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Supreme Court No. 96145-0
Court of Appeals No. 33910-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ADAM SHAUN JENNINGS,
Defendant/Appellant/Petitioner.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Christopher Culp, Judge

PETITION FOR REVIEW
BY ADAM SHAUN JENNINGS

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I. IDENTITY OF PETITIONER/DECISION BELOW

Adam Shaun Jennings requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in *State v. Jennings*, No. 33910-6-III, filed June 28, 2018.¹ A copy of the opinion is attached as Appendix A.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the state's failure to prove beyond a reasonable doubt that Adam, as either principal or accomplice, committed the crime of premeditated first degree murder violates established state and federal law.

2. Whether the court of appeals' refusal to review the State's violation during rebuttal closing argument of the order in limine conflicts with established law.

3. Whether the prosecutorial misconduct in closing/rebuttal closing argument relieved the State of its duty to prove all elements of premeditated murder.

III. STATEMENT OF THE CASE

On September 2, 2013, Michael Carrigan was hunting on the east side of Cow Camp Road in the Pontiac Ridge area of northeastern Okanogan County. Beck RP 272, 276–77, 492–94, 496–97. Adam Jennings and his father, John Jennings, were living on the west side of Cow Camp Road in a shack-like cabin. The area has many trees. Beck RP 414, 513; Exhibit 102; Exhibit 184.

George Stover, a friend of Carrigan's, remained in their pickup while Carrigan was hunting in the field. According to Stover, Carrigan fired his shotgun twice. Stover then heard two additional shots. Beck RP 496–98, 501. One shot sounded from the right side of the road and Stover believed it came from the area of the Jennings' cabin. Stover did not see anyone outside. Beck RP 448, 453, 489–90, 494, 498, 500.

Carrigan went to the ground after the shot. When he got up and started back toward the pickup Stover saw blood on Carrigan's hands. A second shot rang out and Carrigan fell again and rolled over onto his back. Beck RP 500–01.

Stover drove to an area where he could make a 911 call. Deputies from the Okanogan County Sheriff's Office responded from thirty (30) miles away. Deputy Holloway observed Carrigan lying on his back in the field. Other deputies arrived and the people in the cabin were asked through a loudspeaker to come out. Adam and his father came out to where the deputies were located, using canes as they walked. Beck RP 271, 275, 277, 279–80, 298, 503–05. The deputies found no indication of other persons in the area. Beck RP 281.

¹ The current online version is found at *State v. Adam Shaun Jennings*, 33910-6-III, 2018 WL 3199556 (June 28, 2018).

John told deputies he heard two shots and immediately got on the floor. John had been preparing tea for himself and his son and stated he didn't have anything to do with the shooting. John was not arrested, and a deputy drove him to a motel for the night. Beck RP 362–64, 383–84, 694. Adam was arrested on an outstanding warrant on a failure to appear in a suspended license matter, and was transported to jail. Steinmetz RP 289, 295; Beck RP 384.

During execution of a search warrant at the Jennings' cabin the next day, law enforcement found a spent .22 casing on the porch, a .22 revolver and ammunition in the cabin, and a key to a gun safe in a drawer under a bed in Adam's bedroom. Beck RP 387, 399, 400, 539, 541–42. Sergeant Richmond of the Washington State Patrol operated a total station to provide an overview of the incident scene. Beck RP 515, 523–25; Exhibit 115.

Deputy Kinman provided John a ride back to the cabin after the search was completed. John stated he did not want to talk about the incident any more. Beck RP 371, 380.

The following day, Dr. Gina Fino, a forensic pathologist, conducted an autopsy. Initial x-rays revealed a single projectile and

smaller metal fragments near Carrigan's heart. Beck RP 592, 597, 603, 610, 626.

Dr. Fino located an entrance wound from a gunshot in Carrigan's right upper back. There was no soot or stippling around the wound. The path of the bullet was from the back to the front, right to left, and slightly downward. She recovered a bullet from the tissue around Carrigan's heart. Beck RP 614, 618, 623, 626.

There was also an abrasion of Carrigan's lower back. Dr. Fino described it as a concentric contusion suggestive of impact by a projectile, but not conclusive. She opined it could also be a blunt impact injury incurred when Carrigan's body struck the ground. Beck RP 619–20.

Several months later, Adam and his father were arrested on the current charges during execution of a second search warrant. The key to the gun safe was again found in Adam's bedroom. Numerous firearms were seized including .22 rifles and revolvers (one each from the respective bedrooms) and a large cache of .22 caliber ammunition. Beck RP 546–47, 552, 670, 674–76, 680, 736.

