

74363-5

74363-5

NO. 74363-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KARL PIERCE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the defendant may raise his claim of misconduct during voir dire for the first time on appeal, where he did not object to the State's questioning and where the State was properly inquiring as to whether the jurors could follow the court's instructions.

2. Whether the trial court properly declined to inform the jury that this was not a death penalty case, as required by current law, while correctly informing the jury that it would have nothing to do with imposing punishment.

3. Whether State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), should be overruled where it is incorrect and harmful and the state supreme court has concluded that jurors are no less careful simply because they know a defendant will not be executed.

4. Whether the trial court committed clear error in denying the defense Batson¹ challenge where the State offered valid race-neutral reasons that were well-supported by the record for exercising a peremptory challenge against one of several minority jurors.

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

5. Whether the trial court properly exercised its discretion in admitting Pierce's assault on a State's witness prior to trial pursuant to ER 404(b) because witness intimidation is proper evidence of consciousness of guilt and the evidence was not unduly prejudicial.

6. Whether the trial court properly exercised its discretion in excluding some but not all evidence regarding the victim's financial circumstances pursuant to ER 404(b) where the excluded evidence was of limited additional probative value and would have been time-consuming and confusing.

7. Whether the trial court properly exercised its discretion in excluding a prior robbery accusation against the victim pursuant to ER 404(b) where the defendant could not prove the accusation by a preponderance of evidence and has identified no purpose other than propensity.

8. Whether the trial court properly exercised its discretion in excluding prior gun ownership of one of the State's witnesses pursuant to ER 404(b) where the prior guns had no connection to the crime, and the evidence was offered to show the witness's propensity to own guns.

9. Whether the trial court properly exercised its discretion in admitting co-conspirator statements and a witness's prior inconsistent statements.

10. Whether the defendant can raise an appearance of fairness claim for the first time on appeal where there is no evidence of actual bias that would support a constitutional claim.

11. Whether the defendant can claim the trial court erred in not instructing the jury on excusable homicide where the defendant did not request such an instruction, and where excusable homicide was legally unavailable as a defense because accident is not a defense to felony murder based on attempted robbery.

12. Whether the defendant's claim that the alternate jurors were inadequately instructed can be raised for the first time on appeal where there is no manifest error.

13. Whether the defendant's claim of improper deliberations can be raised for the first time on appeal where there is no manifest error.

14. Whether the defendant's offender score was properly calculated.

15. Whether the trial court properly imposed mandatory legal financial obligations.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Karl Pierce was charged by information with felony murder in the first degree predicated on attempted robbery in the first degree. CP 102-03. He was tried with co-defendant Michael Bienhoff. The jury found both Pierce and Bienhoff guilty as charged. CP 192. Pierce was sentenced to 540 months of incarceration. CP 195.

2. FACTS OF THE CRIME.

It was undisputed at trial that Precious Reed was killed in a parking lot at Woodland Park by a single .38 caliber bullet that entered and exited his right shoulder and then entered the back of his neck and skull. RP 1132, 3039-46, 3119.² It was undisputed that Reed was killed while he and Michael Bienhoff were seated in the front seat of Reed's van. RP 1639, 3452-55. It was undisputed that Reed had agreed to meet Bienhoff, an old acquaintance, at Woodland Park because he believed that Bienhoff had a large amount of marijuana to sell. RP 1614-16, 3233, 3428. The dispute

² Most, but not all of the volumes of the verbatim report of proceedings are consecutively paginated. As in appellant's brief, the consecutively paginated volumes of the verbatim proceedings will be referred to as RP. The separately paginated volumes of the verbatim proceedings will be referred to by the date of the proceeding, e.g., RP (10/7/15) at 190.

at trial was whether Bienhoff was trying to rob Reed at the time of Reed's death, with the assistance of Pierce, or whether Reed was trying to rob Bienhoff. Text messages and the actions of Bienhoff and Pierce before and after the shooting proved that Bienhoff in fact had no marijuana to sell, and that Bienhoff had enlisted the help of Pierce and two others and armed himself with the intent to rob Reed of the money he brought to purchase marijuana.

Cell phone records showed that Bienhoff called Reed on the evening of February 17, 2012, and Reed called Bienhoff back.

RP 2368. Bienhoff then texted his girlfriend, Chamise Wax, the following:

I need to find a ride today. Somebody I know that got big money. Thinks I got pounds for sale. This guaranteed money. Anywhere from 2500 to 4000. I need that. We need that.

RP 2369. Bienhoff called Reed again the next day. RP 2370. Two days later, Bienhoff texted Wax, instructing her to call "Scotty" and have him contact Ray Lyons, urging her "this shit is important."

RP 2371-72. Shortly after noon on February 20, Wax texted Scott Barnes' phone number to Bienhoff. RP 2373. Bienhoff called Ray Lyons, then repeatedly tried to call Barnes. RP 2373-77. Bienhoff and Reed exchanged numerous calls throughout that afternoon

until shortly after 5:00 p.m. RP 2378-82. Reed was found dead in the Woodland Park parking lot at 5:15 p.m. RP 1129-32.

Scott Barnes testified that he was an acquaintance of Bienhoff, and a good friend of Bienhoff's girlfriend. RP 2090-92. Since he had a car, he sometimes gave Bienhoff rides. RP 3360. On February 20, Wax texted Barnes and asked him if he was "down for some adventure." RP 2098. After he responded "yes," he received multiple phone calls from Bienhoff which he did not answer because he did not recognize the number. RP 2012. He then received a text message from Bienhoff, asking him to contact "Ray" and frantically pleading, "You will be covered. Weed pills and \$\$\$\$. Please like right now." RP 2102. Barnes drove to Ray Lyons' house, where Bienhoff met him. RP 2104-07. Barnes drove the three of them to Pierce's apartment at Lyons' direction, where Pierce joined them, bringing a backpack along. RP 2107-10. Barnes drove Bienhoff, Pierce and Lyons to Woodland Park at Bienhoff's request, and then Bienhoff directed him to park in a lot away from and out of view of the parking lot where Bienhoff had planned to meet Reed. RP 2115-20. Barnes saw that both Bienhoff and Pierce were armed with guns, and texted Wax "It bout

to go deep” as he waited in the car because he suspected they intended to rob someone. RP 2122-24.

Ray Lyons testified that he was a friend of Barnes, and often asked Barnes for rides. RP 2153-14. Lyons was also acquainted with Bienhoff. RP 2518-19. On February 20, 2012, Bienhoff contacted Lyons and said he needed a ride from Barnes. RP 2522. Lyons arranged for Barnes to give them a ride. RP 2526. Lyons also arranged for Pierce to join them. RP 2535-38. Bienhoff had asked to borrow a gun, so Lyons gave a loaded .45 caliber gun to Pierce, and another loaded gun to Bienhoff. RP 2540-53. Barnes drove them all to Woodland Park and Bienhoff hid a backpack in the bushes. RP 2561. Lyons testified that he waited in the park and did not see Bienhoff’s interaction with Reed. RP 2565.

Demetrius Bibb testified that he was a good friend of Reed’s. RP 1612. On the morning of February 20, 2012, Reed went to Bibb’s house in Kent and told him that he had found a good deal on marijuana and wanted Bibb to help him purchase it. RP 1614-16. Bibb had no communication with Bienhoff, and did not know him. RP 1620, 1629. Bibb, driving a Cadillac, followed Reed’s van to a parking lot in Woodland Park. RP 1622-23. When they arrived, they parked and exited their vehicles, and Reed introduced Bibb to

Bienhoff, who identified himself as "Casper." RP 1629-31, 1655, 3450. Bibb saw someone crouching in the bushes, and he informed Reed, sensing that something was amiss and suggested they not go forward with the transaction. RP 1632-34. Reed asked Bienhoff, who had retrieved a backpack from the bushes, about whether someone was hiding in the bushes, and Bienhoff feigned ignorance. RP 1635-36. Bibb returned to his Cadillac, and Bienhoff and Reed entered Reed's van. RP 1636. Bibb had not given Reed any money, because he no longer wanted to be part of the transaction. RP 1637-39. Bibb next saw another man, identified as Pierce, running toward the cars, shooting. RP 1641-47, 1656; RP (10/7/15) 190-91. He could hear and feel bullets hitting his car, and quickly drove away and back to Kent. RP 1643-47. Bibb did not see what happened inside Reed's van, did not know whether Reed was injured and did not call the police. RP 1650, 1658-61. Bibb's wife called Reed's wife, and Bibb learned at 1 a.m. that Reed had been killed. RP 1662. Bibb's Cadillac had bullet holes in it, and he agreed to let police examine it when they contacted him the next day. RP 1650-52. Bibb never saw any marijuana and did not smell marijuana and concluded that Bienhoff did not have marijuana in the backpack. RP 1867-88.

Barnes testified that as he waited in his car he heard gunshots and then Lyons, Bienhoff and Pierce ran back to the car. RP 2131-33. Bienhoff said that he "might have killed him" and Pierce stated he had shot at the Cadillac. RP 2137-38. Lyons stated, "nobody say anything, we're all screwed." RP 2138. Bienhoff still had the backpack, which Barnes saw contained clothes. RP 2137. Barnes never saw or smelled marijuana. RP 2153-54.

Lyons testified that as he waited in the park he heard gunfire and then ran back to Barnes' car. RP 2566-70. Lyons claimed that when Bienhoff returned to the car he was crying and said, "he tried to rob me." RP 2587. Lyons claimed he was not aware of any marijuana deal or a plan to rob anyone. RP 2597, 2617. He could not explain why he provided a gun to Pierce. RP 2641.

