

FILED
Court of Appeals
Division I
State of Washington
8/24/2021 4:37 PM

100117-7
No. 82531-3-I

FILED
SUPREME COURT
STATE OF WASHINGTON
8/25/2021
BY ERIN L. LENNON
CLERK

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

THOMAS PHILLIP LEAE

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

The Honorable Gregory Gonzales, Judge

PETITION FOR REVIEW

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Petitioner

The Tiller Law Firm
118 North Rock Street
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. IDENTITY OF PETITIONER

Petitioner Thomas Leae, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Leae seeks review of the unpublished opinion of the Court of Appeals in cause number 82531-3-I, filed July 26, 2021. *State v. Leae*, 2021 WL 3142069. A copy of the decision is in Appendix A at pages A-1 through A-15.

C. ISSUES PRESENTED FOR REVIEW

1. The Sixth Amendment and the Fourteenth Amendment's Due Process Clause require the State prove each element of an offense to the jury beyond a reasonable doubt. Was evidence the evidence that Mr. Leae was associated with Ailiana Siufanua during the approximately two-week period before Siufanua killed Bentley Brookes during the robbery of a coin and jewelry store sufficient to prove beyond a reasonable doubt that Mr. Leae intended to assist Ms. Siufanua in robbing Mr. Brookes and that he therefore acted as an accomplice to the robbery and was guilty of murder through accomplice liability?

2. Did the prosecutor commit flagrant and ill-intentioned misconduct during closing argument when he misstated the law of accomplice liability by telling the jury that it could convict Mr. Leae as an accomplice if

he was present and was “essentially lending moral support” to Siufanua, and by arguing that “everything points to the defendant” having provided the murder weapon to Siufanua, despite any evidence supporting this contention?

D. STATEMENT OF THE CASE

1. Procedural history, trial testimony, and closing:

The State charged Thomas Leae by information in Clark County Superior Court with first degree murder, first degree robbery and first degree rendering criminal assistance. Clerk’s Papers (CP) 1-2.

Thomas Leae went to several businesses in Vancouver, Washington, selling or pawning items in mid and late November, 2015. These businesses included Lucky Pawn and Pacific Bullion. 5Report of Proceedings (RP) at 630. On November 18, 2015, Mr. Leae pawned four guitars at Lucky Loan, a pawn shop located diagonally across the intersection from Pacific Bullion. 5RP at 628. Pawn shop employee Jeff Lemuel identified Mr. Leae as the person who pawned the guitars on that date and testified that he came the store alone. 5RP at 630.

On one occasion he was accompanied by Ailiana Siufanua when selling or pawning items. Mr. Leae and Ms. Siufanua also shopped together at a WinCo store in Vancouver on November 18, 2015 and stayed at a motel in Kalama, Washington on two separate occasions in late November, 2015.

Pacific Bullion, a coin, metals and jewelry store located in downtown

Vancouver, was staffed solely by Bentley Brookes, who co-owned the business with his brother. 8RP at 990-91. The shop sold jewelry, bullion, diamonds, silver coins, numismatic collectible coins, silver bars, gold coins, and silver items. 8RP at 993-94.

On November 25, 2015, Ailiana Siufanua, wearing red converse high tops and an olive drab green parka with a hood, entered the Pacific Bullion while carrying a backpack in her hand. 4RP at 486, 510-11. Mr. Brookes was seated at a desk in the shop and stood up and went to the counter when she entered the store. 4RP at 500. Siufanua's hair was in a partial bun when she entered the store. 4RP at 511. Ms. Siufanua placed the backpack on the display counter and then pulled a gun from her pocket and held it up to Mr. Brookes. 4RP at 486, 505-07, 509-10. She fired the gun, hitting Mr. Brookes in the face, causing him to fall to the ground. 4RP at 486, 505-07. Siufanua stepped over Mr. Brookes' body and removed items from the display cases and put them in the backpack, and then removed items from drawers in a credenza and then from the desk, and then left the store, again stepping over Mr. Brookes' body. 4RP at 486, 506. When she left the store, the bun hair style was released and her hair was down. 4RP at 511-12. Exhibit 172.

Chaz Davis was driving on Main Street in Vancouver and saw an "old blue-ish or gray-ish" car pull up and park "kitty corner" to the 7th Avenue transit station and Main Street near the coin shop, and saw a woman

get out of the passenger side of the car. 9RP at 1132, 1146, 1155. Later when he returned home, he saw a report of the murder and contacted police. 9RP at 1132, 1145. He stated that the female in the car was big and that she was not white, but was light skinned. 9RP at 1137-38. Davis said that the driver had a “big hood” and an “afro” hairstyle and had facial hair. 9RP at 1139-40. The woman entered the coin shop about one minute after the car was recorded by the C Tran bus camera. 7RP at 949.

