FILED
Court of Appeals
Division I
State of Washington
6/30/2022 4:42 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
7/1/2022
BY ERIN L. LENNON
CLERK

Supreme Court No. 101062-1
Court of Appeals No. 83493-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LANCE GENE FRANCOISE ROUGEAU,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Lance Gene Francoise Rougeau requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Rougeau, No. 83493-2-I, filed on May 31, 2022. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Cases from this Court and the Court of Appeals repeatedly affirm that a jury may not be instructed on a legal theory not support by the evidence. Further, the government may not encourage the jury to rely on speculation. Here, the Court of Appeals affirmed the trial court's decision to instruct the jury on accomplice liability despite the absence of evidence to support it. The Court of Appeals' opinion conflicts with prior case law, warranting review. RAP 13.4(b)(1), (2), (4).

2. A trial court may not admit evidence that is only marginally relevant and has a significant potential to arouse an emotional response in the jurors. The trial court violated this

principle by admitting evidence that the police found a baby who had been left alone for days in the burglarized house. The Court of Appeals' endorsement of that decision warrants review. RAP 13.4(b)(1), (2), (4).

3. A trial court abuses its discretion in denying a motion for a mistrial if the defendant has been so prejudiced by a witness's unexpected, improper testimony that nothing short of a new trial can ensure a fair trial. Here, a law enforcement witness became emotional and nearly cried when he testified about following the infant in the ambulance to the hospital. The witness's emotional testimony encouraged the jury to render a verdict based on emotion rather than reason. The court abused its discretion in denying Mr. Rougeau's motion for a mistrial.

4. The prosecutor deliberately appealed to the jurors' passions and prejudices in opening and closing statements by repeatedly referring to the baby who had been left alone in the burglarized house, and referring to evidence not presented at trial. Although the Court of Appeals agreed the prosecutor

committed misconduct, it concluded the misconduct was harmless. That conclusion warrants review. RAP 13.4(b)(1), (2), (4).

5. A law enforcement witness testified that Mr. Rougeau's fingerprints were "already in our records." The trial court agreed the jury might infer from the testimony that Mr. Rougeau had previously been in trouble with the law. The court abused its discretion in denying Mr. Rougeau's motion for a mistrial.

6. Cumulative error denied Mr. Rougeau a fair trial.

C. STATEMENT OF THE CASE

Early on the morning of October 24, 2017, someone found Linda Sweezer's body on a road near Bonney Lake. 2/20/20RP 1286-87. A nearby resident provided the police with a copy of a video recorded by security cameras affixed to his house. 2/10/20RP 632-35; Exhibit 327. The video shows that at around 1:30 a.m. that night, two vehicles stopped at the location where the body was found. 2/11/20RP 784-88; CP 2. A brief

flash of light can be seen that the police believed was the attempted burning of the body. CP 2. The two vehicles then drove away. 2/11/20RP 787-88; CP 2. The quality of the video is too poor to identify either of the vehicles or anyone inside. Exhibit 327.

A medical examiner testified the cause of death was manual strangulation. 2/27/20RP 2002-03. Ms. Sweezer also suffered several apparent stab wounds and non-life-threatening blunt force trauma to her head. 2/27/20RP 1993-2000.

Ms. Sweezer's Nissan sedan was found abandoned a couple of miles away. 2/19/20RP 1165. A witness encountered Mr. Rougeau next to the Nissan earlier that morning. 2/11/20RP 792-97. Mr. Rougeau said he had run out of gas. 2/11/20RP 796-97. Evidence obtained during a search of the car corroborated that Mr. Rougeau had been present in the car. But the evidence also suggested other individuals had also been in the car. 2/13/20RP 146, 169; 2/24/20RP 1494; 2/27/20RP 1952-55, 1971-75, 1882-96; 3/02/20RP 2061.

When the police searched Ms. Sweezer's house the next day, they found her five-month-old granddaughter lying on the bed upstairs. 2/10/20RP 667; 2/12/20RP 1067. The baby was severely dehydrated. 2/12/20RP 1075-78. The State was permitted to admit evidence of the baby at trial, over objection, under the theory that the baby's state of dehydration helped to establish the timeline of events. 2/03/20RP 97-103. Undercutting that theory was a physician's testimony establishing that the baby could have been left alone for anywhere from 36 to 60 hours. 2/12/20RP 1079-80.

During opening and closing statements, the deputy prosecutor repeatedly referred to the baby in an effort to appeal to the jury's emotions, despite the trial court's repeated admonishments that the prosecutor could use the evidence only to establish a timeline of events. 2/10/20RP 558, 564, 585; 3/04/20RP 2254. The prosecutor also referred to irrelevant information not presented at trial by telling the jury Ms.

Sweezer had just adopted her granddaughter and took her new role "seriously." 3/04/20RP 2254.

Inside the house, on the kitchen floor, the police found a United States Navy lanyard that had a bloodstain containing Ms. Sweezer's DNA and also the DNA of Mr. Rougeau. 2/13/20RP 91; 2/27/20RP 1959-60. A bloodstain on the carpet close to the kitchen also contained Mr. Rougeau's DNA. 2/13/20RP 101; 2/27/20RP 1955-56. But the evidence also showed that other individuals, never identified, were present in the house. Two similar-looking nylon head coverings, one with blood on it, were found on the kitchen floor and seemed out of place. 2/12/20RP 952-54; 2/13/20RP 91, 107-08; 2/19/20RP 1125, 1149-50. These items were not tested for DNA. 2/13/20RP 109-10; 2/19/20RP 1150; 3/02/20RP 2072-73. DNA from four individuals, too many to identify, was found on the handle of a lockbox in the office. 2/27/20RP 1970.

Later on the morning of October 24, someone broke into the home of Dixie Reynolds in Auburn, close to where Ms.

Sweezer's body was found, and stole Ms. Reynolds's car and her daughter's backpack. RP 2/19/20RP 1112; 2/24/20RP 1504-13, 1535. When the police arrested Mr. Rougeau at his mother's apartment, they found Ms. Reynolds's daughter's backpack inside the apartment. 2/12/20RP 957; 2/25/20RP 1570, 1677-80. The backpack contained two sets of keys, one for Ms. Reynolds's car and one for Ms. Sweezer's Nissan. 2/12/20RP 957; 2/25/20RP 1570, 1677-80.

Several days later, after Mr. Rougeau's arrest, the police found Ms. Reynolds's car in Tacoma. 2/19/20RP 1177, 1183; 2/24/20RP 1434, 1491. The police did not process the car for evidence because "a number of individuals . . . had access to that vehicle." 2/24/20RP 1435. Also after Mr. Rougeau's arrest, someone used Ms. Sweezer's credit card multiple times in multiple locations. 2/25/20RP 1578-79.

When the police arrested Mr. Rougeau, his brother Jason told them that when Mr. Rougeau returned home the night before, he said something had "happened that he was not

involved with and [he] had to get away but they would not let him leave." 3/02/20RP 2113.

Mr. Rougeau had scratches on his forearm, hand, and leg. 2/26/20RP 1834-37. One of his socks had blood on it containing a mixture of DNA from four individuals, which was too complex to analyze. 2/27/20RP 2018.

The State charged Mr. Rougeau with one count of first degree felony murder based on first degree burglary and a separate count of first degree burglary of Ms. Sweezer's home. The State also charged one count of residential burglary and one count of theft of a motor vehicle regarding the burglary of Ms. Reynolds's home. CP 28-30.

At trial, over defense objection, the trial court instructed the jury on accomplice liability. 3/02/20RP 2152-66, 2168-69; CP 140, 143, 148.. The State's theory was that Mr. Rougeau acted as a principal but the prosecutor acknowledged the evidence showed other people could have been present in Ms. Sweezer's home. 3/02/20RP 2152.

During deliberations, the jury asked for clarification of the instruction defining accomplice liability. CP 166-67. In response, the court simply told the jury to “reread your jury instructions and continue to deliberate.” CP 168.

The jury found Mr. Rougeau guilty of all counts as charged. CP 169-73; 3/06/20RP 2343-44. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The court erred in instructing the jury on accomplice liability because the evidence did not support it.

