No. 89917-7
Court of Appeals No. 42257-3-II
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THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

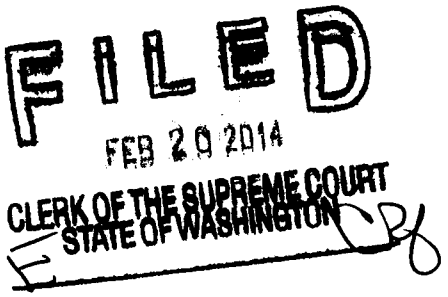
V.

DARCUS ALLEN,

Petitioner.

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

PETITION OF REVIEW



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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner, Dorcus Allen, asks this court to accept review of the published opinion in *State v. Allen*, __Wn.2d __, (2014 WL 121672).

B. OPINION BELOW

In a published the Court of Appeals unanimously agreed the closing argument by attorneys from the Pierce County Prosecutor's Office was plainly improper. The court found prosecutors repeatedly misstated the definition of "knowledge," telling the jury the State proved knowledge so long as the jury found Mr. Allen "should have known" his acts were assisting another. However, the court split on the question of whether the repeated misconduct required reversal, with only Judge Bradley Maxa's dissent concluding it had denied Mr. Allen a fair trial.

C. ISSUES PRESENTED

1. The Sixth Amendment and the Fourteenth Amendment's Due Process Clause require the State prove each element of an offense to the jury beyond a reasonable doubt. To convict someone as an accomplice, Washington law requires the State prove beyond a reasonable doubt the person knew he was assisting someone in the commission of the crime charged. To prove knowledge, Washington law requires the State prove beyond a reasonable doubt that a person has actual subjective knowledge

of the facts necessary to constitute the crime charged. Where the State did not prove beyond a reasonable doubt that Mr. Allen had actual subjective knowledge that he was assisting in the commission of four murders do his four convictions of first degree murder violate the Sixth and Fourteenth Amendments?

2. A prosecutor violates the Fourteenth Amendment's Due Process Clause when he misstates the law and endeavors to relieve the State of its burden of proving each element of an offense. The prosecutors purposefully and repeatedly told the jury, over Mr. Allen's objection and in direct contradiction of long-settled Washington law, that Mr. Allen was guilty so long as he "should have known" Mr. Clemmons intended to commit murder. Did the State's purposeful misconduct violate the Fourteenth Amendment's Due Process Clause?

3. Article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution do not permit a warrantless police entry of a home to arrest a person based solely upon probable cause. The warrantless entry may only be justified if the State proves an exception exists to the warrant requirement. Where the State did not establish any exigent circumstance justified the officers' warrantless entry, did the entry of a motel room and the subsequent arrest

of Mr. Allen inside violate the Article I, section 7 and the Fourth Amendment?

4 Due process requires a trial court to instruct on a lesser included offense when requested by the defendant, where (1) the lesser offense is necessarily committed when one commits the greater offense as charged, and (2) in the light most favorable to the defendant the evidence supports an inference that only the lesser offense was committed. In a prosecution for first degree murder as an accomplice, the State's evidence, when viewed in the light most favorable to Mr. Allen, permitted a reasonable juror to conclude Mr. Allen committed only rendering criminal assistance. Did the trial court deny Mr. Allen due process when it refused to provide the requested instruction on the lesser offense?

5. The general accomplice liability statute, RCW 9A.08.020, does not apply to sentencing enhancements or factors. Sentencing enhancements and aggravating factors may only apply to an accomplice if the statute establishing the enhancement or factor provides for accomplice liability. Did the court error in imposing an exceptional sentence in Mr. Allen's case?

6. The Sixth and Fourteenth Amendments impose an affirmative duty upon the trial court to ensure the jury's verdict is the product of the evidence presented at trial and is free of influence from outside sources.

The trial court concluded it could not limit courtroom spectators from wearing t-shirts memorializing the victims of Maurice Clemmons's crimes, even when those t-shirts were visible to the jurors during trial. Did the trial court's failure to ensure the jury's verdict was free of improper influences deprive Mr. Allen of his Sixth and Fourteenth Amendment rights?

D. SUMMARY OF THE CASE

Mr. Allen worked for a landscaping company Maurice Clemmons owned.

In May 2009 Maurice Clemmons began throwing rocks through his neighbors' windows. 42 RP 3305. When police responded, Clemmons wrestled with and punched the officers. *Id.* at 3307. At one point he began telling an officer to shoot him. *Id.* at 3308.

Clemmons illustrated other bizarre behavior. On several occasions he invited family to barbecues and told them celebrities such as Barack Obama, Oprah Winfrey, and LeBron James would be in attendance. 42RP 3309, 3322. On other occasions Mr. Clemmons claimed to be Jesus Christ, and travelled to New York City to proclaim himself. 37RP 2769.

About six months following his arrest for his assault of the police officers, Mr. Clemmons posted bail and was released from jail the Monday before Thanksgiving. That week, and particularly at his family's

Thanksgiving dinner, Clemmons expressed an animosity towards police officers that family members found shocking. 37RP 2749-52. Mr. Clemmons proclaimed to his family that if police came for him, he would be waiting with a gun. Mr. Clemmons also stated he would go to a school and kill the white children. 37RP 2753. Mr. Clemmons would not listen to reason. 37RP 2777. Mr. Allen was present at that Thanksgiving dinner.

On the following Sunday, Maurice Clemmons called Mr. Allen and told him that he wanted Mr. Allen to wash the company truck. Ex 288. Mr. Allen and Mr. Clemmons drove to a carwash at 212th and Steele in Pierce County. *Id.* Mr. Allen crossed 212th to an *ampm* store, where he purchased a cigar and obtained change for the carwash. 37RP 2762. Unbeknownst to Mr. Allen, Clemmons, too, left the carwash. *Id.*

Minutes later, Clemmons walked into a Forza Coffee shop a few blocks away and murdered four Lakewood Police Department officers. Clemmons then walked back to the carwash, arriving minutes after Mr. Allen returned from the *ampm*. Ex 288. Clemmons demanded that they leave immediately. *Id.* Mr. Allen drove the truck away from the car wash. *Id.*

Maurice Clemmons was killed by a Seattle police officer in the early morning of December 2, 2009. 37RP 2826-30.

About an hour later a SWAT team stormed through the door of Mr. Allen's motel room and arrested him. 38RP 2924-25. Officers conducted a lengthy interrogation, during which Mr. Allen conveyed his lack of knowledge about Mr. Clemmons's intended acts. 39RP 2944; Ex 288. At the close of the interview, the lead detective commented that he had no doubt that Mr. Allen was being truthful. Ex 288.

Despite this belief, the State charged Mr. Allen with four counts of aggravated first degree murder, alleging two aggravating factors under RCW 10.95.020: the victims were law enforcement officers performing their duties at the time of the murder, and there was more than one victim killed as part of a common scheme or plan. CP 1-4. The State subsequently amended the charge to allege the aggravating factor set forth in RCW 9.94A.533 regarding offenses against law enforcement. CP 817-23.

A jury convicted Mr. Allen of four counts of first degree murder. CP 2041-44. The jury however returned a special verdict form finding the aggravating factor alleged under RCW 9.94A.535, and found Mr. Allen or an accomplice were armed during the crime. CP 2049-56.

The trial court imposed an exceptional sentence of 420 years. CP 2180-82.

E. ARGUMENT

After a six-week trial the State proved beyond a reasonable doubt that Maurice Clemmons killed four police officers. However, Maurice Clemmons was dead and not on trial. Instead, the person on trial for four counts of aggravated first degree murder was Dorcus Allen. Unlike its case against Maurice Clemmons, the State could not prove beyond a reasonable doubt that Mr. Allen committed the crime even under the State's accomplice theory. To bridge this gap between its proof and the law, the State, in its closing argument, relied upon a repeated misstatement of the law regarding knowledge and accomplice liability. The Court of Appeals affirmed those convictions.

The split, published opinion of the Court of Appeals presents several significant constitutional questions, and is in conflict with several opinions of this Court, the United States Supreme Court, and several opinions of the Court of Appeals.

1. Because the State did not prove Mr. Allen knew he was assisting in a crime his convictions must be reversed.

The Fourteenth Amendment right to due process and Sixth Amendment right to a jury trial require the State prove each element of an offense beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (quoting *United States*

v. Gaudin, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed.2d 444 (1995)); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970).

To convict Mr. Allen, the State was required to prove Mr. Allen had actual knowledge that he was assisting Clemmons in the commission of four murders. RCW 9A.08.020; *State v Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); *State v. Shipp*, 93 Wn.2d 510, 514-15, 610 P.2d 1322 (1980). It is not enough that the State prove he might have known or that he should have known. In its best light, the State's evidence established only that Mr. Allen may have learned of what Clemmons had done and rendered criminal assistance after the fact. That cannot establish his complicity in the four murders.

The record establishes Mr. Allen and Clemmons arrived together at a car wash a short distance from the scene of the shooting. Ex 288. Mr. Allen went to a convenience store across the street from the carwash. 37RP 2762. Unbeknownst to Mr. Allen, Clemmons, too, left the carwash. Id. It was during his absence, that Clemmons committed his crimes.

Yet in the Court of Appeals, the State asserted "it is undisputed that the defendant drove Clemmons to the scene." Brief of Respondent at 6-7. That fact is very much in dispute and has never been proved by the State. The State cannot point to a single piece of evidence adduced at trial

which supports its assertion that Mr. Allen drove Clemmons to the coffee shop.

This is not an insignificant failing on the State's part. Again, the State had to prove Mr. Allen actually knew he was assisting Clemmons in the commission of four murders. RCW 9A.08.020; *Cronin*, 142 Wn.2d at 579; *Shipp*, 93 Wn.2d at 514-15. What the State actually proved at trial was that Mr. Allen was wholly unaware of what Clemmons intended to do, or even aware that Clemmons had left the car wash. What the State proved, was that during the time Clemmons was committing the offense, Mr. Allen was not waiting at the truck. Instead, Mr. Allen walked, not ran, to a convenience store and purchase a cigar and got change. 37RP 2762. Those are not the acts of a person that knows he is assisting in the murders of four police officers.

The absence of evidence of knowledge sufficient to find Mr. Allen was acting as an accomplice is illustrated by the State's resort in closing argument to repeated and blatant misstatements of the law. In direct contradiction of *Shipp*, the deputy prosecutors repeatedly told the jury that RCW 9A.08.010(1)(b)(ii) permitted the jury to convict Mr. Allen even "if he doesn't actually know" Mr. Clemmons was going to commit his horrendous crime. 45RP 3546. The State did not attempt to qualify its statements in terms of the permissive inference *Shipp* allows, nor did the

State ever remind the jury that it was still required to find actual knowledge. Instead, as detailed in Mr. Allen's opening brief, the State's entire theory centered on the very negligent-knowledge theory that *Shipp* ruled was unconstitutional. Ex 351-54.