Following the shooting on November 25, Sgt. Graaff obtained surveillance video from the store. 4RP at 602-04. Store surveillance video from November 12 showed a person entering Pacific Bullion alone. 5RP at 598. Viewing still images from the video, Sgt. Graaff identified Mr. Leae as the person in the store surveillance video on November 12. 5RP at 610. Exhibits 115, 116, 117. Surveillance video downloaded from the store DVR was entered as Exhibit 175 and played to the jury. 5RP at 600; 8RP at 997-99. In the video, Mr. Leae is seen entering the shop and engaging with Mr. Brookes for approximately four minutes and then leaving the store. 5RP at 607-12. The video showed a transaction between Mr. Brookes and Mr. Leae and Mr. Brookes producing his wallet. 5RP at 621-23. In the video, Mr. Leae entered the store and engaged with Mr. Brookes for about four minutes and then left. 5RP at 606-07.

Video from a Vancouver WinCo grocery store showed Mr. Leae and Ms. Siufanua in the store together on the morning of November 12, 2015.

7RP at 919-21, 924. Exhibits 120, 121, 122.

Courtney Brumitt was a desk clerk at Motel 6 in late November, 2015, and she testified that Mr. Leae checked in “in the middle of the night.” 8RP at 1056. A receipt was introduced showing that Mr. Leae checked into the motel on November 26 and checked out on November 27. 8RP at 1059. Exhibit 125. Ms. Brumitt said that Mr. Leae had blood on his hands and kept “reaching down at his sock,” and that his girlfriend was standing outside the building between two cars. 8RP at 1056, 1057. Ms. Brumitt said that Mr. Leae called the motel after they checked out on November 27, asking if a pair of shoes they left were still in the room. 8RP at 1058. She was shown a photo line up by a detective and identified Mr. Leae as the person who checked into the motel. 8RP at 1063.

Surveillance video from the store was shown to the jury depicting the murder. 7RP at 931-37. Det. Boswell testified regarding the surveillance video. 7RP at 931-37. The video showed a female wearing a green jacket entering the store with a backpack and approach the counter and set the backpack on the counter. 7RP at 932. Mr. Brookes walked to the counter and the female, identified as Ms. Siufanua, produced a gun from her right side jacket pocket. 7RP at 936. Mr. Brookes stepped around the counter and tried to reach for the gun and Ms. Siufanua shot him and he fell to the ground. 7RP at 936. After shooting him, Ms. Siufanua went directly behind the counter and did not search Mr. Brookes’ body. 7RP at 833. Ms. Siufanua

stepped over his body and went behind the credenza and removed items from the display case and put them into the backpack. 7RP at 835. She also took a cell phone from the desk, then picked up the backpack and left the store and walked toward 7th and Main Street. 7RP at 935, 937. Detective Boswell testified that Ms. Siufanua reached with her left hand and pulls out a tie that was in her hair. 7RP at 937

The C Tran video showed that the bus was approaching 7th and Broadway in Vancouver. 7RP at 939, 947. The C Tran bus video showed a silver Honda Accord without wheel covers, with a license plate reading “AND 848.” 7RP at 942, 944, 945. Two people were in the car. 7RP at 942. A person in the front passenger seat of the car was wearing a green jacket and had the hair at the top of her head in a bun. 7RP at 941, 944. Det. Boswell stated that the driver had a “round hair, style, maybe an afro.” 7RP at 944.

On November 30, 2015, the Honda was involved in a high speed chase in central California and the car, driven by Mr. Leae, crashed into a tree between the northbound lane and an exit ramp at a rest area, killing Siufanua. 6RP at 698-99, 7RP at 870-72.

During closing, the prosecutor argued without defense objection:

So where would [Ailiana Siufanua] have access to a firearm? Who was she with that would get her access to a firearm? what is—everything point to the defendant.

10RP at 1290.

The prosecutor also argued:

The word aid means all assistance whether by given words, acts, encouragement, support, or presence. It goes on that a person who is present and is willing to assist essentially lending moral support to the principal, the actor, is aiding in the commission of that crime. So you have to—you don't have to actually do a whole lot. As long as you're willing, and you're there to lend moral support, you are aiding in the commission of that crime.

10RP at 1296.

The jury found Mr. Leae guilty of murder in the first degree (count 1), robbery in the first degree (count 2), and rendering criminal assistance in the first degree (count 3). The jury found by special verdict that Mr. Leae or an accomplice was armed with a firearm at the time of the commission of counts 1 and 2. 11RP at 1369-70; CP 250, 251, 252, 253, 254. The court found that counts 1 and 2 merged for sentencing purposes, as robbery was the triggering crime for the felony murder charge. 11RP at 1387; CP 542. The court sentenced Leae to 540 months, followed by community custody. The court determined that Leae would serve this sentence consecutively to a sentence in California stemming from the crash in which Ailiana Siufanua was killed.

Leae appealed his convictions and sentence, arguing that (1) insufficient evidence supports his murder conviction, (2) prosecutorial misconduct, (3) improper opinion testimony by a police detective, (4) ineffective assistance of counsel, and (5) and that the discretionary legal financial obligations imposed on him should be stricken. By unpublished

opinion filed July 26, 2021, the Court of Appeals, Division I, affirmed the convictions. See unpublished opinion.