The trial court erred in instructing the jury on accomplice liability because the evidence did not support a finding that either Mr. Rougeau or anyone else acted as an accomplice. The jury’s inquiry requesting clarification of the accomplice liability instruction, and their statements to counsel after the verdict, demonstrate the erroneous instruction likely contributed to the verdict. Mr. Rougeau is entitled to a new trial.

Due process requires that jury instructions, read as a whole, correctly state the relevant law. State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); U.S. Const. amend. XIV; Const. art. I, § 3. Due process also requires the State to prove every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). Jury instructions that relieve the State of its burden of proof require reversal. Cronin, 142 Wn.2d at 580.

"[I]t is prejudicial error to submit an issue to the jury where there is not substantial evidence concerning it." State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Speculation about potential criminal culpability is not a basis for a jury instruction. "'[S]ome evidence must be presented affirmatively to establish'" the theory for which a jury instruction is sought. State v. Rodriguez, 48 Wn. App. 815, 820, 740 P.2d 904 (1987) (quoting State v. Wheeler, 22 Wn. App. 792, 797, 593 P.2d 550 (1979)).

The court may not instruct the jury on a legal principle that is factually "outside of the issues in the case," because it confuses jurors by "introduc[ing] a rule of law inapplicable to the facts." Bowen v. Odland, 200 Wash. 257, 263, 93 P.2d 366 (1939).

Moreover, the prosecution may not encourage the jury to rely on speculation. Evidence of criminal liability must not rest on speculation, surmise or conjecture. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013); State v. Hummel, 196 Wn. App. 329, 282 P.3d 592 (2016).

Here, the State requested a jury instruction on accomplice liability. 3/02/20RP 2151-52. This requested instruction necessarily invited jurors to determine Mr. Rougeau's culpability as an accomplice. Yet the prosecution conceded it had no evidence that Mr. Rougeau or anyone else acted as an accomplice. 3/02/20RP 2155-68.

Because the evidence did not support an instruction on accomplice liability, the court should not have provided one.

For a person to be liable as an accomplice, the person must aid, agree to aid, solicit, command, or encourage a person to commit the charged crime while knowing that it will promote or facilitate the crime. RCW 9A.08.030. If convicted as an accomplice, the 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.'" State v. Carter, 154 Wn.2d 71, 78, 109 P.3d 823 (2005) (quoting State v. Graham, 68 Wn. App. 878, 881, 846 P.2d 578 (1993)).

Being present at the scene of a crime is insufficient to prove accomplice liability, even if the person's presence "bolsters" or "gives support" to the perpetrator. In re Wilson, 91 Wn.2d 497, 491-92, 588 P.2d 1161 (1979); State v. Asaeli, 150 Wn. App. 543, 568-69, 208 P.3d 1136 (2009).

Whether or not the alleged accomplice was present at the scene, the State must prove he did something in association with the principal to accomplish the crime. State v. Boast, 87 Wn.2d 447, 456, 553 P.2d 1322 (1976). "There is no aiding and

abetting unless one associates himself with the venture and participates in it as something he wishes to bring about, and by action to make it succeed." Id. The State must prove the accomplice "shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed." Id.

Here, the court erred in providing an instruction on accomplice liability because no evidence showed that Mr. Rougeau acted in concert with anyone else or shared with anyone "a community of unlawful purpose at the time the act [wa]s committed." Boast, 87 Wn.2d at 456.

First, although the evidence suggested someone other than Mr. Rougeau was present at some point in Ms. Sweezer's home, nothing established any connection between that person and Mr. Rougeau. The identity of a possible other burglary suspect was never established. The police lifted several fingerprints and DNA samples from the home that were never identified. 2/13/20RP 133-34; 2/27/20RP 1866; 3/02/20RP

2058. The handle of the open lockbox in the office had the DNA of four unidentified individuals. 2/27/20RP 1970. And the police found a broken piece of jewelry and two nylon head coverings, one with blood on it, on the kitchen floor but they were never linked to anyone. 2/12/20RP 952-54; 2/13/20RP 91, 107-08; 2/29/20RP 1125, 1149-50.

Second, although the evidence suggested other unidentified individuals rode in Ms. Sweezer's car, no evidence linked that person or persons to Mr. Rougeau. 2/13/20RP 146, 169; 2/24/20RP 1494; 2/27/20RP 1882-96, 1952-53, 1974-75.

Third, the evidence suggested two or more individuals were present when Ms. Sweezer's body was deposited on the road. The video recorded by the security camera showed two vehicles stopped at the location but it is impossible to identify any person on the video. 2/11/20RP 784-88; Exhibit 327. No evidence established that the individuals in those vehicles had earlier worked in concert to commit the burglary and the murder of Ms. Sweezer.

Finally, the evidence established that other people were in possession of property stolen during the two burglaries. Someone used Ms. Sweezer's credit card, and drove Ms. Reynolds's car, after Mr. Rougeau's arrest. 2/25/20RP 1578-79; 2/29/20RP 1177, 1183; 2/24/20RP 1434-35, 1491. Those individuals were never identified and nothing established any connection between them and Mr. Rougeau.

Providing an instruction on accomplice liability merely encouraged the jury to rely on speculation and conjecture. The court's decision to provide the instruction was reversible error.

In State v. Longshore, the Court of Appeals reversed a murder conviction where the trial court gave an accomplice instruction but the evidence did not support it. 197 Wn. App. 1019, 2016 WL 7403795 (2016) (unpublished, nonbinding decision cited as persuasive authority under GR 14.1). During deliberations, the jury asked whether, if a person were found liable as an accomplice, he would be guilty of either first or second degree murder. Id. at *5. The court held that "[t]he

jury's confusion and improper consideration of Longshore's accomplice liability is evidenced by its question during deliberations." Id. As a result, the court could not be convinced beyond a reasonable doubt the erroneous instruction did not contribute to the verdict. Id.

Similarly, here, during deliberations, the jury asked for clarification of the accomplice liability instruction:

> In reference to being an accomplice, the last sentence [of instruction number 11] contradicts the entire definition/explanation of what an accomplice is. It says the word 'aid' means to assist or be present in the commission of a crime but the last sentence contradicts the definition provided. Please elaborate.

CP 166-67. In addition, after the verdict, the jurors told counsel directly that they had rendered a verdict "based upon the accomplice liability instruction." 4/24/20RP 2356-57; CP 175.

The jury's inquiry and their comments to counsel demonstrate they relied upon a theory of accomplice liability in convicting Mr. Rougeau. This Court cannot be certain beyond a

reasonable doubt the erroneous instruction did not contribute to the verdicts. The convictions must be reversed.

2. The trial court abused its discretion in admitting evidence that the police found Ms. Sweezer's infant granddaughter in her house.

Contrary to the trial court's ruling and the Court of Appeals' opinion, the fact the police found an infant in Ms. Sweezer's home was not relevant to prove any element of the crimes. Given its great potential to cause unfair prejudice, the court abused its discretion in admitting the evidence.

To be relevant, evidence must meet two requirements: (1) it must have a tendency to prove or disprove a fact, and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law. State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987).

Here, the State claimed the fact the baby had probably been left alone in the house for 36 to 60 hours was relevant to establish the timing of the burglary. 2/03/20RP 104-06. But the estimated amount of time the baby was left alone is very broad,

undermining the relevance of the evidence to establish a timeline. Moreover, the precise timing of the burglary was of no consequence to the action. Mr. Rougeau did not present an alibi defense. The State made no effort to establish his whereabouts at any time prior to the early evening of October 23. 2/11/20RP 887-91; 2/12/20RP 1006. The precise timing of the burglary had no bearing on the State's theory of the case. Any marginal relevance of the evidence was outweighed by the danger of unfair prejudice created by allowing the jury to hear about the infant.

In deciding whether to exclude evidence on the ground of unfair prejudice, the trial court should consider the availability of other means of proof and whether the fact the evidence is offered to prove is disputed. State v Cameron, 100 Wn.2d 520, 528, 674 P.2d 650 (1983).

The State had other means of proving the timing of the burglary. Ms. Sweezer's employer testified she was expected at work at 9 a.m. on Monday, October 23, but did not show.

2/13/20RP 17-20. And she was wearing pajamas when her body was found. 2/25/20RP 1562, 1594. This evidence was sufficient to establish the burglary occurred before October 23 at 9 a.m., and probably occurred sometime at night. At what precise point before October 23 at 9 a.m. that the burglary occurred was not disputed by the defense and was not a material issue in the case.

