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SUPREME COURT NO. 100824-4

NO. 81069-3-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO INDA,

Petitioner.

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

The Honorable Roger Rogoff, Judge
The Honorable Melinda Young, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Antonio Inda, the appellant below, asks this Court to review his case.

B. COURT OF APPEALS DECISION

Inda requests review of the Court of Appeals decision in State v. Inda, COA No. 81069-3-I, filed March 14, 2022.

C. ISSUES PRESENTED FOR REVIEW

1. Petitioner is Hispanic. In contesting a transfer from juvenile to adult court, petitioner argued that racial bias tainted the process. The court declined juvenile court jurisdiction without resolving this claim. Where the Court of Appeals' refusal to remand for consideration of this claim conflicts with State v. Behre[1] and State v. Quijas,[2] is review warranted under RAP 13.4(b)(1)-(2)?

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[1] 193 Wn.2d 647, 444 P.3d 1172 (2019).

[2] 12 Wn. App. 2d 363, 457 P.3d 1241 (2020).

2. In State v. Teal,[3] this Court suggested that, in cases prosecuted on a theory of accomplice liability, the "to convict" instruction should reference "the defendant or an accomplice" when describing the State's proof requirements. Teal involved only the defendant and one alleged accomplice. Where, however, a case involves multiple alleged accomplices, this language violates due process by permitting jurors to convict the defendant based on other individuals acting as accomplices to each other without requiring proof the defendant himself was an accomplice to the crimes. Is review appropriate under RAP 13.4(b)(1) where the Court of Appeals decision is incorrect and conflicts with the reasoning and intent in Teal?

3. The State agreed not to seek petitioner's conviction based on a theory of general accomplice liability. When, however, the State submitted instructions

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[3] 152 Wn.2d 333, 96 P.3d 974 (2004).

inadvertently allowing conviction on that very theory, defense counsel failed to ensure they were modified consistent with the parties' intent, making conviction more likely. Where the Court of Appeals' rejection of petitioner's ineffective assistance of counsel claim conflicts with this Court's prior precedent, is review warranted under RAP 13.4(b)(1)?

4. The courtroom in which Inda was tried was the only one on the courthouse wing employing supplemental security measures and marked with a security order affixed to the door. It was apparent these measures were atypical and deemed necessary solely for the protection of witnesses at Inda's trial. The Court of Appeals' conclusion that these measures were not inherently prejudicial conflicts with this Court's decisions in State v. Jaime[4] and State v. Hartzog.[5] Is review therefore appropriate under RAP 13.4(b)(1)?

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[4] 168 Wn.2d 857, 233 P.3d 554 (2010).

D. STATEMENT OF THE CASE[6]

The King County Prosecutor's Office charged 15-year-old Antonio Inda in juvenile court in connection with the April 11, 2017 shooting death of Arturo Marcial Alvarez (a.k.a. "Travieso"). CP 6. Prosecutors successfully moved for an order declining jurisdiction and transferring the case for adult prosecution. CP 6-31; JRP[7] 1-472. Inda's case was then joined with that of two adult co-defendants: Miguel Bejar and Alondra Garcia-Garcia. CP 1.

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[5] 96 Wn.2d 383, 635 P.2d 694 (1981).

[6] For a comprehensive statement of the case, see Brief of Appellant, at 4-14.

[7] This petition refers to the verbatim report of proceedings as follows: JRP – consecutively paginated volumes from juvenile court for January 24-26, and 31, 2018; RP – consecutively paginated volumes from September 10, 2019 through November 14, 2019. Citations to the remaining volumes will indicate "RP" followed by the date of the proceeding.

Garcia-Garcia eventually pleaded guilty to Murder in the Second Degree with firearm enhancement. RP 1729, 1872-1873. Prosecutors then charged Inda and Bejar with: (count 1) Murder in the First Degree with firearm enhancement and (count 2) Murder in the Second Degree (felony murder predicated on assault and drive by shooting) with firearm enhancement. Count 3 charged Bejar with Unlawful Possession of a Firearm in the First Degree (based on a prior conviction for a serious offense) and count 4 charged Inda with Unlawful Possession of a Firearm in the Second Degree (possession by an individual younger than 18). CP 32-34.

Evidence at Inda's and Bajar's trial established that, in the months prior to the April 11, 2017 shooting death of Alvarez, tensions had been high between two local gangs: VL (Varrio Locos) and UL (United Lokotes). RP 1734-1735. A third gang, SSL (South Side Locos), aligned with VL in the dispute. RP 1557-1558.

On April 11, 2017, Inda was one of six people – most of whom were aligned with VL and SSL – traveling in a minivan when they spotted UL member Alvarez as he boarded a bus. RP 1276-1277, 1318-1320, 1616-1618, 1734, 1739, 1743-1744, 1750-1753, 2619-2620, 2656-2657. Garcia-Garcia, who owned the van, followed the bus. RP 1323, 1622-1623, 1771, 2657-2659.

Eventually, Alvarez exited the bus at a designated stop. RP 1334, 1784. Garcia-Garcia's van was stopped behind the bus as Alvarez approached on the sidewalk. Alvarez, who was armed, spotted the van and quickly reached for his pocket in a manner consistent with retrieving a gun. RP 1628, 1681-1682, 1784-1786, 2027, 2272-2278.

Bejar was already holding a .22 pistol that belonged to Garcia-Garcia. RP 1334-1335, 1874. When Alvarez made his quick move toward his jacket, Bejar gave Garcia-Garcia "a questioning look," Garcia-Garcia said "go ahead,"

and shots were immediately fired at Alvarez, killing him. RP 1787-1796, 1874, 2229. Garcia-Garcia quickly drove away. RP 1340, 1651.

There was no dispute that Bejar shot Alvarez using Garcia-Garcia's .22 semi-automatic. RP 3258. But whether Inda *also* shot at Alvarez was an important and contested issue at trial. Inda denied possessing a firearm in Garcia-Garcia's van and denied shooting Alvarez. RP 2631-2632, 2671-2672, 2718. The physical evidence did not reveal whether any firearm other than Garcia-Garcia's .22 had been used to shoot Alvarez from inside the van. RP 2228, 2365, 2950-2953, 2960, 3006-3008.

At the close of evidence, Bejar's attorney conceded to jurors that Bejar shot Alvarez using Garcia-Garcia's pistol, but argued that he had acted in lawful self-defense. RP 3258-3259. Counsel for Inda argued that Inda was not armed the day of the shooting, he did not fire any

weapon at Alvarez, and he should be acquitted on all charges. RP 3294-3324.