Mr. Leae now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner submits that this Court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH THAT LEAE ACTED AS AN ACCOMPLICE TO FELONY MURDER

The State charged Leae as an accomplice with first degree felony murder with a firearm enhancement. CP 1-2.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const, amend. 14; Const, art. 1, § 3; *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the

crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

In determining the sufficiency of the evidence, the test is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *Green*, 94 Wn.2d at 220-22). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *affd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

RCW 9A.08.020(3)(a), the general accomplice statute, and RCW 9A.32.030, the felony murder statute, supply alternative grounds under which an accused may be found guilty of murder whenever the accused is not the shooter. Although one participant in a predicate felony, alone,

commits a homicide during the commission of, or flight from, such felony, the other participant in the predicate felony has, by definition, committed felony murder. *State v. Carter*, 154 Wn.2d at 79, 109 P.3d 823. When legal culpability is imposed for the actions of another, the State must prove beyond a reasonable doubt that the person is guilty as an accomplice. RCW 9A.08.020; *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001); U.S. const. amend. XIV; Const. art. I, §§ 21, 22

Under RCW 9A.08.020(3)(a) a person may be convicted as an accomplice to another's crime only if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) Aids or agrees to aid such other person in planning or committing it.

The evidence must show that the accomplice aided in the planning or commission of the crime and that he had knowledge of the crime. *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). Mere knowledge or presence of the defendant is not sufficient to establish accomplice liability. *State v. Parker*, 60 Wn. App. 719, 724-25, 806 P.2d 1241 (1991). Rather, the State must prove that the defendant was ready to assist the principal in the crime and that she shared in the criminal intent of the principal, thus “demonstrating a community of unlawful purpose at the time the act was committed.” *State v. Castro*, 32 Wn. App. 559, 564, 648 P.2d 485 (1982). Evidence that a person is merely present at the scene of a crime, even with

knowledge of the crime, is insufficient to prove accomplice liability. *State v. Jameison*, 4 Wn. App. 2d 184, 205, 421 P.3d 463 (2018). The accomplice must “associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed.” *Id.*

Here, Division One found that “overwhelming evidence” supported the verdict that Leae was an accomplice to the robbery. *State v. Leae*, slip op. at 7. In particular, the Court notes that Leae was in Pacific Bullion twice in the weeks leading up to the murder, once with Siufanua, that on the day of the murder, the surveillance footage showed the Honda Accord with a male driver and passenger matching Siufanua's description a block away from Pacific Bullion, and that the day after the murder Leae checked into a motel with blood on his hands accompanied by a woman, that Leae's photo in the photo montage that the hotel clerks used to identify Leae matches the description of the driver of the car from the surveillance tape, and the testimony of Chaz Davis regarding the car he saw near Pacific Bullion on the day of the murder. *Leae*, slip op. at 7. The Court noted that when police apprehended Leae in California, he had crashed the same Honda Accord depicted on the surveillance video, with Siufanua as the passenger, and the car contained items from Pacific Bullion. *Leae*, slip op. at 7.

The State argued that Mr. Leae was an accomplice to the murder and therefore had to prove that he had knowledge that he was promoting or

facilitating the crime and that he aided Siufanua in planning or committing the crime. RCW 9A.08.020(3). The video of the transaction involving only Leae on November 12, 2015, shows that Mr. Brookes appeared to take money from his own wallet to pay Leae when he went to Pacific Bullion. The surveillance video of the murder on November 25, 2015, however, shows that after shooting Mr. Brookes, Siufanua did not take money from the victim's wallet. The State argued that she "didn't know about the money because the one time that she was in the store on the 18th of November, he didn't pull out his wallet." RP at 1320. The fact that she was unaware that Mr. Brookes had money in his wallet and that he appeared to use that money to buy items supports the argument that Mr. Leae was not "casing" the store in preparation for a robbery when he was in Pacific Bullion on November 12 because there is no evidence that he told Ms. Siufanua about the money in Mr. Brookes' wallet. The evidence supports the conclusion that Mr. Leae did not report to her that Mr. Brookes carried a wallet on his person and had money in the wallet, and supports the contention that he did not know she was going to commit a robbery when she went into the store on November 25, 2015.

Rather than acting in preparation to commit a robbery, the evidence shows that during the two-week period in late November, 2015, Mr. Leae appeared to be selling or pawning items in stores in downtown Vancouver. He had conducted successful transactions with Mr. Brookes two times, once

on his own on November 12 and once with Ms. Siufanua on November 18, and he pawned guitars at Lucky Loan across the street from Pacific Bullion on November 18.

The State presented evidence that the Honda Accord was seen in the vicinity of Pacific Bullion at the time of the murder, and that Ms. Siufanua committed the murder. As seen in his pattern in the two-week period prior to the murder, it was common for the two of them to be together, and it was usual for them to pawn or sell items in Vancouver, including Pacific Bullion. There was no evidence that Mr. Leae had any knowledge that Ms. Siufanua was going to commit robbery or murder when she went into the Pacific Bullion, and no evidence that he knowingly aided or assisted in the commission of the burglary or murder.

In addition, there is no evidence that Mr. Leae had seen the gun used in the murder, or that he even knew that Ms. Siufanua had the gun on her person when she went into the store. Moreover, there is no evidence that Mr. Leae supplied a gun to Ms. Siufanua.