Finally, the court considers the danger of unfair prejudice posed by the evidence. Cameron, 100 Wn.2d at 529. Evidence is "unfairly prejudicial" if it "is likely to arouse an emotional response rather than a rational decision among the jurors." Rice, 48 Wn. App. at 13.

There should be no question that allowing the jury to hear that a five-month-old baby was left alone in the house after a home-invasion burglary during which her grandmother was killed was highly likely to arouse an emotional response among the jurors. In fact, the evidence did arouse an emotional response in one of the law enforcement witnesses on direct examination. 2/12/20RP 951, 976. The likelihood the evidence

aroused an emotional response in the jurors was increased because of the prosecutor's repeated references to the baby in opening and closing statements.

Because the evidence regarding the baby was not probative or necessary to prove any material issue in the case, and was likely to arouse an emotional response among the jurors, the court abused its discretion in admitting it. Rice, 48 Wn. App. at 13.

Additionally, the trial court abused its discretion in denying Mr. Rougeau's motion for a mistrial after the law enforcement witness became emotional when testifying about the baby.

On direct examination, a police detective testified he followed the ambulance carrying the infant to the hospital. 2/12/20RP 951. The prosecutor asked why and the detective responded, "I think for just a brief time I forgot I was a police officer and I became a grandpa." 2/12/20RP 951. After the detective's testimony, defense counsel moved for a mistrial,

explaining that the detective became emotional while testifying—that he was “[a]lmost crying.” 2/12/20RP 976. The court denied the motion. 2/12/20RP 977.

A court abuses its discretion in denying a motion for a mistrial if the defendant has been so prejudiced by a witness’s unexpected, improper testimony that nothing short of a new trial can ensure the defendant will be tried fairly. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). A trial court’s denial of a motion for mistrial will be overturned if there is a substantial likelihood that the error prompting the request for a mistrial affected the jury’s verdict. Id.

The court abused its discretion in denying the motion for a mistrial because the detective’s emotional testimony undoubtedly impacted the jury unfairly. The testimony improperly encouraged the jury to render a verdict based on emotion rather than reason.

It is probable the outcome of the trial would have been materially affected had the jury not heard about the baby. It was

likely very difficult for the jurors to set aside their emotional reactions to the evidence and decide the case based on reason rather than emotion. The erroneous admission of the evidence was not harmless and the convictions must be reversed.

3. The prosecutor committed misconduct by repeatedly appealing to the passions and prejudices of the jurors in opening and closing statements.

The Court of Appeals agreed the prosecutor committed misconduct in closing argument "by discussing evidence not admitted at trial and by making statements which served no purpose other than to encourage an emotional reaction from the jury." Slip Op. at 2. The court's conclusion the misconduct was harmless is erroneous and warrants review by this Court.

The prosecutor repeatedly referred to the baby in a manner designed to elicit an emotional reaction among the jurors. He immediately began his opening statement by declaring that Ms. Sweezer had just obtained custody of her granddaughter when she was killed. 2/10/20RP 558. He referred again to the baby in a dramatic fashion when he said

that, when the police found her, she "not moving and was very lethargic, but she was alive." 2/10/20RP 564.

The prosecutor also referred to the baby in unnecessary and gratuitous ways in closing argument. He began by again informing the jury of the irrelevant fact—which was not supported by any evidence presented at trial—that Ms. Sweezer had just gone through the process of adopting her granddaughter when she was killed. 3/04/20RP 2254. He also averred Mr. Rougeau's blood was on the carpet because Ms. Sweezer "fought. She fought for her granddaughter." 3/04/20RP 2280.

Finally, the prosecutor again appealed to the jurors' passions and prejudices when he reminded them that the medical examiner had testified he could not rule out the small possibility that Ms. Sweezer was still alive when her body was set on fire. 3/04/20RP 2265. The prosecutor elaborated, "He believed she was dead. I think everyone can hope she was in fact at that point as well." 3/04/20RP 2265.

Defense counsel objected to all of these statements, arguing the prosecutor was improperly appealing to the passions and prejudices of the jurors. 2/10/20RP 583; 3/04/20RP 2254, 2265, 2280. The court overruled the objections. 2/10/20RP 585; 3/04/20RP 2254, 2265, 2280.

A defendant who timely objects to a prosecutor's statements at trial will prevail on a claim of prosecutorial misconduct if he shows the conduct was both improper and prejudicial in the context of the entire trial. Loughbom, 196 Wn.2d at 70. Prosecutorial misconduct is prejudicial if it had a substantial likelihood of affecting the jury's verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). In analyzing prejudice, the misconduct must be viewed cumulatively rather than in isolation. Glasmann, 175 Wn.2d at 707. The focus is on the impact of the misconduct, not on the otherwise properly admitted evidence. State v. Walker, 182 Wn.2d 463, 479, 341 P.3d 976 (2015).

Contrary to the Court of Appeals' conclusion, the prosecutor's misconduct was prejudicial. It is likely the prosecutor's statements affected the jury's verdict by encouraging them to make a decision based on emotion rather than reason. In fact, as defense counsel observed, when the prosecutor mentioned in opening statement that the baby had been left alone in the house, one of the jurors had a visible emotional reaction. 2/10/20RP 583. That the jury considered convicting Mr. Rougeau under a theory of accomplice liability, as discussed above, suggests the jury was not fully persuaded by the State's evidence that Mr. Rougeau acted as a principal. This Court cannot conclude the prosecutor's misconduct did not affect the verdicts. The convictions must be reversed.

4. The court abused its discretion in denying Mr. Rougeau's motion for a mistrial after a law enforcement witness testified in a manner that implied Mr. Rougeau had a criminal history.

A law enforcement witness testified he compared the fingerprints found at the scene to the known fingerprints of Mr. Rougeau in their database. 2/26/20RP 1841, 1845. When asked

by the prosecutor if those prints were obtained when Mr. Rougeau was booked into jail in the current case, the witness responded, "These were already in our records." 2/26/20RP 1845. Defense counsel moved for a mistrial, arguing the testimony was unduly prejudicial because it suggested Mr. Rougeau had a criminal history. 2/26/20RP 1846. The court agreed the testimony implied Mr. Rougeau had been arrested previously but nonetheless denied the motion for a mistrial. 2/26/20RP 1847-48.

In doing so, the court abused its discretion because the jury likely inferred that Mr. Rougeau had a criminal history.

It is generally impermissible for the court to admit evidence that a person has been in trouble with the law on other occasions because it is unduly prejudicial. Arrests are unproven allegations and there is no way to know whether the alleged crime occurred. State v. Acosta, 123 Wn. App. 424, 434, 98 P.3d 503 (2004). Testimony about prior police contacts implies

a person’s bad character and propensity for being on the wrong side of the law. Id.; ER 404(b).

In State v. Sanjurjo-Bloom, at trial in a shoplifting case, a police officer testified he recognized the defendant in the surveillance video from previous interactions he had with him. 16 Wn. App. 2d 120, 123-24, 479 P.3d 1195 (2021). The court concluded the testimony introduced unfair prejudice because of the risk the jury would conclude the prior contacts with the police evidenced prior bad acts, even though the witness did not elaborate on the nature of the prior contacts. Id. at 1199. That the jury drew such a conclusion was shown by the jury’s inquiry submitted during deliberations. The jury asked about the nature of the defendant’s criminal history. Id. The jury’s inquiry demonstrated they likely considered Sanjurjo-Bloom’s apparent prior criminal acts in deciding whether he committed the current crime. Id. Thus, there was a reasonable probability the outcome of the trial would have been materially affected had the error not occurred. Id. at 1199.

Here, similarly, the jury likely inferred from the law enforcement witness's testimony that Mr. Rougeau's fingerprints were "already in our records," 2/26/20RP 1845, that Mr. Rougeau had prior contacts with the police and therefore had engaged in prior bad acts. The jury likely considered this history in deciding whether Mr. Rougeau committed the crimes charged.

As defense counsel noted, the prejudice caused could not be cured by a limiting instruction, as the bell had already been rung. 2/26/20RP 1849; 2/27/20RP 1856-57. Courts recognize that "evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994). Statistical studies show that even with a limiting instruction, a jury is more likely to convict a defendant with a criminal record. State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds, State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989). "It is

difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again." Id.

