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No. 98859-5
Court of Appeals No. 79189-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EMANUEL JAIME-RODRIGUEZ,

Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

Pursuant to RAP 13.4 Emanuel Jaime-Rodriguez asks this Court to accept review of the opinion in *State v. Jaime-Rodriguez*, 79539-2.

B. PROCEEDINGS BELOW

The State offered no direct evidence linking Mr. Jaime-Rodriguez to the murder of Celina Peterson. No witness testified that Mr. Jaime-Rodriguez was present at the time of the murder. Indeed, one witness who had confessed to the murder, testified Mr. Jamie-Rodriquez was not present. While DNA recovered from the murder weapons included the confessed murderer's DNA, it did not include Mr. Jamie-Rodriguez's DNA. Nonetheless a jury convicted Mr. Jamie-Rodriguez of the crime.

The Court of Appeals affirmed the conviction concluding this Court decisions regarding the law of the case doctrine did not apply to Mr. Jaime-Rodriguez's case.

C. ISSUES PRESENTED

1. The law of the case doctrine requires the State prove the elements of an offense as they are set forth in the “to convict” instruction provided to the jury. Here, Instruction 18 expressly permitted the jury to find either “the defendant or an accomplice” committed one element while requiring the jury find Mr. Jamie-Rodriguez alone committed another element. Where the State did not offer sufficient evidence to prove the crime in the manner in which the instruction required, is the conviction on Count II supported by sufficient evidence?

2. To convict Mr. Jaime-Rodriguez of second degree murder in Count I, the State was required to prove either he caused another’s death or that he acted with knowledge that he was assisting in the commission of the murder. The State did not offer any evidence establishing Mr. Jaime-Rodriguez was the person who killed Ms. Peterson. The State did not prove Mr. Jaime-Rodriguez acted with knowledge that he was

assisting in that crime. Did the State offer sufficient evidence to convict Mr. Jaime-Rodriguez of murder?

3. Where a trial irregularity results in prejudice a court should grant a motion for a mistrial. Here, one of the state's witnesses violated the court ruling barring testimony of Mr. Jaime-Rodriguez's previous arrest for a domestic violence assault. Where the trial court used the incorrect legal standard in ruling on the motion, and the violation prejudiced Mr. Jaime-Rodriguez, must his conviction be reversed?

D. STATEMENT OF THE CASE

Celina Peterson's body was discovered early one morning in an alley in Seattle's South Park neighborhood. RP 577-78. The person who discovered the body had heard shouting several hours earlier. RP 577-78.

Tobi Carroll was walking in that area in the early hours of that morning. RP 815. Ms. Carroll passed a group of three men on a sidewalk. RP 822-23, 826. One of the three men appeared to be holding one of the others. She identified one of the individuals as Mr. Jaime-Rodriguez. RP 822-23.

As she walked away from the group, she heard screaming. RP 829-30. She could not tell if the voice was male or female. *Id.* Ms. Carroll did not see Mr. Jamie-Rodriguez do anything. RP 853.

Later, Ms. Carroll saw a person, who she believed to be Mr. Jaime-Rodriguez, carrying a trash bag into a nearby alley. RP 832.

With the discovery of Ms. Peterson's body, police found a leather belt, a large rock or piece of concrete and a flat-tip screwdriver near the body. RP 426, 448-49. A medical examiner determined Ms. Peterson died from several penetrating stab wounds into her brain, as well a large trauma to the side of her head that fractured her skull. RP 990-91, 999-1009. The doctor also noted strangulation was possible. RP 983.

Analysis of the belt and screwdriver revealed a mixed DNA sample which included both Ms. Peterson and Cristen Parada-Rivera. RP 746, 750, 752. Mr. Jamie-Rodriguez was excluded from both samples. RP 755.

Several months after the murder, Mr. Jamie-Rodriguez was in jail on an unrelated matter when he encountered Jeremy Hall, who also lived in South Park.

Mr. Parada-Rivera pleaded guilty to murder. RP 1052. Mr. Parada-Rivera explained Mr. Jaime-Rodriguez was not present and not involved in the killing. RP 1065. Nonetheless the State charged Mr. Jamie-Rodriguez with first degree intentional murder and a second count of second degree felony murder. CP 18-19.

At trial, Mr. Hall testified on behalf of the State in an effort to avoid a sentence of life in prison without the possibility of parole as a three-striker. RP 899-900. Instead, the State had substantially reduced the charges against him such that he only faced a sentence of a little more than six years. RP 900. Mr. Hall claimed that on one occasion Mr. Jamie-Rodriguez told Mr. Hall police had questioned him regarding the murder. RP 904-05. Mr. Hall claimed that on another occasion while he was using heroin, the two of them were near the murder scene. RP 910. Mr. Jamie-Rodriguez

became upset and said “it wasn’t supposed to go down like that.” RP 910-11.

A jury convicted Mr. Jamie-Rodriguez of the lesser offense of second degree intentional murder on Count I and second degree felony murder as charged in Count II. CP 119-22.

E. ARGUMENT

1. The State failed to offer sufficient evidence of second degree murder in Count II as charged and submitted to the jury.

a. Due process required the State prove each element of the offense beyond a reasonable doubt.