The evidence does not support the contention that Mr. Leae assisted her in the burglary was "casing" the store; the evidence does not show that he told Ms. Siufanua that Mr. Brookes carried money on his person, something that he presumably would have done if he was casing the business and passing information on to Ms. Siufanua.

The record, taken in a light favorable to state, shows that he had no

reason to believe, that Ms. Siufanua was going to commit robbery or murder. The evidence supported the conviction for rendering criminal assistance but did not support accomplice liability for the murder. The petitioner respectfully requests that this Court accept review and reverse the conviction for first degree felony murder.

2 **PROSECUTORIAL MISCONDUCT WAS
FLAGRANT AND ILL-INTENTIONED**

Mr. Leae was deprived of his right to a fair trial by the prosecutor's misconduct in this case. The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutors have a duty to see that those accused of a crime receive a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. *State v. Coles*, 28 Wn.App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). A court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*,

150 Wn.2d 559, 578, 79 P.3d 432 (2003).

The defendant bears the burden of proving that a prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Prejudice is established where “ ‘there is a substantial likelihood the instances of misconduct affected the jury's verdict.’ ” *Dhaliwal*, 150 Wn.2d at 578 (quoting *State v. Pirtle*, 127 Wash.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)). In this case, counsel for Mr. Leae did not object to the prosecutor's argument below. A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). In determining whether the misconduct warrants reversal, a reviewing court considers its prejudicial nature and its cumulative effect. *State v. Suarez–Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994).

When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *State v. Gotcher*, 52 Wn.App. 350, 355, 759 P.2d 1216 (1988).

Regarding accomplice liability, mere knowledge or presence of the defendant is not sufficient to establish accomplice liability. *State v. Rotunno*, 95

Wn.2d 931, 933, 631 P.2d 951 (1981).

The jury was given instruction No. 10, which reads in part as follows:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) Solicits, commands, encourages, or requests another person to commit the crime; or
- (2) Aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 182.

During closing argument the State argued to the jury that "the word aid means all assistance whether given by words, acts, encouragement, support, or presence. It goes on that a person who is present and is willing to assist essentially *lending moral support* to the principal, the actor, is aiding in the commission of that crime." 10RP at 1296 (emphasis added). The prosecutor continued: "[a]s long as you're willing, and you're there to lend *moral support*, you are aiding in the commission of that crime." 10RP at 1296 (emphasis added). This was obvious, flagrant, and ill-intentioned misconduct. The defense position at trial was that Mr. Leae was not in the car seen by Mr. Davis near Pacific

Bullion on November 25, and that no evidence supported the contention that Mr. Leae knew what Ms. Siufanua was going to do. 10RP at 1309, 1311. But the prosecutor told the jury, that mere “moral support” was sufficient to make Mr. Leae an accomplice, even if he did not provide support, indicate that he was ready to assist, or share Ms. Siufanua's criminal intent.

The State compounded the prejudice by arguing facts not in evidence:

Ailiana Siufanua, like I said, was 18 years old living at home with her parents and her sisters. Never got into trouble. Never had any experience with firearms. They didn't have any guns in their house. Her father Aitu said that he never even fired a gun.

So where would she have access to a firearm? Who was she with that would get her access to a firearm? What is---everything points to the defendant. He brought her down here. He was the one that had the car. He has family down here. Okay. And he was the only one who had the opportunity to convince his girlfriend, his 18-year-old gullible girlfriend to commit this horrible crime.

10RP at 1290.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991). However, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant. *State v. Jones*, 71 Wn.App. 798, 808, 863 P.2d 85 (1993), review denied, 124 Wash.2d 1018, 881 P.2d 254 (1994). “It is a serious error for [the prosecutor] to make statements in closing argument unsupported by evidence, to misstate admitted evidence, or to misquote a witness' testimony.” *United States v. Earle*, 375 F.3d 1159, 1163 (D.C. Cir. 2004) (quotations omitted). See also

United States v. Blueford, 312 F.3d 962, 968 (9th Cir. 2002) (misconduct for prosecution to “propound inferences that it knows to be false, or has very strong reason to doubt”). A prosecutor commits misconduct by encouraging the jury to decide a case based on evidence outside the record. *State v. Pierce*, 169 Wn. App. 553, 280 P.3d 1158 (2012).

In this case, the prosecutor made an unreasonable inference that she obtained the gun from Mr. Leae by arguing “where else would she have access to a firearm? Who else was she with that would get her access to a firearm?” 10RP at 1290. The prosecution committed flagrant and ill-intentioned misconduct by making an unreasonable inference by leading the jury to believe that no one other than Mr. Leae could have provided the gun used in the murder to Ms. Siufanua.

The State's argument regarding the origin of the gun was not derived from any evidence adduced at trial; the argument was simply invented from whole cloth.

Because the jury knows the prosecutor is an officer of the State, it is particularly grievous for a prosecutor to mislead the jury regarding a critical fact in a case. See *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015). “Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is reasonable ground to believe that the defendant has been prejudiced.” *State v. Pete*, 152 Wn.2d 546, 555, n.4, 98 P.3d 803 (2004).