Nothing short of a new trial would cure the prejudice caused by the witness's unexpected and prejudicial testimony. The trial court abused its discretion in denying Mr. Rougeau's motion for a mistrial.

5. Cumulative error deprived Mr. Rougeau of a fair trial.

Due process entitles an accused in a criminal trial a fair proceeding. U.S. Const. amend. XIV; Const. art. I, § 3. An accumulation of errors may deprive a defendant of this right. Chambers v. Mississippi, 410 U.S. 284, 290 n.3, 93 S. Ct. 1038, 1043, 35 L. Ed. 2d 297 (1973). Reversal is warranted for cumulative error when the combination of errors denies the defendant a fair trial, even if each individual error is harmless by itself. State v. Salas, 1 Wn. App. 2d 931, 952, 408 P.3d 383 (2018).

The appellate court considers errors committed by the trial court as well as instances of misconduct by the prosecutor.

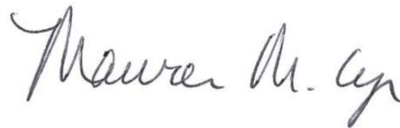
See State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

Here, the accumulation of errors described above together denied Mr. Rougeau of a fair proceeding. He is entitled to a new trial.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 30th day of June, 2022. I certify this brief complies with RAP 18.17 and contains 4,861 words, excluding those portions of the document exempted from the word count by the rule.



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State Bar Number 28724
Washington Appellate Project – 91052

FILED
5/31/2022
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. LANCE GENE FRANCOISE ROUGEAU, Appellant.	No. 83493-2-I UNPUBLISHED OPINION

VERELLEN, J. — Lance Rougeau challenges his convictions for first degree felony murder, first degree burglary, residential burglary, and theft of a motor vehicle. Rougeau focuses on limited evidence of his participation in the crimes to argue that the trial court erred in instructing the jury on accomplice liability. But where the evidence is sufficient to support the theory that the defendant acted as the principal, the evidence is also sufficient to support the alternative theory that the defendant's level of participation was adequate for accomplice liability. Because the evidence was sufficient to support the State's theory that Rougeau acted as the principal in committing the crimes and the alternative theory that he participated with others in committing the crimes, the jury instruction on accomplice liability was appropriate.

Rougeau also fails to establish the trial court abused its discretion in admitting evidence regarding Linda Sweezer's granddaughter and in denying Rougeau's two motions for mistrial.

Rougeau contends that the prosecutor committed misconduct in opening statement and closing argument. Here, the prosecutor committed misconduct in closing argument by discussing evidence not admitted at trial and by making statements which served no purpose other than to encourage an emotional reaction from the jury. But taking the prosecutor's statements in the context of the evidence as a whole, Rougeau does not establish a substantial likelihood that the prosecutor's misconduct affected the jury's verdict.

Because the trial court erred in failing to conduct a same criminal conduct analysis on two of Rougeau's convictions from 2014, we accept the State's concession and remand for resentencing. And because the prosecutorial misconduct is the only trial error committed here, that error alone is insufficient to implicate the cumulative error doctrine.

Therefore, we affirm the convictions and remand for resentencing.

FACTS

The issues require a detailed review of the evidence. On Monday, October 23, 2017, Linda Sweezer did not show up to work. That evening, Sherria Dooling-Rodin was at the Emerald Queen Casino in Tacoma. Dooling-Rodin saw Lance Rougeau in a black vehicle in the parking lot of the casino and asked him for a ride to Forest Canyon Road in the Auburn/Bonney Lake area. After arriving, Dooling-Rodin decided to drive to Seattle with Rougeau because he told her "he could get [her] heroin."[1] She drove to Seattle, where the two smoked crack cocaine. Dooling-Rodin drove them back to the

[1] Report of Proceedings (RP) (Feb. 11, 2020) at 895.

Auburn/Bonney Lake area, where they arrived around 12:00 a.m. Dooling-Rodin's friend, Chase Waters, picked her up with his friend Kyle Wason in the vehicle.

Dan Rouse, a resident who lived on 169th Avenue in Lakeland Hills, an Auburn neighborhood, testified that at approximately 1:30 a.m., his security cameras affixed to his house showed two vehicles stop near 166th, a flash of light, and the same two vehicles drive away. About 20 minutes later, Randall Jacks, a resident who lived near Rouse in Lakeland Hills, testified that his doorbell camera showed Rougeau wearing a Seahawks jersey walk onto his porch and then turn around.

At 2:00 a.m., Salvador Morales, who lived on 63rd Street in Lakeland Hills, was driving home when Rougeau, who was standing by a Nissan, waved him down. Rougeau told Morales that he needed gas. When Morales returned with gas, the Nissan still did not start. Rougeau used Morales's cell phone to call his mother and brother for help. Morales went home.

At 3:30 a.m., Jennifer Johnson was driving home from a friend's house when she saw the body of a woman lying in the road near 166th Avenue in Lakeland Hills. Johnson called 911. The woman was wearing a t-shirt and pajama pants and was partially covered by a blanket that had been lit on fire. The forensic investigators, working with the medical examiner, conducted a facial recognition identification examination and identified the body as Sweezer. The medical examiner testified that he was unable to estimate a time of death. He stated that Sweezer was stabbed at least 35 times, but that her cause of death was manual strangulation.

Joni Ly, another Lakeland Hills resident who lived about a mile and a half from where Sweezer's body was found, testified that at 4:35 a.m., his security camera affixed

to his house showed a man wearing a hat and a reflective safety vest walk toward his neighbor, Dixie Reynolds' house.

At 5:00 a.m., Reynolds heard the sound of her garage door motor. Reynolds saw someone drive her car away and realized that someone had rummaged through her bag and stolen her daughter's backpack. And when Reynolds went in her garage, she noticed that the window was open and that someone had removed the screen and placed it on the ground.

At 6:45 a.m., Jacks noticed that there was a Nissan parked oddly and abandoned near his house. Jacks contacted the Auburn Police Department. The responding officers ran the license plate of the black Nissan and discovered that Sweezer was the registered owner. Officers located Sweezer's Nissan about two and a half miles from where her body was found near 166th Avenue in Lakeland Hills.

The officers searched Sweezer's Nissan. Inside the vehicle, they found a phone belonging to Randy Mullins.[2] Cell phone data recovered from the device revealed that at 1:36 a.m. on October 24, the phone was close to where Sweezer's body was found, and at 1:51 a.m., the phone was close to where Sweezer's Nissan was found.

That evening, around 6:00 p.m., law enforcement arrested Rougeau at his mother's apartment in Kent where he and his brother, Jason Jordan, had been living. At the time of his arrest, Rougeau had scratches on his forearm, hand, and leg and was carrying a backpack with a "GoNavy.com" lanyard. Inside his mother's apartment,

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[2] Randy Mullins did not testify at trial, and the record on appeal contains no information about him.

officers found car keys to Sweezer's and Reynolds' vehicles and Reynolds' daughter's backpack. After Rougeau's arrest, Sweezer's credit card was used multiple times.

On October 25, 2017, at approximately 10:00 a.m., officers searched Sweezer's house in Kent. The officers noted that someone had removed a screen from the front window of her residence and placed it on the ground. The officers found blood stains and blood spatter on the kitchen floor, blood stains in the garage, a bloody knife on the kitchen counter, a "GoNavy.com" lanyard with blood on it, and blood stains on the carpet closest to the kitchen. Officers also found a broken piece of jewelry on the kitchen floor and noticed that the door to the lockbox was open. And the officers found Sweezer's severely dehydrated five-month-old granddaughter alive, lying on the bed upstairs. Dr. Joan Roberts, an attending physician at Seattle Children's Hospital, estimated that Sweezer's granddaughter was left alone for "between 36 and 60 hours."[3]

Forensic investigators testified that they found the DNA[4] of multiple individuals inside Sweezer's vehicle, that Rougeau's DNA was on the outside and inside of her vehicle, and that Sweezer's blood was in the trunk of her vehicle. Investigators also found Sweezer's blood on the knife, Sweezer's blood and Rougeau's DNA on the "GoNavy.com" lanyard in her kitchen, DNA from at least three individuals on the handle of the lockbox, Rougeau's DNA on the carpet closest to the kitchen, and blood on one of Rougeau's socks which contained the DNA of at least four individuals.

