

86043-2

NO. 60015-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

TINH TRINH LAM,

Appellant.

REC'D

APR 30 2008

King County Prosecutor  
Appellate Unit

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COURT OF APPEALS  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jeffrey Ramsdell, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

JORDAN B. McCABE  
CHRISTOPHER H. GIBSON  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court violated Appellant's constitutional right to a fair trial when it informed his jury it was not a death penalty case.

2. Defense counsel violated Appellant's constitutional right to effective assistance of counsel by failing to request a mistrial when the court informed the jury this was not a capital case.

Issues Pertaining to Supplemental Assignments of Error.

1. Did informing the jury this aggravated murder case did not involve the death penalty constitute reversible error?

2. Did defense counsel's failure to request a mistrial constitute prejudicially deficient performance?

B. SUPPLEMENTAL FACTS

During jury voir dire a juror asked whether this was a death penalty case. 3RP 48. The court replied:

You should not concern yourselves with what penalty may be administered in the event the jury reaches a finding of guilty except the fact that a penalty may follow conviction should make you careful obviously. This is not a capital case, and, therefore, the jury will not be involved in any way in determining any sentence which may be imposed in the event of a conviction.

3RP 48-49. Defense counsel did not request a mistrial.

C. SUPPLEMENTAL ARGUMENT

1. THE COURT MAY NOT INFORM THE JURY A MURDER CASE DOES NOT INVOLVE THE DEATH PENALTY.

It is reversible error to inform the jury the death penalty is not involved in a noncapital murder case. State v. Hicks, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2008 WL 1821869 (Slip Op. filed April 24, 2008 No. 79143-1) Slip Op. at 4 (attached as appendix); State v. Townsend, 142 Wn.2d 838, 840, 15 P.3d 145 (2001). This is a strict prohibition. Townsend, 142 Wn.2d at 846; Hicks, Slip Op. at 4. This Court has observed that, when a jury is told a case is noncapital, it is likely to take this into account. State v. Murphy, 86 Wn. App. 667, 670, 937 P.2d 1173 (1997). A ‘no-death’ instruction casts doubt on the jury’s impartiality and unfairly influences its deliberations, because the jurors “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 at 840; Hicks Slip Op. at 4.

Reversal is automatic unless it is beyond reasonable probability that the error could have affected the verdict. Townsend, 142 Wn.2d at 848. Reversible prejudice arises when the record suggests a reasonable probability the outcome would otherwise have been different. Townsend, 142 Wn.2d at 844; State v. Hendrickson, 138 Wn. App. 827, 833, 158

P.3d 1257 (2007). Erroneously instructing the jury about sentencing considerations creates reversible prejudice if the record suggests the jurors were inattentive or if the evidence of guilt is overwhelming. Hicks, Slip Op. at 5.

In Townsend and Hicks, the reviewing court was satisfied the error could not have affected the jurors' attentiveness or the quality of their deliberations. Townsend was charged in the alternative with first and second degree murder for the same homicide, and the Court found ample evidence of premeditation. Townsend, 142 Wn.2d at 841, 842, 848. Hicks was not convicted of the more serious crime, negating concern the jury was influenced by sentencing considerations. Hicks, Slip Op. at 5.

Here, by contrast, the record does establish prejudice. The jury did convict Lam of aggravated murder. But the jurors could have been overwhelmed by the evidence of guilt only if they were inattentive. As discussed in Appellant's opening brief, the most strikingly overwhelming feature of the State's evidence is the sheer weight of inconsistencies and contradictions.

But for the instructional error, there is at least a reasonable probability the jury would have been less likely to convict. Reversal is required.

2. LAM RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Defense counsel should have moved for a mistrial. Failure to do so constituted ineffective assistance of counsel requiring reversal.

The Sixth Amendment to the United States Constitution and art I, § 22 of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. In re Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004).

To establish ineffective assistance of counsel Appellant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice simply means a reasonable probability the outcome would otherwise have been different. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

There is no question of trial strategy in not objecting when the court informs the jury a murder trial is a noncapital case, because there is no possible advantage to the defense from comments regarding the death penalty. Hicks, Slip Op. at 4.

A mistrial is the only appropriate remedy when a trial irregularity causes reasonable doubt the plaintiff received a fair trial. Spratt v. Davidson, 1 Wn. App. 523, 526, 463 P.2d 179 (1969). Specifically, when

a trial error may have unduly influenced the jury, the only appropriate response is to request a mistrial. State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976).

