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No. 96345-2  
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NO. 74519-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BIENHOFF,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. Whether the trial court commented on the evidence in issuing a limiting instruction where the instruction did not convey whether the court believed the testimony.

7. 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.

8. Whether excusable homicide was legally unavailable as a defense because accident is not a defense to felony murder based on attempted robbery.

9. 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.

10. Whether WPIC 1.04 properly communicates the requirement that a unanimous verdict result from the jurors' common deliberations?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Michael Bienhoff was charged by amended information with felony murder in the first degree predicated on attempted robbery in the first degree. CP 411-12. He was tried with co-defendant Karl Pierce. The jury found both Pierce and Bienhoff guilty as charged. CP 475. Bienhoff was sentenced to life imprisonment without parole after the trial court found that he was a persistent offender pursuant to RCW 9.94A.570. CP 500-07.

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.<sup>1</sup> 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

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<sup>1</sup> Most, but not all of the volumes of the verbatim report of proceedings are consecutively paginated. 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.

Woodland Park because he believed that Bienhoff had a large amount of marijuana to sell. RP 1614-16, 3233, 3428. The dispute 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 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.<sup>2</sup> 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 or he 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 claimed that he and Reed struggled over a gun that Reed pulled and Reed was shot. Ex. 92 and Pretrial Ex. 1 at 42.

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<sup>2</sup> Pierce admitted in cross-examination that he was the person that Howard saw. RP 3285.

At trial, he testified that he agreed to sell Reed two pounds of marijuana, and that he obtained the marijuana from someone named "Vlady." RP 3353, 3358, 3428-29, 3431. He denied that his February 17<sup>th</sup> text to Wax was about Reed, claiming it pertained to another drug deal.<sup>3</sup> 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.<sup>4</sup>

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.

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<sup>3</sup> Bienhoff testified that he purchased the two pounds of marijuana from "Vlady" for \$1800 a pound, and was intending to sell it to Reed for \$2200 a pound, which would have resulted in an \$800 profit. RP 3428. Thus, the February 17 text strongly corroborated the State's theory that Bienhoff intended to rob Reed of the money he brought to purchase marijuana.

<sup>4</sup> 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 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 him calling or texting any such person or an associate. 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. 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. BIENHOFF WAS NOT PREJUDICED BY THE TRIAL COURT'S COMMENTS REGARDING PUNISHMENT.

Bienhoff contends that the trial court erroneously informed the jury that his case did not involve the death penalty. Bienhoff 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 Bienhoff's punishment. Moreover, even

if the trial court's comments were somehow improper, Bienhoff was not prejudiced because there is no indication that the jury disregarded its instructions or failed to take its duty seriously.

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 the 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, other jurors expressed general confusion about the process, and at least one juror indicated that he or she knew whether this was a death penalty case. 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.<sup>5</sup> Eventually, the trial court instructed the potential jurors as follows, without objection:

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<sup>5</sup> 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.

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.

Bienhoff'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. As in Clark, 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.

Moreover, 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).

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

Bienhoff 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). 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 *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. Exclusion Of Some Of Reed's Financial Circumstances.

Bienhoff 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. 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 vacation to Las Vegas and to Great Wolf Lodge,<sup>6</sup> 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

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<sup>6</sup> Great Wolf Lodge is a hotel with an indoor water park located in Grand Mound, Washington.

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 under “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 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 (Chadbourne 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 (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 had no income and debt 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 in order to resell it at a profit. 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. RP 1142.

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, vacations and lifestyle 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.

b. Exclusion Of A Prior Robbery Accusation  
Against Reed.

Bienhoff 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, 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.

Bienhoff 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, Bienhoff 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. Bienhoff 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 to the transaction that resulted in Reed’s death other than the use of a gun. 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.

c. Exclusion Of Bibb’s Past Gun Ownership.

Bienhoff contends that the trial court abused its discretion in excluding the fact that Bibb owned guns in the past. However, as

with the trial court's other rulings pursuant to ER 404(b), the trial court properly exercised its discretion.

According to the defendants' 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.<sup>7</sup> 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.<sup>8</sup> The State agreed that it was proper for the defense to ask Bibb about his gun ownership 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

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<sup>7</sup> 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.").

<sup>8</sup> 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.

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.<sup>9</sup> 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 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.

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<sup>9</sup> In Hartzell, ballistics analysis showed that the bullets were fired from those guns. 156 Wn. App. at 927.

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 or the other, it is relevant." RP 1800. Counsel's assessment was correct. The murder convictions did not rest on Bibb's credibility, as 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.

3. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE.