On count 1, jurors acquitted Inda of Murder in the First Degree, but convicted him of Murder in the Second Degree while armed with a firearm. They also convicted him of Murder in the Second Degree (felony murder) in count 2, but this conviction was vacated to avoid double jeopardy. RP 3368-3369; CP 294-295, 297-299, 405. Inda was then convicted at a subsequent trial on the severed charge of Unlawful Possession of a Firearm. RP 3389-3419.

Inda was sentenced to 194 months and appealed. RP (1/31/20) 205-208; CP 467. He raised several issues, including those discussed below in the argument for review. The Court of Appeals affirmed.

E. ARGUMENT

1. REVIEW IS APPROPRIATE UNDER RAP 13.4(b)(1)-(2) BECAUSE THE JUVENILE COURT'S FAILURE TO DECIDE INDA'S RACIAL BIAS CLAIM CONFLICTS WITH PRECEDENT.

Antonio Inda is Hispanic. CP 31. Prior to the declination hearing in the juvenile division of King County Superior Court, defense counsel filed a memorandum in support of retaining jurisdiction. CP 562-578.

The first page of the memorandum indicates, "For the reasons that follow, the Court should DENY the State's Motion for Decline and retain jurisdiction of Antonio in the juvenile court system." CP 562. On page 10 and 11 of the memorandum, the defense argued:

> An adult sentence would result in Antonio not getting out of prison until he was forty years of age . . . . In light of the extreme amount of time Antonio is facing, particularly if the State seeks the highest penalty possible (a near certainty given past experience), the reality of the State's "concern" for Antonio is laid bare. The State will seek the most amount of time regardless of the forum (i.e.

> juvenile or adult). Putting Antonio in the adult system is not about rehabilitation, services he will receive, or, in light of the research, public safety. It is about what the State ultimately is always about: locking up young men – particularly Hispanic and black men – as long as possible and removing them from society for the better part of their lives. It may not be always conscious effort, but the net effect is always the same. *A Summary of Washington State Data and Recent Study Findings: The Transfer of Youth (under age 18) to the Adult Criminal Justice System,* Washington State Partnership Council on Juvenile Justice Bulletin, November 2014.

CP 571-572 (emphasis added).

Counsel further supported this argument with a quoted finding from the cited bulletin, which states, "A high percentage of youth of color are transferred to adult criminal court jurisdiction, particularly under the automatic decline law, contributing to significant racial and ethnic disparities." CP 572, at n.4.

Defense counsel also provided the court with a copy of the actual bulletin.[8] JRP 9-10. On the issue of race, the bulletin indicates:

> **Youth of Color Findings**: Of significant concern is the disparity in the percentage of youth of color transferred to the adult system. In fiscal year 2013 in Washington State, the highest percentage of youth -- by race and ethnicity -- who were transferred and sentenced in adult criminal court **were youth of Hispanic ethnicity**. In FY 2012, the highest percentage of youth -- by race and ethnicity – who were transferred and sentenced in adult criminal court were **Black youth** (non-Hispanic). Data on race and ethnicity findings show that over the 5-year period from FY 2009 through 2013, approximately two-thirds (65%) were youth of color. In comparison, youth of color comprise approximately one-third (34%) of Washington's age 10-17 population.
>
> It should be noted that youth of color are significantly impacted by Washington's automatic decline law (exclusive original criminal court jurisdiction) – in FY 2013, 74.4% of the youth who were automatically transferred to adult criminal court jurisdiction and convicted in adult court were Black or Hispanic youth. In

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[8] The record shows Judge Rogoff received the copy. See JRP 9-10; see also JRP 337; CP 6-7 (Judge Rogoff indicates he read everything submitted). A copy of the bulletin is also attached to Inda's Brief of Appellant.

> comparison, the percentage of Black and Hispanic youth in FY 2013 whose case was transferred to adult court via the discretionary decline process (judicially controlled transfers) was 55.7% of the total discretionary transfers. While there is significant disparity for youth of color in both pathways to the adult court system, the data show the race and ethnicity of youth meeting the criteria for Washington's auto decline law have been predominantly youth of color from FY 2010 through 2013.

Bulletin, at 2 (emphasis in original; footnote omitted).

On appeal, Inda argued that the juvenile court erred when it declined jurisdiction without first deciding his racial bias claim, requiring remand to address the claim and possibly a new trial. See BOA, at 14-19; RBF, at 1-3.

As this Court has made clear, "once a claim of racial bias is raised, investigations into allegations of racial bias are conducted on the record and with oversight of the court." Behre, 193 Wn.2d at 661.

Division One recently addressed a similar failure to decide a racial bias claim in State v. Quijas, 12 Wn. App.

2d 363, 457 P.3d 1241 (2020), and reversed. Like Inda, Quijas was 15 years old when charged in juvenile court with murder in connection with the shooting death of a rival gang member. Id. at 365-366. Like Inda, Quijas is Hispanic. Id. at 367. As in Inda's case, the State filed a motion for discretionary decline to adult court. Id. at 366. As in Inda's case, the defense briefing on that issue alleged that juvenile court jurisdiction was declined in a racially disproportionate manner. Id. As in Inda's case, counsel for Quijas relied primarily on the 2014 bulletin by the Washington State Partnership Council on Juvenile Justice to establish disparate treatment of Hispanic and black youths. Id. 367. And, as in Inda's case, when granting the State's motion for discretionary decline, the court failed to address the assertions of implicit and explicit racial bias. Id. at 368. Following a guilty plea to murder in the second degree, Quijas was sentenced to

180 months and appealed the juvenile court's decline decision. Id.

Recognizing that Quijas's racial disparity claim touched on state and federal constitutional guarantees of equal protection and due process, Division One cited Behre for need to address and decide such claims. Id. at 374. The Court continued:

> "The fact of racial and ethnic disproportionality in our criminal justice system is indisputable." Task Force On Race & Criminal Justice Sys., Preliminary Report On Race And Washington's Criminal Justice System 1 (2011). Our Supreme Court has made clear that trial courts must be vigilant in addressing the threat of explicit or implicit racial bias that affects a defendant's right to a fair trial. We hold that equal vigilance is required when racial bias is alleged to undermine a criminal defendant's constitutional rights at any stage of a proceeding. When confronted by such a claim, supported by some evidence in the record, the trial court must rule. It cannot ignore the evidence or the claim. And we cannot affirm the result of a proceeding in which such a necessary ruling is absent.

