No. 41970-0-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ODIES D. WALKER,
Appellant.

REPLY BRIEF OF APPELLANT/ CROSS RESPONDENT

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Point I: The Jury Instructions Regarding Premeditated Murder Relieved the State of its Burden of Proving the Charged Crime and Violated Mr. Walker's Right to a Unanimous Verdict

The erroneous jury instructions in this case allowed Mr. Walker to be convicted without the State having proved premeditated murder as charged. It is undisputed that Mr. Walker was not the shooter in this case and the State charged him under a theory of accomplice liability. For an accomplice to be guilty of a crime committed by another, that crime actually had to be committed. RCW 9A.08.020(6) ("A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his or her complicity therein") (emphasis added). Premeditated murder is not committed without premeditation by the actor. As the Supreme Court has noted, "RCW 9A.32.030(1)(a) requires a mens rea of premeditated intent to kill and an actus reus that causes the death of the victim." State v. Roberts, 142 Wn.2d 471, 502, 14 P.3d 713 (2000); *Appellant's Brief* at 42-43.

Once the crime is committed, someone not present during its commission may nevertheless be accountable through accomplice liability. The mens rea for accomplice liability is knowledge, with an actus reus of "soliciting, commanding, encouraging, or requesting the commission of the crime, or aiding or agreeing to aid in the planning of the crime of the general crime committed." Roberts, 142 Wn.2d at 513; *see also* State v. Truong, 2012 WL 1918941 *5 (May 29, 2012) (noting the intent of the accomplice is that he or she "shared in the criminal intent

of the principal"), *citing*, State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485 (1982). Thus, contrary to the State's argument, unless the State proved Finley premeditated the murder, Mr. Walker is not guilty as an accomplice. See *Brief of Respondent/Cross Appellant* (Brief of Respondent) at 21-23.

The jury instructions in this case permitted conviction if Mr. Walker, not Finley, premeditated the crime. The instructions allowed a conviction if the State proved, *inter alia*, Mr. Walker "or an accomplice" intended to kill Kurt Husted and the intent to cause the death was premeditated. CP 215 (Jury Instruction No. 13). The phrase, "or an accomplice," coupled with the passive form of the premeditation instruction operates such that no premeditation was required on Finley's part. *See* State v. Thomas, 150 Wn.2d 821, 841-42, 83 P.3d 970 (2004) (noting that "or an accomplice" language, coupled with the passive form of the actus reus element of the crime, meant no finding of actus reus on the part of the defendant was required).

The State asks this Court to hold that an accomplice not actively involved in the commission of a murder, such as a lookout, an absent mastermind or a getaway driver, can be the sole possessor of the premeditation necessary for the commission of first degree murder. However, it cites no cases in support of this proposition. See *Brief of Respondent* at 19-24. It also argues that specific intent crimes would be exempt from accomplice liability under Mr. Walker's position. See *id.* at 23. To the contrary, accomplice liability is relevant to every element of a specific intent crime except the intent itself. Under the law of this State, including

State v. Haack, that intent must be possessed by a person actively engaged in carrying out the crime. 88 Wn. App. 423, 958 P.2d 1001 (1997).

Moreover, the State is not without options in these matters. The complicity statute provides three separate ways liability can attach for a crime committed by another:

> A person is legally accountable for the conduct of another person when:
> (a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or
> (b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or
> (c) He or she is an accomplice of such other person in the commission of the crime.

RCW 9A.08.020(2). Mr. Walker was charged with being an accomplice under RCW 9A.08.020(2)(c). CP 11; CP 211 (Jury Instruction No. 9).

Notably, the type of liability the State seeks in this case, with Mr. Walker as the participant who premeditated the murder and Finley the participant who followed Mr. Walker's orders, falls under RCW 9A.08.020(2)(a). That this prong is distinct from the accomplice liability prong indicates the Legislature intended to establish separate and distinct types of complicity. Thus, the State would have needed to charge Mr. Walker under RCW 9A.08.020(2)(a) to allow his premeditation to provide that element of the crime. Under these circumstances, the State was required to show Finley premeditated the crime.

For all these reasons and the reasons set forth in Appellant's Brief at 41-55 the erroneous jury instructions in this case allowed the State to convict Mr.

Walker without proving premeditated murder occurred, violating his due process rights, prejudicing him, and requiring remand.

In addition, the erroneous jury instructions violated Mr. Walker's right to a unanimous verdict because, although the State was required to prove Finley premeditated the killing, the instructions allowed the jury to convict if either Mr. Walker or Finley premeditated the killing. See *Appellant's Brief* at 55-57. The cases the State cited in opposition to this argument are inapposite. See *Brief of Respondent* at 23-24, *citing*, State v. Carothers, 84 Wn.2d 256, 264, 525 P .2d 731 (1974), (finding no violation of defendant's right to unanimous verdict when jury was not instructed it need be unanimous as to whether defendant was accomplice or principal), *overruled on other grounds in* State v. Harris, 102 Wn.2d 148,685 P.2d 584 (1984); State v. Teal, 152 Wn.2d 333, 96 P.3d 974 (2004) (noting accomplice liability is not an alternate means of committing a crime requiring a unanimity instruction); State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984) (holding State was not required to prove accomplice knew principal was armed to establish liability for first degree robbery); State v. Medley, 11 Wn. App. 491, 496-97, 524 P.2d 466 (1974) (holding no unanimity instruction required when alternate means of committing crime included premeditated murder, "robbery murder," or first-degree murder via the accomplice statute).