Once the court told Lam's jury he was not facing the death penalty, the bell could not be unrung and the only effective defense response was to request a mistrial. Counsel's failure to do this constituted prejudicially deficient performance.

D. CONCLUSION

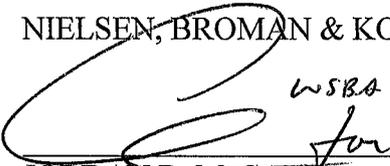
Lam asks the Court to reverse his conviction on the grounds set forth herein.

DATED this 30th day of April, 2008.

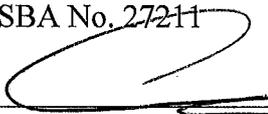
Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

*WSBA 25097*

  
\_\_\_\_\_  
JORDAN B. McCABE

WSBA No. 27211

  
\_\_\_\_\_  
CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant



IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
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 Respondent, )  
 )  
 v. )  
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 PHILLIP VICTOR HICKS, )  
 )  
 Petitioner. )  
 \_\_\_\_\_ )  
 STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 RASHAD DEMETRIUS BABBS, )  
 )  
 Petitioner. )  
 \_\_\_\_\_ )

No. 79143-1

En Banc

Filed April 24, 2008

J.M. JOHNSON, J.—Phillip Hicks and Rashad Babbs were convicted at two separate trials for the murder of Chica Webber (first trial) and the attempted murder of Jonathan Webber (second trial). We must determine whether their defense counsel was ineffective in informing potential jurors

that the case was noncapital and in not objecting to the trial court and prosecution doing the same. We must also decide whether the trial court erred in denying the defendants' *Batson*<sup>1</sup> challenge to the exclusion of the only remaining African-American juror on the venire.

We hold that under our current precedent, informing the jury that the case is noncapital and failing to object to the trial court and prosecution doing the same, is deficient performance of counsel. In this case, the error was nonprejudicial. We additionally hold that the trial court's denial of the *Batson* challenge was not clearly erroneous. For reasons stated, we affirm the convictions.

#### Facts and Procedural History

On the night of March 21, 2001, two men approached Jonathan Webber and his wife Chica as they were walking from a friend's house and asked the couple if they had drugs. The Webbers told the men that they did not and kept walking. The two men followed the Webbers, demanding several times that they empty their pockets. The Webbers continued walking, and the two men started shooting at them. Jonathan<sup>2</sup> sustained wounds to his

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

<sup>2</sup> First names of the victims are used for the sake of clarity.

leg, wrist, and the left side of his back, but survived. Chica died. The autopsy of Chica's body revealed that she had been shot three times in the head—twice by a .22 revolver and once by a 9 mm handgun. Jonathan and another witness, Wayne Washington, also testified that the shots came from two firearms. Jonathan identified Hicks in a photomontage as one of his assailants but was unable to identify Babbs as the second assailant.

After the attack, the shooters ran off through an alley. A search of the area recovered a .22 revolver, a brown glove, a black leather jacket, a knit stocking cap, and a sweatshirt. The sweatshirt had DNA (deoxyribonucleic acid) that later testing found to be consistent with Babbs's DNA. The jacket also contained items linked to Babbs's sister and cousin.

On the night of the shooting, a man not wearing a jacket pounded on the window of Dana Duncan. Duncan did not know the man, but he convinced her he knew her brother. She gave the man a ride to another part of town. Shortly after Duncan arrived home, she received a thank you call from a cell phone linked to Babbs. Duncan first had difficulty identifying Babbs but eventually testified that Babbs was the man who had come to her window.

On April 24, 2001, the police arrested Hicks for unrelated drug dealing charges. Hicks made statements implicating himself in the Webber shootings both before and after he was read his *Miranda*<sup>3</sup> warnings.

For Chica's death, the State charged Hicks and Babbs with aggravated first degree murder and in the alternative, first degree intentional murder and first degree felony murder, with first or second degree robbery as the underlying felony. The State also charged Hicks and Babbs with attempted murder of Jonathan and unlawful firearm possession. Babbs pleaded guilty to the firearm charge before trial.