Quijas, 12 Wn. App. at 375 (hyperlink and footnote omitted).

Despite the similarities between Inda's case and Quijas, Division One found that Inda had not raised a constitutional race-based challenge to juvenile transfers. Slip op., at 4-5. In light of the arguments made and documents relied upon by Inda in juvenile court, this finding is not sustainable.

Because the decision in Inda's case conflicts with both Behre and Quijas, review is appropriate under RAP 13.4(b)(1)-(2).

2. REVIEW IS APPROPRIATE UNDER RAP 13.4(b)(1) BECAUSE DIVISION ONE'S DECISION IN INDA'S CASE CONFLICTS WITH THIS COURT'S DECISION IN TEAL.

As a requirement of due process, "The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld," and jury instructions are not legally sufficient if they relieve the State

of this burden. State v. Byrd, 125 Wn.2d 707, 713-714, 887 P.2d 396 (1995) (citing cases).

"Accomplice liability, though not an 'element', must still be proved by the State beyond a reasonable doubt in order for a jury to convict." State v. Teal, 117 Wn. App. 831, 839, 73 P.3d 402 (2003) (citing State v. Cronin, 142 Wn.2d 568, 579-580, 14 P3d 752 (2000)), aff'd, 152 Wn.2d 333, 96 P.3d 974 (2004). It is "essential . . . that the jury is clearly made aware of the State's burden." Id. And where an accomplice instruction improperly expands the scope of liability, reversal is required unless the element in question was "supported by uncontroverted evidence" and this Court concludes beyond a reasonable doubt that the jury's verdict would have been the same without the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

Inda's jury was instructed that, to convict him of murder, they had to find:

> (1) That on or about the 11th day of April, 2017, the defendant Antonio Inda acted with an intent to cause the death of Arturo Alvarez;
>
> (2) That Arturo Alvarez died as a result of the acts of the defendant Antonio Inda <u>or an accomplice</u>;
>
> (3) That the acts occurred in the State of Washington.

CP 501 (emphasis added).

At Inda's trial, the State ensured jurors knew that Alondra Garcia had already pleaded guilty to being an accomplice to Alvarez's murder and faced 183 months in prison. <u>See</u> RP 1729-1730, 1866-1868, 3251. During closing arguments, prosecutors expressly identified her as an accomplice to Alvarez's murder. <u>See</u> RP 3244 ("Who is an accomplice? An accomplice is someone who aids in committing the crime. So in this van, Alondra was

an accomplice, Mr. Bejar was an accomplice, Mr. Inda was an accomplice.").

Although the intent behind adding "or an accomplice" to the murder definitions and corresponding "to convict" instructions was to permit jurors to convict whether Bejar, Inda, or both shot Alvarez, use of "or an accomplice" throughout these instructions created a significant and unintended problem. It permitted jurors to convict Inda if any accomplice (not necessarily an accomplice to Inda) was involved in Alvarez's death.

As noted above, murder element 2 required proof "[t]hat Arturo Alvarez died as a result of the act of the defendant Antonio Inda <u>or an accomplice</u>." CP 501 (emphasis added). Because Bejar unquestionably shot Alvarez – and Garcia and Bejar were undoubtedly accomplices to each other in that shooting – jurors could find that "an accomplice" had caused Alvarez's death

without also finding that Inda played any role in the actual acts that killed him.

This could have been easily fixed. Had the instruction said "that Arturo Alvarez died as a result of the act of the defendant Antonio Inda or a person to whom he was an accomplice," criminal liability would have been properly tied to Inda's actions. This language is often used at trial as a preferred alternative to "or an accomplice." See, e.g., State v. Whitaker, 195 Wn.2d 333, 343, 459 P.3d 1074 (2020) (Madsen, J., concurring) (""That [the victim] died as a result of the defendant's acts or the acts of the person to whom he was an accomplice"); State v. McDonald, 138 Wn.2d 680, 686, 981 P.2d 443 (1999) ("If you are satisfied beyond a reasonable doubt that the acts of the defendant or a person to whom he acted as an accomplice . . ."; State v.

Comenout, 10 Wn. App. 2d 1038, at *4 (2019)[9] ("the defendant and/or a person to whom he was an accomplice intended to commit theft . . . ."), review denied, 195 Wn.2d 1003, 458 P.3d 789 (2020); State v. Anderson, 186 Wn. App. 1022, at *5 (2015) ("[Anderson], or a person to whom [Anderson] was an accomplice, unlawfully took personal property . . . .").

Indeed, it seems that use of "the defendant or an accomplice," while acceptable when the defendant has only a single potential accomplice, is inherently problematic whenever there are multiple potential accomplices for the charged crime. In any case where the defendant has more than one alleged accomplice, and accomplice liability is dealt with in a "to convict" instruction, it must be made clear the defendant can be found guilty only if he "or a person to whom he was an

[9] GR 14.1(a) permits citations in this petition to unpublished decisions as non-binding persuasive authority.

accomplice" engaged in the charged act. Otherwise, jurors may conclude that others involved were accomplices to each other (though not necessarily the defendant) but still convict the defendant based on the jury instructions as written.

Ultimately, at Inda's trial, the jury instructions authorized jurors to convict him based solely on the acts of Garcia and Bejar, each of whom was clearly "an accomplice" to the other. This was a violation of due process.

Division One declined to review Inda's constitutional challenge under RAP 2.5(a) based on its finding that the error was not "manifest" because there was no showing of actual prejudice. Slip Op., at 8, 11. That finding, in turn, was based largely on what Division One called this Court's "explicit approval" in Teal of the phrase "or an accomplice" in all "to convict" instructions. Slip op., at 10. It was also based on a stated fear that use of "the

defendant or a person to whom he was an accomplice" could be construed as an impermissible judicial comment on the evidence. Slip op., at 11 (citing State v. Fallentine, 149 Wn. App. 614, 626, 215 P.3d 945 (2009)).

In Teal, this Court indicated that, while not required in cases involving accomplice liability, the "better practice . . . might be to include the language 'the defendant or an accomplice' in a 'to convict' instruction." Teal, 152 Wn.2d at 336 n.3. The Teal court, however, was not asked to consider whether such language would be problematic in cases involving more than one accomplice and did not address the issue. The Court of Appeals erred when it held that Teal controlled the outcome in Inda's case.