For all these reasons and the reasons set forth in Appellant's Brief at 55-57, the erroneous jury instructions in this case violated Mr. Walker's right to a unanimous verdict and prejudiced him, requiring reversal.

Point II: Prosecutorial Misconduct Deprived Mr. Walker of His Right to a Fair Trial

A. The State's Reasonable Doubt Analogies Were Flagrant and Incurable Misconduct, Prejudicial to Mr. Walker

The State's analogies about reasonable doubt trivialized the subject, were flagrant and ill-intentioned, and require reversal. This case presents unusual circumstances in that the State employed three different analogies in its attempt to explain reasonable doubt: a puzzle, train tracks, and a basketball game. Even if one alone did not mislead the jury, given the other instructions the court provided, together they require reversal.

Contrary to the State's argument, the trial prosecutor clearly used the puzzle analogy to explain reasonable doubt. In the State's four-paragraph excerpt of the analogy, the term "reasonable doubt" was used nine times. *Brief of Respondent* at 60-61. Indeed, the prosecutor concluded her argument on this point by firmly tying the puzzle analogy to the reasonable doubt standard: "When you put all of the pieces of the puzzle together, it is clear that the defendant is guilty beyond a reasonable doubt." 12VRP 1393. The State's complete puzzle analogy was as follows:

> The Court has also instructed you that in order to find the defendant guilty of these crimes, you must find him guilty beyond a reasonable doubt. A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.
>
> Reasonable doubt is not an impossible standard. It is not magic. Imagine, if you will, a jigsaw puzzle of the Tacoma Dome.

> There will come a time when you are putting that puzzle together, that you will be able to say with some certainty beyond a reasonable doubt what the puzzle is. The Tacoma Dome.
>
> Because there will always be some unanswered question in every case, some doubt, the burden of proof is not proof beyond a shadow of a doubt or proof beyond any and all doubt. It is proof beyond a reasonable doubt. If you know in your gut, if you know in your heart that the defendant is guilty as an accomplice, then you are convinced beyond a reasonable doubt.
>
> This case is different than most cases because there is absolutely no doubt that the defendant is guilty beyond a reasonable doubt. When you put all of the pieces of the puzzle together, it is clear that the defendant is guilty beyond a reasonable doubt.

12VRP 1392-93.

The problem with analogizing reasonable doubt to identifying the image in a puzzle is that such an analogy lowers the State's burden of proof by implying "the jury should convict the defendant unless it found a reason not to do so." State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936 (2010) (discussing State's characterization of reasonable doubt as akin to the certainty used in everyday decisions). Although the Court was specifically disapproving arguments linking reasonable doubt to everyday decision-making, the Court's analysis applies equally to the State's puzzle argument in this case.

Similarly to such disapproved analogies, the State's analogy focused entirely on the degree of certainty needed before a person is willing to act. This framing of reasonable doubt is especially pernicious given the nature of criminal trials. In a typical criminal trial, the State holds most or all the puzzle pieces. It is the holes in the puzzle a defendant relies on for reasonable doubt. But under the

State's analogy, once the prosecution's picture is discerned with certainty, the holes in the case, or even the pieces that do not fit the picture–in other words, the very things that lead to reasonable doubt–can be ignored. As this Court has held, "discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so." *Id.* at 685.

The decision in Johnson is in apparent conflict with State v. Curtiss, 161 Wn. App. 673, 250 P.3d 496 (2011). As the State points out, Curtiss upheld a puzzle analogy virtually identical to the second paragraph of the puzzle analogy used in this case. The Curtiss decision does not reference Johnson. Curtiss, 161 Wn. App. 673. Instead, the Court held the puzzle analogy before it merely "describe[d] the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof." *Id.* at 700. Because the analogy did not shift the burden of proof, was neither flagrant nor ill-intentioned, and the defendant could not show prejudice in light of the jury instructions, the Court found no reversible error. *Id.*

Given that only a single-paragraph excerpt from the State's argument in Curtiss is available, it is possible the prosecutor's argument in that case was less clearly about reasonable doubt than it was in this case and in Johnson. Moreover, another panel of the Court declined to follow the Curtiss panel's holding on a separate alleged incident of prosecutorial misconduct. State v. Walker, 164 Wn.

App. 724, 733, 265 P.3d 191 (2011). Most importantly, an argument need not be burden-shifting to be improper. Instead, as was found in Johnson, a reasonable-doubt argument that makes a guilty verdict seem appropriate once "the puzzle" can be seen with certainty trivializes and diminishes the reasonable doubt standard.

Finally, as the State pointed out in its brief, the Court need not have held a particular argument improper before use of such an argument can be flagrant and ill-intentioned. Johnson, 158 Wn. App. 677, 685.

For all these reasons, this Court should follow the reasoning of Johnson and hold the puzzle analogy improper and prejudicial.

