NO. 314413

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BENJAMIN LOPEZ, JR., Appellant,

BRIEF OF APPELLANT

Mitch Harrison

Attorney for Appellant

Harrison Law Firm

101 Warren Avenue N

Seattle, Washington 98109

Tel (253) 335 - 2965

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III. STATEMENT OF THE CASE

On April 22, 2011, Alexis Hernandez (age 17) and two brothers, Benjamin (age 17) and Abraham Lopez (age 15). CP 8-10; Vol. 10, RP 186-190. Benjamin and Abraham had arrived at the barbeque first. Vol. 10, RP 188. About 15 minutes after Benjamin and Abraham arrived at the party, Alexis arrived through the front door. RP 187-89. Shortly after he arrived, Alexis told Benjamin that he wanted to buy some weed. RP 190. After that the boys made plans to pick up some weed from a local drug dealer in Quincy, named Kenney Watkins. Vol. 10, RP 190. Alexis even admitted that the plan for the day was to buy bud.). Vol. 7, RP 139-141; Vol. 7, RP 171.

However, none of the boys have a car. They needed someone to take them there. Murillo was an adult and had a car. Vol. 10, RP 189. When Murillo got to the party, Benjamin, Alexis, and Abraham all got into the car to go pick up some weed from Mr. Watkins. Vol. 10, RP 189. On the way to Watkin's house, the four drove by the former home of Adan Beltran. Vol. 10, RP 191-94. When they passed his house, someone had said that they thought they saw Beltran in the front yard of the house. Vol. 10, RP 193. Believing that Beltran had been

deported, Benjamin doubted that they had actually seen Beltran and believed they were mistaken. Vol. 10, RP 193-94.

Suddenly, Benjamin heard someone "rack" a gun directly behind him, where Alexis was sitting. RP 198. Benjamin saw Alexis hand forward an object to the driver, Murillo. Vol. 10, RP 199. Although he did not get a full look at it, Benjamin believed it was a gun because the noise he had heard moments earlier. Vol. 10, RP 199.

At that point, Murillo stopped the vehicle near the trailer where the men had thought they saw Beltran. Murillo and Alexis jumped out of the car and disappeared around the other side of the trailer when Murillo and Alexis had scene Beltran. Vol. 10, RP 201-04. Benjamin remained in the car the entire time. Vol. 10, RP 201-14. Abraham stepped out of the car but remained within only a few feet of it, until Benjamin told his younger brother to get back into the car. Vol. 10, RP 203.

At that point, Benjamin and Abraham hear multiple gunshots. Vol. 10, RP 203. Immediately after the gunshots, Alexis and Murillo are seen running back around the trailer. They both quickly got back into the car, sitting in the same respective positions in the car as they were when they left. Murillo drove away at a high rate of speed. Vol. 10, RP 205. Soon after the shooting, Benjamin had asked Murillo what had happened. Murillo told him to shut up and to not worry about it. Vol. 10, RP 204-06.

Soon after the shooting, police located Murillo's vehicle driving in Quincy, with the three young passengers still in the car. Vol. 10, RP 210. Murillo

tried to evade the pursuing police vehicles, but the car was eventually stopped by authorities using spike strips. Vol. 10, RP 212. Once the car was immobilized by the spike strips, Murillo jumped out of the car and fled the scene on foot. He was later found in an orchard 100 yards away and identified as 23-year-old Robert Murillo. CP 9. Each of the boys remained in the vehicle. None of them fled the scene. CP 8-10. They were all taken into custody.

Because Murillo and Alexis had demanded that they stay quiet, Benjamin and his brother refused to tell police what had occurred. Vol. 10, RP 210-14. Alexis initially spoke with investigators, but did not tell them who the shooter was. CP 6-11. He eventually invoked his *Mirdanda* rights, but it was not clear whether they were read to him before the interview started. CP 5-11.

On April 25, 2011, the State charged all four defendants. Abraham was initially charged in juvenile court, he was eventually transferred to adult court to be charged with his brother.The State originally charged Benjamin with Murder in the Second Degree, Drive by Shooting, and Unlawful Possession of a Firearm. CP 1-4. Well before Benjamin and Abraham began their joint trial, Murillo pled guilty to second degree murder, but his plea statement did not admit whether he was a shooter or merely an accomplice. After he was taken into custody, the State inexplicably offered Alexis full immunity to testify against Benjamin and Abraham.

On December 29, 2011, the State amended the charges to include one Count of Premeditated Murder in the First Degree. In addition, the State alleged several aggravators, including the drive-by aggravator and the gang aggravator.

The severity of these allegations cannot be underestimated – especially considering that the only evidence of Ben's involvement in the murder is supplied by a so called "cooperating" witness – a Mr. Alexis Hernandez.

Before the trial, the State tested the firearms for finger prints, running a check on each of the weapons found at the scene. Benjamin's finger prints tested negative. However, Alexis's finger prints were found on one of the firearms. Still, without testing Mr. Hernandez in any way through polygraph or any other means, the prosecution has extracted a "promise" from Mr. Hernandez to tell the truth regarding the Lopez brother's involvement. In exchange for his telling the "truth", the prosecution has apparently agreed to dismiss murder charges against him entirely. Aside from this "promise", no evidence has been provided that corroborates Mr. Hernandez's version of the events leading up to the shooting.

Before deciding Benjamin's guilt, the jury deliberated for several days. During that time, the jury submitted multiple jury questions. CP 207-12. After deliberating, the jury acquitted Benjamin of Murder in the First Degree. In addition, it easily rejected each of the numerous aggravating allegations, which is unsurprising given the fact that none of the allegations except the gang aggravator appear to be supported by probable cause. However, the jury still found Benjamin guilty of two crimes, one Count of Drive-By Shooting and one Count of Felony Murder. CP 229-240. Strangely, although the jury must have found Benjamin's guilt through accomplice liability,[1] it still found that he was not "armed" with a

[1] Benjamin did not own either of the guns recovered from the car. His DNA was found nowhere on the guns nor the gloves, and various pieces of evidence and testimony during trial pointed to every passenger in the car *except* for Benjamin as the possible shooter. The State provided no

firearm—a logically necessary finding if the general verdict were to be read as consistent with the special verdict. *See* CP 213-20.

The State did not request that the jury decide whether Benjamin or his brother acted as an accomplice or a principle. Yet, because the State argued that Benjamin was an accomplice and no evidence proves that he was one of the potential shooters, Benjamin must have been convicted as an accomplice. The State's trial theory appeared to be that Benjamin and his brother, Abraham, had planned to Murder Mr. Beltran, a rival gang member. The State, however, lacked any evidence that Benjamin was involved in such planning. The jury quite easily rejected the State's argument that either of the brothers had premeditated the Murder of Mr. Beltran, as shown by its acquittal on the First Degree Murder charges.

IV. ARGUMENTS

A. THE TRIAL COURT'S "TO CONVICT" INSTRUCTIONS VIOLATED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

1. STANDARD OF REVIEW

The trial court must correctly instruct the jury as to the law. Although the specific language of the instructions is left to the discretion of the trial court,[2] the instructions as a whole must correctly state the law.[3] When reviewing jury instructions, an appellate court's review is de novo.[4]

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evidence whatsoever that Benjamin was the principal actor, focusing its theory of the case on Benjamin's brother, Abraham as the lone shooter.

[2] *State v. Coe*, 101 Wn.2d 772, 787, 684 P.2d 668 (1984).

[3] *Boeing Co. v. Key*, 101 Wn. App. 629, 633, 5 P.3d 16 (2000).

[4] *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

2. THE TRIAL COURT'S "TO CONVICT" INSTRUCTIONS ALLOWED THE JURY TO CONVICT MR. LOPEZ EVEN IN THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT.

Washington has adopted pattern jury instructions for use in criminal trials.[5] These instructions "are drafted and approved by a committee that includes judges, law professors, and practicing attorneys;" and "have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state." *Id.*

In a criminal case, the pattern "to convict" instructions provide trial courts with time-tested instructions that adequately explain to the jury how to apply the law to the facts of the case. Most importantly, the WPIC's define the reasonable doubt standard. This standard requires the jury's to acquit unless the evidenced at trial overcomes the presumption of innocence:

> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, *then it will be your duty to return a verdict of not guilty.*

See, e.g., WPIC 35.19 (emphasis added).

In a criminal case, the jury must be instructed that the state has the burden to prove each essential element of the crime beyond a reasonable doubt.[6] As a corollary, the court must properly instruct the jury on the presumption of innocence and the reasonable doubt standard because it "provides concrete

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[5] *State v. Bennett*, 161 Wn. 2d 303, 307-308, 165 P.3d 1241 (2007).
[6] *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

substance for the presumption of innocence."[7] The importance of the reasonable doubt instruction cannot be underestimated: it is the "cornerstone" of our criminal justice system.[8]

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.[9] The standard provides concrete substance for the presumption of innocence -- that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."[10] It also "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."[11]

To ensure that the jury applies the reasonable doubt standard and the presumption of innocence correctly, it is vital that the Court's "To-Convict" Instruction for each crime charged because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence."[12] Consequently, when the "To-Convict" Instructions misstate the substantive elements of the criminal offense or the jury's duty to convict or acquit, reversal is the usual remedy.[13]

If the trial court fails to properly instruct the jury on the reasonable doubt standard or if the instructions inadequately convey the defendant's presumption of

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[7] *Id.*
[8] *Id.*
[9] *Smith*, 174 Wash. App. at 368.
[10] *In re Winship*, 397 U.S. 358, 363 (1970).
[11] *Id.*
[12] *State v. DeRyke,* 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (If "To-Convict" instructions misstate the applicable law, a reviewing court may not rely on other instructions to supply the element missing from the "to convict" instruction.)
[13] *See State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785, 789-90 (2013).

innocence, any subsequent jury verdict lacks the assurance that is constitutionally required to convict a criminal defendant. And the entire criminal trial is affected.

> But the essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a mis-description of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty."[14]

These instructions convey to the jury the importance of convicting if convinced beyond a reasonable doubt, while also demanding that the jury acquit the defendant of all charges if not convinced beyond a reasonable doubt.[15] Jury instructions must convey the duty to acquit if the State's burden is not met; instructing the jury otherwise improperly relieves the state of its fundamental burden and is reversible error.[16]

In *State v. Smith*, this Court has already the issue at hand; that case requires reversal and a new trial. In *Smith*, the same trial court and judge inappropriately modified the WPIC instructions located after every "to-convict" instruction. The trial court instructed the jury "if, after weighing all the evidence, you have a reasonable doubt … , then *you should* return a verdict of not guilty."[17] This instruction replaced the phrase "will be your duty to find the defendant not guilty" with the phrase "you *should*," to describe the juries duty to acquit. This Court held that by replacing the term "your duty" with "should," the trial court's instructions relieved the State of its burden of proving all of the required elements

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[14] *Sullivan*, 508 U.S. 281 (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)).
[15] *Smith*, 174 Wn. App. at 366.
[16] *Id.*
[17] *Id.* at 789 (emphasis added).

beyond a reasonable doubt, thereby violating due process and constituting manifest constitutional error.

Here, the court's "to convict" instructions stated the jury's duty to acquit in identical language: "if, after weighing the evidence, you find [the elements] have been proven beyond a reasonable doubt, then you *should* return a verdict of not guilty." RP 18, 24; Vol 12. This instruction, like in *Smith*, clearly confused the jury and allowed them to render a guilty verdict even if they may have had a reasonable doubt as to Benjamin's guilt. These instructions, therefore, failed to "make the relevant legal standard manifestly apparent to the average juror."[18]

Because this error undermined the reasonable doubt standard and Benjamin's constitutional right to be presumed innocent, the error infected the jury verdict and was by its very nature structural.[19] Prejudice for such an error must be presumed.[20] Consequently, *Smith* requires reversal of Benjamin's convictions. If this court does not dismiss his convictions, as argued below, this court must remand for a new trial.

B. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT BENJAMIN WAS AS AN ACCOMPLICE IN THE ASSAULT OF ADAN BELTRAN.