Contrary to *Cronin*, the published opinion of the Court of Appeals diminishes the State's burden of proving knowledge. The opinion endorses the very definition of knowledge which this Court found unconstitutional in *Shipp*. Because it conflicts with this Court's decisions and because it permits an unconstitutional standard of knowledge, the opinion warrants review under RAP 13.4.

2. The deputy prosecutors' flagrant misconduct in closing argument requires reversal of Mr. Allen's convictions.

A person cannot be convicted as an accomplice of a crime unless the State proves "that individual . . . acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged." *Cronin*, 142 Wn.2d at 579(Emphasis in original); RCW 9A.08.020. "The Legislature . . . intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge.'" *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2000). The mens rea of "knowledge," requires actual subjective knowledge on the part of the person. *Shipp*, 93 Wn.2d at 517. Thus, the

State was required to prove Mr. Allen actually knew he was assisting in the commission of four murders.

Recognizing that its case fell far short of this, the State purposefully crafted an improper closing argument designed to bridge this gap. The State presented a closing argument which from start to finish focused on redefining the term knowledge to include what Mr. Allen "should have known." The State repeated numerous times Mr. Allen was guilty so long as the jury found "he should have known." In direct contradiction of *Shipp*, the State said

> And under the law, **even if he doesn't actually know**, if a reasonable person would have known, he should have known, he's guilty

(Emphasis added.) CP 3546. The deputy prosecutors repeated similar claims throughout closing argument, and again in rebuttal. That purposeful misstatement of the law led to Mr. Allen's convictions and now requires reversal of those convictions.

There can be no doubt of the purposeful nature of the State's misconduct. The State prepared PowerPoint presentations to accompany its argument. Those presentations highlighted "should have known" as an alternative and lesser mens rea.

The very first slide following one bearing pictures of the officers provides:

Those officers are dead because
Dorcus Allen helped Maurice Clemmons.
He knew or **should have known**
Clemmons would murder the officers

(Emphasis added.) Ex 351-52.

That was followed by another slide titled "SHOULD HAVE KNOWN," which slowly crossed off one mental state after the next until it read:

- ~~Premeditate~~
- ~~Intend~~
- ~~Purpose~~
- ~~Plan~~
- ~~Want~~
- ~~Hope~~
- ~~Care~~
- ~~Know~~
- Should Have Known

Ex 351-52, at 30-31. The State presented numerous other slides highlighting "should have known" as an alternative mens rea sufficient to convict Mr. Clemmons regardless of his actual knowledge. Ex 351-52. The repeated misstatements were flagrant and denied Mr. Allen a fair trial.

The Sixth and Fourteenth Amendments and article I, section guarantee the right to a fair trial. *In re the Personal Restraint of*

Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). A prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1934). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

This Court has recognized the flagrancy of misconduct is illustrated by repeated misstatements of the law. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Prejudice is established if there is a substantial likelihood that the misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 704.

The Court of Appeals recognized the wholly improper nature of the State's argument. *Allen*, at 11. The Court properly noted the repeated misstatements concerned the central issue at stake in this case, that Mr. Allen timely and repeatedly objected, and that evidence indicates the misconduct affected "at least some of jurors." *Id.* This seemingly establishes a substantial likelihood that that the State's misconduct affected the jury. But the opinion does not heed the cautionary statement

from *Glasmann*, that courts must be willing to reverse cases involving significant misconduct to "give substance to [the] message that 'prejudicial prosecutorial tactics will not be permitted'" 175 Wn.2d at 712-13. Instead, the majority opinion looks past all of this and excuses the prosecutor's misconduct offering four justifications. *Allen*, at 11-12.

First, the majority reasons the repeated misconduct did not have substantial likelihood of affecting the verdict because the trial court previously provided he jury a proper instruction on knowledge. *Id* at 12. A proper jury instruction cannot be a license to commit repeated and purposeful conduct. Indeed, the prosecutors' comments are improper precisely because they sought to steer the jury away from the proper statements of the law contained in the court's instructions. It would be counterintuitive to excuse such purposeful misstatements of law due to the existence of the very instruction they misstate. Further, when Mr. Allen specifically objected to the misstatements the court overruled the objections implying to the jury that it was not a misstatement at all.

Second, the majority reasons the prejudice was lessened because the prosecutors' prefaced their repeated misstatements with a lone proper statement of the law. *Allen*, at 12. That ignores the fact that the central point of everything that followed was to improperly restate that legal

standard. Uttering the correct standard once cannot excuse all that followed.

Third, the court concludes there was not a likelihood of harm because Mr. Allen in his closing attempted correctly state the standard for knowledge. *Allen*, at 12. But that begs the question, what other option did Mr. Allen have? His timely objections were overruled. Because the trial court failed to correct the State's misstatement, Mr. Allen could either ignore the State's repeated misstatements or take the one opportunity he had to mitigate it. Further, Mr. Allen's argument was made after the judge had implied, by overruling his objections, that what the State argued was correct. Finally, even after Mr. Allen attempted to correct the jury's understanding of the law, the State returned to its misconduct in its rebuttal argument, again over Mr. Allen's objection. Mr. Allen's argument did not mitigate the prejudice resulting from the State's misconduct.

Finally the majority faults Mr. Allen for failing to request a curative instructions "directly refuting the prosecutor's misstatement. *Allen,* at 12. As the dissent properly notes, because Mr. Allen objected to the improper argument there is no need to ask whether a jury instruction could have cured the misconduct. *See State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Indeed, it makes little sense to do so as the trial court had twice overruled specific and timely objections to the State's

misstatements, thus the trial court did not believe there as anything to cure. Thus, there is no reason to believe that even if requested the trial court would have provided such an instruction.

The relevant question is not whether it is remotely possible that repeated misconduct did not affect the jury's verdict. Rather, this Court's case law requires a determination of the likelihood, albeit a substantial one, that the verdict was affected. In the face of evidence that the misconduct **actually** affected the verdict, the Court of Appeals surmises it did not even have a substantially likelihood of doing so. A cynical reader might read the published opinion of the Court of Appeals as a roadmap for misconduct by less constrained prosecutors. This is no small concern in light of the recent list of published opinions detailing the misconduct of this prosecutor's office. Contrary to *Glasmann*, and as recognized in Judge Maxa's dissent, by failing to reverse a case such as this where misconduct permeated the State's argument and became its theme, the majority reduces to "empty words" the warning that such tactics will not be tolerated. *See* Allen, at 24 (Maxa, J. dissenting) (citing *Glasmann*, 175 Wn.2d at 712-13).

Moreover, the opinion recognizes the State's misconduct told the jury it was "required to find knowledge if it found [Mr. Allen] 'should have known.'" *Allen*, at 11. Thus, as Mr. Allen argued below that State

created a mandatory presumption. Such a presumption is harmless only if it is "unimportant in relation to everything else the jury considered on the issue in question." *Yates v. Evatt,* 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled in part on other grounds, Estelle v. McGuire,* 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *see also, Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed.2d 705 (1967). Contrary to these decisions, the Court of Appeals refused to apply that standard here. *Allen* at 10-11.

The published opinion presents a significant constitutional question concerning the ability of defendants to obtain a fair trial. And the opinion leaves significant doubt on the fairness of the trial Mr. Allen received. Review is warranted under RAP 13.4

3. The trial court erred in failing to suppress the fruits of the warrantless entry of Mr. Allen's motel room.

Police officers entered Mr. Allen's motel room without a warrant. Officers arrested Mr. Allen without a warrant. At the time, police knew that Maurice Clemmons was dead. CP 806-07 (Findings of Fact I.15, I.16).

Article I, section 7 required the State establish officers had "authority of law" to enter the room – either a warrant or a recognized exception. The State did neither in the trial court. The trial court's findings

do not include any finding or conclusion of what authority permitted the entry.

In *Payton v. New York*, a murder prosecution, the Court held that the Fourth Amendment does not permit the warrantless entry of a person's home in order to arrest them. 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *State v. Eserjose*, 171 Wn.2d 907, 912, 259 P.3d 172 (2011). The Court recognized that even probable cause to believe a person has committed murder is not sufficient to support a warrantless entry of that person's home.

> [A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made . . . . although no exigency is created simply because there is probable cause to believe that a serious crime has been committed.

Welsh v. Wisconsin, 466 U.S. 740, 753, 104 S. Ct. 2091, 80 L.Ed.2d 732 (1984).

Nonetheless, the published opinion of the Court of Appeals concludes the warrantless entry of the motel room was justified by a lone exigent circumstances, the seriousness of the crime. *Allen* at 14. The opinion does so without citing or addressing *Welsh*.

Probable cause for arrest, even for murder, is not a basis for a warrantless entry. *Payton* 445 U.S. at 586. And of course, if probable cause of murder is not a basis for a warrantless entry, then certainly

probable cause of the far less serious offense of rendering criminal assistance is not.

The published opinion is plainly contrary to the Supreme Court's opinion in *Welsh*. By concluding that probable cause to believe a person has committed a crime, even a serious one, is alone a sufficient exigency to allow warrantless entry of their home the published opinion presents as a substantial constitutional issue which warrants review under RAP 13.4.

4. Because accomplice liability does not extend to aggravating factors the Court must reverse Mr. Allen's sentence.

"A trial court only possesses the power to impose sentences provided by law." *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The Supreme Court has repeatedly held it is for the Legislature to establish the relevant sentencing procedure and that courts may not infer nor imply authority beyond that provided. *State v. Davis*, 163 Wn.2d 606, 611, 184 P.3d 689 (2008); *State v. Ammons,* 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). Mr. Allen has argued there is no statutory authority permitting application of an aggravating factor based upon accomplice liability. And, in response, the State identifies none.

Prior to 1975, Washington's accomplice-liability statute, former RCW 9.01.030, provided in relevant part:

> Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent . . . is a principal, and shall be proceeded against and punished as such.

The current statute does not include language that an accomplice shall "be punished" as a principal. *Compare* RCW 9A.08.020. Therefore, RCW 9A.08.020, cannot be the basis to impose a sentencing enhancement on an accomplice. *State v. McKim*, 98 Wn.2d 111, 115-16, 653 P.2d 1040 (1982). Instead, "the operative language" of the applicable sentencing statute must provide a basis to apply accomplice liability for the sentencing provision. *Id.* at 116.

The aggravating at issue here provides:

> The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

RCW 9.94A.535(3)(v). Plainly, nothing in the "operative language" of the that statute provides for accomplice liability. Thus, under *McKim* it could not authorize an exceptional sentence.