The train track and basketball analogies the prosecution employed were similarly problematic. What is unacceptable about all three arguments is that the State presented reasonable doubt as something other than reasonable doubt. By analogizing it to familiar objects or situations, the State changed the questions the jurors asked themselves. The law requires jurors to ask, "Do I personally have a reasonable doubt as to guilt?" CP 205, 206 (Jury Instructions Nos. 2 & 3). Under the State's analogies, the jurors were empowered to ask simpler, everyday questions: "If the evidence were a puzzle, would I be able to see the picture with certainty?" "If the evidence were railroad tracks, would I feel comfortable riding on them?" "If the evidence were a basketball game, would the State win?" These analogies improperly reduced the reasonable doubt standard to the realm of everyday decision making.

The questions prompted by the State's analogies are similar to those questions deemed improper in State v. Anderson, 153 Wn. App. 417, 431-32, 220 P.3d 1273 (2009); *accord* State v. Walker, 164 Wn. App. 724, 732, 265 P.3d 191 (2011) (relying on Anderson to hold analogies to everyday questions trivialized the burden of proof). In Anderson, the prosecutor also discussed the reasonable doubt standard in the context of everyday decision making, such as choosing to have elective dental surgery, leaving children with a babysitter and changing lanes on the freeway. 153 Wn. App. 417, 425, 431. The Court held those arguments improper because they "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing" the State's case against the defendant and because they implied, by "focusing on the degree of certainty the jurors would have to have to be willing to act, rather than that which would cause them to hesitate to act," that the jury should convict the defendant unless it found a reason not to do so. *Id.* at 431-32.

The questions behind the State's analogies in this case were similarly improper. Taken together, all three analogies "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against" Mr. Walker. Walker, 164 Wn. App. 724, 732.

For all these reasons and the reasons set forth in Appellant's Brief at 65-68, this Court should find the State's three analogies were flagrant and ill-intentioned misconduct requiring reversal.

B. The State's Improper Urging of the Jury to Find the Truth and "Remedy" the Crimes Was Prejudicial, Requiring Reversal

The prosecutor's entreaties to the jury to declare the truth of the case were improper. Walker, 164 Wn. App. 724, 732-33; State v. Evans, 163 Wn. App. 635, 644-45, 260 P.3d 934 (2011); State v. Emery, 161 Wn. App. 172, 195, 253 P.3d 413, *review granted,* 172 Wn.2d 1014, 262 P.3d 63 (2011); Anderson, 153 Wn. App. 417, 429; *but see* Curtiss, 161 Wn. App. 673, 701-02. The clear weight of precedent establishes the impropriety of the prosecutor's remarks in this case.

Only one decision considered a "truth" argument and found it not improper. Curtiss, 161 Wn. App. 673, 701-02. However, Walker was decided after Curtiss, and that court explained the two reasons it did not find the holding of Curtiss persuasive. First, in Curtiss, the prosecutor had stated, "[w]e ask that you return a verdict that you know speaks the truth." Curtiss, 161 Wn. App. 673, 701. By contrast, in Walker, the prosecutor argued, "by your verdict in this case, you folks, the 12 of you who will deliberate, will decide the truth of what happened to" the victim. Walker, 164 Wn. App. 724, 733. It later added, "So it's time for the truth. . . . So I talked to you at the very beginning about this—about declaring the truth as part of your role in returning a verdict. The truth is, the defendant is guilty." *Id.*

In this regard, the instant case is closer to Walker than to Curtiss. Here the prosecutor told the jury "it is your job to decide what the truth is." 12VRP 1435. Later, the prosecutor added, "you have to set [your concerns about penalties] aside

and tell us the truth of what happened by your verdicts, set aside issues of punishment." *Id.* It subsequently noted that Williams-Irby was motivated to testify because of the truth, "she wants the Husted family to know the truth. The true facts coming out in this courtroom is a powerful form of justice." *Id.* at 1435-36. Indeed, with its emphasis on putting penalties aside and telling the victim's family the truth, the Stated equated truth with guilt, similarly to the error in Walker.

Notably, the State continues to equate truth with guilt on appeal, stating:

> Indeed, the jury's role is to declare the truth any time it finds that the State has proved the defendant's guilt beyond a reasonable doubt. . . .When it finds a defendant guilty, the jury is necessarily saying it found the State proved the defendant's guilt beyond a reasonable doubt, and that the State's evidence was therefore true beyond a reasonable doubt. Every jury verdict of [word missing, presumably "guilty"] inherently declares the truth of the defendant's guilt.

Brief of Respondent at 75. With this statement, the State candidly confesses its belief that the jury only tells the truth when it returns a guilty verdict. That, in a nutshell, is the problem with the State asking the jury to tell the truth. The logical corollary of "guilty" equals truth is "not guilty" equals, if not a lie, then at least a non-truth. By equating guilt with a value such as truth, the State tells the jury it can only do the right thing by convicting the defendant. Thus, appealing to jurors to tell the truth is a prejudicial appeal to their passion. *See* State v. Turner, ___ Wn. App. ___, 275 P.3d 356, 362 (2012) (noting it is improper "to appeal to the jury's passions in a way that prejudices the defendant").

The other reason Walker did not follow Curtiss is that Curtiss did not rely on Anderson, the seminal case in this State, in discussing this issue. Walker, 164 Wn. App. 724, 733. For the same reason, this Court should not follow the holding of Curtiss.