Eric Cadaret is a retired trucker who lives in an RV that he parks at Woodland Park during the day, where he feeds the rabbits and squirrels and socializes with others enjoying the park. RP 1333-34. His RV was parked in the parking lot where Reed was shot, approximately 340 feet from Reed's van. RP 1348, 2480. Cadaret had just woken from a nap when he looked through a small window in his RV and saw two men walking toward two vehicles

parked in the lot. RP 1348. He started to make coffee and noticed a man sitting in the driver's seat of one of the vehicles, a Cadillac. RP 1353. He did not have a good view of the other vehicle, and he was not wearing his glasses, which he needed to see at a distance. RP 1343, 1354, 1356, 1431. Several minutes later he saw a man in front of the other vehicle, a van. RP 1355-56. He heard "bangs" at some point, and then saw the Cadillac drive away. RP 1358, 1361. He saw Reed collapse on the ground outside the van, and called 911. RP 1361, 1370. Although he reported a shooting, he admitted that he did not in fact see the shooting. RP 1371. He never saw a gun. RP 1359.

Mark Howard, a carpenter, was parked in the same parking lot, and was calling his wife on the way home from work. RP 1513-15. Howard was parked much closer to Reed's van, approximately 40 feet away. RP 1521, 2483. He saw Bibb's Cadillac and Reed's van pull into the parking lot. RP 1521. He saw Bibb and Reed converse with Bienhoff. RP 1523. He saw Bienhoff pull a backpack out of the bushes, which he considered suspicious, and the three men return to the two cars. RP 1529-30. He next heard a popping sound and saw a man he identified as Pierce running toward the cars with a gun, shooting toward the vehicles.

RP 1531-36, 3285.³ Frightened, Howard immediately drove out of the parking lot, but returned to the scene later to talk to the police after seeing the shooting on the news. RP 1540-41, 1545.

Police officers who responded to the scene within minutes found Reed face down on the ground next to his van, not breathing. RP 1129-33, 1226. Both the driver's door and front passenger door were open. RP 1132. Reed had \$1200 in cash on his person. RP 1142; RP (10/6/15) 122. Reed had no gun, and no gun was found at the scene. RP 1144, 1189, 1275, 1320; RP (10/6/15) 175. Several .45 caliber casings were found in the parking lot. RP 1261.

Bienhoff was arrested eight days after the shooting on February 28, 2012. RP (10/7/15) 125). He initially lied and said he had not seen Reed on the day of the shooting and had not been at Woodland Park. Ex. 92 and Pretrial Ex. 1 at 11-12, 17, 18, 26. But he changed his story when confronted with cell phone records and eventually claimed that he and Reed struggled over a gun that Reed pulled and Reed was shot. Ex. 92 and Pretrial Ex. 1 at 16-18, 28, 42.

At trial, he testified that he agreed to sell Reed two pounds of marijuana, and that he obtained the marijuana from someone

³ Pierce admitted in cross-examination that he was the person that Howard saw. RP 3285.

named "Vlady." RP 3353, 3358, 3428-29, 3431. He denied that his February 17th text to Wax was about Reed, claiming it pertained to another drug deal. RP 3355-56. He denied asking Lyons for a gun or being armed. RP 3435. He denied knowing that Pierce was armed. RP 3444. He admitted that Woodland Park was just a short walk from where he was living, calling into question why he so desperately needed a ride from Barnes as well as armed accomplices for a "simple weed deal." RP 3468, 3509, 3519.⁴

Bienhoff claimed that in the van Reed tried to persuade him to sell him the marijuana for less money, and that when Bienhoff refused, Reed pulled out a gun. RP 3452-55. Bienhoff and Reed struggled over the gun when it discharged, striking Reed. RP 3455. Bienhoff ran to Barnes' car with the others, and he claimed that when Barnes dropped him off nearby, he gave the backpack full of marijuana away to someone he barely knew on the street. RP 3461, 3498. Bienhoff claimed he had no intent to rob Reed or shoot him. RP 3468-69. On cross-examination he admitted that there was no "Vlady" in his phone contacts and no evidence of Bienhoff calling or texting any such person or his associate.

⁴ Indeed, Bienhoff admitted he took the bus 45 blocks north to meet Barnes, Lyons and Pierce, supposedly carrying more than two pounds of marijuana in a backpack, rather than walking to Woodland Park. RP 3512.

RP 3485-87. He admitted that in speaking about Bibb in a recorded phone call to Wax shortly after his arrest, he told Wax that Bibb "gave up everything on how it went down." RP 3589. Bienhoff admitted to having prior robbery and theft convictions. RP 3467.

Barnes was arrested on July 24, 2012, and he cooperated with the police. RP (10/7/15) 147-53. His statement to the police was played to the jury by agreement of the parties. RP 2282-84, 2427-28. Barnes pled guilty to the crime of robbery in the first degree in exchange for this testimony. RP 2155.

Lyons was arrested days later on July 27, 2012. RP (10/7/15) 192. He denied any involvement when interviewed by the police. RP (10/7/15) 194-95. Lyons eventually pled guilty to manslaughter in the first degree. RP 2610.

Pierce was arrested on July 30, 2015. RP 1983-86. He denied knowing Bienhoff when questioned by the police. Ex. 102 and Pretrial Ex. 3 at 4. At trial, he admitted to being with Bienhoff at Woodland Park, but testified that he had never met Bienhoff before that day. RP 3228. He was friends with Lyons, who he claimed asked him to help with a weed deal for \$50. RP 3233. He admitted providing a backpack that had clothes in it at the others' request. RP 3236-38. He admitted that Lyons gave him a gun,

although he denied having knowledge of any plan to rob Reed. RP 3245, 3256. He admitted that he started moving toward Reed's van when he perceived a struggle inside the van, but denied pulling the gun out or shooting. RP 3261-64. He admitted that he was the person that Howard saw. RP 3285. He also admitted lying to police and to all his family members about not being involved, and trying to get someone to falsely testify that he was somewhere else. RP 3316, 3328.

C. ARGUMENT

1. DURING VOIR DIRE, THE STATE PROPERLY RAISED THE QUESTION OF WHETHER THE JURORS COULD FOLLOW THE COURT'S INSTRUCTIONS REGARDING PUNISHMENT.

Pierce contends on appeal that the prosecutor "incited" a discussion of the death penalty during voir dire. Pierce does not fairly characterize the State's voir dire. The prosecutor properly questioned the potential jurors about their ability to follow the court's instructions that "you may not consider the fact that punishment will follow." CP 131. Co-defendant Bienhoff was, in fact, attempting to offer evidence that he would be serving a life without parole sentence if convicted. RP 60-61. The jurors raised

the question of the death penalty and the trial court did its best to manage the issue, given the lack of clarity regarding what prospective jurors can and should be told when the State is not seeking the death penalty in a murder case. The State did not act improperly. Moreover, there was no timely objection below, and thus Pierce's challenge to the State's questioning may not be raised for the first time on appeal.

Jury selection in this case lasted four days. On the third day, the prosecutor inquired about the venire's ability to decide guilt without considering the resulting punishment. Although such questioning would be proper in any case, it was especially salient in this case. Bienhoff wanted the jury to hear that a murder conviction would result in a life without parole sentence for him. RP 60-61, 269-74. The State objected, and the court had preliminarily ruled that Bienhoff could only offer evidence that he was facing a "lengthy sentence" if convicted. CP 451; RP 274. Given this backdrop, the State had a legitimate concern that the jurors chosen to serve on the jury would be able to render a guilty verdict, if the State proved the crime beyond a reasonable doubt, regardless of the length of the potential sentence.

The State asked the jurors if they were "okay" with them having "nothing whatsoever to do with punishment." RP 825. There was no objection to this line of questioning. RP 825-37. Juror 1 asked if there was death penalty in Washington and the prosecutor deferred to the trial court: "I will let the judge answer that question." RP 825. The trial court told the jurors, "The Washington Supreme Court has said that I can't tell you whether a death sentence is involved or not." RP 825-26. Some of the jurors expressed concern about serving on a case involving the death penalty, at least one juror indicated that he or she knew whether this was a death penalty case, and other jurors expressed general confusion about the process. RP 826-38. After considerable discussion between the State and the prospective jurors with no objection, Bienhoff and Pierce requested a mistrial. RP 838, 844. The trial court reminded the defense that the State had not mentioned the death penalty: "All that Mr. Yip did was asked them if they had a problem not being involved in the penalty." RP 839. The court concluded that the State's voir dire was not "improper in any way," and denied the motion for a mistrial. RP 846. The trial court noted that, in its experience, the question of the death penalty is often raised by jurors during voir dire in first degree murder

cases. RP 846.⁵ Eventually, the trial court instructed the potential jurors as follows, without objection:

I am not allowed to tell you whether this is a capital case. However, if it is, the question of whether the death penalty would be imposed is a separate proceeding at which there could be additional evidence and would be determined by a jury that follows the trial and any conviction.

RP 887.

Pierce's claim of misconduct in voir dire cannot be raised for the first time on appeal. Failure to raise a timely objection to the prosecutor's questioning during voir dire bars consideration on appeal. State v. Elmore, 139 Wn.2d 250, 277, 985 P.2d 289 (1999). Voir dire involves compliance with procedural court rules rather than constitutional issues, and challenges regarding voir dire may not be raised for first time on appeal. Id. Because Pierce raised no timely objection to the State's questions, his claim cannot be raised for the first time on appeal.