Again, due process requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where additional elements are added to the “to convict” instruction, and the State does not object, the additional element becomes the “law of the case” and must be proved beyond a reasonable doubt. *State v.*

Johnson, 188 Wn.2d 742, 756, 399 P.3d 507 (2017) (citing *State v. Hickman*, 135 Wn.2d 97, 99, 954 P.2d 900 (1998)). If the State failed to meet this burden with respect to the added element, the conviction must be dismissed just as for the failure to prove any element of the offense. *Hickman*, 135 Wn.2d at 103.

b. The State did not prove Mr. Jaime-Rodriguez committed the crime of second degree assault.

Instruction 18 provides:

To convict the defendant of the crime of felony murder in the second degree, as charged in Count II. Each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 15, 2015, the defendant committed the crime of Assault in the Second Degree;

(2) That the defendant or an accomplice caused the death of Celina Peterson in the course of and in furtherance of such crime:

(3) That Celina Peterson was not a participant in the crime of Assault in the Second Degree

.....

CP 102.

As is clear, the instruction differentiates between acts which Mr. Jaime-Rodriguez was required to commit himself and those that could be committed by others. The second

element permits the jury to find either “the defendant or an accomplice” caused Ms. Peterson’s death. The first element, however, specifically required the jury find Mr. Jaime-Rodriguez, not an accomplice, committed the assault. Thus the State was required to prove Mr. Jaime-Rodriguez committed second degree assault. *Hickman*, 135 Wn.2d at 99. The State did not meet that burden.

The Court of Appeals, however, concludes that despite the language of the instruction *Hickman* did not require the State to prove Mr. Jaime-Rodriguez personally committed the assault. That conclusion is contrary to *Hickman* and to the Supreme Court’s opinion in *State v. Willis*. 153 Wn.2d 366, 103 P.3d 1213 (2005).

The language of Instruction 18 is similar to that at issue in *Willis*. There an instruction required the jury find the defendant was armed. *Willis*, 153 Wn.2d at 374-75. As with the first element in Instruction 18, the instruction in *Willis* omitted the words “or an accomplice.” *Id.* at 374. Citing *Hickman* the Court concluded “[b]y failing to include the phrase ‘or an

accomplice,' instruction 29 required the State to prove that Willis himself was armed." *Id.* at 375.

Here, not only does the first element in Instruction 18 omit the words "or an accomplice," the second element expressly includes those words. As Mr. Jaime-Rodriguez has argued, and *Willis* requires, the omission of the term in element one by itself creates the obligation that the State prove Mr. Jaime-Rodriguez personally committed the assault. That obligation is cemented by the inclusion of the phrase "or an accomplice" in the second element. But the Court of Appeals affirmed nonetheless.

The State offered no evidence that Mr. Jaime-Rodriguez engaged in any assaultive act much less one constituting a second degree assault. In the absence of such proof, Mr. Jaime-Rodriguez's conviction on Count II must be reversed.

The opinion of the Court of Appeals is contrary to *Hickman* and *Willis*. Moreover the court's refusal to follow this Court settled precedent is a substantial departure from the usual course of judicial proceedings. Review is warranted under RAP 13.4.

2. The State failed to offer sufficient evidence to prove Mr. Jaime-Rodriguez guilty of second degree murder as charged in Count I.

a. Due process required the State prove each element of the offense beyond a reasonable doubt.

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *Winship*, 397 U.S. at 364. Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

As charged in Count I, to convict Mr. Jaime-Rodriguez of second degree murder, the State was required to prove he acted with intent to kill Ms. Peterson and caused her death. RCW 9A.32.050; CP 18-19, 102. To prove a person is an accomplice to a crime, the State must prove the person acted with knowledge that he was assisting in the commission of the crime charged. RCW 9A.08.020; *State v. Roberts*, 142

Wn.2d 471, 510-11, 14 P.3d 713 (2000). A person's mere presence is not sufficient to prove they are an accomplice even if the person has knowledge of the criminal act. *State v. Truong*, 168 Wn. App. 529, 540, 277 P.3d 74 (2012). Instead, the State must prove the person aided in the act or was ready to assist. *Id.*

b. The State did not prove Mr. Jaime-Rodriguez either caused Ms. Peterson's death or acted as an accomplice to someone who did.

Here the State did not offer any evidence establishing Mr. Jaime-Rodriguez was the person that killed Ms. Peterson. Nor did the State prove Mr. Jaime-Rodriguez acted with knowledge he was assisting in that crime. Instead, the State proved nothing more than that Mr. Jaime-Rodriguez may have been in the vicinity of where Ms. Peterson was killed near the time of her death.

Tobi Carroll testified she passed a group of three individuals on the sidewalk. RP 822-23. It appeared to her to be a group of three men. RP 826. One of the men appeared to

be holding one of the others. She identified one of the individuals as Mr. Jaime-Rodriguez. RP 822-23.

As she walked away from the group she heard screaming. RP 829-30. She could not tell if the voice was male or female. *Id.*

Later, Ms. Carroll saw a person, who she believed to be Mr. Jaime-Rodriguez, carrying a trash bag into a nearby alley. RP 832. The next morning, Ms. Peterson's body was discovered in an alley near the area where Ms. Carroll was walking.

