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Court of Appeals
Division I
State of Washington

No. 96345-2
(consolidated with No. 96344-4

NO. 74519-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BIENHOFF,

Appellant.

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

The Honorable Douglas A. North, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENTS IN REPLY</u>	1
1. IN DIRECT VIOLATION OF <u>STATE V. TOWNSEND</u> , THE JURY WAS INFORMED OVER DEFENSE OBJECTION THAT THE DEATH PENALTY WAS NOT IN PLAY AND REVERSAL IS THEREFORE REQUIRED.....	1
2. THE TRIAL COURT INSTRUCTED THE JURY THAT RAY LYONS' ORAL ASSERTIONS TO HIRAM WARRINGTON COULD ONLY BE CONSIDERED FOR PURPOSES OF IMPEACHING LYONS CONSTITUTED A UNCONSTITUTIONAL COMMENT ON THE EVIDENCE REQUIRING REVERSAL.	4
3. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON BIENHOFF'S THEORY OF THE CASE REQUIRES REVERSAL.	9
4. THE FAILURE TO INSTRUCT THE JURY ON HOW TO REACH CONSTITUTIONAL VALID UNANIMOUS VERDICTS CONSTITUTES STRUCTURAL ERROR FOR WHICH REVERSAL IS REQUIRED.....	11
B. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>1000 Virginia Ltd. Partnership v. Vertecs Corp.</u> 158 Wn.2d 566, 146 P.3d 423 (2006).....	3
<u>Hamilton v. Dept. of Labor and Indus.</u> 111 Wn.2d 569, 761 P.2d 618 (1988).....	5, 6, 7
<u>Moore v. Mayfair Tavern, Inc.</u> 75 Wn.2d 401, 451 P.2d 669 (1969).....	5, 7
<u>Newby v. Gerry</u> 38 Wn. App. 812, 690 P.2d 603 (1984).....	6
<u>State v. Becker</u> 132 Wn.2d 54, 935 P.2d 1321 (1997).....	8, 9
<u>State v. Brightman</u> 155 Wn.2d 506, 122 P.3d 150, 160 (2005).....	9, 10
<u>State v. Fernandez-Medina</u> 141 Wn.2d 448, 6 P.3d 1150 (2000).....	10, 11
<u>State v. Gore</u> 101 Wn.2d 481, 681 P.2d 227 (1984).....	3
<u>State v. Hairston</u> 133 Wn.2d 534, 946 P.2d 397 (1997).....	3
<u>State v. Jackman</u> 156 Wn.2d 736, 132 P.3d 136 (2006) as corrected (Feb. 14, 2007).....	8
<u>State v. Jussila</u> 197 Wn. App. 908, 392 P.3d 1108 (2017).....	3
<u>State v. Lamar</u> 180 Wn.2d 576, 327 P.3d 46 (2014),.....	11, 12

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Levy</u> 156 Wn.2d 709, 132 P.3d 1076 (2006).....	8
<u>State v. Riley</u> 137 Wn.2d 904, 976 P.2d 624 (1999).....	11
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	2
<u>State v. Townsend</u> 142 Wn.2d 838, 15 P.3d 145 (2001).....	1, 2, 3
<u>Wilber v. Department of Labor & Indus.</u> 61 Wash.2d 439, 378 P.2d 684 (1963).....	5

FEDERAL CASES

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

RULE, STATUTES AND OTHER AUTHORITIES

Const. Art. IV, § 16.....	9
WPIC 1.02.....	1

A. ARGUMENTS IN REPLY¹

1. IN DIRECT VIOLATION OF STATE V. TOWNSEND,² THE JURY WAS INFORMED OVER DEFENSE OBJECTION THAT THE DEATH PENALTY WAS NOT IN PLAY AND REVERSAL IS THEREFORE REQUIRED.

The State contends Bienhoff's jury was never informed the death penalty was not a punishment option if they convicted. Brief of Respondent (BOR) at 13-16. The State reaches this conclusion by ignoring the sequence of events during voir dire, as set forth in detail in Bienhoff's opening brief. Brief of Appellant (BOA) at 55-59. That recitation of the facts reveals the trial court failed to follow the recommended advisement for such circumstances as set forth in WPIC 1.02.³ It also shows the court failed to advise Juror 20, who revealed he/she understood the two-step deliberative process required for death penalty cases, not to inform others in the venire about that knowledge. IRP 830. Coupled with Pierce's counsel's recognition that the venire had

¹ This reply brief addresses four of the State's arguments in response, and relies on the arguments presented in the opening brief as the State's remaining three arguments in response.