During the course of the search Detective Heyen observed bar marks on a window sill in Adam's bedroom in the southeast corner of the

cabin. Up until a week before, John hung his scoped rifle there. A pair of binoculars was located on a barrel in that room, near the window. Beck RP 637, 657, 659–60; 717–18; Exhibit 33.

In an interview with Detective Sloan, Adam said he heard a “boom” really close and hit the floor. He had been sitting in a chair rolling a cigarette. He described the source as gunfire coming from the south, but said he wasn’t counting shots. When it was over, he looked out the window and heard a rig driving away. Adam stated his father did not shoot Carrigan, and he denied shooting Carrigan. Beck RP 855–56, 871–75, 874, 886.

In an interviewed with Detective Heyen, John described the same events as he had before with additional detail. While making tea he heard a loud bang which he recognized as a gunshot, and dropped to the floor. He heard additional gunshots. Some were closer and some were not as loud as the first shot. Beck RP 694–95, 700.

John told law enforcement he is legally blind in one eye but can see out of it. If using a long gun, he needs a scope to be able to see one hundred and fifty (150) yards. Beck RP 708, 1026–028, 1043–046.

According to John, all of the firearms in the house belonged to him. He stated he and Adam had used the guns for target shooting. Law enforcement found evidence of mostly old target shooting activities in the area to the north of the cabin. Beck RP 663–64, 673, 710, 713–14.

Some of the recovered firearms and the bullet recovered from Carrigan's body were sent to the Washington State Patrol Crime Lab (WSPCL) for analysis. The fatal bullet was identified as a .22 long rifle (CCI brand – Stinger). Beck RP 757, 767–68, 770, 773.

Richard Wyant, the WSPCL firearm examiner, excluded the .22 rifles found in the cabin as being the weapon that fired the fatal bullet. Beck 779–80.

Mr. Wyant could not eliminate the .22 caliber High Standard revolver. The results were inconclusive. There were no individual marks observable on the test fired bullets. There were only similar class characteristics. He opined that another weapon altogether may have fired the fatal bullet. Beck RP 767–68, 780, 784.

Mr. Wyant was asked to examine the fatal bullet in relation to fired bullets recovered from the target shooting area. He filed a report dated January 15, 2014. He was unable to identify any of the recovered bullets as

being fired from same gun as the fatal bullet. The results were again inconclusive. Beck RP 744–46, 786–88.

Mr. Wyant was also asked to determine the range and penetration capability of the High Standard revolver. He used the sights on the revolver to target a gel test dummy. He determined the revolver could penetrate a human body at a hundred and fifty (150) yards. Beck RP 789, 791, 795.

Mr. Wyant and Matthew Noedel, a forensic consultant retained by the defense, agreed the fatal bullet *did not* show slippage and gas erosion. However, the bullets test-fired from the revolver *did* show slippage and erosion. Beck RP 809–10, 957–98, 972, 1007.

Officer McCormick of the Department of Fish and Wildlife gave the jury a general overview of the incident scene reflecting the location of the cabin and Carrigan's body. Beck RP 408–09, 414–15.

Sergeant Christensen of the Department of Fish and Wildlife identified the window in Exhibit 33 as the window in Adam's bedroom. He indicated that a line of sight measurement, using a laser range finder, from the shotgun lying in the field to that window, was one hundred and thirty-four (134) yards. Beck RP 423, 436, 438–39, 445; Exhibit 103.

Sergeant Richmond observed that the trees between the cabin and the site of the body did not block line of sight from the cabin window. Beck RP 528–29.

Bonnie Scott, who works at the Chesaw General Store, said Adam was present and nodded affirmatively when John apparently stated “[i]f any hunters come on my property we’ll shoot them.” Beck RP 838–39, 841, 843.

Petitioner was charged with and convicted of premeditated first degree murder as principal or accomplice and first degree unlawful possession of a firearm a jury trial in Okanogan County. Adam J. CP 93, 187–89. By special verdict, the jury found he was armed with a firearm at the time of commission of the murder. Adam J. CP 95. The Honorable Christopher Culp imposed a high end standard range sentence of 393 months inclusive of the 60 months firearm enhancement. Adam J. CP 21, 23–24. Petitioner appealed and on June 28, 2018, Division Three of the court of appeals affirmed in an unpublished opinion. *See* App. A. Additional relevant facts are contained in the argument section below.