1. STANDARD OF REVIEW

The State must prove *each* and *every* "element" or "ingredient" of the charged crime beyond a reasonable doubt.[21] If it fails to do so, the court must

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[18] *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).
[19] *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006) (describing structural error).
[20] *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); *Smith*, 174 Wash. App. at 368 (Even if it is more likely than not the jury understood the court's use of "should" in the elements instruction as mandatory, reversal is required) *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State.
[21] *United States v. O'Brien*, 560 U. S. 218 (2010). The essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed

dismiss the conviction with prejudice.[22] In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State's case in chief, (c) at the end of all the evidence, (d) after verdict, and (e) on appeal."[23]

When the defendant challenges the sufficiency of the evidence, the court must review the evidence in the light most favorable to the State.[24] This level of review gives respect and deference to the jury verdict. Respect for the jury verdict has roots in common sense and the understanding that a reviewing court does not have access to many observations from a "bare record" that the jury may have had. This deference requires the court to defer to the trier of fact in two respects. First, the Court will generally assume that the jury resolved all conflicting testimony in favor of the State and that they similarly found all of the State's witnesses credible. Second, in most cases, the court will assume that the jury found the evidence favorable to the State persuasive and that the evidence that may have been favorable to the defendant was not persuasive.

a) CONFLICTING TESTIMONY AND WITNESS CREDIBILITY.

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punishment so as to aggravate it, the fact necessarily constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction. *Alleyne v. United States*, 133 S. Ct. 2151, 2162 (2013).

[22] *Id.*

[23] *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996).

[24] *State v. Joy*, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993); *State v. Salinas*, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992).

Determinations of credibility are for the fact finder and are not reviewable on appeal.[25] If witnesses give conflicting testimony, the reviewing court must accept the testimony that is the most favorable to the State.

If an accomplice to a crime, for instance, testifies that he stole a large quantity of ephedrine so that the defendant could manufacture methamphetamine, but the defendant denies any involvement, the reviewing court must assume that the defendant lied and the defendant did in fact intend to manufacture methamphetamine.[26] Or, if the victim of a sex crime claims that the defendant molested her and the defendant denies the claim, the court of appeals cannot determine from the record who, the victim or the defendant, was credible.

In those situations, the reviewing court, therefore, properly assumes that the jury found that the victim was credible and that the defendant was *not credible*.[27] In other words, if the defendant argues on appeal that the evidence was insufficient to convict him, but reversing his conviction would require the court to ignore conflicting testimony, or to find that a witness was *not* credible, his sufficiency argument should generally fail.

b) INFERENCES FROM CIRCUMSTANTIAL EVIDENCE

The State can prove a crime either through direct or circumstantial evidence or some combination of both.[28] When no direct evidence is presented regarding a material element of the crime, a reviewing court looks to whether

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[25] *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006).
[26] *Id.*
[27] *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004) (The court should defer to the trier of fact on issue of "conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.").
[28] *See State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

there is adequate circumstantial evidence from which a jury could reasonably determine that the element(s) in dispute were actually proved.[29] An inference allows the jury to a logical deduction or conclusion that the law allows, but does not require, following the establishment of the basic facts.[30] When the evidence of guilt includes circumstantial evidence, the reviewing court does not have insight as to the jury's thought process, it must necessarily speculate as to the "inferences" that the jury must have made to find the defendant guilty. In other words, an inference is an evidentiary device that allows the jury to use logic and common experience to decide whether the State has proved one fact circumstantially.

In a case based on circumstantial evidence, the record must reveal a quantum of evidence so that the jury could reasonably infer guilt as to all facts required to convict.[31] Consequently, a reviewing the record for insufficient evidence, the reviewing court may only consider inferences if they are reasonable, i.e. rooted in common experience and logic.[32] Conversely, a reviewing court must reverse a defendant's conviction if upholding it would requires the court to assume that jurors rendered their verdict on facts established by "guess, speculation, or conjecture."[33] Finally, to prove criminal intent by circumstantial evidence, the State must meet a greater level of proof: the State must present the

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[29] *State v. Bailey*, 52 Wn. App. 42, 51, 757 P.2d 541 (1988), aff'd, 114 Wn.2d 340, 787 P.2d 1378 (1990). *State v. Maxey*, 63 Wn. App. 488, 491, 820 P.2d 515 (1991)
[30] *State v. Jackson*, 112 Wn.2d 867, 874, 774 P.2d 1211 (1989)
[31] *State v. Miller*, 60 Wn. App. 767, 772, 807 P.2d 893 (1991).
[32] *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).
[33] *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

jury with facts that "plainly" indicate that the defendant intended to commit *the* crime charged. [34]

2. The State Failed to Produce Sufficient Evidence To Convict Benjamin As An Accomplice to the Assault of Mr. Beltran.

In Washington, a person is guilty as an accomplice if, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it."[35] To convict as either an accomplice or a principal, the jury need be convinced only that the crime was committed and that the defendant participated in it.[36]

Washington's accomplice statute, therefore, requires the State to prove "a mens rea of knowledge, and an actus reus of soliciting, commanding, encouraging, or requesting the commission of the crime, or aiding or agreeing to aid in the planning of the crime."[37] To prove that the defendant was an accomplice, the State must show that the defendant aided in the planning or commission of the crime and had knowledge of the crime.[38] If convicted as an accomplice, an individual is considered to have actually committed the crime on the basis that "[t]he liability of the accomplice is the same as that of the principal."[39] Consequently, an individual convicted as an accomplice is subject to

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[34] *State v. Johnson,* 159 Wn. App. 766, 774, 247 P.3d 11 (2011) *(quoting Delmarter,* 94 Wn.2d at 638).
[35] RCW 9A.08.020(3)(a).
[36] *State v. Teal,* 152 Wn.2d 333, 339, 96 P.3d 974 (2004).
[37] *State v. Roberts,* 142 Wn.2d 471, 502, 14 P.3d 713 (2000).
[38] *State v. Berube,* 150 Wn.2d 498, 511, 79 P.3d 1144 (2003); *State v. Jackson,* 137 Wn.2d 712, 724-25, 976 P.2d 1229 (1999).
[39] *State v. Carter,* 154 Wn.2d 71, 78, 109 P.3d 823 (2005).

all the legal consequences of a crime as if he or she had actually been a principal in its commission.[40]

Similarly to the accomplice liability statute, Washington's felony murder statutes contain built-in vicarious liability to provide a mechanism by which liability for a homicide may be imputed to a co-participant who does not actually commit the homicide.[41] When one participant in a predicate felony, alone, commits a homicide during the commission of, or flight from, such felony, another participant in the predicate felony has, by definition, committed felony murder.[42] Therefore, in the felony murder context, the State need not prove that the non-killer participant was an accomplice to the homicide."[43] Instead, the State need only prove that the defendant was an accomplice to the predicate felony offense.[44]

Here, Benjamin was found guilty of being an accomplice to Drive-By Shooting and Felony Murder. The State failed to ask the jury to specify which crime stood as the basis for the Felony Murder Conviction. However, this section assumes that the jury found that he was an accomplice to both felony assault and drive-by shooting because it could not possibly have found him guilty to the crime of drive-by shooting without finding him guilty of the uncharged crime of "felony assault."

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Carter*, 154 Wn.2d at 79.
[44] *Id.*

To prove felony murder, the State was required to prove that Benjamin knew that his actions would be facilitating a felony assault.[45] Of course then, if the evidence was insufficient to prove that Benjamin acted as an accomplice to a felony assault, then it was necessarily insufficient to find him guilty of drive-by shooting. As the argument below shows, the State failed to prove that Benjamin knew the assault was about to occur.

a) THE SCANT CIRCUMSTANTIAL EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO PROVE THAT BENJAMIN ACTED WITH KNOWLEDGE THAT HIS ACTIONS WOULD AID IN THE ASSAULT ON BELTRAN BECAUSE THE RECORD DOES NOT SUPPORT A REASONABLE INFERENCE THAT BENJAMIN KNEW THAT THE ASSAULT WAS ABOUT TO OCCUR.

The language of the accomplice liability statute establishes a mens rea requirement of "knowledge" of "the crime." RCW 9A.08.020(3)(a). In *State v. Roberts*,[46] the Court pointed out that Washington's accomplice statute, in relevant part, is identical to that of the Model Penal Code. Specifically, both require the accomplice to "have the purpose to promote or facilitate the particular conduct that forms the basis for the charge.[47]" Additionally, both statutes specifically safeguard defendants who do not clearly act with this purpose be declaring that the accomplice "he will not be liable for conduct that does not fall within this purpose."[48]

After comparing the two statutes, the *Roberts* Court, concluded that the Washington Legislature, intended the culpability of an accomplice ***not*** extend

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[45] *State v. Rice*, 102 Wn.2d 120, 125, 683 P.2d 199 (1984).
[46] *State v. Roberts*, 142 Wn.2d 471, 510-511, 14 P.3d 713 (2000).
[47] *Id.*
[48] *Id.*

beyond the crimes of which the accomplice actually has "knowledge," the mens rea of RCW 9A.08.020. The Legislature intended that an accomplice "'have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*'." If the State fails to prove that the defendant acted with such a purpose, the Court reasoned, the defendant "'will not be liable for conduct that does not fall within this purpose.'"[49] Thus, while a person may be an accomplice if his conduct aids another in planning or committing the crime, the aid must be rendered with *knowledge* that it will promote or facilitate the crime.[50]

Evidence that the defendant was present at the scene and knew—after-the-fact—that a crime was committed is insufficient to allow a jury to infer criminal knowledge sufficient to establish accomplice liability.[51] Washington courts have applied this concept to cases in which the driver escorts the principal to and from the scene of the crime. When the underlying criminal act crime involves the use of an automobile to transport the principle to the scene of the crime, the driver and any passengers are not held strictly liable because merely because they drove the car or directed the driver to the scene of the ultimate crime.

A passenger, for example, is not liable as an accomplice where the driver stops the car, gets out, walks away, and then steals a truck, absent evidence the passenger knew the driver intended to commit the crime.[52] Likewise, a driver is

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[49] *Id.* at 510-11.
[50] *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000).
[51] *State v. Luna*, 71 Wn. App. 755, 759-760 862 P.2d 620 (1993); *State v. Asaeli*, 150 Wn. App 543, 569 (2009).
[52] *Luna*, 71 Wn. App. at 756.

not an accomplice where there is no evidence he knew a passenger would suddenly jump out and commit a violent offense, such as robbery absent specific evidence that the defendant knew the robbery was going to occur.[53] If the State fails to present sufficient evidence that the defendant *knew* the crime was about to occur, the defendant's conviction must be reversed.[54]

Here, Benjamin's conviction should be dismissed because State failed to prove that Benjamin actually *knew* that an assault on Mr. Beltran was about to occur. Without proof that Benjamin knew that of the assault, it is impossible for him to have given the driver directions to Beltran's home *with the purpose to promote or facilitate* the assault on Beltran.[55] Several Washington cases compel dismissal of Benjamin's conviction: *State v. Robinson*,[56] *State v. Asaeli*,[57] and *State v. Larue*.[58]

(1) *STATE V. ROBINSON*

As stated above, knowledge of the principle's intent to commit a particular crime is an essential element of accomplice liability for any crime.[59] It of course follows that someone cannot be an accomplice to an already completed crime, even if the person is somehow responsible for causing the principal to arrive at the scene of the crime (i.e. by driving the defendant there or by directing the defendant how to get there). In fact, even if someone helps the principal escape

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[53] *Robinson*, 73 Wn. App. at 857.
[54] *See e.g. id.*; *Luna*, 71 Wn. App. at 756.
[55] *See Roberts*, 142 Wn.2d 471, 510-511.
[56] *State v. Robinson*, 73 Wn. App. 851, 857, 872 P.2d 43 (1994).
[57] *State v. Asaeli*, 150 Wn. App 543, 569 (2009).
[58] *State v. Larue*, 74 Wn. App. 757, 760-761, 875 P.2d 701 (1994).
[59] *Robinson*, 73 Wn. App. at 857.

from the scene of the crime, he is not an accomplice under Washington law because one cannot aid the completion of a crime that is already completed.[60]

In *State v. Robinson*, the Court properly applied these concepts of accomplice liability and dismissed Robinson's conviction.[61] In that case, the defendant, a juvenile, picked up several friends and took them for a drive in his mother's car. At some point during this drive, the front passenger exited the vehicle out of the slow moving car, grabbed a bystander's purse, and jumped back into the car. Robinson drove away but demanded that his friend get rid of the purse. Robinson dropped his friend off but did not report the incident to police. The trial court convicted Robinson of second degree robbery as an accomplice.