Moreover, there is no authority that supports Pierce's claim that the State acted improperly by asking the prospective jurors about their ability to follow the court's instructions regarding

⁵ The court observed, "I actually was amazed that we had gotten this far without anybody raising the death penalty. . . that's one of things that usually comes out of a juror's mouth." RP 846.

consideration of punishment. Pierce's claim of prosecutorial misconduct during voir dire was not preserved below, and is without merit.

2. PIERCE WAS NOT PREJUDICED BY THE TRIAL COURT'S COMMENTS REGARDING PUNISHMENT.

Pierce contends that the trial court erroneously informed the jury that his case did not involve the death penalty. Pierce is incorrect. Consistent with Washington case law, the trial court did not inform the jury that the case did not involve the death penalty. Instead, the trial court properly explained to the jury that it would have no role in determining Pierce's punishment. Moreover, even if the trial court's comments were somehow improper, Pierce was not prejudiced because there is no indication that the jury disregarded its instructions or failed to take its duty seriously.

Pierce's claim of error is predicated on State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001). In Townsend, the State informed the potential jurors during voir dire that "This case does not involve the death penalty." Id. There was no objection by the defense. Id.

On appeal, the state supreme court held that defense counsel was deficient in not objecting. Id. at 847. The court expressed concern that informing the jury that a case does not involve the death penalty would result in jurors being “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. The court’s concern employs a startling presumption that jurors do not do their job properly unless they think the defendant could be executed. The Townsend court could conceive of “no possible advantage” to be gained by the defense from such an instruction. Id. at 847. However, after finding counsel’s performance to be deficient, the court found that the defendant was not prejudiced. Id. at 848.

Six years later, in State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007), the state supreme court addressed the issue again. During voir dire, one juror responded to a question about the ability to follow the law by stating, “If it were the death penalty. I don’t support the death penalty. I would have a hard time with that.” Id. at 929. The trial court responded by stating “I will respond by informing you that this is not a capital case. In other words, this case does not involve a request for the death penalty.” Id. In

affirming the conviction, the supreme court expressed its willingness to reconsider its holding in Townsend: “If . . . 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.” Id. at 930. However, because defense counsel had objected, the court found that the advisement was error, but harmless error. Id.

In State v. Hicks, 163 Wn.2d 477, 482-83, 181 P.3d 831 (2008), one juror expressed that her religious beliefs regarding capital punishment might interfere with her ability to decide the case. After a sidebar, the trial court told the jury, “This is not a death penalty case.” Id. at 483. Both the prosecutor and defense counsel subsequently referenced the fact that the death penalty did not apply during voir dire. Id.

Relying on Townsend and Mason, the majority opinion summarized: “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.” Id. at 487. The court concluded that defense counsel was deficient insofar as counsel participated in informing the jury that the case was noncapital, but that the error

was not prejudicial because there was “no indication that the jurors failed to take their duty seriously.” Id. at 488.

In a concurrence, Judge Chambers explained why informing the jury that a case did not involve the death penalty would be helpful to the defense:

What is a trial lawyer to do when she has three potential jurors whom she would love to sit on her client’s case? The jurors share similar backgrounds, occupations, and experiences with her client, which causes her to believe they will relate to her client. They have made statements during jury selection which lead her to believe they will be sympathetic to the arguments she intends to advance on behalf of her client. But all three have made statements to suggest they are morally opposed to the death penalty. Trial counsel could be reasonably concerned that, if in doubt as to whether or not the case involves capital punishment, the jurors will simply declare that they cannot be fair and impartial. Trial counsel knows the law and knows her duty but could well make a calculated decision that her client has a significantly better chance of acquittal if these jurors are informed that the case is not capital and that they may, in good moral conscience, become a juror. While counsel may not mislead the court as to the law, in such a case counsel should not be faulted for not objecting to the jury being informed that the case does not involve the death penalty.

Id. at 496 (Chambers, J., concurring).

This question was recently addressed again, albeit briefly, in State v. Clark, 187 Wn.2d 641, 389 P.3d 462 (2017). In Clark, defense counsel did not object when the State informed the

prospective jurors that the case did not involve the death penalty. Id. at 654. Noting that the jury was properly informed of its duties, and there was “no indication that the jury disregarded its instructions or paid less attention to the evidence presented throughout Clark’s trial because it was told that the death penalty was not at issue,” the court held that Clark was not prejudiced and there was no ineffective assistance of counsel. Id. at 655.

Unlike Townsend, Mason, Hicks, and Clark, the prospective jurors in this case were not informed that convictions could not result in the death penalty. Rather they were told that they could not be informed whether it was a death penalty case, and that any proceeding involving punishment would involve another jury. RP 887. In so instructing the jury, the trial court was endeavoring to comply with the holding of Townsend, while also endeavoring to prevent jurors who opposed the death penalty (who most lawyers would consider good defense jurors) from being disqualified from serving on the jury. Even if the court’s admonition to the jury was somehow in error, the error was not prejudicial. There is no indication that the jury disregarded its instructions or did not diligently carry out its duty. The jury deliberated for two days before reaching its verdict. RP 3929, 3941.

The State agrees with Pierce that Townsend is incorrect and harmful and should be overruled. First, the holding of Townsend is incorrect. Informing potential jurors that a murder case does not involve the death penalty is not, in fact, informing the jury of the punishment that will result. As illustrated by this case, the punishment for murder in the first degree could be anything from 20 years to life in prison without parole. The jury that is informed that it is not a death penalty case has no way to determine what the actual punishment will be. More importantly, there is no reason to believe that jurors in a murder case would not take their duty seriously. There certainly should be no *presumption* that jurors become lackadaisical and inattentive as soon as they know execution is not a possible sentence.

Second, the holding of Townsend is harmful. As can be seen here, it causes much unnecessary confusion and anxiety among some potential jurors during jury selection. Washington should join the other states that allow potential jurors to be informed in a murder case that the death penalty is not being sought. See State v. Mott, 187 Ariz. 536, 931 P.2d 1046 (1997); People v. Hyde, 166 Cal. App. 3d 463, 212 Cal. Rptr. 440 (1985); Stewart v. State, 254 Ga. 233, 326 S.E.2d 763 (1985); Burgess v. State, 444 N.E.2d

1193 (Ind. 1983); State v. Wild, 266 Mont. 331, 880 P.2d 840 (1994).

3. THE TRIAL COURT DID NOT COMMIT CLEAR ERROR IN REJECTING PIERCE'S BATSON CHALLENGE.

Pierce contends that the trial court erred in denying his challenge to the State's use of a peremptory challenge against an African-American juror, pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). This claim should be rejected. The trial court's finding that there was no purposeful discrimination by the State was not clearly erroneous.

In Batson, the United States Supreme Court held that the Equal Protection Clause prohibits purposeful racial discrimination in jury selection. State v. Meredith, 178 Wn.2d 180, 181, 306 P.3d 942 (2013). A three-part analysis is used to determine whether a peremptory strike unconstitutionally discriminates based on race.

First, the person challenging the peremptory 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." Batson, 476 U.S. at 93-94, 106 S.Ct. 1712. Second, "the burden shifts to the State to come forward with a [race-]neutral explanation" for the challenge. Id. at 97, 106 S.Ct. 1712. Third, "the trial court then [has] the duty to

determine if the defendant has established purposeful discrimination.” Id. at 98, 106 S.Ct. 1712. If the trial court finds purposeful discrimination, the challenge should be granted and the peremptory strike disallowed.

State v. Saintcalle, 178 Wn.2d 34, 42, 309 P.3d 326 (2013).

Comparative juror analysis can be used, examining whether the proffered race-neutral reason was applied only to the minority juror and not to nonminority jurors that were allowed to serve. Id. at 43. Disparate questioning of minority jurors can also be evidence of discriminatory purpose. Id. The appellate court reviews the trial court’s ruling on a Batson challenge for clear error, deferring to the trial court when its ruling is based on factual determinations. Id. at 41. If the trial court chooses between two permissible views of the evidence, the trial court’s choice cannot be clearly erroneous.

State v. Luvane, 127 Wn.2d 690, 700, 903 P.2d 960 (1995).

In this case, Bienhoff was charged with his third strike pursuant to the Persistent Offender Accountability Act. CP 590. Bienhoff wanted the jury to hear that a conviction in this case would result in his third strike. CP 590; RP 60-61, 269-74. The trial court denied that motion, but ruled that the defense could offer evidence that Bienhoff was facing a “lengthy sentence.” RP 273-74. When

Bienhoff testified, the fact of his two prior convictions for robbery and theft was admitted. RP 3467.

The jury that served on Pierce's case consisted of one person who appeared to be of African-American heritage. RP 1040. Peremptory challenges were exercised against three minority jurors. RP 1015, 1026, 1040. The State exercised a peremptory challenge against Juror 6, who was African-American, and the defense exercised a peremptory challenge against Juror 114, also African-American. RP 1015, 1026, 1040. The defense also exercised a peremptory challenge against Juror 115, who was of Indian descent. RP 1015, 1026, 1040.