IV. ARGUMENT IN SUPPORT OF REVIEW

1. This Court should grant review to determine whether the state's failure to prove beyond a reasonable doubt that Adam, as either principal or accomplice, committed the crime of premeditated first degree murder violates established state and federal law.

This Court should accept review under RAP 13.4(b)(1)–(3) because the decision below highlights conflicts with decisions of this Court and the Court of Appeals in interpreting constitutional principles.

Due process requires the state to prove each element of a charged crime beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art I, § 3; *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If the state fails to prove an essential element, due process mandates dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 990 L.Ed.2d 116 (1986).

To convict Adam or his father of first degree premeditated murder as principal, the State had to prove that one of them caused the death of Michael Carrigan with premeditated intent. RCW 9A.32.030(1)(a). There is no doubt Carrigan was killed by a fatal shot. The State could not determine who actually pulled the trigger. The State thus proceeded against Adam and his father as each being a “principal or accomplice” in a premeditated murder. Nevertheless the State was still required to prove,

beyond a reasonable doubt, that Adam was either a principal or an accomplice to a premeditated crime. It did not do so.

The closest the State came to identifying a firearm which may have been used was the inconclusive results on the .22 High Standard revolver. There was no direct evidence Adam pulled the trigger. Circumstantial evidence of his being a principal actor is weak: Adam was in the cabin, there was a line of sight from his bedroom window to the location where Carrigan was shot, he'd previously used some of the guns found in the house for shooting out of the window at targets on trees located in the opposite direction from where Carrigan was shot, and he was present a few days before the shooting when his father made a statement at a local store that "[i]f any hunters come on my property we'll shoot them." Additional evidence established Adam's father was also present in the house they shared and had used guns for target shooting out of that same window. Inferences based on circumstantial evidence must be reasonable and "cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). On these sparse facts, the jury would have had to engage in impermissible guesswork to conclude Adam or his father acted as principal actor.

A person is an accomplice of another person in the commission of a crime if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) Aids or agrees to aid such other person in planning or committing it; or
- (b) His or her conduct is expressly declared by law to establish his or her complicity.

RCW 9A.08.020(3). The State presented no evidence Adam solicited, commanded, encouraged, or requested his father to shoot Carrigan. The issue is whether Adam aided or agreed to aid his father in planning or committing the crime of premeditated first degree murder.

A critical piece of evidence presented by the State against Adam and his father was the testimony of Bonnie Scott. She indicated that a few days before the incident, Adam was present with his father in the local mercantile store during a discussion among regulars about the upcoming hunting season, commiserating about the “[s]ame old stuff, that hunters are a pain.” Ms. Scott indicated Adam nodded yes when his father made the statement, “If any hunters come on my property we’ll shoot them.” Beck RP 841, 843–44.

In context the father’s statement could be social banter reflecting the age-old sentiments of the customers at the store in Okanogan County and residents of many rural areas—accepting and at the same time

frustrated by the annual prospect of hunters encroaching upon and possibly disrupting their solitude, property, or livestock. Even if considered a threat, however, accomplice liability requires more than mere assent. *State v. Peasley*, 80 Wash. 99, 100, 141 P. 316 (1914).

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act. **Accomplice liability requires some form of overt act**; the doing or saying of something that either directly or indirectly contributes to the criminal act; some form of demonstration that expresses affirmative action, **and not mere approval or acquiescence, which is all that is implied in assent.**

State v. Trout, 125 Wn. App. 403, 427, 105 P.3d 69 (2005) (Schultheis, J. (dissenting) (citations omitted). The only action attributed to Adam during the course of this statement is that Adam nodded his head. That does not invoke criminal liability.

In this state when it cannot be determined which of two defendants actually committed a crime, and which encouraged or counseled, it is not necessary to establish the role of each. It is sufficient if there is a showing that **each defendant** was involved in the commission of the crime, **having committed at least one overt act**

State v. Baylor, 17 Wn. App. 616, 618, 565 P.2d 99 (1977) (emphasis added). An “overt act” is the “doing or saying of something that either directly or indirectly contributes to the criminal act, some form of

demonstration that expresses affirmative action, and not mere approval or acquiescence.” *Trout*, 125 Wn. App. at 427.