On appeal, this court reversed Robinson's conviction for insufficient evidence and dismissed the conviction. In so holding, the court of appeals reasoned that that at the point the friend got back into the car after stealing the purse, the robbery was complete. Thus, Robinson could not have aided the already completed crime. The evidence also showed that Robinson did not associate himself with the purse snatching, participate in it with desire to bring it about, or seek to make it successful by his own actions. In other words, by merely driving the principal to the scene of the crime, the State failed to prove the defendant's intent "plainly" as a "matter of logical probability."

Here, just as the defendant's driving in *Robinson* did not that the driver knew that the principal was going to commit a robbery, the facts here fail to

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[60] *See id.* (holding that under such circumstances, the State should charge the defendant with "rendering criminal assistance", but cannot obtain a conviction as an accomplice).
[61] *Id.*

establish that Benjamin knew that the one of the men in the car was going to jump out and shoot down Adan Beltran in broad daylight until the crime had actually occurred. Just as in *Robinson*, the State here presented no evidence that Benjamin was involved in the planning of the assault. Although DNA evidence connected his co-defendants to the firearms, the DNA evidence failed to connect Benjamin to any of the firearms.

Moreover, in some respects, Benjamin was less culpable than the defendant in *Robinson*. Unlike the defendant in *Robinson*, who intentionally drove the defendant to the scene of the shooting, Benjamin did not drive the vehicle to the scene of the crime. Thus, unlike the defendant in *Robinson*, Benjamin was not clearly the one who caused the vehicle to be at the scene of the crime.

In fact, the defendant in Robinson's criminal culpability in the unplanned robbery was actually far more egregious than Benjamin's involvement in the crime because Benjamin, unlike Robinson, did not act as the getaway driver after the robbery. As the court in Robinson astutely recognized, Robinson's driving away could have subjected him to criminal liability for aiding and abetting his cohort's robbery by helping him flee from the scene. However, "Robinson's subsequent action of driving away with Baker could not have aided and abetted Baker to commit the second degree robbery because by then, Baker had already completed that crime."[62]

(2) *STATE V. ASAELI*

[62] *Id.*

In *State v. Asaeli*,[63] Division Two reversed a defendant's conviction for second-degree murder based upon accomplice liability for insufficient evidence and dismissed with prejudice on facts that were more egregious than those here. In that case, the accomplice at issue (Vaielua) and his friends left a bar late at night; Vaielua drove the group to a nearby park that would soon become the scene of the murder. While at the park, a friend of the defendant shot and killed someone (Fola). The defendant and the shooter were both charged with Murder.

At trial, the State introduced evidence that Vaielua knew that one of the passengers in his car (Williams) may have been looking for the victim, but the State failed to present any evidence that Vaielua actually knew that the co-defendants in his car had intended to assault or otherwise injure or kill the victim once he was found. Although it was undisputed that Vaielua drove the accomplices to the scene of the crime, the record lacked any evidence that he knew that his act of driving would promote the eventual assault and death of the victim. Consequently, the court reversed Vaielua's conviction and dismissed with prejudice.[64]

In that case, Vaielua's involvement was greater than Benjamin's involvement in this case, yet the court still found the evidence to be insufficient. The court summarized those facts as follows:

> (1) Asaeli [the shooter and principal], Asi, and Williams witnessed Fola [the victim] shoot at a car with Asian men in it at Thea Foss Park a week before Asaeli shot Fola but that Vaielua was not present at the time; ***[Evidence of Motive to Kill]***
> (2) a week later, Vaielua was at Papaya's bar at the same time as Williams and Asaeli;

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[63] *Asaeli*, 150 Wn. App at 569.
[64] *Id.*

> (3) Vaielua spoke to Williams and Asaeli either at the bar or as they were all leaving the bar at closing time; ***[Evidence that co-defendants were acting in concert]***
> (4) Asaeli did not ask [a friend of his] if she wanted to go to the waterfront until after speaking to the others as they were leaving the bar;
> (5) Vaielua did not normally go to the waterfront after the bars closed when he was with Ishmail;
> (6) after leaving the bar, talking to the others, and dropping Ishmail off, Vaielua drove the Explorer to Thea Foss Park at the same time Asaeli, Van Camp, and Asi drove to the park;
> (7) the three cars arrived at approximately the same time; [Concert of Action]
> (8) when Vaielua arrived, he had four passengers with him, including Williams;
> (9) before the shooting, Vaielua and the others exited the Explorer and Vaielua spoke and motioned to the people in the Explorer for several minutes;
> (10) also before the shooting, some of those who arrived with Vaielua spoke to Asaeli;
> (11) immediately before the shooting, Vaielua approached James, whom he knew from prior peaceful encounters; and
> (12) after greeting James, Vaielua asked where "Blacc" was and then stood with James (with a car between them and Ramaley's car) until the shooting.[65]

These facts taken together were insufficient to support even circumstantially that Vaielua was an accomplice to the shooting. The limited facts in this case are even more innocuous for several reasons. First, the record in *Asaeli* showed that Vaielua was present near the murder scene, like Benjamin. Unlike Benjamin, however, Vaielua was actually close enough to witness the shooting occur directly in front of him.

Second, the *Asaeli* court rejected the State's contention that gang evidence offered to prove motive and that the defendants were "acting in concert" could establish Vaeilua's guilt as an accomplice:

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[65] *Id.*

> There was also evidence that Vaielua may have shared an affiliation with his friends, that Vaielua and his friends may have displayed several gang colors when they arrived, and that someone shouted out "K" after the shooting. *Although this is evidence that Vaielua and the others may have been acting in concert and may relate to motive, this evidence, even taken in the light most favorable to the State, does not demonstrate that Vaielua was aware that the group was planning to do more than locate Fola; it does not demonstrate that Vaielua was aware of a plan to assault or kill Fola.*[66]

Here, like in *Asaeli*, the State's gang evidence—even though clearly used for improper purposes throughout the trial—cannot demonstrate that Benjamin *knew* that the group was planning to assault Mr. Beltran on the day of the fatal shooting.

Third, the facts in *Asaeli* showed that Vaielua had actual knowledge that his co-defendants "were looking" for the victim *on the night that the shooting occurred* and that there was apparently a *great deal of planning in trying to locate him*. These facts are far more probative of the defendant's knowledge than those presented here because they tend to show that Vaielua could have foreseen the shooting under the circumstances at the time. Still, they were not enough to say hold Vaeilua accountable as an accomplice because foreseeability cannot be equated to knowledge as required by the accomplice statute. Here, the facts are even less convincing than those in *Asaeli* because aside from the act of the assault itself, the State failed to introduce any probative evidence that Benjamin was aware than they were looking for Beltran on the day he was shot. In fact, the evidence appears to contradict that finding because the undisputed evidence shows that Benjamin was looking to score "some bud", not aid in the commission of an assault.

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[66] *Id.*

Fourth, like in *Asaeli*, the State here presented no evidence that Benjamin had discussed assaulting or killing the victim. The court in *Asaeli* noted the importance of the lack of any evidence of such planning by Asaeli, "[i]mportantly, the evidence did not show what was said during any conversations Vaielua may have had or overheard that evening nor was there any evidence that any of these conversations related in any way to a plan to shoot or assault Fola."[67] Here, the State's only witness who would have had knowledge of such conversations admitted that, prior to the shooting, no such conversations occurred. Initially when questioned, Hernandez claimed that he did not remember any conversations until the shooting occurred. RP 140, Vol. 7. According to him, the group never discussed assaulting Adan Beltran or even mentioned his name.

The State will likely try to argue that Benjamin "gave directions" to the victim's house, and the court should consider that sufficient to establish knowledge that an assault was about to occur. This court should reject such a speculative argument because it does not comport with the evidence and *reasonable* inferences therefrom, including the testimony of Hernandez himself, who admitted that he did not know where they were going. RP 140, Vol. 7. Although the car eventually stopped at the house of the eventual shooting, Hernandez later acknowledged upon cross-examination that the particular turn which Benjamin told Murillo to make would have been a conceivable place to turn in order to get to the house of Mr. Watkins, a known drug dealer who lived several blocks from Adan Beltran. RP at 216, Vol. 7. Indeed, Hernandez admitted

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[67] *Id.*

that Benjamin could have been giving directions to a local drug dealer's house, which was consistent with why Benjamin was in the car in the first place: to get some weed to bring to a party.

Finally, although the facts of this case are strikingly similar to those of *Vaielua*, several facts show that the defendant in *Vaielua* was far more complicit in the assault and killing than Benjamin was here. It was undisputed in *Vaielua*, for instance, that Asaeli knew that his co-defendants had a grudge against the victim *and* that they were looking for him *on the night of the shooting*. Here, by contrast, no evidence suggests that Benjamin had such knowledge. Additionally, the accomplice in *Vaielua* actually drove himself and others to the scene of the crime *knowing* that his friends were looking for the victim. Here, by contrast, Benjamin was merely sitting in the driver's seat when one of the co-defendants unexpectedly hopped out of the car and gunned down a rival gang member in cold blood. Lastly, unlike here, the accomplice in *Vaielua* never offered a reasonable explanation for why he was present at the scene of the murder when it occurred. Here, the contradicted evidence clearly shows that Benjamin (a 16 year old boy) was riding in the car with a 22 year old driver and his 15 year old brother in the back seat.

(3) STATE V. LARUE

As stated above, a defendant's criminal knowledge may be inferred by circumstantial evidence, but only if it is "***plainly*** indicated as a ***matter of logical probability***." In *State v. LaRue*,[68] the Court analyzed whether the defendant was

[68] *State v. Larue*, 74 Wn. App. 757, 760-761, 875 P.2d 701 (1994).

an accomplice to the crime of First Degree Welfare Fraud. The Welfare Fraud statute prevents, amongst other things, a person from making false material statements to obtain public funds and also imposes an affirmative duty on the beneficiary to notify the State of any changes in financial circumstances. Such circumstances include returning to employment. In that case, the defendant, LaRue had begun collecting unemployment checks in 1989. Despite returning to work, the husband and wife continued to collect welfare checks and deposited them into their joint bank account.

LaRue had signed the initial forms for enrollment, but his wife deposited every check for him in their joint bank account. He was eventually investigated for and charged with welfare fraud. LaRue was convicted as an accomplice to Welfare Fraud. On appeal, the court reversed his conviction, holding that the evidence was insufficient as a matter of law to prove that he acted as an accomplice to his wife's deposit of the checks.

In determining whether LaRue acted as an accomplice to his wife, who made the false statements by depositing the checks every week, the court first noted that it must draw all ***reasonable*** inferences "in favor of the State and against the defendant."[69] Like the State will surely attempt to do here, the State attempted to prove knowledge by pointing to very limited circumstantial evidence. In *LaRue*, the following circumstantial evidence was insufficient to support his conviction:

> (1) he admitted signing the Application for Assistance form; (2) he did not report his income while out of the family home; (3) he and [his wife] opened a joint checking account in July 1989; (4)

[69] *Id.*

> [LaRue's Wife] was seen at [LaRue's] place of employment in the last half of 1989; and (5) [LaRue] told Woolf in June 1991 that he was aware of [LaRue's wife] signing his name.[70]

In analyzing the first four factors, the court concluded that these facts were insufficient to prove that Larue was an accomplice to his wife's material misstatements. Specifically, these facts failed to allow for a *reasonable* inference that LaRue actually *knew* of his wife's criminal activity, i.e. that she continued to deposit the checks after he re-gained employment, Moreover, even if he had known of the criminal deposits, these facts still failed to prove that any of his acts showed that he "desired to facilitate" the crime.

As for the fifth factor—that LaRue admitted that he was aware that his wife had signed his name—the court held that the record was insufficient for a jury to reasonably conclude that the statement was evidence of his prior knowledge because the record failed to indicate *when* that statement was made.[71] If the Statement was made in 1989, LaRue would have had the requisite guilty knowledge for accomplice, but if it occurred in 1991, then he would not be criminally liable as an accomplice. Put other way, the record did not establish how, viewed objectively, a reasonable juror could conclude that he was guilty as an accomplice because the record could not conclusively establish whether a valuable piece of evidence (his admission to knowing about the fraud) was made before or after the fraud had ended.

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[70] *Id.*

[71] "The details of the statement to Woolf were never developed, and there is no way to discern whether he was referring to the time of Lee Ann's conduct (1989) or the time of his statement (1991)."