At the first trial during voir dire, juror nine expressed concern that her religious beliefs might interfere with her ability to decide the case. When the trial judge asked her to think of an area where her church's teachings might conflict with her jury service, she mentioned capital punishment. After a sidebar with the attorneys, the trial court informed the jury that "[t]his 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." Verbatim Report of Proceedings

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

(VRP) (Apr. 22, 2003) at 74-75. There was no objection on the record from counsel. Juror nine then stated she could follow the law as given to her.

Later during voir dire, the prosecutor asked juror 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.” *Id.* at 155. The prosecutor then confirmed that because capital punishment was not an issue, juror nine was eligible to serve.

Both the defense and the prosecution referenced the nonapplicability of the death penalty on a few more occasions during voir dire. When counsel for Hicks reminded jurors that the case did not involve the death penalty, the prosecutor objected, and the trial court instructed the venire members that they should not consider punishment except to make them careful. Later, 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.’” VRP (Apr. 23, 2003) at 63-64. Counsel for Babbs responded, “Okay. All right. Again, we are not heading

toward the death penalty in this case, but I understand.” *Id.* The juror responded, “Right. Of course.” *Id.* The State dismissed juror 33, but the remaining jurors had all been present for this exchange on the death penalty. Additionally, during closing argument, the trial deputy also alluded to the case being noncapital. Contrasting Hicks’s situation with decedent Chica’s, 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.” VRP (May 12, 2003) at 31.

The jury convicted Hicks and Babbs of first degree felony murder of Chica. The jury also convicted Hicks of the firearm charge. The jury could not reach a verdict on the attempted murder charges. Consequently, after a two day impasse, the trial court declared a mistrial on those charges.

A second trial was held on the attempted murder charges. During the jury voir dire, counsel for Hicks and Babbs both objected when the State used a peremptory challenge to remove juror nine, the only remaining African-American juror from the venire. (Juror 17, another African-American juror was challenged for cause because he knew many of the witnesses and thought this knowledge would impact his assessment of their credibility, and juror 54,

also African-American, fell ill and did not return.) Defense counsel argued that, because the prosecutor had not asked this juror any questions,<sup>4</sup> race must have been the reason for removing her. After a discussion with counsel regarding the *Batson* three-part test, the trial court determined, “[O]ut of an abundance of caution, I find a prima facie case [of discrimination].” 5 VRP (Jan. 30, 2004) at 496. The prosecutor then offered 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.

....

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

*Id.* at 496-97.

In response, the trial court remarked, “[h]e must have read the same version of the jury selection book that’s been on my shelf for years.” *Id.* at 497. The defense counsel reminded the court that the final step of *Batson*

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<sup>4</sup> The prosecution and defense actually did ask juror nine some questions, although the questioning was not extensive.

required the trial court's determination. After the prosecution's reiteration of his reasons for the strike, the court said "Okay. The *Batson* challenge is denied." *Id.* at 497-98. The jury at the second trial convicted Hicks and Babbs of attempted murder of Jonathan.

Hicks and Babbs appealed their convictions for first degree felony murder, attempted murder, and unlawful possession of a firearm. They contended that they received ineffective assistance of counsel in their first trial because their attorneys informed the jury that the case was noncapital and failed to object to the trial court and prosecution doing the same, and that this information was prejudicial.

Additionally, Hicks and Babbs claimed that the trial judge in their second trial erred in denying their *Batson* challenge. They contended that the judge failed to perform the third step of *Batson*'s three-part analysis. They argued that even though the prosecutor's reasons for excusing the only remaining African-American juror were race-neutral, they were clearly pretextual.

On appeal, the Court of Appeals affirmed all convictions. Although the court found that the defense counsel's performance was deficient insofar as

they did not object to the trial court informing the jury that the case was noncapital, the court held that the error was nonprejudicial because Hicks and Babbs failed to show that the trial outcome would likely have differed.

The Court of Appeals also upheld the trial court's denial of the *Batson* challenge. The court did not address whether the trial court properly performed *Batson*'s third step or whether the prosecutor's offered reasons were pretextual. Instead, the court addressed the trial court's finding of a prima facie case. The Court of Appeals held that because defense counsel never established a prima facie case, the trial court did not err in denying the *Batson* challenge.

#### Standard of Review

The appellate test for ineffective assistance of counsel is “whether, after examining the whole record, the court can conclude that appellant received effective representation and a fair trial.” *State v. Ciskie*, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988).