Because Mr. Leae failed to object to this argument, however, he must show that it caused prejudice incurable by a jury instruction. A defendant cannot demonstrate flagrant and ill-intentioned conduct where a curative instruction could have cured any error. *State v. Corbett*, 158 Wn.App. 576, 594, 242 P.3d 52 (2010). The focus on this inquiry is not on the flagrant or ill-intentioned nature of the remarks but rather on whether the resulting prejudice could have been cured. *Pierce*, 169 Wn. App. at 552. To assess whether prosecutorial misconduct prejudiced the defendant, a reviewing court does not assess whether sufficient evidence exists to convict the defendant; but instead assesses whether the misconduct encouraged the jury to base its verdict on the prosecutor's improper arguments rather than the properly admitted evidence. *In re Restraint of Glasmann*, 175 Wn.2d 696, 710-11, 286 P.3d 673 (2012).

In this case, the prosecutor's misconduct substantially prejudiced Mr. Leae because it went to the heart of the disputed issue in this case – whether Mr. Leae was an accomplice to Ms. Siufanua's crimes. See *Glasmann*, 175 Wn.2d at 708 (reversing a conviction due to prosecutorial misconduct because the misconduct addressed a critical element of the defendant's charge).

Taken together, there is more than a substantial likelihood that the above improper arguments affected the verdict. The prosecutor argued facts not in evidence that Mr. Leae must have provided the gun to Mr. Siufanua and that “everything” pointed to that conclusion. The prosecution's argument that Mr. Leae and only Mr. Leae could have provided the gun finds absolutely no

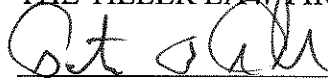
support in the record. The misconduct was prejudicial, and could not be cured by instruction, resulting in a violation of Mr. Leae's right to a fair trial.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: August 24, 2021.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

ptiller@tillerlaw.com

Of Attorneys for Thomas Leae

CERTIFICATE OF SERVICE

The undersigned certifies that on August 24, 2021, that the Appellant's Petition for Review was sent by the JIS link to the Clerk of the Court, Court of Appeals, Division I, 600 University St, Seattle, WA 98101-1176, and to Rachael Rogers, Clark County Prosecutor, and a copy was mailed by U.S. mail, postage prepaid, to the Appellant at the following address:

Rachael Rogers
Pros. Attorney's Office Clark County
Clark County Prosecuting Attorney
PO Box 5000
Vancouver, WA 98666-5000
Rachael.rogers@clark.wa.gov

Clerk of the Court
Court of Appeals
Division I
600 University St
Seattle, WA 98101-1176

Mr. Thomas Leae
Pleasant Valley State Prison
Attn: Mr. Thomas Leae #BE8767 C5-
241
PO Box 8500
Coalinga, CA 93210
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on August 24, 2021.



PETER B. TILLER

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 82531-3-I
)	
Respondent,)	
)	DIVISION ONE
v.)	
)	
THOMAS PHILLIP LEAE,)	
)	UNPUBLISHED OPINION
Appellant.)	
<hr/>		

MANN, C.J. — Thomas Leae appeals his convictions for murder in the first degree and rendering criminal assistance in the third degree. He argues that insufficient evidence supports his murder conviction, the prosecutor committed misconduct, a detective’s testimony was improper opinion and expert testimony, his counsel was ineffective, and that the discretionary Legal Financial Obligations (LFOs) imposed on him should be stricken.¹ We remand to strike the discretionary LFOs. We otherwise affirm.

¹ Leae also filed a statement of additional grounds that raises no issues of merit.

FACTS

The State charged Leae with murder in the first degree and robbery in the first degree based on the November 25, 2015, murder of Bentley Brookes. The State later amended the information, adding a charge of rendering criminal assistance in the first degree. At trial, the State presented testimony from witnesses to establish the following timeline of events.

Pacific Bullion Precious Metals (Pacific Bullion) is a coin, metal, and jewelry store in Vancouver, Washington that Brookes owned with his brother. The store had a camera surveillance system that recorded video, but not audio. The surveillance video showed Leae entering Pacific Bullion on November 12, 2015, and engaging in a brief purchase transaction with Brookes. Brookes is seen taking an item from Leae, getting out his wallet, and then going to the cash drawer.

On November 18, 2015, surveillance video depicts Leae and Ailiana Siufanua at Pacific Bullion. Brookes spoke with Leae and Siufanua, and purchased something from them after weighing it.

On the morning of November 25, 2015, Keith West, a silver coins dealer, made an agreement with Brookes over the phone to sell Brookes some silver coins. West arrived at Pacific Bullion within an hour of the call, where he discovered Brookes' body lying on the floor with a large pool of blood around his head.

When police arrived, they reviewed the Pacific Bullion surveillance footage. The footage depicts a woman, later identified as Siufanua, enter the store with a backpack. Siufanua approached the counter, put down the backpack, and pulled out a gun. Brookes stepped around the counter, trying to reach for the gun, and Siufanua shot him

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in the face. Brookes dropped immediately. Siufanua filled the backpack with items from the store, stepped over Brookes's body, and left from the same door from which she entered.

