SUPREME COURT No.: 91452-4

COA NO. 31441-3-III

SUPREME COURT OF WASHINGTON

ABRAHAM LOPEZ, Petitioner,

v.

STATE OF WASHINGTON, Respondent,

Petition for Review

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT CASES

WASHINGTON COURT OF APPEALS CASES

STATUTES

OTHER AUTHORITY

I. THE PETITIONER & THE COURT OF APPEALS' OPINION

Benjamin Lopez and his younger brother Abraham Lopez, were tried in Grant County Superior Court where a jury convicted both of them of one count of second degree murder and one count of drive by shooting.

Each of them appealed their convictions to Division III of the court of appeals. Asking for a new trial, each of them advanced two nearly identical arguments: the first, based upon a jury instruction which misstated the "reasonable doubt:" standard, and the second, based upon the prosecutor's repeated misconduct during closing argument. Both opinions rejected the arguments of each appellant using the same reasoning and nearly identical language.[1] In addition, Benjamin argued that the evidence did not support his conviction as an accomplice to the murder.

II. ISSUES PRESENTED FOR REVIEW

A. Whether a defendant, under the invited error doctrine, forfeits his right to assign error to an erroneous instruction that misstates the reasonable doubt standard when the trial court, not the defendant, initially suggests the instruction and has been giving that same erroneous instruction for years.

B. Whether a prosecutor does not commit misconduct when he repeatedly

[1] Ror that reason, and judicial economy, counsel is submitting the same petition for each case.

argues that gang violence in the community, unconnected to the defendant's own acts, is a valid basis to convict someone as an accomplice to murder simply because gang members have a "natural tendency" to engage in retaliatory violence.

C. Whether an accomplice can be convicted as an accomplice to murder so long some facts make it "possible" that the accomplice knew the charged crime was going to be committed.

III. STATEMENT OF THE CASE

On April 22, 2011, Alexis Hernandez (age 17) and two brothers, Benjamin (age 17) and Abraham Lopez (age 15), attended a barbeque together.2 Benjamin testified that he knew a local weed dealer, Kenney Wilkins, who lived in Ephrata and suggested that they drive to his house to buy weed from him.3 Murillo, a co-defendant who later pleaded guilty, was 22 years old, had a driver's license and a car, and agreed to drive everyone to go get the weed.4 All parties, including the State's star witness, Hernandez, testified that they left the party to "buy bud."5

Benjamin testified that while on the way to Watkin's house, the four drove by the former home of Adan Beltran, a rival gang member.[6] As

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[2] CP 8-10; Vol. 10, RP 186-190.
[3] Vol. 10, RP 190.
[4] Vol. 10, RP 189.
[5] Vol. 7, RP 139-141; Vol. 7, RP 171.

they passed the house, someone in the car had said that they thought they saw Beltran in the front yard of the house.[7]

At that point, Benjamin testified to hearing multiple gunshots.[8] Murillo tried to evade the pursuing police vehicles, but his car was eventually stopped by authorities using spike strips.[9] Once the car was immobilized, Murillo jumped out of the car and fled the scene on foot. None of the juveniles fled from the car.[10]

On April 25, 2011, the State charged all four defendants with various forms of first and second degree murder, drive by shooting, and other related charges. Only the petitioners in this case, Benjamin and Abraham, were tried. Before trial, Murllio pleaded guilty to one count of second degree murder and did not testify at trial. In addition, the State offered Alexis full immunity

Before deciding Abraham's guilt, the jury deliberated for several days. During that time, the jury submitted multiple jury questions. CP 207-12. The jury acquitted Abraham and Benjamin of Murder in the First

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[6] Vol. 10, RP 191-94.
[7] Vol. 10, RP 193.
[8] Vol. 10, RP 203.
[9] Vol. 10, RP 212.
[10] CP 8-10.

Degree but found them both guilty of Drive-By Shooting and Felony Murder in the Second Degree.[11]

IV. WHY THIS COURT SHOULD ACCEPT REVIEW

A. THIS COURT SHOULD ACCEPT REVIEW OF THE COURT OF APPEALS DECISION THAT HELD THAT BOTH PETITIONERS "INVITED" AN ERRONEOUS JURY INSTRUCTION THAT MISSTATED THE REASONABLE DOUBT STANDARD, EVEN THOUGH THAT INSTRUCTION WAS INITIALLY PROPOSED AND THEN FULLY ENDORSED BY THE TRIAL COURT.

Rather than following the WPICs, the trial court to-convict instructions in this case told the jury that it "should return a verdict of not guilty."[12] Both petitioners argued in their briefing that his was a structural error and required the court of appeals to reverse. The court of appeals agreed that the instruction was "structural error":

> This instruction confused the jury and allowed them to return a guilty verdict even if they had a reasonable doubt as to Benjamin's guilt. Thus, the court relieved the State of the burden of proof beyond a reasonable doubt, thereby violating due process and constituting manifest constitutional error. We agree with Benjamin. [13]

Citing its previous decision in *Smith*, the court of appeals reasoned that,

> [h]ere, as in Smith, the trial court erroneously instructed the jury that it "should" return a verdict of not guilty based on the evidence. This instruction relieved the State of its

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[11] CP 229-30. The

[12] Benjamin Lopez Opinion at 11.

[13] *See State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785, review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013). This case is relied upon and cited in the Opinion at 13 (Benjamin Lopez Opinion).

burden of proving guilt beyond a reasonable doubt.[14]

Although it agreed with Benjamin and Abraham that that the instruction relieved the State of its burden of proof and constituted "structural error," the court of appeals reversed, holding that both petitioners "invited the error" and could not claim error on appeal. This holding, as argued below, conflicts with numerous decisions of this court. It also presents a significant issue of unresolved law within this State that warrants this courts review.

1. The Opinion conflicts with the Following Decisions from this Court: *State v. Wakefield*[15] and *State v. Coggin.*[16] This court should therefore accept review to resolve this conflict.[17]

"The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial."[18] The doctrine "prohibits a party from *setting up an error* at trial and then complaining of it on appeal."[19] An error is only "invited" if the defendant's actions were affirmative and voluntary.[20]

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[14] Benjamin Lopez Opinion at 14-15.
[15] *State v. Wakefield*, 130 Wn. 2d 464, 475, 925 P.2d 183, 188 (1996).
[16] *In re Coggin*, 182 Wn. 2d 115, 119, 340 P.3d 810, 812 (2014).
[17] RAP 13.4(b)(1).
[18] *In re Coggin*, 182 Wn. 2d 115, 119, 340 P.3d 810, 812 (2014); *State v. Momah*, 167 Wn. 2d 140, 154, 217 P.3d 321, 328 (2009)
[19] *State v. Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000) (court's emphasis); *In re Call*, 144 Wn. 2d 315, 328, 28 P.3d 709, 716 (2001).
[20] *Id.* (This court has observed that the invited error doctrine "appears to require affirmative actions by the defendant ... [in which] the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine."). *Thompson*, 141 Wn.2d at 723.

Though the court of appeals here correct that a party who "proposes" an erroneous instruction has usually "set up" that error and forfeits any right to complain of it,[21] that rule does not apply when the party is merely "assenting" to an error proposed by the court or by the State.[22]

In *Wakefield,* the State argued for the doctrine because the trial court became involved in the plea negotiations "in response to a request from *defense counsel."*[23] Because the source of any error may have been not defense counsel but *the trial court*, whose actions cast doubt on the voluntariness of Wakefield's plea, this court declined to apply the invited error doctrine.[24]

Similarly, in *Coggin*, In *Coggin*, the defense counsel initially proposed the idea of questing jurors in chambers. This obviously was not error, presuming that the trial judge complied with *Bone-Club*. Then the State drafted jury instructions, *which the defense approved.* Despite this approval, this Court held that a defendant does not "invite" the trial court to violate his right to a public trial by merely "assenting to the State's juror

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[21] *See In re Call*, 144 Wn. 2d 315, 328, 28 P.3d 709, 716 (2001).
[22] *State v. Wakefield*, 130 Wn. 2d 464, 475, 925 P.2d 183, 188 (1996).
[23] *Id.*
[24] *Id.*

questionnaire, also noting that *"it was the trial judge who decided to question jurors in chambers."*[25]

This case, like *Wakefield* and *Coggin*, is not one in which the invited error doctrine applies. Here, just as in those cases, "it was the trial judge who decided" to commit the constitutional (and structural error) at issue. In all three cases, had the trial court not suggested the erroneous procedure, the error would never have occurred. This case is very similar to cases like *Coggin*, where trial court's regularly violated defendant's public trial rights as a matter of course because here, the trial judge in this case openly admitted that he had been giving the same erroneous instruction for years.