In a recent opinion issued by the same division of the Court of Appeals, the Court concluded "because Hayes's conviction was based on accomplice liability and the major economic offense sentence

enhancement statute contains no triggering language for accomplice liability, the exceptional sentence was improper." *State v. Hayes*, __ Wn. App. __, 312 P.3d 784, 788 (2013). *Hayes* rejected the very reasoning the Court of Appeals employed in Mr. Allen's case. *Hayes* noted that where he Legislature intended accomplice liability to reach to sentencing enhancements or aggravating factors, the Legislature had expressly said so. *Id.* (citing RCW 9.94A.533(3) and (5)). Yet here, the Court of Appeals affirmed the sentence without identifying any specific triggering language.

Mr. Allen's convictions were plainly based on accomplice liability. And, just as the statute in *Hayes*, RCW 9.94A.535(3)(v) does not contain specific language permitting it to apply to an accomplice. Nonetheless, the Court of Appeals affirmed. Because the opinion in Mr. Allen's case conflicts with this Court's decisions and other opinions of the Court of Appeals, review is warranted under RAP 13.4.

5. The trial court erred in refusing Mr. Allen's request to instruct the jury on rendering criminal assistance as a lesser included offense of first degree murder as charged in this case.

Mr. Allen requested the court instruct the jury on the crime of rendering criminal assistance as a lesser included offense. CP 1923-27 (Defense Proposed Instructions 55-58); 44RP 3464. The trial court refused to provide such an instruction. 44RP 3485. The court did not explain the basis of its ruling.

RCW 10.61.003 and RCW 10.61.006 permit a conviction for an offense which is a lesser included offense of the offense charged. The failure to instruct the jury on a lesser offense, where the evidence might allow the jury to convict the defendant of only the lesser offense violates the Fourteenth Amendment. *Beck v. Alabama*, 447 U.S. 625, 636-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). An instruction on a lesser offense is warranted where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

Here the Court of Appeals applied an incorrect test. The court reasoned that because complicity reaches a broader array of behavior than

rendering, rendering cannot be an included offense. *Allen* at 15. But the fact that greater offense may be committed in other ways is not relevant to the inquiry. The only question is whether if the present offense "as charged" necessarily proves the lesser. *Berlin*, 133 Wn.2d at 548. In this case the answer is yes. The opinion of the Court of Appeals I contrary to this court's decision in cases such as *Berlin*. Thus, review is warranted under RAP 13.4.

6. The trial court's failure to ensure the jury's verdict was free of improper influences from displays by courtroom spectators deprived Mr. Allen of his Sixth and Fourteenth Amendment rights.

Several courtroom spectators wore t-shirts which started "You will not be forgotten, Lakewood Police" and then listed the names of the four officers. 40RP 3024. The t-shirts were visible from the jury box. Mr. Allen asked the court to direct the individuals to either remove or cover up the t-shirts. The trial court refused, concluding the spectators' rights to free speech could not be abridged, without any consideration of Mr. Allen's right to a fair trial. 40RP 3027.

The following day, when spectators again arrived wearing the t-shirts, Mr. Allen again objected and renewed his motion that the court take steps to ensure the jury was not unduly influenced. 41RP 3156. Again

without any balancing of Mr. Allen's right to a fair trial, the court denied the motion. 41RP 3157.

> [T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.

(Citations omitted) *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). Essential to that right is that jurors' decisions are based solely on the evidence presented at trial. *Turner v. Louisiana*, 379 U.S. 466, 471, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).

> One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

Holbrook v. Flynn, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (internal citations omitted). The "trial judge has an affirmative obligation to control the courtroom and keep it free of improper influence." *Carey v. Musladin*, 549 U.S. 70, 82, 127 S. Ct. 649, 656, 166 L. Ed. 2d 482 (2006) (Souter, concurring).

A defendant's fair trial right has been violated when a courtroom practice creates "an unacceptable risk" of "impermissible factors coming into play." *Estelle v. Williams*, 425 U.S. 501, 504-05, 96 S. Ct. 1691, 48 L.

Ed. 2d 126 (1976). Such a practice is determined to be inherently prejudicial to the defendant's right to a fair trial. *Id.*

This Court has found small displays of ribbons or buttons *containing no written messages* do not inherently prejudice the defendant. *See In re the Personal Restraint of Woods*, 154 Wn.2d 400, 416, 114 P.3d 607; *State v. Lord*, 161 Wn.2d 276, 165 P.3d 1251, (2007). Here, spectators wore full, matching T-shirts, not small pins or buttons. And most importantly, the t-shirts bore a written message. The trial judge did not provide a corrective jury instruction. Indeed, the court did not believe it had the ability, never mind the obligation, to limit the jury's prejudicial exposure to the message of sympathy. These circumstances created a courtroom atmosphere that was inherently prejudicial to the defendant.

The Court of Appeals engaged in a superficial analysis equating the t-shirts, with the writing, with the small buttons worn in *Lord. Allen* at 17. But because the trial court did not engage in any analysis there is no record which permits the reviewing court to make that assessment. Additionally, the Court of Appeals concluded that because Mr. Allen did not request and curative instruction or mistrial he cannot raise this argument on appeal. *Id.* But Mr. Allen twice objected and twice asked that the trial order spectators to cover or remove the t-shirts. Twice, the trial court said there was nothing to be done. Mr. Allen preserved his objection.

The opinion of the Court of Appeals presents a significant constitutional question regarding the fairness of Mr. Allen's trial, and the trial court's failure to protect the proceeding from undue influence. Thus, review is proper under RAP 13.4.

7. The State offered insufficient evidence to prove Mr. Allen committed first degree murder.

The Fourteenth Amendment right to due process and Sixth Amendment right to a jury trial require the State prove each element of an offense beyond a reasonable doubt. *Winship*, 397 U.S. at 364. In his Statement of Additional Grounds, Mr. Allen argued the State failed to present sufficient evidence to convict him of the four counts of murder because the State did not prove he was present at the scene. To prove him guilty as an accomplice the State was "required to prove he actually participated in the crime[s]." *State v. Everybodytalksabout*, 145 Wn. 2d 456, 481, 39 P.3d 294 (2002). There is no evidence that Mr. Allen was present and/or participating in the murders.

Nonetheless, the Court of Appeals concludes that because the State only argued that Mr. Allen was an accomplice it need only prove he had knowledge that he was assisting in the crime. *Allen,* at 17. But that is not what the instruction required the State to prove. The court instructed the jury on the four counts of first degree murder, in relevant part, as follows:

> (1) That on or about November 29, 2009, the defendant or an accomplice acted with intent to cause the death of another,
> (2) That the intent to cause death was premeditated,
> (3) That [someone] died as a result of the acts of the defendant or an accomplice
> . . . .

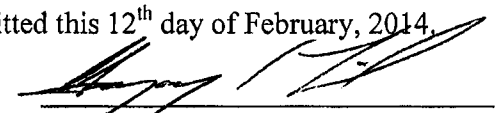
CP 2030-33. There is no evidence that the defendant, Mr. Allen, acted with premeditated intent to do anything. There is no evidence that Mr. Allen was at the scene when the murders were committed. Thus, the State did not prove Mr. Allen committed first degree murder. The instruction required the State prove Mr. Allen committed the crime, or someone acting as an accomplice to him. The State did not present any evidence that anyone was acting as an accomplice to Mr. Allen. The State did not provide sufficient evidence to convict Mr. Allen of murder.

The opinion of the court of Appeals warrants review under RAP 13.4.

F. CONCLUSION

For the reasons above, and pursuant to RAP 13.4, this Court should grant review of Mr. Allen's case.

Respectfully submitted this 12th day of February, 2014.



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Court of Appeals of Washington,
Division 2.

STATE of Washington,
Respondent/Cross Appellant,
v.
Darcus D. ALLEN, Appellant/
Cross Respondent.

No. 42257–3–II. | Jan. 14, 2014.

Synopsis

Background: Defendant was convicted in the Superior Court, Pierce County, Frederick Flemming, J., of first-degree premeditated murder in connection with shooting deaths of four police officers. Defendant appealed.

Holdings: The Court of Appeals, Penoyar, J., held that:

[1] evidence supported defendant's knowledge that he was assisting shooter in the murders, as necessary for accomplice liability;

[2] defendant was not prejudiced by prosecutor's improper arguments concerning what defendant "should have known" in describing knowledge requirement for accomplice liability;

[3] exigent circumstances permitted warrantless entry of motel room and defendant's arrest;

[4] rendering criminal assistance is not a lesser included offense of first-degree murder as an accomplice;

[5] sentence enhancement was properly applied to defendant, as enhancement was based not on defendant's acts as an accomplice, but on victims' statuses as law enforcement officers; and

[6] t-shirts reading "You will not be forgotten, Lakewood Police" and listing victims' names, as worn by members of public at trial, did not prejudice defendant's right to a fair trial.

Affirmed.

Maxa, J., filed an opinion dissenting in part and concurring in part.

West Headnotes (21)

[1] Criminal Law
Principals, Aiders, Abettors, and Accomplices in General

Criminal Law
Presence

Physical presence and assent, without more, are insufficient to establish accomplice liability. West's RCWA 9A.08.020.

[2] Criminal Law
Principals, Aiders, Abettors, and Accomplices in General

An accomplice does not have to have specific knowledge of the elements of the principal's crime. West's RCWA 9A.08.020(3).

[3] **Homicide**

Parties to Offense

Defendant's knowledge that he was assisting shooter in the murders of four police officers, as necessary for accomplice liability on four counts of first-degree premeditated murder, was supported by evidence that defendant twice heard shooter in previous week threaten to shoot police officers and saw him display a gun both times, that defendant and shooter drove past coffee shop where police cars were parked before going to car wash, that defendant was seen waving sprayer at car wash without water coming out of it, that shooter committed shootings at coffee shop and walked to car wash, and that he and defendant quickly drove away. West's RCWA 9A.08.010(1)(b), 9A.08.020(1), (2)(c), (3).

[4] **Criminal Law**

Flight or Refusal to Flee

Flight may be circumstantial evidence of guilty knowledge.

[5] **Criminal Law**

Duties and Obligations of Prosecuting Attorneys

To establish a prosecutorial misconduct claim, the defendant must prove that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial.

[6] **Criminal Law**

Particular Statements, Comments, and Arguments

Constitutional harmless error standard did not apply to state's improper use of phrase "should have known" when discussing knowledge requirement for accomplice liability during closing argument in murder prosecution, and, therefore, state would not be required to prove beyond a reasonable doubt that its misconduct did not contribute to verdict; misconduct did not directly violate defendant's constitutional rights, did not involve racial bias, and did not involve an instructional error. West's RCWA 9A.08.010(1)(b), 9A.08.020(3).