Although the crime in *LaRue* is certainly different than the crimes at issue here, the State's failure in proving those crimes is very similar. First, as discussed in detail above, the facts presented at trial do not establish that Benjamin *knew* that his co-defendants had intended to commit an assault on Adan Beltran on the day the shooting occurred, just as the facts in *LaRue* failed to establish that LaRue had actual knowledge that his wife was committing an on-going fraud—despite evidence that could have put him on notice that such might be the case.

Second, just as in LaRue, the only piece of evidence that could establish the defendant's guilty knowledge (here, the supposed directions given by Benjamin) could not reasonably be interpreted to establish his complicity in *the* crime charged. In *LaRue*, the jury had no way of determining *when* LaRue had admitted to having *knowledge* of his wife's fraud. The record was void on this subject. Thus, no reasonable juror could conclude within reasonable probability that the Statement was made *during* the ongoing fraud rather than after. Such a conclusion would have been mere conjecture. Likewise here, for the jury to have determined that Benjamin have directions to the Adan Beltran's house to knowingly assist in assaulting Mr. Beltran rather than directing the driver of the car to the local weed dealer's house, which was located down the same road, would be mere conjecture and speculation.

In sum, both *Asaeli* and *LaRue* held that the circumstantial evidence was insufficient to support an inference that each respective defendant acted with the specific intent required to prove accomplice liability. In other words, the defendant's *knowledge* that their actions were not *plainly* indicated from the

proven facts as a matter of logical probability. Similarly here, without considering the numerous improper inferences advanced by the State during the trial, a rational and reasonable jury could not find that Benjamin acted with the required knowledge to hold him accountable for the assault and eventual death of Adan Beltran.

b) Even if the State proved that an Assault on Adan Beltran Was Foreseeable, The Evidence is Still Insufficient to prove that Benjamin's Actions actually facilitated the Commission of the Assault.

A person may not be convicted as an accomplice merely because he knew a crime was about to occur but failed to prevent it.[72] Likewise, an accomplice may not be convicted of a crime merely because his actions may have aided in a crime that was foreseeable under the circumstances.[73] In this case, the State may argue that even though Benjamin did not actually know that his accomplices intended on assaulting Adan Beltran on the day of his murder, the surrounding circumstances should have put him on notice that a crime might occur. Such an argument should be rejected because it would be inconsistent with Washington accomplice statute, which clearly requires an accomplice to act with knowledge of the general crime that is eventually committed.

Such an argument by the State would be tantamount to arguing that Washington's accomplice liability statute should be read a broadly as the Federal Pinkerton Doctrine, which imposes liability for not only the general crime that the defendant seeks to aid in (here, possession of Marijuana) but also to *any*

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[72] *State v. Jackson*, 137 Wn.2d 712, 724-25, 976 P.2d 1229 (1999).
[73]. *State v. Stein*, 144 Wn.2d 236, 245–46, 27 P.3d 184 (2001);

foreseeable crimes that might be incidentally furthered by the defendant's actions or by the actions of his co-conspirators.[74] Yet, Washington has already declined to expand accomplice liability so broadly. Thus, even if Benjamin could have reasonably foreseen that his brother would shoot Beltran, it does not establish knowledge in regards to the particular charged crimes.

In *State v. Luna*,[75] the defendant was charged with taking and riding a motor vehicle without permission. The evidence introduced at Luna's trial showed that Luna and at least three other juvenile boys had went for a joy ride late at night. The court referred to this behavior as "vehicle prowling." They began the evening in a white 1986 Camaro driven by Co-Defendant Lauriton. At one point, Lauriton stopped the Camaro, exited, and walked away. The other occupants of the car, including Mr. Luna, got out of the Camaro, but stood near it.

Suddenly, a red pickup truck sped past the group, driven by Lauriton. Luna took over as the driver of the Camero and followed the stolen red truck, escorting Co-Defendant Brown and at least two other boys along with them. When Lauriton pulled the stolen red truck to the side of the road, Luna pulled over alongside the stolen vehicle, allowing Brown to step out of the Camero and drive off in the stolen red truck.

Mr. Brown drove the truck recklessly, causing substantial damage to it, and eventually abandoned it in an alley near an apartment complex. After the truck was damaged and abandoned, a witnesses saw the group of boys, including Luna, standing around the damaged truck. Suspecting criminal activity, another

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[74] *Id.*

[75] *State v. Luna*, 71 Wn. App. 755, 759-760, 862 P.2d 620 (1993)

witness yelled at the group of boys and they all—including Luna—ran away. The above evidence left no dispute that the red pickup truck was stolen by Lauriton, nor that Mr. Brown drove the truck knowing it was stolen. Luna even admitted that he knew the truck was stolen when he followed it in the Camaro.

However, this evidence was insufficient to prove that Luna acted as an accomplice to either Lauriton's crime (theft of a motor vehicle) or to Brown's crime (taking and riding a motor vehicle) because the record lacked sufficient evidence to prove "that Mr. Luna knew of Mr. Lauriton's intentions before he took the truck." Likewise, there was insufficient evidence that Luna acted as an accomplice to Brown's crime, even though Luna dropped Brown off where the stolen truck was parked. Such evidence was still insufficient to prove that Luna "knew of Mr. Brown's intention to drive it when they stopped on the freeway." *Id.*

Here, as argued above, the record lacks sufficient circumstantial evidence to show that Benjamin knew that any of the occupants of the car were about to assault or kill Mr. Beltran. As *Vaielua* and *Luna* makes clear, circumstantial evidence must make a criminal defendant's criminal intent "plain", applying common experience and logic. In this case, the State could have done that by showing that *before the assault*, some of the car's occupants discussed the plan to assault or shoot Beltran. The State failed to do that here. In fact, the evidence strongly suggests that Benjamin had no idea the assault was about to occur. Hernandez, the State's star witness testified that the only conversation that occurred before the shooting was about picking up some marijuana from a local drug dealer. Just like the State in *Luna* failed to prove that Luna knew Lauriton

was about to steal the red truck, the State here failed to prove that Benjamin *knew* that one of his co-defendants had planned on assaulting Adan Beltran in broad daylight in front of numerous possible witnesses.

Moreover, even if some facts might have put Benjamin on notice that a crime *might* occur, *Luna* shows that more is needed than mere speculation as to what crimes might have been reasonably foreseeable as a result of his actions. In *Luna*, for instance, it was certainly foreseeable that when Luna followed the car, pulled over and let Brown out of the vehicle, that Brown could have assumed control of the vehicle and committed a crime. Yet, such speculative evidence is still insufficient to prove that he acted with knowledge that Brown would assume control of the stolen truck and commit a crime. Likewise, even if Benjamin actually knew that it was possible that one of the co-defendants was about to that one of his co-defendants had planned to hope out of the vehicle, track down the victim, and shot him down in cold blood, such evidence is still insufficient to prove that Benjamin acted as an accomplice to the assault and eventual death of Adan Beltran.

a) AT WORST THE STATE PROVED THAT BENJAMIN INTENDED TO FACILITATE THE CRIME OF POSSESSION OF MARIJUANA, BUT IT FAILED TO PRESENT EVIDENCE THAT HE ACTED WITH THE KNOWLEDGE THAT HIS ACTIONS WOULD PROMOTE AN ASSAULT.

In *Roberts*, the Supreme Court clarified the breath of Washington's accomplice statute and held that the statute plainly applies narrowly only to *the* crime the accomplice sought to facilitate and not *any* crime that an accomplice's actions might ultimately facilitate:

> [A]n accomplice need not have knowledge of each element of the principal's crime in order to be convicted under RCW 9A.08.020. General knowledge of "the crime" is sufficient. Nevertheless, knowledge by the accomplice that the principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow. Such an interpretation is contrary to the statute's plain language, its legislative history, and supporting case law. [76]

After *Roberts* and its progeny, it is now well-established in Washington that a defendant cannot be convicted as an accomplice if he acts with the intent to aid another in committing one crime but the person subsequently commits a totally different crime.[77] In other words, "while an accomplice may be convicted of a *higher degree* of the general crime he sought to facilitate, he may not be convicted of *separate crime* absent specific knowledge of that general crime."[78]

A defendant, for instance, cannot be convicted of robbery as an accomplice if he intends merely to aid the principal in committing a theft.[79] Likewise, a defendant cannot be held liable as an accomplice to assault if he only had knowledge that he was facilitating harassment of the victim.[80] In *State v. King*,[81] Division One reversed and dismissed with prejudice a kidnapping conviction of an accomplice in a home invasion robbery. There the court found that though the evidence was sufficient to convict for accomplice liability on the crime of robbery, there was no evidence to show that the kidnapping was part of the original plan; rather the decision to put the victims in the trunk of the car was a spontaneous one made by other accomplices:

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[76] *Roberts*, 142 Wn.2d at 471; *State v. Grendahl*, 110 Wn. App. 905, 910-11, 43 P.3d 76 (2002).
[77] *See State v. King*, 113 Wn. App. 243, 288, 54 P.3d 1218 (2002).
[78] *Id.*
[79] *Grendahl*, 110 Wn. App. at 911.
[80] *State v. Bui*, 142 Wn.2d 568, 14 P.3d 752 (2000).
[81] *King*, 113 Wn. App. at 288.

> Although the evidence was sufficient to show that Israel was involved in planning the Burtenshaw robbery, none of the evidence indicated that kidnapping was a part of that plan, and in fact, the testimony of the victims indicated that the decision to lock the Burtenshaws in their trunk was a spontaneous one made at the scene by Bryant and King. Absent any evidence that Israel knew Bryant planned to commit the crime of kidnapping, the evidence was insufficient to convict Israel of kidnapping. Israel's conviction for first degree kidnapping is dismissed with prejudice.[82]

Mr. Hernandez testified that they were going to pick up some marijuana from a local drug dealer. The State's entire case theory against Benjamin as an accomplice rests entirely on the testimony of Mr. Hernandez. From his testimony, the State will likely argue that Benjamin acted with the intent to further an assault on Beltran by giving directions to the driver of the car as to how to get to the victim's home. This court should reject such a strained argument because the evidence is insufficient to prove that Benjamin gave directions to the victim's home. Just about every piece of evidence points to a contrary destination with a different criminal purpose: Benjamin was giving the driver directions to his weed dealer's house.

C. THE PROSECUTOR'S CLOSING ARGUMENT WAS INFECTED WITH EGREGIOUS, HIGHLY PREJUDICIAL MISCONDUCT, ALL OF WHICH HAVE BEEN REPEATEDLY CONDEMNED BY WASHINGTON'S APPELLATE COURTS FOR DECADES.

1. STANDARD OF REVIEW

To establish prosecutorial misconduct during closing argument, the defendant bears the burden of demonstrating that the prosecutor's remarks were improper and that they prejudiced the defense.[83] If trial counsel fails to object to

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[82] *Id.*

[83] *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006).

the misconduct, he may waive the issue, unless the comments constitute prosecutorial conduct so egregious that no curative instruction could have remedied its harm.[84]

To determine whether a prosecutor has engaged in misconduct during closing argument, the court should evaluate the statements in light of several considerations: (1) the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence addressed in the argument.[85]

2. THE PROSECUTOR'S ENTIRE CLOSING ARGUMENT WAS INFECTED WITH COUNTLESS INSTANCES OF MISCONDUCT.

"After a careful review of the trial record and the appellate arguments of counsel," this court will likely "arrive at the inescapable conclusion that [Benjamin Lopez's] trial was marred by the prosecutor's inflammatory closing argument."[86] As the below analysis will show, "The inappropriate argument was so egregious as to constitute prosecutorial misconduct, the appeals to passion and prejudice therein having compromised the fairness of the trial."[87]

The arguments made above reveal that the misconduct in this case reached a level that is either more egregious than or at least as egregious as the worst of the worst prosecutorial misconduct cases in Washington. The list of the misconduct is lengthy. The prosecutor in this case made no attempt to confine himself to the facts of the case or to argue from those facts. He argued that the

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[84] *State v. Boehning,* 127 Wn. App. 511, 518, 111 P.3d 899 (2005).
[85] *State v. Perez-Mejia,* 134 Wn. App. 907, 916, 143 P.3d 838 (2006).
[86] *State v. Perez-Mejia,* 134 Wn. App. 907, 909, 143 P.3d 838 (2006).
[87] *Id.*

jury should convict Benjamin based upon countless improper purposes, including based on his family ties to the co-defendant, prosecutor's own personal belief in the justness of the case and the veracity of its *only eye witness*. He misstated and misstated the law on numerous occasions in a concerted effort to lower his burden of proof in a case that was obviously weak, and only supported by one government witness who the prosecutor himself admitted might be equally culpable as the defendants charged. These are only a few of the numerous instances of misconduct that will essentially go unpunished if this court fails to dismiss Benjamin's conviction with prejudice.

a) THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE APPEALED TO THE PASSIONS AND PREJUDICES OF THE JURY AND ARGUED THAT THE JURY SHOULD CONVICT BENJAMIN BECAUSE IT WAS THE "RIGHT" THING TO DO.

