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Supreme Court No. ____
(COA No. 37557-9-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FERNANDO MARCOS GUTIERREZ,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Fernando Marcos Gutierrez, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated February 8, 2022, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). A copy is attached as Appendix A. On February 22, 2024, the Court of Appeals granted in part a motion for reconsideration involving sentencing issues that are not at issue in this petition. A copy is attached as App. B.[1]

B. ISSUES PRESENTED FOR REVIEW

1. During voir dire, the prosecution raised the specter of illegal immigration in a manner similar to what this Court condemned in *State v. Zamora*.[2] Echoing these comments, Juror 16 said he disliked illegal immigration, discredited anyone who

[1] The delay between the Court of Appeals decision and ruling on reconsideration occurred due to a stay imposed pending the outcome of *State v Westwood*, 2 Wn.2d 157, 534 P.3d 1162 (2023).

[2] 199 Wn.2d 698, 512 P.3d 512 (2022).

came to the United States illegally, and had already judged the defendants who had Mexican surnames and used Spanish interpreters in the courtroom. However, the defense exhausted their peremptory challenges and did not ask to remove this juror for cause. This Court should grant review because an apparently and admittedly biased juror served in Mr. Gutierrez's case, denying Mr. Gutierrez his right to an impartial and fundamentally fair jury trial.

2. When an aggravated first degree murder conviction rests on accomplice liability, the prosecution must prove the defendant was a major participant in the homicide. Mr. Gutierrez was not present when a victim initiated a spontaneous struggle over gun that resulted in a person's death. Misinterpreting this Court's precedent, the Court of Appeals concluded Mr. Gutierrez's participation in an earlier part of the incident made him an accomplice to aggravated first degree murder, despite not playing a role in the homicide. This Court should grant review due to the Court of Appeals'

misapplication of the law governing accomplice liability for aggravated first degree murder.

3. The prosecution's case rested on whether Mr. Gutierrez's participation in an earlier assault constituted sufficient evidence to convict him of a homicide and shooting that occurred in another place and arose spontaneously. The court impermissibly commented on the evidence and diluted the State's burden of proof by instructing the jury that Mr. Gutierrez was "deemed" guilty if it found he was involved any assaultive conduct.

4. The prosecution may not misrepresent the law in its closing argument. The prosecutor told the jury accomplice liability requires knowingly aiding "a crime," even though the law requires the accomplice knowingly aid "the crime charged." The prosecutor's closing argument diluted its burden of proving Mr. Gutierrez was an accomplice.

5. The court allowed a former defense lawyer, who was a current prosecutor, to testify about prior statements made by a

co-defendant testifying for the State as part of a plea agreement, ruling this qualified as a prior consistent statement. However, a witness's prior statement is inadmissible if made after the witness had a motive to fabricate. This Court should grant review because the trial court misconstrued the rules of evidence and the Court of Appeals impermissibly sanctioned the prejudicial practice of practice of permitting a former defense attorney and current prosecutor to bolster the credibility of a witness.

C. STATEMENT OF THE CASE

Mr. Gutierrez was accused of being an accomplice to a murder committed by Gustavo Tapia Rodriguez and Julio Albarran. He was tried alongside Mr. Tapia Rodriguez. Both men speak Spanish as their first language and used interpreters at trial.

1. Jury selection.

Mr. Gutierrez's trial occurred in 2019. The prosecutor started jury selection by asking jurors about their opinions of

immigration "going on in the country right now" and whether people think the United States has a "very good immigration policy" or is it "a terrible immigration system" that's "not working." RP 386.

After several jurors spoke of their opinions about immigration, the prosecutor similarly asked jurors to give their opinions of "the criminal justice system" and whether they felt crime was out of control or things were going well. RP 391. Jurors connected the related topics, one noting there is a "broken immigration system, [and] we get some people that you've got to lock your doors for," and another saying "It doesn't seem to have much to do with the illegal immigration as has maybe been suggested. It's our society has just kind of come apart at the seams." RP 395, 397.

Juror 16 admitted he harbored a strong bias against people who came to the country illegally.[3] He admitted he

[3] Mr. Gutierrez's supplemental brief sets forth Juror 16's comments in detail.

already judged the defendant. RP 507-08. He said he was "bothered" by the defendant's Mexican dissent. RP 507. When asked if it would influence his decision despite not knowing if the defendant came here legally, he answered, "yes," without equivocation. RP 509. He said even if immigration was not mentioned at trial, it would be in the back of his mind. RP 508. He doubted his ability to follow an instruction to set his bias aside but when pressed, said, "I'm willing to listen." *Id*.

Juror 16 served on the jury, after the defense used all peremptory challenges and without anyone moving to strike this juror. RP 685; CP 315-19.

The Court of Appeals ruled the trial court was not required to question Juror 16's bias and ruled the trial court properly deferred to counsels' failure to excuse the juror. Slip op. at 21.

2. Trial evidence.

Eustolia Campuzano asked Mr. Tapia Rodriguez to scare her former boyfriend, Arturo Sosa, after Mr. Sosa broke up with

her. RP 2099, 2105, 2108. Mr. Tapia Rodriguez drove Ms. Campuzano, Mr. Gutierrez, Julio Albarran, and another person, following Mr. Sosa on his way to work. RP 2106, 2112-15. Jose Cano Barrientos was driving Mr. Sosa. RP 808-09.

Mr. Cano Barrientos pulled over because a car behind him was flashing its lights. RP 810-11. Two men approached with guns. RP 812-13, 830. At trial, Mr. Albarran said these men were Mr. Tapia Rodriguez and Mr. Gutierrez. RP 925-26. The men told Mr. Sosa and Mr. Cano Barrientos to kneel on the ground. RP 812. *Id*. Mr. Cano Barrientos thought he heard a gunshot and suspected someone fired into the ground to scare them. RP 813, 1199.

Someone said there were too many cars driving by. RP 813-14. The men put Mr. Cano Barrientos and Mr. Sosa into the back seat of Mr. Cano Barrientos' car. RP 814. Mr. Albarran drove this car with Mr. Tapia Rodriguez, who was pointing his gun at the two men as they drove. RP 817, 931. Mr.

Gutierrez was in the back seat of a different car, which was ahead of the car Mr. Albarran was driving. RP 930, 2120.

While Mr. Albarran was driving, Mr. Sosa tried to grab Mr. Tapia Rodriguez's gun. RP 817. Mr. Cano Barrientos saw Mr. Sosa struggling with Mr. Tapia Rodriguez and he grabbed Mr. Albarran's neck and tried to choke him. RP 817-18. Unable to break free of Mr. Cano Barrientos, Mr. Albarran fired a shot at him, believing he had to defend himself. RP 931-32. Mr. Tapia Rodriguez then fired several shots at Mr. Sosa. RP 819, 933.