In its brief, the State makes much of the fact that Anderson did not rely on precedent to hold it error for a prosecutor to ask the jury to speak the truth. *Brief of Respondent* at 69-71. This argument ignores the fact that jury arguments, by their nature, are constantly evolving and changing. The Court relied on no precedent because that particular argument had not previously been convincingly challenged on appeal. Notably, the State cites no cases prior to Anderson in which a court held proper a prosecutor's repeated requests to the jury to tell the truth.

Significantly, moreover, Anderson in no way ran afoul of existing law. The reasoning underpinning both the State's argument to the contrary (*Brief of Respondent* at 72-77) and the ruling in Curtiss is flawed. In Curtiss, the panel reasoned, "courts frequently state that a criminal trial's purpose is a search for truth and justice." Curtiss, 161 Wn. App. 673, 701-02, *citing*, Strickler v. Greene, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); State v. Gakin, 24 Wn. App. 681, 686, 603 P.2d 380 (1979). The cases the Curtiss panel and the State cite stand for the unremarkable proposition that a trial is a search for the truth. That truism is quite different from the State telling the jury its role is to determine the truth and implying that nothing other than guilt is the truth. As held in Anderson, the jury cannot determine anything other than whether a reasonable

doubt exists. Anderson, 153 Wn. App. 417, 429. If a guilty verdict were a statement of the truth, no convicted person would ever be exonerated.

For all these reasons and the reasons set forth in Appellant's Brief at 68-72, the State's attack on the jury's role–with its improper appeal to the jury's passion and prejudice by urging it to find the truth and "remedy" the crimes against "the peace and dignity of the people of the state of Washington" by returning "true verdicts"–prejudiced Mr. Walker and require reversal.

C. The State Misinformed the Jury about Premeditation, Misleading the Jury and Denying Mr. Walker a Fair Trial

The State misinformed the jury about what was required to find premeditation when it argued premeditation involved the same forethought as stopping at a stop sign or railroad crossing, 12VRP 1376, and that it could occur in "just seconds," 12VRP 1376, lines 12-13, or in a "split second." Pl. Exh. 243 at 69 (PowerPoint slide stating "That split second decision involved DELIBERATION Is it safe to enter Involved PREMEDITATION"). Even if the prosecutor's argument was not incorrect, the slide that accompanied the argument clearly stated that premeditation was a "split second" decision made at a stop sign or railroad crossing. Pl. Exh. 243 at 69.

Trial counsel objected to the State's characterization of the law, stating: "It is lessening the standard by which this jury has to find an element of the crime. One of the elements of the crime in this case is premeditation. To analogize it to something as simple as whether or not you stop at a stop sign would seem to be

lessening that burden significantly." 12VRP 1377. In other words, if the State could proving premeditation beyond a reasonable doubt by showing it involves the same forethought as stopping at a stop sign, the State's burden is greatly lessened. Counsel later reiterated the point,

> Well, when you equate an element of the crime, that it is sufficient to . . . whether or not when driving a car, you stop at a stop sign or at a railroad crossing, it seems to be lessening their burden. They have to find proof beyond a reasonable doubt that premeditation was, but it is not as simple as that slide . . . seem[s] to suggest. They are lessening their burden by that particular slide.

12VRP 1378-79. In this manner, counsel objected to the State's reduction of the definition of premeditation to something as simple as stopping at a stop sign, which the State's slide showed could be done in a "split second." That counsel did not object explicitly to each word used by the State in either its PowerPoint slide or argument does not diminish the impact of his objection to the State's characterization of premeditation. Further, the trial court ruled on the objection, holding the State did not "redefine the instruction." 12VRP 1380. It is the State's incorrect characterization of premeditation to which Mr. Walker continues to object on appeal.

As this Court held in Walker, the State's mischaracterization of the law "is a serious irregularity" that may deny a defendant a fair trial:

> It is well-established that a prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. State v. Gotcher, 52 Wn. App. 350,

> 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

Walker, 164 Wn. App. 724, 736. In Walker, the Court relied on these tenets to find reversible error when the State encouraged the jury to determine the defendant's defense of others defense through a subjective, rather than the required objective, standard. Walker, 164 Wn. App. 724, 734-36. The prosecutor's mischaracterization of premeditation in this case–reducing it through its slide and argument to the "split second" thought required to stop at a stop sign or railroad crossing–was similarly misleading and prejudicial.

For these reasons and the reasons set forth in Appellant's Brief at 75-78, this Court should reverse Mr. Walker's conviction.

D. The State's Improper Comments Throughout its Arguments, Taken Together, Require Reversal

Mr. Walker raises seven general types of error regarding the State's presentation of the case. The following were unobjected-to errors: 1) in opening statements, stating it was wrong for Williams-Irby to associate with Mr. Walker, that Finley committed "cold-blooded," premeditated murder and "had an equally depraved heart lacking any conscience whatsoever," and arguing Mr. Walker was "lying like crazy to the police;" 2) in closing arguments, using a prejudicial PowerPoint presentation which repeatedly declared, "**DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER**" and other prejudicial conclusions; 3) using three problematic analogies to explain reasonable doubt, each of which

reduced the standard to a simple, everyday question; and 4) repeatedly alleging Mr. Walker or defense counsel was trying to mislead the jury and depicting him as "desperate." *Appellant's Brief* at 27-32, 34-36, 57-78. The objected-to errors were: 1) telling the jury its job was to find the truth and, in effect, it could only tell the truth with a guilty verdict; 2) asking the jury to "remedy" the crimes committed against "the peace and dignity of the people of the state of Washington" by returning "true verdicts;" and 3) misinforming the jury as to the law regarding premeditation. *Appellant's Brief* at 32-33, 36-38, 57-78.