On November 25, 2015, video footage from a Vancouver C Tran bus showed a silver Honda Accord with a driver and passenger. Police obtained the partial license plate "AND84" from the footage. The footage was taken about a minute prior to Brookes's murder a block away from Pacific Bullion. The passenger matched Siufanua's description from the Pacific Bullion footage. The driver had a "round hair style, maybe an afro."

A witness, Chaz Davis, identified Siufanua as a woman he saw near Pacific Bullion on the day of the murder. He saw an old "blue-ish" or "gray-ish" car pull near the transit station close to Pacific Bullion, and a woman got out of the car and entered Pacific Bullion. He described the driver of the car as a male with facial hair and an afro hair style. After learning of the murder, Davis contacted police.

Police canvassed the local motels, businesses, and pawn shops, and released an image of Siufanua from the Pacific Bullion footage to the public to help identify the suspect. During the course of the investigation, police discovered additional sightings of Leae and Siufanua in the days leading up to the murder. On November 12, 2015, surveillance footage captured Leae and Siufanua at the Vancouver WinCo. On November 14, 2015, Leae and a woman checked in a Motel 6 in Kalama, Washington. The desk clerk, Michelle Shertzer, later identified Leae in a photo montage. On November 18, 2015, Leae pawned four guitars at Lucky Loan, a pawn shop located diagonally across the intersection from Pacific Bullion.

On November 26, 2015, Leae checked into the Motel 6 in Kalama and checked out the following day.² The desk clerk, Courtney Brumitt, who later identified Leae in a photo montage, said that Leae checked in the motel in the middle of the night, and he had blood on his hands. The clerk saw him reaching down at his sock, and observed Leae's girlfriend waiting out in the parking lot.

On November 30, 2015, Siufanua's family contacted the police and identified the suspect in the surveillance video as Siufanua. Siufanua's father told police that he spoke with his daughter and Leae that morning and he encouraged her to turn herself in.

On the evening of November 30, 2015, California highway patrol officers attempted to stop a speeding silver Honda Accord traveling southbound of Interstate 5. Police ran the license plate, AND8486, and discovered the car was a stolen vehicle from Washington. After a high speed chase, the car crashed into a tree between the northbound lane and an exit ramp at a rest area. Siufanua, the identified passenger, died at the scene. Leae, the identified driver, suffered a broken leg. Officer John Rosendale searched Leae at the scene where he discovered Leae's Washington driver's license and about \$1,600 in cash on his person.

Leae was transported to the hospital, where Officer Rosendale spoke with him in the trauma unit. Officer Rosendale advised Leae of his Miranda rights, and Leae agreed to speak with him. He identified Siufanua as the passenger. He claimed he was borrowing the Honda Accord, then he said he was in the process of buying the car from an unidentified friend.

² Leae's name was on the motel receipt.

Washington detectives searched the Honda Accord, discovering coins, jewelry, various silver items, and a backpack filled with DVD movies, a laptop computer, and a paystub belonging to Siufanua. Police also recovered a Vancouver WinCo receipt from November 12, 2015, and Leae's pay stubs. Brookes's brother identified a tungsten ring, a pair of grape shears, a Tiffany pot, a goblet, and a hand mirror as items from Pacific Bullion from the recovered items. Two precious metal dealers, who frequently sold precious metals to Brookes, identified plastic bags containing metals, a turquoise ring, a mirror, scissors, a water pitcher, a chocolate pot, and a tea caddy as items they had sold to Brookes.

During Leae's trial, Vancouver Police Detective Lawrence Zapata testified about how Leae became a suspect. Detective Zapata also testified about the blood splatter seen on the surveillance video.

The jury found Leae guilty of murder in the first degree (count 1), robbery in the first degree (count 2), and rendering criminal assistance in the first degree (count 3). The jury found by special verdict that Leae or an accomplice was armed with a firearm in the commission of counts 1 and 2. The court found that counts 1 and 2 merged for sentencing purposes, as robbery was the triggering crime for the felony murder charge. See RCW 9A.32.030(1)(c).

The court sentenced Leae to 540 months, followed by community custody. The court determined that Leae would serve this sentence consecutively to his sentence in

California, where Leae is currently serving 25 years and 8 months to life.³ Leae appeals.

ANALYSIS

A. Sufficiency of the Evidence

Leae contends that insufficient evidence supports his conviction for an accomplice to first degree felony murder. We disagree.

We review if evidence is sufficient in the light most favorable to the prosecution to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "A sufficiency challenge admits the truth of the State's evidence and accepts the reasonable inferences to be made from it." State v. O'Neal, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007). Circumstantial and direct evidence carry equal weight on appeal. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

The State charged Leae as an accomplice to felony murder with robbery in the first degree as the predicate offense. A person is guilty of felony murder in the first degree if they attempt to commit the crime of robbery in the first degree, and in the furtherance of the crime, they or another participant causes the death of an uninvolved person. RCW 9A.32.030(1)(c). RCW 9A.08.020(3) states:

- (a) A person is an accomplice of another person in the commission of a crime if:
 - (1) With knowledge that it will promote or facilitate the commission of the crime, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it; or

³ Leae was convicted of murder in the second degree, theft of a vehicle, and evading a peace officer for the November 30, 2015, car chase and Siufanua's death in the crash.

(ii) Aids or agrees to aid such other person in planning or committing it.