Mr. Sosa died from Mr. Tapia Rodriguez's gunshot. RP 1156, 1179, 1205. Mr. Cano Barrientos was injured by Mr. Albarran's gunshot but survived. RP 819, 821.

After the shooting occurred, the person driving the car Mr. Gutierrez was in noticed the other car had stopped. RP 819, 934. They turned around, picked up Mr. Tapia Rodriguez and Mr. Albarran, and drove away. *Id*.

Sometime later, Mr. Albarran was arrested for an unrelated murder for which he faced life in prison. RP 945, 966-68, 1101-02. He reached an agreement to plead guilty to one count of second degree murder for the other case and to receive a sentence of 18 years, on the condition he testify for the prosecution in this case and the other murder case — in exchange, Mr. Albarran was not charged with any crimes related to this case. RP 938-39, 945-46.

Mr. Albarran testified Mr. Tapia Rodriguez told him they were going to "beat up" the men and "leave them" on the roadside. RP 916, 981. He did not believe there was a plan to shoot anyone. *Id*. Mr. Albarran agreed Mr. Gutierrez was not present for the shooting. RP 925-26.

The prosecution charged Mr. Gutierrez and Mr. Tapia Rodriguez with aggravated murder in the first degree based on premeditated murder occurring during kidnapping in the first degree; first degree murder under alternatives of intentional murder, felony murder based on assault, and murder by extreme

indifference involving Mr. Sosa's death, as well as two offenses for harm caused to Mr. Cano Barrientos: assault in the first degree and kidnapping in the first degree. CP 1-6. Each offense had a firearm sentencing enhancement. *Id*.

Over defense objection, the prosecution called Mr. Albarran's former defense attorney as a witness in its case-in-chief. RP 488-95. Attorney Smitty Hagopian was now a prosecutor and he verified that Mr. Albarran told him the same information he told the prosecution. RP 1009-10, 1013.

During closing argument, the prosecution conceded Mr. Gutierrez was not present when the shooting occurred. RP 2720, 2726, 2728, 2730-31. It encouraged the jury to convict him because he aided in "a crime" and "helped with the assault." RP 2721, 2730. Mr. Gutierrez was convicted of all charges. CP 101-14.

The facts are further explained in Appellant's Opening and Supplemental Briefs, in the relevant factual and argument sections, and are incorporated herein.

D. ARGUMENT

1. This Court should grant review to address the trial court's obligation when a juror expresses anti-immigrant racial bias during voir dire.

a. By permitting a racially biased juror to serve in the case, Mr. Gutierrez was denied a fundamentally fair trial.

People accused of a crime have a federal and state constitutional right to a fair and impartial trial by jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Irby*, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015); *United States v. Kechedzian*, 902 F.3d 1023, 1027 (9th Cir. 2018). "The bias or prejudice of even a single juror is enough to violate that guarantee." *Kechedzian*, 902 F.3d 1027.

A juror who cannot try the issue impartially and without prejudice to the substantial rights of a party is actually biased. *Irby*, 187 Wn. App. at 194; *see* RCW 4.44.170(2); CrR 6.4(c). "A trial judge has an independent obligation to protect" the accused's right to remove a biased juror, "regardless of inaction by counsel or the defendant." *Id*. at 193.

To protect this right, the trial court should excuse a prospective juror for cause if the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Pena Salvador*, 17 Wn. App. 2d 769, 784, 487 P.3d 923 (2021), *overruled on other grounds*, *State v. Talbott*, 200 Wn.2d 731, 744, 521 P.3d 948 (2022) (internal citations omitted).

Racial and ethnic bias "implicates unique historical, constitutional, and institutional concerns." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 209, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017). While all forms of improper bias by jurors "pose challenges to the trial process," courts justifiably "treat racial bias with added precaution." *Id*. at 225. By ignoring concerns of racial animus expressed by a juror, courts risk undermining confidence in jury verdicts and diluting the "central premise of the Sixth Amendment trial right." *Id*.

It "fundamentally undermines the principle of equal justice" to permit a juror to serve when that juror has expressed

racial biases that may affect their perceptions of the accused. *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011).

b. The court is independently obligated to remove jurors who clearly express their racial or ethnic bias.

Permitting "racial or ethnic prejudice to invade the jury system, at any stage of a criminal proceeding, is to damage 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" *Zamora*, 199 Wn.2d at 711 (quoting inter alia, *Peña-Rodriguez*, 580 U.S. at 224).

Expressions of racial bias need not be blatant to be insidious and effective. *Id*. at 714 (citing *Monday*, 171 Wn.2d at 678). For example, a prosecutor's statements during voir dire impermissibly taint the trial if they "apparently" appeal to racial bias, even if the remarks are not an intentional appeal to such bias. *Id*. at 715.

In *Zamora*, defense counsel did not object when the prosecutor discussed the societal harms wrought by illegal

immigration with potential jurors. The prosecution contended this lack of objection signaled the defense was not troubled by the comments and perhaps wanted to take advantage of the information learned. *Id*. at 716. But this Court ruled it would "not defer to defense counsel's personal opinion regarding the prosecutor's remarks." *Id*. Defense counsel might not have strong feelings about jurors who express racial bias or they may also be engaging in racial discrimination, but the court must enforce the parameters of a fair trial. *Id*.

This Court declared, "Defense counsel cannot waive his client's constitutional right to a fair trial, and we will not skirt the responsibility of upholding a defendant's constitutional right because defense counsel failed to appreciate the impropriety of the prosecutor's conduct." *Id*. at 717. "Therefore, it is incumbent on the trial courts to protect a defendant's right to a fair trial, even when defense counsel fails to object to conduct that is flagrantly or apparently intentionally appealing to racial or ethnic bias." *Id*.

These principles apply equally to the circumstances in this case. Juror 16 said he strongly disliked illegal immigrants. RP 507, 509. He said he had already judged the defendants to a degree based on their appearances, as counsel conceded they were Mexican. RP 507-08. The juror said he would be hard for him to get past his perceptions. RP 508-09. When asked what it would take to convince him not to be impacted by his perception of the defendants as illegal immigrants, he said was "ready to listen," but did not say what he would listen to and whether this meant he could be fair and unbiased. RP 509-10.