Mr. Walker argues each of these errors was sufficiently prejudicial individually to require reversal. Moreover, when taken together, the cumulative effect is overwhelming. As observed in Walker, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Walker, 164 Wn. App. 724, 737, *citing*, State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

When a case is largely a credibility contest, repeated prosecutorial error can "easily serve as the deciding factor." Walker, 164 Wn. App. at 738. In Walker, the Court evaluated several prior cases where prosecutorial misconduct was found, but not always found to require reversal, discussing Anderson, Venegas, Johnson and Emery. *Id.* at 737-38. Distilling the lessons of those cases and applying them to the facts before it, the Court reversed the defendant's convictions. The Court found three unobjected-to erroneous prosecutorial

arguments–fill in the blank, declare the truth, and reasonable doubt is used in everyday decisions–and one objected-to argument–a mischaracterization of the defense, defense of others. These cumulative errors, repeated throughout the trial, and when balanced against a case largely based on witness credibility, required reversal. *Id.* at 737-39.

Equally compelling reasons require reversal here. Here, the State also sought to establish Mr. Walker's involvement in planning the crime through the credibility of its witnesses. It relied largely on coparticipant Williams-Irby's testimony, as well as the testimony of others involved in various permutations of various alleged plans to rob the Walmart. The physical evidence against Mr. Walker was slight. He did not enter the Walmart where the crime was committed and he was not seen on the videotape of the crime. The forensic evidence linking him to the getaway car could not establish when his fingerprints or DNA were left behind. Neither Turpin nor Finley testified against him. While a large sum of cash was recovered from his house, that fact did not establish he had knowledge of the crime beforehand. The gun used in the crime was never recovered.

Against this evidence the State's improper conduct weighs heavily, especially given the way improper arguments were used not just once or twice, but were peppered throughout opening, closing and rebuttal. Indeed, at least 120 times during closing argument alone, the State showed the jury an image declaring "**DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER.**" As in Walker, these circumstances created "a substantial likelihood the prosecutor's

misconduct affected the jury's verdict and that further instructions would not have cured the effects of the prosecutors' comments." Walker, 164 Wn. App. at 738-39. For these reasons and the reasons set forth in Appellant's Brief at 57-80, this Court should reverse Mr. Walker's convictions.

POINT III: The State's Challenge to Jury Instruction Number 46 Fails

The State's claimed instructional error is not ripe and should not be heard by the Court. The State objected to a portion of Jury Instruction Number 46, which required the State to prove beyond a reasonable doubt Mr. Walker was "a major participant in acts causing the death of Kurt Husted" and the aggravating factors "specifically appl[ied]" to his actions. CP 250. However, the jury answered "yes" to the special verdict. CP 262. Thus, the State suffered no harm and the issue presents no case or controversy before the Court. It is well established that Washington appellate courts do not render advisory opinions or decide purely theoretical controversies. State ex rel. O'Connell v. Kramer, 73 Wn.2d 85, 87, 436 P.2d 786 (1968); *see* Nat'l Elec. Contractors Ass'n v. Seattle Sch. Dist. No. 1, 66 Wn.2d 14, 17-18, 400 P.2d 778 (1965). "The power to render such opinions should of course be exercised with great reluctance and only when there are urgent and convincing reasons for doing so." In re Elliott, 74 Wn.2d 600, 616, 446 P.2d 347 (1968).

Even if this Court reverses Mr. Walker's convictions and remands for a new trial, the issue will not be ripe for review unless the trial court gives the same instruction and the jury answers "no" to the special verdict on remand. Only if and

when that happens will the issue be suitable for review. The State will still suffer no prejudice as, if the Court should rule in its favor on appeal, a jury can be empaneled to address solely the question of aggravating factors. State v. Thomas, 166 Wn.2d 380, 392-94, 208 P.3d 1107 (2009).

If this Court reaches the State's issue, it should only address the State's objection to the "major participant" language, as that was the only objection raised in the trial court and, thus, preserved for appeal. 12VRP 1327-28. In any event, the instruction was a correct statement of the law in its entirety. This Court reviews errors of law in jury instructions de novo. State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008).

The trial court was correct to require the State both to prove Mr. Walker was a major participant in the underlying crime and to prove the aggravating factor specifically applied to his actions. As argued below, both requirements are necessary under the State and federal constitutions. Moreover, the requirement that the aggravating factor be specifically applicable to Mr. Walker's actions is independently established through the plain meaning of RCW 9A.08.020 and RCW 10.95.020.