Despite Leae's argument that he was simply pawning items in the Vancouver area, the State presented overwhelming evidence that Leae was an accomplice to the robbery where Siufanua murdered Brookes. The surveillance tape establishes that Siufanua killed Brookes in the furtherance of the robbery. Leae was in Pacific Bullion twice in the weeks leading up to the murder, once with Siufanua. On the day of the murder, the surveillance footage depicted the Honda Accord with a male driver and passenger matching Siufanua's description a block away from Pacific Bullion. The day after the murder, Leae checked into a motel with blood on his hands accompanied by a woman. Leae's photo in the photo montage that the hotel clerks used to identify Leae matches the description of the driver of the Honda Accord from the surveillance tape, and Davis's testimony. When police apprehended Leae in California, he had crashed the Honda Accord seen on the surveillance video, with Siufanua as the passenger, and the car contained items from Pacific Bullion.

While a large portion of the evidence is circumstantial, it carries the same weight as direct evidence. When viewing the evidence in the light most favorable to the State, it is clear that Leae aided Siufanua in robbing Pacific Bullion. Sufficient evidence supports the jury's finding that Leae acted as an accomplice.

B. Prosecutorial Misconduct

Leae next argues that the prosecutor committed misconduct during closing arguments. We disagree.

To demonstrate prosecutorial misconduct, the defendant must prove that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d

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741, 756, 278 P.3d 653 (2012). If the defendant did not object at trial, the error is waived unless the prosecutor's conduct was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760. On appeal, the defendant must demonstrate that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affected the jury's verdict. Emery, 174 Wn.2d at 760-61. "The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." In re Pers. Restraint of Davis, 152 Wn.2d 647, 716, 101 P.3d 1 (2004).

1.

Leae contends first that the prosecutor misstated that law of accomplice liability. The court instructed the jury that in the context of accomplice liability, aid means "all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime." During closing argument, the prosecutor said

The word aid means all assistance whether given by words, acts, encouragement, support, or presence. It goes on that a person who is present and is willing to assist essentially lending moral support to the principal, the actor, is aiding in the commission of that crime. So you have to—you don't have to actually do a whole lot. As long as you're willing, and you're there to lend moral support, you are aiding in the commission of that crime.^[4]

The defense did not object.

Leae contends that this statement by the prosecutor was a misstatement of accomplice liability. Despite Leae's contention that the jury could find that Leae aided

⁴ (Emphasis added.)

by merely lending moral support, he ignores the fact that the jury was also instructed that Leae had to “solicit, command, encourage, or request,” or “aid or agree to aid another person” with the “knowledge that it will promote or facilitate the commission of the crime.”⁵ (Emphasis added). Because moral support with knowledge would be sufficient to establish Leae was an accomplice to the robbery, the prosecutor did not misstate the law.

2.

Leae contends next that the prosecutor committed misconduct by arguing facts not in evidence. During closing, the prosecutor argued

Ailiana Siufanua, like I said, was 18 years old living at home with her parents and her sisters. Never got into trouble. Never had any experience with firearms. They don't have any guns in their house. Her father Aitu said that he never even fired a gun.

So where would she have access to a firearm? Who was she with that would get her access to a firearm? What is—everything points to the defendant. He brought her down here. He was the one that had the car. He has family down here. Okay. And he was the only one who had the opportunity to convince his girlfriend, his 18-year-old gullible girlfriend to commit this horrible crime.

The defense did not object.

Leae cannot demonstrate that this statement was so flagrant and ill intentioned that a curative instruction could not cure it, and that this statement affected the jury's verdict. While the State agrees that this statement was improper, the jury was instructed that the attorneys' arguments were not evidence, and to disregard any argument unsupported by the evidence. The jury was not required to find that Leae provided Siufanua with the gun to convict him as an accomplice. Ultimately, Leae

⁵ The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

cannot demonstrate that any error was incurable by instruction, or that this single point affected the verdict when there is overwhelming evidence of his involvement in the crime.

3.

Leae also argues that his counsel was ineffective for failing to object to these statements made during closing argument. We disagree. Washington follows the Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) test to determine if defense's counsel's performance was deficient. To demonstrate ineffective assistance of counsel, a defendant is required to show that: (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness based on consideration of all the circumstances and (2) defense counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

We have a strong presumption that counsel's performance was reasonable. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). The defendant must show the absence of a legitimate strategic or tactical reason supporting the challenged conduct by counsel. State v. Mannering, 150 Wn.2d 277, 286, 75 P.3d 961 (2003).

Leae cannot demonstrate his counsel was ineffective. Although defense counsel did not object, this statement was during the State's closing argument. It is rare for counsel to object during closing argument, therefore choosing not to object is a legitimate strategy. Further, counsel's objection could have brought more attention to how Siufanua obtained the gun, which was unnecessary for the jury's determination.

Because defense counsel had a legitimate strategy by not objecting during closing, Leae cannot demonstrate his counsel was ineffective.

C. Opinion Testimony

Leae contends that Detective Zapata improperly gave his opinion about Leae's guilt. We disagree.