In reviewing a trial court's ruling on a *Batson* challenge, “[t]he determination of the trial judge is ‘accorded great deference on appeal,’ and will be upheld unless clearly erroneous.” *State v. Luvane*, 127 Wn.2d 690,

699, 903 P.2d 960 (1995) (quoting *Hernandez v. New York*, 500 U.S. 352, 364, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

### Analysis

#### A. Defendants Received Effective Assistance of Counsel

We have adopted the two-part *Strickland*<sup>5</sup> 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.” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To establish deficient performance, a defendant must “demonstrate that the representation fell below an objective standard of reasonableness under professional norms . . . .” *State v. Townsend*, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001). Second, the “defendant must show that the deficient performance prejudiced the defense.” *Cienfuegos*, 144 Wn.2d at 227 (quoting *Strickland*, 466 U.S. at 687). This requires the defendant to prove that, but for counsel’s deficient performance, there is a “reasonable probability” that the outcome would have been different. *Id.*

#### 1. Precedent in this Court Supports Finding That Counsel’s

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<sup>5</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

### Performance Was Deficient

In *Townsend*, 142 Wn.2d at 840, this court held that it is error to inform the jury during the voir dire in a noncapital case that the death penalty is not involved. In *Townsend*, the trial court at the prosecutor's request, instructed the jury "[t]his is not a case in which the death penalty is involved and will not be a consideration for the jury." *Id.* at 842 (quoting Suppl. Partial Report of Proceedings at 2). We reasoned that where the jury has no sentencing function, it should not be informed on matters that relate only to sentencing. *Id.* at 846. We found "[t]his strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury's deliberations." *Id.*

In *Townsend*, we also rejected the argument that revealing this information was part of a legitimate tactic, reasoning that "[t]here was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner." *Id.* at 847. We further noted "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.” *Id.*

Recently, in *State v. Mason*, 160 Wn.2d 910, 929, 162 P.3d 396 (2007), we also declined to recognize a distinction between a court or counsel-initiated and a juror-initiated discussion of the inapplicability of the death penalty. Thus, under our precedent, in response to any mention of capital punishment, the trial judge should state generally that the jury is not to consider sentencing.<sup>6</sup>

Applying both *Townsend* and *Mason*, we hold that the defense counsel’s performance was deficient insofar as counsel informed the jury that the case was noncapital and failed to object when the trial court and prosecution made similar reference.

## 2. Counsel’s Deficient Performance Was Not Prejudicial

Proving that counsel’s deficient performance prejudiced the defense “requires showing that counsel’s errors were so serious as to deprive the

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<sup>6</sup> In *Mason*, we did note that “[i]f this court was incorrect in *Townsend* then, upon a proper record, our decision should be challenged in a truly adversarial proceeding. If our reasoning was flawed in *Townsend*, and there are legitimate strategic and tactical reasons why informing a jury about issues of punishment would advance the interest of justice and provide a more fair trial, then counsel should zealously advance the arguments.” *Mason*, 160 Wn.2d at 930.

defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687.

In the instant case, there is no showing that the defendants were deprived of a fair trial or that the trial outcome likely would have differed. There is no indication that the jurors failed to take their duty seriously. In declaring a mistrial on the attempted murder charges, the trial court particularly noted the active deliberation of the jury.<sup>7</sup> There is also abundant evidence in the record to support the conviction of both Hicks and Babbs. A guilty verdict was likely even if the jury had not been informed that the case was noncapital. Most notably, a different jury in the second trial on the attempted murder charge, with no mention of the death penalty, found the evidence convincing enough to identify and convict both Hicks and Babbs as the shooters.

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<sup>7</sup> 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 that they had sent out a question earlier that seemed to indicate that they were already at impasse, and they’ve had a good bit of time since then to try to break that impasse with no apparent movement whatsoever.

VRP (May 14, 2003) at 21.

Moreover, since Hicks and Babbs were not convicted by the first jury of the most serious charges (aggravated murder concerning Chica and attempted murder concerning Jonathan), the harm feared in *Townsend* that a jury might be more likely to convict was not manifest. We find defense counsel's deficient performance in this case nonprejudicial.

B. The Trial Court's Denial of the *Batson* Challenge Was Not Clearly Erroneous

1. Federal law governing *Batson*

In *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the United States Supreme Court declared that “[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race.” *Batson* outlines a three-part process to determine whether a prosecutor has excluded a juror based on race. First, the challenger must “make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” *Id.* at 93-94. Second, “the burden shifts to the State to come forward with a neutral explanation for challenging” the juror. *Id.* at 97. And third, “[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination.”