The Court of Appeals ruled the trial court did not definitively know whether Mr. Gutierrez was in the United States illegally, and could infer the defense counsel did not challenge Juror 16 because counsel planned to introduce evidence of Mr. Gutierrez's legal status. Slip op. at 21.

This speculation is puzzling and wrongheaded. This conversation arose in the context of telling the juror that citizenship was not a relevant part of the case. RP 507-08. Yet

even knowing this, Juror 16 said, "I think it will bother me" to serve in a case where a defendant was Mexican, without knowing his immigration status, because of his strong dislike of illegal immigration. RP 507.

Juror 16 expressed a troubling and intractable animus toward people who have not arrived in the United States with legal documentation. RP 507, 509. The Court of Appeals disregarded the problematic nature of seating a juror who admitted to a bias against people who appear to be non-citizens based on their race and ethnicity and who admitted he had already presumed the defendants were not here legally. RP 510.

A fair trial before a jury that is "unbiased and unprejudiced" is a cornerstone of the justice system. *State v. Berhe*, 193 Wn.2d 647, 658, 444 P.3d 1172 (2019). The Court of Appeals decision impermissibly condones counsel taking advantage of juror biases. Any juror who cannot try a case impartially for any reason should be removed. RCW 4.44.170.

This Court should grant review due to the court's failure to protect Mr. Gutierrez's right to a fundamentally fair trial.

At a minimum, this Court should enforce a test similar to that applied in *Zamora*. 199 Wn.2d at 718-19. When it is objectively apparent that a juror harbors racial biases, that juror should be excused unless the court affirmatively ascertains that the juror will not be impacted by racial animus. *Id*. No party should endorse or seek out jurors who will use their racial or ethnic biases to render a decision.

2. The Court of Appeals diluted the essential elements of aggravated murder based on accomplice liability as mandated by this Court.

a. Aggravated first degree murder requires proof a person was a major participant in the acts causing death.

Aggravated first degree murder requires the prosecution prove the accused person committed premediated intentional murder in the first degree as well as a statutory aggravating circumstance, and a conviction must rest on the person's own

conduct. RCW 10.95.020; *see State v. Roberts*, 142 Wn.2d 471, 501-02, 505, 14 P.3d 713 (2000).

Accomplice liability alone does not suffice. "Merely satisfying the minimal requirements of the accomplice liability statute" does not authorize a court to impose the mandatory life sentence that follows any conviction for aggravated first degree murder. *Id*. Instead, the jury must find the accused person was a major participant in the acts causing death and was personally involved in the aggravating circumstance. *Roberts*, 142 Wn.2d at 502; *see also In re Howerton*, 109 Wn. App. 494, 501, 36 P.3d 565 (2001) (aggravated murder "must depend on the defendant's own conduct").

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The Court of Appeals decision is contrary to this constitutional threshold and does not adhere to this Court's precedent.

b. The Court of Appeals ruled Mr. Gutierrez was liable as an accomplice based on conduct separate from the acts causing the person's death, contrary to this Court's precedent.

The Court of Appeals decision disregards the circumstances of the case. Mr. Gutierrez's role in the initial threats made to Mr. Sosa and Mr. Cano Barrientos by the side of the road did not involve any injury to anyone. Mr. Gutierrez was not involved in the homicidal acts. *Roberts*, 142 Wn.2d at 505. He was not present when these acts occurred and no one claimed he was an active participant at this time. Even the prosecution recognized this during closing argument. RP 2720, 2728, 2730.

There was no evidence of any plan to kill Mr. Sosa. All witnesses testified the plan was to scare Mr. Sosa or perhaps beat him up. RP 916, 981, 2105. And even there had had been such a plan, the acts that caused Mr. Sosa's death arose in a spontaneous struggle over a gun that was initiated by Mr. Sosa, and joined by Mr. Cano Barrientos.

The Court of Appeals erroneously construed "major participation in the acts causing death" as meaning the same thing as accomplice liability. Its decision is contrary to *Roberts* and *Howerton*. Mr. Gutierrez was convicted of aggravating first degree based on his acts at the outset of the incident, not because he played any active role in causing Mr. Sosa's death as case law demands. This Court should grant review.

3. The court's instructions diluted the elements of accomplice liability.

a. The court's instructions may not comment on the evidence or compel jurors to convict by creating inaccurate presumptions.

The court's instructions must correctly state the relevant law. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Instructions that do not correctly inform the jury of the applicable law or mislead the jury do not satisfy the constitutional demands of a fair trial. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)). If the instructions are

inaccurate or ambiguous, "the reviewing court cannot presume the jury followed the constitutional rather than the unconstitutional interpretation." *State v. McLoyd*, 87 Wn. App. 66, 71, 87 P.2d 1255 (1997) (citing *Sandstrom v. Montana*, 442 U.S. 510, 526, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)).

The court may not interfere with the jury's role as fact-finder by signaling certain facts have been proven or by giving instructions that jurors would reasonably construe as directing them to reach a certain decision. *Sandstrom*, 442 U.S. at 523; U.S. Const. amends. VI; XIV; Const. art. I, § 3, art. IV, § 16.

The parameters of accomplice liability are "subtle" but these subtleties are critical to establish culpability. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). The prosecution must prove the accused person "*actually* knew that he was promoting or facilitating" another person in committing the specific offense charged, not that he "should have known." *Id*. (emphasis in original). An accomplice does not need

advance knowledge of every element of the charged crime, but must be knowingly involved in it. *Roberts*, 152 Wn.2d at 510.

b. The court's instruction relieved the prosecution of its burden of proving the essential elements of accomplice liability.

The court's instruction explaining accomplice liability added language not in the pattern instruction. CP 63; *see* 11 Wash. Prac., Pattern Jury Instr. Crim., WPIC 10.51 (4th Ed 2016). The added language told the jury, "If a defendant is an accomplice to the crime of assault in any degree, he is deemed to be an accomplice in any other degree of assault." CP 63. It also told the jury that if it finds Mr. Gutierrez is an accomplice to "any degree" of murder or kidnapping "he is deemed" to be an accomplice to "any other degree" of murder or kidnapping. *Id*.

The Court of Appeals erroneously believed Mr. Gutierrez proposed this instruction. Slip op. at 16. However, the prosecution proposed the language that a person is "deemed to be an accomplice" to any assault if he was an

accomplice to any degree of assault. CP 245. The defense asked for different language pertaining solely to murder and kidnapping offenses, in separate instructions. CP 46, 47. The language in the defense-proposed instructions may also have misled the jury, but it does not pose the same degree of risk that jurors would construe the instructions as compelling it to find accomplice liability for all offenses.