A. Both Provisions of the Challenged Instruction Are Constitutionally Required

The major participant instruction was necessary in this case because life without the possibility of parole is akin to a death sentence in its constitutional repercussions. The Eighth and Fourteenth Amendments to the United States

Constitution and the due process and cruel punishment clauses of the Washington State Constitution require "major participation by a defendant in the acts giving rise to the homicide" before a sentence of death may be imposed upon "a defendant convicted solely as an accomplice to premeditated first degree murder." State v. Roberts, 142 Wn.2d 471, 505, 14 P.3d 713 (2000); State v. Thomas, 150 Wn.2d 821, 842, 83 P.3d 970 (2004) (Thomas I). The same constitutional provisions mandate that death cases also require any aggravated factors under RCW 10.95.020 to be found specifically applicable to the defendant. Roberts, 142 Wn.2d 471, 506, 509; Thomas I, 150 Wn.2d 821, 842.

These rules should be extended to sentences of life without the possibility of parole because that sentence and a death sentence are, in terms of severity, alternate sides of the same coin. They are the two most severe sentences the State may impose, different in kind from every other criminal sentence. Even the next most harsh sentence, life with the possibility of parole is "wholly different" from life without such possibility:

> [I]t is clear that the legislature intended a life sentence with the possibility of parole and a sentence of life without parole to be wholly different. By statute, a defendant charged with murder is not eligible for either life without parole or the death penalty unless aggravators are found beyond a reasonable doubt. Without a showing of aggravators, the maximum sentence is life with the possibility of parole. This statutory scheme reveals that the legislature perceived life without parole to be a harsher sentence than just life.

Thomas I, 150 Wn.2d 821, 848. What makes a sentence of death and a sentence of life without parole so similar to each other and distinct from all other sentences is

that, with either sentence, the State effectively takes the rest of a person's life away.

Indeed, the Legislature, by its statutory scheme, has shown it considers death and life without parole to be similarly severe sentences. RCW 10.95.020 applies the same aggravating factors to trigger the death penalty as it does to trigger a sentence of life without parole, indicating a qualitative similarity between the two punishments. It separates these two sentences into a category of their own, utterly distinct from any other sentence imposed. Thus, by the nature of the statutory scheme itself, the Legislature has indicated that sentences of death or life without the possibility of parole are similarly severe and, together, separate and distinct from all other sentences. Accordingly, the two sentences create similar constitutional "cruel and unusual" or "cruel" punishment implications and imposition of either sentence requires the safeguards imposed in Roberts and Thomas.[1]

For all these reasons, the Eighth and Fourteenth Amendments to the United States Constitution and the due process and cruel punishment clauses of

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1. While similarly severe, the two sentences are not similarly final. Thus, defendants sentenced to death are accorded greater appellate rights than those sentenced to life without parole. *See, e.g.*, RCW 10.95.100; RCW 10.95.130.

Moreover, the two sentences may be effectively indistinguishable as a practical matter for defendants. That is because the majority of people sentenced to death end up dying of natural causes in prison while awaiting execution, just as defendants sentenced to life without parole do. *ACLU of Northern California*, "The Truth About Life Without Parole: Condemned to Die in Prison" (noting that, in California, the state with the largest death row in the country, more than four times as many prisoners have died of other causes while awaiting execution than have actually been executed).Found at: https://www.aclunc.org/issues/criminal_justice/death_penalty/the_truth_about_life_without_parole_condemned_to_die_in_prison.shtml.

the Washington State Constitution require the same protections be applied to persons sentenced to life without the possibility of parole as are applied to persons sentenced to death. For both categories of defendants, the State must prove, when the defendant has been convicted of the underlying crime as an accomplice, major participation by a defendant in the acts giving rise to the homicide and the aggravating factors' specific application to the defendant. If the Eighth and Fourteenth Amendments do not extend such protection, this Court should hold that the Washington State Constitution does. The Supreme Court has "repeatedly" recognized that the prohibition against "cruel punishment" under the State constitution "often provides greater protection than the Eighth Amendment." Roberts, 142 Wn.2d 471, 506.

Further, Division 1 has observed that the decision in Thomas I compels the conclusion that the challenged jury instruction is required by constitutional jurisprudence. State v. Whitaker, 133 Wn. App. 199, 234, 135 P.3d 923 (2006) (ultimately not deciding State's appeal of jury instruction issue due to mootness). In Thomas I, the Supreme Court, relying on Roberts, reversed a death sentence when the jury instructions did not include a major participation requirement and the aggravating factors could have been proven without the defendant's direct involvement. Thomas I, 150 Wn.2d 821, 840-43. If these two requirements were only applicable to death cases, not cases involving life without parole, the Supreme Court could have remanded for resentencing to life without parole. Instead, however, the Court held harmless error was not available to uphold an

aggravated conviction or sentence under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Thomas I, 150 Wn.2d at 847-49. Accordingly, the Court remanded for either a new trial on aggravated first degree murder or resentencing on first degree murder. Thomas I, 150 Wn.2d at 850.

As the court in Whitaker reasoned, this result indicates the Supreme Court holds the jury instruction the State challenges is required in any aggravated factors case, not just a death penalty case:

> The conclusion that "major participant" language had to be included in the instructions for Whitaker's aggravated murder case even though no death penalty was sought appears to be compelled by the analysis in Thomas. Had the Thomas court believed that "major participant" language in the instructions was required only for death cases, Thomas could have been resentenced to life in prison without parole. There would have been no reason to decide whether harmless error was available to affirm the aggravated murder conviction but not the death penalty, if no error occurred in the first place.