For accomplice liability to attach there must be evidence that the accomplice did something in association with the principal to accomplish the crime. *State v. Murray*, 10 Wn. App. 23, 28, 516 P.2d 517 (1973); *State v. Boast*, 87 Wn.2d 447, 455–56, 553 P.2d 1322 (1976). The person giving aid must participate in the crime charged “as something he wishes to bring about, and by action to make it succeed.” *Boast*, 87 Wn.2d at 456. “Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was *ready to assist* in the crime.” *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) (emphasis added).

The State did not establish that Adam pulled the trigger. It presented no evidence that he solicited, commanded, encouraged or requested his father to shoot Carrigan. There was no evidence Adam aided or agreed to aid his father in planning or committing the crime of premeditated first degree murder. There was no evidence he had knowledge of ongoing criminal activity. The State did not establish that Adam did anything on September 2, 2013, other than be present in the cabin when the shooting occurred. Even if coupled with some knowledge

of potential criminal activity, Adam's mere presence at the scene is insufficient to establish accomplice liability. *State v. Asaeli*, 150 Wn. App. 543, 568, 208 P.3d 1136 (2009).

Because there is insufficient evidence that Adam acted as a principal actor, or was ready to assist a principal in the crime and that he shared in the criminal intent of the principal, the conviction should be reversed and dismissed. Review is warranted.

2. Review should also be granted to determine whether the court of appeals' refusal to review the State's violation during rebuttal closing argument of the order in limine prohibiting speculation about missing guns violates established law and whether cumulative prosecutorial misconduct relieved the State of its duty to prove all elements of premeditated murder.

This Court should accept review under RAP 13.4(b)(1)–(3) because the decision below highlights conflicts with decisions of this Court and the Court of Appeals in interpreting principles ensuring the right to a fair and impartial trial guaranteed by both the United States Constitution and the Washington State Constitution.

Division Three concedes during rebuttal closing argument the prosecutor violated the constitutional right to remain silent by implying the defendants had an obligation to testify and present evidence. *Slip Op.* at 24–25. The court erroneously concluded the prosecutor's wide-spread references during closing/rebuttal closing arguments to “they” and “them”

did not confuse the jury on whether sufficient evidence was present to convict either defendant as principal or accomplice and the defendants' failure to object during rebuttal closing argument to the prosecutor's violation of an order in limine prohibiting speculation about missing guns precluded review (*citing State v. Sullivan*)². *Slip Op.* at 21–24. Review is warranted of the cumulative prosecutorial misconduct.

The State proceeded against Adam and his father because it could not determine who actually pulled the trigger. Adam recognizes that

... [a] jury is not required to determine which participant acted as a principal and which participant acted as an accomplice. *State v. Hoffman*, 116 Wn.2d 51, 104–05, 804 P.2d 577 (1991). The jury need only conclude unanimously that both the principal and accomplice participated in a crime. [*Id.*].

Personal Restraint of Heggney, 138 Wn. App. 511, 524, 158 P.3d 1193 (2007) (emphasis added). “The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof, though they are not favored in the law.” *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006). However, inferences based on circumstantial evidence must be reasonable and “cannot be based on speculation.” *Vasquez*, 178 Wn.2d at 16.

² 69 Wn. App. 167, 171–73, 847 P.2d 953 (1993).

The prosecutor, in closing argument, could not point to any act by Adam which was an overt act as principal or accomplice. Thus, his argument urged the jury to speculate about joint participation in the crime by unceasingly using the unifying terms “they” and “the defendants:”

...[T]he defendants shot and killed Michael Carrigan. (Beck RP 1079)

... The defendants in this case told people ... ‘We’ll shoot them.’ The defendants’ murder of Michael Carrigan was premeditated. (Beck RP 1079)

... They thought about it, they thought between the first and second shot. They thought – beforehand. (Beck RP 1083)

... In this case – both defendants were involved in various aspects of the crimes charged. We’re really talking (inaudible) crime – murder (inaudible). (Beck RP 1086)

... They were – they were accomplices in this case, they’re both defendants and accomplices. (Beck RP 1087)

... In this case both defendants were responsible for the murder of Michael Carrigan. ... In this case, the evidence does show beyond a reasonable doubt the defendants murdered Michael Carrigan ... (Beck RP 1087)

... Now, in this case, -- how do we know the defendants were involved? How do we know the defendants murdered Michael Carrigan?

In addition to their statement, a couple of days before, they prepared for this. You have a pretty good sense of the mindset, through the testimony, through the physical photographs. They prepared. They armed themselves.