Members of this Court and the Court of Appeals have recognized that use of the term "or an accomplice" in a "to convict" can create juror confusion depending on the particular circumstances. See State v Walker, 182 Wn.2d 463, 491-499, 341 P.3d 976 (2015) (Gordon

McCloud, J., concurring); Teal, 117 Wn. App. at 838-839. And, as Inda's case demonstrates, this is certainly true where multiple accomplices are alleged. Teal should not be stretched beyond its facts to increase confusion.

The Court of Appeals' other rationale – that Inda's proposed language could be construed as a judicial comment on the evidence – has previously and properly been rejected. Although Division One cited Fallentine as supporting this concern, the Fallentine court actually rejected the notion this language was a judicial comment on the evidence. Fallentine, 149 Wn. App. at 626. Consistent with Fallentine, Division One recently rejected this same concern again. See State v. Martin, 11 Wn. App. 2d 1046, at *3 (2019) (rejecting notion that use of "the defendant or a person to whom the defendant was an accomplice" is a judicial comment on the evidence and finding use of the phrase "the defendant or an

accomplice" is not a required practice), review denied, 195 Wn.2d 1020, 464 P.3d 202 (2020).

Because the jury instructions permitted Inda's convictions without required proof of his own criminal liability, they violated due process. And because the Court of Appeals refusal to address this issue is based on flawed reasoning and reliance on Teal, review is appropriate under RAP 13.4(b)(1).

3. REVIEW IS APPROPRIATE UNDER RAP 13.4(b)(1) BECAUSE THE COURT OF APPEALS' REJECTION OF INDA'S INEFFECTIVE ASSISTANCE CLAIM CONFLICTS WITH THIS COURT'S DECISIONS.

Prosecutors withdrew a general theory of accomplice liability, meaning a theory that Inda was an accomplice to the homicide based on any knowing assistance in that crime. RP 3111, 3124.

Instead, prosecutors sought to rely on accomplice liability for one element of proof only: causation.

Assuming jurors believed two guns were used, and because it was impossible to determine who fired the bullets causing Alverez's death, they sought a "limited accomplice" instruction on the element of causation to ensure that, regardless of who was actually responsible, both could be found to have caused it. RP 3124-3126; see also CP 500-501, 509-509 (jury instructions refer to Inda "or an accomplice" only as to causation element)

Unfortunately, however, typical in cases involving *general* notions of accomplice liability, jurors were also instructed using a version of WPIC 10.51. Instruction 13 informed them:

> A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.
>
> 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 aids another person in committing the crime.
>
> The word "aid" means all assistance in committing the crime. More than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 492.

Caselaw makes clear that, by including a general instruction defining accomplice liability – regardless of modifications to the elements instructions – jurors may convict based on a general theory of accomplice liability. Thus, the instructions used at Inda's trial unintentionally allowed his conviction if he knowingly aided the shooting of Alvarez in *any* manner, even if based solely on presence and readiness to assist.

In Teal, 152 Wn.2d at 335-336, the "to convict" instruction for robbery repeatedly referred to the acts of "the defendant" rather than "the defendant or an accomplice." This Court held that, because accomplice

liability is not an element of a criminal offense, the failure to mention it in the "to convict" instruction was irrelevant to its availability as a theory of criminal liability. Because jurors were provided a separate instruction defining an accomplice, and instructions must be read as a whole, jurors could convict Teal as an accomplice. Id. at 336-340.

Under Teal, jurors possess the unconstrained ability to find a defendant guilty as an accomplice based solely on the giving of a general accomplice instruction. And, notably, this is true even where an accomplice option is included for some elements in the "to convict" instructions but excluded for others. See State v. Jaime-Rodriguez, 13 Wn. App. 2d 1092, at *4-*5 (2020) (where separate instruction described accomplice liability, omission of reference to accomplice liability in one element of "to convict" irrelevant), review denied, 196 Wn.2d 1026, 476 P.3d 572 (2020); State v. Abdi, 200 Wn. App. 1002, at *2

(2017) (under Teal, use of accomplice language for one attempted burglary charge but not the other legally irrelevant; jurors free to convict defendants as accomplices for either charge), review denied, 191 Wn.2d 1001, 422 P.3d 913 (2018); State v. Out, 174 Wn. App. 1063, at *4-*5 (jurors can convict based on general accomplice instruction even where "or an accomplice" not added to all elements in "to convict" instructions), review denied, 178 Wn.2d 1014, 311 P.3d 27 (2013).

On appeal, Inda argued that his trial attorney was ineffective for failing to modify the jury instructions to ensure that – consistent with everyone's intent – Inda could not be convicted based on general theories of accomplice liability. See BOA, at 38-50; RBF, at 10-16.

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457,

395 P.3d 1045 (2017). "Under Strickland, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim." Estes, 188 Wn.2d at 457-58.

"Performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances.'" Id. at 458 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" Id. (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A "reasonable probability" is lower than the preponderance of the evidence standard; "it is a probability sufficient to undermine confidence in the outcome." Id.

Division One rejected Inda's claim based on a finding that he could not demonstrate prejudice because "the State

did not argue or adduce evidence indicating that Inda acted as an accomplice in any way other than as a shooter." Slip Op., at 13. This is incorrect. Although the State argued that Inda and Bejar were accomplices because they both shot at Alvarez, their arguments to the jury also identified other ways in which Inda assisted the shooting and emphasized that accomplice liability is quite broad.

During opening statements, the prosecutor focused on Inda's role the day of the shooting, telling jurors that Inda spotted Alvarez and alerted the others, he looked up Alvarez on his phone, he asked another an occupant to confirm Alvarez's identify, he told those in the van to turn off their phones so they could not be tracked, and he said to duck immediately before shots were fired. RP 1010-1014. The prosecutor's opening statement also made clear that one need not fire a gun to be an accomplice, informing jurors that Garcia-Garcia "pled guilty to the crime of murder in the second degree with a firearm

enhancement for causing the death of Arturo Alvarez as an accomplice. She never shot Arturo Alvarez, but she was the driver of that minivan." RP 1021.

Similarly, during closing arguments, the prosecutor reminded jurors that Inda had assisted prior to the shooting. See RP 3222-3223 (Inda turned off his phone and told others to do so); RP 3328 (Inda pulled up images of Arturo on his cell phone to show the others). And, like opening statements, the prosecutor's arguments sometimes veered into a broader theory of accomplice liability:

> Who is an accomplice? An accomplice is someone who aids in committing the crime. So in this van, Alondra was an accomplice, Mr. Bejar was an accomplice, Mr. Inda was an accomplice. Magaly was not. Salvador was not. They were just there. And you can't be an accomplice if you're just there. You can only be an accomplice if you help.
>
> And these two were working together. They were shooting together. They were helping each other. And that is why if either one of their bullets killed Arturo, which it did,

> then they are accomplices, and the State has proven that they caused Arturo's death.