Aiding a mere assault involves a tremendous range of conduct that includes the greater offenses of murder and kidnapping. *See*, *e.g.*, *Guffey v. State*, 103 Wn.2d 144, 149, 690 P.2d 1163 (1984) (assault includes threatening to injure another without any injury); *In re Burchfield*, 111 Wn. App. 892, 899, 46 P.3d 840 (2002) (ruling "purposefully shooting [someone] will always prove first degree assault," which overlaps with manslaughter and murder). This part of the court's instruction directed the jury that a person is deemed an accomplice to any crime involving assault, which would include murder and kidnapping, by their merely aiding any degree of assault.

The court's instruction impermissibly stated it must find accomplice liability if a person is an accomplice to any degree of assault, when this finding is never mandatory. The court's instruction commented on the evidence and diluted the State's burden. This Court should grant review of the instructional error.

4. The prosecution misrepresented its burden of proving accomplice liability in its closing argument.

The State must prove the accomplice "*actually* knew that he was promoting or facilitating" the charged crime. *Allen*, 182 Wn.2d at 374 (emphasis in original). It is misconduct for the prosecution to misrepresent this standard to the jury. *Id*.

The prosecution told the jury to view any involvement in any assault as a pathway to liability for another person's assaultive acts, without regard to the accused person's involvement in a later assaultive act or greater offense. This argument diluted the State's burden to prove accomplice liability for the charged offenses.

It told the jurors that accomplice liability means, "if you're helping somebody commit *a crime* with the knowledge that they're committing *a crime*, you're guilty of that crime. That's what the law says." RP 2720 (emphasis added).

The prosecutor also repeatedly used the court's instruction diluting its burden to prove accomplice liability based on Mr. Gutierrez's role in "any other assault" or "any level" of another offense committed by someone else. RP 2721-22, 2729, 2731. He explained that an assault can be "a swing and a miss," a punch, or pointing a gun and saying "I will shoot you." RP 2721. He gave the example of "you and your buddy go up to fight somebody" and "your buddy pulls out a gun and shoots them, you're responsible for that shooting, because you committed a lower level of assault, and your buddy raised it up to the next level." *Id*. The prosecutor told the jury these "rules" apply to kidnapping and murder. RP 2722.

The prosecution again explained that any simple assault, "like a punch" where "your buddy ratchets it up to one of those

felony assaults, that goes back to that accomplice liability instruction, you are guilty of the felony assault." RP 2729.

These thematic arguments were the only grounds on which the prosecution sought to convince the jury of Mr. Gutierrez's liability. It diluted the "subtle" but critical requirements of accomplice liability by repeatedly insisting some involvement in a crime automatically sufficed to render Mr. Gutierrez legally responsible for conduct committed by "a buddy." *Allen*, 182 Wn.2d at 374. By minimizing its burden of proof, the prosecution secured a conviction by improper means. This Court should grant review due to the likelihood this error will recur and the critical nature of accomplice liability in this case.

5. The court improperly allowed the State to bolster the credibility of its key witness through testimony from a prosecutor.

Using a prosecutor as a testifying witness in the State's case is a disfavored practice that risks denying the accused person a fair trial. *See United States v. Alu*, 246 F.2d 29, 33-34

(2d Cir. 1957). A prosecutor's misuse of evidence may deny a defendant his right to a constitutionally fair trial. *Monday,* 171 at 676; U.S. Const. amend. XIV; Const. art. I, §§ 3, 21, 22.

The "danger in having a prosecutor testify as a witness" results from the credibility jurors accord prosecutors. *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998). Jurors are likely to accord far greater weight to a prosecutor's testimony due to the prosecutor's prestige and official status. *See e.g.*, *Monday,* 171 Wn.2d at 677.

In any case, a party may not bolster or vouch for a witness's testimony "by showing that the witness has made prior, out-of-court statements similar to and in harmony with his or her present testimony on the stand." *Thomas v. French*, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983). Courts bar this bolstering testimony because "[r]epetition generally is not a valid test of veracity." *State v. Purdom*, 106 Wn.2d 745, 750, 725 P.2d 622 (1986). The emphasis at trial should be on in-

court, not out-of-court, statements. *Tome v. United States*, 513 U.S. 150, 156, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995).

The prosecution called Mr. Albarran's former defense attorney, who had become a prosecutor, to testify about Mr. Albarran's statements to him while he was representing him. RP 1009. Mr. Albarran's statements to his lawyer were made long after he was arrested, jailed, and charged with first degree murder in a different case. RP 968-70. The court admitted them as prior consistent statements. RP 496.

The former defense lawyer turned prosecutor, Mr. Hagopian, told the jury that Mr. Albarran had told him the same, consistent story he told the prosecutors in this case. RP 1010-13. The court overruled the defense objection to this testimony, even though Mr. Hagopian had no firsthand knowledge of the incident and was called only to vouch for and

bolster the credibility of the prosecution's main witness. RP 488-90, 492, 494-96.[4]

Mr. Albarran's motive to lie about Mr. Gutierrez's role in this offense arose before he made statements to his lawyer about the incident. His motive to lie about this case, and exaggerate Mr. Gutierrez's role in the incident, arose when he was charged with murder and other offenses that exposed him to a life sentence. RP 968, 1016-17, 1032, 1101. It arose when he sat in jail for months trying to piece together a defense for the original murder charges, and realized his precarious position for his role in that case unless he found a way to get a better deal. RP 1032, 1042, 1090-92.

Prior consistent statements from a witness which "merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative

[4] The Court of Appeals said there was no objection to this testimony, but the record shows both defense counsel objected as part of a joint conversation and the court overruled the objections. RP 488-04; Slip op. at 16-17.

force." *Purdom*, 106 Wn.2d at 750 (quoting *State v. Harper*, 35 Wn. App. 885, 858, 670 P.2d 296 (1983)).

It was manifestly unreasonable for the court to allow Mr. Albarran's former lawyer to testify about what Mr. Albarran told him while they were preparing a defense and negotiating a guilty plea. Mr. Albarran's out of court statements did not meet the requirements of ER 801(d)(1)(ii) as prior consistent statements. Yet by offering testimony from an experienced lawyer and current prosecutor vouching for the truthfulness of the central witness in the prosecution's case, the evidence likely swayed the jury to trust Mr. Albarran.

This impermissible bolstering should not be permitted, yet the trial court allowed such testimony in this trial as well as another trial, as the record indicates. RP 489-95. This Court should grant review as a matter of substantial public interest.

E. CONCLUSION

Based on the foregoing, Mr. Gutierrez respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 4906 words and complies with RAP 18.17(b).