Bienhoff contends that the trial court made an unconstitutional comment on the evidence in giving a limiting instruction as to Hiram Warrington's testimony. This claim is without merit. The limiting instruction did not convey the trial court's attitude toward the evidence or the court's opinion of Warrington's credibility, and was not a comment on the evidence.

Hiram Warrington testified that he was well acquainted with Ramon 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 immediately 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, it was admitted not 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 responded that he had. RP 2791-92. At the defendant’s request, the trial court instructed the jury that they could only consider the challenged evidence as evidence of Lyons’ credibility. RP 2783. The court stated:

Testimony regarding any oral assertions made by Ray Lyons to Hiram Warrington may be considered by you only for the purpose of impeaching Ray Lyons’ credibility.

RP 2783.

The parties had debated the proper wording of the limiting instruction. RP 2713. The trial court explicitly stated that “I don’t want to be making a comment on the evidence.” RP 2713. Bienhoff agreed to the wording that the State proposed for the limiting instruction, but wanted the word “alleged” be added as follows: “Testimony regarding any *alleged* oral assertions made by Ramon Lyons to Hiram Warrington may be considered by you only for the purpose of impeaching Ramon Lyons’ credibility.” RP 2714; CP 423. Defense counsel argued that without the word “alleged,” the court was endorsing that the assertions were made, which the

defendants disputed. RP 2721-22. The trial court concluded that wording of the State's proposed limiting instruction, "any oral assertions," was not a comment on the evidence because it did not instruct the jury that the assertions were made. RP 2722-23.

The Washington Constitution provides that, "judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH. CONST. art. IV, § 16. A trial court violates this prohibition when it instructs the jury as to what weight to give certain evidence. "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed or disbelieved the particular testimony in question." Hamilton v. Dept. of Labor and Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988). Appellate courts review whether a jury instruction amounts to a comment on the evidence *de novo*. State v. Butler, 165 Wn. App. 820, 835, 269 P.3d 315 (2012).

In Hamilton, the trial court instructed the jury to give "special consideration" to the opinion of the plaintiff's attending physician. Id. at 570. On appeal, the state supreme court held that the instruction was not an unconstitutional comment on the evidence

because it did not convey the personal opinion of the trial judge or say that the judge personally believed or disbelieved the testimony. Id. at 571.

In Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 408, 451 P.2d 669 (1969), the trial court orally instructed the jury that a doctor's testimony about statements made to him by a patient should be considered not for the truth of the statement but as evidence that the statements were made. The state supreme court rejected appellant's claim that the oral instruction was a comment on the evidence. The court explained:

When the court told the jury that it could consider the doctor's testimony as evidence that the statements were made, it was not passing upon the credibility of the doctor's testimony but was simply advising the jury concerning the limited purpose for which the evidence could be considered. Whether or not the doctor's testimony was to be believed was a question for the jury. The court expressed no appraisal of the truth or falsity of this testimony. A judge may refer to the evidence so long as he does not explain or criticize the evidence, or assert that a fact is proven thereby, and so long as the jury is made aware that the fact is for it to determine.

Id. at 409.

Likewise, in this case, the wording of the limiting instruction did not convey the trial court's personal opinion or tell the jury whether the court believed Warrington's testimony. Use of the

phrase “testimony regarding any oral assertions” did not convey that the trial judge found Warrington credible. Indeed, it plainly left the jury to determine whether the oral assertions that Warrington testified to were in fact made.

Even if this bordered on a comment on the evidence, it was not prejudicial. When a trial court unconstitutionally comments on the evidence, reversal is not required if the State can show the defendant was not prejudiced. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). The court’s instruction was not prejudicial because the jury was instructed that it could only use Warrington’s testimony about Lyons’ assertion only for judging Lyons’ credibility. 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.<sup>10</sup> 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

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<sup>10</sup> 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.

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 possibility that had the trial court used the phrase “any *alleged* oral assertions” instead of “any oral assertions” the outcome of the trial would have been different. See State v. Barry, 183 Wn.2d 297, 303, 352 P.3d 161 (2015).

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

Bienhoff 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 the defendants suggest, evidences no bias against Bienhoff’s racial group. Bienhoff’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, with the State questioning the probative value because the identity of Karisma was unknown, it was unknown whether he or she was actually threatening Reed or joking, and further, the amount owed was not significant. RP 2910, 2916. Nonetheless, 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 [sic] 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 [sic], 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.<sup>11</sup> Both Bienhoff and Pierce are Caucasian. CP 14.