[3] RP (Feb. 12, 2020) at 1079.

[4] Deoxyribonucleic acid.

The State charged Rougeau with one count of first degree felony murder based upon first degree burglary, one count of first degree burglary, one count of residential burglary at Reynolds' house, and one count of theft of Reynolds' motor vehicle.

Before trial, Rougeau moved to exclude evidence of Sweezer's granddaughter as not relevant and overly prejudicial. The court denied Rougeau's motion in limine and admitted the evidence for the limited purpose of establishing a timeline of events. In opening statement, the prosecutor made several references to Sweezer's granddaughter. The trial court denied Rougeau's motion for mistrial.

During trial, Rougeau renewed his motion for mistrial when an officer testified about the state of Sweezer's granddaughter when they found her and moved for another mistrial on different grounds. The trial court denied the motions. In closing argument, the prosecutor again made various references to Sweezer's granddaughter. The trial court overruled Rougeau's objections.

Before jury deliberations, the prosecutor requested an accomplice liability instruction. The prosecutor argued that on cross-examination of the State's witnesses, Rougeau's counsel repeatedly alluded to the fact that others were present and participated with Rougeau in the charged crimes. Rougeau's counsel objected to the instruction, arguing that the evidence did not establish that others were present and participated with Rougeau in the charged crimes but rather that Rougeau did not commit the crimes. The court overruled the objection and provided instructions on accomplice liability.

During deliberations, the jury submitted an inquiry asking for clarification on the accomplice liability instruction. In response, the court directed the jury to "reread your

instructions and continue to deliberate."[5] The jury found Rougeau guilty as charged. Rougeau's counsel moved for a new trial. The trial court denied the motion.

At sentencing, the court applied the burglary antimerger statute to two of Rougeau's prior residential burglary convictions from 2014 and did not conduct a same criminal conduct analysis. The trial court sentenced Rougeau to 548 months in prison.

Rougeau appeals.

ANALYSIS

I. Accomplice Liability Jury Instruction

Rougeau argues that the trial court erred in instructing the jury on accomplice liability because "the evidence did not support it."[6] We review a trial court's "choice of jury instructions for an abuse of discretion."[7] A trial court abuses its discretion when its decisions are based on untenable grounds or reasons.[8]

"Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law."[9] "When determining if the evidence at trial was sufficient to support the giving of an instruction, we view the supporting evidence in the

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[5] Clerk's Papers (CP) at 168.

[6] Appellant's Br. at 22.

[7] State v. Hathaway, 161 Wn. App. 634, 647, 251 P.3d 253 (2011) (citing State v. Douglas, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005)).

[8] State v. Sanjurjo-Bloom, 16 Wn. App. 2d 120, 125, 479 P.3d 1195 (2021) (citing State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

[9] Hathaway, 161 Wn. App. at 647 (citing State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002)).

light most favorable to the party that requested the instruction."[10] When the State requests an instruction, all reasonable inferences from that evidence must be drawn in favor of the State and interpreted against the defendant.[11] "'Circumstantial evidence and direct evidence are equally reliable in determining the sufficiency of the evidence.'"[12] But "'inferences based on circumstantial evidence must be reasonable and cannot be based on speculation.'"[13]

Rougeau argues there is inadequate evidence of his level of participation in the crimes required for his accomplice liability. In State v. Munden,[14] the appellate court held that where "the evidence [does] not exclude the possibility that [the defendant] acted as an accomplice, . . . accomplice liability [is] supported."[15] And in reviewing the Munden decision, our Supreme Court in State v. McDonald held that

> [w]hile Munden hinted at the right approach, we would take a logical step further and hold that because the evidence in this case clearly supports a finding of accomplice liability, we need not engage in the empty exercise of reaching McDonald's principal liability argument or the Court of Appeals' resolution of it. It is enough to note that "[a]ccomplice liability

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[10] State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

[11] State v. Brooks, 107 Wn. App. 925, 928-29, 29 P.3d 45 (2001) (citing State v. Bryant, 89 Wn. App. 857, 869, 950 P.2d 1004 (1998)).

[12] State v. Scanlan, 193 Wn.2d 753, 770, 445 P.3d 960 (2019) (internal quotation marks omitted) (quoting State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010)).

[13] Id. at 771 (internal quotation marks omitted) (quoting State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)).

[14] 81 Wn. App. 192, 913 P.2d 421 (1996).

[15] State v. McDonald, 138 Wn.2d 680, 689, 981 P.2d 443 (1999) (citing id. at 197).

> represents a legislative decision that one who participates in a crime is guilty as principal regardless of the degree of the participation."[16]

The key issue being raised here is whether, in viewing the evidence in the light most favorable to the State, a reasonable juror could have inferred beyond mere speculation that others were present and participated with Rougeau in the charged crimes so that, at the very least, the State is entitled to an instruction on a viable alternative to its theory that the defendant was liable as the principal actor.

The court's accomplice liability instruction 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

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[16] Id. (second alteration in original) (quoting State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991)). "'The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. The elements of the crime remain the same.'" State v. Holcomb, 180 Wn. App. 583, 588, 321 P.3d 1288 (2014) (quoting State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974)).

knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.[17]

Here, there is sufficient evidence for a reasonable juror to infer that in accordance with the State's theory, Rougeau acted as the principal in committing the charged crimes. On October 24, at approximately 1:36 a.m., a cell phone found in Sweezer's vehicle was near where Sweezer's body was found. Randall Jacks, who lived a few miles from where Sweezer's body was found, testified that his doorbell camera caught Rougeau walking on his porch at 1:49 a.m. Two minutes later, the cell phone found in Sweezer's vehicle was near where her vehicle was found. At about 2:00 a.m., Rougeau asked Salvador Morales for help with Sweezer's vehicle because it would not start. Forensic investigators found Rougeau's fingerprints and DNA on the inside and outside of Sweezer's vehicle, Sweezer's blood in the trunk of the vehicle, and Sweezer's blood and Rougeau's DNA at her residence. The blood on the carpet outside Sweezer's kitchen was consistent with "the reference profile of Lance Rougeau."[18] Investigators also found Sweezer's blood and Rougeau's DNA on a "GoNavy.com" lanyard in Sweezer's residence. When officers arrested Rougeau, he had scratches on his forearm, hand, and leg, and he was carrying a backpack with a

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[17] CP at 140. Jury instruction 14 provided that the jury could convict Rougeau of first degree murder if the jury found that "[t]he defendant or an accomplice caused the death of Linda Sweezer in the course of or in furtherance of such crime or in immediate flight from such crime." CP at 143. And jury instruction 19 provided that the jury could convict Rougeau of first degree burglary if "in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged assaulted a person." CP at 148. The court did not provide the jury with a specific accomplice liability instruction for the burglary of Reynolds' residence or the theft of her vehicle.

[18] RP (Feb. 27, 2020) at 1956.

"GoNavy.com" lanyard. He also had blood on one of his socks which contained the DNA of at least four individuals. And inside his mother's apartment, officers found the keys to Sweezer and Reynolds' vehicles and Reynolds' daughter's backpack. Sufficient evidence supported the State's theory that Rougeau acted as the principal in committing the charged crimes.

Rougeau's objection to the accomplice liability instruction centers around his faulty premise as argued to the trial court that the court can only use the evidence he presented to support his theory that he was not involved in the charged crimes and that the court, in viewing the evidence in the light most favorable to the State, cannot combine the evidence presented by the parties to establish that he and others were present and participated in the charged crimes.

Specifically, in discussing the accomplice instruction, Rougeau's counsel stated:

> My cross raised the possibility that my client wasn't the one who killed Ms. Sweezer, which is what my client was charged with. He was not charged as an accomplice in the charging documents. He was charged as a principal. And I have continuously and will continue to argue in closing arguments that there is no evidence that my client committed these crimes, and in fact, there's sufficient evidence that somebody else may have committed the crime.[19]

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[19] RP (Mar. 2, 2020) at 2153 (emphasis added). For example, during cross-examination of Jennifer Hayden, a forensic scientist with Washington State Patrol, Rougeau's counsel engaged in the following exchange suggesting that others were present and participated with Rougeau in the charged crimes:

Q And just so that I'm clear, at one point when you asked for [an] additional reference sample from Sherria Dooling-Rodin so that you could confirm the CODIS hit, law enforcement never provided you with that?