Ms. Peterson's DNA was recovered from both a belt and screwdriver found next to her body. RP 746, 752. Cristen Pareda-Rivera's DNA was recovered from both the belt and screwdriver. RP 750, 752. Mr. Jaime-Rodriguez was excluded as a contributor of DNA recovered from either item. RP 755

Mr. Pareda-Rivera admitted to the jury he was involved in Ms. Peterson's killing. RP 1052. Consistent with the DNA evidence, Mr. Pareda-Rivera explained Mr. Jaime-Rodriguez was not present and not involved in the killing. RP 1065.

Even in the light most favorable to the State, the evidence does not establish Mr. Jaime-Rodriguez was involved in the murder of Ms. Peterson. The evidence established Mr. Jaime-Rodriguez, with others, was in the area in which Ms. Peterson's body was found. The evidence established that in the time preceding her death, Mr. Jaime-Rodriguez was with a person who was involved in killing Ms. Peterson. But no evidence established Mr. Jaime-Rodriguez did any act causing Ms. Peterson's death or that he acted with knowledge that he was assisting in a murder.

A question from the jury illustrates jurors had doubts as to the State's proof. During deliberations, jurors asked the court to clarify whether a person's actions after the crime subjected them to accomplice liability. That question reveals jurors doubted Mr. Jaime-Rodriguez's involvement in or knowledge of the killing of Ms. Peterson.

The State did not offer sufficient evidence to convict Mr. Jaime-Rodriguez of murder. The opinion affirming the conviction in the absence of any evidence of Mr. Jaime-

Rodriguez's involvement is contrary to this Court's opinions and presents a significant constitutional question.

3. The trial court erred in denying Mr. Jaime-Rodriguez's motion for a mistrial following a witness's improper and prejudicial testimony.

a. The State's witness violated the court's in limine ruling.

The State rewarded Mr. Hall for his testimony by reducing his sentence from life in prison without the possibility of parole as a three-striker. RP 899-900. Instead, the State permitted him to plead guilty to substantially reduced charges resulting in a sentence of only six plus years. RP 900.

Prior to trial, the court ruled Mr. Hall could testify that on one occasion, he spoke with Mr. Jaime-Rodriguez in jail, but could not say Mr. Jaime-Rodriguez was in jail following his arrest for a domestic violence assault. RP 86-87. Again, on the morning of Mr. Hall's testimony, the court made clear its straight-forward ruling that Mr. Hall could not testify Mr.

Jaime-Rodriguez was in jail due to the domestic violence arrest. RP 872.

Nonetheless, early in his testimony, Mr. Hall stated he saw Mr. Jaime-Rodriguez while both were in jail. RP 906. Mr. Hall offered his belief Mr. Jaime-Rodriguez was acting nervous. RP 906-07. The prosecutor asked Mr. Hall why he thought Mr. Jaime-Rodriguez seemed nervous, Mr. Hall responded: “He said he was stressed out. That he had beat up [his girlfriend], and he thought that they were going to charge him - - .” RP 907.

The trial court granted Mr. Jaime-Rodriguez’s immediate objection and struck the testimony. *Id.* The court did not tell the jury to disregard the testimony.

At the next break, Mr. Jaime-Rodriguez asked the court to declare a mistrial. RP 934. The court denied the motion.

b. A court should grant a mistrial where a trial irregularity denies a person a fair trial.

A trial court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514

(1994). An irregularity is prejudicial if there is reasonable probability it affected the outcome. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The denial of a motion for mistrial should be reversed on appeal if the trial court's reasoning was based on untenable grounds or manifestly unreasonable. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A court's ruling based upon the incorrect legal standard is by definition an abuse of discretion. *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015).

c. The trial court used an incorrect legal standard in ruling on Mr. Jaime-Rodriguez's motion for a mistrial.

In denying Mr. Jaimie-Rodriguez's motion for a mistrial, the trial court first offered its view that it had instructed the jury to disregard the testimony even before defense counsel could complete his objection. RP 937. The record, however, is devoid of any contemporaneous instruction to the jury to disregard the comment. RP 907.

The court also indicated it did not believe Mr. Hall intentionally violated the straightforward ruling barring such

testimony. RP 937-38. The court said, “I don’t think there is enough here that showed that this was a purposeful or intentional act.” RP 937.

Whether a violation of an order or ruling is intentional only matters to the question of whether double jeopardy will permit a new trial after a mistrial is declared. *See, Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S. Ct 2083, 72 L. Ed. 2d 416 (1982) (Double Jeopardy Clause will bar retrial where prosecutor intends to “goad” defense into seeking mistrial by misbehavior). Indeed, if the improper action denies a defendant a fair trial, it cannot matter that that unfairness was the result of an inadvertent, unintentional or negligent act. What matters is that the resulting trial was not fair.

Here, the trial court never analyzed the fairness of the proceeding following Mr. Hall’s violation of the order in limine. The court did not address much less answer the question of whether the improper comments deprived Mr. Jaime-Rodriguez a fair trial.