DATED this 22nd day of March 2024.

Respectfully submitted,

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APPENDIX A

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February 8, 2022

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CASE # 375579
State of Washington v. Fernando Marcos Gutierrez
GRANT COUNTY SUPERIOR COURT No. 181003264

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TW/pb
Enc.

c: **E-mail** Hon. David Estudillo
c: Fernando Marcos Gutierrez
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FILED
FEBRUARY 8, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. FERNANDO MARCOS GUTIERREZ, Appellant.	)))))))))	No. 37557-9-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Fernando Marcos Gutierrez appeals after a jury found him guilty as an accomplice of the aggravated first degree murder of Arturo Sosa and the first degree kidnapping and first degree assault of Jose Cano Barrientos. We affirm Gutierrez's convictions, but remand for the trial court to apply the correct same criminal conduct test to the kidnapping and assault convictions.

FACTS

Eustolia Campuzano had been in a relationship with Arturo Sosa for almost three years before breaking up with him in November 2016. Campuzano moved out of the home they shared together and into Paula Rodriguez's home.

Ms. Rodriguez informed Campuzano that she knew some people who could scare Sosa. Ms. Rodriguez took Campuzano to see these people: Fernando Marcos Gutierrez and Gustavo Tapia Rodriguez. Campuzano told these men about Sosa and how she wanted to scare him.

Gutierrez and others developed a plan. Gutierrez told Julio Albarran Varona that he, Albarran Varona, Tapia Rodriguez, and Ambrosio Villanueva were going to beat up Sosa for hitting Campuzano and causing two screws to be placed into her jaw. On the evening of December 8, 2016, these four men and Salvador Gomez armed themselves with guns and went to Ms. Rodriguez's home. Gutierrez had a .40 caliber handgun. Tapia Rodriguez had a .45 caliber handgun.

Tapia Rodriguez told Campuzano they were going to scare Sosa. Most of them drank alcohol and consumed crystal methamphetamine throughout the night.

In the early morning hours of December 9, 2016, Tapia Rodriguez, Gutierrez, Villanueva, Albarran Varona, and Campuzano got into Tapia Rodriguez's GMC Yukon and drove to Sosa's house. They parked on the side of the road near the house until Sosa and a second person, Jose Cano Barrientos, left the house in Cano Barrientos's Ford Explorer. Tapia Rodriguez and his crew followed in the Yukon.

After they reached the highway, Tapia Rodriguez began flashing his lights on and off until Cano Barrientos pulled over to see if something was wrong. Tapia Rodriguez parked his Yukon behind Cano Barrientos's Explorer.

Three or four men got out of the Yukon, all armed with firearms equipped with silencers. Tapia Rodriguez and Gutierrez approached Cano Barrientos's vehicle with

guns drawn; Tapia Rodriguez went to the driver's side and Gutierrez went to the front passenger side. They ordered Cano Barrientos and Sosa out of the Explorer at gunpoint. Deoxyribonucleic acid (DNA) taken from the outside front passenger door handle of Cano Barrientos's vehicle matched Gutierrez's DNA.

Tapia Rodriguez and Gutierrez ordered Cano Barrientos and Sosa to kneel between the two vehicles. They told Cano Barrientos and Sosa, "*te voy matar*," which means, "I'm going to kill you." Report of Proceedings (RP)[1] at 1198. They cocked their guns and pointed them at the heads of Cano Barrientos and Sosa.

By this time, the plan to beat up Sosa had changed to killing both men. Tapia Rodriguez later remarked to Albarran Varona, "[S]ometimes when things don't work out the right way, people have to die." RP at 926.

Realizing that both men were about to be killed, Albarran Varona warned Tapia Rodriguez that there was traffic on the highway. The armed men then loaded Cano Barrientos and Sosa into the back seat of Cano Barrientos's Explorer.

Cano Barrientos sat in the back driver's-side seat, Sosa sat in the back center seat, and Tapia Rodriguez sat in the back passenger-side seat next to Sosa, pointing a gun at

[1] "RP" references are to the verbatim report of proceedings of the trial unless otherwise indicated.

him and Cano Barrientos. Albarran Varona was in the driver's seat, holding a pistol with a chambered round. Gutierrez, Villanueva, and Campuzano were in Tapia Rodriguez's Yukon, the lead vehicle, while Albarran Varona followed in Cano Barrientos's Explorer.

About one mile down the road, Sosa and Cano Barrientos tried to wrestle the gun from Tapia Rodriguez. While driving, Albarran Varona pointed his pistol at Sosa. Cano Barrientos then began choking Albarran Varona so he would not shoot Sosa. Albarran Varona fired his gun and the bullet hit Cano Barrientos in his upper chest, near his collarbone, causing him to collapse between the two front seats. Once Albarran Varona regained control of the car, he looked back and saw Tapia Rodriguez put his gun to Sosa's head and shoot three times.

With Gutierrez's help, the men got their guns, some shell casings, and a magazine and left in Tapia Rodriguez's Yukon. Before leaving, Gutierrez made Campuzano look at Sosa's body and threatened to kill her if she said anything.

Cano Barrientos survived. Sosa died.

Charges

The State filed a consolidated information against Gutierrez and Tapia Rodriguez. For Sosa's killing, the State charged both men with murder in the first degree and murder in the second degree, and alleged various special allegations, including

allegations that would support a sentence of aggravated first degree murder under RCW 10.95.020(11)(d). For Cano Barrientos's abduction, the State charged both men with first degree kidnapping and first degree assault and alleged various special allegations.

Albarran Varona was not charged but agreed to testify against Tapia Rodriguez and Gutierrez in exchange for a plea deal in a different murder case.

Jury Voir Dire

During voir dire, venire juror 16 expressed his opinion, that, as an immigrant from Russia, he experienced prejudice and hostility from others. He admitted he had racist thoughts when he was younger but his feelings changed because he kept an open mind and became more educated and aware. When jurors were asked whether anyone was going to hold Tapia Rodriguez's Mexican name or heritage against him, no one, including juror 16, answered affirmatively. However, when asked if everyone felt comfortable not delving into immigration issues because they lacked relevance to the case, juror 16 said, "Given that I came to this country legally, I think it will bother me." RP at 507. "It would influence my decision, I would think." *Id*. Following up on juror 16's comments, counsel for Tapia Rodriguez clarified that his client's immigration status is irrelevant to both the facts and the charges. Juror 16 responded, "Sure, I think that thought would still

linger in the back of my mind." *Id.* at 508. When defense counsel asked, "Would you hold that against him," juror 16 answered, "Yes." *Id.* Juror 16 then said, "[i]t might be" problematic for him even if the judge instructed him to ignore it. *Id.* Juror 16 explained why it was difficult for him to set aside his opinion on illegal immigration:

> JUROR [16]: . . . [Me] and my family came here legally, and it was very hard to do so. We followed the proper channels to get to this country legally. And so when you see somebody do it illegally, it doesn't matter what skin color they are, they're coming from Canada, it doesn't matter. If they're doing something illegally, they're breaking the law, they're breaking the law in this country.