The State's peremptory challenge against Juror 6 prompted a Batson challenge from the defendants. RP 1014. Juror 6 had initially requested to speak outside the presence of the other jurors. RP 444. She disclosed that her younger brother had been incarcerated for attempted murder. RP 495. She opined that she would be sympathetic to someone in a similar situation as her brother, who was incarcerated "for such a long time for a gun charge." RP 495-96. But she initially concluded that she could be unbiased. RP 495-98. During general voir dire, Juror 6 further disclosed that her brother had been assaulted by police and had

successfully sued based on the assault. RP 659. She stated, however, that that experience did not shape her view of police. RP 659. Other jurors discussed negative experiences they had with police, including being “roughed up.” RP 660-64. Later in voir dire, Juror 6 opined that her brother had not been treated fairly by police or prosecutors, although she felt that prosecutors had been fair to him “most of the time.” RP 713-14.

When the issue of the death penalty was raised, Juror 6 stated that she was not comfortable with the death penalty, and additionally, “I wouldn’t feel comfortable also with sending someone to jail for life.” RP 827. At this point, the State raised a challenge for cause against Juror 6. RP 833. The trial court initially granted the challenge based on Juror 6’s statement that she could not serve on a death penalty case, but then reconsidered and allowed the defense an opportunity to “rehabilitate” her. RP 854-55, 861. During further questioning, Juror 6 initially stated that she could not be fair, explaining “knowing that it could have a basis on the outcome of somebody’s life, it still – I think that that would haunt me.” RP 873. Her qualms extended beyond the death penalty: “I would feel extremely conflicted sentencing someone – knowing that my decision could impact somebody being incarcerated for

life.” RP 874. She persisted that serving as a juror in a case involving a life sentence made her “extremely uncomfortable.” RP 876. The trial court ultimately denied the challenge for cause because the court concluded there was not a clear statement from Juror 6 that she could not be fair. RP 882.

The State subsequently exercised a peremptory challenge against Juror 6 and the defense objected. RP 1014. The State argued that no prima facie case of purposeful discrimination had been established based on its single peremptory challenge, given that Juror 6 was not the only minority juror and the State had not struck any other minority jurors. RP 1015. Nonetheless, the State offered three race-neutral reasons for its challenge to Juror 6. First, she repeatedly stated that she was not comfortable serving as a juror on a case that might carry either the death penalty or a life sentence. RP 1017. Second, her brother was convicted of attempted murder. RP 1018. Third, she expressed strong opinions that the justice system had not treated her brother fairly. RP 1019. The trial court denied the Batson challenge, concluding “the State clearly has nondiscriminatory reasons for exercising its peremptory challenge against Juror Number 6.” RP 1020.

Regarding the first step of the Batson analysis, it should be noted that there was no prima facie case of purposeful discrimination. To establish a prima facie case, the defendant must show circumstances that raise an inference that the peremptory challenge was being exercised to exclude the juror based on her race. State v. Rhone, 168 Wn.2d 645, 651, 229 P.3d 752 (2010). In State v. Meredith, supra, 178 Wn.2d at 184-85, the state supreme court clarified that there is no bright-line rule that the exercise of a peremptory against the sole remaining member of the defendant's constitutionally cognizable group or the last remaining minority member of the venire establishes prima facie discrimination. Even if there were such a bright line rule, it is not met here. Juror 6 and Pierce are not of the same race,⁶ and Juror 6 was not the sole remaining minority member of the venire. There were no circumstances that raised an inference of racial discrimination here, other than the fact that Juror 6 was one of several minority jurors on the venire, and one of two jurors that appeared to be of African-American descent. However, a prima facie showing is rendered unnecessary and becomes moot once the party offers a race-neutral explanation and the trial court rules

⁶ Pierce is Caucasian. CP 197.

on the question of whether purposeful discrimination has occurred. Luvene, 127 Wn.2d at 699; Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

Thus, this Court must address the third step of the Batson analysis. The trial court's determination that the State's reasons were valid and not discriminatory was a factual determination that is not clearly erroneous. Of paramount concern were Juror 6's repeated statements that she could not serve on a jury where a guilty verdict might result in a life sentence. That was *this* case, and it was highly likely that the jurors would infer that Bienhoff would be facing a life sentence. Indeed, Bienhoff wanted to submit that fact to the jury in order to argue that he would not have committed a robbery knowing that it would be his third strike. CP 590; RP 61. Although the court had preliminarily ruled that Bienhoff's potential sentence would not be admitted, the ruling could have changed, or Bienhoff in testifying might have violated the motion in limine. Moreover, because the jurors heard about Bienhoff's two prior convictions, as well as Pierce's prior convictions, RP 3222-23, 3467, they might have collectively or individually inferred that this murder conviction would lead to a life sentence. The risk that Juror 6 would not be able to return a verdict

based on her fear that it would result in life imprisonment was very real, and was a valid race-neutral reason to exercise a peremptory challenge. Moreover, the fact that her brother had been convicted of attempted murder, that she was of the opinion that he was not treated fairly, and her statements that she would be sympathetic to someone in a position similar to her brother's were also valid race-neutral reasons.

The State did not "bait" Juror 6 into expressing her concerns, as Pierce alleges. Initially, Juror 6 asked to be questioned outside the presence of the other jurors to express her concerns about serving on a case similar to her brother's. RP 444, 494-98. In other portions of voir dire, the State merely followed up with Juror 6 based on her responses to general questions as it did with the other jurors, or called on her when she volunteered information and concerns. RP 659-64, 710-29, 827-28. There is no evidence of disparate questioning that would support an inference of discriminatory intent.

Nor can Pierce show that the race-neutral reasons for challenging Juror 6 were applied unequally. Juror 6 was the only juror that expressed an inability to serve on a jury where a life

sentence might be imposed.⁷ Juror 6 was the only juror with a close family member who had been convicted of a crime similar to the crime charged in this case. The trial court's finding that there was no purposeful racial discrimination in the State's exercise of a peremptory challenge against Juror 6 is not clearly erroneous.

Pierce argues that this Court should adopt a more protective rule for guarding against racial discrimination in jury selection. In Saintcalle, a majority of the state supreme court rejected a similar invitation to adopt a new rule through case law, deferring to the rule-making process. 178 Wn.2d at 52. Even if a wholly new, stricter standard were adopted in this case—for example, Justice Wiggins' suggestion that the standard be whether it is "more likely than not that, but for the defendant's race, the peremptory would not have been exercised"—Pierce would be unable to meet that standard. Id. at 54. First, Pierce is Caucasian. CP 197. Second, given that Juror 6 repeatedly expressed her great discomfort with serving on a jury in a case with a potential life sentence, the State's peremptory challenge would have met a heightened standard.

⁷ Juror 76 expressed significant distress when the death penalty was discussed, and was eventually excused for cause without objection. RP 837, 848, 856-58.

4. THE TRIAL COURT REASONABLY EXERCISED ITS DISCRETION IN BOTH ADMITTING AND EXCLUDING VARIOUS OTHER ACTS OF PIERCE, REED AND BIBB PURSUANT TO ER 404(b).

Pierce contends that the trial court committed several errors in either admitting or excluding evidence pursuant to ER 404(b). However, the rulings challenged were well within the trial court's broad discretion.

ER 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for the purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). ER 404(b) prohibits prior acts from being used "to prove the character of a person in order to show action in conformity therewith," but allows that same evidence to be introduced if relevant for other purposes, depending on a balancing of its probative value against the danger of unfair prejudice.

State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Washington courts use a four-part test to determine if

ER 404(b) evidence is admissible:

The trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify

the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Id. at 421 (quoting State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The trial court must conduct this inquiry on the record, but an evidentiary hearing is not required. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); State v. Kilgore, 147 Wn.2d 288, 294, 53 P.3d 974 (2002). Unless the trial court's ruling is based on a misinterpretation of the evidence rule, the appellate court reviews a trial court's decision to admit evidence pursuant to ER 404(b) for abuse of discretion. Foxhoven, 161 Wn.2d at 174. The appellant bears the burden of proving an abuse of discretion. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

ER 404(b) applies to evidence offered by the defense as well as to evidence offered by the State. State v. Donald, 178 Wn. App. 250, 259, 316 P.3d 1081 (2013). The language of the rule, referring to a "a *person's*" character, plainly applies to persons other than the accused. Id. As the Ninth Circuit has concluded, "The Rules therefore provide no basis for [the defendant's]

proffered use of propensity evidence of a third party.” Id. (quoting United States v. McCourt, 925 F.2d 1229, 1232-33 (9th Cir. 1991)).

An error in admission of evidence does not require reversal unless there is prejudice to the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Where the error is based on an evidentiary rule and not a constitutional mandate, courts apply the nonconstitutional harmless error standard: “the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). An error in admitting evidence is harmless if the evidence is of minor significance in reference to the overall evidence. Bourgeois, 133 Wn.2d at 403.

a. Admission Of Pierce’s Assault Of Barnes.

Pierce contends that the trial court abused its discretion in admitting Pierce’s assault on Scott Barnes while both were in custody pending trial. This claim should be rejected. This evidence of witness intimidation was admissible to show consciousness of guilt.

Barnes testified that on December 13, 2012, he and Pierce were placed in the same holding tank prior to a court hearing. RP 2158-61. Suddenly, Barnes was knocked to the ground and found Pierce standing above him. RP 2161. Barnes was transported to the hospital for medical treatment and received eight stitches. RP 2161-62. A jail officer testified that Pierce was standing over Barnes and yelling at him. RP 2393-400. Pierce himself admitted to assaulting Barnes in jail "because he lied." RP 3225.