In many ways, Benjamin and Abraham were *less* responsible for the error that occurred in this case, than were the defendants in *Wakefield* and *Coggin* because here, unlike in those cases, there was no request from defense counsel that prompted the trial court to error. In *Wakefield*, defense counsel actually invited the trial court to participate in plea negotiations, which lead the court to improperly participate in plea

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[25] *Coggin*, 182 Wn. 2d at 119. "During jury selection, defense counsel expressed a desire for individual juror questioning due to the publicity and sensitive nature of the case. The prosecutor drafted a juror questionnaire, and *defense counsel approved the final version.* The questionnaire advised the potential jurors that if they preferred to discuss their answers in private, the court would give them an opportunity to explain their answers in a "closed hearing." The court and the parties questioned 12 prospective jurors in chambers. Before doing so, the court did not engage in the analysis required by Bone–Club, Six prospective jurors were dismissed for cause." *Id.* at 117.

negotiations, but that invite did not preclude review.[26] Similarly, in *Coggin*, defense counsel invited the court to question the jurors in chambers, but that invitation did not preclude him from challenging the trial court's failure to conduct the *Bone-Club* analysis before acting on that request.[27]

This Court was clear in *Gentry*, "the failure to except to an erroneous jury instruction is different than actually proposing an erroneous instruction; the former is a failure to preserve error; the latter is error invited by the defense."[28] But here, neither defense attorney invited the trial judge to give an erroneous instruction; the trial judge was the one who suggested it, without any party first asking for it. At best, Benjamin and Abraham "assented" to the trial court's belief that the instruction was an accurate statement of law. But mere "assent" is not enough to invoke the "invited error" doctrine, as this court clearly stated in *Coggin*.

Finally, applying the invited error doctrine fails to serve the sole purpose of the doctrine: to prevent "a party who sets up an error at trial" so he can "claim that very action as error on appeal and receive a new trial."[29]

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[26] *Wakefield*, 130 Wn. 2d at 475.
[27] *Coggin*, 182 Wn. 2d at 119.
[28] *State v. Gentry*, 125 Wn.2d 570, 646, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995).
[29] *Coggin*, 182 Wn. 2d at 119.

2. This issue presents a significant question of law under the federal and/or state constitutions.[30]

This court should accept review of this case because this issue will likely resurface in other cases. As the court of appeals has already noted, the trial judge in this case has been giving this same instruction for years. And under current case law in Division III, this error is "structural" and requires it to reverse any conviction, unless the defense invited the error.[31]

This issue is significant because it may require reversal of numerous convictions, without a showing of prejudice, both in the present and in the future. As the trial judge in this case has admitted, he has been using this same erroneous instruction for years. And in this case, even despite the State's objection to the instruction, the trial court still gave it. To prevent these errors from plaguing the court of appeals and confusing criminal attorneys, this court should accept review of this case to resolve these unresolved issues.

B. THE OPINION HOLDS THAT A PROSECUTOR DOES NOT COMMIT MISCONDUCT WHEN HE REPEATEDLY ARGUES THAT GANG VIOLENCE IN THE COMMUNITY, UNCONNECTED TO THE DEFENDANT'S OWN ACTS, IS A VALID BASIS TO CONVICT SOMEONE AS AN ACCOMPLICE TO MURDER SIMPLY BECAUSE GANG MEMBERS HAVE A "NATURAL TENDENCY" TO ENGAGE IN RETALIATORY VIOLENCE. THIS HOLDING CONFLICTS WITH DECISIONS OF THIS COURT.

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[30] RAP 13.4(b)(3).

[31] *See Smith*, 174 Wn. App. at 366 (reversing based upon structural error without a showing of prejudice).

The Opinion acknowledges this Court's decision in *Belgarde* in which the court held that it is reversible misconduct for a prosecutor to argue The prosecutor in this case repeatedly argued facts not in evidence,[32] improperly appealed "to the passion and prejudice of the jury by calling attention to the amount of violence in the community and implying that a conviction would help stop the violence,"[33] and made "gang violence and retribution" a focal point of his closing argument by mentioning it "*throughout the prosecution's* closing argument."[34] For example, the prosecutor told the jury

> You heard Alexis Hernandez say that he had been shot at on three separate occasions. This is an 18 year old who's already been shot at on three separate occasions. This is out of hand."[35]

The Opinion admits that although "The State produced evidence of repeated gang violence, including Mr. Hernandez's testimony that he was shot at on three separate occasions, [t] there is no inference that either Abraham or Benjamin was responsible for the three shootings at Mr.

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[32] The court agreed that much of the prosecutor's argument was not at all supported by facts in the record. For example, the Opinion observes, "In our review of the record, there is no evidence regarding Mr. Hernandez's mental capacity or his ability to make up a story. The prosecutor bolstered Mr. Hernandez's credibility by giving an unsupported reason as to why he was telling the truth." Benjamin Lopez Opinion at 33 (finding this statement improper but holding that the prejudice was "minimal" and could have been cured by a limiting instruction).

[33] Benjamin Lopez Opinion at 27.

[34] Benjamin Lopez Opinion at 28.

[35] Benjamin Lopez Opinion at 24 (citing 12 RP at 32)

Hernandez."[36] It goes on to claim however, that this statement was not improper because "the State's motive was retaliation,"[37] even though there was absolutely *no* connection between the petitioner's and the gang violence that the prosecutor implied as a basis for the jury to convict.

And the prosecutor, as mentioned above, continued this theme "throughout" his closing argument. The prosecutor clearly argued that, gang members have the propensity for violence and retribution, thus implying that the jury should convict the petitioners on that basis. In one such example, quoted in the Opinion, the court of appeals observed that the prosecutor argued:

> Let's talk for a moment about common sense and human emotion. These young men have committed their lives to this group, and we know that one of their friends was murdered. *And we know from our human experience that revenge and retribution is a natural human desire. Maybe not for everyone. Maybe not for everyone in this courtroom. Maybe not for everyone in the world. But it is definitely fair to say that it is a natural desire for many. And certainly it would be a more natural desire for people who have committed their lives to a criminal street gang, people who have actively engaged in back and forth fighting.*[38]

This argument too, as the petitioners both argued, was improper and prejudicial because it appealed to the fears of gang violence, their prejudices against gang members, and was a classic example of pure

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[36] Benjamin Lopez Opinion at 27.
[37] Benjamin Lopez Opinion at 27.
[38] Benjamin Lopez Opinion at 28. (citing 12 RP 38) (emphasis added).

propensity evidence. The court of appeals, dismissed this argument claiming that this argument "did not use [the petitioners''] gang membership to show [their] propensity to commit the shooting."[39]

This holding ignores clear precedent from this Court regarding what is and what is not propensity evidence. In *Foxhaven*, this Court observed that, under ER 404(b), evidence of other misconduct is not allowed to show that the defendant is a "criminal-type person" likely to commit the crime charged.[40] By preventing such inferences, as the court of appeals itself has observed, the rule helps ensure a fair trial by "confine[ing] the fact finder to the merits of the current case in judging a person's guilt or innocence."[41]

But the arguments advanced by the prosecutor were clearly designed to have the jury ignore the merits of the case and instead, decide the case based on the propensity of all gang members to commit crimes, not the individual acts of the petitioners. In the portion of argument quoted above, for instance, the prosecutor claims that Benjamin and Abraham have "devoted their lives" to their gang, and then clearly implies that, as gang members, it is fair to say that [retribution] is a natural tendency" for them because they have "committed their lives to a criminal street gang,

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[39] *Id.* at 29.
[40] *State v. Foxhoven,* 161 Wn.2d 168, 175, 163 P.3d 786 (2007).
[41] *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1998).

people [not the petitioners] who have engaged in back and forth fighting."[42] This is no more than pure propensity evidence poorly concealed as "motive" evidence.

Although the prosecutor briefly mentions that the petitioners' friend was killed by a rival gang, he makes no effort to connect the death to the petitioners themselves. Instead, the prosecutor clearly calls attention to the unproved prior bad acts of *all* gang members, and then tells the jury that all gang members have "a natural tendency" to kill other gang members.

Gang violence is, of course, unacceptable, deplorable, and should be punished accordingly. Those who are punished for it, however, should be the ones who engaged in that violence. Here, the prosecutor produced absolutely no evidence that either petitioner had a history of gang "violence," yet it strongly implied, "throughout" its closing argument, that this was a valid reason for the jury to find each petitioner guilty of murder.