"Prosecutors have a duty to secure a verdict free of prejudice and based on reason. A prosecutor's appeal to the jury's passion and prejudice violates this duty."[88] Prosecutors, therefore, have a duty to ensure that the defendant receives a fair trial. Yet, a "trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial."[89] If it appears that a prosecutor's words or actions are calculated to align the jury with the prosecutor and against the defendant, the prosecutor has committed misconduct and deprived the defendant of a fair trial.[90]

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[88] *State v. Pierce,* 169 Wn. App. 533, 537, 280 P.3d 1158 (2012).
[89] *State v. Miles,* 73 Wn.2d 67, 70, 436 P.2d 198 (1968).
[90] *State v. Reed,* 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Here, on several occasions, the prosecutor urged the jury argued that the jury should convict Benjamin by trying to align the jury with the State's case and by urging the jury to convict Benjamin based upon inappropriate propensity evidence, rather than the limited facts presented at trial. From the beginning to end, the prosecutor improperly attempted to align the jury with the State's case theory by telling the jury that if it wanted to what was "right" that it must convict Benjamin.

At the beginning of his closing argument, for example, the prosecutor told the jury: "I'm going to stand here and ask you to do what is *right*." Vol.12 RP 30. This statement set the theme for the State's closing argument, which was almost in its entirety, an obvious effort to align the jury with the State's case, rather than to ask the jury to apply the law to the limited facts that the State actually proved at trial. The prosecutor began his closing with an extremely prejudicial statement, asking the jury to do what is "right."

Later, during closing argument, the prosecutor persisted with the theme that Alexis was doing "the right thing" by coming to law enforcement and by giving "them an initial outline that completely fit the facts of the case."

> [THE STATE:] But he did decided to do the *right thing* after the police told him *his mother wanted him to*, and he quickly gave them an initial outline that completely fit the facts of this case.

Vol.12 RP 53. By telling the jury that Alexis's testimony "completely fit" the State's theory and that this was "the right thing" to do, the prosecutor improperly aligned the prosecutor's office with Alexis's testimony and implicitly put his own personal stamp of approval on it. As it were not improper enough for the

prosecutor to align himself and the prosecutor's office, in making this statement, the prosecutor compounded that error and its prejudice by misstating the evidence and introducing facts to the jury that were never part of the trial. The prosecutor testified that Alexis came forward because "his mother wanted him to." That Statement is not at all supported by the record before us. A close look to Alexis's testimony shows that he never testified that his mother was the catalyst to his coming forward, or that she told him to do the "right thing."

The only mention of Alexis's mother occurred when defense counsel cross examined him; yet, that testimony makes no mention about his mother urging him to testify against Benjamin or Abraham:

> [DEFENSE COUNSEL:] Did they [police] tell you about conversations that they had with your mom?
>
> [ALEXIS HERNANDEZ:] No. It was my mom's birthday the next day...they told me my mom was sad, but that's about it.

Volume 7 RP 192.

This statement was improper not only because it referenced facts not in evidence, but also because the prosecutor again vouched for Alexis's testimony. Instead of implying that both him and his office believed Alexis's testimony, this time, the prosecutor bolstered Alexis's credibility telling that his mother told him to "do the right thing" by testifying, thus implying that his mother also believed he was telling the truth.

b) THE PROSECUTOR IMPROPERLY ARGUED THAT THE JURY SHOULD CONVICT BENJAMIN BY APPEALING TO THE JURY'S FEAR OF GANG VIOLENCE AND ENCOURAGED THE JURY TO CONVICT HIM TO SEND A MESSAGE TO GANGS IN THE LOCAL COMMUNITY.

It is "unquestionably improper"[91] improper for a prosecutor to appeal to the jury's passions and prejudices by urging jurors to base a guilty verdict on a goal of "sending a message" to gangs or taking part in a mission to end violence, rather than returning a verdict based upon a consideration of the evidence properly admitted in the case (the "send a message" argument).[92] As stated in *State v. Ramos*, such conduct clearly improper because it encourages the jury to render its verdict based on reasons that are entirely irrelevant to proving the defendant's guilt of the crimes charged:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. *Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem.* The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.[93]

In *Perez-Mejia,* Division II properly condemned the prosecutor's comments to the jury that bear a striking similarity to those made by the prosecutor in this case. In *Perez Mejia*, the defendant was convicted as an accomplice to felony murder, just as Benjamin was here. The prosecutors argued that the shooting was gang motivated.

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[91] *State v. Perez-Mejia,* 134 Wn. App. 907, 143 P.3d 838 (2006) (*State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)).

[92] *See State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011) (reversed where prosecutor argued that jury should convict defendant to eliminate drug dealing at shopping center); *State v. Ra*, 142 Wn. App. 868, 175 P.3d 609 (2008) (reversed based on prosecutor's introduction of "gang evidence" contrary to judge's ruling to exclude); *State v. Perez-Mejia*, 134 Wn. App. 907, 143 P.3d 838 (2006).

[93] *Ramos,* 164 Wn. App. at 338 (citing *Solivan*, 937 F.2d at1153.).

In his closing, the prosecutor described the events leading up to the shooting, painting a "troubling" picture of the events leading up to the shooting. Specifically, the State argued that

> [THE STATE:] [W]hen the gang members were at the defendant's house after receiving the call they walked out of the house with their chests sticking out proudly showing their machismo.

Id. The court first noted that this statement, on its own, was "troubling." Later, the prosecutor asked the jury to render its verdict to send a message to other gang members in the community:

> [THE STATE:] Now, although you as ladies and gentlemen of the jury will not be placed in harm's way, you will not physically be in the middle of a war as Ms. Emmitt was, you will not have someone behind you pointing a loaded gun at your back as Ms. Emmitt was. But what you can do as ladies and gentlemen of the jury is send a message.

In this case, the prosecutor's closing argument, much like the improper argument in *Perez Mejia*, improperly urged the jury to convict Benjamin based off of his "gang" involvement and the dire need to bring this "gang" problem to an end. However, unlike in *Perez Mejia*, this type of improper argument was much more egregious and numerous in Benjamin's trial. The prosecutor here improperly implied that the jury needed to convict Benjamin so that they could send a message to the gangs in Grant County and to stop gang violence in general, without regard to the facts of this case and without regard to Benjamin's actual culpability (if any) in the death of Adan Beltran. The prosecutor, for instance, mentioned three shootings that occurred in Grant County (prior bad acts) and implied that the jury should convict Benjamin to stop these uncharged and unproved shootings:

> [THE STATE:] You heard Alexis Hernandez say that he had been shot at on three separate occasions. This is an 18 year old *who's already been shot at on three separate occasions. This is out of hand.*

Vol. 12 RP 32. The prosecutor made no attempt to tie this particular statement to either defendant, Benjamin or Abraham. In any case, there was no evidence that Benjamin was involved in that crime, and even if there was, Benjamin was not charged with it. The comment had nothing to do with the charges Benjamin was now facing. However, the statement seems to imply that Benjamin and Abraham were somehow responsible for Alexis being shot at on "three separate occasions."

Still, despite the obvious irrelevance of the statement and its clear prejudice to both Benjamin and Abraham, the prosecutor clearly intended for this statement to influence the jury's decision. Aside from either implying that Benjamin or Abraham was responsible for the uncharged shootings, the only reason for the prosecutor to make such a statement would be to improperly encourage the jury to "send a message" to the local gangs of Grant County by convicting Benjamin. This type of misconduct continued throughout the State's closing argument. It infected the entire trial and denied Benjamin any chance of a fair trial.

c) THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE USED THE GANG EVIDENCE TO PROVE BENJAMIN, AS A GANG MEMBER, HAD A PROPENSITY FOR VIOLENCE, INSTEAD OF ONLY USING IT FOR ADMISSIBLE PURPOSES.

It is misconduct for a prosecutor to repeatedly abuse propensity evidence that has been admitted for limited purposes, such as to prove motive or a gang aggravator, and use it merely as a weapon to argue that the defendant should be

convicted because he is predisposed to crime.[94] "Introducing a defendant's prior bad acts to prove current criminal intent is tantamount to telling the jury to convict the defendant of the current charges because his prior bad acts show that he has a propensity to commit crimes. ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime."[95]

It is fundamental to American criminal law that this inference remain "forbidden" in criminal trials. The inference is strictly prohibited because all criminal defendants are presumed innocent until proven guilty. This concept is essential to our criminal justice system because it "confines the fact finder to the merits of the current case in judging a person's guilt or innocence."[96]

In this case, the prosecutor directly and repeatedly called attention to Benjamin's "gang" involvement and violated ER 404(b) and flipped the inference of innocence on its head. For instance, during closing argument, the prosecutor argued this to the jury:

> [THE STATE:] Let's talk for a moment about common sense and human emotion. These young men have committed their lives to this group, and we know that one their friends was murdered. And *we know from our human experience that revenge and retribution is a natural human* desire. Maybe not for everyone. *Maybe not for everyone in this courtroom.* Maybe not for everyone in the world. But it is *definitely fair to say* that it is a natural desire for many. *And certainly it would be a more natural desire for people who have committed their lives to a criminal street gang, people who have actively engaged in back and forth fighting.*

Vol. 12 RP 38.

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[94] In *State v. Ra*, 144 Wn. App. 688, 175 P.3d 609 (2008) (published in part),
[95] *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1998).
[96] *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1998).

This excerpt from the State's closing shows how the prosecutor improperly argued that Benjamin and Abraham had a propensity to commit crimes ("certainly it would be a more natural desire for people who have committed their lives to a criminal street gang, people have actively engaged in back and forth fighting." The prosecutor was not offering this statement to prove that Benjamin had a motive to assist in the killing of Adan; that motive was not even connected in this passage. It was clearly used to prove that Benjamin, as a gang member, was willing to "engage in back and forth fighting" as were all gang members, according to the prosecutor here.

Moreover, even though *some* of the gang evidence may have been introduced and used for proper purposes, i.e. to prove motive, the prosecutor here, clearly abused the evidence by using it numerous times for improper purposes. As the court noted in *Perez-Mejia*:

> Although much of the prosecutor's closing argument was properly based on the evidence, the case against [the defendant] was comprised of prejudicial, yet properly admissible, evidence of a gang dispute that resulted in the death of an innocent. The misconduct at issue encouraged the jury to base its verdict on the powerful emotions, concerns, or prejudices that arise from the facts of the case, rather than on the facts themselves. The evidence addressed by the improper argument increases the likelihood that it affected the jury's verdict.[97]

Given the abundance of time the prosecutor spent discussing Benjamin's gang involvement, and the extremely limited time that he spent discussing the other, very limited facts connecting Benjamin to the shooting, the jury almost

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[97] *State v. Perez-Mejia*, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) ("Although gang-related evidence was central to the State's theory of culpability, this evidence was, by its nature, highly prejudicial.").

certainly considered the gang evidence for improper propensity purposes. It was, therefore, very unlikely the jury "missed the [prosecutor's] message."[98]

d) The Prosecutor Repeatedly Vouched for the Credibility of the State's Most Crucial Witness and Made Assertions Not Supported by the Evidence.