² 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001)

³ WPIC 1.02 provides: "You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful."

been informed service would be completed by the chosen jury once guilt or innocence was determined, there can be no question the entire venire was aware the death penalty was not in play. 1RP 836-37, 844.

The issue then comes down to whether there was prejudice to Bienhoff, which there was. There is a reasonable probability knowing the death penalty was not a punishment option made it easier for the jury to convict. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland v. Washington, 466 U.S. 668, 693-94, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

Absent knowledge about whether the death penalty was in play, Bienhoff's jury would likely have been more discriminating about how it viewed the evidence, set the beyond a reasonable doubt burden of the State at a higher level, and enforced the presumption of innocence to its fullest, which would have created a better chance of acquittal, or at least a hung jury. See Townsend, 142 Wn.2d at 847 ("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.").

Bienhoff was involved in Reed's death. But who was culpable for that death was not obvious from the evidence. There was ample evidence

Reed introduced the gun instead of Bienhoff, and that it was Bibb who fired numerous .45 caliber rounds at the scene instead of Pierce. Evidence of Bienhoff's guilt was far from overwhelming. Knowing Bienhoff would not be put to death if convicted, there is a reasonable probability at least some jurors decided to convict because there was evidence of guilt, Reed was dead, and someone should be punished. Each deliberating juror's decision to convict was made easier by the trial court's mishandling of the punishment issue during voir dire. This Court should therefore reverse.

Finally, the State asks this Court to "overrule" Townsend, claiming it is "incorrect and harmful." BOR at 20-21. But it is well settled;

This appellate court remains bound by a decision of the Washington Supreme Court. State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 397 (1997); State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). We must follow Supreme Court precedence, regardless of any personal disagreement with its premise or correctness. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006); State v. Gore, 101 Wn.2d at 487. When the Court of Appeals fails to follow directly controlling authority by this court, it errs. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wash.2d at 578; State v. Gore, 101 Wash.2d at 487.

State v. Jussila, 197 Wn. App. 908, 931, 392 P.3d 1108 (2017). This Court should ignore the State's invitation to exceed its authority.

2. THE TRIAL COURT INSTRUCTED THE JURY THAT RAY LYONS' ORAL ASSERTIONS TO HIRAM WARRINGTON COULD ONLY BE CONSIDERED FOR PURPOSES OF IMPEACHING LYONS CONSTITUTED A UNCONSTITUTIONAL COMMENT ON THE EVIDENCE REQUIRING REVERSAL.

The trial court improperly commented on the evidence when it instructed the jury,

Ladies and gentlemen, some of this evidence here, evidence that Mr. Warrington's testified to is being admitted by the Court for a limited purpose.

Testimony regarding any oral assertion made by Ray Lyons to Hiram Warrington may be considered by you only for the purpose of impeaching Ray Lyons' credibility. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

1RP 2783.

As correctly noted by the defense, this advisement constitutes a judicial comment on the evidence on a contested factual issue because it informs the jury that "Ray Lyons" made "oral assertions" to Warrington, despite Lyons' testimony to the contrary. 1RP 2659-60, 2713-14. The defense proposed curing the problem by adding "alleged" before "oral assertions," or "allegedly" after. 1RP 2714-15. The prosecution objected and the court refused to add the word, preferring instead to give the prosecution's version. 1RP 2716-17, 2622-23.

In its response, the State first argues the oral jury instruction was not a comment on the evidence because the use of the word “any” before “oral assertions” was sufficient to leave the question of whether assertions were made by Lyons to Warrington up to the jury. BOR at 34-38. The State relies on two civil appellate decisions for this proposition, Hamilton v. Dept. of Labor and Indus., 111 Wn.2d 569, 761 P.2d 618 (1988) and Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 451 P.2d 669 (1969). Neither supports the State’s position.

Hamilton involved the State’s appeal of a jury verdict in favor of Larry Hamilton for disability benefits as a result of injuries suffered while employed by the Omak Police Department. 111 Wn.2d at 570. The State claimed Instruction 11 constituted an unconstitutional comment on the evidence by stating:

In cases under the Industrial Insurance Act of the State of Washington, special consideration should be given to the opinion of the plaintiff’s attending physician.

Id.