C. THE OPINION HOLDS THAT AN ACCOMPLICE CAN BE CONVICTED AS AN ACCOMPLICE TO MURDER SO LONG SOME FACTS MAKE IT "POSSIBLE" THAT THE ACCOMPLICE KNEW THE CHARGED CRIME WAS GOING TO BE COMMITTED. THE OPINION CONFLICTS WITH THE FOLLOWING DECISIONS FROM THIS COURT: *STATE V. STEIN*, *STATE V. VASQUEZ*, AND

[42] Benjamin Lopez Opinion at 28

STATE V. GREEN.[43]

The court held, and the petitioner does not dispute, that Benjamin "aided" in the murder by "giving directions" to the location of the scene of the crime. The court summarized this evidence as follows:

> Mr. Hernandez testified that [1] Benjamin gave directions and the mend ended up at Mr. Beltran's] home, and [2] Abraham [then] left the car at the time of the shooting.[44]

The court of appeals also held, however, that Benjamin gave these directions knowing that his alleged accomplices intended to kill Beltran. The court reasoned that the jury could "infer that Benjamin knew Abraham and Mr. Murillo intended to commit a drive-by shooting and that Benjamin"[45] because "*it was possible* for the jury to find that Benjamin knew that the murder of Mr. Beltran would occur."[46]

But, both Due Process and the precedent of this court require more than that to convict someone of a crime as an accomplice. To prove accomplice liability, the State must prove actual knowledge.[47] The

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[43] RAP 13.4(b)(1). This argument, unlike the previous two, only applies to Benjamin's petition for review.
[44] Benjamin Lopez Opinion at 36.
[45] Benjamin Lopez Opinion at 19.
[46] Benjamin Lopez Opinion at 18-19.
[47] It is both beyond well-established now that a jury can only find someone guilty as an accomplice it the State has proved, beyond a reasonable doubt that the defendant (1) aided in the charged crime, and (2) he did so with "actual knowledge" that such aid would "promote or facilitate" "the crime charged." *See State v. Bauer*, No. 88559-1, Slip at 16-17 (citing *State v. Stein*, 144 Wn.2d 236, 245, 27 P.3d 184 (2001); RCW 9A.08.020(3)(a). *State v. Walker*, 341 P.3d 976, 993 (2015) (J. McCloud concurring) ("The jury must find, at the very least, that he had knowledge of "the crime" to be

evidence must do more than show that the crime was merely "foreseeable" or that the defendant "should have known that his alleged accomplices would commit such a crime.[48]

In its brief discussion of why the evidence was sufficient, the Opinion states that Benjamin "gave directions" to the ally where the shooter stopped the car, got out, ran around a house, and shot the victim. But giving directions to the scene of a crime does not make someone an accomplice unless the jury can reasonably infer that the defendant actually knew that his directions would aid in the charged crimes, here murder and drive by shooting. If, however, Benjamin gave those directions intending to commit some other crime, i.e. simple possession of marijuana for example, then the jury could not find him guilty.

Under *Green*, the court of appeals was still required to overturn that verdict if no juror, acting rationally, could have found such knowledge *beyond a reasonable doubt.*[49] If the evidence allows two "equally plausible" inferences, inferring one fact over the other is illogical and violates Due Process.[50] For example, when there are multiple possible

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committed and that he acted with knowledge that his conduct would promote or facilitate that crime.").

[48] *Stein*, 144 Wn.2d at 245–46.

[49] *See State v. Green*, 94 Wn. 2d 216, 220–22, 616 P.2d 628 (1980); *see, e.g., In re Welfare of Wilson,* 91 Wash.2d 487, 491, 588 P.2d 1161 (1979) (dismissing a juvenile's conviction based upon accomplice liability when it would be unreasonable for the jury to infer that his mere presence, without more, made him an accomplice to a crime).

[50] *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013).

inferences from Fact A, the proven facts must allow the jury to conclude, at a minimum, that Fact B (the inferred fact) flows "more likely than not" from fact A (the proven fact).[51] Accordingly, the evidence must allow the jury to conclude—at a minimum—that it was "more likely than not" that Benjamin (1) Benjamin did in fact *give* directions to Murillo, *and* (2) the he did so with the knowledge that those directions would aid in a murder.[52]

In *Vasquez*, this Court reversed a conviction where the jury found the defendant intended to defraud based upon evidence that—once viewed as a whole—was "patently equivocal."[53] There, this Court held that "[w]hen intent is an element of the crime, intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability."[54] "Though intent is typically proved through circumstantial evidence," the court continued, "intent may not be inferred from evidence

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[51] *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). Indeed, in cases in which the inference is the sole and sufficient proof of an element, a higher standard of reasonable doubt may well be triggered. *Id.*; *State v. Hanna*, 123 Wn.2d 704, 710–11, 871 P.2d 135 (1994); *State v. Sandoval*, 123 Wn. App. 1, 5, 94 P.3d 323 (2004) (referring to opinions that have discussed a higher standard of reasonable doubt, but noting that the state Supreme Court has not yet applied it); *State v. Farr-Lenzini*, 93 Wn. App. 453, 469 n.7, 970 P.2d 313 (1999) (same).

[52] *See State v. Evans*, 154 Wash.2d 438, 114 P.3d 627 (2005) (reversing felony murder; jury instruction allowed conviction on murder without finding he personally attempted or committed the robbery if it found he was only an accomplice to theft).

[53] *State v. Vasquez*, 178 Wn. 2d 1, 14, 309 P.3d 318, 324 (2013) (*citing Bergeron*, 105 Wash.2d at 20, 711 P.2d 1000).

[54] *Id.* at 14 (*citing State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)).

that is "patently equivocal."[55] Rather, inferences of intent may be drawn only "from conduct that plainly indicates such intent as a matter of logical probability."[56] *Vasquez* reaffirmed the longstanding Due Process requirement that a jury never "infer criminal intent from evidence that is patently equivocal."[57]

Here, just as in *Vasquez*, the jury was presented with two equally likely inferences: (a) the State's theory—that Benjamin, Abraham, and Murillo pre-planned a murder and that Benjamin gave directions to the victim's house, and (b) the defense theory—that Benjamin gave directions to a drug dealer's house that lived in the same neighborhood as the victim, but then, as they drove past the victim's house, Murrillo turned the car around and came back and shot the victim. None of the evidence cited in the opinion, including a potential motive and Benjamin's alleged post-crime silence, would allow the jury to find that one of these theories was more likely than the other.

Motive for example, does make it more likely that Benjamin wanted the victim to die, but it does not make it any more likely that the killing was planned. It is at least equally likely that Benjamin gave directions, intending to go buy some weed, a fact upon which all parties

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[55] *Id.* (*citing State v. Bergeron*, 105 Wn. 2d 1, 20, 711 P.2d 1000 (1985), *Woods*, 63 Wn. App. at 591), and *State v. Couch*, 44 Wn. App. 26, 32, 720 P.2d 1387 (1986)).
[56] *Id.* (*citing Bergeron,* 105 Wash.2d at 20)).
[57] *Id.*

agreed. And if Benjamin gave directions to Murillo, the driver, believing that they were just going to buy weed, he clearly cannot be convicted of accomplice to murder.[58]

Further, contrary to the Opinion's holding, Benjamin's post-crime silence is not helpful for the same reason: it fails to make it "more likely than not" that the crime was planned. And, if the jury cannot infer a plan to kill the victim, it is impossible for it to infer that Benjamin's directions were given with actual knowledge that they would aid in that crime.

Although this in not a published opinion, this court should still accept review because the court of appeals error here, most notably in applying *Green* and the reasonable doubt standard on appeal, is widespread in this State. Court's regularly uphold convictions based upon circumstantial evidence without first determining whether the jury's inferences are "reasonable" and this court almost always declines to review those cases.[59]

This is especially true with regard to cases in which the defendant was convicted, as an accomplice, where the circumstantial evidence of

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[58] *See* cases cited in FN 20.

[59] *See, e.g., State v. Longshore*, 181 Wn. App. 1033 (2014) review denied, 182 Wn. 2d 1011, 343 P.3d 760 (2014) (In a very close case, Division I dismissed appellant's sufficiency argument holding that "The evidence offered by the State was sufficient to establish that Longshore exercised dominion and control over the vehicle in which the methamphetamine was found" and that any arguments about whether the jury could reasonably infer that Longshore possessed *a controlled substance* "when to the weight" regardless of the reasonableness of the inference.).

guilt is tenuous at best. One of the only significant cases from this court to dismiss a conviction based upon accomplice liability was *In re Wilson*, which this court decided in 1979, almost 40 years ago.[60]

The lack of guidance on these issues has clearly affected how prosecutors charge and argue their cases. Twenty years ago, courts would routinely instruct juries that it had to convict a defendant if he aided in "any" crime, rather than "the" crime charged.[61] In a serious of cases, this Court reversed numerous convictions based upon these faulty instructions.

Yet, despite these cases, prosecutors still continue to charge defendants under an erroneous understanding of accomplice liability.[62] In *Walker*, for example, this Court had to reverse a conviction for first degree murder because the prosecutor repeatedly argued to the jury that it should convict the defendant if he "should have known" that the principle would commit a cold-blooded murder of four Lakewood police officers.[63] These erroneous arguments, which were made by a very experienced prosecutor, were repeated throughout his closing argument, clearly show that some prosecutors are willing to charge and convict a defendant as an

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[60] *In re Welfare of Wilson*, 91 Wash.2d 487, 491, 588 P.2d 1161 (1979).
[61] *State v. Roberts*, 142 Wash.2d 471, 510, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wash.2d 568, 576–77, 14 P.3d 752 (2000).
[62] *See id.*
[63] See *Walker*, 341 P.3d 976.