In admitting the evidence, the trial court utilized the proper framework. The trial court properly found that the act occurred since it was undisputed. RP 200. The trial court concluded that the assault was offered for an admissible purpose, to show consciousness of guilt, and that the danger of unfair prejudice did not outweigh the probative value of the evidence. RP 192, 200-01.

Pierce argues that the evidence of his assault on Barnes was not unequivocally evidence of consciousness of guilt, because he could have been angry at Barnes for giving a false statement to the police. But there is no requirement that evidence "unequivocally" show consciousness of guilt in order to be admissible. Indeed, almost any piece of evidence would be subject

to multiple interpretations. Evidence need only support a reasonable inference of consciousness of guilt to be admissible pursuant to ER 404(b). For example, evidence of flight is admissible as consciousness of guilt as long as the inference of flight is substantial and not speculative. State v. Price, 126 Wn. App. 617, 645, 109 P.3d 27 (2005). As Division 2 has explained, “the evidence must be sufficient so as to create a reasonable and substantive inference that defendant’s departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.” Id. Evidence need not exclude all other inferences in order to create a reasonable and substantive inference of consciousness of guilt. In Price, the defendant’s travel out of the state shortly after the murder with a backpack full of grooming supplies, medications, and hair trimmers supported a reasonable inference that he left the state to avoid arrest and prosecution, and was admissible. Id. at 644-45. Similarly, the use of an alias is normally admissible as consciousness of guilt, although it would support multiple inferences. State v. Chase, 59 Wn. App. 501, 507, 799 P.2d 272 (1990).

Like flight, witness intimidation is admissible under ER 404(b) when it raises a reasonable inference of consciousness of guilt. In State v. Moran, 119 Wn. App. 197, 218, 81 P.3d 122 (2003), this Court held that evidence that a defendant threatened a witness is relevant “because it reveals a consciousness of guilt.” In State v. Saenz, 156 Wn. App. 866, 871, 234 P.3d 336 (2010), affirmed in part and reversed on other grounds, 175 Wn.2d 167, 283 P.3d 1094 (2012), evidence of jailhouse communications with and an assault on a State’s witness in an attempt to get the witness to take sole responsibility for the crime was admissible under ER 404(b). Likewise, in State v. McGhee, 57 Wn. App. 457, 460, 788 P.2d 603 (1990), this Court held that evidence that the defendant called a jailed state’s witness a snitch and threatened him was admissible as consciousness of guilt pursuant to ER 404(b).

In this case, the trial court did not abuse its discretion in concluding that Pierce’s assault on Barnes was offered for a proper purpose under ER 404(b): consciousness of guilt. The trial court reasonably concluded that the probative value was not substantially outweighed by the danger of unfair prejudice, especially since

Pierce testified that he had previously assaulted Barnes.⁸ Nor is there any reasonable probability that the outcome of the trial was affected by this evidence, and thus, any error in its admission was harmless.

b. Exclusion Of Some Of Reed's Financial Circumstances.

Pierce contends that the trial court abused its discretion in excluding some evidence of the financial difficulties that Reed was facing at the time of his death. In fact, the trial court carefully exercised its discretion in allowing some, but not all of the evidence to be admitted.

In order to support the claim that Reed was attempting to rob Bienhoff, Pierce and Bienhoff wanted to admit evidence of Reed's financial difficulties.⁹ In particular, the defense offered evidence that neither Reed nor his wife were employed for the two years prior to Reed's death, but that they owned four cars, took a

⁸ Pierce testified that he had met Barnes once before the shooting of Reed, that he did not like Barnes, and that "I had an altercation with him, and I ended up taking his drugs." RP 3224-25.

⁹ In his trial brief, Pierce joined in Bienhoff's motion to admit "Precious Reed's financial motive/intent to rob codefendant Bienhoff." CP 88.

vacation to Las Vegas and to Great Wolf Lodge,¹⁰ and were thus “living beyond their means.” CP 352. The defendants also offered evidence that Reed pawned property, and borrowed money from an acquaintance who was now threatening him. CP 484. The trial court ruled that evidence that the Reeds were generally “living beyond their means,” as the defendants claimed, was not admissible. RP 125. However, the trial court ruled that the defendants could present evidence indicating that Reed was in “enormous financial pressure” on the day he died, in particular, that he and his wife did not have jobs, that he had pawned a valuable ring, and that he owed money to an acquaintance who wanted his money back. RP 127.

Evidence regarding a defendant’s financial state is not admissible to establish motive to commit a violent crime unless it is accompanied by something more than poor finances. State v. Hilton, 164 Wn. App. 81, 103, 261 P.3d 683 (2011). As Professor Wigmore has expressed,

The lack of money by A might be relevant enough to show the probability of A’s desiring to commit a crime in order to obtain money. But the practical result of such a doctrine would be to put a

¹⁰ Great Wolf Lodge is a hotel with an indoor water park located in Grand Mound, Washington.

poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly those of violence.

II Wigmore, *Evidence* § 392 (Chadbourn rev. 1979). For this reason, the traditional view has been that “evidence of poverty is not admissible to show motive, because it is of slight probative value.” United States v. Mitchell, 172 F.3d 1104, 1108 (9th Cir. 1999). However, in State v. Matthews, 75 Wn. App. 278, 286, 877 P.2d 252 (1994), this Court held that although “poor people are not more likely to steal than are people of higher income levels,” the trial court did not abuse its discretion in concluding that evidence of Matthews’ recent bankruptcy and living beyond his means had sufficient probative value not outweighed by unfair prejudice, and was admissible to show his motive for committing robbery and murder. Adopting the reasoning of Matthews, other courts have held that lack of income and extensive debts can be admissible to show motive to commit robbery. State v. Kim, 153 N.H. 322, 897 A.2d 968 (N.H. 2006).

Here, evidence of Reed’s financial circumstances was only marginally relevant given the facts of this case. ER 401 defines relevant evidence as “evidence having any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The defendants ostensibly wanted to present evidence that Reed needed money to argue that he had motive to rob Bienhoff. But this financial motive evidence was extremely weak due to the fact under either the State’s theory or the defense theory Reed was meeting Bienhoff in order to make money. Under the State’s theory, Reed’s motive in meeting Bienhoff was to buy a large amount of marijuana presumably in order to sell it at a profit. Reed had \$1200 in cash on his person at the time he was killed. RP 1142. Reed’s financial circumstances were of minimal relevance under the standard of ER 401 because his poverty did not make it more likely that he was trying to rob Bienhoff rather than simply buying marijuana from Bienhoff that he could resell for a profit, both of which would have helped his financial situation. The \$1200 in Reed’s pocket showed that he had money to buy some of the marijuana.

The trial court relied on Matthews in concluding that evidence of Reed’s lack of employment, recent pawning of a valuable ring and the money owed to Karisma was more probative than prejudicial and therefore admissible for the defense to argue

that Reed had a motive to rob Bienhoff. RP 126-28. The trial court reasonably concluded that evidence about the number of cars the Reeds owned and their vacations was of diminished probative value in comparison to the other evidence. RP 127-28. The trial court was rightly concerned that this other evidence not only had diminished probative value but was outweighed by the danger of unfairly “painting the Reeds as potentially people that the jury doesn’t like.” RP 127-28. Allowing this additional evidence would have entailed a time-consuming and confusing exploration of the costs of the Reeds’ cars and vacations and what might constitute them “living beyond their means.” Confusion of issues warrants exclusion of relevant evidence if admission would lead to the litigation of collateral issues. ER 403; State v. Watkins, 136 Wn. App. 240, 248, 148 P.3d 1112 (2006).

The trial court used the proper framework and reasonably excluded the less probative and more confusing evidence regarding Reed’s financial circumstances. This was not an abuse of discretion. Moreover, there is no reasonable probability that additional evidence would have affected the outcome of the trial. The evidence admitted regarding the Reeds’ lack of employment, the pawning of the ring and the debt owed to Karisma was sufficient

for the defendants to argue that Reed had a financial motive to rob Bienhoff. Any error was harmless.

c. Exclusion Of A Prior Robbery Accusation
Against Reed.

Pierce contends that the trial court abused its discretion in excluding the fact that Reed had been accused, but not convicted, of robbery in 2006. There was no basis to admit this evidence, and thus the trial court properly exercised its discretion in excluding it.

According to Bienhoff's proffer, which Pierce joined, Reed was charged with first degree robbery in 2006 based on an accusation by Tony Sweet. CP 88, 424-35. The charge was dismissed without prejudice, and Reed was not convicted. CP 428. The defendants sought admission of the fact of this charge under ER 404(b). CP 429.

Pierce makes no attempt to explain how this unsubstantiated robbery accusation was admissible under ER 404(b). First, Sweet was not offered as a defense witness, so Reed's prior act was not proved by a preponderance of the evidence as required by ER 404(b). CP 75, 582-83. Second, Pierce offers no basis for admission other than propensity. Evidence of a prior act could be

admissible to show a common scheme or plan under ER 404(b) if the evidence indicates a single plan used repeatedly to commit separate but similar crimes. State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003). In order to be admissible, the prior act and current act must have “such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.” Id. Pierce does not argue that this standard was met. There are insufficient similarities between the prior accusation and Bienhoff’s claim of being robbed by Reed. Sweet claimed that Reed was driving a car while Sweet was walking down the street, and Reed pulled up to him. CP 427. According to Sweet’s statement to police, Reed put a gun to Sweet’s chest and took \$150 in cash and a pack of cigarettes. There was no drug deal involved and no similarity, other than the use of a gun, to the transaction that resulted in Reed’s death. The trial court properly exercised its discretion in excluding this evidence. Any error was harmless given the lack of any similarity or connection between the 2006 robbery accusation and the Woodland Park shooting.

d. Exclusion Of Bibb's Past Gun Ownership.