Id. at 508-09. He acknowledged that there are justifications—such as genocide or gang infestation—for fleeing a dangerous country and such justifications would possibly change his mind. Yet, even knowing there is a possibility that Tapia Rodriguez fled a dangerous country, he would hold it against him. Finally, when counsel for Tapia Rodriguez asked, "[I]s there anything we could convince you or say to you, even with the judge's instruction, say, you shouldn't hold that, that shouldn't be a factor," juror 16 said, "I'm ready to listen." *Id.* at 510. He admitted he had already judged Tapia Rodriguez "[t]o some degree," but repeated, "Like I said, I'm willing to listen." *Id.*

Counsel for the State and the codefendants challenged several jurors for cause, but none challenged juror 16 for cause. Counsel also exercised their peremptory challenges,

but none exercised a peremptory challenge to remove juror 16. Each attorney confirmed that the jury ultimately empaneled, which included juror 16, was the jury he selected.

Pretrial Motions in Limine

In pretrial proceedings, Tapia Rodriguez moved to prohibit attorney Smitty Hagopian, Albarran Varona's former defense attorney, from testifying based on relevance, impermissible bolstering and vouching for Albarran Varona. The State intended to ask Hagopian about his research into protection for people who cooperate with the State and to establish that Albarran Varona had not received the State's investigatory records before his free talk with law enforcement. The court identified Albarran Varona's credibility as the central issue and found the expected testimony was factual and not improper bolstering or vouching. Based on its findings, the court denied Tapia Rodriguez's motion in limine.

During trial, defense counsel elicited testimony from Albarran Varona that Hagopian had prepared him for a free talk with law enforcement and went through the facts of this case.

Hagopian testified he had previously represented Albarran Varona in a murder case and worked out a plea agreement with the State. Part of the agreement required Albarran Varona to tell the State everything he knew about any crimes of which he was

aware. Hagopian had no discovery from the State related to the present case, so he had no evidence to share with his client before the free talk with law enforcement. Hagopian sat in on the free talk and heard Albarran Varona reiterate what he had previously heard from his client.

Jury Instructions

The State proposed a set of instructions, including a modified Washington Pattern Jury Instruction accomplice liability instruction. The modification added the following language to the standard instruction: "If the defendant is an accomplice to the crime of assault in any degree, he is deemed to be an accomplice in any other degree of assault." CP at 246. Counsel for Gutierrez proposed additional instructions that contained similar modification language, but, instead of discussing "assault," the modifications discussed "murder" and "kidnapping." CP at 46-47. The parties agreed to consolidate the modifications into an agreed accomplice liability instruction.

Counsel for Gutierrez explained:

> I filed some instructions earlier last week. . . . There are not too many. Since you haven't read them, I'll make it a little quicker. The first two I've cited, which are relying on WPIC 10.51, [the accomplice liability instruction]. [The prosecutor] and I agreed to incorporate that in what's now one of the state's supplemental instructions. Which explains why they did that. So their Supplemental Instruction 10.51, I'm satisfied with, because it incorporates what wasn't incorporated in their original set of instructions. Which is what I wrote. . . .

RP at 2617.

The trial court gave the agreed accomplice liability instruction, which read:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she 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 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.
>
> *If the defendant is an accomplice to the crime of murder in any degree, he is deemed to be an accomplice in any other degree of murder.*
>
> If the defendant is an accomplice to the crime of assault in any degree, he is deemed to be an accomplice in any other degree of assault.
>
> *If the defendant is an accomplice to the crime of kidnapping in any degree, he is deemed to be an accomplice in any other degree of kidnapping.*

CP at 63 (italics added to show the two sentences Gutierrez requested; underlining added to assist the reader in an issue raised on appeal).

State's Closing Argument

During closing arguments, the State referred to the court's accomplice liability instruction several times. The prosecutor argued that accomplice liability means: "[I]f you're helping somebody commit a crime with the knowledge that they're committing a crime, you're guilty of that crime. That's what the law says." RP at 2720. He explained to the jury, "[Y]ou and your buddy go up to fight somebody" and "your buddy pulls out a gun and shoots them, you're responsible for that shooting, because you committed a lower level of assault, and your buddy raised it up to the next level." RP at 2721. He concluded that these same "rules" apply to kidnapping and murder. RP at 2722.

Jury Verdict

After deliberating, the jury returned verdicts finding Gutierrez and his codefendant guilty of all charges, and answered "yes" as to all enhancements, including the enhancement supporting the sentence of aggravated first degree murder.

Sentencing

Gutierrez, citing *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987), and other authorities, argued that his convictions of first degree assault and first degree kidnapping against Cano Barrientos should be considered the same criminal conduct for purposes of calculating his offender score and running the convictions concurrently. The

trial court, however, applied the statutory intent analysis in *State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016), to conclude that the crimes were not the same criminal conduct, consistent with the most recently published Court of Appeals opinion in *State v. Johnson*, 12 Wn. App. 2d 201, 460 P.3d 1091 (2020), *aff'd*, 197 Wn.2d 740, 487 P.3d 893 (2021). Concluding that "the most recent published case law appears to apply this statutory element analysis versus the objective factual analysis that was done previously," the trial court found that the assault and kidnapping offenses did not "match statutorily." RP (Apr. 20, 2020) at 126-27. The trial court reasoned:

> So, the—the element that is different here is the intent to inflict "great bodily harm", which is an element that is separate and apart from the other charge. And when you do that objective statutory element review then, because there is a difference it does not appear [that they] can be considered the same conduct, same criminal conduct.
>
> So, at this point I am going to make a decision in favor of the State on this issue and we'll count those separately.

Id. at 127.

The trial court sentenced Gutierrez to life without parole for aggravated first degree murder, 210 months for first degree assault, and 144 months for first degree kidnapping. All sentences were ordered to run consecutively.

ANALYSIS

A. SUFFICIENT EVIDENCE SUPPORTS THE AGGRAVATED MURDER CONVICTION

Gutierrez contends the State failed to produce sufficient evidence that he was a major participant in the aggravating circumstances of Sosa's murder.