Prosecutors cannot place the prestige of the government behind the witness or indicate that information not presented to the jury supports the witness's testimony.[99] In other words, it is "improper for the prosecution to vouch for the credibility of a government witness."[100] It is error for a prosecutor to use the authority of the prosecutor's office to bolster the credibility of, or "vouch" for, witnesses.[101] Improper vouching generally occurs: (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness;[102] or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony.[103]

Vouching for a witness's credibility invades the province of the jury to determine the facts of the case and the credibility of the witnesses.[104] Because the "prosecutor's opinion carries with it the imprimatur of the Government," the defendant is unfairly disadvantaged because the prosecutor's personal opinions are likely to "*induce the jury to trust the Government's judgment rather than its*

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[98] *Ra*, 144 Wn. App. 688.
[99] *Coleman*, 155 Wn. App. at 957.
[100] *Id.*
[101] *State v. Ish*, 170 Wn. 2d 189, 241 P.3d 389 (2010); *State v. Heaton*, 149 Wash. 452, 271 P. 89 (1928).
[102] *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he "'knew'" the defendant committed the crime).
[103] *Coleman*, 155 Wn. App. at 957.
[104] *Thorgerson*, 172 Wn.2d at 443 ("Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact.").

own view of the evidence."[105] For that reason in particular, when the prosecutor expresses his personal belief in a witness, he can "easily skew proper jury deliberation" and unfairly tip the scales against the defendant and deny him a fair trial.[106] Such risk is at its greatest in cases—such as this one—in which "the credibility of the witness and defendant comprised the principal issue of the case."[107]

The prosecutor improperly impliedly vouches for a government witness when he attempts to bolster a witness's credibility with facts not in evidence.[108] In *State v. Jones,* for instance, the State charged Jones with one count of unlawful delivery of cocaine. On appeal, Jones argued that he was denied the right to a fair trial when the prosecutor improperly vouched for the credibility of the State's most crucial witnesses during closing argument.[109] The court found these statements to be improper and prejudicial because the prosecutor (1) bolstered the credibility of the confidential informant and Officer Elliot, and (2) did so by using highly prejudicial "facts" not in evidence.[110]

Similarly, a prosecutor improperly vouches for a witness's credibility if he urges the jury to trust a particular witness based upon the prosecutor's unsubstantiated personal opinions as to how young children think and that they cannot lie. [111] Specifically, Connecticut's Supreme Court has applied this to a

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[105] *United States v. Young*, 470 U.S. 18-19 (1985).
[106] *Alexander,* 254 Conn. at 305.
[107] *Id.*
[108] *State v. Jones,* 144 Wn. App. 284, 287, 183 P.3d 207 (2008).
[109] *Id.* at 292.
[110] *Id.* at 294.
[111] *State v. Alexander,* 254 Conn. 290, 304, 755 A.2d 868 (2000) (prosecution for sexual abuse of a child).

similar situation to what occurred here, in which the prosecutor speculated as to the young victim's thought process and as to the credibility of children in general. The prosecutor told the jury to trust the young victims because they cannot lie and "[t]hat's how little kids think."[112] No evidence in the record supported this argument. Additionally, the prosecutor in *Alexander* continued to bolster the victim's credibility by expressing his personal opinion as to how children think: "children 'can't make this [sexual abuse] up.' "[113] Again, no credible evidence supported this contention.

With these statements, the prosecutor bolstered the victim's credibility in several ways. First, the prosecutor "implied that the victim testified truthfully because she is young and therefore honest."[114] Second, as noted by the *Alexander* court, this argument improperly "suggested that a[n] eight year old is not 'sophisticated' enough to conjure up a story of sexual abuse."[115] Such statements imply that the prosecutor personally believes the victim, and therefore, the jury should believe the victim. In addition, the record contained no evidence of the victim's level of intelligence (i.e. a low I.Q. or learning disability) so that the prosecutor could argue that the particular victim actually lacked the intelligence to "conjure up a story of sexual abuse." These arguments was improper because it was not based in facts in evidence and clearly urged the jury the convict the defendant based upon the prosecutor's unfounded personal belief that all children were honest and not intelligent enough to lie. The *Alexander* Court had no

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[112] *Id.*
[113] *Id.*
[114] *Id.* at 306.
[115] *Id.*

problem holding that these statements constituted improper vouching because "statements such as these are likely to sway a jury in favor of the prosecutor's argument without properly considering the facts in evidence."[116]

In this case, the prosecutor attempted to "sway" the jury with improper arguments that are very similar to the improper arguments in *Alexander* and *Jones*. First, just as in those cases, the prosecutor here attempted to bolster crucial witness testimony by implying that he had personal knowledge as to the witnesses' credibility and by relying upon facts which were not in evidence. In *Alexander,* the prosecutor stated: "[t]hat's how little kids think" and "children can't make this up"; in *Jones,* the prosecutor argued that the CI must be reliable because Officer Elliot and other detectives would not "put their reputation on the line," "their credibility," or "their integrity."

Second, just as in *Alexander* and *Jones*, the prosecutor argued that the jury should find the State's most crucial witness credible by encouraging the jury to believe the prosecutor's own biases and improper generalizations of particular classes of people (i.e. children, confidential informants, and police officers) without a basis in evidence or proper inferences therefrom. Without a basis in the facts, the obvious conclusion the jury must draw is simply that the prosecutor personally believed the witness's crucial testimony. In *Alexander,* the prosecutor argued that the jury should believe the victim because she was *young and therefore honest.*[117] And in *Jones,* the prosecutor urged the jury to reject the defendant's testimony and believe the detectives and the confidential informant

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[116] *Id.*
[117] *Alexander,* 254 Conn. at 305.

because they are "smart individuals, they are "not fools," and "if they believe[d] for one second, one second that the [the CI] wasn't up to par, that he was under the influence or that he couldn't be trusted, do you think they would have continued to use him? I submit to you they would not."[118]

Similarly, in this case, the prosecutor improperly vouched for Alexis's credibility by expressing his personal opinion about Alexis's intelligence and his inability to lie because he was not "bright" and therefore unable lie and implicate Benjamin and his brother in the murder of Adan Beltran; therefore, he must be telling the truth and the defendants must be lying. During closing argument, the prosecutor argued:

> And there's one other thing that the jury probably picked up on. Alexis is ***not real bright***. He's just not ***a real bright guy. He just doesn't have the ability to make up a complex story and be consistent with it. He just doesn't.***" Vol. 12, RP 54.

In all three cases, the prosecutors improperly vouched for their witness and argued prejudicial facts not supported by the evidence. Either the witness was: "not bright enough" to lie, "too smart" to have an unreliable CI, or too "young" to lie.

Lastly, in our case, the prosecutor told the jury:

> If a witness were bought and paid for, ***wouldn't his testimony have been a little bit better?*** If this was really a situation of *say what we want you to say,* ***wouldn't he have said,*** I actually saw Abraham shoot the gun? *He didn't say that.* ***Because he didn't see it. He testified to what he knew, no more, no less.***

Vol. 12 RP 162. In turn, the jury was to believe that: Alexis wasn't lying because, if he had been lying, his story would have been much better. RP 162. These

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[118] *Jones,* 144 Wn. App. at 293.

statements are very similar to those statements made in *Alexander*—the prosecutor told the jury that young children are honest and that no child would possibly make up a story regarding sexual abuse—and the statements in *Jones*—the prosecutor improperly argued that the CI was trustworthy because the detectives chose to use him on multiple occasions.[119]

Third, the prosecutor engages in misconduct when he bolsters a witness's testimony by telling the jury that if they been lying they would have concocted more damaging stories in order to curry favor with the government.[120] *See* Vol. 12 RP 162. Federal courts have held that such statements are "*clearly* improper," and have warned all prosecutors to abstain from using such improper argument.[121] This is exactly what happened here when the prosecutor paradoxically told the jury that Alexis was not bright enough to concoct a story like the one he told and even if he was lying, he would have come up with a better story.

Fourth, the prosecutor implied that he personally believed Alexis when he told the jury that Alexis had risked his life to tell *the truth.* Vol 12 RP 54; 53, 162. This statement is tantamount to explicitly telling the jury that the prosecutor *believes* the witness and is clearly improper.

Fifth, the prosecutor again affirmed his own personal belief in Alexis testimony when he told the jury that "*[t]he only way* [Alexis] *could know that the story he was telling wouldn't be disproven by other evidence is if he told the truth.*

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[119] *Alexander,* 254 Conn. at 305; *Jones,* 144 Wn. App. at 293-94.
[120] *U.S. v. Martinez-Medina,* 279 F.3d 105 (1st Cir. 2003) (Improper for prosecutor to argue that "If a witness were bought and paid for, *wouldn't his testimony have been a little bit better?* If this was really a situation of *say what we want you to say, wouldn't he have said,* I actually saw Abraham shoot the gun? *He didn't say that."*).
[121] *Id.*

Vol. 12, RP 54. This Statement bolstered Alexis's testimony in two ways. First it implied that the prosecutor personally believed Alexis. Second, because no testimony was introduced as to the possible "ways" that Alexis would "know that the story he was telling was the truth," the prosecutor's statement was not based in the evidence of the case.

Finally, the prosecutors' statements here were especially detrimental to Benjamin's case because "*the credibility of [Alexis was] crucial*" for the State to obtain convictions against Benjamin as an accomplice.[122] Even if the State did present enough evidence to barely sustain a conviction on insufficiency grounds, the prosecutor's improper attempts to bolster Alexis's credibility and impinge upon Benjamin's believability when he told the jury that he had absolutely no knowledge of the assault and murder before it occurred. This court should not allow the prosecutor in this case to use any means to obtain a conviction, which of course should include punishing the prosecution for repeatedly implying that Alexis was credible by relying on facts not in evidence to bolster his credibility to fill the gaps in an incredibility weak case.

e) THE PROSECUTOR COMMITTED MISCONDUCT BY MISSTATING THE LAW TO THE JURY AND MINIMIZING THE BURDEN OF PROOF FOR ACCOMPLICE LIABILITY WHEN HE ARGUED THAT BENJAMIN "WAS READY TO ASSIST" IN THE ASSAULT ON BELTRAN BECAUSE HE WAS IN A GANG WITH AND RELATED TO THE ALLEGED SHOOTER.

It is serious misconduct for a prosecutor, with all the weight of the prosecutor's office behind him, to misstate the applicable law when explaining

[122] *United States v. Wilkies,* 662 F.3d 524, 536 (9th Cir.2011) (emphasis added).

it to the jury.[123] If the prosecutor does misstate the law, Washington courts consider it a "serious irregularity" because it has "the grave potential to mislead the jury."[124] It is even more egregious when the prosecutor's misstatements specifically relieve the prosecutor of his constitutionally mandated burden of proof, such as that required to prove accomplice liability.

If the prosecutor misstates the law in a way that eases the level of proof required to convict, the State "insidiously" disadvantages the defendant and thus commits misconduct.[125]

During closing argument, the prosecutor argued that Benjamin was an accomplice to the assault on Beltran merely because he was a gang member and because he was the alleged shooter's brother. Specifically, the prosecutor argued, "Of course they were ready to assist, that is their obligation as a fellow gang member. That is his obligation as a brother." RP at 49, Vol. 12. This argument was improper because it implied that the jury could convict Benjamin was an accomplice merely because the State proved that Benjamin was present when the shooting occurred and if he was in a gang along with his brother.

Instead of admitting or minimizing these legal and factual deficiencies in the State's case during closing argument, the prosecutor instead decided to reduce its burden of proof and misstate what it must prove to convict Benjamin as an accomplice. In discussing the accomplice liability instruction and applying it to

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[123] *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984); *State v. Fleming*, 83 Wn. App. 209, 214-16, 921 P.2d 1076 (1996); *State v. Gotcher*, 52 Wn. App. 350, 759 P.2d 1216 (1988).
[124] *Davenport*, 100 Wn.2d at 763.
[125] *See Glassman*, at 713.

the facts of the case, the State implied to the jury that all it need to prove was that Benjamin was in a gang and that he was Abraham's brother:

> [THE STATE:] Of course, they were ready to assist, that is their obligation as a fellow gang member. That is [Benjamin's] obligation as a brother.

Vol. 12 RP 49.

It only takes a cursory analysis of accomplice liability to realize that accomplice liability in Washington does not allow a defendant to be convicted based upon such limited, irrelevant, and clearly prejudicial facts. Without a doubt, Benjamin's presence is not enough to prove accomplice liability because someone's mere presence at the scene of a crime is of course insufficient to prove complicity in a crime.[126] Presence plus knowledge is similarly insufficient to warrant a conviction.[127] To prove that one who is present is aiding in the commission of the crime, it must be established that he is "ready to assist" in the commission of that crime.[128]

Wilson, a seminal case on accomplice liability, proves this point. In that case, a juvenile appeared to be part of a group which had stolen weather stripping, tied it into a rope, and had strung the rope across a road. The entire group was charged with reckless endangerment. Wilson's accomplice conviction was reversed, because no evidence supported Wilson ever holding the rope or

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[126] *State v. Roberts,* 80 Wn. App. 342, 355–56, 908 P.2d 892 (1996).
[127] *In re Welfare of Wilson,* 91 Wash.2d at 492, 588 P.2d 1161 (1979).
[128] *Id.* at 487.

participating in the theft. He was merely seen with the group on the day of the crime. [129]

In the defense closing, the defense attacked the credibility of Alexis by pointing out his obvious bias to testify so as to not implicate himself in the murder. In doing so, the defense pointed out that Alexis had no less a reason to lie than either of the defendants. In addition, aside from Alexis' own self-serving testimony, he could have been more culpable than either of the two defendants. In his rebuttal argument, the prosecutor again went well beyond a reasonable response to the defense's arguments. He argued as follows:

> [THE STATE:] But it cuts both ways. Because if [Alexis] is guilty, as [defense counsel] say, for simply being there, these two are in the exact same boat. If Mr. Hernandez is guilty as they say, and he getting the benefit of a deal, that may be true, ***but what that tells you is that their clients are guilty and they have just told you that.*** As a matter of law, ***they have told you their clients are at a minimum accomplices to this murder.***

Vol. 12 RP 159.