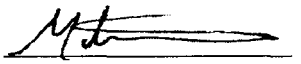
accomplice, even if it is clear he had no actual knowledge that the principal intended to commit the charged crime.

This is, therefore, exactly the type of case that needs this court's guidance, not only for the benefit the petitioner, but for the benefit of all prosecutors, defense attorneys, trial judges, and most importantly, defendants who may be convicted despite committing a far lesser crime, or even, no crime at all.

V. CONCLUSION

For the reasons stated above, this Court should accept review.

Dated April 13, 2015.



Mitch Harrison
Attorney for the Appellant

CERTIFICATE OF SERVICE

I, Christopher Wieting, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

3. On the date set forth below, I served in the manner noted a true and correct copy of the attached document on the following persons in the manner indicated below:

Court of Appeals Division III 500 N Cedar St Spokane, WA 99201	☐ U.S. Mail ☐ In Person ☐ Fax: 5094565288
Grant County Prosecuting Attorney P.O. Box 37 Ephrata, WA 98823	☒ U.S. Mail ☐ Email: ☐ Fax:
Abraham Lopez, DOC #363266 Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362	☒ U.S. Mail ☐ Email: ☐ Fax:

Dated April 13, 2015.

at Seattle, Washington.

Christopher Wieting

Christopher Wieting

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FEBRUARY 12, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 31439-1-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ABRAHAM LOPEZ TORRES,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — A jury found Abraham Lopez Torres guilty of second degree murder and drive-by shooting after a member of a rival gang was shot and killed. Abraham[1] appeals. He contends that the court's to-convict jury instructions violated due process by misstating the reasonable doubt standard, which allowed the jury to convict even if reasonable doubt existed. He also contends that the prosecutor committed misconduct during closing argument, and the cumulative error of the misconduct warrants reversal. We disagree with these contentions and affirm.

[1] To avoid confusion between Abraham Lopez Torres and Benjamin Lopez, we refer to the brothers by their first names.

FACTS

On April 22, 2011, Adan Beltran was shot and killed outside of his home in Quincy, Washington. Four men were associated with the shooting—Abraham Lopez Torres, Benjamin Lopez, Alexis Hernandez, and Roberto Murillo.

Abraham, Benjamin, and Mr. Hernandez are members of the Marijuanos 13 Street gang, while Mr. Murillo is a member of a Surenos gang. The victim, Mr. Beltran, was a member of the West Side 18th Street gang. The Marijuanos 13 gang and West Side 18th gang are rivals and have physically fought with each other. Rumors circulated that the West Side 18th Street gang was responsible for the death of Marijuanos 13 member Edwin "Chow" Davalos, with Mr. Beltran being the shooter. Mr. Davalos and Benjamin were close friends.

Abraham was initially charged in juvenile court, but was declined to adult court. The amended information included charges for first degree premeditated murder, second degree murder, drive-by shooting, and unlawful possession of a firearm. Several aggravating circumstances were also charged, including a gang aggravator. Brothers Abraham and Benjamin were tried together. The State gave Mr. Hernandez immunity for his involvement with the crime in return for his testimony at Abraham's and Benjamin's trial. Mr. Murillo pleaded guilty to second degree murder and did not testify.

At the Lopez brothers' trial, Mr. Hernandez testified that he went to Quincy on April 22 to meet with Benjamin and Abraham at the house of Marcos Avalos. Upon arriving at the house, Mr. Hernandez saw Benjamin sitting in the front passenger seat of a car, Abraham sitting in the driver's side passenger seat, and Robert Murillo driving the car. Mr. Hernandez got into the rear passenger's side seat. Benjamin wanted to buy marijuana. Benjamin gave driving directions to Mr. Murillo.

Eventually, the car turned down an alley. Mr. Hernandez observed Abraham putting on a pair of gloves. The car stopped in the alley between two houses. Abraham got out of the car and left. Shortly after, Mr. Hernandez heard multiple gun shots. He then saw Abraham running back to the car. The bandana Abraham was wearing covered the bottom half of his face and his sweatshirt hood was on with the strings cinched. Only his eyes were visible. Abraham got back into the vehicle and it sped off. Mr. Hernandez noticed a .357 caliber handgun on the seat next to him. Benjamin gave driving directions to Mr. Murillo on how to get out of town.

The men parked by a canal to smoke some spice. Then, as they drove toward Wenatchee, a police chase ensued. Abraham attempted to give guns to Mr. Hernandez but Mr. Hernandez refused to get involved. Mr. Hernandez believed that Benjamin took

the guns. As the vehicle stopped, Mr. Hernandez saw Benjamin throw something out of the window.

Benjamin testified to a different account of the crime. He said that he was at Mr. Avalos's house with Abraham and Mr. Hernandez for a barbeque. When Mr. Murillo arrived at the party, they all got into his car to buy marijuana from a dealer that Benjamin knew.

On the way to the dealer's house, someone saw Mr. Beltran in front of his home. The men discussed that Mr. Beltran had been deported. Benjamin could not see well and doubted that the man was Mr. Beltran because of the deportation. Benjamin noticed that Mr. Hernandez and Mr. Murillo were tense.

Mr. Murillo turned down an alley in the trailer park. Benjamin heard a gun cock behind him where Mr. Hernandez was sitting. Mr. Hernandez handed something up to Mr. Murillo. Benjamin did not see the object, but believed it was a gun. The men stopped at a trailer. Mr. Murillo said "let's go" and got out of the car with Mr. Hernandez and Abraham. 10 Report of Proceedings (RP) at 199. Benjamin stayed inside and told Abraham to get back into the car because he sensed something was going on. Abraham walked a few feet and got back into the car. Mr. Murillo and Mr. Hernandez went around the trailer and out of sight of Benjamin. Benjamin heard two or three gunshots and then

saw Mr. Murillo and Mr. Hernandez jogging back to the car. The men took their same seats and sped off. As they left, they almost hit another car.

As they parked by the canal to smoke spice, Benjamin asked Mr. Murillo what happened. Mr. Murillo said nothing, and to shut up and kick back. The men were apprehended after being chased by police. Benjamin testified that Mr. Murillo and Mr. Hernandez told him not to talk to the police.

Four members of the Garces family saw the shooting and testified at trial. Alexia Garces witnessed the shooting as she was riding in her mother's vehicle. She testified that she saw a man with a gun shoot another man who was running away. She said the shooter was wearing dark gloves, dark pants and hoodie with the hood up. The shooter quickly got into a car and left down the alley.

Alexia's father and brother were traveling behind Alexia and her mother. Three of the family members stated that they saw the shooter get back into the rear driver's side of a blue four-door sedan. Two of the family members testified that this same vehicle nearly collided with them as it attempted to flee the scene. All four family members said that the occupants of the vehicle were Hispanic males.

Mr. Beltran was dead by the time emergency personnel responded to the scene of the shooting. The Washington State Crime Lab determined that the bullet found in Mr.

Beltran's body was fired out of a .25 caliber semi-automatic. The gun was found next to the front passenger side door of the suspect's car, the location where Benjamin was sitting.

DNA[2] analysis was performed on items involved in the crime, including a blue knit glove found inside the vehicle. The investigator found that Abraham was a substantial contributor to the DNA found on the blue knit glove, with one in 42,000 persons matching the profile.

The State introduced testimony and exhibits regarding gang culture in the area. Deputy Joe Harris, a Grant County police officer with specialized gang training, explained that it was his job to keep track of gangs in the area and gear members toward resources that would help them change their lifestyle. Deputy Harris said that a member is expected to benefit the gang by "putting in work." 7 RP at 41. Work includes assaulting rival gang members, and it is expected that members will do something to disrespect a rival gang member when paths cross, such as throwing gang signs, trying to instigate a fight, or attacking immediately. A gang member earns respect by putting in work. Deputy Harris also said that killing a rival gang member suspected of killing a member of your gang would be "putting in work." 7 RP at 63.

[2] Deoxyribonucleic acid.

Deputy Harris testified that the Marijuanos 13 gang and West Side 18th Street gang are rivals. He identified signature graffiti from both gangs, noted that an "x" drawn over the gang graffiti is a sign of disrespect, and stated that West Side 18th Street gang graffiti in Quincy had been marked in this way.

Mr. Hernandez and Benjamin testified to the rivalry between the gangs. Mr. Hernandez said that the Marijuanos had x-ed out 18th Street graffiti and that the Marijuanos fought with the 18th Street gang more than 20 times. Mr. Hernandez said that he was shot at by the 18th Street gang three times. Benjamin said that he had been involved in armed fights with the 18th Street gang, and that killing an 18th Streeter would benefit his gang.