When a defendant challenges the sufficiency of the evidence, the proper inquiry 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). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. This court's role is not to reweigh the evidence or to substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion). Instead, because the jurors observed testimony firsthand, this court defers to the jury's decision regarding the persuasiveness of and the appropriate weight to be given to the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Accomplice liability can apply to any crime, including aggravated first degree murder. *State v. Mak*, 105 Wn.2d 692, 739-40, 744, 718 P.2d 407 (1986). Generally, to be an accomplice, the defendant must either (1) solicit, command, encourage, or request

that the principal commit the crime, or (2) aid or agree to aid the principal in planning or committing it. RCW 9A.08.020(3)(a)(i),(ii). These acts must be done with the knowledge that they will promote or facilitate the commission of the crime. *Id*. "[B]ecause only general knowledge is required, even if the charged crime is aggravated, premeditated first degree murder . . . 'the crime' for purposes of accomplice liability is murder, regardless of degree." *In re Pers. Restraint of Sarausad*, 109 Wn. App. 824, 835, 39 P.3d 308 (2001). In other words, to prove accomplice liability for Sosa's first degree murder, the State had to prove that Gutierrez generally knew that he was facilitating Sosa's murder. Additionally, to prove accomplice liability to support an aggravated murder sentence, the State also had to prove that Gutierrez was a "major participant" in the acts giving rise to Sosa's murder, which depends on *his* conduct, not the principal's conduct. *See State v. Roberts*, 142 Wn.2d 471, 502-03, 14 P.3d 713 (2000); *In re Pers. Restraint of Howerton*, 109 Wn. App. 494, 503-04, 36 P.3d 565 (2001).

There is ample evidence that Gutierrez was a major participant in the events that led to Sosa's murder: Gutierrez was armed with a firearm—a .40-caliber handgun. He was a passenger in the Yukon that followed Cano Barrientos's Explorer on the highway. Once the vehicles pulled over on the side of the highway, Gutierrez got out of the Yukon armed with his firearm, approached the Explorer's front passenger window with his gun

drawn, and ordered Sosa out of the vehicle. DNA taken from the outside front passenger door handle of Cano Barrientos's Explorer matched Gutierrez's DNA. Gutierrez and Tapia Rodriguez ordered Sosa and Cano Barrientos to kneel, said they were going to kill them, and pointed their guns at the men's heads.

The State's theory at trial was the plan to beat up Sosa had changed by the time Gutierrez and Tapia Rodriguez had the two men kneel between the parked vehicles. The State asked Albarran Varona if he knew why the plan had changed. He answered that he did not know at the time, but later Tapia Rodriguez told him, "[S]ometimes when things don't work out the right way, people have to die." RP at 926. The evidence, construed in the light most favorable to the State, shows that Gutierrez and Tapia Rodriguez were about to execute the two men when Albarran Varona warned them of approaching traffic. At that point, the decision was made to drive the two men somewhere else.

The evidence, construed in the light most favorable to the State, shows Gutierrez was not merely present and did not simply encourage or aid Tapia Rodriguez in kidnapping and murdering Sosa. Gutierrez, himself, initiated Sosa's abduction by ordering Sosa out of the Explorer at gunpoint. Gutierrez, himself, was about to kill Sosa on the side of the road. Thus, the record shows that Gutierrez was a major participant in the murder of Sosa.

B. WE DECLINE TO REVIEW AN UNPRESERVED CLAIM OF INSTRUCTIONAL ERROR

For the first time on appeal, Gutierrez assigns error to the jury instruction defining accomplice liability. He argues the accomplice liability instruction was erroneous and deprived him of his constitutional right to a fair trial because it told the jury it was *required* to find accomplice liability under circumstances where the law only *allows* the jury to find accomplice liability.[2] Gutierrez focuses on the word "deemed," which appears three times toward the bottom of the instruction fully quoted earlier. The State responds that this court should decline to review this issue because Gutierrez invited the alleged error. We agree.

The invited error doctrine prohibits a party from complaining of an error when that party materially contributes to it. *In re Estate of Reugh*, 10 Wn. App. 2d 20, 62, 447 P.3d 544 (2019). The doctrine applies when the party "takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal." *Lavigne v. Chase, Haskell, Hayes & Kalamon, PS*, 112 Wn. App. 677, 681, 50 P.3d 306

[2] Gutierrez also argues the instruction was constitutionally erroneous by diminishing the State's burden of proof because it allowed the State to argue Gutierrez was an accomplice to *the* crime because he was promoting *a* crime. We disagree that the instruction permitted this argument. But to the extent the prosecutor ineloquently made that argument, Gutierrez fails to raise or sufficiently analyze a prosecutorial misconduct claim.

(2002). Invited error of "whatever kind"—even constitutional error—may not be complained of on appeal by the party inviting the error. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (invited error doctrine applied to requested Washington Pattern Jury Instruction subsequently ruled unconstitutional; recognizing strictness of rule, but refusing to apply a more flexible approach).

Here, Gutierrez proposed two of the three sentences of which he now complains. In addition, he told the trial court he approved the entire instruction. These affirmative acts induced the trial court to give the modified accomplice liability instruction. We conclude that the invited error doctrine precludes review of this claim of error.

C. WE DECLINE TO REVIEW THE CLAIM OF ERROR RELATED TO HAGOPIAN'S TESTIMONY

Gutierrez argues the trial court erroneously allowed Albarran Varona's former defense attorney turned deputy prosecutor, Smitty Hagopian, to testify at trial. Gutierrez contends that Hagopian's testimony was more prejudicial than probative, constituted vouching and witness bolstering, and failed to satisfy ER 801's prior consistent statement standard.

Gutierrez did not object to Hagopian's testimony, either in a pretrial motion in limine or during trial. His defense counsel instead said that he was not counsel in a previous unrelated murder trial involving Gutierrez and was at a substantial disadvantage

when discussing what occurred during that case. This statement was not couched as an objection and it garnered no ruling from the trial court. Instead, Gutierrez's codefendant filed a motion in limine to exclude Hagopian's testimony as irrelevant and improper vouching or bolstering.

"Without an objection, an evidentiary error is not preserved for appeal. Appellant cannot rely upon the objection of a codefendant's counsel to preserve an evidentiary error on appeal." *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000) (footnote omitted). We therefore decline to review this claim of error.

D. SENTENCING ERROR

Gutierrez contends the trial court abused its discretion by applying the wrong legal standard when it determined his assault and kidnapping convictions were not the same criminal conduct. He asks that we apply the correct legal standard, conclude the two convictions are the same criminal conduct, score them as one offense, and remand for resentencing. We agree in part with Gutierrez's arguments.