*Id.* at 98.

The *Batson* Court further outlined the requirements of a prima facie case. To establish a prima facie case, the challenger “first must show that he is a member of a cognizable racial group.” *Id.* at 96. Second, the defendant “must show that these facts and any other relevant circumstances raise an inference” that the prosecutor used a peremptory challenge to exclude a potential juror from the jury on account of the juror’s race. *Id.*

Although the Supreme Court has provided some elucidation on this three-part process since *Batson*, the Court has also recognized that the states have flexibility in the procedure for applying the *Batson* test. *Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005); *Batson*, 476 U.S. at 99 (“We decline . . . to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.”). Lower courts have been entrusted with the task of determining the type and amount of proof necessary for a defendant to establish a prima facie case of discrimination.

2. Washington’s Application of *Batson*

- a. A Trial Court May in its Discretion Find a Prima Facie Case Based on Removal of the Sole Remaining Venire Person from a Constitutionally Cognizable Group

The parties and the Court of Appeals focus on three cases that have addressed whether excusing the only remaining African-American in the jury venire is sufficient to make out a prima facie case of discrimination.

Although the Court of Appeals relied on *State v. Evans*, 100 Wn. App. 757, 998 P.2d 373 (2000),<sup>8</sup> and *State v. Wright*, 78 Wn. App. 93, 896 P.2d 713 (1995) in its ruling, and specifically rejected *State v. Rhodes*, 82 Wn. App. 192, 917 P.2d 149 (1996),<sup>9</sup> a closer look at these three cases shows that they actually articulate the same standard: trial courts are not *required* to find a prima facie case based on the dismissal of the only venire person from a constitutionally cognizable group, but they *may*, in their discretion, recognize a prima facie case in such instances.

Hicks and Babbs cite decisions from other jurisdictions that have similarly found that striking the sole remaining African-American, Hispanic, or Native American juror may be sufficient for a prima facie case under *Batson*.<sup>10</sup> This seems consistent with the Supreme Court's concern in *Batson*.

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<sup>8</sup> *Evans* did not involve the sole member of the minority class on the venire. *Evans*, 100 Wash. App. at 761 (the venire included five persons of color).

<sup>9</sup> Both *Rhodes* and *Wright*, however, involved the sole remaining African-American on the venire. *Rhodes*, 82 Wash. App. at 201; *Wright*, 78 Wash. App. at 97.

<sup>10</sup> See, e.g., *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (finding that "the additional fact that the Government used its peremptory challenges to strike the last remaining juror of defendant's race is sufficient to 'raise an inference' that the juror was

The *Batson* Court noted that “‘a consistent pattern of official racial discrimination’ is not ‘a necessary predicate to a violation of the Equal Protection Clause’” and that “[a] single invidiously discriminatory governmental act’ is not ‘immunized by the absence of such discrimination in the making of other comparable decisions.’” 476 U.S. at 95 (quoting *Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266 n.14, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)). The Court further declared that “[f]or evidentiary requirements to dictate that ‘several must suffer discrimination’ before one could object would be inconsistent with the promise of equal protection to all.” *Id.* at 95-96 (citation omitted).

The *Batson* Court also declared that “[w]e have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.” *Id.* at 97.

Here, the trial judge was well within his discretion when he determined, “[O]ut of an abundance of caution, I find a prima facie case [of discrimination].” 5 VRP (Jan. 30, 2004) at 496. Not only was juror nine the

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excluded ‘on account of [his] race.’” (alteration in original) (quoting *Batson*, 476 U.S. at 96)).

only remaining African-American venire member, but both Hicks and Babbs are African-American, and the prosecution failed to orally question juror nine about all reasons for which he dismissed her. Lack of questioning prior to dismissing a juror can be evidence that the removal is race-based. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 246, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (“[T]he State’s failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.” (*Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000))). The facts were sufficient for the trial court to find an inference of discrimination.