Mr. Hernandez said he participated in gang activities with Abraham and Benjamin. He said the murder of Mr. Davalos angered Benjamin and Abraham, as well as himself. He confirmed that Marijuanos rumors alleged Mr. Beltran murdered Mr. Davalos. Mr. Hernandez said that when Mr. Davalos died, one of the brothers said, "[o]h, they fucked up." 7 RP at 210. In remembrance, Benjamin tattooed RIP Chow Loco on his arm for Mr. Davalos.

Mr. Hernandez said that committing murder would raise a person's standing in Marijuanos 13. On the other hand, Mr. Hernandez said that a Marijuanos 13 gang rule

prohibits testifying against a fellow gang member, and the penalty for violating the rule is that they try to kill you or they do kill you.

When Mr. Hernandez was initially questioned by police, he told them that he knew nothing about the shooting. He also told police that he was scared to testify against Benjamin and Abraham. A few days later, Mr. Hernandez spoke to police again and gave his account of the shooting.

Abraham's attorney drew attention to the fact that Mr. Hernandez entered into a deal with the prosecutor and was given absolute immunity in exchange for his testimony. Defense counsel asked Mr. Hernandez whether his testimony needed to be consistent with what he previously told law enforcement to benefit from the deal. Mr. Hernandez responded that he was to testify to the truth. When defense counsel pointed out that the prosecutor would decide if Mr. Hernandez met the conditions of his agreement to testify, Mr. Hernandez repeated his obligation was to cooperate. A third time Mr. Hernandez stated, "I'm just trying to say the truth." 7 RP at 198.

Benjamin's attorney asked Mr. Hernandez whether he ever thought about his option to lie to police. Mr. Hernandez responded that during his initial interview with police, he did not want to tell police what happened because he was scared. Counsel pressed the point, asking, "Well, you did not only not want to tell them what happened, in

fact, you took door number three, didn't you?" 8 RP at 49. Mr. Hernandez responded, "yes," and that door number three was to "lie." 8 RP at 49. When defense counsel repeated, "[y]ou lied," Mr. Hernandez responded, "I didn't lie—what I'm saying now is not a lie. What I testified to yesterday and today is not a lie. What I told the officer, I told him I didn't know what happened, which I did know." 8 RP at 50.

Defense counsel asked Mr. Hernandez whether the prosecutor told him to repeatedly say that he was telling the truth and whether he practiced that phrase as part of a script. Mr. Hernandez responded, "He's told me to tell the truth, to do what's right." 8 RP at 64. Defense counsel then questioned Mr. Hernandez about inconsistencies in his testimony. Later, defense counsel again questioned Mr. Hernandez about his deal with the State, stating, "And the exchange [with the State] was this: You testify against them and you will have your murder charges dismissed." 8 RP at 114. Mr. Hernandez replied, "Incorrect. The deal was I cooperate and testify truthfully." 8 RP at 114.

At the conclusion of the State's case, the court dismissed some of the aggravators, but left all charges in place. Abraham and Benjamin stipulated that they were members of the Marijuanos 13 criminal street gang.

The trial court prepared draft jury instructions for the parties to review. The reasonable doubt standard in the trial court's to-convict instructions informed the jury that

"if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then you *should* return a verdict of not guilty." Clerk's Papers (CP) at 43 (emphasis added). A jury instruction conference was held. After receiving comments, the court invited counsel to prepare proposals to incorporate requested modifications into the instructions.

Defense counsel for Abraham's co-defendant, Benjamin, proposed to-convict jury instructions for first and second degree murder that incorporated accomplice liability. Benjamin's proposed instructions also used the phrase "*should* return [a] verdict of not guilty." CP 84-85 (emphasis added).

After the trial court distributed a third draft of proposed jury instructions, the State alerted the trial court to erroneous wording of the reasonable doubt standard. The State said instructing a jury that it "should" return a verdict of not guilty is improper. Instead, the prosecutor urged the court to instruct the jury according to the Washington Pattern Jury Instructions, informing the jury of their "duty" to return a verdict of guilty or not guilty based on the evidence. The State said it was involved in an appeal on the very same issue and the argument is that "should" is somewhat optional; not a must. The State posed the question, "Basically is should mandatory enough or can the jury disregard it or do what they want? Basically jury nullification either way." 11 RP at 72.

The trial court stated that it had used the "should" language before and the purpose of the language was to allow for jury nullification. The court and the State discussed jury nullification in the presence of the defense. The State took the position that jury nullification and a corresponding instruction was not supported by law.

The court asked for the defense's position on the matter. Abraham's counsel answered, "The court is not—the proposed instruction does not tell the jury that they can nullify their verdict. That's all." 11 RP at 74. When asked by the court if counsel had any objection to the use of the word "should" as opposed to "duty," Abraham's counsel answered "[n]one." 11 RP at 74. The court clarified that the "should" language went "[b]oth directions." 11 RP at 74. Counsel again answered that he had no objection. The trial court then asked Benjamin's counsel if he had any objections. Counsel replied, "We have—we don't take exception to any of the instructions as proposed." 11 RP at 74.

The trial court stated that it was interested in the outcome of the pending appeal on the issue, "[b]ut in this case, since neither defendant—since each defendant waives any objection, then I think I will not make that change and the jury will be instructed as set forth in the third draft." 11 RP at 75. The to-convict instructions informed the jury that it "should return a verdict of not guilty," mirroring the language first suggested by the court and included in Benjamin's proposed jury instruction. CP at 18, 22, 27.

A jury found Abraham guilty of second degree felony murder and guilty of drive-by shooting. The jury acquitted Abraham of first degree murder and multiple charged aggravating circumstances.

Abraham appeals. He assigns error to the to-convict jury instructions. Also, he contends that the prosecutor committed misconduct during closing arguments.

ANALYSIS

The Trial Court's To-Convict Instructions. For the first time on appeal, Abraham contends that the to-convict jury instructions violated his right to due process because they failed to accurately convey the reasonable doubt standard to the jury. He identifies the reasonable doubt portion of the instruction that states, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, "then you *should* return a verdict of not guilty." CP at 18, 22, 27 (emphasis added). This language changes the reasonable doubt standard in 11 *Washington Practice: Washington Pattern Jury Instructions* 27.04 at 381 (3d ed. 2008) (WPIC) that states "it will be *your duty* to return a verdict of not guilty." (Emphasis added.)

Abraham maintains that by replacing "your duty" with "should," the trial court's instruction did not impose a mandatory duty on the jury to acquit if reasonable doubt existed. This instruction confused the jury and allowed them to return a guilty verdict

even if they had a reasonable doubt as to Abraham's guilt. Thus, the court relieved the State of the burden of proof beyond a reasonable doubt, thereby violating due process and constituting manifest constitutional error. We agree with Abraham. *See State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785, *review denied*, 178 Wn.2d 1008, 308 P.3d 643 (2013).

In a criminal trial, due process conveys the burden on the State to prove every element of a crime beyond a reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). "A corollary of the due process requirement that a jury find proof beyond a reasonable doubt in order to return a verdict of guilty is that it must return a verdict of not guilty if the State does not carry its burden. . . . It is reversible error to instruct the jury in a manner relieving the State of its burden." *Smith*, 174 Wn. App. at 366. We apply de novo review to a challenged jury instruction. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). "The jury instructions, read as a whole, 'must make the relevant legal standard manifestly apparent to the average juror.'" *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)).

In *Smith*, the trial court prepared jury instructions that differed from the WPIC. *Smith*, 174 Wn. App. at 362. Of importance, the court instructed the jury that "'if after

weighing all the evidence, you have reasonable doubt[,] *you should* return a verdict of not guilty.'" *Id.* at 363 (some alterations in original). On appeal, Mr. Smith argued that the instruction relieved the State of its burden of proof because the instruction left the jury with the impression that it ought to acquit if it possessed reasonable doubt, but acquittal was not mandatory. *Id.* at 366-67. Acknowledging the due process rights at stake, this court allowed Mr. Smith to raise his challenge to the elements instruction for the first time on appeal because it involved a manifest error involving a constitutional right. *Id.* at 365. We held that a corollary of due process requires that a jury must return a verdict of not guilty if the State does not carry its burden of proof beyond a reasonable doubt. *Id.* at 366. And, that even though the jury likely understood that the court's use of "should" in the elements instruction expressed a mandatory action, we could not be sure that it did. *Id.* at 368. The trial court's erroneous instruction was a structural error that required reversal of Mr. Smith's conviction. *Id.* at 368-69.

Here, as in *Smith*, the trial court erroneously instructed the jury that it "should" return a verdict of not guilty based on the evidence. This instruction relieved the State of its burden of proving guilt beyond a reasonable doubt. We decline the State's request to revisit *Smith* and consider cases outside this court's jurisdiction.