A: Correct.

Q: And they never provided you with DNA samples from a gentleman named Chase Waters?

A: Correct.

But contrary to Rougeau's assertion, viewing the evidence in the light most favorable to the State allows consideration of combined portions of the defense and the State's evidence when determining whether the evidence is sufficient to support a proposed instruction. And notably here, defense counsel clearly committed to presenting the jury with the defense theory that there is "sufficient evidence that somebody else may have committed the crime."[20] In this setting, the trial court had the discretion to conclude an accomplice liability instruction was consistent with defense counsel's acknowledgement that reasonable inferences from the evidence presented by the defense established that someone other than Rougeau had been present and participated in the crimes. Viewed in a light most favorable to the State, there is sufficient evidence based upon reasonable inferences for a rational juror to conclude that others were present and participated with Rougeau in the crimes.

First, as to the burglary of Sweezer's home and her murder, forensic investigators testified that they found the DNA of at least three individuals on the handle of the lockbox in Sweezer's residence and that the lockbox appeared "open and ransacked."[21] Investigators also found Sweezer's blood in the trunk of her vehicle and the DNA of multiple individuals on the inside and outside of her vehicle. Dan Rouse, a

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Q: They never provided you with DNA samples from a gentleman named Kyle Wason?

A: Correct.

RP (Mar. 2, 2020) at 2077.

[20] Id. at 2153.

[21] RP (Feb. 20, 2020) at 1265.

Lakeland Hills resident, testified that on October 24 at approximately 1:30 a.m., a video surveillance camera affixed to his house showed two vehicles stop at the location where Sweezer's body was found. The video then shows a flash of light and the two vehicles drive away. At some point before officers arrested Rougeau, he told his brother, Jason Jordan, that "something happened that he was not involved with and [he] had to get away but they would not let him leave."[22] And after officers arrested Rougeau, Sweezer's credit card was used multiple times. There is sufficient evidence to support a reasonable inference that others were present and participated with Rougeau in Sweezer's murder and the burglary of her residence.

Second, as to the residential burglary at Reynolds' house, Joni Ly, a Lakeland Hills resident, testified that at 4:35 a.m., his video camera surveillance showed a man wearing a hat and a reflective safety vest walking toward the front door of Reynolds' residence. Reynolds testified that at 5:00 a.m., she heard her garage door open and noticed that her car keys and her daughter's backpack were missing. And when Pierce County Sheriff's Office Detective Jessica Whitehead arrested Rougeau, she found Reynolds' car keys and her daughter's backpack in his mother's apartment. There is sufficient evidence to support a reasonable inference that others were present and participated with Rougeau in the burglary of Reynolds' residence.

Finally, as to first degree theft of a motor vehicle, Ly testified that at 5:05 a.m., his video surveillance showed a man wearing a hat and safety vest drive Reynolds' vehicle out of her driveway. Reynolds testified that she saw her vehicle reverse "around to the

[22] RP (Mar. 2, 2020) at 2113 (emphasis added).

cul-de-sac and then turn and go the opposite direction."[23] And when Officer Whitehead arrested Rougeau, she found Reynolds' car keys in his mother's apartment. Officers eventually located Reynolds' vehicle in Tacoma. And Pierce County Sheriff's Office Detective Jason Laliberte testified that the officers had reason to believe that individuals were driving Reynolds' vehicle after Rougeau was arrested. There is sufficient evidence to support a reasonable inference that others were present and participated with Rougeau in the theft of Reynolds' vehicle.

Because substantial evidence supports the State's alternative theory, that others were present and participated with Rougeau in the commission of the murder, burglaries, and theft, the trial court did not abuse its discretion in instructing the jury on accomplice liability.[24]

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[23] RP (Feb. 24, 2020) at 1511.

[24] For the first time in his reply brief, Rougeau appears to argue that based upon the evidence presented, a reasonable juror could only conclude that his involvement in the charged crimes was merely "after the fact" which in turn means that the trial court erred in instructing the jury on accomplice liability. Appellant's Reply Br. at 5-6. In his argument, Rougeau, citing State v. Robinson, 73 Wn. App. 851, 858, 872 P.2d 43 (1994), emphasizes the distinction between accomplice liability and criminal assistance, noting that "dispos[ing] of evidence of the crime" can only establish criminal assistance. Appellant's Reply Br. at 6. But his argument is not compelling. In Robinson, the defendant was driving a vehicle when one of his passengers jumped out of the car, robbed a girl on the street, and got back in the car. 73 Wn. App. at 852. The defendant made the passenger throw the purse out the window but did not contact law enforcement. Id. at 853. The State charged the defendant with one count of second degree robbery based upon an accomplice liability theory. Id. The court held that "[b]ecause [the passenger] completed the act of robbery by the time he reentered the car and [the defendant] saw the purse, [the defendant] could not have aided and abetted [the passenger's] crime. He neither associated himself with [the passenger's] undertaking, participated in it with the desire to bring it about, nor sought to make the crime succeed by any actions of his own." Id. at 857. Here, even assuming that a rational juror could conclude that Rougeau was involved only "after the fact," unlike the defendant in Robinson, there was still a competing reasonable inference that Rougeau

II. ER 403

Rougeau contends that the trial court abused its discretion in "admitting evidence that the police found [Sweezer's] infant granddaughter in her house."[25] We review a trial court's evidentiary decisions for an abuse of discretion.[26]

Generally, all relevant evidence is admissible.[27] But even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[28]

Here, Rougeau pleaded not guilty, which required the State to prove every element of the charged crimes beyond a reasonable doubt. To do so, the State had to establish when events occurred over the course of several days to prove Rougeau's involvement in the crimes. Specifically, on Monday, October 23, at 9:00 a.m., Sweezer did not show up to work. On Tuesday, October 24, at 3:30 a.m., Jennifer Johnson, a Lakeland Hills resident, found Sweezer's body. On Wednesday, October 25, at 10:00 a.m., officers found Sweezer's granddaughter. And Dr. Joan Roberts testified that Sweezer's granddaughter was left alone for "between 36-60 hours."[29] Taken together,

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associated, participated, and assisted in the charged crimes. Criminal assistance is not applicable. Additionally, we need not consider arguments raised for the first time in a reply brief. Nakatani v. State, 109 Wn. App. 622, 625 n.1, 36 P.3d 1116 (2001); RAP 10.3(c).

[25] Appellant's Br. at 31.

[26] Sanjurjo-Bloom, 16 Wn. App. 2d at 125 (citing Powell, 126 Wn.2d at 258).

[27] Id. (citing ER 402).

[28] ER 403.

[29] RP (Feb. 12, 2020) at 1079.

this evidence helps establish a more definitive timeline for the alleged crimes, notably, the murder of Sweezer. The trial court did not abuse its discretion.

III. Motions for Mistrial

Rougeau argues that the trial court erred in denying his two motions for mistrial. We review a trial court's denial of a motion for mistrial for an abuse of discretion.[30]

A motion for mistrial "will be overturned only when there is a 'substantial likelihood' that the error prompting the request for a mistrial affected the jury's verdict."[31] A court should only grant a mistrial "'when the defendant has been so prejudiced that nothing short of a new trial can ensure the defendant will be tried fairly.'"[32]

First, Rougeau contends that the trial court abused its discretion in denying Rougeau's "motion for a mistrial after a law enforcement witness became emotional when testifying" about Sweezer's granddaughter.[33]

On direct examination, the prosecutor engaged in the following exchange with Pierce County Sheriff's Office Detective Darren Moss:

> Q: Detective, once you handed the baby to the medics, where did you go?
>
> A: I followed them to the hospital.
>
> Q: For what purpose?

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[30] State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

[31] State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (internal quotation marks omitted) (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

[32] Id. (quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)).

[33] Appellant's Br. at 35.

A: I think just for a brief time I forgot I was a police officer and I became a grandpa.

Defense Counsel: Your Honor, objection. Nonresponsive.

Court: Sustained. Jury will disregard.

Defense Counsel: Move to strike.