Whenever a person is convicted of two or more current offenses that constitute the same criminal conduct, the offenses are counted as one crime. RCW 9.94A.589(1)(a). "Same criminal conduct" "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

The parties accurately note that appellate courts have applied different tests in analyzing same criminal conduct. The inconsistency arises because of two arguably irreconcilable Supreme Court cases. Both cases apply different same criminal conduct tests.

In *Dunaway*, the court held that the same criminal conduct test turns on whether the defendant's objective criminal intent changed from one crime to the next. 109 Wn.2d at 214-15. Years later, in *Chenoweth*, the court held that rape and incest charges arising from the same incident are not the same criminal conduct because the legislature had adopted distinct mens rea for each of the two offenses. 185 Wn.2d at 221. More succinctly, *Dunaway* views the same criminal conduct test as an inquiry into the *defendant's intent*, while *Chenoweth* views the same criminal conduct test as an inquiry into the *statutory mens rea*.

We recently reconciled both cases in *State v. Westwood*, No. 37750-4-III, (Wash. Ct. App. Dec. 16, 2021), http://www.courts.wa.gov/opinions/pdf/377504_pub.pdf. There, we noted that the Supreme Court has continued to follow *Dunaway* and that *Chenoweth* did not explicitly overrule *Dunaway* and its progeny. *Westwood*, slip op. at 10. We therefore limited *Chenoweth* to cases involving rape and incest. *Id.* at 10-11. The trial court did not have the benefit of *Westwood* prior to sentencing. It

understandably applied the *Chenoweth* test, reasoning that the most recent Court of Appeals authority controlled. In doing so, it erred.

We nevertheless decline Gutierrez's invitation to be the court that applies the *Dunaway* test. The *Dunaway* test must be conducted by the trial court. The trial court heard the evidence, is better equipped to conduct a hearing, and is the appropriate tribunal for the necessary factual findings.

We remand for the trial court to determine whether Gutierrez's convictions for first degree kidnapping and first degree assault are the same criminal conduct. In making this determination, it should apply the *Dunaway* test, as more fully explained in *Westwood*. If the trial court determines that Gutierrez's kidnapping conviction and assault conviction arise out of the same criminal conduct, these two offenses must be scored as one conviction.[3]

E. CONSTITUTIONAL RIGHT TO A FAIR TRIAL

By supplemental brief, Gutierrez contends his constitutional right to a fair trial was denied when the trial court allowed a venire juror to be seated even though the juror was biased against persons who are in the United States illegally. He asserts the trial court

[3] We further note that a party, at resentencing, may submit issues not raised on appeal to ensure the trial court enters the appropriate sentence. *State v. Davenport*, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007).

was required to remove the venire juror sua sponte. We disagree. Gutierrez's argument assumes the trial court knew Gutierrez was in the United States illegally.

A defendant has a constitutional right to an unbiased jury trial. *State v. Demer*y, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion); *City of Cheney v. Grunewald*, 55 Wn. App. 807, 810, 780 P.2d 1332 (1989). The presence of a biased juror cannot be harmless and allowing a biased juror to serve on a jury requires a new trial without a showing of prejudice. *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015). If the juror demonstrates actual bias, empaneling the biased juror is a manifest error. *Id*.

A trial judge is obligated to excuse a biased juror even if no party challenges the juror. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 855, 456 P.3d 869, *review denied*, 195 Wn.2d 1025, 466 P.3d 772 (2020). A trial court's erroneous failure to remove a biased juror requires a new trial without demonstrating prejudice. *Id.*

Venire juror 16 expressed bias against individuals, regardless of their country of origin, who enter the United States illegally. He said he would listen to the evidence, but he also admitted he might have prejudged Tapia Rodriguez to some degree even though he did not know his immigration status.

There is nothing in the record that shows the trial court knew, at the time of jury selection, Gutierrez was in the United States illegally.[4] Defense counsel actively challenged jurors for cause but failed to challenge juror 16. This permitted the trial court to infer that defense counsel would produce evidence that their clients were legal residents. Had Gutierrez requested to admit such evidence, the trial court would have allowed it.[5]

Because the trial court did not know that Gutierrez was in the United States illegally, only conjecture supported juror 16's removal. A trial court should be reluctant to interfere with a defendant's constitutional right to present their defense, including strategic decisions made during voir dire. *State v. Lawler*, 194 Wn. App. 275, 285, 374 P.3d 278 (2016) (citing *State v. Coristine*, 177 Wn.2d 370, 374-76, 300 P.3d 400 (2013)). The trial court exercised proper restraint here.

[4] The trial court knew that Gutierrez had once been picked up and released the same day by Immigration and Customs Enforcement. This brief detention even warrants the belief that Gutierrez was in the United States *legally*.

[5] Toward the end of trial, Tapia Rodriguez sought to admit evidence that he was born in Texas and was a United States resident. The trial court commented that it would have allowed the evidence but for the State convincing it that the evidence was fraudulent.

Affirmed, but remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, A.C.J.

Staab, J.

APPENDIX B

FILED
FEBRUARY 22, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, **Respondent,** **v.** **FERNANDO MARCOS GUTIERREZ,** **Appellant.**	**No. 37557-9-III** **ORDER GRANTING IN PART RESPONDENT'S MOTION FOR RECONSIDERATION**

THE COURT has considered respondent State of Washington's motion for reconsideration of the opinion filed February 8, 2022. Appellant Fernando Marcos Gutierrez has filed an answer. The panel has considered the motion and the answer and has determined the motion should be granted in part and this matter should be remanded to the trial court for further proceedings consistent with *State v. Westwood*, 2 Wn.3d 157, 534 P.3d 1162 (2023), and the 2023 statutory amendments to RCW 7.68.035 and RCW 43.43.7541, and to reconsider restitution interest in light of the 2022 statutory amendment to RCW 10.82.090. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of February 8, 2022, is hereby granted in part;

IT IS FURTHER ORDERED, this matter is remanded to the trial court (1) for further same criminal conduct proceedings consistent with the Supreme Court's clarification in *Westwood*, 2 Wn.3d 157, (2) to strike the victim penalty assessment and DNA fees in light of the 2023 statutory amendments to RCW 7.68.035 and RCW 43.43.7541, and (3) to reconsider restitution interest in light of the 2022 statutory amendment to RCW 10.82.090.

George Fearing

GEORGE FEARING
CHIEF JUDGE

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 37557-9-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Kevin McCrae
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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: March 22, 2024

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