Even though *Smith* supports Abraham's position, we agree with the State that Abraham cannot raise this issue for the first time on appeal because it was deliberately waived at trial. "Even where a constitutional error is manifest, it can still be waived if the issue is deliberately not litigated during trial." *State v. Hayes*, 165 Wn. App. 507, 515, 265 P.3d 982 (2011).[3]

Here, Abraham waived the error in the jury instructions because he assented to the instructions even after he was alerted to the error. During the jury instruction conference, the State informed Abraham that the "should" language allowed for jury nullification because it did not impose a mandatory duty to follow the court's instructions on returning a verdict of guilty. He was also informed that the language deviated from the WPIC and was being challenged in this court. Yet, when asked for his position on the instruction,

[3] The State also argued that this issue cannot be raised for the first time on appeal because it is not a manifest error. We disagree. Generally, an error cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). Establishing manifest error requires a showing of actual prejudice. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Actual prejudice occurs when the asserted error had practical and identifiable consequences at trial. *Id.* (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). An error to a to-convict instruction is significant because the instruction implicates the standard used by the jury to determine guilt or innocence. *See State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Thus, misstating the standard by instructing the jury that it can acquit despite the presence of reasonable doubt has practical and identifiable consequences and is a manifest error affecting a constitutional right.

Abraham argued that the proposed instruction did not tell the jury that it could nullify their verdict, and that he had no objection to the use of "should" instead of "your duty." 11 RP at 74. While Abraham did not initially propose the to-convict instructions, he assented to the instruction after being told of the suspected error.

The waiver doctrine precludes Abraham from challenging the jury instruction on appeal. His appeal raises essentially the same arguments that he rejected in the trial court—no mandatory duty was imposed on the jury to return a not guilty verdict. He cannot complain of an error that he asserted to at trial. Under these circumstances, reversal of Abraham's convictions is not warranted.

Prosecutor's Closing Argument. Abraham contends that the State made several inflammatory statements during closing arguments that amounted to prosecutorial misconduct. We address each statement in turn.

To establish prosecutorial misconduct, Abraham must show that the prosecutor's statements were improper and, as a result, prejudicial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). For improper statements that were followed by a proper objection, a prosecutor's statements are prejudicial if the statement had a substantial likelihood of affecting the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

However, "[i]f the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61. "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762. A proper jury instruction generally cannot cure a statement that has an inflammatory effect. *Id.* at 763.

"Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *Dhaliwal*, 150 Wn.2d at 578. A prosecutor is given wide latitude in closing arguments to draw and express reasonable inferences from the evidence. *State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006).

1. "*Right thing to do.*" First, Abraham alleges that the prosecutor attempted to align the jury with the prosecutor's office by telling the jury that convicting Abraham was the right thing to do. In the beginning of closing argument, the prosecutor said,

> No matter what you do when you get back there to deliberate, it's not going to be easy. Nobody ever told you it would be. . . . But when it's done, I'm going to ask you to do one thing. I'm going to stand here and ask you to do what is right. Because it is proper and because the evidence in this case leaves you only one conclusion.

12 RP at 30.

It is misconduct for a prosecutor to "try to exhort the jury to 'do its job'; that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice." *United States v. Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). Similarly, this court has held that it is improper for the State to make an argument that could be construed as "telling the jury that it would violate its oath if it disagreed with the State's theory of the evidence." *State v. Coleman*, 74 Wn. App. 835, 839, 876 P.2d 458 (1994).

Here, the prosecutor's statement, when taken in context, was not improper. The statement did not attempt to align the jury with the prosecutor or instruct the jury that it could submit a guilty verdict based on what it believed was right. Instead, the prosecutor instructed the jury that it should do what was right based on the evidence, even though

getting to that decision may be tough. The prosecutor did not tell the jury that it must reach the State's conclusion in order to do what is right.

Abraham contends that the State continued this theme of the "right thing to do" throughout the trial. He also calls attention to the prosecutor's discussion of Mr. Hernandez's decision to testify. The prosecutor stated, "But [Mr. Hernandez] did decide to do the right thing after the police told him his mother wanted him to, and he quickly gave them an initial outline that completely fit the facts of this case." 12 RP at 53. Additionally, Abraham contends that the statement is improper because no evidence presented at trial addressed Mr. Hernandez's mother's wishes. It is reversible error for a prosecutor to urge a jury to decide a case based on evidence outside the record. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012).

Again, this statement does not attempt to align the jury with the State. Instead, when taken in context, the statement responded to defense's theory that Mr. Hernandez's testimony was not credible because he was given a deal for his testimony. While true that there was no evidence to support the statement that he told the investigating officer the truth because his mother wanted him to, Mr. Hernandez did testify that he talked to police because he decided to do the right thing and that police told him his mom was sad. Even with this error referencing the mother, the comment was a brief, one time assertion that

could have been cured by a limiting instruction. This minor misstatement likely did not affect the jury's verdict.

2. *Send a message*. Abraham contends that the prosecutor committed misconduct by encouraging the jury to return a guilty verdict in order to send a message to gangs in the local community. For instance, he cites the prosecutor's statements, "You heard Alexis Hernandez say that he had been shot at on three separate occasions. This is an 18 year old who's already been shot at on three separate occasions. This is out of hand." 12 RP at 32. Abraham also contends that this statement inappropriately implies that Abraham was somehow responsible for shots being fired at Mr. Hernandez.

A prosecutor's closing statement is improper if it merely appeals to the passion and prejudice of a jury or references prejudicial allusions outside of evidence. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (quoting *State v. Belgarde*, 46 Wn. App. 441, 448, 730 P.2d 746 (1986)). "[A] prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict." *Perez-Mejia*, 134 Wn. App. at 916. Misconduct also occurs when a prosecutor repeatedly urges jurors to convict a criminal in order to protect community values, preserve civil order, or deter

future criminal activity. *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011) (quoting *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991)).

In *Perez-Mejia*, the court held that the prosecutor's closing argument was improper and prejudicial when the prosecutor asked the jury to

> "[s]end a message to Scorpion, to other members of his gang . . . and to all the other people who choose to dwell in the underworld of gangs. That message is we had enough. We will not tolerate it any longer. That we as citizens of the State of Washington and the United States of America, we have the right to life, liberty and pursuit of happiness and we will no longer allow those who choose to dwell in the underworld of gangs to stifle our rights. And that message begins now.
>
> It begins now by finding that the defendant was involved in the death of Ms. Emmitt."

Perez-Mejia, 134 Wn. App. at 917 (footnote omitted). The trial court overruled the defendant's objection "to call for messages." *Id.* The appellate court ruled that this argument improperly invoked the juror's patriotic sentiment and cast the defendant as an oppressor of inalienable rights. *Id.* at 918. This, when combined with a statement referencing the defendant's "machismo," were racially prejudicial comments that affected the jury's verdict. *Id.* Additionally, the court found that the prejudice was magnified by the issues in the case. *Id.* Of importance, the court found that the statement appealed to the jury's passion and prejudice by inviting them to decide based on their fear of crime. *Id.* at 919.

In *Belgarde*, the prosecutor referenced the American Indian Movement (AIM) and the chilling events of Wounded Knee, South Dakota. *Belgarde*, 110 Wn.2d at 507. The prosecutor said the group was a militant group to be afraid of like the Irish Republican Army and that the defendant was a part of the group. *Id.* at 506-07. The defendant did not object. *Id.* at 507-08. On appeal, the court concluded that the statements were improper and prejudicial. *Id.* at 508. The court held that an objection and instruction to disregard could not have erased the fear and revulsions jurors would have felt if they had believed the prosecutor's descriptions of the Indians involved in AIM. *Id.* at 507-08. Additionally, the court found that the prosecutor's statements could not be considered proper argument because they were not supported by any evidence in the case. *Id.* at 508-09. Thus, the prosecutor's statements, which were based on his own memory of the events of Wounded Knee, was testimony and improper. *Id.*

Here, the prosecutor's statement did not directly ask the jury to convict Abraham in order to send a message to gangs in Grant County. However, it does appeal to the passion and prejudice of a jury by calling attention to the amount of gang violence in the community and implying that a conviction would help stop the violence. Even then, we do not find this statement flagrant and ill-intentioned to the point that it could not have been cured by a limiting instruction. *See Dhaliwal*, 150 Wn.2d at 580-81. While the

statement calls attention to gang violence, the State's theory of motive was gang retaliation. The State produced evidence of repeated gang violence, including Mr. Hernandez's testimony that he was shot at on three separate occasions. There is no inference that either Abraham or Benjamin was responsible for the three shootings at Mr. Hernandez.

Perez-Mejia and *Belgarde* do not persuade us to reach a different conclusion. Both of those cases involve arguments that do more than simply reference the out-of-control nature of gang violence and are much more egregious than Abraham's situation. The prosecutors in *Perez-Mejia* and *Belgarde* both made improper, unsupported references to classes of people and used prejudice and stereotypes as a basis for finding guilt. The prosecutor appealed to the passion and prejudice of the jury by asking to decide based on fear of these groups of people. In both cases, the argument was repeated and not based on evidence presented at trial.