Q: What hospital --

Court: Granted. Stop, Mr. Benton. The jury will disregard the last response.[34]

In renewing his motion for mistrial, Rougeau's counsel argued that Detective Moss "got quite emotional . . . . He was tearing up. He was crying."[35] In responding to Rougeau's counsel's argument, the court reminded the prosecutor:

> [T]he reason I'm letting this in primarily is for your argument that it goes to the timeline of when these events occurred. So I don't want testimony -- if it's something beyond that, you're going to need to get permission, and I want you to talk to every witness who's going to address this on that topic.[36]

And the trial court struck Detective Moss's statement. We presume the jury followed the instruction to disregard his statement.[37] Because Rougeau does not establish a substantial likelihood that denying this motion for mistrial affected the jury's verdict, the court did not abuse its discretion.

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[34] RP (Feb. 12, 2020) at 951.

[35] Id. at 976.

[36] Id. at 977.

[37] State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Second, Rougeau argues that the trial court abused its discretion in denying his motion for a mistrial "after a law enforcement witness testified in a manner that implied" he had a criminal history.[38]

Here, on direct examination, the prosecutor engaged in the following exchange with Pierce County Sheriff's Office forensic investigator Steven Wilkins:

> Q: And what did you use to do the comparison of Lance Rougeau?
>
> A: I used those fingerprints that I acknowledged a few minutes ago.
>
> Q: And I'm going to show you again. So that's Plaintiff's Exhibit No. 457. Is that what you're talking about?
>
> A: Yes.
>
> Q: And were those obtained when he was booked into the jail on the day he was arrested?
>
> A: These were already in our records.[39]

In moving for a mistrial, Rougeau's counsel argued that Wilkins' testimony violated an order in limine that specifically prohibited any reference to Rougeau's criminal history. The trial court acknowledged that Wilkins' testimony "at least implies, at least for people within the court system, that he's been arrested."[40] But the court denied Rougeau's motion, stating that the answer was "vague enough" that it did not warrant a mistrial.[41] The court offered to provide the jury a limiting instruction or strike Wilkins' response. Defense counsel responded, "I think it can be done in examination

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[38] Appellant's Br. at 42.

[39] RP (Feb. 26, 2020) at 1845.

[40] Id. at 1848.

[41] Id. at 1847.

of the witness."[42] And on cross-examination, Rougeau's counsel went on to elicit testimony from Wilkins, who provided various explanations to the jury as to why someone's fingerprints could be in the "database" apart from criminal history, such as law enforcement officers, individuals who apply for concealed weapons permits, and anyone who applies for a job that requires a background check. Because Rougeau cannot establish prejudice, the trial court did not abuse its discretion.

IV. Prosecutorial Misconduct

Rougeau contends that the prosecutor committed misconduct in opening statement and closing argument "by repeatedly appealing to the passions and prejudices of the jurors."[43] We review a claim of prosecutorial misconduct for an abuse of discretion.[44] We "must consider the comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury."[45]

"'A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.'"[46] Prosecutors must "'seek convictions based only on probative evidence

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[42] Id. at 1848-49.

[43] Appellant's Br. at 37.

[44] State v. Ramos, 164 Wn. App. 327, 333, 263 P.3d 1268 (2011) (citing State. v. Ish, 170 Wn.2d 667, 676, 257 P.3d 551 (2011)).

[45] State v. Edvalds, 157 Wn. App. 517, 521, 237 P.3d 368 (2010) (citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

[46] State v. Craven, 15 Wn. App. 2d 380, 385, 475 P.3d 1038 (2020) (citing RPC 3.8 cmt. 1), review denied, 197 Wn.2d 1005, 483 P.3d 784 (2021).

and sound reason.'"[47] A prosecutor commits misconduct by "seeking a conviction based on emotion rather than reason."[48] And references to evidence outside the record constitute misconduct.[49]

A defendant claiming prosecutorial misconduct bears the burden of establishing "the impropriety of the prosecutor's comments as well as their prejudicial effect."[50] "In determining whether prosecutorial misconduct has occurred, we look at whether the defendant objected to the alleged misconduct."[51] If the defendant objected, we evaluate whether the prosecutor's comments were improper and whether those improper comments prejudiced the defendant's case.[52] A prosecutor's comments were improper if the prosecutor's arguments were "calculated to inflame the passions or prejudices of the jury."[53] A prosecutor's comments prejudiced the defendant if there is "a substantial likelihood that the misconduct affected the jury verdict."[54]

In opening statement, the prosecutor stated:

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[47] Id. (citing In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (plurality opinion)).

[48] Id. (citing State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993)).

[49] State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)).

[50] State v. Schlichtmann, 114 Wn. App. 162, 167, 58 P.3d 901 (2002) (citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

[51] State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (citing State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995)).

[52] State v. Pierce, 169 Wn. App. 533, 551-52, 280 P.3d 1158 (2012).

[53] State v. Thierry, 190 Wn. App. 680, 690, 360 P.3d 940 (2015) (citing Glasmann, 175 Wn.2d at 704).

[54] State v. Salas, 1 Wn. App. 2d 931, 939, 408 P.3d 383 (2018).

> [Sweezer's granddaughter] was born in spring of 2017, and a few months later, her grandmother, Linda Sweezer, was granted custody to care for her granddaughter. She took a leave of absence from her work as part of that process, and she was scheduled to return to work, her job at Providence Health Care, on Monday, October 23rd of 2017, at 9:00 a.m.[55]
>
> At about 10:00 a.m. on October 25th, shortly before they were planning to enter the house anyway, the detectives learned that Linda had received custody and was caring for her granddaughter[ ]. It was the first time they had learned of the child. Detectives entered the house and found [Sweezer's granddaughter] lying on a bed in the master bedroom. [Sweezer's granddaughter] was not moving and was very lethargic, but she was alive. Deputies called for medical aid. The State expects a medical expert will testify that [Sweezer's granddaughter] had been without care for anywhere from 24 to in excess of 48 hours. And [Sweezer's granddaughter] has recovered and is doing well.[56]

After opening statements, Rougeau's counsel moved for a mistrial on the ground that the prosecutor's comments improperly appealed to the passions and prejudices of the jury. Rougeau's counsel noted that "Juror 11 [had] a physical reaction [to the prosecutor's statements] because, not knowing if that child [was] alive or dead, her hands [covered] her face because she [was] afraid of what she [was] going to hear."[57] But the prosecutor's comment about Sweezer's granddaughter, namely, that she "was not moving and very lethargic, but alive," was not "calculated to inflame the passions and prejudices of the jury." Rather, the prosecutor's statement was supported by the evidence presented at trial and demonstrated an attempt to factually outline the timeline of events, notably, Sweezer's murder, by specifically referencing the state of Sweezer's

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[55] RP (Feb. 10, 2020) at 558.

[56] Id. at 564.

[57] Id. at 583.

granddaughter when the officers found her and how long the medical expert believed she was left alone.[58] "The purpose of the prosecutor's opening statement is to outline the material evidence the State intends to introduce."[59] And as this court noted in State v. Craven, the facts of some crimes are inherently emotional but referring to those facts is not in itself misconduct.[60] Rougeau fails to establish that the prosecutor's comments in opening statement were improper.

In closing argument, the prosecutor stated:

> Over the last few weeks, you've been introduced to this woman. Her name is Linda Sweezer. At age 64, she took on a new role, a role often not reserved for those at that point in their life. She went through the process of adopting her granddaughter. Took her into her home. You've seen the pictures, and you will have access to more pictures that show you how seriously she took this role. The home is replete with toys, diapers, a nursery. There are blankets on the floor. There are children's books on the floor.[61]
>
> . . . .
>
> [Defense Counsel]: I'm going to object at this time. . . . Counsel's argument is to the passions and prejudices of the jury.
>
> Court: Overruled.
>
> . . . .

[58] Pierce County Sheriff's Office Lieutenant Kevin Roberts testified, "The child was not moving, not making any sound. I could smell the soiled diaper. I announced that there was a child in the room. Shortly after that, I think the announcements [were to] see [if] the baby's eyes were fixed. I immediately checked on the child. I could see that the child was alive, but still remained very, very lethargic and no sounds." RP (Feb. 10, 2020) at 668.

[59] State v. Kroll, 87 Wn.2d 829, 834, 558 P.2d 173 (1976).

[60] 15 Wn. App. 2d 380, 389 n. 22, 475 P.3d 1038 (2020), review denied, 197 Wn.2d 1005, 483 P.3d 784 (2021).

[61] RP (Mar. 4, 2020) at 2254.

