Mason decision no weight whatsoever.

Of course, by citing Mason, the State has now released the proverbial "elephant in the living room." Therefore, Babbs feels compelled to discuss the decision. Mason plainly conflicts with Townsend. The Mason court held that it is proper to tell the venire the death penalty is not at issue when a juror raises the subject. Mason, 127 Wn. App. at 572. But whether a juror, an attorney, or the court raises the subject, the problem is the same -- telling jurors the death penalty is not an option increases the likelihood of conviction. Townsend, 142 Wn.2d at 847.

The Mason Court appears to have adopted the view of the trial judge in that case that "people who would opt off a jury panel because they oppose the death penalty would be naturally pro-defense." Therefore, reasoned the court, failing to inform jurors about the death penalty might prejudice the defendant. Mason, 127 Wn. App. at 573. This reasoning, based purely on a stereotype, is wholly inconsistent with Townsend, where the Court found "no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty." Townsend, 142 Wn.2d at 847.

Townsend's message is that the death penalty is to play no role whatsoever in voir dire:

Rather than giving jurors information about the penalty in a noncapital case, we believe that voir dire should be used to screen out jurors who would allow punishment to influence their determination of guilt of innocence and then, through instructions, jurors should be advised that they are to disregard punishment. This should satisfy the concerns raised by the State [that jurors will acquit if they fear the penalty may be imposed]. We see no reason to create an exception for noncapital murder cases.

Townsend, 142 Wn.2d at 847.

Taking its lead from the unpublished discussion in Mason, the State argues in Babbs's case that there may have been a strategic advantage to informing jurors that the death penalty was not an option. The State speculates that the defense may have perceived juror 9 favorably and felt the need to tell her the death penalty was not at issue to ensure she remained a prospective juror. Brief of Respondent, at 30.

This makes no sense. Juror 9 indicated she could convict Babbs of murder so long as this was not a death penalty case. See 3RP 154-55. Once she was informed this was not a death penalty case, she became a very attractive juror for the *prosecution* because the only clear impediment to conviction had now been removed. As the Townsend Court recognized,

there is no legitimate reason to tell jurors the case does not involve the death penalty.

Moreover, even assuming there were a legitimate reason, if the defense wanted juror 9 to hear that the death penalty was not involved, it could have asked that the panel be given the general instruction that punishment is irrelevant and then instructed juror 9 privately about the death penalty. Competent counsel would not have permitted the entire venire to repeatedly hear that the case did not involve the death penalty, thereby tainting all potential jurors.¹ See 3RP 74-75, 154-55; 4RP 43, 63-64; 11RP 31 (jurors repeatedly reminded this was not a death penalty case).

As a fallback argument, the State argues that even if Babbs's constitutional rights were violated under Townsend, the violation was harmless. As proof, it cites to the fact that jurors could not agree on premeditated murder or the attempted murder charge. According to the State, this shows jurors were careful despite their awareness that Babbs's would not be executed. Brief of Respondent, at 30-31.

This shows no such thing. As discussed in the opening brief, jurors would have struggled mightily with the sufficiency of the evidence against

¹ This is another distinction between Babbs's case and Mason, where the "discussion of the death penalty was short and succinct." Mason, 127 Wn. App. at 573.

Babbs because, among other reasons, (1) *no one* saw him at the scene; (2) 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) Willie Watkins, 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 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 -- this case should be remanded for a new trial on the murder charge.

2. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT.

Babbs's argument is simple. A person commits first-degree felony murder if he commits or attempts to commit robbery and, while doing so, he causes the death of another. RCW 9A.32.030(1)(c)(1); CP 138-141.

In the information charging Babbs with first-degree felony murder, the State intended to charge him under both of these theories -- that Chica died during a completed or attempted robbery.

The information used the correct language when it alleged that Babbs "while . . . attempting to commit the crime of robbery" caused Chica's death. CP 139. The error pertains to the language intended to charge a completed robbery. Instead of alleging that Babbs "committed" robbery and caused Chica's death, the information alleges that "while committing . . . the crime of robbery" Babbs caused Chica's death. CP 139 (emphasis added).

As discussed in the opening brief, this affirmatively misstated the elements of first-degree felony murder. The term "was committing" falls short of a completed robbery. And a defendant would also reasonably conclude that it falls short of "attempted robbery." A reasonable defendant would interpret the employed language to require proof of some diminished standard -- that perhaps presence or perhaps mere knowledge would satisfy the erroneous "was committing" element.

Because a defendant would reasonably read the information to mean that first-degree felony murder requires something far less than even an

attempted robbery, the information was deficient under State v. Kjorsvik, 117 Wn.2d 93, 104, 812 P.2d 86 (1991).