At Abraham's trial, the contested statement that gang violence is out of hand was not the overarching theme of the case. Admittedly, while gang activity and retribution was mentioned throughout the prosecution's closing argument, this was based on evidence of gang violence presented at trial and the State's theory of motive. Most importantly, the statements did not reinforce stereotypes or invoke racial prejudices. The

prosecutor's statement was not so inflammatory that it could not have been cured by an instruction and, thus, did not constitute prosecutorial misconduct.

3. *Propensity for violence*. Abraham contends that the prosecutor committed misconduct by encouraging the jury to use evidence of gang affiliations to conclude that Abraham had a propensity for violence. For example, he quotes the prosecutor,

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

12 RP at 38.

Prior bad acts cannot be used to establish a person's propensity to commit a current crime. ER 404(b). "[T]he only relevance between the prior acts and the current act is the inference that once a criminal always a criminal." *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

Evidence of gang affiliation is presumed prejudicial. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). However, when evidence of gang membership can be connected to the crime, such evidence is admissible. *Id.* "Courts have regularly admitted

gang affiliation evidence to establish the motive for a crime or to show that defendants were acting in concert." *Id.* at 527.

The prosecutor was free to discuss gang affiliation during closing argument. Abraham stipulated to his membership in the Marijuanos 13 gang during trial. Furthermore, Abraham was charged with the aggravating circumstance that he committed the crime to benefit a criminal street gang, so gang affiliation was crucial for this charge.

Although armed with evidence of gang affiliation, the prosecutor did not use Abraham's gang membership to show his propensity to commit the shooting. The prosecutor did not ask the jury to convict Abraham based on his membership in a criminal street gang or because he had a natural desire to seek revenge and retribution. Instead, the prosecutor used gang affiliation as part of the motive for the crime—retribution for the death of Mr. Davalos, a fellow gang member. In Abraham's situation, evidence showed that he and Mr. Davalos had a close relationship, that he was upset when Mr. Davalos was killed, and that gang members suspected Mr. Beltran of the crime. Mr. Beltran was a member of a rival street gang that often fought with Abraham's gang. Testimony established that it was common in gang culture to kill members of rival gangs when the rival member is suspected of killing a member of the opposing gang. In Abraham's gang, committing murder would raise a person's standing. In sum, the prosecutor did not use

gang membership to show propensity, but instead to show motive for the current crime. The prosecutor used the above statement to explain the thought processes of gang members and why Abraham would commit the murder. This argument was not improper.

4. *Vouching for the credibility of a witness.* Abraham contends that the prosecutor improperly vouched for the credibility of Mr. Hernandez by personally supporting his testimony and by adding facts not in the record. He gives four examples of this error. First, Abraham contends that the prosecutor used a stereotype to support credibility by arguing that the jury should believe Mr. Hernandez's testimony because Mr. Hernandez was not smart enough to lie. Second, he contends that the prosecutor attempted to bolster Mr. Hernandez's testimony by telling the jury that Mr. Hernandez would have come up with a better story if he was lying. Third, Abraham contends that the prosecutor implied that he personally believed Mr. Hernandez when he told the jury that Mr. Hernandez risked his life to tell the truth. Fourth, the prosecutor again affirmed his own belief in Mr. Hernandez's testimony by arguing that Mr. Hernandez knew he needed to tell the truth so his story would not be disproven by other evidence.

Abraham identifies two particular statements that support his contentions. First, he cites to the prosecutor's statement, "And there's one other thing that the jury probably picked up on. [Mr. Hernandez] is not real bright. He's just not a real bright guy. He just

doesn't have the ability to make up a complex story and be consistent with it. He just doesn't." 12 RP at 54.

In the other statement, the prosecutor told the jury during rebuttal, "If a witness were bought and paid for, wouldn't his testimony have been a little bit better? If this was really a situation of say what we want you to say, wouldn't he have said, I actually saw Abraham shoot the gun? He didn't say that. Because he didn't see it. He testified to what he knew, no more, no less." 12 RP at 162.

"It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. However, prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility, and prejudicial error will not be found unless it is clear and unmistakable." *State v. Allen*, 176 Wn.2d 611, 631, 294 P.3d 679 (2013). Improper vouching occurs when the prosecutor expresses his personal belief in the veracity of the witness or indicates that evidence not presented at trial supports the testimony of the witness. *Thorgerson*, 172 Wn.2d at 443.

"Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747

(1994). A prosecutor can argue that the evidence does not support the defense theory and is entitled to make a fair response to defense arguments. *Id.* at 87.

In *Russell*, a constant theme in the defendant's case was that the police had inadequately investigated the charged murders. *Id.* In response, the State argued that further investigation was offered to and rejected by the defense and, therefore, some incriminating evidence may not have been developed. *Id.* The court held that it was not misconduct to argue that the evidence did not support the defense theory; the State's argument was a fair response to defense criticisms. *Id.* Furthermore, any impropriety was ameliorated by a curative instruction. *Id.*

In considering Abraham's first credibility challenge, we conclude that the prosecutor went outside the evidence in the case when he stated that Mr. Hernandez could not make up his account of the shooting because he was not smart enough. In our review of the record, there is no evidence regarding Mr. Hernandez's mental capacity or his ability to make up a story. The prosecutor bolstered Mr. Hernandez's credibility by giving an unsupported reason as to why he was telling the truth. While we find this statement improper, any minimal prejudicial effect could have been cured by a limiting instruction.

We reject the remainder of Abraham's contentions that the prosecutor improperly vouched for the credibility of Mr. Hernandez. The challenged statements did not imply that the prosecutor personally believed Mr. Hernandez. Like in *Russell*, it was proper for the prosecutor to rebut defense argument and say that if Mr. Hernandez was lying, then he clearly would have made up a better story and that he needed to tell the truth so his story would not be disproven. Both Abraham and Benjamin attempted to discredit Mr. Hernandez by contending that he was lying, that he took the deal from the State to avoid prosecution, and that he was simply saying what the prosecutor wanted to hear. The State had wide latitude to respond to this argument. The State responded by arguing that Mr. Hernandez's story did not provide the level of incriminatory evidence that the State would have liked to present if it were a lie. The argument merely responded to the defense's argument that Mr. Hernandez was not telling the truth.

Furthermore, the prosecutor did not imply that he personally believed Mr. Hernandez when he told the jury that Mr. Hernandez risked his life to tell the truth. The prosecutor argued, "At first, he was reluctant to talk. And he told you why on the stand. He said he didn't want to testify against these two guys. He felt concern for his safety." 12 RP at 53. The prosecutor was restating the testimony of Mr. Hernandez and not implying his personal belief.

5. *Misstatement of the burden of proof.* Abraham contends that the prosecutor lowered the burden of proof for accomplice liability by telling the jury that Abraham was ready to assist in the crime because it was his obligation as a gang member. In describing the events on the night of the murder, the State argued, "Now, while this was going on, the other three Surenos, two of them Marijuanos 13 members, were in the car with another gun, ready to assist, if necessary. Of course, they were ready to assist, that is their obligation as a fellow gang member. That is his obligation as a brother." 12 RP at 49.

In the State's rebuttal argument, the prosecutor said,

> You heard Mr. Crowley say that [Mr.] Hernandez is guilty as an accomplice. And you know that the driver is also guilty, as well. Now, what did Mr. Hernandez do that makes him guilty as an accomplice, according to Mr. Crowley? He had the motive, right? They were all in the same gang, they all lost a friend. He had the opportunity, he was there, as well, just like [the defendants]. And arguably had the ability, because he was there with the gun, or the group was there with the gun.
>
> But it cuts both ways. Because if Mr. Hernandez is guilty, as they say, for simply being there, these two are in the exact same boat. If Mr. Hernandez is guilty as they say, and he's getting the benefit of a deal, that may be true, but what that tells you is their clients are guilty and they have just told you that. As a matter of law, they have told you their clients are at a minimum accomplices to this murder.

12 RP at 159. Abraham's attorney objected to these statements on the grounds that Benjamin's counsel had not made the alleged statements. The court overruled the objection as argument. Abraham maintains that these statements imply that Abraham

could be found guilty as a matter of law for simply being at the scene of the crime, which is insufficient to prove accomplice liability.

A defendant's presence at the scene of a crime is not enough to prove accomplice liability, even if the defendant is fully aware of the ongoing criminal activity. *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (quoting *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)). The accused's presence at the scene is sufficient only if the jury also finds that the defendant was present at the scene and was ready to assist. *Id.* at 491. To prove that a defendant is ready to assist, the State must be able to point to specific facts that tend to show that the defendant's presence at the scene indicated that he was also ready to assist with the commission of the crime. *State v. Collins*, 76 Wn. App. 496, 501-02, 886 P.2d 243 (1995).