RP 3244 (emphasis added). Not once did prosecutors tell jurors their consideration of Inda's liability as an accomplice was limited to the single element of causation. Nor did the instructions limit jurors in this manner. Instead, consistent with accomplice liability generally, jurors could convict Inda merely because he knowingly assisted in *some* way.

The Court of Appeals finding that Inda suffered no prejudice from his attorney's deficient performance is contrary to the record and contrary to this Court's well-established and articulated prejudice standard. That standard – based on Strickland and discussed in cases such as Estes – simply asks if there is a "reasonable probability" counsel's mistake affected the outcome, meaning "a probability sufficient to undermine confidence in the outcome." Estes, 188 Wn.2d at 458. Properly

applied, that standard is met. Review of this issue is also warranted.

4. REVIEW OF THE "SUPPLEMENTAL SECURITY MEASURES" USED AT INDA'S TRIAL IS WARRANTED UNDER RAP 13.4(b)(1).

Under both the federal and state constitutions,[10] a defendant's fundamental right to a fair trial includes the presumption of innocence. 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, 844, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999); State v. Butler, 198 Wn. App. 484, 494, 394 P.3d 424, review denied, 189 Wn.2d 1004, 400 P.3d 1261 (2017). Security measures that single out a defendant as particularly dangerous or guilty undermine a fair trial by eroding this presumption; they are inherently prejudicial.

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[10] U.S. Const. amends. VI and XIV; Wash. Const. art. I, § 22.

State v. Jaime, 168 Wn.2d 857, 861-862, 233 P.3d 554 (2010) (citing Finch, 137 Wn.2d at 844-845).

A supplemental screening station (magnetometer) was placed "immediately prior" to the courtroom used for Inda's trial. RP 996. The station was beyond other courtrooms on the wing, making it apparent the same safety concerns did not apply to cases being heard within other courtrooms. RP 996, 1168.

Moreover, a paper copy of the security order was affixed to the courtroom door and contained the following advisement directly beneath the case caption:

> The following Order applies to all trial Superior Court proceedings in the above captioned cause of action beginning October 14, 2019 until the end of closing argument. The purpose of this Order is to provide the parties a fair trial, to preserve the dignity of these proceedings, and **ensure witness safety**.

CP 553, 556, 559 (emphasis added).

The order then warns:

> Persons entering the courtroom may be subjected to secondary screening, including use of a magnetometer, handheld metal detector, and pat down searches. Persons who fail to comply with screening requirements will not be permitted access to the courtroom.

CP 553, 556, 559.

On appeal, Inda argued that these supplemental security measures were inherently prejudicial and violated due process. This was so because (1) given the location of the secondary screening, it would have been clear to jurors that Inda's case was a focus of that additional security; (2) the court's order, posted on the door, expressly informed jurors the additional security was necessary to "ensure witness safety" at Inda's trial; and (3) many of the jurors had served or testified before and would have noticed the unusually heightened measures for Inda's trial. See AOB, at 30-33; RBF, at 3-10.

In Jaime, the defendant was tried for murder in a courtroom located within the local county jail. Jaime, 168 Wn.2d at 860-861. To diminish the risk of prejudice to the defendant, the trial judge told jurors the trial location "was simply the result of scheduling and administrative needs." Id. at 861. Even without the judge expressly telling jurors the measure was "to ensure witness safety," this Court found that jurors would not be "so inured" to the circumstance that it would have no effect on their perspective of the proceedings. Id. at 863. The procedure was inherently prejudicial, an abuse of discretion, and reversible error. Id. at 861-867. The same is true in Inda's case.

In State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981), this Court recognized the inherent prejudice to the presumption of innocence stemming from courtroom security practices. Hartzog was convicted of possessing a controlled substance while an inmate at the Washington

State Penitentiary. Hartzog, 96 Wn.2d at 386. Addressing security measures employed by the superior court that included "magnetometer searches of jurors and witnesses," the court said, "We think the potential prejudicial effect of such searches is obvious, and in some circumstances would constitute reversible error." Hartzog, 96 Wn.2d at 404-405.

Under Jaime and Hartzog, Inda should have prevailed. Instead, Division One rejected Inda's claim in light of its decision in State v. Bejar, 18 Wn. App. 2d 454, 491 P.3d 229, review denied, 198 Wn.2d 1029 (2021). Slip Op., at 5-7. In Bejar, Division One found the procedures used for Inda's and Bejar's trial similar to those upheld in Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), and Hayes v. Ayers, 632 F.3d 500 (9th Cir. 2011). Bejar, 18 Wn. App. 2d at 465. They are not.

In Flynn, where the defendant was tried along with five codefendants, "the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectator's section." 475 U.S. at 562. The Supreme Court was not convinced that jurors would interpret this as a sign the defendants were particularly dangerous or culpable. Id. at 569. "Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings" involving six defendants. Id. at 571.

In Inda's case, his disparate treatment (as opposed to "normal official concern") was apparent based on a security order and secondary screening used only in the courtroom where his case was being tried.

In Hayes, the Ninth Circuit Court of Appeals upheld the use of supplemental security measures (including use of a hand-held wand, pat down of outer clothing,

examination of bags/purses, and extra deputies inside and outside the courtroom). Hayes, 632 F.3d at 521. Citing Flynn, the Court reasoned:

> If uniformed guards sitting directly behind a defendant "need not be interpreted as a sign that he is particularly dangerous or culpable," 475 U.S. at 569, 106 S. Ct. 1340, then the mere screening of all who enter the courtroom certainly should not be. Indiscriminate screening at the courtroom door permits an even "wider range of inferences" than strategically placed guards, and it suggests even more strongly that the security is designed "to guard against disruptions emanating from outside the courtroom." *Id.*

Id. at 522.

The key difference in Hayes is that it involved "indiscriminate screening." Id. There is no indication in Hayes that jurors would have known or could have suspected that security measures differed in any other courtroom. That is not true in Inda's case, where the discrepancy in treatment compared to courtrooms located

on the very same courthouse wing highlighted the selective screening unique to his trial.