Pierce contends that the trial court abused its discretion in excluding the fact that Bibb owned guns in the past. However, as with regard to the trial court's other rulings pursuant to ER 404(b), the trial court properly exercised its discretion.

According to Pierce's offer of proof, during a defense interview Bibb reported that he had previously owned guns. RP 205-06. In addition, Bibb reported to police that a .45 caliber gun had been stolen from his unattended vehicle in November of 2011. RP 205-06. Pierce and Bienhoff argued that Bibb's prior ownership and familiarity with guns was relevant to whether Bibb had a gun in his possession at the time of Reed's death and whether he shot at Pierce and Bienhoff as they fled. RP 207-08, 1604-06.¹¹ Pierce conceded that using past gun ownership to prove present gun ownership would be improper propensity evidence, but claimed the fact that Bibb previously owned a .45 caliber gun changed the analysis. RP 215.¹² The State agreed that it was proper for the defense to ask Bibb about his gun ownership

¹¹ Bibb admitted to having shot a .45 caliber before. Ex. 18 at 44 ("I've shot a 357 before, a 45 or 9. What else? A couple rifles, like a 22, the 22.").

¹² Pierce's counsel argued, "If I said, well, you owned guns in the past and you must own guns now, then that's propensity evidence." RP 215.

on the date in question, but objected to questions about prior gun ownership. RP 1585, 1592-94. The trial court ruled that Bibb's prior gun ownership was being offered for propensity purposes, but the defendants could ask about Bibb's gun ownership on the date of the shooting. RP 1606-07. Bibb testified that he did not have a gun at Woodland Park and he had no knowledge of Reed having a gun. RP 1648, 1667.

Bibb's possession of a .45 caliber gun in the past might have been admissible under ER 404(b) if there was evidence it was the same gun used at the scene of the shooting. State v. Hartzell, 156 Wn. App. 918, 237 P.3d 928 (2010). In Hartzell, the trial court properly admitted evidence that the weapons fired into the victim's apartment were found days later in the defendants' possession, because the evidence tended to show that the defendants were involved in the shooting. Id. at 932.¹³ The court explained that the evidence linked the particular guns to the shooting and was not used to show the defendants' general propensity to use guns. Id. Conversely, in State v. Freeburg, 105 Wn. App. 492, 500, 20 P.3d 984 (2001), the fact that the defendant had a gun in his possession

¹³ In Hartzell, ballistics analysis showed that the bullets were fired from those guns. 156 Wn. App. at 927.

when he was arrested more than two years after the murder in question was inadmissible where it was not the gun used in the shooting.

In this case, the trial court reasonably concluded that there was not a sufficient nexus between Bibb's prior gun ownership and the .45 caliber gun fired at Woodland Park at the time of Reed's shooting to make Bibb's prior gun ownership relevant for any purpose other than a propensity to own guns. Moreover, any error was harmless. There is no reasonable probability that the outcome of the trial was affected by exclusion of this evidence. Indeed, Bienhoff's counsel admitted at trial that the evidence was not especially important, stating "the relevance isn't, you know, absolutely the most probative absolutely and that will turn the tide one way of the other, it is relevant." RP 1800. Counsel's assessment was correct. The murder convictions did not rest on Bibb's credibility, most of his testimony was corroborated by Bienhoff, and whether Bibb also possessed a gun at the time had little bearing on whether Bienhoff and Pierce were trying to rob Reed at the time of Reed's death. This is especially so since any gun in Bibb's possession was not the murder weapon, and there

was overwhelming evidence that both Bienhoff and Pierce were armed.

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING WARRINGTON TO TESTIFY AS TO STATEMENTS MADE BY PIERCE, STATEMENTS MADE BY PIERCE'S CO-CONSPIRATOR AND EXTRINSIC EVIDENCE OF LYONS' PRIOR INCONSISTENT STATEMENTS.

Pierce contends that the trial court abused its discretion in allowing Hiram Warrington, an acquaintance of Ray Lyons', to testify as to statements made to him by Lyons several hours after the death of Reed, and a conversation he overheard between Pierce and Lyons a few days after Reed's death. The trial court did not abuse its discretion. Statements made by Pierce were admissible as statements of a party opponent. Statements made by Lyons while he and Pierce discussed how evidence of the crime had been concealed were admissible as statements of a co-conspirator. And finally, statements that Lyons made to Warrington, which Lyons had denied, were properly admitted as prior inconsistent statements relevant to Lyons' credibility.

Hiram Warrington testified that he was well acquainted with Ray Lyons and had lived in Lyons' house for a brief period in 2012,

including at the time of Reed's death. RP 2759-60. He testified that Lyons had guns in the house and that he saw Lyons, Barnes, Bienhoff and Pierce together in Barnes' car just prior to the shooting. RP 2763-77. He testified that Lyons had a gun with him at the time. RP 2763. He testified that he saw Lyons again at approximately two a.m. and that Lyons looked scared and told him "If anybody asks, I was home." RP 2781. As to the following testimony, the jury was instructed not to consider it for the truth of the matter asserted, but for the purpose of impeaching Lyons' credibility. RP 2783. Warrington testified that Lyons told him that he and the others had intended to rob Reed, that Bienhoff stated that he "had to shoot" Reed and that Pierce admitted to shooting at the other vehicle. RP 2783-88. Warrington also testified that, days later, he overheard Lyons ask Pierce if he had "got rid of everything," meaning weapons and clothes, and Pierce respond that he had. RP 2791-92. In Lyons' testimony, which preceded Warrington's, he admitted providing guns to the others, but denied that he was aware of any plan to rob Reed and denied speaking to Warrington after the shooting or speaking with Pierce when Warrington was present. RP 2542-53, 2656, 2659, 2660.

An appellate court can affirm a trial court's evidentiary ruling on any grounds supported by the record. State v. Huynh, 107 Wn. App. 68, 26 P.3d 290 (2001). Testimony regarding statements made by Pierce that Warrington overheard were admissible as admissions of a party opponent pursuant to ER 801(d)(2)(i). That rule provides that a party's statement offered against the party is not hearsay. Although not argued below, statements made by Lyons to Pierce in Warrington's presence were admissible under ER 801(d)(2)(v) because they were statements by a coconspirator during the course of a conspiracy. Statements made to inform a coconspirator about the status of a conspiracy fall within the rule. State v. Israel, 113 Wn. App. 243, 54 P.3d 1218 (2002). "A coconspirator's statement satisfies the 'in furtherance' element ... when the statement is 'part of the information flow between conspirators intended to help each perform his role.'" United States v. Herrero, 893 F.2d 1512, 1528 (7th Cir. 1990) (quoting United States v. Van Daal Wyck, 840 F.2d 494, 499 (7th Cir. 1988)). The conversation between Lyons and Pierce about disposal of evidence was part of the information flow between them to cover up the crime.

The statements made by Lyons to Warrington in the middle of the night immediately after Reed's death were offered only to impeach Lyons' credibility. As such, they did not need to fall within a hearsay exception, since they were not offered for the truth of the matter asserted. A witness may be impeached as to his credibility by a prior inconsistent statement. State v. Garland, 169 Wn. App. 869, 282 P.3d 1137 (2012). If a witness denies making a prior inconsistent statement, extrinsic evidence of the statement is admissible. ER 613. However, such evidence is not admissible unless the witness is afforded an opportunity to explain or deny the prior inconsistent statement. ER 613(b). Lyons testified before Warrington, and denied having made any statements to Warrington after Reed's death, and thus Lyons was afforded the opportunity required by ER 613. RP 2659. The trial court did not abuse its discretion in allowing the statements to impeach Lyons' credibility.

Moreover, any error was harmless. The jury was instructed they could only consider the challenged evidence as evidence of Lyons' credibility. RP 2783. Juries are presumed to follow instructions absent evidence to the contrary. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Interestingly, both the State and defense attempted to rely on Lyons' testimony for some

matters, but argued he was not credible as to other matters.¹⁴

Thus, Lyons' credibility was in some sense universally challenged, and was not central to the defense. Moreover, there was other strong evidence that Lyons was not entirely credible. Most notably, on cross-examination by the defendants, Lyons admitted that he initially denied knowing Barnes, Bienhoff or Pierce. RP 2606. There is no reasonable probability that had the error not occurred, the outcome of the trial would have been different. See State v. Barry, 183 Wn.2d 297, 303, 352 P.3d 161 (2015).

6. THE APPEARANCE OF FAIRNESS DOCTRINE
MAY NOT BE RAISED FOR THE FIRST TIME ON
APPEAL AND THE DOCTRINE WAS NOT
VIOLATED IN THIS CASE.

Pierce contends that a single comment made by the trial court in ruling on the admission of evidence violated the appearance of fairness doctrine, entitling him to a new trial. This claim was not raised below and may not be raised for the first time on appeal. Moreover, the comment at issue was an isolated one, does not clearly convey any racial bias, and even if interpreted as

¹⁴ The State argued "We're not asking you to believe Ray Lyons. His story is rather ludicrous in light of all the evidence, right?" RP 3766. Similarly, Bienhoff argued that Lyons was one of the State's witnesses that "has difficulty with their credibility." RP 3839.