By using the wrong legal standard the court abused its discretion. *Henderson*, 182 Wn.2d at 743.

Denying Mr. Jaime-Rodriguez a fair trial warrants review by this Court. RAP 13.4.

F CONCLUSION

This Court should grant review in Mr. Jaime-Rodriguez's case.

Respectfully submitted this 5th day of August, 2020.



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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 79189-3-I
)	
Respondent,)	ORDER DENYING MOTION
)	FOR RECONSIDERATION
v.)	
)	
EMANUEL JAIME-RODRIGUEZ,)	
)	
Appellant.)	
_____)	

Appellant, Emanuel Jaime-Rodriguez, filed a motion for reconsideration of the opinion that was filed on June 15, 2020. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Andrus, A.C.J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 79189-3-I
)	
Respondent,)	UNPUBLISHED OPINION
)	
v.)	
)	
EMANUEL JAIME-RODRIGUEZ,)	
)	
Appellant.)	
)	

ANDRUS, A.C.J. — A jury found Emanuel Jaime-Rodriguez guilty of second degree felony murder in connection with the assault and resultant death of Celina Petersen. Jaime-Rodriguez appeals his conviction, arguing the “to convict” instruction required the State to prove he assaulted Petersen and the evidence that he acted as an accomplice is insufficient to sustain the conviction. He further argues the trial court abused its discretion when it denied his request for a mistrial based on one witness’s testimony.

We conclude the “to convict” instruction allowed the State to prove Jaime-Rodriguez committed the assault as either the principal or an accomplice and the State presented sufficient evidence to support the conviction. We also conclude the trial court did not abuse its discretion when it denied his request for a mistrial because the statement, even if improper, did not prejudice Jaime-Rodriguez. We thus affirm.

FACTS

At approximately 8:00 a.m. on February 15, 2015, a local resident found Celina Petersen's body in an alley in the South Park neighborhood of Seattle. An autopsy revealed Petersen died by significant blunt force trauma to her head, stab wounds that penetrated her skull, and manual strangulation. The stab wounds were consistent with a screwdriver found near Petersen's body.

Security videos from nearby businesses and a private residence revealed three men—one wearing a blue checkered shirt—with Petersen at various times throughout the early morning hours and in different locations in the neighborhood, including a Union 76 gas station. The security cameras last captured Petersen walking northbound on 14th Avenue South toward South Cloverdale Street at 4:45 a.m. Petersen was carrying a cup of coffee, purchased at the Union 76 station, and her purse.¹

Within two minutes, the three men were seen following Petersen. A witness, as well as the security cameras, observed the men together at various times between 5:00 a.m. and 5:45 a.m. near the alley where Petersen's body was later found.

Police officers identified one of the men in the security videos as Jaime-Rodriguez. Homicide Detective Jason Kasner met with Jaime-Rodriguez several days after the murder. When shown video still images taken from a security camera at the Union 76 gas station, Jaime-Rodriguez identified himself as the man wearing the blue checkered shirt. He identified the woman in the photo as

¹ The police did not find Petersen's purse at the crime scene.

Petersen. When Detective Kasner showed Jaime-Rodriguez photos of the other two men with him that night, he identified one as Cristen Parada-Rivera.² Jaime-Rodriguez would not identify the third man.

Detective Kasner identified another woman—seen walking toward the Union 76 at approximately 5:05 a.m.—as Tobi Carroll, a local homeless camp resident. He also saw Carroll walking westbound on South Cloverdale Street, near the entrance to the alley where Petersen’s body was found, between 5:18 a.m. and 5:22 a.m. that morning.

Carroll was a friend of Petersen’s and an acquaintance of Jaime-Rodriguez, whom she knew by the name “Wedo.” While out walking in the early morning hours of February 15, Carroll saw Jaime-Rodriguez standing on a sidewalk with two other people. Jaime-Rodriguez was standing close to one person who seemed to be holding another’s hands behind their head. Carroll heard someone scream, “help, help, somebody help me,” before hearing the person ask, “why do you have to be so mean?” She then heard “one final . . . cry” and fled toward the Union 76.

When Carroll realized the Union 76 was closed, she panicked and ran back toward her home and her husband. When she backtracked and got to the corner of the alley, she saw Jaime-Rodriguez drop a large, heavy item she thought was a 50-gallon trash bag in the alley.

Over a year after Petersen’s murder, Detective Kasner met and interviewed Petersen’s friend, Jeremy Hall, who was in jail pending trial on a robbery charge.

² Forensic testing revealed both Petersen’s and Parada-Rivera’s DNA on the screwdriver found near Petersen’s body. Petersen’s and Parada-Rivera’s DNA was also found on a belt laying on the ground in the alley.

Hall knew Jaime-Rodriguez from the neighborhood, and the two had taken drugs together on several occasions. Jaime-Rodriguez told Hall that he had been questioned by the police about Petersen's murder and that he was afraid he would be charged with the murder. Then during another conversation, he told Hall that Petersen had stolen money from him that he needed for drugs and that when he became "dope sick," he tracked her down, confronted her about the theft, and beat her after seeing her coming back from a gas station. According to Hall, Jaime-Rodriguez said that "it wasn't supposed to go down like that."