Because the decision in Inda's case conflicts with Jaime and Hartzog, review is appropriate under RAP 13.4(b)(1).

F. CONCLUSION

Inda respectfully asks this Court to grant his petition and reverse the Court of Appeals.

I certify that this petition contains 5,998 words excluding those portions exempt under RAP 18.17.

DATED this 13th day of April, 2022.

Respectfully submitted,

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APPENDIX

FILED
3/14/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO INDA,

Appellant.

DIVISION ONE

No. 81069-3-I

UNPUBLISHED OPINION

DWYER, J. — Antonio Inda appeals his convictions of murder in the second degree with a firearm enhancement and unlawful possession of a firearm in the second degree. Inda contends that (1) the juvenile court erred by not ruling on his claim of racial bias before declining jurisdiction, (2) supplemental security measures ordered by the trial court denied him a fair trial, (3) the to-convict instruction relieved the State of its burden of proof, (4) he was denied effective assistance of counsel with regard to an instruction defining accomplice liability, (5) his refusal to consent to a search was unconstitutionally used as substantive evidence of guilt, and (6) cumulative error denied him a fair trial. Finding none of these claims meritorious, we affirm.

I

Arturo Alvarez was killed in a drive-by shooting in April 2017, amidst an escalating gang war in south King County. The shots that killed Alvarez were fired from a vehicle driven by Alondra Garcia-Garcia. Fifteen-year-old Antonio

Inda, Miguel Bejar Jr., Sergio Contreras, Salvador Estrada-Bautista, and Margarita Alvidrez-Rodriguez were passengers in that vehicle.

Inda was initially charged in juvenile court with murder in the second degree with a firearm enhancement. The State moved to decline jurisdiction and transfer the case for adult prosecution. Following a declination hearing, the motion was granted.

In superior court, Inda's case was joined with those of his adult codefendants, Garcia-Garcia and Bejar. Garcia-Garcia was charged with rendering criminal assistance. Bejar and Inda were charged with murder in the second degree.

Eventually, Garcia-Garcia pleaded guilty to an amended information charging her with murder in the second degree with a firearm enhancement. The State also amended the charges against Bejar and Inda, charging each defendant with murder in the first and second degrees, with firearm enhancements, as well as with unlawful possession of a firearm (Bejar in the first degree and Inda in the second).

At trial, the State adduced evidence that Bejar and Inda each fired bullets at Alvarez. Inda testified and denied that he had possessed a firearm or shot at Alvarez.

Inda was convicted of murder in the second degree with a firearm enhancement.[1] Bejar was convicted of murder in the first degree. At a

[1] Inda was also charged and found guilty of murder in the second degree by means of felony murder. This conviction was subsequently vacated so as not to run afoul of double jeopardy protections.

subsequent trial, Inda and Bejar were each also convicted of unlawful possession of a firearm.

Inda appeals.

II

Inda, who self-identifies as "Hispanic," first contends that the juvenile court erred by not ruling on his claim of racial prejudice. As Inda did not advance such a claim before the juvenile court, we disagree.

"[T]rial courts must be vigilant in addressing the threat of explicit or implicit racial bias that affects a defendant's right to a fair trial." State v. Quijas, 12 Wn. App. 2d 363, 375, 457 P.3d 1241 (2020). "[O]nce a claim of racial bias is raised, investigations into allegations of racial bias are conducted on the record and with the oversight of the court." State v. Berhe, 193 Wn.3d 647, 661, 444 P.3d 1172 (2019). Thus, we have held that a juvenile court is required to rule on the question of whether racial bias influenced a declination proceeding when the juvenile alleged that juvenile court jurisdiction is declined in a racially disproportionately manner, citing due process and equal protection concerns. Quijas, 12 Wn. App. 2d at 367, 374. When confronted by a claim, supported by some evidence in the record, that racial prejudice has tainted the declination process, the juvenile court is required to rule on the claim. Quijas, 12 Wn. App. 2d at 375.

Inda asserts that the juvenile court herein made the "same error" as was made by the juvenile court in Quijas.[2] However, Inda did not argue, in either the

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[2] Br. of Appellant at 17.

written memorandum submitted to the juvenile court or in his oral presentation to the juvenile court, that the declination process herein was racially biased. Instead, Inda argued that consideration of the Kent[3] factors, as well as ongoing research about adolescent brain development, required the juvenile court to retain jurisdiction. The only reference to race in Inda's memorandum appeared in a section in which he argued that the eighth Kent factor, "the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the Juvenile Court," supported a decision to retain jurisdiction. Specifically, Inda argued that

> [p]utting Antonio in the adult system is not about rehabilitation, services he will receive, or, in light of the research, public safety. It is about what the State ultimately is always about: locking up young men—particularly Hispanic and black men—as long as possible and removing them from society for the better part of their lives. It may not be always conscious effort, but the net effect is always the same.

Inda supported this argument by citing a 2014 bulletin by the Washington State Partnership Council on Juvenile Justice, which he quoted in a footnote to the memorandum as follows: "A high percentage of youth of color are transferred to adult criminal court jurisdiction, more so pursuant to the automatic decline law (exclusive original adult court jurisdiction), contributing to significant racial and ethnic disparities."[4] While these statements note that racial disproportionality

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[3] Kent v. United States, 383 U.S. 541, 566-67, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). The Washington Supreme Court adopted the factors enumerated in Kent to govern declination hearings in Washington. State v. Williams, 75 Wn.2d 604, 606-07, 453 P.2d 418 (1969).

[4] The bulletin, which is further quoted in Inda's briefing on appeal, was not filed with the trial court and does not appear in the record.

exists within the criminal legal system and that juvenile transfers (particularly automatic ones, unlike the one at issue herein) contribute to that disproportionality, they are not a claim that racial bias tainted Inda's declination process. Nor do they identify a particular constitutional right as being at issue. Had Inda advanced such claims, the juvenile court would have been required to rule on them. As he did not, the juvenile court was not required to do so. No trial court error is established.

III

Inda next contends that supplemental security measures used at trial were inherently prejudicial. This issue was also raised on appeal by Inda's codefendant, Bejar. See State v. Bejar, 18 Wn. App. 2d 454, 465, 491 P.3d 229, review denied, 198 Wn.2d 1029 (2021). As a result, we have previously addressed this issue with regard to these specific security measures and have determined that they were not inherently prejudicial. We thus reject Inda's claim of error.