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 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

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<sup>11</sup> The gangster-type language the trial court was referring to was "us og's got sportin blood." Pierce CP 491.

“fairly strong likelihood that serious constitutional error occurred.”

Id.

Bienhoff’s claim cannot 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. Bienhoff 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 Bienhoff 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 Bienhoff would not cause a reasonably prudent, disinterested observer to conclude that the judge was biased against Bienhoff 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 Bienhoff 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 Bienhoff’s racial group. There is insufficient evidence of any actual or potential bias, and thus the appearance of fairness claim fails.

5. EXCUSABLE HOMICIDE WAS LEGALLY UNAVAILABLE AND THE JURY INSTRUCTIONS ALLOWED BIENHOFF TO ARGUE HIS THEORY OF THE CASE THAT HE NEVER ATTEMPTED TO ROB THE VICTIM.

Bienhoff contends 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. There 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." The defense does not apply to one who is engaged in felonious conduct. The trial court's instructions allowed Bienhoff to argue his theory of the case that he was not attempting to rob Reed, and was not guilty of felony murder.

Bienhoff first requested that the jury be instructed on self-defense pursuant to WPIC 17.02. CP 427. Bienhoff then withdrew his request for that instruction, and instead requested an excusable homicide instruction, arguing that he had used non-lethal force in self-defense and the shooting occurred by accident. RP 3648-49. Defense counsel agreed with the State that if the jury

found that Bienhoff was not attempted to rob Reed, then “that’s really the end of their inquiry.” RP 3667. He nonetheless argued that excusable homicide was an available defense because there was “an act done by lawful means.” RP 3668. The trial court, noting that there could be no lawful use of force during the course of a robbery because self-defense is not a defense to robbery, declined to give an excusable homicide instruction. RP 3679.

The felony murder doctrine 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. For example, in 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), 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:

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. 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.

Bienhoff's reliance on State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), 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 remand<sup>12</sup> was proper given that Brightman was charged with premeditated murder.

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<sup>12</sup> The conviction was reversed based on an open courts violation. Brightman, 155 Wn.2d at 518.

Brightman did not overturn previous Washington cases that hold that excusable homicide is not a defense to felony murder based on crimes such as burglary or robbery.<sup>13</sup>

Finally, the lack of an excusable homicide instruction did not prejudice Bienhoff 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 Bienhoff argued, then the jury could not have found Bienhoff and Pierce guilty of felony murder based on attempted robbery. 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. Bienhoff's theory was adequately covered by the trial court's instructions to the jury.

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<sup>13</sup> 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.

6. BIENHOFF'S CHALLENGE TO THE INSTRUCTIONS TO THE ALTERNATE JURORS MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Bienhoff contends for the first time on appeal that the trial court erred in instructing the alternate jurors prior to deliberations. His claim does not involve a manifest error 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 432-36. On Monday morning, both Bienhoff and Pierce argued for dismissal of the juror. RP 3901-15.<sup>14</sup> 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 parties<sup>15</sup> and instructed the

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<sup>14</sup> 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 432-36. This was likely done by the bailiff off the record.

<sup>15</sup> Both alternates were present, but one had vacation plans starting three days later. RP 3924-25.

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. State v. Lamar, 180 Wn.2d at 583. When the record on appeal 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.

Bienhoff 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, neither Pierce nor Bienhoff made any 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. Bienhoff’s claim is not a manifest error affecting a constitutional right that may be raised for the first time on appeal.

7. THE TRIAL COURT PROPERLY INSTRUCTED THE JURORS ON THE REQUIREMENT THAT ANY

VERDICT BE THE UNANIMOUS RESULT OF  
COMMON DELIBERATIONS.

Bienhoff argues for the first time on appeal that the trial court violated his constitutional right to a unanimous verdict by not specifically instructing the jurors that deliberations must involve all 12 jurors at all times. This claim should be rejected. The Washington State Supreme Court has already determined that WPIC 1.04, which was given in this case, is sufficient to apprise the jury of the need to deliberate together in the manner required by the constitutional right to a unanimous verdict.

At the start of trial, the court instructed the jury as suggested by WPIC 4.61, "Do not discuss this case among yourselves or with anyone else. Do not permit anyone to discuss it with you or in your presence." RP 1033. At the close of evidence, the court instructed the jury as set forth in WPIC 1.04, which states:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow

jurors. Nor should you change your mind just for the purpose of reaching a verdict.