Officers arrested Parada-Rivera and Jaime-Rodriguez in connection with Petersen's death. The State charged both Parada-Rivera and Jaime-Rodriguez with first degree murder.

In a post-arrest interview, Jaime-Rodriguez admitted that he saw an unconscious Petersen in the alley that night, that he saw two men beating her, and that he heard Petersen's screams. Jaime-Rodriguez denied assaulting Petersen himself but admitted he was present, pacing back and forth, and told the other men to "get their money" and "hurry the f*** up."

Parada-Rivera pleaded guilty to murdering Petersen. The State then amended the information against Jaime-Rodriguez, charging him with first degree murder (count 1) and the alternative crime of second degree murder under Washington's felony murder statute, RCW 9A.32.050(1)(b) (count 2).

At Jaime-Rodriguez's trial, Parada-Rivera testified he lived in the South Crest Apartments at the corner of 12th Avenue South and South Cloverdale Street, in close proximity to the alley where Petersen's body was found. He admitted he

worked and was friends with Jaime-Rodriguez. He further testified he was hanging out with Jaime-Rodriguez and a third man, an African American he claimed he had never met before, on the night of February 14 and into the morning of February 15.

Parada-Rivera testified he was drunk and turned into an alley to urinate when Petersen demanded money from him. Parada-Rivera said he became angry and hit Petersen. He was unclear, however, on whether he hit her with his fist, with a stone, or with a piece of concrete. He also testified that as he left the alley, the African American then began attacking Petersen with a screwdriver. Parada-Rivera denied stabbing Petersen with the screwdriver, despite the presence of his DNA on it. Parada-Rivera testified Jaime-Rodriguez was not present in the alley when he was hitting Petersen and assumed Jaime-Rodriguez had gone to Parada-Rivera's apartment to go to sleep.

But Parada-Rivera's trial testimony was inconsistent with the version of events he gave police and with Jaime-Rodriguez's statements to police. Parada-Rivera initially told detectives he did not know Jaime-Rodriguez. He also told them that he—and he alone—followed Petersen into the alley to take money from her. Parada-Rivera recounted to detectives that he hit Petersen with the screwdriver when she threw herself at him. He also stated that Petersen was alive and standing when he fled the scene. The medical examiner, however, testified that once Petersen received the stab wound through her skull, it would have been a physical impossibility for her to remain conscious given the severity of the brain damage the screwdriver caused.

The jury found Jaime-Rodriguez guilty of count 2, second degree felony murder. It could not reach a verdict as to count 1, first degree murder, but found Jaime-Rodriguez guilty of the lesser included crime of second degree intentional murder. It also found that Jaime-Rodriguez was armed with a deadly weapon during the commission of the crimes.

Jaime-Rodriguez moved for an arrest of judgment under CrR 7.4,³ arguing there was insufficient evidence to support the convictions. Jaime-Rodriguez argued that there was no direct evidence linking him to the murder, Carroll was not a credible witness, and Hall's testimony was contradicted by the security videos because the security cameras did not capture a confrontation between Jaime-Rodriguez and Petersen. Jaime-Rodriguez further argued there was insufficient evidence to sustain a conviction based on an accomplice theory. The trial court denied the motion because there was an "extraordinary amount of circumstantial evidence which is just as valuable and not weighted any differently than direct evidence," and because Jaime-Rodriguez had confessed to Hall that he had committed the murder. The State subsequently moved to vacate the conviction for count 1, second degree intentional murder, on double jeopardy grounds. The trial court dismissed count 1.

The court sentenced Jaime-Rodriguez to 278 months in prison on count 2, which included a 24-month weapons enhancement. Jaime-Rodriguez appeals his conviction.

³ "Arrest of Judgments. Judgment may be arrested on the motion of the defendant for the following causes: (1) Lack of jurisdiction of the person or offense; (2) the indictment or information does not charge a crime; or (3) insufficiency of the proof of a material element of the crime." CrR 7.4(a).

ANALYSIS

Jaime-Rodriguez makes three arguments on appeal. First, he maintains Instruction 18—the “to convict” instruction for the felony murder charge—required the State to prove, and the jury to find, that Jaime-Rodriguez acted as a principal in Petersen’s assault. Second, he contends the State presented insufficient evidence that he acted as either a principal or an accomplice in Petersen’s assault and murder. Finally, he asserts the trial court abused its discretion in denying Jaime-Rodriguez’s motion for a mistrial based on a statement Hall made during his trial testimony.

Felony Murder “To Convict” Instruction

Jaime-Rodriguez first argues the language of Instruction 18, the “to convict” instruction, required the State to prove he acted as a principal in Petersen’s assault. He contends the jury instruction did not permit the jury to find him guilty of assault as an accomplice. We disagree and conclude the State was not required to prove Jaime-Rodriguez was the principal in Petersen’s assault; the jury was instructed on accomplice liability and could find Jaime-Rodriguez guilty of assault as either a principal or an accomplice.

In a criminal prosecution, the State bears the burden of proving all of the elements of the crime charged. State v. Teal, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). In this case, Instruction 17 defined second degree murder:

A person commits the crime of murder in the second degree when he or she commits the crime of [a]ssault in the [s]econd [d]egree and in the course of and in furtherance of such crime he or she or an accomplice causes the death of a person other than one of the participants.