Whitaker, 133 Wn. App. 199, 234. In this way, Division 1 observed that the issue was decided by Thomas I to require the "major participant" language, even as the court "acknowledge[d]" the force of the State's argument that the major participant language might have lawfully been omitted in a non-death-penalty case. *Id.*

Although Division 1 did not affirmatively decide this issue, its reasoning is sound and should be adopted by this Court to require "major participant" language

and direct application of aggravating factors to the defendant in all accomplice liability cases involving such factors under RCW 10.95.020.

For all these reasons, if the Court reaches this issue, it should hold Jury Instruction Number 46 provided a correct statement of the law.

B. The State was Required to Prove the Aggravating Factor Specifically Applied to Mr. Walker's Actions

Next, the requirement in the challenged jury instruction that the aggravating factor apply directly to the defendant is squarely based on a plain reading of RCW 10.95.020 and RCW 9A.08.020. Questions of statutory interpretation are reviewed de novo. A court's primary objective in statutory interpretation is to give effect to the intent of the Legislature, beginning with the plain language of the statute. Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010) (citations omitted). Criminal statutes "must be strictly construed, and any ambiguity must be resolved in favor of lenity." United States v. Enmons, 410 U.S. 396, 411, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973); *accord* Internet Community & Entertainment Corp. v. Washington State Gambling Comm'n, 169 Wn.2d 687, 691-92, 238 P.3d 1163 (2010) ("Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law.").

By its terms, the complicity statute applies to substantive crimes, not sentence enhancements. RCW 9A.08.020(1) ("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.") (emphasis added). Accordingly, courts have consistently held a person cannot be an accomplice to a sentence enhancement through the complicity statute alone. State v. McKim, 98 Wn.2d 111, 115-16, 653 P.2d 1040 (1982), *superceded by statute as noted in*, State v. Bilal, 54 Wn. App. 778, 782, 776 P.2d 153 (1989); State v. Davis, 101 Wn.2d 654, 658, 682 P.2d 883 (1984) (explicitly reaffirming the holding from McKim that the complicity statute provides accomplice liability only for the substantive crime, not sentence enhancements); State v. Barnes, 153 Wn.2d 378, 386 n.7, 103 P.3d 1219 (2005) (noting the Court's reaffirmance of McKim); State v. Pineda-Pineda, 154 Wn. App. 653, 661, 226 P.3d 164 (2010) (relying on McKim to hold the accomplice liability statute "cannot be the basis to impose a sentencing enhancement" and resolving question left open in Silva-Baltazar); In re Howerton, 109 Wn. App. 494, 500-01, 36 P.3d 565 (2001) (relying on McKim to hold that the complicity statute does not provide a basis for liability for a sentence enhancement); *see also* State v. Silva-Baltazar, 125 Wn.2d 472,886 P.2d 138 (1994) (discussing reasoning of McKim but finding it did not apply to facts before Court).[2]

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2. As these cases reveal, the State is mistaken when it argues that the Sentencing Reform Act, "by changing the language of various enhancements, effectively superseded the analysis of McKim on the applicability of enhancements to accomplices." *Brief of Respondent* at 36. In addition, the cases the State relies upon to argue accomplice liability provides equal liability for sentence enhancements are inapposite. Silva-Baltazar held that defendants convicted of distributing drugs under a theory of accomplice liability, who actually participated in the commission of the crime in

The aggravating factor at issue here was a sentence enhancement and, thus, not subject to accomplice liability through the complicity statute. The factor provided that the "murder was committed in the course of, in furtherance of, or in immediate flight from . . . [r]obbery in the first or second degree." RCW 10.95.020(a); see CP 11-14. This was a sentence enhancement as it raised the offense seriousness level from XV for murder in the first degree to XVI for aggravated murder. RCW 9.94A.515; State v. Roberts, 142 Wn.2d 471, 501, 14 P.3d 713 (2000) ("Aggravated first degree murder is not a crime in and of itself; the crime is 'premeditated murder in the first degree (not murder by extreme indifference or felony murder) accompanied by the presence of one or more of the statutory aggravating circumstances listed in the criminal procedure title of the code.'"). Only crimes at seriousness level XVI are punished with life in prison without the possibility of release or death. RCW 9.94A.510. Because the aggravating factor is a sentence enhancement, not a crime, the complicity statute does not apply on its face. McKim, 98 Wn.2d at 115-16; Howerton, 109 Wn. App. 494, 499-501.

Once the complicity statute is found not to apply to a situation, the Court is required to look at the penalty enhancement itself to determine whether it

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a drug-free zone, could be subject to a sentence enhancement based on the drug-free location of the crime. 125 Wn.2d 472, 483. It expressly reserved the question of whether the accomplices would be so liable had only an accomplice, not the defendants themselves, been in the zone. 125 Wn.2d at 480. It distinguished its situation case from McKim by holding that the applicable statute, unlike the statute addressed in McKim, imposed strict liability. 125 Wn.2d at 481-82. State v. Carter, 154 Wn.2d 71, 109 P.3d 823 (2005), held that a person who had not participated in the commission of an underlying crime could be responsible for felony murder only through accomplice liability.

contemplates accomplice liability. McKim, 98 Wn.2d at 115; Howerton, 109 Wn. App. 494, 500-501. In McKim, the Court held that the deadly weapon enhancement at issue did not contemplate accomplice liability because RCW 9.95.015 required "a finding of fact of whether or not the accused was armed with a deadly weapon." McKim, 98 Wn.2d at 116 (emphasis in original). The Court held this language required a special finding of fact as to whether the defendant was armed or had knowledge of the deadly weapon. A conclusion of similar effect is required in this case.