[7] **Criminal Law**

Principals, Aiders, Abettors, and Accomplices in General

Whether a defendant should have known that his actions were furthering the crime is not the standard for knowledge under accomplice liability statute.

West's RCWA 9A.08.010(1)(b), 9A.08.020(3).

[8] **Criminal Law**
Particular Statements, Comments, and Arguments
Criminal Law
In Particular Prosecutions

Defendant was not prejudiced, in murder prosecution involving shooting deaths of four police officers by another individual, by prosecutor's improper arguments concerning what defendant "should have known" in describing knowledge requirement for accomplice liability; while knowledge was a key issue, jury instructions correctly stated knowledge requirement, prosecutor also argued that defendant actually knew his actions were furthering shooter's crime and focused on facts known to defendant, and defendant failed to request a specific curative instruction regarding prosecutor's improper remarks. West's RCWA 9A.08.010(1)(b), 9A.08.020(3).

[9] **Criminal Law**
Denying or Explaining Assent to Verdict

Juror affidavits relating to jurors' mental processes in reaching verdict would not be considered on appeal in determining whether defendant was prejudiced by prosecutor's improper arguments regarding what defendant "should have known" in describing the knowledge requirement for accomplice liability in murder prosecution. West's RCWA 9A.08.020.

[10] **Arrest**
Arrest Without Arrest Warrant
Arrest
Exigent Circumstances

In the absence of exigent circumstances, the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to arrest the suspect. U.S.C.A. Const.Amend. 4.

[11] **Searches and Seizures**
Expectation of Privacy

A guest in a hotel room is entitled to constitutional protection against warrantless searches. U.S.C.A. Const.Amend. 4.

[12] **Searches and Seizures**
Presumptions and Burden of Proof

The state bears the burden of proving that the exigent circumstances exception applies to a warrantless search. U.S.C.A. Const.Amend. 4.

[13] **Searches and Seizures**

Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

Court determines whether the evidence supports a finding of exigent circumstances in the case of a warrantless search by looking at the totality of the situation. U.S.C.A. Const.Amend. 4.

[14] **Arrest**

Exigent Circumstances

Court looks at six factors in determining whether exigent circumstances support a warrantless and nonconsensual entry into a suspect's home to make an arrest: (1) the gravity or violent nature of offense with which suspect is to be charged; (2) whether suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that suspect is guilty; (4) whether there is strong reason to believe that suspect is on premises; (5) whether there is a likelihood that suspect will escape if not swiftly apprehended; and (6) whether entry is made peaceably; because court analyzes totality of situation, state does not have to prove all six factors. U.S.C.A. Const.Amend. 4.

[15] **Arrest**

Exigent Circumstances

Exigent circumstances permitted warrantless entry of motel room and defendant's arrest as suspected accomplice in fatal shootings of four police officers; offenses were grave and violent, arresting officers had information from multiple sources indicating defendant's involvement, defendant stated he knew officers were coming and "coming hard," his hands were not visible and he appeared to be reaching for something when officers entered room, there was strong reason to believe defendant was in that motel room, and entry was relatively peaceable. U.S.C.A. Const.Amend. 4.

[16] **Indictment and Information**

Charge of Homicide

Rendering criminal assistance is not a lesser included offense of first-degree murder as an accomplice; rendering criminal assistance requires a greater degree of culpability, i.e., intent, than accomplice liability, which requires only knowledge, and rendering criminal assistance requires proof of the defendant's acts after a crime has been committed, while a person is guilty as an accomplice if he assists in the planning or commission of the crime, acts which do not necessarily require assistance after the fact. West's RCWA 9A.08.020(1, 2), (3)(a), 9A.76.050.

[17] **Criminal Law**
Relation Between Offenses; Sufficiency of Charging Instrument
Criminal Law
Evidence Justifying or Requiring Instructions

Court applies a two-prong test to determine whether a defendant is entitled to a lesser included offense instruction: first, each element of the lesser offense must be a necessary element of the charged offense; second, the evidence must support an inference that the lesser crime was committed.

[18] **Sentencing and Punishment**
Official Victim

Sentence enhancement for four counts of first-degree premeditated murder was properly applied to defendant who was convicted as an accomplice, as enhancement was based not on defendant's acts, but on victims' statuses as law enforcement officers who were performing their official duties at the time of the crime and defendant's knowledge that the victims were law enforcement officers. West's RCWA 9A.08.020(1, 2), (3)(a), 9.94A.535(3)(v).

[19] **Sentencing and Punishment**
Factors Increasing Offense Level

The accomplice liability statute itself cannot be the basis for imposing a sentence enhancement because it imposes liability only for the crime of another, and sentence enhancements do not define crimes; therefore, the authority to impose a sentencing enhancement on the basis of accomplice liability must come from the specific enhancement statute. West's RCWA 9A.08.020.

[20] **Criminal Law**
Presence and Conduct of Bystanders

T-shirts reading "You will not be forgotten, Lakewood Police" and listing victims' names, as worn by members of public at first-degree murder trial in connection with shooting deaths of four police officers, did not prejudice defendant's right to a fair trial, and trial court's decision to allow the t-shirts was not manifestly unreasonable; t-shirts did not convey a message of guilt or innocence.

[21] **Homicide**
Parties to Offense

Evidence that defendant drove shooter to and from murder scene was sufficient to show, for purposes of accomplice liability, that he aided shooter in planning or committing crime. West's RCWA 9A.08.020(3).

Attorneys and Law Firms

Gregory Charles Link, Washington Appellate Project, Seattle, WA, for Appellant/Cross–Respondent.

Kathleen Proctor, Thomas Charles Roberts, Pierce County Prosecuting Atty. Office, Tacoma, WA, for Respondent/Cross–Appellant.

Opinion

PENOYAR, J.

*1 ¶ 1 A jury convicted Darcus Allen of first degree premeditated murder for his role in the murders of four police officers. He appeals, arguing that (1) insufficient evidence supports his convictions, (2) the prosecutor committed misconduct by misstating the level of knowledge required for accomplice liability, (3) evidence from the warrantless entry into his motel room should have been suppressed, (4) the trial court erred by not including rendering criminal assistance as a lesser included offense, (5) his sentence enhancement for crimes against uniformed officers does not apply to accomplices, and (6) the trial spectators' t-shirts violated his fair trial right. He also includes a statement of additional grounds (SAG), arguing insufficient evidence and an invalid sentence enhancement. The State cross appeals, contending that the trial court erred by dismissing Allen's second degree murder counts for insufficient evidence.

¶ 2 There is sufficient evidence that Allen knew his actions were furthering the crime and, although the prosecutor misstated the mental state required for accomplice liability, this did not prejudice the trial's outcome. Additionally, (1) exigent circumstances justified the warrantless entry into Allen's motel room, (2) rendering criminal assistance is not a lesser included offense of first degree murder as an accomplice, (3) the sentence enhancement applied to Allen as an accomplice because it was based on the victims' statuses and not his actions, (4) the t-shirts did not violate his fair trial right because they did not convey a message of innocence or guilt, and (5) the issues in his SAG are meritless. We do not reach the State's cross appeal because remand is not necessary. We affirm.

FACTS

¶ 3 This case arises from Maurice Clemmons's shooting of four Lakewood police officers on November 29, 2009. At about 8 A.M., Clemmons walked into a coffee shop with two guns, a 9 mm Glock and a .38 caliber semiautomatic Smith and Wesson. He shot and killed four officers and then fled the scene, wounded, in a white truck. Allen was the driver of the truck.

¶ 4 In the week before the shooting, Clemmons indicated that he was planning to harm police officers. Allen twice heard Clemmons threaten to harm police if they came looking for him. Both times, he displayed a gun. Allen also knew that Clemmons had cut off his ankle monitor. [1]

¶ 5 On the day of the shooting, Clemmons called Allen at 7:30 A.M. and asked Allen to wash his truck; Allen agreed. Allen admitted

that he and Clemmons drove past the coffee shop, a known gathering place for police, at least once on the way to the car wash.[2] According to the coffee shop receipts, one of the officers was at the coffee shop by 7:55 A.M. The officer's patrol cars, which were parked at the coffee shop during the shooting, would have been visible from the street.

¶ 6 Allen drove the truck to the car wash a few minutes after 8:00 A.M. A witness testified that there was only one person in the truck when it entered the car wash. Clemmons entered the coffee shop and began shooting at a little after 8:00 A.M. While Clemmons was at the coffee shop, witnesses saw Allen at the car wash, waving the sprayer at the truck without using water.

*2 ¶ 7 After the shooting, Clemmons arrived back at the truck on foot. He and Allen got into the truck and quickly left the car wash. They abandoned the truck in a grocery store parking lot, where police found it about an hour after the shooting. Police discovered Allen's fingerprints on the driver's side door of the truck and Clemmons's blood on the passenger side. Police also noted that the truck was not wet.

¶ 8 An officer fatally shot Clemmons in Seattle in the early morning of December 1. About an hour later, police arrested Allen at the New Horizons Motel in Federal Way. He was staying with Latanya Clemmons, Clemmons's sister, under the name "Randy Huey." Report of Proceedings (RP) (Apr. 28, 2011) at 3069. Police transported him to the South Hill Precinct for questioning. Allen told police several versions of what happened on November 29, eventually admitting that he was the driver of the white truck but maintaining that he did not know what Clemmons had done.

¶ 9 The State charged Allen with four counts of aggravated first degree murder and four counts of second degree felony murder. The trial court held a CrR 3.6 hearing to determine whether Allen's warrantless arrest was valid. It found that exigent circumstances—officer safety—justified the warrantless arrest.

¶ 10 During the trial, members of the public arrived wearing t-shirts that said "You will not be forgotten, Lakewood Police" and listed the victims' names. RP (Apr. 28, 2011) at 3024. Allen objected and asked that the shirts be covered up. The trial court denied Allen's motion.

¶ 11 Allen also requested an instruction on rendering criminal assistance, arguing that it is a lesser included offense of first degree murder as an accomplice. The trial court declined to give the instruction.

¶ 12 During closing argument, the prosecutor defined "knowledge" as it is used in the accomplice liability instruction for the jury. He stated, "if a person has information that would lead a reasonable person in the same situation to believe that a fact exists, then the jury is permitted, but not required, to find that that person acted with knowledge." RP (May 12, 2011) at 3544. The prosecutor then added, "For shorthand we're going to call that 'should have known.' " RP (May 12, 2011) at 3544–45. He used the phrase "should have known" several times during closing and rebuttal argument—over Allen's objections—and implied that the

jury could find Allen guilty as an accomplice if he should have known that Clemmons was going to murder the police officers.