[Prosecutor]: . . . All of the evidence in this case proves that she did not leave that home willingly. She fought. She fought for her life. She fought for her granddaughter's life.

At some point later, the final indignity, her body was dumped from her car and set on fire. The Court has read to you what the law is in this case, and it's your job and your role to accept that as the law and apply it to the facts of this case as you have heard it.[62]

. . . .

. . . [The medical examiner] wasn't able to rule out the very small possibility that [Sweezer] still may have been alive when she was set on fire. He believed she was dead. I think everyone can hope she was in fact at that point as well.

[Defense Counsel]: Objection, Your Honor. Counsel's argument is playing to the passions and prejudices of the jury.

Court: Overruled.[63]

. . . .

[Prosecutor]: Blood got on the carpet because Linda Sweezer fought. She fought for her granddaughter. She fought for her --

[Defense Counsel]: Objection, Your Honor. Plays to the passions and prejudices of the jury when he makes that argument.

Court: Overruled, but move on, Mr. [Prosecutor].[64]

Rougeau argues that the prosecutor's statement that "the medical examiner wasn't able to rule out the very small possibility that [Sweezer] still may have been alive when she was set on fire" was misconduct. But in closing argument, prosecutors have "'wide latitude to argue reasonable inferences from the evidence.'"[65] And the evidence

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[62] Id. at 2255.

[63] Id. at 2265.

[64] Id. at 2280.

[65] Thierry, 190 Wn. App. at 689 (quoting Glasmann, 175 Wn.2d at 704).

presented at trial did not eliminate this possibility.[66] Further, as discussed, the fact that a prosecutor references a crime that is "inherently emotional" is not itself misconduct. This statement was not improper.

Rougeau also contends that the prosecutor's references to "the baby in unnecessary and gratuitous ways" constituted misconduct.[67] A few sentences into his closing argument, the prosecutor stated that Sweezer "went through the process of adopting her granddaughter."[68] But evidence of the adoption was not admitted at trial.[69]

At oral argument before this court, the State conceded that the prosecutor's reference to the adoption was improper.[70] We agree.

Rougeau further argues that the prosecutor's repeated comments that Sweezer "fought for her granddaughter" were misconduct. Read as a whole, the prosecutor's statements were improper because the prosecutor used Sweezer's relationship with her granddaughter as a framework to structure his entire closing argument. These

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[66] Pierce County Medical Examiner Thomas Clark testified, "I think it's most likely that she was already dead when she was burned. That is not a hundred percent, however, because she doesn't have any injury that would lead to death a hundred percent of the time. My best interpretation is that she actually died as a result of strangulation, was probably transported and burned after she was dead. However, there isn't any guarantee, and I can't exclude the possibility that she was alive, conscious or unconscious, and burned. I don't have any way of knowing." RP (Feb. 12, 2020) at 2009.

[67] Appellant's Br. at 38.

[68] RP (Mar. 4, 2020) at 2254.

[69] "'Conduct is improper if, for example, . . . it refers to matters outside the record.'" Matter of Sandoval, 189 Wn.2d 811, 832, 408 P.3d 675 (2018) (quoting State v. Davis, 175 Wn.2d 287, 330, 290 P.3d 43 (2012)).

[70] Wash. Court of Appeals oral argument, State v. Rougeau, No. 83493-2-I (Apr. 27, 2022), at 13 min., 30 sec., through 13 min., 55 sec. https://tvw.org/video/division-1-court-of-appeals-2022041066/?eventID=2022041066.

comments demonstrated a thematic attempt to encourage the jury to rely on their emotions by generating sympathy for Sweezer and anger toward Rougeau. The prosecutor's statements here improperly appealed to the jurors' emotions. This was misconduct.

Next, we must determine whether the improper statements regarding Sweezer's granddaughter were prejudicial. "'The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent [a defendant] from having a fair trial.'"[71] Here, the evidence presented at trial established that Sweezer had a violent encounter with Rougeau at her residence which ultimately culminated in her death. Specifically, at trial, the medical examiner testified that Sweezer was stabbed at least 35 times but manual strangulation was the cause of death. Officers testified that there was blood spatter in the kitchen and the garage at Sweezer's residence and that at the time of his arrest, Rougeau had scratches on his forearm, hand, and leg. Forensic investigators testified that the knife found in Sweezer's kitchen had Sweezer's blood on it and that Rougeau's DNA and blood were found at Sweezer's residence. The evidence presented at trial supports a reasonable inference that Sweezer struggled to survive. And taking the prosecutor's statements in the context of the evidence as a whole, Rougeau does not establish that these improper statements influenced the jury's verdict such that Rougeau was prevented from having a fair trial.

[71] State v. Pinson, 183 Wn. App. 411, 419-20, 333 P.3d 528 (2014) (quoting State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)).

Rougeau fails to show that the prosecutor's comments in closing argument regarding the adoption and the other statements about Sweezer's granddaughter prejudiced his case.

V. Sentencing

Rougeau argues that his offender score was incorrectly calculated because the trial court applied the burglary antimerger statute instead of considering whether his two prior convictions from 2014 encompassed the same criminal conduct. The State concedes error. Because the trial court erred in failing to conduct a same criminal conduct analysis, we accept the State's concession and remand for resentencing.[72]

VI. Cumulative Error

Rougeau argues that cumulative error deprived him of a fair trial. "'The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal.'"[73] Rougeau demonstrates that the prosecutor committed misconduct and that

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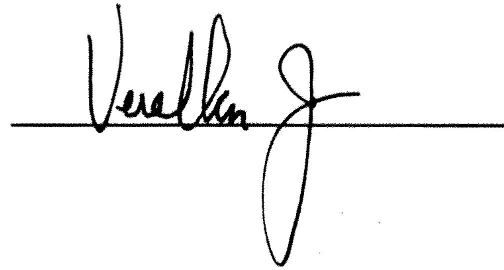
[72] On March 17, 2021, Rougeau submitted a statement of additional grounds (SAG) under RAP 10.10. But our review of a SAG is limited by "several practical limitations." For example, we "consider only issues raised in a statement of additional grounds that adequately inform us of the nature and occurrence of the alleged errors. Further, we only consider arguments that are not repetitive of briefing." State v. Calvin, 176 Wn. App. 1, 26, 316 P.3d 496 (2013), as amended on reconsideration (Oct. 22, 2013), review granted in part, cause remanded, 183 Wn.2d 1013, 353 P.3d 640 (2015); RAP 10.10. In his SAG, Rougeau appears to argue that the court's "jury instructions were wrong," that there were "false allegations made by officers of the law," and that the prosecutor committed misconduct. SAG at 1. Because Rougeau's arguments are largely repetitive of his counsel's briefing and his other argument relies on facts that are absent from the record on appeal, we need not address his arguments.

[73] State v. Song Wang, 5 Wn. App. 2d 12, 31, 424 P.3d 1251 (2018) (quoting In re Det. of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012)).

the trial court committed a sentencing error by failing to conduct a same criminal conduct analysis on two of his prior convictions from 2014. Because the prosecutor's misconduct is the only trial error committed here, the cumulative error doctrine is not implicated.[74]

Therefore, we affirm the convictions and remand for resentencing.



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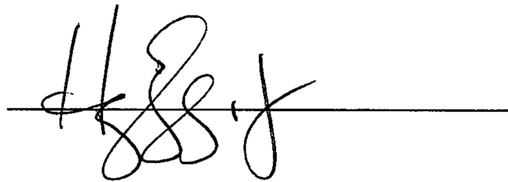

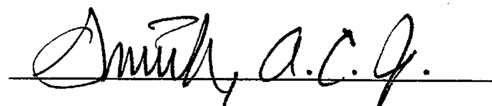

[74] Additionally, Rougeau appears to challenge the trial court's denial of his motion for arrest of judgment or a new trial. Appellant's Br. at 2. But Rougeau merely assigns error to the trial court's denial without including any argument or authority. Therefore, we need not address Rougeau's motion for new trial. RAP 10.3(a)(4) and (6).

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. 83493-2-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 / residence / e-mail address as listed on ACORDS / WSBA website:

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Date: June 30, 2022

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June 30, 2022 - 4:42 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83493-2
Appellate Court Case Title:	State of Washington, Respondent v. Lance Gene Francoise Rougeau, Appellant
Superior Court Case Number:	17-1-04175-2

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