Pierce suggests, evidences no bias against Pierce's racial group. Pierce's claim that he is entitled to a new trial based on the comment must be rejected.

As discussed above, the defendants were allowed to present some evidence of the victim's financial circumstances on the day of his death, but only evidence of "enormous financial pressure." RP 103-05, 121, 130. Prior to trial, the trial court indicated that it would allow evidence that an unknown person had texted the victim prior to his death about a \$300 debt that the victim owed. RP 127; CP 88, 356, 490-91. These texts were found in the victim's cell phone records. CP 490-91. In those records, the person was identified as "Karisma." CP 490-91. During trial, the admission of this evidence was debated further, with the State questioning the probative value because the identity of Karisma was unknown, it was unknown whether he or she was joking or actually threatening the victim, and further, the amount owed was not significant. RP 2910, 2916. The trial court allowed the defense to ask Detective Norton about the victim's exchange with Karisma, and to present the victim's texts to Karisma. RP 2923, 2970-71. In the course of discussing the fact that the identity of Karisma was unknown, the trial court stated:

He's just saying that this one email, which I think we have still got to grab, is from Charisma making use of gangster-type language saying that I want to collect this debt. But we don't have any information, of course, about Mr. Charisma, we don't know whether he's some white guy like me making a threat or somebody who's actually, you know, more likely to be a gangster.

RP 2914-15.¹⁵ Both Bienhoff and Pierce are Caucasian. CP 197.

The general rule is that appellate courts will not consider issues that are raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a)(3). The rule reflects a policy of encouraging the efficient use of judicial resources. State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Only a manifest error affecting a constitutional right may be raised for the first time on appeal. Kirkman, 159 Wn.2d at 926. The exceptions contained in RAP 2.5(a) are to be construed narrowly. Id. at 934. It is insufficient for an appellant to merely assert a constitutional claim. Id. Not all errors that implicate a constitutional right are reviewable. Id. To show manifest error, the defendant must make a plausible showing that the error had practical and identifiable consequences in the trial. State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). If the record on appeal

¹⁵ The gangster-type language the trial court was referring to was "us og's got sportin blood." CP 491.

does not contain sufficient facts to review the claim, the error is not manifest. Id. RAP 2.5(a)(3) bars review unless the record shows a “fairly strong likelihood that serious constitutional error occurred.”

Id.

Pierce’s claim is not a manifest error affecting a constitutional right that may be raised for the first time on appeal. State v. Gentry, 183 Wn.2d 749, 356 P.3d 714 (2015). An appearance of fairness doctrine claim is not a constitutional issue that can be raised for the first time on appeal. Criminal defendants have a due process right to a fair trial by an impartial judge. In re Pers. Restraint of Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). Impartial means the absence of actual or apparent bias. Id. Reviewing courts presume that a judge acts without bias or prejudice. Id. In addition to the due process guarantee of an impartial judge, CJC Canon 3(D)(1) requires a judge to disqualify herself from a proceeding under the appearance of fairness doctrine if the judge’s impartiality might reasonably be questioned. Id. Pierce cites to no authority that the appearance of fairness doctrine is a requirement of due process. In this case, there is no evidence of actual or apparent bias against Pierce that would rise to the level of a due process claim.

Even if this were a constitutional claim, there is no manifest error here. Evidence of a judge's actual or potential bias must be shown in order to establish a violation of the appearance of fairness doctrine. State v. Chamberlin, 161 Wn.2d 30, 37, 162 P.3d 389 (2007). The appearance of fairness doctrine asks whether "a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). The single comment cited by Pierce would not cause a reasonably prudent, disinterested observer to conclude that the judge was biased against Pierce during this trial. The trial court's meaning is not clear from the comment, but "white guy like me" was most likely a self-deprecating remark indicating that given his appearance and age he would not be seen as particularly threatening or intimidating, as opposed to someone who was in fact involved in a criminal street gang. The comment does not convey the opinion that white people are not gang members, as Pierce suggests. Even if this one isolated comment in a trial lasting 25 days would lead a reasonably prudent and disinterested observer to suspect bias, such bias was not directed against Pierce's racial group. There is

insufficient evidence of any actual or potential bias, and thus the appearance of fairness claim fails.

7. PIERCE DID NOT REQUEST AN EXCUSABLE HOMICIDE INSTRUCTION AND THAT DEFENSE WAS LEGALLY UNAVAILABLE IN ANY CASE.

Pierce contends on appeal that the trial court erred by not instructing the jury as to the defense of excusable homicide, pursuant to RCW 9A.16.030. His claim must be rejected. The record reflects that Pierce never proposed or argued for an excusable homicide instruction. Moreover, there was is no legal basis for an excusable homicide instruction because the charge was felony murder based on attempted robbery. RCW 9A.16.030 allows a defense to homicide where the homicide was "committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent." It does not apply to one who is engaged in felonious conduct. Finally, the trial court's instructions allowed Pierce to argue his theory of the case.

Pierce's defense theory was two-fold: that there was no attempted robbery of Precious Reed, and even if Bienhoff had attempted to rob Reed, Pierce had no knowledge of it, and could

not be found to be an accomplice to robbery. RP 3788-89, 3812, 3822.¹⁶ Pierce submitted a packet of proposed instructions to the trial court. CP 104-14. Pierce did not propose WPIC 15.01, the excusable homicide instruction. When Bienhoff argued at the close of evidence that the court should instruct the jury on excusable homicide, counsel for Pierce stated, "I don't have a position." RP 3652. Later, counsel explained "I am staying out of the argument," and "I have no standing, in a way." RP 3667. Pierce took no exceptions to the court's instructions to the jury. RP 3726. "No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made." Scott, 110 Wn.2d at 686 (quoting State v. Kroll, 87 Wn.2d 829, 843, 558 P.2d 173 (1976)). Likewise, CrR 6.15(c) requires an objection to instructions refused. Id. Pierce's claim of error must be rejected outright because he did not request an excusable homicide instruction.

Moreover, there was no legal basis for an excusable homicide instruction in this case. The felony murder doctrine

¹⁶ In closing argument, counsel for Pierce stated, "So I ask you on behalf of Mr. Pierce to find that the Government has not shown that he was an accomplice to a robbery. . . . Mr. Pierce's belief all along is he's just there for a drug deal." RP 3822.

requires the State to prove a killing by the defendant and that the killing was done in connection with the underlying felony, in this case, attempted robbery. State v. Craig, 82 Wn.2d 777, 782, 514 P.2d 151 (1973). The State does not need to prove the state of mind of the defendant at the time of the killing beyond the mens rea of the underlying felony. Id. The State does not need to prove that the homicidal act was committed with malice, design or premeditation. State v. Bolar, 118 Wn. App. 490, 78 P.3d 1012 (2003). “Even if the murder is committed more or less accidentally in the course of the commission of the predicate felony, the participants in the felony are still liable for the homicide.” Id. (citing State v. Leech, 114 Wn.2d 700, 708, 790 P.2d 160 (1990)). Indeed, the very purpose of the felony murder doctrine is to “deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit” in the course of committing enumerated felonies. Leech, 114 Wn.2d at 708. It would defeat the purpose of the doctrine to allow a defense when the defendant claims that he accidentally killed the victim during the course of an attempted robbery.

Excusable homicide is not a legally valid defense to felony murder predicated on attempted robbery in the first degree,

because the State need only prove that the crime of attempted robbery in the first degree was committed, and the victim was killed in the course of that crime. If Pierce and Bienhoff were attempting to rob Reed, as the State charged, then Reed was not killed while they were doing a “lawful act by lawful means, without criminal negligence,” as required for the excusable homicide defense to apply. RCW 9A.16.030.

Pierce’s reliance on State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), and State v. Slaughter, 143 Wn. App. 936, 186 P.3d 1084 (2008), is misplaced. Brightman was alternatively charged with premeditated first degree murder and felony murder based on robbery. Brightman, 155 Wn.2d at 512. The trial court refused to instruct the jury as to excusable homicide or justifiable homicide. Id. On appeal, the state supreme court clarified that the proper defense for an accidental killing is excusable homicide, not justifiable homicide. Id. at 525. The appellate court’s determination that excusable homicide could be argued on remand¹⁷ was proper given that Brightman was charged with premeditated murder. Brightman did not overturn previous Washington cases that hold

¹⁷ The conviction was reversed based on an open courts violation. Brightman, 155 Wn.2d at 518.

that excusable homicide is not a defense to felony murder based on crimes such as burglary or robbery.¹⁸

Similarly, in Slaughter, the defendant was alternatively charged with intentional second degree murder and second degree felony murder based on assault. 143 Wn. App. at 941, 945. The jury was instructed on excusable homicide based on Slaughter's contention that he stabbed the victim accidentally while defending himself from an assault. Id. This Court discussed at length what standard should apply to self-defense when the charge is felony murder based on assault. Id. at 946-47. Slaughter does not support Pierce's claim that excusable homicide is a valid defense to felony murder based on robbery.

Pierce also cites to State v. Harris, 69 Wn.2d 928, 932, 421 P.2d 662 (1966), abrogated by In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), but that case is not helpful to him. In Harris, the state supreme court held that felony murder in the second degree could be predicated on assault. Id. at 933. In reaching its conclusion, the court explained the common law origin of the felony murder doctrine:

¹⁸ It is possible that excusable homicide would be available as a defense to felony murder based on assault, but that issue is not presented in this case.

As early as 1536, it was held that if a person was killed accidentally by one of the members of a band engaged in a felonious act, all could be found guilty of murder.