In a brief in support of the defendants, amicus American Civil Liberties Union emphasizes that this court has found that the Washington Constitution provides greater protection for jury trials than is provided in the federal constitution. *See, e.g., City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982). Article I, section 21 states, “The right of trial by jury shall remain inviolate . . . .” In interpreting “inviolable,” this court has relied on *Webster’s* definition: “free from change or blemish : PURE, UNBROKEN . . . free from assault or trespass : UNTOUCHED, INTACT.” *State v. Smith*,

150 Wn.2d 135, 150, 75 P.3d 934 (2003) (quoting Webster's Third New International Dictionary 1190 (1993)).

The increased protection of jury trials under the Washington Constitution further supports allowing the trial judge, in his discretion, to find a prima facie case of discrimination when the State removes the sole remaining venire person from a constitutionally cognizable group.

b. Whether Defendants Established a Prima Facie Case Is Not Necessary To Decide on Review

In *Hernandez*, the Court declared that “[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.” 500 U.S. at 359. We have similarly held that “if . . . the prosecutor has offered a race-neutral explanation and the trial court has ruled on the question of racial motivation, the preliminary prima facie case is unnecessary.” *Luvone*, 127 Wn.2d at 699 (citing *Hernandez*, 500 U.S. at 359).

In the instant case, where the trial court found a prima facie case “out of an abundance of caution,” the prosecutor offered a race-neutral

explanation, and the trial court properly ruled, whether a prima facie case was established does not need to be determined. 5 VRP (Jan. 30, 2004) at 496. A reviewing court should focus its deferential review on the trial court's ultimate ruling on the *Batson* challenge. The discussion of a prima facie case, *supra*, is included only to clear up confusion among the lower courts.

c. The Trial Court's Denial of the *Batson* Challenge Was Not Clearly Erroneous

Courts afford a high level of deference to the trial court's determination of discrimination. In *Hernandez*, the Supreme Court noted that “[d]eference to trial court findings on the issue of discriminatory intent makes particular sense in this context because . . . the finding ‘largely will turn on evaluation of credibility.’ 476 U.S. at 98 n.21. . . . As with the state of mind of a juror, evaluation of the prosecutor’s state of mind based on demeanor and credibility lies ‘peculiarly within a trial judge’s province.’ *Wainwright v. Witt*, 469 U.S. 412, 428, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985).” 500 U.S. at 365. And in *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003), the Court declared, “[d]eference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility

determinations.”

Although defendants contend that the trial judge’s prompt ruling of “Okay. The . . . challenge is denied” illustrates a failure to perform the third step of the *Batson* process, the record does not support this contention. 5 V.R.P. (Jan. 30, 2004) at 498. The Supreme Court stated in *Hernandez*, “[t]he analysis set forth in *Batson* permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.” 500 U.S. at 358. Although more articulation of a trial judge’s findings is always helpful on appellate review, the court here carefully followed the *Batson* analysis as outlined in *Evans* and provided sufficient explanation for his denial of the *Batson* challenge. The record indicates that the trial judge found defense counsel’s prima facie case weak and the prosecutor’s explanation for juror nine’s dismissal credible and in accordance with common jury selection considerations. Many lawyers maintain strong viewpoints that individuals in certain professions or occupations tend to be unfavorable jurors. The trial judge recognized the prevalence of such beliefs with his response to the prosecutor’s explanation for juror nine’s removal: “[h]e must have read the same version of the jury selection book that’s been

on my shelf for years.” 5 VRP (Jan. 30, 2004) at 497. While dismissing teachers or social workers from jury service may be based upon generalizations about the type of persons engaged in those professions, such challenges are not race- or gender-based and thus constitutionally permissible. Here, although the prosecutor did not pointedly question juror nine, the dismissal was based on the facts revealed in the extensive juror questionnaire. The trial court’s denial of the *Batson* challenge was not clearly erroneous.<sup>11</sup>

### Conclusion

Under our current precedent, informing the jury that the case is noncapital and failing to object to the trial court and prosecution doing the same is deficient performance of counsel. If the death penalty is mentioned, a trial judge should state generally that the jury is not to consider sentencing. The error here, however, was nonprejudicial. Additionally, the trial court’s denial of the *Batson* challenge to one juror was not clearly erroneous. We affirm all convictions.

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<sup>11</sup> After oral arguments but before our decision in this case, the United States Supreme Court issued its decision in *Snyder v. Louisiana*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). This opinion changes neither the analysis nor the outcome of this case.

AUTHOR:

Justice James M. Johnson

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WE CONCUR:

Justice Susan Owens

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Justice Charles W. Johnson

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Justice Mary E. Fairhurst

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Bobbe J. Bridge, Justice Pro Tem.

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