The Washington Supreme Court noted,

The industrial insurance act is a unique piece of legislation; it is “remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries.” (Citations omitted.) Wilber v. Department of Labor & Indus., 61 Wash.2d 439, 446, 378 P.2d 684 (1963). The case law allowing special consideration of the attending physician’s testimony supports the purpose of the act which

is to promote benefits and to protect workers. Newby v. Gerry, 38 Wn. App. 812, 814, 690 P.2d 603 (1984).

111 Wn.2d at 572–73. Thus, the complained of instruction was merely a correct statement of the law rather than a comment on the evidence. 111 Wn.2d at 572. The Court also noted Instruction 12 negated the State’s additional claim that Instruction 11 was misleading and confusing, because Instruction 12 provides:

You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that doctor, the reasons given for the opinion, the sources of the doctor's information, together with the factors already given you for evaluating the testimony of any other witness.

111 Wn.2d at 573.

Thus, Hamilton addresses a comment-on-the-evidence claim in the context of the credibility of a plaintiff’s doctor in an Industrial Insurance Act claim, an act which “should be liberally construed in favor of the beneficiaries.” 111 Wn.2d at 572. Hamilton does not address the issue here, which deals not with credibility, but instead whether the trial court improperly informed the jury it thought Lyons made the incriminating comments after the shooting attributed to him by Warrington. BOA at 2, 62. Hamilton does not advance the State’s position here. Nor did Beinhoff’s jury have the benefit of a further clarifying instruction like the

jury in Hamilton, got informing them it was up to them to decide if Lyons made the statements attributed him by Warrington.

In Moore, the plaintiff claimed a tavern owner was negligent for failing to eject Harold Streeter from the tavern before Streeter engaged Danny Moore in a confrontation, and eventually shot Moore three times. 75 Wn.2d at 402. A jury rejected Moore's claim and he appealed, claiming in part that the trial court unlawfully commented on the evidence via an oral jury instruction. 75 Wn.2d at 402, 408-09. The instruction was given after the defendant's medical expert testified about comments Streeter made about his history and mental problems and Moore objected on hearsay grounds. In response, the trial court instructed the jury "that it should consider the testimony about the statements, not as evidence of the truth of the statements but simply as evidence that the statements were made." 75 Wn.2d at 408. In rejecting Moore's claim, the Court noted the instruction "was a correct statement of the law," and that it did not indicate the court found the medical expert's testimony "credible," finding it merely correctly advising the jury on the limited application of that evidence. 75 Wn.2d at 408-09.

Unlike in Hamilton and Moore, here the issue is raised in the context whether the statements attributed to Lyons by Warrington were

ever made, not just their credibility. As such, Bienhoff's case is more like State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997).

In Becker, a disputed factual issue was whether a "Youth Education Program" was a school. 132 Wn.2d at 56. The special verdict form asked: was the defendant "within 1000 feet of the perimeter of school grounds, to wit: Youth Employment Education Program School at the time of the commission of the crime." 132 Wn.2d at 64. The Supreme Court held that the special verdict form effectively removed a disputed issue of fact from the jury's consideration, relieving the State "of its burden to prove all elements of the sentence enhancement statute." 132 Wn.2d at 65. Accord State v. Jackman, 156 Wn.2d 736, 742-44, 132 P.3d 136 (2006), as corrected (Feb. 14, 2007) (inclusion of victims' birth dates in "to convict" jury instructions, where crimes required victims to be minors, was an impermissible comment on the evidence); State v. Levy, 156 Wn.2d 709, 716, 718-23, 132 P.3d 1076 (2006) (jury instructions defining "building" as the apartment at issue and "deadly weapon" as a crowbar were impermissible comments on the evidence).

As in Becker, the trial court here "effectively removed" from the jury's consideration the factual issue of whether Lyons ever actually made the remarks attributed to him by Warrington. And despite the State's claims to the contrary (BOR at 52-53), this was not harmless error.

Bienhoff denied intending to rob Reed, claiming instead it was Reed who tried to rob him at gunpoint and was accidentally shot and killed during a struggle to control Reed's gun. 1RP 3452-55, 3523-30, 3536-37. Lyons denied knowing what the plan was that evening, and denied talking with Warrington about the incident. 1RP 2512, 2597-98, 2659-60, 3281.

Despite a dispute whether the conversations ever occurred, the court told the jury they had. This interfered with the jury's duty to resolve factual issues. By doing so, the court essentially told the jury Lyons and Pierce were lying when they denied the conversations occurred, and so was Bienhoff when he denied any intent to rob Reed. 1RP 3536.