CP 444. Bienhoff made no objection to this instruction, and did not propose any additional instructions to the jury regarding deliberations. RP 3726. At no point did Bienhoff request an instruction more specifically stating that deliberations must involve all 12 jurors at all times. There is no evidence in the record that the jury ever deliberated without all 12 jurors present. When polled, each member of the jury affirmed that the verdict announced was both the juror's individual verdict and the collective verdict of the jury. RP 3941.

Criminal defendants have a constitutional right to a unanimous verdict. WASH. CONST. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This requires not only that all 12 jurors reach the same ultimate verdict, but that they "reach their consensus through deliberations which are the common experience of all of them." Lamar, 180 Wn.2d at 583-88 (quoting People v. Collins, 17 Cal.3d 687, 693, 552 P.2d 742 (1976)). For the first time on appeal, Bienhoff challenges the trial court's failure to explicitly instruct the jury that deliberations must involve all 12 jurors at all times as a violation of his constitutional

right to unanimity. In order to have a claim reviewed for the first time on appeal a defendant must demonstrate that the error is manifest, and of constitutional dimension. RAP 2.5(a)(3). A manifest error is an error that is unmistakable, evident or indisputable and that causes “actual prejudice” by having “practical and identifiable consequences in the trial of the case.” State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). The burden of demonstrating actual prejudice falls on the defendant. Id.

As explained below, the trial court’s jury instructions were sufficient to ensure that the right to unanimity was preserved, so no constitutional error occurred. Bienhoff has not made a showing that lack of a more explicit unanimity instruction had practical and identifiable consequences in the trial of his case. This Court should therefore decline to allow Bienhoff to raise the issue for the first time on appeal.

Even if this Court reaches the merits of the claim, it should conclude that no error occurred. Bienhoff relies on State v. Lamar, supra, for his contention that the requirement of shared deliberations is violated if the trial court must give an instruction beyond WPIC 1.04 to more specifically instruct the jury that

deliberations must involve all 12 jurors at all times. However, he overlooks the fact that Lamar resolves that issue against him.

In Lamar, the instructions given to the original 12 jurors included WPIC 1.04.<sup>16</sup> Lamar, 180 Wn.2d at 580. During deliberations, one of the jurors was replaced with an alternate, and the trial court instructed the reconstituted jury that the 11 remaining original jurors should bring the alternate “up to speed” as to what had already occurred and the jury should then resume its deliberations from there. Id. at 579. On appeal, Lamar challenged the trial court’s failure to instruct the reconstituted jury that it must begin deliberations anew as required by CrR 6.5. Id.

Our supreme court held that WPIC 1.04 properly instructed the original jurors “to deliberate together in the constitutionally required manner,” but that a violation of the right to unanimity subsequently occurred when the trial court later contradicted that instruction by directing the reconstituted jury to deliberate together on only those aspects of the case not yet addressed by the original jurors. Id. at 585. Bienhoff’s jurors were instructed on their duty to deliberate together in an effort to reach a unanimous verdict in

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<sup>16</sup> The Lamar opinion does not identify the relevant instruction as WPIC 1.04, but a comparison of WPIC 1.04 and the instruction given in Lamar confirms that the two are identical. Lamar, 180 Wn.2d at 580; WPIC 1.04.

exactly the same manner as the original 12 jurors in Lamar. Id. at 580. Unlike Lamar, the replacement of one juror with an alternate in this case occurred *before* deliberations began. The supreme court's ruling that Lamar's original jurors were properly instructed "to deliberate together in the constitutionally required manner" is therefore binding in this case. Lamar, 180 Wn.2d at 585.

The Lamar court's holding that WPIC 1.04 properly instructs a jury on the requirement of a unanimous verdict resulting from common deliberations makes good sense. WPIC 1.04 specifically instructs jurors that they must "discuss the case with one another," "deliberate in an effort to reach a unanimous verdict," and decide the case "only after you consider the evidence impartially with your fellow jurors." Such an instruction cannot reasonably be interpreted to permit jurors to split into small groups and divide the issues between them. The trial court was not required to give a more explicit instruction.

Even if there were some question as to the clarity or sufficiency of WPIC 1.04, the polling of the jury affirmatively indicates that the verdict was unanimous. Lamar, 180 Wn.2d at 587-88 (polling is evidence of jury unanimity unless "the record

affirmatively shows a reason to seriously doubt that the right has been safeguarded”).

D. CONCLUSION

Bienhoff’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,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
ANN SUMMERS, WSBA #21509  
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Christopher Gibson, the attorney for the appellant, at Gibsonc@nwattorney.net, containing a copy of the Brief of Respondent in State v. Michael William Bienhoff, Cause No. 74519-1-I, 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.



Name:  
Done in Seattle, Washington

**KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT**

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