3. BY ADOPTING THE STATE'S FAULTY INSTRUCTIONS, DEFENSE COUNSEL VIOLATED BABBS'S RIGHT TO EFFECTIVE REPRESENTATION.²

The State correctly points out that Babbs's own attorney adopted the prosecution's instructions as his own. Brief of Respondent, at 37. The trial deputy and trial court believed that defense counsel could be compelled to make such an adoption or, alternatively, forced to submit his own instructions. RP (5/9/03) 21-22. And apparently Babbs's attorney, Mr. Hershman, agreed.³ RP (5/9/03) 8.

To the extent this Court concludes that such an adoption constitutes invited error, it should find that defense counsel was ineffective for agreeing to the constitutionally defective instructions. Ineffective assistance of counsel defeats a claim of invited error. See 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).

² This is a new issue based on the discovery of an additional transcript not originally provided to our office. Contemporaneous with the filing of this reply brief, our office is filing a motion to allow this new issue as part of the appeal.

³ It appears this is the State's manner of ensuring that even if the jury instructions denied the defendants a fair trial, the convictions would be insulated (via invited error) from any constitutional challenges.

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.

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978); Strickland, 466 U.S. at 690-91. Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel. See Aho, 137 Wn.2d at 745-46 (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct).

There is simply no excuse for counsel's failure to object to jury instructions 23 and 25. For the reasons discussed in Babbs's opening brief, these instructions misstated the law on first-degree felony murder. See Brief of Appellant, at 26-35. Counsel's failure to object was deficient.

As a result, Babbs was prejudiced because there is a reasonable probability that but for counsel's errors, the result of the trial would have been different. "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).

Similar to the error discussed in State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997), instruction 23 required proof of a far more inchoate crime than the crime charged, thereby easing significantly the State's burden. See Brief of Appellant, at 27-33. And, similar to the language in the information, instruction 25 used "was committing" in place of "committed" in the "to convict" instruction for felony murder. This, too, significantly eased the State's burden. See Brief of Appellant, at 33-35. In a case where Babbs's level of participation was far from clear, these instructions contained significant mistakes.

In its brief, the State fails to address, much less refute, the prejudicial effect of instruction 23 and its misstatement of the elements for attempted and completed robbery. See Brief of Respondent, at 35-40. As to instruction 25, however, the State argues that jurors would have necessarily interpreted the phrase "was committing" as something more than an attempt. Brief of Respondent, at 44-45. But this is just conjecture.

As the Supreme Court has recognized, without benefit of the proper legal standard, jurors "hammer out a definition" and it simply cannot be assumed that their chosen definition is the correct one. State v. Allen, 101 Wn.2d 355, 362, 678 P.2d 799 (1984).

Counsel's failure to object to the faulty instructions denied Babbs his right to effective representation.

4. THE STATE'S EXCLUSION OF THE LONE REMAINING AFRICAN-AMERICAN JUROR VIOLATED BABBS'S RIGHT TO EQUAL PROTECTION AT THE SECOND TRIAL.

Under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), a three-part test determines whether the State's use of peremptory challenges violates equal protection. First, the defendant must make a prima facie case of purposeful discrimination. Second, the State must articulate a neutral explanation for the challenge. Third, the trial court must look behind the stated reasons to determine if they should be believed. See Brief of Appellant, at 39-40 (citing cases).

For the reasons stated in Babbs's opening brief, steps one and two are not at issue. But step three most certainly is. And as Babbs's brief pointed out, steps two and three cannot be collapsed into a single step by simply accepting the prosecution's stated reasons at face value. Brief of Appellant, at 40 (citing State v. Rhodes, 82 Wn. App. 192, 196-97, 917

P.2d 149 (1996), and McClain v. Prunty, 217 F.3d 1209, 1220 (9th Cir. 2000)). Yet, that is precisely what the State is asking this Court to do.

In his opening brief, Babbs thoroughly scoured the record for any evidence to support the trial deputy's stated reasons for removing juror 9 from the venire. There is none. See Brief of Appellant, at 41-43. In its brief, the State does not even acknowledge the record on these points, much less argue that the record offers factual support for its position. See Brief of Respondent, at 49-50. This is because it cannot. The record does not support and/or directly contradicts the prosecutor's three race-neutral reasons. These reasons were pretextual and require that Babbs's attempted murder conviction be reversed.

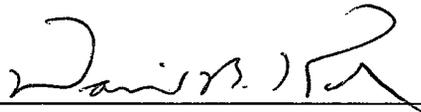
B. CONCLUSION

For the foregoing reasons, and those contained in Babbs's opening brief, his convictions should be vacated and his case remanded for a new and fair trial.

DATED this 10th day of November, 2005.

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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