¶ 13 The trial court dismissed the second degree murder counts for insufficient evidence. The jury found Allen guilty of four counts of premeditated first degree murder. It also found that the crime was committed against law enforcement officers and that Allen or an accomplice was armed with a firearm at the time of the crimes. The trial court imposed an exceptional 420 year sentence. Allen appeals. The State cross appeals, arguing that the trial court erred by dismissing the second degree murder counts.

ANALYSIS

I. INSUFFICIENT EVIDENCE OF KNOWLEDGE

*3 ¶ 14 Allen first argues that there is insufficient evidence to prove that he knew he was assisting in the commission of a crime. Allen knew that Clemmons was threatening to shoot police officers and Allen fled the scene and hid after the shooting. Because of this and other significant incriminating testimony, there is sufficient evidence to prove that Allen knew he was assisting Clemmons in the murders.

¶ 15 Evidence is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore,* 141 Wash.2d 414, 420–21, 5 P.3d 1256 (2000). We interpret all reasonable inferences in the State's favor. *State v. Hosier,* 157 Wash.2d 1, 8, 133 P.3d 936 (2006). Direct and circumstantial evidence carry the same weight. *State v. Varga,* 151 Wash.2d 179, 201, 86 P.3d 139 (2004). Credibility determinations are for the trier of fact and are not subject to review. *State v. Cantu,* 156 Wash.2d 819, 831, 132 P.3d 725 (2006).

[1] [2] ¶ 16 A person is guilty of a crime committed by another if he is an accomplice to the commission of the crime. RCW 9A.08.020(1), (2)(c). A person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests the other person to commit the crime or aids or agrees to aid the other in planning or committing the crime. RCW 9A.08.020(3). A person knows or acts with knowledge when he is aware of facts or circumstances described by a statute defining an offense or he has information that would lead a reasonable person in the same situation to believe that such facts exist. RCW 9A.08.010(1)(b). Physical presence and assent, without more, are insufficient to establish accomplice liability. *State v. Roberts,* 80 Wash.App. 342, 355, 908 P.2d 892 (1996). But the accomplice does not have to have specific knowledge of the elements of the principal's crime. *State v. Hoffman,* 116 Wash.2d 51, 104, 804 P.2d 577 (1991); *State v. Davis,* 101 Wash.2d 654, 655, 682 P.2d 883 (1984) (holding that the State is not required to prove that the accomplice knew the principal was armed).

[3] ¶ 17 Here, there is sufficient evidence for the jury to find that Allen knew he was assisting Clemmons in the murders. In the week leading

up to the murders, Allen twice heard Clemmons threaten to shoot police officers. Both times, Clemmons had displayed a gun. Allen also knew that Clemmons had removed his ankle monitor.

¶ 18 On the morning of the murders, Allen and Clemmons drove past the coffee shop, where police cars were parked, before going to the car wash. A witness testified that there was only one person in the truck when it pulled into the car wash. Witnesses then saw Allen waving the sprayer without water coming out of it, and, when the truck was discovered about an hour later, it was not wet. From these facts, the jury could conclude that Allen, knowing about Clemmons's threats against police, dropped Clemmons off at the coffee shop and was pretending to wash the truck until Clemmons returned from the murders.

*4 [4] ¶ 19 Moreover, flight may be circumstantial evidence of guilty knowledge. *State v. Bruton,* 66 Wash.2d 111, 112, 401 P.2d 340 (1965). After the shootings, Clemmons, who had been shot and was bleeding, walked from the coffee shop to the car wash, and he and Allen got into the truck and quickly drove away. They then abandoned the truck in a grocery store parking lot a couple of miles from the car wash,[3] and Allen checked into a motel in Federal Way under the name "Randy Huey." When police found Allen, he demonstrated guilty knowledge by giving several different versions of the events on the morning of the shooting before admitting that he was the driver. There was sufficient evidence for the jury to infer Allen's knowledge that he was assisting Clemmons in the murders by driving him to and from the coffee shop, and we affirm the jury's verdict.

II. PROSECUTORIAL MISCONDUCT

¶ 20 Next, Allen argues that the State committed misconduct by misstating the law regarding the level of knowledge required for accomplice liability. Because the trial court's instructions correctly stated the law regarding knowledge, any improper argument by the prosecutor was not prejudicial. We affirm.

¶ 21 In closing argument, after first correctly stating the knowledge instruction, the prosecutor repeatedly used the phrase "should have known" when discussing accomplice liability. Allen objected, but the trial court overruled his objections. The prosecutor again made several "should have known" comments in rebuttal argument, and again the trial court overruled Allen's objections.

¶ 22 During deliberation, the jury asked the court "If someone 'should have known' does that make them an accomplice?" Clerk's Papers (CP) at 2014. After seeking input from both counsel, the trial court referred the jury to its existing instructions.

¶ 23 The trial court had instructed the jury that

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the

> testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP at 2017. The trial court had also instructed the jury that

> A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly is required to establish an element of a crime, the element is also established if a person acts intentionally.

CP at 2026. Neither party objected to these instructions.

*5 [5] ¶ 24 To establish a prosecutorial misconduct claim, the defendant must prove that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *In re Pers. Restraint of Glasmann,* 175 Wash.2d 696, 704, 286 P.3d 673 (2012). But Allen asks us to apply a divergent standard of review. He contends that we should instead apply the constitutional harmless error standard, which requires the State to prove beyond a reasonable doubt that its misconduct did not contribute to the verdict.

¶ 25 Our Supreme Court rejected a similar argument in *State v. Emery,* 174 Wash.2d 741, 757, 278 P.3d 653 (2012). There, the defendants argued for the constitutional harmless error standard, alleging that the prosecutor's remarks violated their right to the presumption of innocence and shifted the burden of proof. *Emery,* 174 Wash.2d at 756, 278 P.3d 653. The court declined to adopt the constitutional harmless error standard, reasoning that it had previously refused to adopt the standard under similar circumstances where the misconduct did not directly violate the defendant's constitutional rights. *Emery,* 174 Wash.2d at 757, 278 P.3d 653; *see State v. Warren,* 165 Wash.2d 17, 26 n. 3, 195 P.3d 940 (2008) (declining to apply the constitutional harmless error analysis where the error involved counsel's argument over the application of instructions on reasonable doubt and the burden of proof and the error could be cured with a jury instruction and distinguishing this misconduct from that of a prosecutor violating the defendant's right to silence); *State v. Easter,* 130 Wash.2d 228, 234, 242, 922 P.2d 1285 (1996) (applying the constitutional harmless error analysis where the defendant's right to silence had been violated by testimony and closing argument regarding defendant's pre-arrest silence). The court also noted that the misconduct did not involve racial bias, *see, e.g., State v. Monday,* 171 Wash.2d 667, 680, 257 P.3d 551 (2011) (applying the constitutional harmless error standard where the prosecutor deliberately injected racial bias into closing argument), and the misconduct

occurred during closing argument and could not be likened to instructional error. *Emery,* 174 Wash.2d at 757–59, 278 P.3d 653.

[6] ¶ 26 The same reasoning is applicable in this case. Similar to the defendants in *Emery,* Allen alleges that the State's comments eliminated its burden of proof. The Supreme Court has twice declined to apply the constitutional harmless error analysis where the defendants have not alleged that the misconduct directly violated a constitutional right. *Emery,* 174 Wash.2d at 757, 278 P.3d 653; *Warren,* 165 Wash.2d at 26 n. 3, 195 P.3d 940. Further, the misconduct did not involve racial bias and it occurred during closing argument and did not involve an instructional error. Accordingly, the constitutional harmless error standard does not apply here.

[7] ¶ 27 Under the established standard of review, we first consider whether the prosecutor's remarks were improper. *Glasmann,* 175 Wash.2d at 703, 286 P.3d 673. The prosecutor argued multiple times during closing argument that the jury could find that Allen had knowledge that his actions were furthering Clemmons's crime if Allen "should have known" his actions were furthering the crime. These statements were accompanied by PowerPoint slides that also contained the "should have known" language.[4] Allen objected to the phrase as a misstatement of the law, but the trial court overruled his objections. The State admits that it was improper for the prosecutor to use "should have known" as shorthand for knowledge. Resp't's Br. at 16–17. The jury is not required to find knowledge if the defendant "should have known"; instead, it is permitted to find knowledge if the defendant has information that would lead a reasonable person in the same situation to believe that such facts exist. *State v. Shipp,* 93 Wash.2d 510, 514, 610 P.2d 1322 (1980). We agree that the prosecutor's comments were improper.

***6 [8]** ¶ 28 Next, we must decide whether the prosecutor's improper remarks prejudiced Allen. *Glasmann,* 175 Wash.2d at 704, 286 P.3d 673. A defendant establishes prejudice by showing a substantial likelihood that the misconduct affected the jury verdict. *Glasmann,* 175 Wash.2d at 704, 286 P.3d 673. In determining whether the misconduct warrants reversal, we consider its prejudicial nature and cumulative effect. *State v. Boehning,* 127 Wash.App. 511, 518, 111 P.3d 899 (2005). We review a prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal,* 150 Wash.2d 559, 578, 79 P.3d 432 (2003). We presume that the jury followed the court's instructions. *State v. Russell,* 125 Wash.2d 24, 84, 882 P.2d 747 (1994).

[9] ¶ 29 We have considered a number of factors in assessing the likely prejudicial effect of the prosecutor's improper argument. First, knowledge was a key issue here and the State repeatedly misstated the law regarding knowledge during its closing argument, incorrectly emphasizing "should have known" as the standard for knowledge. And Allen properly objected to this argument. Further, the jury's question during deliberation reflects that at least some jurors focused on the State's "should have known" argument.[5]

¶ 30 On the other hand, the jury instructions correctly instructed the jury on knowledge and stated that the law is contained in the instructions and not the lawyer's arguments. Additionally, the State initially correctly stated the knowledge instruction during closing argument and argued throughout closing argument that Allen actually knew his actions were facilitating Clemmons's crime, accompanying this argument with evidence supporting his knowledge. Notably, the prosecutor focused on facts known to Allen: Allen twice heard Clemmons threaten to harm police if they came after him; Clemmons displayed a gun when making those threats; Clemmons had cut off his ankle monitor; Allen drove the truck past the coffee shop where the police cars were visible; Allen waited at the car wash waving the sprayer at the truck without using any water; and Allen quickly drove from the car wash when Clemmons, bleeding from a gunshot wound, returned. The State also made some references to what a reasonable person would have known. The State did not argue that any inference was mandatory. And during his closing argument, Allen countered the State's "should have known" argument by telling the jury "Well, read those instructions. He needed to know." RP (May 12, 2011) at 3604. In the context of the entire closing argument, the nuances of what Allen "should have known" versus what a reasonable person would have known based on the information known to Allen likely had no prejudicial impact on the jury. Finally, the trial court redirected the jury to the instructions, which properly stated the law, in response to its question regarding "should have known."