We review a trial court's evidentiary rulings for an abuse of discretion. Gilmore v. Jefferson County Pub. Transp. Benefit Area, 190 Wn.2d 483, 494, 415 P.3d 212 (2018). The trial court abuses its discretion when a decision is manifestly unreasonable or based on untenable grounds. Gilmore, 190 Wn.2d at 494.

In general, no witness, lay or expert, may offer an opinion about the defendant's guilt, whether by direct statement or inference. City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). "However, testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." Heatley, 70 Wn. App. at 578.

Detective Zapata testified that Leae became a suspect in mid-December. The State then asked "what do you base your progression of the case on when you determine that he was now a suspect in this case? . . . What evidence did you have?" Defense counsel objected. The court sustained the objection, allowing the State to "rephrase your question as to what prompted him to make a decision and become a suspect." Over objections by defense, Detective Zapata discussed the factors that led police to discovering Leae's involvement: the video footage, the car, and the items discovered in the car. The court addressed defense's concern, stating Detective Zapata

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is “not going to state on the record that he believe[s] Mr. Leae is guilty. He merely is commenting on the videos and factors that led him to become a suspect. That’s it. We’re not going any farther than that.”

Later, the prosecutor asked if Detective Zapata was able to determine whether Siufanua was acting alone, and Detective Zapata said “we were able to determine she was not acting alone.” Defense objected and moved to strike. The court ultimately rejected defense’s contention that this was opinion testimony, reasoning that “[t]estimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness is otherwise helpful to the jury. And it’s based upon inferences from the evidence. It is not improper opinion testimony.” The court sustained the objection after asking the State to rephrase the question: “But as you asked it, during the course of the investigation, did you determine, somewhat of [an] opinion conclusion. Rephrase it to include the facts. Sustained on that basis alone.”

Leae cannot demonstrate that the court abused its discretion in allowing the State to elicit this testimony from Detective Zapata. Despite Leae’s claim that Detective Zapata testified that Leae was the guilty accomplice, Detective Zapata’s testimony was merely connecting the facts of the investigation for the jury. Explaining why someone became a person of interest, and how the police came to realize that Siufanua had an accomplice is not improper opinion testimony. The trial court carefully directed the State to ask questions in a way that would not elicit opinion testimony, and cured any potential error through the rephrased questions. Leae cannot demonstrate the court erred.

D. Blood Splatter Testimony

Leae next argues that Detective Zapata's testimony about blood splatter should have been excluded because he was not qualified as an expert witness. We disagree.

The trial court has wide discretion to determine the admissibility of evidence and we will not disturb the trial court's evidentiary decision absent an abuse of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Under ER 701, a lay witness may testify to "inferences which are (a) rationally based on the perception of the witness, [and] (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

At trial, Detective Zapata testified about the blood seen on the Pacific Bullion surveillance footage, and if it was likely that Siufanua would have gotten any blood on her shoes or clothing. The defense did not object to this line of questioning until Detective Zapata was asked if he was surprised that police were never able to locate the clothing Siufanua wore at the time of the murder. Because Leae raises this issue for the first time on appeal, and does not contend it is manifest error affecting a constitutional right, we need not consider this argument. RAP 2.5; McFarland, 127 Wn.2d at 332-33 (we do not consider issues raised for the first time on appeal).

Leae also argues that his counsel was deficient for failing to object to Detective Zapata's testimony about blood splatter. Despite Leae's contention that Detective Zapata improperly testified as an expert lacking foundation, this testimony was permissible under ER 701. Detective Zapata had been a detective for 19 years at the time of trial, 10 of those years as a major crimes detective mainly working homicides. His testimony regarding blood splatter was inferred from his perspective as a detective

as to why Siufanua may or may not have gotten the victim's blood on her shoes or clothing. The comments he made regarding blood patterns were to illustrate to the jury what they were seeing on the video, and how Detective Zapata formulated his opinion. Because Detective Zapata's testimony was permissible under ER 701, Leae cannot demonstrate that his counsel acted below an objective standard of reasonableness by not objecting. See McFarland, 127 Wn.2d at 334-35.

E. Discretionary LFOs

Leae argues that the court erred by imposing discretionary LFOs. The State concedes. We accept the State's concession.

The trial court found Leae indigent and waived all waivable fees, fines, and interest. The court imposed community custody supervision fees and stated that the LFOs would bear interest from the date of judgment to the date of payment in full.⁶

Courts shall not impose discretionary costs on defendants who have been found indigent. RCW 10.01.160(3); State v. Ramirez, 191 Wn.2d 732, 748, 426 P.3d 714 (2018). Supervision fees are discretionary LFOs. State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020). "As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(1). We remand to the trial court to strike the community custody supervision fees and interest accrual provision.⁷

⁶ While Leae notes that the court imposed a \$500 victim assessment fee, that fee is a mandatory LFO.

⁷ We also remand for the trial court to strike the references from the judgment and sentence about the robbery as the robbery conviction was properly merged with the murder conviction for sentencing purposes.

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Affirmed.

Mann, C.J.

WE CONCUR:

Smith, J.

Lippelwick, J.

THE TILLER LAW FIRM

August 24, 2021 - 4:37 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Thomas P. Leae, Appellant
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