And Instruction 18 outlined the elements of the charged crime:

To convict the defendant of the crime of felony murder in the second degree, as charged in Count [2], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 15, 2015, the defendant committed the crime of [a]ssault in the [s]econd [d]egree;

(2) That the defendant or an accomplice caused the death of Celina Petersen in the course of and in furtherance of such crime;

(3) That Celina Petersen was not a participant in the crime of [a]ssault in the [s]econd [d]egree; and

(4) That any of these acts occurred in the State of Washington.

Jaime-Rodriguez contends that by omitting the words “or an accomplice” from element (1) of this instruction, the trial court effectively required the State to prove Jaime-Rodriguez assaulted Petersen himself. It is well-established that when an element that increases the burden of proof is added to a jury instruction, it becomes the law of the case if the State does not object. State v. Hickman, 135 Wn.2d 97, 102, 105, 954 P.2d 900 (1998). But Hickman does not control here because that case did not address accomplice liability.

Jaime-Rodriguez’s argument was effectively rejected by our Supreme Court in Teal. In that case, the defendant claimed the robbery “to convict” instruction required the State to prove he had committed the crime as the principal because the words “or an accomplice” were missing from the instruction. Teal, 152 Wn.2d at 337. The court held that accomplice liability is neither an element of the crime, nor an alternative means of committing a crime. Id. at 338. And it further held that the jury need not reach unanimity on whether a defendant acted as a principal or

an accomplice in the crime for which the defendant was charged as long as it is convinced the alleged crime was committed and the defendant participated in it. Id. at 338-39. For these reasons, when a separate instruction describes accomplice liability, a “to convict” instruction need not include a reference to accomplice liability, and the State may rely on this theory. Id. at 339.

As in Teal, the jury instructions here accurately stated the law and did not add an unnecessary element to Instruction 18. Under Instruction 18, the jury had to find that Jaime-Rodriguez committed the crime of assault. The jury could have decided Jaime-Rodriguez did so personally. Or under the separate accomplice liability instruction,⁴ the jury could have found that Jaime-Rodriguez committed the crime of assault as an accomplice. CP 93. And Instruction 17 told the jury that Jaime-Rodriguez could be found guilty of murder in the second degree if in the course of the assault, he or an accomplice caused Petersen’s death.

⁴ Instruction 9 provided:

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

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

It is true that the “to convict” instruction mentioned accomplice liability in element (2) of the instruction. But it did so to be consistent with Instruction 17. And neither Hickman nor Teal stand for the proposition that when accomplice liability is mentioned in one element of a “to convict” instruction, it cannot apply to crimes described in other elements of the same instruction.

We conclude the State did not have the burden of proving that Jaime-Rodriguez acted as the principal in Petersen’s assault.

Sufficiency of the Evidence of Felony Murder

Jaime-Rodriguez next argues that there was insufficient evidence for a jury to convict him of second degree murder as either a principal or an accomplice. “A reviewing court will reverse a conviction for insufficient evidence only if no rational trier of fact could find that the State met its burden.” Teal, 152 Wn.2d at 337. When a defendant challenges the sufficiency of the evidence, he admits the truth of all of the State’s evidence. State v. Cardenas-Flores, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). We view the evidence in the light most favorable to the State, drawing reasonable inferences in the State’s favor. Id. at 265-66. “Circumstantial and direct evidence are to be considered equally reliable.” Id. And credibility determinations are left to the jury and are not subject to review. Id.

Here, there was ample evidence Jaime-Rodriguez actively participated in Petersen’s assault. Parada-Rivera and Jaime-Rodriguez both admitted that Jaime-Rodriguez was present at some point in the early hours of February 15. And while Parada-Rivera claimed Jaime-Rodriguez left the scene before he began hitting Petersen, Carroll, the security videos, and Hall told a different story. Carroll

saw Jaime-Rodriguez immediately before she heard Petersen's screams and calls for help. Carroll later saw Jaime-Rodriguez placing a large object in the alley where Petersen's body was found. A security video, in which Carroll is walking toward the Union 76 gas station, demonstrated she was present in the area at the same time as Jaime-Rodriguez and Parada-Rivera. Based on a correlation of when Carroll was seen in the video footage and her testimony that she saw Jaime-Rodriguez with two other people on the street and then later in the alley, there is ample circumstantial evidence that Jaime-Rodriguez did not leave the scene before the assault.

Additionally, in a police interview, Jaime-Rodriguez told detectives that he saw Petersen being beaten, that he heard Petersen's screams, and that he saw Petersen's body in the alley. He admitted to police he told the men beating Petersen to "hurry" and get their money. This is direct evidence that Jaime-Rodriguez was actively encouraging his friends to hasten their assault of Petersen. Jaime-Rodriguez's admission that he was in the alley that morning for any amount of time, along with the security videos, contradicted Parada-Rivera's testimony that Jaime-Rodriguez left and returned to Parada-Rivera's apartment before the murder. Parada-Rivera's account was further put into question based on Jaime-Rodriguez's admission that he saw Petersen in the alley and assumed she was unconscious.