*7 ¶ 31 We also note that Allen could have requested specific curative instructions, such as an instruction specifically referring to the knowledge instruction with the correct statement of law or an instruction directly refuting the prosecutor's misstatement. Not acting on this opportunity to rectify the error, Allen agreed to the trial court's proposal of simply referring the jury back to the legally correct instructions already given. A clear curative instruction could have eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's improper remarks.

¶ 32 Considering all of these factors and the context of the total argument, we conclude that there is not a substantial likelihood that the prosecutor's misstatement affected the jury verdict. We will not reverse on this record.

III. SUPPRESSION

¶ 33 Next, Allen argues that the trial court erred by failing to suppress evidence arising from the officers' warrantless entry into Allen's hotel room and Allen's warrantless arrest. Because exigent circumstances justified the officers' entry and Allen's arrest, we affirm the trial court's denial of Allen's suppression motion.

¶ 34 Allen does not challenge any of the trial court's findings of fact from the suppression hearing.[6] Unchallenged findings are verities on appeal. *State v. Hill,* 123 Wash.2d 641, 644, 870 P.2d 313 (1994). We review conclusions of law from a suppression hearing de novo. *State v. Gaines,* 154 Wash.2d 711, 716, 116 P.3d 993 (2005). Allen challenges the trial court's conclusions that exigent circumstances

justified his detention and that it was reasonable for the officers to not take chances with their own safety.

¶ 35 At the suppression hearing, police testified that they learned of Allen's involvement in the shootings and his current location from informants. Based on this information, police went to room 25 of the New Horizons Motel in Federal Way, where Allen was allegedly staying, to question him. They did not have a warrant. At the motel, police asked the manager for the receipt for room 25, which was registered to "Randy Huey"—one of Allen's aliases—and had a copy of a driver's license with Allen's picture on it. CP at 807. They knocked on the door of room 25 and announced their presence, and Latanya Clemmons opened the door. Officers saw Allen inside the room, sitting on the bed next to some pillows. When he saw the officers, Allen said "I knew you were coming and coming hard." CP at 808. The officers could not see Allen's hands and he appeared to be moving toward the pillows, so a SWAT team entered the room and handcuffed him. Officers then placed him in a patrol car and drove him to the precinct for questioning.

[10] **[11]** ¶ 36 In the absence of exigent circumstances, the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to arrest the suspect. *State v. Eserjose,* 171 Wash.2d 907, 912, 259 P.3d 172 (2011) (citing *Payton v. New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). A guest in a hotel room is similarly entitled to constitutional protection against warrantless searches. *Stoner v. California,* 376 U.S. 483, 490, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). Washington courts have held that " 'danger to [the] arresting officer or to the public' " can constitute an exigent circumstance. *State v. Smith,* 165 Wash.2d 511, 517, 199 P.3d 386 (2009) (quoting *State v. Counts,* 99 Wash.2d 54, 60, 659 P.2d 1087 (1983)).

***8** **[12]** **[13]** **[14]** ¶ 37 The State bears the burden of proving that the exigent circumstances exception applies. *Smith,* 165 Wash.2d at 517, 199 P.3d 386. We determine whether the evidence supports a finding of exigent circumstances by looking at the totality of the situation. *Smith,* 165 Wash.2d at 518, 199 P.3d 386. We consider six factors in analyzing the situation:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry is made peaceably.

State v. Cardenas, 146 Wash.2d 400, 406, 47 P.3d 127 (2002). Because we analyze the totality of the situation, the State does not have to prove all six factors to show that exigent circumstances existed. *Smith,* 165 Wash.2d at 518, 199 P.3d 386.

[15] ¶ 38 Here, the evidence supports the finding that exigent circumstances permitted the warrantless entry and Allen's arrest. The offense—the shooting of four police officers —was extremely grave and violent, and the arresting officers had information from multiple sources indicating that Allen was involved. Although some of the officers knew that Clemmons had been killed before they entered Allen's motel room, Clemmons's death did not decrease the gravity of his crimes or the officers' perception of Allen's involvement in them. And, because Allen's hands were not visible and he appeared to be reaching for something under the pillows, the officers could have reasonably believed he was reaching for a gun. Further, there was a strong reason to believe that Allen was on the premises—an informant told police he was in room 25 at the motel, police found his alias on a receipt for room 25, and the driver's license picture from the receipt matched the police's picture of him. Finally, there is evidence that the officers' entry was relatively peaceable. The officers knocked and announced their presence, then waited for someone to answer the door before entering the room. *See Cardenas,* 146 Wash.2d at 408, 47 P.3d 127 (holding that police entered a motel room peaceably when they were in uniform, announced their presence, and entered through an unlocked window).

¶ 39 Police did not know whether Allen was armed, and there was no evidence that Allen was attempting to escape the motel room. But even if these two factors were not met, given the totality of the circumstances, including Allen's involvement in the shooting of four uniformed officers and simultaneous statement that he knew the officers were coming and "coming hard," exigent circumstances justified the police officers' warrantless entry and Allen's arrest. Therefore, the trial court correctly denied Allen's suppression motion.

IV. LESSER INCLUDED OFFENSE

[16] ¶ 40 Allen contends that the trial court erred by refusing to instruct the jury on rendering criminal assistance as a lesser included offense of first degree murder as an accomplice. Because the elements of rendering criminal assistance are not necessary elements of the charged offense, this argument fails.

*9 [17] ¶ 41 We apply a two-prong test to determine whether a defendant is entitled to a lesser included offense instruction: first, each element of the lesser offense must be a necessary element of the charged offense; second, the evidence must support an inference that the lesser crime was committed. *State v. Sublett,* 176 Wash.2d 58, 83, 292 P.3d 715 (2012). We view the evidence in the light most favorable to the party requesting the instruction. *Sublett,* 176 Wash.2d at 83, 292 P.3d 715.

¶ 42 Under RCW 9A.76.050,

> a person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he or she knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he or she:
>
> (1) Harbors or conceals such person; or

(2) Warns such person of impending discovery or apprehension; or

(3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or

(4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or

(5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or

(6) Provides such person with a weapon.

A person is guilty of a crime as an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests another to commit the crime or aids in planning or committing the crime. RCW 9A.08.020(1), (2), (3)(a).

¶ 43 The elements of rendering criminal assistance are not necessary elements of first degree murder as an accomplice because both the mental states and the required acts differ for each offense. Rendering criminal assistance requires a greater degree of culpability—intent—than accomplice liability, which requires only knowledge. *Compare* RCW 9A.76.050 *with* RCW 9A.08.020. Further, rendering criminal assistance requires proof of the defendant's acts after a crime has been committed, but a person is guilty as an accomplice if he assists in the planning or commission of the crime, acts which do not necessarily require assistance after the fact. *Compare* RCW 9A.76.050 *with* RCW 9A.08.020. The trial court correctly denied Allen's lesser included offense instruction.

V. AGGRAVATING FACTOR

[18] ¶ 44 Next, Allen challenges the trial court's application of an aggravating factor to enhance his sentence, asserting that the accomplice liability statute cannot be the basis for imposing a sentence enhancement. Because the enhancement statute at issue here refers to the victims' statuses rather than the defendant's acts, we hold that the enhancement was properly applied to Allen.

¶ 45 The jury found the following aggravating factor under RCW 9.94A.535(3)(v): the crime was committed against law enforcement officers who were performing their official duties at the time of the crime and the defendant knew the victims were law enforcement officers. The trial court used this finding to impose an exceptional sentence.

***10** **[19]** ¶ 46 Washington courts have recognized that the accomplice liability statute itself cannot be the basis for imposing a sentence enhancement because it imposes liability only for *the crime* of another, and sentence enhancements do not define crimes. *State v. Pineda–Pineda,* 154 Wash.App. 653, 661, 226 P.3d 164 (2010). Therefore, "the authority to impose a sentencing enhancement on the basis of accomplice liability must come from the specific enhancement statute." *Pineda–Pineda,* 154 Wash.App. at 661, 226 P.3d 164.

¶ 47 For example, in *Pineda–Pineda,* Division One vacated the defendant's school zone

enhancement, holding that the enhancement did not apply to an absent accomplice. 154 Wash.App. at 664, 226 P.3d 164. There, the defendant was convicted as an accomplice to delivery of a controlled substance after he facilitated a drug deal between his accomplices and the buyer. *Pineda–Pineda,* 154 Wash.App. at 658, 659, 226 P.3d 164. The defendant was not present at the actual delivery, which took place within 25 feet of a school bus stop. *Pineda–Pineda,* 154 Wash.App. at 659, 226 P.3d 164. The jury found that the defendant delivered a controlled substance within 1,000 feet of a school bus stop, and the trial court imposed an exceptional sentence under RCW 69.50.435, which states

> (1) Any person who violates RCW 69.50.401 by ... delivering, or possessing with the intent to ... sell or deliver a controlled substance.
>
> ....
>
> (c) Within one thousand feet of a school bus route stop designated by the school district; ...
>
> may be punished by a fine ... or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter.

Pineda–Pineda, 154 Wash.App. at 659, 226 P.3d 164. Division One held that this statute does not explicitly authorize imposition of the sentence enhancement on an accomplice; accordingly, the defendant's own acts must form the basis for the enhancement. *Pineda–Pineda,* 154 Wash.App. at 664, 226 P.3d 164. Because the defendant was not physically present at the delivery, the school bus stop enhancement was improper. *Pineda–Pineda,* 154 Wash.App. at 664, 226 P.3d 164.

¶ 48 This case is distinguishable from *Pineda–Pineda.* In *Pineda–Pineda,* the sentence enhancement was based on the defendant's conduct. Therefore, the State had to show that the defendant actually engaged in the conduct, namely, delivering drugs within a school zone. By contrast, the sentence enhancement here is based on the victims' statuses as police officers and not on the defendant's conduct. *See* RCW 9.94A.535(3)(v). Accordingly, the enhancement statute allows for imposition of accomplice liability even if Allen was not physically present at the shooting. The victims' statuses as officers were not contested, and the enhancement was properly applied to Allen.

VI. SPECTATOR T–SHIRTS

[20] ¶ 49 Finally, Allen argues that the spectators' t-shirts deprived him of his right to a fair trial. Because the t-shirts did not convey a message of guilt or innocence, they did not prejudice Allen's fair trial right and the trial court's decision to allow them was not manifestly unreasonable.