This statement is filled with yet again, numerous more instances of misconduct. First, the prosecutor implies that the defendants can be guilty "as a matter of law" "simply for being" at the scene of the crime. As stated above, this is clearly insufficient to prove accomplice liability.[130] By telling the jury that Benjamin could be convicted as an accomplice merely because he was in the car

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[129] *In re Welfare of Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979) ("Even though a bystander's presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt. It is not the circumstance of "encouragement" in itself that is determinative, rather it is encouragement plus the intent of the bystander to encourage that constitutes abetting. We hold that something more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite to finding Wilson to be an accomplice in this instance.").

[130] *See id.*

when the shooting occurred, the prosecutor clearly misstated the law and minimized the State's burden by telling the jury that "simply being there" was all that was necessary to convict Benjamin of accomplice to murder.

Second, the prosecutor explicitly misstates the defendants' arguments and twists it around so that the jury now thinks that the defendants' attorneys just admitted to their own client's guilt. Defense counsel never said that Alexis was guilty for "simply being" at the scene of the crime. This statement went beyond the prosecutor's "wide latitude" in drawing inferences from the record. The prosecutor intentionally misled the jury into believing that because defense counsel properly advocated for his client and poked holes in Alexis's testimony, that defense counsel believed "as a matter of law" that Benjamin Lopez was also guilty.

Finally, even though defense counsel objected almost immediately to the above comments and accurately pointed out that defense counsel never made the above statements, the trial court inexplicably *overruled* the objection. Apparently, the court thought that, although the prosecutor maliciously manipulated defense counsel's words and flipped the entire defense theory on its ear, such conduct is acceptable because it was done during or as "argument." Vol. 12 RP 159-160.

By failing to sustain defense counsel's meritorious objection, the Court did more than allow extremely prejudicial and misleading argument in front of the jury. By over-ruling the defense's objection to such "argument," which was undoubtedly an abuse of discretion, the trial court propounded the prejudicial effect of the prosecutors repeated misconduct by lending an "aura" of legitimacy

to the prosecutor's argument.[131] In effect, the jury was thus allowed to believe that defense counsel *did in fact admit to their client's own guilt as an accomplice.*

f) The Prosecutor Committed Misconduct When He Encouraged the Jury to "Step Into the Shoes" of the Defendants and Speculated as to Their State of Mind Without Factual Support in the Record.

It is well settled that prosecutors cannot appeal to the passion and prejudice based on facts not in evidence.[132] While prosecutors have wide latitude in drawing inferences from the evidence, they cannot step into the defendant's shoes and effectively testify about his thought process.[133] It is, therefore, improper for a prosecutor to ask the jury to "step into the shoes" of *the victim* because the prosecutor implied becomes the victim's "representative." Still, "it is *far more improper* for the prosecutor to step into the *defendant's* shoes during [ ] and, in effect, become the *defendant's* representative."[134] However, that is exactly what the prosecutor did in this case.

Continuing the endless stream of misconduct that permeated his closing argument, the prosecutor argued that the jury should put themselves in the shoes of both Benjamin and Abraham and pretend to be a gang member like them:

> *And every time you see his house, it's going to be a reminder of how the rival gang killed your friend.* Think of how that would affect a 16-year-old or a 17-year-old *young man's mind, gang member's mind*...and here is one of their leaders on the main street in town for everyone to see wearing his colors, full display. Folks, that would probably drive anyone over the edge.

Vol. 12 RP 39; Vol. 12 RP 42.

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[131] *See Davenport*, 100 Wn.2d at 764 (court's ruling lent aura of legitimacy to prosecutor's misconduct).
[132] *State v. Pierce*, 169 Wn. App. 533, 554-55, 280 P.3d 1158 (2012).
[133] *Id.*
[134] *Id.*

When he made this statement, the prosecutor committed numerous forms of misconduct. He effectively testified as to Benjamin and Abraham's thought process, he argued facts not in evidence, and ultimately, he improperly tried to inflame the jury's passions and prejudices so that it would be easier to obtain a conviction.

This statement is clearly designed to encourage the jury to "step into the shoes" of the defendants and speculate as to how "gang members" think and consequently impressed prejudicial images of gang habits in the jurors' minds. In making this argument to the jury, the prosecutor tried to step in Benjamin and Abraham's shoes, and effectively testified, when he described how it would make them—"gang members"—"feel" seeing the victim in the street wearing his gang "colors." The State may attempt to justify this improper argument by arguing that these facts were relevant to prove the gang motive, but this argument was completely unnecessary to prove motive and these arguments serve no legitimate purpose but to inflame the jury's prejudice against the defendant.[135]

g) THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE IMPLIED THAT THE JURY SHOULD CONVICT BENJAMIN AS AN ACCOMPLICE BECAUSE HIS BROTHER WAS GUILTY.

A prosecutor generally has reasonable latitude to argue inferences from the facts presented at trial.[136] However, those inferences must be reasonably based in "sound reasoning" and must be probative of the defendant's guilt.[137] When a prosecutor's argument strays too far from reason or encourages the jury to use

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[135] *See Id.*
[136] *Huson*, 73 Wn.2d at 663.
[137] *Id.*

improper inferences to find the defendant guilty, he often encourages the jury to base its decision on prejudices that are not probative of guilt.[138]

As mentioned above, the prosecutor misstated the law with regard to accomplice liability when he told the jury that they could convict Benjamin as an accomplice because being "ready to assist" was his "obligation as a fellow gang member" and as Abraham's brother. This statement was also improper because it implied to the jury that it could infer guilt based upon improper inferences, namely because Benjamin was in a gang and because his brother was the alleged shooter of who caused Beltran's death. This essentially amounted to a "guilty by association" argument and was clearly improper. The argument lacked any basis in logic and sound reasoning and fails to explain why Benjamin would be more likely to commit an assault merely because his brother would was the alleged shooter in the assault.

Moreover, this was not an isolated improper comment, however. The prosecutor continued throughout the trial to urge the jury to make this improper inference, making the sense of brotherhood a clear theme of his closing argument. Later, the prosecutor revisited this improper argument. Again he urged the jury to convict Benjamin as an accomplice simply because of his membership in the gang and his biological relationship with his brother:

> [THE STATE:] They [Benjamin and Abraham) wear almost identical clothing. On the day of the murder...Now, a lot of people have brothers, a lot of people like their brothers. But it's *pretty rare for brothers to be so close that they wear almost identical outfits.*

[138] *See e.g., State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (race not probative of defendant's guilt.)

> That's a *very, very deep bond*, and that is a mirroring or copying of a younger brother and older brother.

Vol 12. RP 50.

In making this statement, the prosecutor improperly assumed facts that can be found nowhere in the record, i.e. the prosecutor's unsubstantiated claim that Benjamin and his brother wore the same clothes because they were "so close" to each other and had a

deep brotherly bond. The prosecutor speculated that this deep bond was so deep that each of them would lie for each other under oath and even help each other kill someone in broad daylight. these statements, just as those made in *Perez-Mejia,* were improper because the prosecutor "encouraged the jury to base its verdict on powerful emotions, concerns or prejudices, that ar[o]se from the facts of the case," and facts not in evidence, "rather than on the facts themselves."[139]

h) THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE DISPARAGED DEFENSE COUNSEL BY INSINUATING THAT DEFENSE COUNSEL BELIEVED HIS CLIENT WAS GUILTY, REFERENCING FACTS NOT IN EVIDENCE, AND SIMULTANEOUSLY IMPROPERLY BOLSTERING ALEXIS'S CREDIBILITY, YET AGAIN.

"It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity.[140] When a prosecutor attacks the integrity of the defendant's attorney, he can violate the defendant's constitutional right to the assistance of counsel. Prosecutorial attacks on defense counsel usually take three forms: remarks about counsel's reasons for interposing

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[139] *Perez-Mejia,* 134 Wn. App at 920.
[140] *Thorgerson,* 172, Wn.2d at 451.

objections; *insinuations that defense counsel believes his client is guilty;* and attacks on counsel's ethics and integrity.

During their closing arguments, both defendant's case theories of course relied upon discrediting Alexis's testimony. In many respects, defense counsel did an excellent job, by pointing out the inconsistencies in his testimony and his clear motive to fabricate his version of the events before and after the shooting, namely, to protect himself from criminal liability. Both defense counsel properly argued reasonable inferences and facts from the record, also pointing out where facts were lacking.

In response, the prosecutor resorted to unfair and desperate tactics in his reply argument. Just one except from the prosecutor's closing argument puts on display an array of misconduct that his clearly improper and certainly prejudicial to Benjamin's case:

> [THE STATE:] They called Alexis a liar 20 times. You can tell where *an attorney is concerned about a case* based upon what they focus on. *They are scared to death of the testimony of Alexis Hernandez. Because it is the truth*, it is consistent, it is corroborated by other witnesses and other facts. *They don't want you to believe him, because they know what it means.*

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The reasons that this part of the prosecutor's closing argument were improper are numerous and should have been obvious to both the prosecutor and the Court. First, the prosecutor disparaged defense counsel by misstating their arguments, by insinuating that they believe Alexis is telling the truth and that their clients are guilty simply because the defense attorneys argued that *based upon the evidence*, Alexis was not credible ("They are scared to death of the testimony of

Alexis Hernandez [b]ecause it's the truth"). Second, that same statement was also improper because it referenced facts not in evidence[141]—the defense attorneys' alleged personal opinions about their client's guilt—which is of course not and should never be considered as evidence by the jury. Third, the prosecutor committed misconduct by introducing this testimony in such a way that made it impossible for defense counsel to pre-emptively object and minimize the prejudicial effect.[142] Finally, the prosecutor again vouched for the Alexis credibility by telling the jury that Alexis's testimony "was the truth."[143]

i) THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE REPEATEDLY ARGUED FACTS NOT IN EVIDENCE.

During closing argument, it is misconduct for the prosecutor to argue from facts not in evidence.[144] Such conduct is improper, "not because the facts are inadmissible, but because no witness is willing and available to testify as to those facts."[145] In the prosecutor's rebuttal closing argument, he not only vouched for the State's most crucial witness (again), but he stepped beyond the permissible limit of inferring facts from the record and appealed to the passion and prejudice of the jury. The prosecutor stated:

> [THE STATE:] Now, that may be true that Alexis Hernandez isn't going to go to prison for this. But that's not all he gets. Lets be right up front about this. **He gets to never, ever walk down the streets in the city of Quincy again. Ever. He doesn't get to go to**

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[141] *See State v. Lindsay*, 171 Wn. App. 808, 831-832, 288 P.3d 641 (2012) (Although counsel will have a great deal of latitude during closing argument, it is improper to refer in ***closing argument*** to matters that are not in the record).
[142] *State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008) (A prosecutor has engaged in misconduct when he intentionally introduces inadmissible evidence in a manner that denies the defendant a fair the opportunity to object to the inadmissible evidence).
[143] *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he "'knew'" the defendant committed the crime).
[144] *Lindsay*, 171 Wn. App. at 831-32; *Miles*, 139 Wn. App. at 888.
[145] *Id.*

> **a movie theater or a pizza parlor in Quincy or probably Ephrata or Moses Lake. He doesn't get to those things because, as they have testified**, as evidence has shown, if you testify against one of these guys, there's going to be a mark out on you. That's **pretty powerful disincentive to testify. You don't do that.**

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While would allow for the prosecutor to argue that retaliation was a possible risk that Alexis took by testifying, the prosecutor went well beyond what is allowed as a "reasonable" inference by the listing all the activities that Alexis Hernandez could never do again, none of which were made part of the record. Specifically, no evidence supported the assertion that Alexis will "never" "ever" be able to walk the streets of Quincy. Or, that Alexis will never be able to walk the streets of Ephrata or Moses Lake—again, these are purely prejudicial facts not supported by the evidence. No witness, including Alexis himself ever testified that, as a result of his testimony, he would never be able to do these things.