Concerned about witness safety given the context of the shooting—a gang conflict escalated by social media[5]—the trial court issued a written order on courtroom security. The order stated that its purpose was "to provide the parties a fair trial, to preserve the dignity of these proceedings, and ensure witness safety." The order described secondary screening measures as follows:

> 1. Persons entering the courtroom may be subjected to secondary screening, including use of a magnetometer, handheld metal detector, and pat down searches. Persons who fail to comply with

[5] One witness, Estrada-Bautista, testified that he had been called a "snitch" repeatedly on social media prior to being shot at, which he believed to be in connection to his participation in this investigation and trial.

> screening requirements will not be permitted access to the courtroom.
>
> 2. Except as specifically authorized in this document or by separate order of the Court, no cell phones, cameras, or other electronic devices capable of audio or video recording, or component parts of such devices, will be permitted in the courtroom. Persons entering the courtroom may be required to leave such devices with security personnel.

The order stated that jurors were required to go through secondary screening but could keep their laptops, tablets, and cell phones as long as they were wearing their juror badges. According to Inda, the order was posted outside the courtroom door during trial.[6]

The presumption of innocence is a basic component of a fair trial under our system of justice. State v. Jaime, 168 Wn.2d 857, 861, 233 P.3d 554 (2010). "In order to preserve a defendant's presumption of innocence before a jury, the defendant is 'entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man.'" Jaime, 168 Wn.2d at 861-62 (quoting State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)). "'Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial.'" Jaime, 168 Wn.2d at 862 (quoting Finch, 137 Wn.2d at 845). "Such measures threaten a defendant's right to a fair trial because they erode his presumption of innocence; these types of courtroom practices are inherently prejudicial." Jaime, 168 Wn.2d at 862.

[6] It is unclear from the record whether the order was actually posted outside of the courtroom door. The court indicated that the order was to be posted, but there is no information as to whether the order was in fact posted.

As we explained when Inda's codefendant made an identical assertion on appeal, requiring jurors to go through the exact secondary screening here at issue and the posting of the written order on the courtroom door were not inherently prejudicial:

> In short, requiring jurors to go through a secondary screening on the first day of trial and posting a written order on the courtroom door stand in stark contrast to other security measures found inherently prejudicial, such as holding a trial in a jailhouse and shackling a defendant. See Jaime, 168 Wn.2d at 863-64 (holding a trial in a jailhouse courtroom is inherently prejudicial); State v. Finch, 137 Wn.2d 792, 844-47, 975 P.2d 967 (1999) (inherently prejudicial for a defendant to appear before a jury in shackles). This secondary screening here is more similar to Flynn[7] and Hayes[8] where the Supreme Court and the Ninth Circuit respectively found that courtroom security guards and courtroom entry-screening procedures similar to those used here were not inherently prejudicial. We conclude that neither requiring the jurors to go through secondary screening on the first day of trial nor posting the court's written courtroom security order on the courtroom door was inherently prejudicial.

Bejar, 18 Wn. App. 2d at 465.

We adopt the reasoning and analysis of the court in Bejar. On that basis, we conclude that Inda was not denied a fair trial.[9]

IV

Inda next avers that a reference to an accomplice in the to-convict instruction improperly allowed the jury to convict Inda without requiring the State to prove every essential element of the crime. This is so, according to Inda, because the jury could have concluded that an accomplice to Bejar other than

[7] Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

[8] Hayes v. Ayers, 632 F.3d 500 (9th Cir. 2011).

[9] Inda filed a motion to strike several footnotes in the State's brief referencing documents from other cases. We did not consider these documents; we deny Inda's motion to strike.

Inda caused Alvarez's death. As this claim was not properly preserved for appeal, we decline to review it.

We may decline to review any claim of error that was not raised in the trial court. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); see State v. Wilson, 10 Wn. App. 2d. 719, 721 n.1, 450 P.3d 187 (2019) (denying review of an alleged error in a to-convict instruction because it was not objected to at trial). An exception exists when the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); O'Hara,167 Wn.2d at 98. But RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal. Rather, it affords review of only certain questions of "manifest" constitutional magnitude. Our Supreme Court has rejected the argument that all trial errors that implicate a constitutional right are reviewable under RAP 2.5(a)(3), noting that "[t]he exception actually is a narrow one, affording review only of 'certain constitutional questions.'" State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting RAP 2.5 cmt. (a)).

Under RAP 2.5(a)(3), establishing that a claimed error is "manifest" requires a showing of actual prejudice. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). "'Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.'" Kirkman, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

Here, the State's theory of the case was that both Inda and Bejar fired guns at Alvarez and that, although it was unclear which of the two had fired the bullet which struck and killed Alvarez, the one whose bullet had not killed Alvarez was nevertheless guilty as an accomplice.

The jury was given a standard accomplice liability instruction and was further instructed that, to convict Inda, it was required to find beyond a reasonable doubt

> (1) That on or about the 11th day of April, 2017, the defendant Antonio Inda acted with an intent to cause the death of Arturo Alvarez;
> (2) That Arturo Alvarez died as a result of the acts of the defendant Antonio Inda or an accomplice; and
> (3) That the acts occurred in the State of Washington.

Jury Instruction 22.

Inda's trial counsel objected to the instruction, arguing that this wording—specifically the phrase "the defendant Antonio Inda or an accomplice"—allowed Inda to be convicted if the jury found that an accomplice to Bejar —such as Garcia-Garcia—caused Alvarez's death. Inda did not, however, object on the ground that the resulting instruction relieved the State of its burden of proving every element of the offense.

Inda contends that this alleged error is of constitutional magnitude because it allowed the State to obtain a conviction without proving that Alvarez died as a result of his actions or the actions of a person for whom he was responsible. Omitting an element of a charged crime from a to-convict instruction is a constitutional error. O'Hara, 167 Wn.2d at 101; State v. Boss, 144 Wn. App

878, 894, 184 P.3d 1264 (2008), aff'd on other grounds, 167 Wn.2d 710, 223 P.3d 506 (2009).