There is no statutory support for applying the aggravating factors of RCW 10.95.020 solely through accomplice liability. That statute provides the list of aggravating factors which, if found by a jury, establish aggravated murder. Like the deadly weapon enhancement statute interpreted in McKim (and contrary to the current deadly weapon statute, RCW 9.94A.533, which includes "or an accomplice" language), none of the aggravating factors listed in RCW 10.95.020 is relevant to either the defendant "or an accomplice." Instead, each is relevant only to "the person":

> A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:
>
> (1) The victim was a law enforcement officer, corrections officer, or firefighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;
>
> (2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized

or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or

(b) Any criminal assault.

RCW 10.95.020.[3]

Without any reference to "an accomplice," this statute must be interpreted similarly to the way the analogous statute was interpreted in McKim: to require the State to prove the defendant himself was personally responsible for or aware of the particular factor. Because factors that increase a sentence must be found by a jury, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), this case, as was true in McKim, requires a special verdict establishing that Mr. Walker was directly involved in the aggravating factor before the court can impose a sentence of life without the possibility of parole.

Moreover, a tenet of statutory construction, that "when the legislature uses different words in statutes relating to a similar subject matter, it intends different

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3. Counsel could find no significance in the Legislature's use of the word "person" in this statute rather than the word "defendant." According to RCW 9A.04.110(17), "person" includes "any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association." However, that definition is relevant only to that title.

meanings," State v. Flores, 164 Wn.2d 1, 10, 186 P.3d 1038 (2008) (holding violation of particular statute did not encompass the act of selling drugs in the presence of a minor), supports the conclusion that accomplice liability is not relevant in this context. Comparing another sentence enhancement statute, RCW 9.94A.533, with the instant statute, compels this conclusion. RCW 9.94A.533(3), (4) and (5) all provide sentence enhancements for various circumstances, and all include "or an accomplice" language. RCW 9.94A.533. These provisions have been interpreted to allow accomplice liability for the enhancements. *See, e.g.*, State v. Bilal, 54 Wn. App. 778, 782, 776 P.2d 153 (1989) (holding "[t]he inclusion of the words 'or an accomplice' [in the SRA] leaves no doubt that the statute was intended to apply whenever the defendant or an accomplice was armed"). By contrast, when RCW 10.95.020 does not contain such language, the McKim analysis controls and accomplice liability cannot be supported.[4]

Indeed, the State has cited no opinion holding the aggravating factors of RCW 10.95.020 apply to a defendant vicariously, solely through accomplice liability. The most that has been held is such factors apply to a defendant convicted of the underlying crime through such liability. In Roberts, the death penalty case that interpreted the same statute at issue here, RCW 10.95.020, the

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4. Another relevant comparison is RCW 9.94A.535, Departures from the Guidelines. That provision, establishing mitigating and aggravating conditions that allow a court to depart from a standard sentence range, is of a similar nature to RCW 10.95 and its mitigating and aggravating factors. Like RCW 10.95, RCW 9.94A.535 contains only conditions personal to the defendant. None are applicable if either the defendant or an accomplice qualifies. However, in State v. Silva-Baltazar, 125 Wn.2d 472,886 P.2d 138 (1994), the Court found comparisons between RCW 10.95 and the SRA to be unpersuasive.

Court read the opening clause of the statute, "A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a)," narrowly. Roberts, 142 Wn.2d 471, 501 (emphasis added by Court). "Based upon the above statutory language, it is debatable whether the aggravated murder statute as worded even allows for the execution of a defendant convicted as an accomplice to first degree murder." *Id.*

However, the Court next found statutory support indicating the Legislature intended that persons convicted of the substantive crime through accomplice liability could be subject to the aggravating factors. *Id.* at 502 (noting two provisions of RCW 10.95 indicate a person convicted of first degree premeditated murder as an accomplice may be subject to either an aggravating or a mitigating factor). Significantly, this finding is distinct from one allowing the aggravating factors to apply to a defendant solely through accomplice liability. All the Court indicated was that, despite the first clause of RCW 10.95.020, the Legislature intended even those convicted of the substantive crime through accomplice liability to be subject to potential aggravating factors.

For all these reasons, the plain meaning of RCW 10.95.020 and RCW 9A.08.020 compel the conclusion that the trial court was correct in requiring the State to prove that the aggravating circumstance applied specifically to Mr. Walker's actions.

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Mr. Walker relies on Appellant's Brief for the remainder of his arguments.

II. CONCLUSION

For all of these reasons, Mr. Walker respectfully requests this Court to vacate or reverse his convictions.

Dated this 1st day of June, 2012.

Respectfully submitted,

/s/ *Carol Elewski*
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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 1st day of June, 2012, I caused a true and correct copy of Appellant's Reply Brief to be served by e-filing, on:

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