***11** ¶ 50 We review the trial court's decision to allow the spectators' t-shirts to determine whether the decision was manifestly unreasonable or based on untenable grounds or reasons. *State v. Lord,* 161 Wash.2d 276, 283–84, 165 P.3d 1251 (2007). We must consider whether the courtroom scene presented to the jury was " 'so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial.' " *Lord,* 161 Wash.2d at 285, 165 P.3d 1251 (quoting *Holbrook v. Flynn,* 475

U.S. 560, 572, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986)) (emphasis omitted).

¶ 51 Our Supreme Court has held that silent displays of affiliation by trial spectators that do not explicitly advocate guilt or innocence are permissible. *Lord,* 161 Wash.2d at 289, 165 P.3d 1251; *In re Pers. Restraint of Woods,* 154 Wash.2d 400, 416, 418, 114 P.3d,607 (2005). In *Lord,* trial spectators wore buttons with a picture of the victim. 161 Wash.2d at 282, 165 P.3d 1251. The court held that the buttons did not prejudice the defendant's fair trial right because they did not convey any message regarding guilt or innocence. *Lord,* 161 Wash.2d at 289, 165 P.3d 1251. Additionally, the defendant failed to make a motion for mistrial or a curative jury instruction, which, the court noted, has been held to constitute waiver. *Lord,* 161 Wash.2d at 291, 165 P.3d 1251.

¶ 52 The t-shirts at issue here are similarly permissible. The t-shirts said "You will not be forgotten, Lakewood Police" and listed the names of the victims. RP (Apr. 28, 2011) at 3024. Although they did have writing on them, they did not convey a message of guilt or innocence; they were merely worn in remembrance of the victims. Moreover, like the defendant in *Lord,* Allen did not move for a mistrial or request a curative instruction and thereby waived his objections. The trial court's decision to allow the t-shirts was not manifestly unreasonable and we affirm.

VII. SAG

[21] ¶ 53 In his SAG, Allen first argues that the evidence is insufficient to establish the mental state and acts required for first degree murder as either an accomplice or principal. The State argued only that Allen was an accomplice to the murders; accordingly, it had to prove only that Allen had knowledge that he was promoting or facilitating the crime and that he aided Clemmons in planning or committing the crime. RCW 9A.08.020(3). We discussed the sufficiency of the evidence regarding knowledge above and we do not consider it again here. Additionally, there is sufficient evidence that Allen aided Clemmons in committing the crime—he drove Clemmons to and from the murder scene. *See State v. Rainwater,* 75 Wash.App. 256, 257 n. 1, 876 P.2d 979 (1994) (holding that getaway driver was an accomplice to theft). There is sufficient evidence that Allen acted as an accomplice. His first argument fails.

¶ 54 Next, Allen argues that his sentence enhancement is invalid because RCW 9.94A.535(3)(v) is an element of the crime he was convicted of. This argument is incorrect. Allen was convicted of premeditated first degree murder. Premeditated first degree murder requires the State to prove that Allen or an accomplice acted with premeditated intent to cause the death of the victim and that the victim died as a result. RCW 9A.32.030(1)(a). The victims' statuses as police officers—the aggravating factor under RCW 9.94A.535(3)(v)—is not an element of first degree murder. Therefore, Allen's second argument also fails.

VIII. STATE'S CROSS APPEAL

***12** ¶ 55 In its cross appeal, the State argues that the trial court erred by dismissing the felony murder counts for insufficient evidence. In the event that we remand for a new trial, the State asks us to reverse the trial court's

dismissal of the felony murder counts. Because we affirm, it is not necessary to reach this issue.

¶ 56 Affirmed.

I concur: VERELLEN, J.

MAXA, J. (dissenting in part, concurring in part).

¶ 57 I concur with the majority on all of the issues presented except prosecutorial misconduct. I cannot agree that the prosecutor's repeated misstatements of the law regarding the level of knowledge the State must prove to convict Allen as an accomplice—which the State admitted constituted misconduct—did not prejudice Allen. I dissent on that issue. I conclude that the misstatements were repeated so often and were so significant in the context of the trial evidence that there was a substantial likelihood that the jury's verdict was affected. Therefore, I would reverse and remand for a new trial.

A. PROSECUTORIAL MISCONDUCT

¶ 58 A defendant has a fundamental right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *In re Pers. Restraint of Glasmann,* 175 Wash.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial "misconduct"—whether deliberate or inadvertent—can deprive a defendant of this constitutional right. *Glasmann,* 175 Wash.2d at 703–04, 286 P.3d 673.

¶ 59 To prevail on a prosecutorial misconduct claim, a defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. *Glasmann,* 175 Wash.2d at 704, 286 P.3d 673. In analyzing prejudice the conduct is not viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *State v. Warren,* 165 Wash.2d 17, 28, 195 P.3d 940 (2008). If the defendant objected at trial to the conduct, the prejudice standard is whether the conduct "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *State v. Emery,* 174 Wash.2d 741, 760, 278 P.3d 653 (2012).[7] If the defendant did not object at trial, the defendant is deemed to have waived any error unless "the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery,* 174 Wash.2d at 760–61, 278 P.3d 653. Significantly, when deciding whether prosecutorial misconduct requires reversal it is immaterial whether there is sufficient evidence to justify upholding the jury's verdict. *Glasmann,* 175 Wash.2d at 711, 286 P.3d 673.

¶ 60 Misconduct that is relatively minor or insignificant is not grounds for reversal. Our Supreme Court has noted that " '[a] defendant is entitled to a fair trial but not a perfect one.' " *State v. Davis,* 175 Wash.2d 287, 345, 290 P.3d 43 (2012) (internal quotation marks omitted) (quoting *Brown v. United States,* 411 U.S. 223, 231–32, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973)), *cert. denied,* —— U.S. ——, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013); *see also State v. Garcia,* —— Wash.App. ——, 313 P.3d

422, 430 (2013), *petition for review filed,* No. 89691–7 (Wash. Dec. 20, 2013).

B. IMPROPER ARGUMENT

***13** ¶ 61 The prosecutor's misconduct in this case was misstating what level of knowledge the State was required to prove to convict Allen as an accomplice. Under the Washington accomplice liability statute, a person is an accomplice to a crime only if he or she has actual, subjective knowledge that his or her conduct will promote or facilitate the commission of the charged crime. RCW 9A.08.020(3)(a); RCW 9A.08.010(1)(b); *see State v. Roberts,* 142 Wash.2d 471, 511, 14 P.3d 713 (2000); *Pers. Restraint of Sarausad v. State,* 109 Wash.App. 824, 838 & n. 6, 39 P.3d 308 (2001). If the defendant has information that would lead a reasonable person to have such knowledge, the jury is allowed *but is not required* to infer that the defendant had actual, subjective knowledge. *State v. Shipp,* 93 Wash.2d 510, 516, 610 P.2d 1322 (1980); *Sarausad,* 109 Wash.App. at 838 n. 6, 39 P.3d 308. The trial court instructed the jury on this concept. But comparing the defendant to an ordinary person creates only an inference, and the jury still must find that the defendant acted with actual, subjective knowledge. *Shipp,* 93 Wash.2d at 517, 610 P.2d 1322 (stating that even if the jury finds that an ordinary person would have had knowledge under the circumstances, the jury must still be allowed to conclude that the defendant was less attentive or intelligent than the ordinary person).

¶ 62 At the beginning of his closing argument, the prosecutor properly stated the law regarding actual knowledge—that if a reasonable person would have known, the jury was permitted but not required to find that Allen acted with knowledge. However, throughout the remainder of closing argument he argued both directly and indirectly that a jury could convict Allen if it found *either* that he knew *or* that he should have known that Clemmons would murder the officers. Instead of arguing that the jury could *infer* Allen's knowledge from what a reasonable person would know, the prosecutor argued that if a reasonable person would have known and Allen should have known, then Allen *was* an accomplice.

> If a person had information and a reasonable person would have known, then he knew. Because it's really hard to get direct evidence of somebody's knowledge, right?

Report of Proceedings (RP) at 3545.

> [W]hat a jury should do is look at all the facts and all the circumstances surrounding it and say, well, what would a reasonable person know.
>
> And *if a reasonable person would have known* that Maurice Clemmons was going to go in there and kill those cops, then *his getaway driver knew that, too.*

RP at 3545 (emphasis added).

> And under the law, *even if he doesn't actually know,* if a reasonable person would have known, he should have known, he's guilty.
>
> So you're an accomplice if you help another person commit a crime and *you know*

> *or should have known* that your actions are going to help. And Mr. Allen is an accomplice because he helped Maurice Clemmons commit these murders, and *he knew or should have known* that his actions were going to help these murders happen.

***14** RP at 3546 (emphasis added).

> So the question becomes—and really, the question in the case is *did he know or should he have known.* Did he know or would a reasonable person have known? Well, did he know? Should he have known?

RP at 3548–49 (emphasis added).

> Information that would lead a reasonable person in the same situation to believe. He knew. And *he should have known.*

RP at 3566 (emphasis added).

¶ 63 The PowerPoint slides that accompanied the prosecutor's argument were just as significant. The jury repeatedly was shown slides stating that Allen was an accomplice if he knew *or should have known.* The most egregious were two sequential slides entitled "Should Have Known" which listed several words potentially descriptive of Allen's mental state, the last two of which were "Know" and "Should Have Known." Ex. 352, at 5–6. All the words were crossed out—including "Know"—except for "Should Have Known." Ex. 352, at 5. The message was clear. The jury did not have to find that Allen actually knew Clemmons would murder the officers, only that he should have known.

¶ 64 The same argument was repeated in the rebuttal argument by a different prosecutor, along with additional PowerPoint slides.

> This is the knowledge instruction. What did he know, what should he have known....
>
> ... Should have known there were police inside the Forza.... Should have known those police ... were going to be killed by Clemmons....
>
> ... He should have known that Clemmons was going to carry out this plan.

RP at 3614–15. Four slides were titled "Defendant Should Have Known," none of which indicated that the jury had to find actual knowledge. Ex. 354, at 3–4.

¶ 65 Allen argues that the prosecutor intentionally attempted to mislead the jury. I do not necessarily agree. A closing argument is not the same as a written brief, where the author can carefully craft legal statements and ensure they are correct. During closing a prosecutor is on his or her feet arguing in the "heat of the moment," and as a result some misstatements may occur. Although the slide presentation—prepared in advance of closing argument—included multiple references to a "should have known" standard, those slides would not have been improper if the prosecutor had carefully explained the correct legal standard when discussing them. The prosecutor here simply may have gone astray while making an honest attempt to state the law

regarding accomplice liability. However, for purposes of a prosecutorial misconduct claim whether statement is intentional or inadvertent is immaterial to determining whether the statement was improper. *Cf. State v. Ish,* 170 Wash.2d 189, 195 n. 6, 241 P.3d 389 (2010) (refusing to draw fine lines between error and misconduct). My dissent here is not based on a finding that the prosecutor engaged in deliberate misconduct.