And – you’ll see these photographs when you go back – you look and there’s a lot more than that. They armed themselves

with the weapons, the caliber, the type of ammunition specifically. They killed Michael Carrigan. (Beck RP 1089)

... They armed themselves. They had modified weapon – I’m sorry – modified ammunition.

... They practiced. (Beck RP 1089–90)

... They also had – a line of sight. And (inaudible), “well, gee, they had – they had a view.” They had a specific line of sight. (Beck RP 1090)

... They had logs stacked up – defensive positions. They had material up here, solid material, before you got over to the stacked log defensive type of position. (Beck RP 1093)

... Does that exclude the defendants? Absolutely in now [sic] way. The defendants had multiple weapons. They had weapons that we know could not be accounted for. (Beck RP 1095–96)

... The defendants in this case had between, the least, being very conservative, an hour and a half, upwards of two hours, from the time Michael Carrigan was shot until the time they finally came out at the call of law enforcement. Nobody else around them. Nobody else seeing what they’re doing. They had plenty of time to do whatever they wanted. (Beck RP 1096)

... We also know – that the defendants intended to do it. They said so. (Beck RP 1097)

... [T]hey’re armed, how they were set up. They had the intent and they had the opportunity and they took it. (Beck RP 1097)

... [T]hey were prepared for it. They were going to defend themselves. They had basically done all these things to protect themselves. The log stack, the – speakers, the lights, -- kept to themselves. They shot all this time. They practiced. They had everything ready. They had loaded weapons ready and accessible, -- at all time. They were armed when they left their house. (Beck RP 1098)

... And they practiced. And they practiced. Mr. Carrigan was that opportunity, and they took it. (Beck RP 1099)

... The defendants killed Michael Carrigan. (Beck RP 1100)

The State could not prove principal liability as to either Adam or his father. In trying to establish accomplice liability the State accused each of them of being the principal. “They were – they were accomplices in this case, they’re both defendants and accomplices.” Beck RP 1087. Inferences based on circumstantial evidence must be reasonable and “cannot be based on speculation.” *Vasquez*, 178 Wn.2d at 16. The prosecutor improperly urged impermissible speculation by the jury, which could not reasonably infer from the State’s evidence that either “defendant was ready to assist the principal in the crime and that he shared in the criminal intent of the principal, thus ‘demonstrating a community of unlawful purpose at the time’ ” Carrigan was murdered. *State v. Castro*, 32 Wn. App. 559, 564, 648 P.2d 845 (1982).

The following improper statements made by the prosecutor in rebuttal closing argument further violated Adam’s right to a fair and impartial trial guaranteed by both the United States Constitution and the Washington State Constitution.

... The [defendants’] argument that, “Well, why do these other guns matter?” Well, they matter for other counts directly. But they

matter for this count, the murder count, because in fact they show the defendants not only had multiple weapons, and all the ammunition and everything else that went along with that, but **they** also – manipulated and -- **got rid of some weapons** -- very clearly. That’s why matters. Because, again it goes back to the argument, it’s like, “Well, the officers don’t find a weapon,” ...

Beck RP 1121 (alteration added) (emphasis added).

A number of firearms were recovered in the cabin, but not one the State could conclusively point to as the murder weapon. Time elapsed between the shooting and police arrival at the scene, and also between law enforcement contact with Adam and his father and their subsequent arrests on the charges. The prosecuting attorney’s reference directly violated the trial court’s pretrial ruling excluding “officer opinion testimony or prosecutorial comments” about the defendants hiding guns—which the prosecutor had conceded was inappropriate. Steinmetz RP 398–400.

The violation of the motion in limine was blatant, could not have been cured by an instruction, and was prejudicial because it occurred during closing/rebuttal closing argument—at a time the defense could not rebut with new evidence alleged facts not in evidence. This is precisely the “unusual circumstance that makes it impossible to avoid the prejudicial impact of evidence that had previously been ruled inadmissible” and

contrary to Division Three's conclusion the issue is preserved for appeal.

See Sullivan, 69 Wn. App. 167, 173.

The prosecutor's cumulative misconduct relieved the State of its burden to prove every element of premeditated first degree murder. The misconduct warrants review and requires reversal. *State v. Gregory*, 158 Wn.2d 759, 867, 147 P.3d 1201, 1257 (2006), *as corrected* (Dec. 22, 2006) *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

V. CONCLUSION

For the reasons stated, this Court should grant review.

Respectfully submitted on July 30, 2018.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 30, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's petition for review and Appendix A:

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