Jury instructions are read as a whole and in a commonsense manner. See State v. Pittman, 134 Wn. App. 376, 382-83, 166 P.3d 720 (2006), abrogated on other grounds by State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). They are legally sufficient if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

Interpreting the instruction as Inda asks us to would require jurors to read "Antonio Inda or an accomplice" to mean something other than "Antonio Inda or an accomplice to Inda." This reading is not one that is natural or comports with commonsense. Rather, the reading that Inda suggests—that "an accomplice" could refer to an accomplice to someone other than Inda—is a strained reading of the instruction. Inda cites no authority for his proposition that the phrase "or an accomplice" is problematic in cases with multiple potential accomplices. If "an accomplice" could mean an accomplice to anyone, rather than an accomplice to the defendant mentioned in the instruction, it would be problematic in any to-convict instruction. Yet the phrase "or an accomplice" is regularly used in cases in which accomplice liability is at issue and has received the explicit approval of our Supreme Court. See State v. Teal, 152 Wn.2d 333, 336 n.3, 96 P.3d 974 (2004) ("[T]he better practice in a case prosecuted on the theory of accomplice liability might be to include the language 'the defendant or an accomplice' in a 'to convict' instruction."). Furthermore, this phrasing also avoids using a phrase

such as "his accomplice," which could be construed as an impermissible judicial comment on the evidence because it presupposes that the defendant had an accomplice. See State v. Fallentine, 149 Wn. App. 614, 626, 215 P.3d 945 (2009) (finding use of the phrase "his accomplice" did not prejudice defendant where State's theory of the case and undisputed evidence suggested that defendant was the accomplice, not the principal).

Given this context, Inda does not demonstrate actual prejudice resulting from the claimed error. We thus decline to review this issue.

V

Inda next asserts that his trial counsel's failure to propose an alternative instruction more narrowly defining accomplice liability constituted ineffective assistance of counsel. We disagree.

In order to succeed on an ineffective assistance of counsel claim, the defendant must demonstrate both that (1) the attorney's performance was deficient and (2) the defendant was prejudiced by that deficient performance. In re Det. of Hatfield, 191 Wn. App. 378, 401, 362 P.3d 997 (2015) (quoting State v. Borsheim, 140 Wn. App. 357, 376, 165 P.3d 417 (2007)). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland v. Washington, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"Deficient performance is that which falls below an objective standard of reasonableness." State v. Weaville, 162 Wn. App. 801, 823, 256 P.3d 426 (2011). To show prejudice, "[i]t is not enough for the defendant to show that the

errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Rather, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In determining whether there is a reasonable probability that the errors impacted the outcome of the proceeding, we are to consider the "totality of the evidence before the judge or jury." Strickland, 466 U.S. at 695.

Here, the State's theory of the case was that Bejar and Inda each shot at Alvarez, that it was unclear which of the two fired the bullet that caused Alvarez's death, and that each defendant was responsible for the death based on a theory of accomplice liability as to the element of causation. The State indicated that it was not seeking to prove accomplice liability for acts other than shooting a gun. Accordingly, the trial court did not instruct the jury as to a lesser offense—manslaughter in the second degree—that Inda's counsel argued a general theory of accomplice liability would have put at issue.

The jury was issued a standard accomplice liability instruction, consistent with 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.51 (6th ed. 2012):

> A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.

> 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 aids another person in committing the crime.
>
> The word "aid" means all assistance in committing the crime. More than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Jury Instruction 13.

According to Inda, his counsel was ineffective because the attorney did not propose a modified version of the issued instruction which would have more specifically limited his accomplice liability to liability only for firing a gun. But, at trial, the State did not argue or adduce evidence indicating that Inda acted as an accomplice in any way other than as a shooter. Given this context, there is not a reasonable probability that, had Inda's counsel proposed a different instruction, the outcome of the proceeding would have been different. Moreover, Inda's assertion that he was prejudiced relies on the notion that, had the State pursued a more general theory of accomplice liability, additional lesser offense instructions would have been required. Greater specificity as to this claim does not appear in the appellate briefing. And even if it did, Inda does not show that he would be able to meet the demanding standard to establish prejudice in such a circumstance. See Grier, 171 Wn.2d at 44 (holding that because juries are presumed to follow their instructions, which require acquitting on the greater charge before considering lesser offenses, availability of a "compromise verdict" would not have changed guilty finding).

To find prejudice, the Strickland opinion requires that we determine that the claimed error "undermine[d our] confidence in the outcome" of the trial. 466

U.S. at 694. We are not of such a mindset with regard to this proceeding. Thus, Inda has not established prejudice. His claim of error fails.

VI

Inda next asserts that testimony indicating that his social media and cell phone records were obtained pursuant to a warrant improperly prejudiced him based on his exercise of his constitutional right to refuse warrantless searches. We disagree.

The use of a defendant's refusal to consent to a search as substantive evidence of guilt can constitute a constitutional violation because it penalizes the defendant for exercising the protections of the Fourth Amendment or article I, section 7. State v. Gauthier, 174 Wn. App. 257, 267, 266-67, 298 P.3d 126 (2013) (prosecutor's statement that refusing DNA search was consistent with guilt impermissible violation of constitutional rights).

Here, no evidence that Inda refused to consent to a search was introduced. A police detective testified that Inda's Facebook account—like that of all involved individuals, including Estrada-Bautista—was acquired through "judicial authorization" from Facebook. Additionally, an exhibit was admitted indicating that Inda's cell phone records had been acquired from T-Mobile in response to a search warrant. There was no testimony elicited that Inda refused to cooperate by providing cell phone or social media records to investigators. Moreover, as these records were not obtained from Inda pursuant to a warrant, but were instead obtained from T-Mobile and Facebook respectively, there was no implication that Inda was asked to provide these records and refused.

Inda contends that testimony regarding Estrada-Bautista's action of voluntarily providing his cell phone records to the police was used in contrast to him. But no comments were made indicating that Estrada-Bautista's cooperation was indicative of innocence, and testimony was elicited that Estrada-Bautista's Facebook records were provided by Facebook with "judicial authorization," just as were Inda's.

No evidence was admitted implying that Inda exercised his right to refuse a warrantless search. No entitlement to appellate relief on this claim is established.

VII

Finally, based on the assignments of error discussed above, Inda asserts that he has a right to a new trial due to cumulative error. Cumulative error is established when, taken alone, several trial court errors do not warrant reversal of a verdict but the combined effect of the errors denied the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). It is the defendant's burden to prove an accumulation of error of sufficient magnitude to necessitate retrial. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964 (1994). Herein, Inda makes this assertion without support. He has not established any prejudicial error, let alone the confluence of the many errors that would give rise to a ruling of cumulative error. Accordingly, Inda's claim fails.

Affirmed.

Dwyer, J.

WE CONCUR:

Hazelrigg, J. Andrus, A.C.J.

NIELSEN KOCH & GRANNIS P.L.L.C.

April 13, 2022 - 10:50 AM

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