With conflicting evidence about who intended to rob who, resolving a disputed factual issue by judicial fiat was error. This error struck at the heart of the defense because it unfairly discredited the testimony of Lyons, Pierce and Bienhoff. The violation of Article 4, § 16 requires reversal of Bienhoff's conviction. Becker, 132 Wn.2d at 65.

3. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON BIENHOFF'S THEORY OF THE CASE REQUIRES REVERSAL.

Despite the decision in State v. Brightman, 155 Wn.2d 506, 526, 122 P.3d 150, 160 (2005), the State persists in claiming "there is no legal basis for an excusable homicide instruction because the charge was felony murder based on an attempted robbery." BOR at 44. This Court should

reject the State myopic view of the relevant law, conclude Bienhoff was prejudiced by the trial court err, and reverse and remand for a new trial.

As noted Bienhoff's opening brief, Brightman makes clear that excusable homicide can apply in the context of the felony murder charge based on robbery. BOA at 53-54, citing Brightman, 155 Wn.2d at 526. As such, the premise upon which the State's arguments rest is legally unsound.

The State also addresses the issue raised, not from the correct standpoint of the defense theory of the case, but instead from the standpoint of the State's theory of the case. See State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (In determining whether the evidence supports giving an instruction, appellate courts view the evidence in the light most favorable to the requesting party). When correctly assessed, it is clear Bienhoff was entitled to have the jury instructed on his theory of excusable homicide.

Bienhoff's theory of the case was that he had two pounds of marijuana to sell Reed when they met at Woodland Park. When he rejected Reed's request to front the marijuana, Reed tried to rob him of the marijuana at gun point. In response, Bienhoff acted in self-defense by wrestling Reed for control of the gun to prevent the robbery and stop Reed

from shooting him, and in the process the gun accidentally discharged into Reed, who died as a result.

Unfortunately, the jury was never given the instructions necessary to show there was a legal basis to accept Bienhoff's defense theory. Because he was entitled to such instructions, reversal is required. Fernandez-Medina, 141 Wn.2d at 461; State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999).

4. THE FAILURE TO INSTRUCT THE JURY ON HOW TO REACH CONSTITUTIONAL VALID UNANIMOUS VERDICTS CONSTITUTES STRUCTURAL ERROR FOR WHICH REVERSAL IS REQUIRED.

The State claim's the decision in State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014), constitutes binding authority rejecting Bienhoff's claim his jury was never informed how to deliberate properly. The State reaches this conclusion by noting the Lamar decision states that the original 12 deliberating jurors were instructed "to deliberate together in the constitutionally required manner." BOR at 55, citing Lamar, 180 Wn.2d at 585. What the State fails to acknowledge, however, is that this statement is made only in the context of setting forth the actual issue in Lamar, which was whether the trial court failed to instruct the subsequent reconstituted jury to begin deliberations anew. 180 Wn.2d at 585. The Lamar Court did not directly address the issue raised by Bienhoff, about

ensuring all deliberations involve all 12 jurors. As such, although the Lamar decision is extremely relevant to Bienhoff's challenge, it does not, as the State claims, resolve the issue against him, and instead supports his position.

The issue here is unique given the context in which it is raised. Instead of challenging how a reconstituted jury must be instructed, which is how the issue usually arises, Bienhoff has identified a significant omission in the WPIC instructions. As noted in the opening brief, although there are recommended instructions informing jurors that all deliberations must occur in the jury room, none inform them that all 12 jurors must be present at all times deliberations are in progress, which, as the State concedes (BOR at 52), is what the Washington constitution requires. BOA at 71-73. As such, although Lamar is informative on the broader issue, it does not serve to defeat Bienhoff's claim of an inadequately instructed jury. To the contrary, it provides the foundation to support his claim.

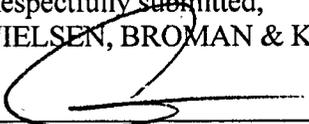
Notably absent from the State's brief is any response to Bienhoff's structural error claim. See BOA at 77-80. To the extent this constitutes a concession by the State, Bienhoff's urges this Court to accept that concession.

B. CONCLUSION

For the reasons stated here and on the opening brief, this Court should reverse and remand for a new, fair trial.

DATED this 5th day of June 2017.

Respectfully submitted,
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