The extensive nature of Petersen's injuries also supports an inference that more than one individual was involved in her assault. Petersen had abrasions and contusions on her hands, upper back, face, neck, hips, and buttocks. There were

30 pattern-type abrasions on her buttocks, arguably consistent with the type of marks left by being beaten with a belt. In addition to the stab wound penetrating her skull, she had stab wounds to her right hand and to the left side of her head. Petersen also had fractured ribs, and there was evidence of manual strangulation around her neck and significant blunt force trauma to her head, the latter causing fractures to her skull. When the medical examiner examined Petersen's skull to identify the implement used, the skull was so fragmented she could not completely reconstruct it.

This evidence is consistent with a brutal attack by more than one individual—one pummeling Petersen's body and face, another beating her with a belt, and a third stabbing her with the screwdriver. The security video supports an inference that all three men—Jaime-Rodriguez, Parada-Rivera, and the third unidentified man—participated in the assault. The security cameras captured the three men following Petersen at 4:45 a.m., captured Carroll in the vicinity of the alley where she saw Jaime-Rodriguez at approximately 5:22 a.m., and captured Jaime-Rodriguez, with Parada-Rivera and the third man, walking away from the alley at 5:26 a.m.

Finally, Hall testified Jaime-Rodriguez admitted to beating Petersen because she stole money from him. While Jaime-Rodriguez attacks this testimony, the jury was aware that Hall's credibility was at issue. Hall testified against Jaime-Rodriguez in exchange for an agreement with the State to reduce a robbery charge, thereby eliminating the risk he would be convicted of his third strike offense and sentenced to life in prison. The jury was aware of this deal and

had to assess Hall's credibility in light of it. We will not review the jury's credibility determination on appeal. Duc Tan v. Le, 177 Wn.2d 649, 670, 300 P.3d 356 (2013) ("Deference to factual determinations that turn on credibility assessment is essential because of the fact finder's unique opportunity to observe and weigh witness testimony.").

Based on the testimony of Hall and Carroll, as well as the security videos and Jaime-Rodriguez's own admissions, a reasonable jury could conclude that Jaime-Rodriguez was guilty of second degree felony murder as either a principal or an accomplice. We thus conclude that the State presented sufficient evidence for a jury to conclude that Jaime-Rodriguez committed the crime of assault against Petersen and that he or an accomplice caused her death in the course of that assault.⁵

Defense Motion for Mistrial

Finally, Jaime-Rodriguez contends the trial court abused its discretion by denying his motion for a mistrial, which was based on Hall mentioning that Jaime-Rodriguez was in jail for assaulting his girlfriend, Liz. Because the trial court struck the inadmissible testimony and instructed the jury to disregard it, Jaime-Rodriguez was not prejudiced by this testimony, and the trial court did not abuse its discretion in denying the motion for a mistrial.

"The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be

⁵ Jaime-Rodriguez challenges the sufficiency of the evidence supporting the vacated murder conviction in count 1. In light of our conclusion that sufficient evidence supports the felony murder conviction in count 2, we need not address his challenge to count 1.

fairly tried.” State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). “We review the trial court’s denial of a mistrial for abuse of discretion, and we find abuse only ‘when no reasonable judge would have reached the same conclusion.’” Id. (internal quotation marks omitted) (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). “In determining the effect of an irregularity, we examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.” Hopson, 113 Wn.2d at 284. In certain situations, “curative instructions cannot remove the prejudicial effect of evidence of other crimes.” Id. But, “in the context of a given case, evidence of other crimes may not affect the outcome of the trial.” Id. at 285. In those cases, the trial court may properly deny the defendant’s motion for a mistrial. Id.

Over six months after Petersen’s murder, Hall and Jaime-Rodriguez were held in the same housing unit at the King County Jail. The State argued that while in jail, Jaime-Rodriguez told Hall that “he had done the same thing to [Petersen] as he did to Liz and that he hoped he did not get charged with murder.” Jaime-Rodriguez sought to exclude any testimony that Jaime-Rodriguez had committed acts of domestic violence against his girlfriend, Liz. But the State sought to introduce this statement through Hall, as it put into context the reason why Jaime-Rodriguez feared being charged with Petersen’s murder. The trial court excluded any reference to domestic violence, with the State’s agreement. Defense counsel did not specifically object to or raise a concern about the specific statement the State indicated it wished to introduce through Hall.

In the State's opening, the prosecutor described Jaime-Rodriguez's conversations with Hall, stating:

They had a second conversation. This was in mid to late September of 2015 when they were both in King County Jail together. Hall noticed that [Jaime-Rodriguez] was acting strangely. He wasn't coming out of his room, and so he went and he asked him what was wrong. [Jaime-Rodriguez] told him that he was afraid that he was going to be picked up and charged with [Petersen's] murder. He said that he had done the same thing to a woman named Liz as he had done to [Petersen], and that was why he was worried he would be charged with murder.

Jaime-Rodriguez raised no objection to this statement.

Before Hall took the stand, the State informed the trial court it had reminded Hall not to mention Jaime-Rodriguez's domestic violence history. Defense counsel corroborated this, noting he had seen the prosecutor reminding Hall not to mention domestic violence in his testimony.