¶ 66 The State correctly acknowledged on appeal that the prosecutors' arguments were improper. Therefore the only issue is whether those arguments prejudiced Allen.

C. PREJUDICE

***15** ¶ 67 Allen objected twice to the "should have known" arguments on the basis that they were incorrect statements of the law, once during closing and once during rebuttal. RP at 3545–46; RP at 3614. The trial court overruled both objections, stating, "It's argument." RP at 3546; RP at 3614. As a result, the prejudice standard is whether the improper arguments had a substantial likelihood of affecting the jury's verdict. *Emery,* 174 Wash.2d at 760, 278 P.3d 653.

1. Factors Showing Prejudice

¶ 68 Several factors, considered together, compel the conclusion that the improper arguments prejudiced Allen's constitutional right to a fair trial. First, and most important, the misconduct was not an isolated incident. The arguments were made repeatedly and persistently, in both closing argument and rebuttal argument. The prosecutor told the jury several times that it could convict Allen if he should have known that Clemmons would murder the officers. The court in *Glasmann* acknowledged that misconduct can be so pervasive that prejudice cannot be avoided, even with a curative instruction. " '[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.' " *Glasmann,* 175 Wash.2d at 707, 286 P.3d 673 (alteration in original) (quoting *State v. Walker,* 164 Wash.App. 724, 737, 265 P.3d 191 (2011), *adhered to on remand,* noted at 173 Wash.App. 1027, 2013 WL 703974, *review denied,* 177 Wash.2d 1026, 309 P.3d 504 (2013)).

¶ 69 Second, the improper arguments were accompanied by slides that repeated the arguments in visual form. The court in *Glasmann* emphasized that visual images can be especially prejudicial when used during closing argument:

> Highly prejudicial images may sway a jury in ways that words cannot. Such imagery then, may be very difficult to overcome with an instruction. Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, the arguments being presented.

175 Wash.2d at 709–10, 286 P.3d 673 (internal citations omitted).

¶ 70 Third, the improper arguments involved an incorrect statement of the law of accomplice liability. "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." *State v. Davenport,* 100 Wash.2d 757, 763, 675 P.2d 1213 (1984); *see also Walker,* 164 Wash.App. at 736, 265 P.3d 191. In *Warren* the prosecutor repeatedly misstated the burden of proof and made misleading statements about the presumption • of innocence. 165 Wash.2d at 23, 25, 195 P.3d 940. Fortunately, in that case after the third misstatement the trial court interrupted and gave a lengthy curative instruction. *Warren,* 165 Wash.2d at 24, 195 P.3d 940. On appeal, our Supreme Court stated that it would have found prejudice but for the curative instruction. "Had the trial [court] not intervened to give an appropriate and effective curative instruction, we would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error." *Warren,* 165 Wash.2d at 28, 195 P.3d 940.

***16** ¶ 71 Fourth, the State's "should have known" argument was the focus of the entire case. The State produced no direct evidence that Allen actually knew that Clemmons was going to murder the officers. The State did argue that circumstantial evidence showed that Allen had actual knowledge, but its primary argument was that Allen was guilty because he should have known the murders would occur. Because the "should have known" issue was so critical, it is more likely that a misstatement regarding the law would affect the verdict.

¶ 72 Finally, the jury's question about accomplice liability demonstrated that at least one member of the jury considered the improper arguments. The question read, "If someone 'should have known' does that make them an accomplice?" Clerk's Papers (CP) at 2014. This question shows that the prosecutor's misstatements made an impact because the "should have known" language was not used in the instructions and, therefore, must have come from closing argument.

2. Majority Arguments Against Prejudice

¶ 73 The majority makes four arguments in support of its conclusion that the improper arguments did not prejudice Allen. Majority at ——— – ———. First, the majority states that the trial court properly instructed the jury that the law is contained in the instructions and not in arguments of counsel. Majority at ——. However, as the court noted in *Glasmann,* the jury may be more susceptible to prejudicial conduct during closing argument. 175 Wash.2d at 709–10, 286 P.3d 673. Further, we have emphasized that "[i]f a self-serving comment at the start of a closing argument could save the prosecutor from repeated, intentional, improper comments, there would be no disincentive to committing prosecutorial misconduct." *Walker,* 164 Wash.App. at 739 n. 8, 265 P.3d 191.

¶ 74 Second, the majority points out that the State initially stated the law correctly and did argue that Allen had actual knowledge as well as that he should have known. Majority at ——— ———. However, correctly stating the law once hardly can compensate for misstating the law

multiple other times. And making a legitimate argument that Allen had actual knowledge is immaterial because the State improperly argued in the alternative that the jury could convict based on actual knowledge or based on a finding that Allen should have known.

¶ 75 Third, the majority notes that Allen countered the State's argument in his closing by telling the jury to "read th[e] instructions" and that Allen "needed to know." RP at 3604. Majority at ——. However, it is difficult to conclude that Allen's attempt to counter the prosecutor's improper arguments would have neutralized any impact on the jury given the pervasive nature of the misstatements.

¶ 76 Fourth, the majority states that the trial court "redirected the jury to the instructions, which properly stated the law, in response to its question regarding 'should have known.' " Majority at ——. However, the trial court did not specifically direct the jury to the correct instruction. The trial court merely wrote, "Please refer to the court's instructions." CP at 2012. Further, the knowledge instruction does not reference the phrase "should have known" that the State repeated so often. As a result, it is naive to assume that the jury figured out the correct law on its own in the face of the State's relentless misstatements.

3. Curative Instruction

***17** ¶ 77 The majority also notes that Allen could have requested specific curative instruction and that a clear instruction could have eliminated any possible confusion and cured any potential prejudice. Majority at ——. However, when the defendant objects to improper conduct, whether an instruction could have cured the prejudice is not the standard. The test for prejudice is whether the conduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Emery,* 174 Wash.2d at 760, 278 P.3d 653. The availability of a curative instruction is only relevant when the defendant *fails* to object. *Emery,* 174 Wash.2d at 760–61, 278 P.3d 653. Further, there is no indication that the trial court would have given a curative instruction here even if requested. The trial court summarily rejected Allen's objections to the "should have known" arguments, and the trial court apparently believed that the prosecutor's arguments were proper.

¶ 78 In any event, I conclude that an appropriate instruction may not have cured the prejudice here. The improper statement of the law was repeated so often that it became a theme of the State's case. Additionally, the State's misstatement of the law was on a crucial issue given the evidence presented at trial. And the prosecutor's arguments likely succeeded in affecting the jury, causing it to consider finding that Allen was an accomplice because he should have known Clemmons would murder the officers. As our Supreme Court noted in Glasmann, repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction can eliminate the potential prejudice. 175 Wash.2d at 707, 286 P.3d 673. Under the circumstances of this case, even a detailed instruction may not have eliminated the possibility that the improper arguments would affect the verdict.

D. CONCLUSION

¶ 79 The murders of officers Griswold, Renninger, Owens and Richards profoundly impacted the people in Pierce County and across the state. I fully understand and support the public's interest in prosecuting, convicting and punishing everyone who knowingly assisted Clemmons. However, despite the horrifying nature of this crime, the quest for a conviction cannot and should not trump a defendant's constitutional right to a fair trial.

¶ 80 Further, the courts have a constitutional obligation to intervene when a prosecutor's improper conduct creates a significant risk of prejudice to the defendant. Only if we are willing to reverse cases involving significant prosecutorial misconduct will we "give substance to our message that 'prejudicial prosecutorial tactics will not be permitted,' and our warning that prosecutors must avoid improper, prejudicial means of obtaining convictions will not be empty words." *Glasmann,* 175 Wash.2d at 712–13, 286 P.3d 673 (quoting *State v. Charlton,* 90 Wash.2d 657, 665, 585 P.2d 142 (1978)).

¶ 81 I would reverse and remand this case for a new trial. The jury must be allowed to evaluate the evidence of Allen's actual knowledge, including consideration of an inference of actual knowledge based on what an ordinary person would know, without being mislead by improper "should have known" arguments. It may be that a jury once again would convict Allen as an accomplice after considering all the evidence and proper arguments. But that conviction would be the result of a fair trial.

Footnotes

1 The ankle monitor was a bail condition for a previous offense.

2 The State argues that Allen and Clemmons drove by the coffee shop twice before the shooting. Video footage shows several white trucks passing by the coffee shop before the shooting, but the picture is not clear enough to determine which of the trucks is Clemmons's.

3 Although Allen claimed that he got out of the truck a few blocks from the car wash when he noticed Clemmons bleeding, Clemmons's blood was found only on the passenger side of the truck when the truck was recovered from the grocery store parking lot.

4 Several of the slides are titled "Should Have Known" and one slide crosses out the words "Premeditate, Intend, Purpose, Plan, Want, Hope, Care, Know" and leaves "Should Have Known." Ex. 351, at 5, 6.

5 Allen also urges us to consider juror affidavits in deciding this issue. But a court may not consider an affidavit that relates to a factor that inheres in the verdict. *State v. Gobin,* 73 Wash.2d 206, 211, 437 P.2d 389 (1968). A factor inheres in the verdict if it concerns the jurors' mental processes, such as their motives, intents, or beliefs. *State v. Hatley,* 41 Wash.App. 789, 793, 706 P.2d 1083 (1985) (quoting *State v. Crowell,* 92 Wash.2d 143, 146, 594 P.2d 905 (1979)). Here, the affidavits relate to the jurors' mental processes in reaching the verdict; therefore, we do not consider the affidavits.

6 Allen assigns error to four of the trial court's "Reasons for Admissibility or Inadmissability of the Evidence" "to the extent [they are] finding[s] of fact." CP at 811, Appellant's Br. at 2–3. But all of the reasons are conclusions of law relating to exigent circumstances and the reasonableness of the police's conduct rather than findings of fact.

7 I agree with the majority that the constitutional harmless error standard is inapplicable here. *Emery,* 174 Wash.2d at 756–57, 278 P.3d 653. Majority at ——.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 42257-3-II
v.	)	
	)	
DORCUS ALLEN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] DORCUS ALLEN 350292 WSP 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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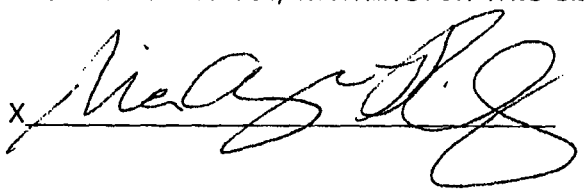
x 

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