Id. at 931 (quoting The Felony Murder Doctrine and its application under the New York Statutes, 20 Cornell L.Q. 288, 289; Mansell & Herbert's Case, 2 Dyer 128b (1936)). If the felony murder doctrine was intended to punish the accidental killing of a victim during commission of a felony as murder, then accident cannot be a defense to felony murder.

Finally, the lack of an excusable homicide instruction did not prejudice Pierce or deprive him from arguing his theory of the case. Each side is entitled to have the jury instructed on its theory of the case if there is sufficient evidence to support that theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). If there was no attempted robbery of Reed, as Pierce and Bienhoff argued, then the jury could not have found Pierce and Bienhoff guilty of felony murder based on attempted robbery as charged. If proof of the attempted robbery had failed, the jury would have been required to acquit Bienhoff and Pierce under the trial court's instructions. Similarly, if Pierce had no knowledge of Bienhoff's attempt to rob Reed, as Pierce alternatively argued, then Pierce was not an

accomplice to felony murder under the trial court's instructions.

The two theories of Pierce's defense were adequately covered by the trial court's instructions to the jury.

8. PIERCE'S CHALLENGES TO THE INSTRUCTIONS TO THE ALTERNATE JURORS AND THE COMPOSITION OF THE JURY MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Pierce contends for the first time on appeal that errors occurred in instructing the alternate jurors and in the composition of the jury during deliberations. His claims do not involve manifest errors that may be raised for the first time on appeal, and must be rejected.

In this case, closing arguments were completed at the end of the day on Thursday, October 29, 2015. RP 3898. The court dismissed the two alternate jurors, told them not to discuss the case with anyone, and instructed the jury that they would receive the exhibits on Monday morning, at which time they could begin deliberations. RP 3898. On Friday, Pierce moved to disqualify one of the jurors before deliberations began. RP 3900; CP 167-71. In arguing that the trial court should dismiss the juror on Monday morning, both Bienhoff and Pierce argued that dismissal of the juror

would not be disruptive because deliberations *had not yet begun*.

RP 3908. Specifically, counsel for Bienhoff told the court:

I guess the major reason for it is just because it's the safest thing to do. And that's what we can do to preserve this trial. And at this point, because *the jury has not started deliberating* and the Court has pretty broad discretion at this point, I think whereas after the jury started deliberating, it would be more problematic.

RP 3901. Counsel for Pierce agreed:

And considering that we do have two alternates and *we haven't even started deliberations—they haven't started deliberations*, it just seems like this is the safest, easiest remedy that there is.

RP 3915.¹⁹ Over the State's objection, the trial court granted the motion to disqualify the juror, seated the second alternate juror with the agreement of the parties²⁰ and instructed the jury "the bailiff will bring you the exhibits and you can commence deliberations."

RP 3929.

As outlined previously, a manifest error requires a plausible showing that the error had practical and identifiable consequences in the trial. Lamar, 180 Wn.2d at 583. When the record on appeal

¹⁹ Email correspondence from the court to the parties on Friday morning indicates that the parties agreed to have both alternate jurors report to the jury room on Monday morning and that jurors would be told not to start deliberating. CP 169. This was likely done by the bailiff off the record.

²⁰ Both alternates were present, but one had vacation plans starting three days later. RP 3924-25.

does not contain sufficient facts to review the claim, the error is not manifest. Id. RAP 2.5(a)(3) requires a “fairly strong likelihood that serious constitutional error occurred.” Id.

Pierce claims for the first time on appeal that on Thursday afternoon the alternate jurors should have been additionally instructed not to research the law or the facts. However, Pierce made no request that the alternate jurors be so instructed. The jurors had already been so instructed at the beginning of trial. RP 1034, 1036. There is no evidence that the alternate juror who was placed on the jury on Monday morning had done any outside research. The record does not show a fairly strong likelihood that serious constitutional error occurred. Pierce’s claim is not a manifest error affecting a constitutional right that may be raised for the first time on appeal.

Pierce also claims that the jury began deliberating first thing on Monday morning, with the alternates present, and were not instructed to disregard previous deliberations and start anew when the alternate replaced the juror that was dismissed. However, there is simply no evidence that the jury began deliberating prior to the alternate juror being placed. Indeed, all the parties agreed on the record that the jury had not started deliberations. The error claimed

on appeal is not manifest because there is *no* indication that the jury began deliberations prematurely. Pierce's argument is based on speculation unsupported by the record and may not be raised for the first time on appeal.

9. THE TRIAL COURT PROPERLY CALCULATED
PIERCE'S OFFENDER SCORE.

Pierce contends that his offender score was miscalculated. His argument is based on the assumption that his two prior juvenile non-violent dispositions were erroneously counted as one point each. The record reveals that this claim is without merit. Under the applicable scoring rule, Pierce's six prior adult non-violent felony convictions, one prior adult violent felony conviction and two prior juvenile non-violent dispositions resulted in a score of nine, as found by the trial court. There was no error below.

Pierce was convicted of murder in the first degree. CP 192. Murder in the first degree is a serious violent offense pursuant to RCW 9.94A.030(46)(a)(i). Pursuant to RCW 9.94A.525(9), serious violent offenses are scored as follows:

If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, *two points for each prior adult and juvenile violent conviction* (not

already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(emphasis added). One of Pierce's prior convictions was an adult violent conviction: his 2003 conviction for assault in the second degree. CP 198.²¹ Thus, the nine prior convictions and dispositions in Pierce's criminal history, reflected in Appendix B of the Judgment and Sentence, resulted in an offender score of nine, as follows:

Date	Crime	Score
2013	Adult residential burglary	1
2012	Adult possession of stolen vehicle	1
2008	Adult possession of stolen vehicle	1
2008	Adult possession of stolen property	1
2003	Adult attempt to elude pursuing police	1
2003	Adult theft in the second degree	1
2003	Adult assault in the second degree	2
2001	Juvenile theft in the second degree	½
2001	Juvenile taking a motor vehicle without permission	½
	Total	9

²¹ RCW 9.94A.030(55)(viii) defines assault in the second degree as a violent offense.

The trial court properly calculated Pierce's offender score to be nine.

10. THE TRIAL COURT PROPERLY IMPOSED \$600 IN MANDATORY LEGAL FINANCIAL OBLIGATIONS.

Pierce contends that the trial court erred in imposing the \$500 mandatory victim penalty assessment and the mandatory \$100 DNA collection fee. These were the only legal financial obligations other than restitution that were imposed by the trial court. CP 194. The trial court properly imposed these mandatory fees.

In State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), the state supreme court held that a trial court must make an individualized inquiry into the defendant's ability to pay before imposing *discretionary* fees. The court allowed Blazina to challenge the imposition of these fees for the first time on appeal. Id. at 834-35. However, the holding of Blazina applies only to discretionary fees, not to mandatory fees. State v. Mathers, 193 Wn. App. 913, 376 P.3d 1163, review denied, 186 Wn.2d 1015 (2016).

In this case, the trial court imposed the \$500 victim penalty assessment pursuant to RCW 7.68.035(1)(a), which states that “when any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.”²² Similarly, the trial court imposed the \$100 DNA collection fee pursuant to RCW 43.43.7541, which states, “every sentence imposed for a crime specified in RCW 43.43.754²³ must include a fee of one hundred dollars.” The words “shall” and “must” are presumptively imperative, and create a duty rather than confer discretion.

Blazina, 182 Wn.2d at 838; State v. Brewster, 152 Wn. App. 856, 218 P.3d 249 (2009). Thus, the legal financial obligations imposed here were mandatory, not discretionary.

Pierce cites to RCW 10.01.160 to argue that the trial court must make an individualized determination of the defendant’s ability to pay before imposing “costs.” That statute applies only to “costs,”

²² The assessment is \$500 for a felony. RCW 7.68.035(1)(a).

²³ All felons are included in RCW 43.43.754, mandating collection of a biological sample for purposes of DNA identification analysis.

which in the statute are defined as the “expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2).

The trial court did not impose any costs on Pierce.

Pierce also argues that the imposition of these mandatory fees violates substantive due process. However, this Court has held that such a claim is not ripe for review until the State seeks to enforce collection of the mandatory fees. State v. Lewis, 194 Wn. App. 709, 715, 379 P.3d 129 (2016); State v. Shelton, 194 Wn. App. 660, 671, 378 P.3d 230 (2016). The other divisions of this Court have either agreed with that approach or rejected the substantive due process claim on its merits. State v. Seward, 196 Wn. App. 579, 585-86, 384 P.3d 620 (2016); Mathers, 193 Wn. App. at 928; State v. Malone, 193 Wn. App. 762, 767, 376 P.3d 443 (2016); State v. Stoddard, 192 Wn. App. 222, 228-29, 366 P.3d 474 (2016). Pierce’s challenge to the mandatory legal financial obligations imposed by the trial court should be similarly rejected.

D. CONCLUSION

Pierce's conviction and sentence should be affirmed. The State does not intend to seek appellate costs.

DATED this 5th day of May, 2017.

Respectfully submitted,

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By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Marla Zink, the attorney for the appellant, at Marla@washapp.org, containing a copy of the Brief of Respondent, in State v. Karl Emerson Pierce, Cause No. 74363-5-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 5 day of May, 2017.

A handwritten signature in black ink, appearing to be "J. [unclear] [unclear]", written over a horizontal line.

Name:
Done in Seattle, Washington

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

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