During Hall's testimony about the conversation with Jaime-Rodriguez in jail, Hall testified Jaime-Rodriguez said he was stressed because he "beat up Liz." The trial court interrupted Hall's testimony, as defense counsel objected to this statement. The trial court instructed the jury to disregard the statement and any comments about "Liz."

Jaime-Rodriguez moved for a mistrial based on this statement. The trial court denied the motion, finding Hall had not intentionally violated any order in limine, and the curative instruction resolved any potential prejudice. The trial court instead offered to give a further curative instruction, but there is no indication that defense counsel accepted the court's offer.

Jaime-Rodriguez contends the trial court abused its discretion when it denied his motion for a mistrial. He further argues the trial court used the wrong

standard, namely whether the improper statement was intentional, instead of whether the statement rendered the proceeding unfair. We disagree with Jaime-Rodriguez's characterization of the trial court's analysis and conclude the trial court correctly determined that Hall's statement did not require a mistrial.

When Jaime-Rodriguez moved for a mistrial, his counsel noted the court had ruled that there would be "no discussions about domestic violence incident[s], nor assaults on Liz, the individual who was identified." Counsel maintained Hall was advised of the court's ruling before taking the stand, and accused Hall of engaging in "a deliberate act . . . to get in damaging testimony against [Jaime-Rodriguez] because of the animosity he has towards him." Counsel argued the intentional statement prejudiced Jaime-Rodriguez.

In response to this specific argument, the State argued there was no basis to contend the statement was intentional. And it argued it was under the impression that it was permitted to elicit testimony from Hall that Jaime-Rodriguez told him, "I did the same to Liz." The State reminded the court that the prosecutor had actually referred to this specific testimony in opening without any objection by the defense.

The trial court ruled, "I don't think we are at mistrial level." In responding to the defense contention that Hall knowingly injected inadmissible evidence into the record, the court noted that although there was clear direction to counsel that there would be no mention of domestic violence incidents, the court did not perceive Hall as purposefully trying to violate the court's order in limine. Thus, the reason the

court found no intentional misconduct on the part of the witness was only because the accusation was raised by the defense.

But the court went further and discussed the issue of whether the statement made the proceeding so unfair as to warrant a mistrial. It noted that the court caught the testimony quickly and that the jury was immediately told to disregard it. And while Carroll testified earlier in the case that she knew Jaime-Rodriguez through a former girlfriend named Liz, the reference was brief. The trial court further noted it provided a curative instruction and was willing to give a further written instruction at the close of trial if the defense wished. The court clearly concluded it was unlikely the jury would be influenced by Hall's statement such that a mistrial was the only available remedy.

Although we question whether Jaime-Rodriguez preserved the issue properly by failing to object to the State's opening statement, we nevertheless conclude that Hall's single comment was not so prejudicial that nothing short of a new trial can ensure that Jaime-Rodriguez receives a fair trial.

This case is similar to Hopson. There, the prosecution located a last minute witness, and when asked how long the victim had known the defendant, this witness indicated the defendant had been in prison, stating that the victim had known him for "three years before he went to the penitentiary the last time." Hopson, 113 Wn.2d at 275-76. Defense counsel objected, and the trial court instructed the jury to disregard the witness's answer. Id. at 276. Defense counsel subsequently moved for a mistrial. Id. The prosecutor told the court while she had time to repeatedly inform the other witnesses not to refer to the defendant's

criminal history—the late arrival of this witness did not give the prosecutor time to make the same impression regarding her testimony. Id. The trial court denied the motion for a mistrial, concluding that “the witness had volunteered the information and that there was not any indication that it was suggested by the State by any question.” Id. (internal quotation marks omitted).

Our Supreme Court agreed, concluding (1) the “irregularity was not serious enough to materially affect the outcome of trial” because there was “no information concerning the nature or number of prior convictions, and the jury had overwhelming evidence favoring conviction”; (2) the defense had not submitted any evidence of prior criminal history, so the evidence was not cumulative; and (3) the trial court issued a curative instruction to the jury, telling them to disregard the statement. Id. at 286.

Here, Hall’s brief comment that Jaime-Rodriguez “beat up Liz” was not serious enough to materially affect the outcome of this trial. This testimony did not imply that Jaime-Rodriguez was in jail for domestic violence or that Jaime-Rodriguez had a history of domestic violence. As the State points out, Hall did not provide any details as to the alleged domestic violence incident after he was stopped by the trial court. The State did not elicit this testimony. And here, both the State and the defense noted on the record that Hall was reminded not to mention domestic violence in his testimony. Furthermore, there was no evidence presented regarding Jaime-Rodriguez’s criminal history, so the evidence was not cumulative. Finally, the trial court instructed the jury to disregard Hall’s comment immediately after Hall said it. Under the reasoning in Hopson, the trial court

correctly concluded the statement did not rise to “mistrial level,” and it did not abuse its discretion when it denied Jaime-Rodriguez’s motion for a mistrial.

Affirmed.

Andrus, A.C.J.

WE CONCUR:

Mann, C.J.

Leach, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79189-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 5, 2020

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