Looking at the prosecutor's entire closing argument it is very clear that he rarely argued facts in evidence; even when he did argue evidence within the four corners of the record, he typically argued these facts in-conjunction with improper argument—either he appealed to the passion and prejudice of the jury or vouched for Alexis Hernandez's credibility.

D. IN LIGHT OF THE TRULY RARE CIRCUMSTANCES OF THIS CASE, THE ONLY APPROPRIATE REMEDY FOR THE IMPROPER CONDUCT DETAILED ABOVE IS DISMISSAL OF THE CONVICTIONS WITH PREJUDICE.

1. RAP 12.2 ALLOWS THE COURT TO DISMISS A CONVICTION AS "THE INTERESTS OF JUSTICE REQUIRE." APPLYING THE RULES FOR DISMISSAL REQUIRED UNDER CRR 7.5 BY ANALOGY, THIS COURT SHOULD DISMISS MR. ALVAREZ'S CONVICTIONS WITH PREJUDICE.

Under RAP 12.2, the appellate court may reverse, affirm, or modify the decision being reviewed and ***take any other action as the merits of the case and the interest of justice may require.*** Once the conviction is dismissed, the dismissal order will be "effective and binding the parties." In *State v. Schwab*, the Washington State Supreme Court recently reaffirmed the court of appeals broad authority to, in rare circumstances, exercise its discretion to act in "the interests of justice under RAP 12.2 and its related counterpart RAP 2.5.[146]

In that case, the defendant had a previous conviction for manslaughter vacated but the court held that the court of appeals had the authority under these rules to "revive" a conviction that was previously vacated and dismissed in the "interests of justice." Nothing in the rules specifically allowed for the revival of the vacated conviction, but the court held that it was necessary in "the interests of justice," as authorized by RAP 12.2. If an appellate court may "revive" an already dismissed conviction under RAP 12.2, it logically follows that it may also dismiss a case with prejudice for the same reason, when "the interest of justice may require."

Similarly, Washington's criminal trial rules contain a similar provision that specifically authorizes a trial court to dismiss a conviction "in the interests of justice."[147] Under CrR 8.3(b) a trial court "may dismiss any criminal prosecution

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[146] *State v. Schwab*, 163 Wn.2d 664, 185 P.3d 1151 (2008).

[147] CrR 8.3(b). The rule reads in full:

> On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect[s] the accused's right to a fair trial." CrR 8.3(b).

First, the defendant must show arbitrary government action or misconduct, which may include simple mismanagement, i.e. through mere negligence.[148] Second, the defendant must show actual prejudice affecting his fair trial rights.[149] Applying these factors to this case, Benjamin can easily show that this standard has been met here. Case law from this Court is instructive.

This Court, in *State v. Martinez*, upheld a trial court's dismissal the trial court dismissed the defendant's multiple convictions (all as an accomplice) because the State intentionally withheld exculpatory evidence until the near end of the defendant's trial.[150] The prosecutorial misconduct that occurred in this case was at least as egregious as that in *Martinez*, but until in Martinez, a factual hearing by the trial court is not necessary here because the prosecutor's incredibly egregious misconduct is clearly evident from the record on appeal.

In that case, the State had a witness who identified both of the weapons used in the crime as weapons the defendant had shown her in December 1999. However, the State determined during pre-trial investigation that the witness could not have correctly identified one of the guns because it belonged to a third party until October 2000.[151] The State did not inform the defense about this evidence and noted in its opening statement that it expected the witness to identify

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[148] *State v. Oppelt*, 172 Wn.2d 285, 296-297, 257 P.3d 653 (2011).
[149] *Id.*
[150] *State v. Martinez*, 121 Wn. App. 21, 25, 86 P.3d 1210 (2004),
[151] *Id.* 121 Wn. App. at 25-26.

the guns in some fashion: "she can't tell you that these are the same guns, I think she will say that they just looked the same."[152] However, the State later informed the defense that it would not question the witness about the gun lineup, which made the defense suspicious.[153] During trial, it was eventually revealed that the gun identified by the witness could not have been the same gun used in the robbery. Nevertheless, the State again tried to suggest a connection between the guns.[154]

Here, just as in *Martinez*, Benjamin can easily show both elements required for reversal: government misconduct and prejudice.

a. THE MISCONDUCT THAT OCCURRED IN THIS CASE WAS AT LEAST AS EGREGIOUS AS THAT IN *MARTINEZ* AND IT APPEARS TO BE THE MOST EGREGIOUS MISCONDUCT DURING CLOSING ARGUMENT OF ALL REPORTED WASHINGTON CASES.

Just as in *Martinez*, the prosecutor here engaged in conduct that was clearly governmental misconduct. Not only did the prosecutor in *Martinez* withhold favorable evidence (the witness's statement that the gun at issue could not have been the same gun used in the crimes alleged), but even when this evidence came to light during the trial, the prosecuting attorney continued to improperly imply that there was a connection between the defendant and the gun. In many ways, then, *Martinez* just as much a case of prosecutorial misconduct during cross examination and closing argument, as it is one of misconduct for failing to produce exculpatory evidence.

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[152] *Id.* 121 Wn. App. at 26.
[153] *Id.* 121 Wn. App. at 26-27.
[154] *Id.* at 28.

As established in the prosecutorial misconduct section above, almost the entire closing argument made by the state contained at least some form of improper argument. Our Supreme Court stated in *Glassman*, "Our courts have repeatedly and unequivocally denounced the type of conduct that occurred in this case."[155] However, a careful and thorough review of the reported decisions in this case reveals that this case may be more egregious than the misconduct noted in any other reported case. *Glassman* is one example in which the court found the conduct especially egregious. Here, like in *Glassman* the prosecutor's closing argument clearly denied young 18-year-old Benjamin Lopez his right to a fair trial. However, unlike in *Glassman*, the Prosecutor's misconduct was far more egregious, as it permeated the State's entire closing argument. Even worse, even assuming arguendo that this court finds the evidence sufficient to convict, unlike overwhelming evidence of guilt in *Glassman*, the evidence of Benjamin's guilt would be *barely* sufficient to uphold a conviction.

The arguments made above reveal that the misconduct in this case reached a level that is either more egregious than or at least as egregious as the worst of the worst prosecutorial misconduct cases in Washington. The list of the misconduct is lengthy. The prosecutor in this case made no attempt to confine himself to the facts of the case or to argue from those facts. He argued that the jury should convict Benjamin based upon countless improper purposes, including based on his family ties to the co-defendant, prosecutor's own personal belief in the justness of the case and the veracity of its *only eye witness*. He misstated and

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[155] *Id.* at 704.

misstated the law on numerous occasions in a concerted effort to lower his burden of proof in a case that was obviously weak, and only supported by one government witness who the prosecutor himself admitted might be equally culpable as the defendants charged. These are only a few of the numerous instances of misconduct that will essentially go unpunished if this court fails to dismiss Benjamin's conviction with prejudice.

b. The Prejudice is this case was at Least as Great as that in *Martinez* and Likelihood that the Prosecutor's Egregious Misconduct Caused the jury to convict rather than Acquit Denied Benjamin his Right

In *Martinez*, the court concluded that the failure to disclose exculpatory evidence until mid-trial was prejudiced in his right to counsel because the late discovery compromised his attorney's ability to adequately prepare for trial, as well as in his right to effective assistance of counsel because suppression of the evidence hindered his attorney's ability to defend.[156] The court concluded that the prosecutor's withholding of exculpatory evidence until the middle of a criminal jury trial was "so repugnant to principles of fundamental fairness that it constitutes a violation of due process."[157]

Likewise here, the prosecutor's repeated misconduct during misconduct clearly violated Benjamin's due process rights and denied him of a fair trial. The risk that a prosecutor's misconduct will unfairly tempt the jury to find the defendant guilty is at its greatest during closing argument. In *Glassman*, The Court emphasized the unique significance of closing argument in a criminal trial

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[156] Martinez, 121 Wn. App. at 34-35.
[157] Martinez, 121 Wn. App. at 35.

and the great prejudice that can result from a prosecutor's misconduct during his argument:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.[158]

In this case, that is exactly what happened. The prosecutor improperly used the prestige of his title and office to unfairly tilt the trial in his favor. Moreover, as argued above, the trial court's erroneous rulings that allowed the prosecutor to continue his improper argument only added to the prosecutor's improper swaying of the jury.

2. Dismissal, Although an Extreme Remedy in Most Cases, is Required in this Case Because Simply Reversing the Conviction and Allowing the State to Re-try Benjamin is an Inadequate Remedy.

"In the drive to achieve successful prosecutions, the end cannot justify the means."[159] And if the State knows that the most severe consequence that can follow from [intentionally committing any type of egregious misconduct" late in the trial is that it may have to try the case twice, it will hardly be seriously deterred from such conduct in the future.[160] In *State v. Charlton*, a case decided 35 years ago, the Court recognized that prosecutorial misconduct during closing argument was a prevailing problem, yet prosecutors appeared to be undeterred by

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[158] *In re Personal Restraint Petition of Glassman,* 175 Wn.2d 696, 706, 286 P.3d 673 (2012)
[159] *State v. Martinez*, 121 Wn. App. 21, 35-36, 86 P.3d 1210 (2004).
[160] *Id.*

the reversal of otherwise valid convictions. Specifically, the court noticed that "[i]n spite of [its] frequent warnings that prejudicial prosecutorial tactics will not be permitted," the Supreme Court found "that some prosecutors continue to use improper, sometimes prejudicial means in an effort to obtain convictions. *In most of these instances, competent evidence fully sustains a conviction.*"[161] In cases where the evidence of guilt is substantial, a "trained and experienced prosecutor" will presumably "not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics." However, as recognized in *Flemming*, a prosecutor with an obviously weak case, such as the case against Benjamin, has a great incentive to use unfair trial tactics if they appear "necessary to sway the jury in a close case."[162] The issue is whether the comments deliberately appealed to the jury's passion and prejudice and encouraged the jury to base the verdict on the improper argument "'rather than properly admitted evidence.'"[163]

To determine whether misconduct occurred, the focus must be on the misconduct and its impact, not on the evidence that was properly admitted.[164] To determine the prejudice to the defendant, the court sometimes looks to the evidence produced at trial when determining whether the misconduct denied the appellant of a fair trial.[165] To determine the remedy, the court should look to deterrence. Here, reversal of Benjamin's conviction is clearly an inadequate

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[161] *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978),
[162] *Fleming*, 83 Wn. App. at 213.
[163] *State v. Furman*, 122 Wn.2d 440, 468-69, 858 P.2d 1092 (1993) (quoting and discussing *Belgarde*, 110 Wn.2d at 507-08).
[164] *Glassman*, 175 Wn.2d at 706.
[165] *See id.*

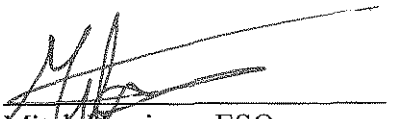
remedy. In a close case such as this, the only way to deter the prosecutor from engaging in such conduct is to threaten such egregious conduct with dismissal of the case. There is no legal or moral reason to make a distinction here between a case in which the prosecutor intentionally withholds exculpatory evidence, such as in *Martinez*, and the case in which the prosecutor intentionally tries to sway the jury with countless improper arguments during his summation to the jury.

When the numerous and extremely prejudicial instances of misconduct is considered in light of the "scintilla" of evidence that somehow resulted in Benjamin's conviction for murder, it risk that the prosecutor's comments unfairly swayed the jury is far too great to allow the prosecutor a second chance is incarcerate the defendant. The prosecutor's closing argument was filled with egregious misconduct; this misconduct, taken in the context of the entire argument, amounted to an incurable prejudice. Due to the severity of prosecutorial misconduct in conjunction with the insufficient evidence against Benjamin Lopez, the appellant requests that this court dismiss with prejudice.

VI. CONCLUSION

Benjamin Lopez respectfully requests that this court grant he relief as requested in this brief.

DATED September 24, 2013,



Mitch Harrison, ESQ.,
WSBA#43040
Attorney for Appellant