The first challenged argument is not improper. The prosecutor did not reduce the burden of proof for accomplice liability. Abraham takes the prosecutor's argument out of context. The prosecutor did not say that mere presence was enough. To the contrary, he argued that Abraham and Benjamin were ready to assist. The right standard is also found in the jury instructions. Jury members are presumed to follow court instructions. *Thorgerson*, 172 Wn.2d at 444.

Furthermore, the argument is supported by the record. Mr. Hernandez testified that gang members were expected to have everyone's back, inferring that gang members have an obligation to assist others. Specifically, Mr. Hernandez testified that Benjamin gave driving directions and the men ended up at Mr. Beltran's home, and that Abraham left the car at the time of the shooting. Based on this evidence the prosecutor could argue that they were in the car to assist. The argument was not improper.

Abraham also maintains that the prosecutor misstated Benjamin's closing argument to imply that his attorney admitted his client's guilt. He contends that he was prejudiced by this misstatement because it led the jury to believe that defense counsel admitted his client's guilt as an accomplice, and the court's decision to overrule his objection added an aura of reliability to the misstatement.

The trial court correctly determined that the rebuttal statements were argument. Defense counsel in closing argued that the evidence connected Mr. Hernandez to the crime. Counsel maintained that the facts showed Mr. Hernandez was involved in the murder but was not being held accountable because of his deal with the State. Defense also argued that the same evidence that linked Benjamin to the crime linked Mr. Hernandez.

> Remember [the prosecutor] spent a great deal of time talking about all the motive and he assured you he would go through his list of evidence, and the litany of evidence that he had against Benjamin indicating motive. He told you he would demonstrate all the motive. But if the motive applies to him, the motive it applied to him. It works the same way. He was in a gang, he was in a gang. He wanted to advance, no, he wanted to advance. Where is the proof? The proof is with me. I am lying to you. My name is [Mr. Hernandez]. I don't want to go to prison.

12 RP at 124. The prosecutor's argument was an extension of defense counsel's argument that Mr. Hernandez and Benjamin had equal motive. It did not imply that the defense attorney thought his client was guilty. The prosecutor's statement was argument and was not improper.

6. *Step into shoes.* Abraham contends that the prosecutor committed misconduct by encouraging the jury to step into the shoes of Abraham and speculate as to his state of mind. The prosecutor argued,

> And every time you see his house, it's going to be a reminder of how the rival gang killed your friend.
>
> Think of how that would affect a 16-year-old or 17-year-old young man's mind, gang member's mind. Every day he wants to go get a slice of pizza and he has to be reminded about the rival gang member that murdered his friend. That's a powerful motivator. Gang members have a duty to back up their friends. They've lost a fellow gang member, and they had a duty to do something about it.
>
> . . . .
>
> Now, go back to that motive issue just briefly. Think about what that must have been like for these young men to believe 18th Street killed their friend, and here is one of their leaders on the main street in town for

> everyone to see wearing his colors, full display. Folks, that would probably drive anyone over the edge.

12 RP at 39-40, 42. Abraham contends that through these statements, the prosecutor testified to Abraham's thought processes, argued facts not in the evidence, and tried to inflame the jury's passions and prejudices.

Statements that do no more than appeal to the passion or prejudice of the jury are improper. *Pierce*, 169 Wn. App. at 552 (quoting *State v. Gregory*, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006)). It is reversible error for a prosecutor to urge a jury to decide a case based on evidence outside the record. *Pierce*, 169 Wn. App. at 553. Prosecutors often use matters outside the record to appeal to a jury's passion; thus, the two rules are closely related. *Id.* It is improper for a prosecutor to step into the shoes of a defendant and represent his thought processes when those facts are not in evidence. *Id.* at 554.

In *Pierce*, the prosecutor stepped into the shoes of the defendant during closing arguments by repeatedly presenting the thought process of the defendant from the first person point of view. *Id.* at 553-54. He argued from the defendant's point of view, "'But who do I know in Quilcene that has money? Well, the Yarrs. I know they got money. And they have cash, because they paid me in cash. I can go up there and get some money. But there's one problem: I don't want to work for it. . . . He's not going to give it to me, so I need a gun, but I don't know anybody that has a gun.'" *Id.* at 542. The court found

that these statements were calculated to portray the defendant as an impatient, amoral drug addict who refused to work. *Id.* at 554. While the court found that the prosecutor could have asked the jury to infer this view from the facts, the court held that the prosecutor went beyond his wide latitude in drawing inferences from the evidence by effectively testifying about the particular thoughts the defendant must have had in his head, outside of the evidence. *Id.* at 555. The court held that the cumulative effect of this and other improper statements objected to by the defendant affected the jury verdict because the statements focused on the shocking nature of the crimes and invited the jury to imagine the crimes happening to themselves. *Id.* at 556.

Here, while the prosecutor's statements peer into the minds of Abraham and Benjamin, the prosecutor's statements do not rise to the level of impropriety as in *Pierce*. Much of the argument is supported by the evidence and did not require speculation. Mr. Hernandez testified that Mr. Davalos's death made Abraham and Benjamin mad. Deputy Harris and Mr. Hernandez testified about a gang member's duty to retaliate. Benjamin testified that two of the people in the car became tense upon seeing Mr. Beltran. The inferences in the argument were based on the evidence and supported the motive advanced by the State. Even if improper, Abraham fails to establish that these statements

could not have been cured by a limiting instruction. The statements were not shocking or repetitive to the extent that they affected the jury's verdict.

7. *Disparaging defense counsel.* As another example of misconduct, Abraham contends that the prosecutor disparaged defense counsel by insinuating that defense counsel believed his client was guilty. The prosecutor discussed the powerful effect of Mr. Hernandez's testimony in his rebuttal argument, stating, "[Defense counsel] called [Mr. Hernandez] a liar 20 times. You can tell where an attorney is concerned about a case based upon what they focus on. They are scared to death of the testimony of [Mr.] Hernandez. Because it is the truth, it is consistent, it is corroborated by other witnesses and other facts. They don't want you to believe him, because they know what it means." 12 RP at 160-61. Abraham also contends that through this statement, the prosecutor referenced facts about counsel's opinion that were not in the record and improperly bolstered Mr. Hernandez's credibility by saying his testimony was the truth.

A prosecutor cannot make disparaging comments about defense counsel's role or impugn defense counsel's integrity. *Thorgerson*, 172 Wn.2d at 451. However, it is not improper for a prosecutor to argue that the evidence does not support the defense theory of the case. *Russell*, 125 Wn.2d at 87. "Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Id.*

Discrediting Mr. Hernandez was crucial to the defense of Abraham. It is true that defense counsel repeatedly referred to Mr. Hernandez as a liar. The prosecutor was permitted to respond to defense arguments. He also was permitted to show that consistent evidence from other witnesses discredited defense arguments that Mr. Hernandez was lying. Nothing in these arguments impugn defense counsel's role or integrity.

8. *Unable to walk down the street.* Abraham contends that the prosecutor argued facts not in the record during rebuttal when he said,

> Now that may be true that [Mr.] Hernandez isn't going to go to prison for this. But that's not all he gets. Let's be right up front about this. He gets to never, ever walk down the streets in the city of Quincy again. Ever. He doesn't get to go to a movie theater of pizza parlor in Quincy or probably Ephrata or Moses Lake. He doesn't get to do those things because, as they have testified, as evidence has shown, if you testify against one of these guys, there's going to be a mark out on you. That's pretty powerful disincentive to testify. You don't do that.

12 RP at 162-63. Abraham contends that the prosecutor stepped far beyond the permissible limit of inferring facts from the record and appealed to the prejudices of the jury.

It is reversible error for a prosecutor to urge a jury to decide a case based on evidence outside the record. *Pierce*, 169 Wn. App. at 553.

Abraham is correct that there is no direct evidence in the record about what Mr. Hernandez will be able to do now that he testified at the trial of a gang member. However, the prosecutor's statements here are reasonable inferences from the record designed to contradict the defense closing argument that Mr. Hernandez would not suffer any consequences from his actions. Defense counsel argued during closing that Mr. Hernandez got his life back in exchange for giving two hours of testimony at trial. On rebuttal, the prosecutor responded by arguing that Mr. Hernandez did not get his life back by testifying. Testimony at trial established that members who testify against other gang members are beaten or killed. From this, the prosecutor presented examples of how Mr. Hernandez's life would be limited.

Abraham contends that even if no individual error warrants reversal, cumulative error denied him a fair trial. Errors that do not individually require reversal may still require reversal if together they violate a defendant's right to a fair trial. *State v. Jackson*, 150 Wn. App. 877, 889, 209 P.3d 553 (2009). In this situation, there are not multiple errors of prosecutorial misconduct. Accordingly, cumulative error does not apply.

Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Korsmo, J.

Fearing, J.