No. 31611-4-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN SAMALIA,

Appellant.

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

The Honorable Doug Federspiel

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Adrian Samalia was convicted of first-degree robbery after he and another man, Travis Cliett, took one package each from an unattended UPS truck. When the UPS driver and a nearby store employee saw them, both men took off running while the driver and employee gave chase. Mr. Samalia dropped his package as he ran down the opposite side of the UPS truck from Mr. Cliett. Mr. Samalia then displayed a firearm while trying to escape, and the driver and employee stopped chasing. Mr. Samalia and Mr. Cliett got into a waiting SUV and were later arrested.

Mr. Samalia's first-degree robbery conviction should be reversed. There was not sufficient evidence that Mr. Samalia displayed the weapon in an attempt to retain stolen property. He displayed the weapon to effectuate his escape after abandoning the property, which does not constitute robbery as a matter of law. Further, there was insufficient evidence that Mr. Samalia knew Mr. Cliett retained the package he had taken or that Mr. Samalia displayed a firearm to help Mr. Cliett retain that package so as to make Mr. Samalia guilty as an accomplice.

Next, Mr. Samalia is entitled to a new trial since the instructions were inadequate to allow him to argue his theory of the case, that any firearm display was merely to effectuate his escape rather than robbery. Moreover, the instructions as given confused and misled the jury. Indeed,

the jury was confused and still questioned the court after deliberating some time on the difference between robbery and theft.

The court further erred by refusing to allow Mr. Samalia to impeach a key witness for the State, the driver of the SUV, so as to show the extent of the bias this witness had and her motivation for testifying in favor of the State in exchange for significantly less incarceration time.

And the court erred by denying defendant's post-verdict motion for a mistrial based on the highly prejudicial testimony of one officer that officers don't lie and based on the prosecutor's essentially visual shout on a PowerPoint slide that defendant was "GUILTY."

Finally, the defendant was denied his right to an open and public trial where the public was notified that the courthouse was closed even though the security guards unlocked courthouse doors after-hours on certain days at the direction of the trial judge.

Mr. Samalia's conviction should be reversed and judgment entered for third-degree theft or, at a minimum, the matter remanded for a new trial. The multiple errors in this case were both individually and cumulatively so prejudicial that justice cannot be satisfied by anything short of a new trial.

B. ASSIGNMENTS OF ERROR

1. The court erred by convicting Mr. Samalia of first-degree robbery.

2. The court erred by denying Mr. Samalia's motion to dismiss for insufficient evidence.

3. The court erred by refusing to submit defendant's proposed instructions to the jury regarding use of force and intent/accomplice liability.

4. The court erred by improperly limiting the defendant's confrontation and impeachment of a key witness for the State, Ms. Melton.

5. The court erred by refusing to admit Defendant's proposed exhibit 5 to impeach Ms. Melton.

6. The court erred by denying defendant's post-verdict motion for a new trial.

7. The court erred by failing to take reasonable measures to provide an open and public trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the evidence was insufficient to establish first-degree robbery where (a) the only evidence of use of force was in flight from the robbery rather than to retain possession of stolen property, and (b) there was no evidence that the defendant knew his charged accomplice retained a stolen package during their attempt to escape.

a. The defendant abandoned the property he had taken and then displayed a firearm in his attempt to escape; these facts cannot sustain a first-degree robbery conviction.

b. There was insufficient evidence that Mr. Samalia knew Mr. Cliett had retained property when Mr. Samalia displayed the weapon in his attempt to escape, so Mr. Samalia's conviction as an accomplice should be reversed.

Issue 2: Whether the court erred by providing the jury with misleading instructions and refusing to instruct on the defendant's legally supported theory of the case that (a) defendant's showing of force for

purposes of mere escape does not constitute robbery, and (b) defendant could only be convicted of robbery as an accomplice if he intended to commit robbery rather than mere theft.

a. Without an instruction that force in mere escape does not constitute robbery, the defendant could not adequately argue his theory of the case and the jury was confused or misled on the proper law for conviction.

b. The instructions as a whole misled or confused the jury on accomplice liability and intent, allowing the defendant to be improperly convicted even if the jury found that he or his accomplice only intended to commit theft.

Issue 3: Whether the court erred by denying defendant's right to confront and impeach witnesses Stacey Melton, a convicted accomplice in this matter, when he was prohibited from asking her what first-degree robbery sentence she expected to avoid in exchange for her testimony against the defendant.

Issue 4: Whether the court erred by denying defendant's motion for a mistrial (a) after flagrantly improper opinion testimony by an officer that "I know these officers aren't lying" and (b) based on prosecutorial misconduct during closing argument including a PowerPoint that essentially shouted that defendant was "GUILTY."

a. The officer's flagrant and non-responsive comment that he knew the other officers weren't lying was so prejudicial that it could not be cured by an instruction and should have resulted in a mistrial.

b. The prosecutor's closing PowerPoint slides that stated the defendant was "GUILTY" were so prejudicial that they should have resulted in a mistrial.

Issue 5: Whether the court failed to take reasonable measures to guarantee an open and public trial when it merely directed security guards to unlock the courthouse, while the signage and other publicly posted hours indicated that the courthouse was closed at 4:00 p.m.

Issue 6: Whether the cumulative error doctrine requires reversal and remand for a new trial in this case.

D. STATEMENT OF THE CASE

On December 9, 2011, two males each took a package from the back of a UPS truck that was stopped to pick up deliveries at Graphic Label, Inc., in Yakima, Washington. (RP 259-61, 263, 289) Although their faces were not seen, the two unidentified males were seen removing the packages by the UPS truck driver, Vernon Place, and an employee for Graphic Label, Ty Walker. (RP 262, 277, 289) Mr. Place and Mr. Walker yelled at the two males and gave chase when they ran, with Mr. Walker chasing one male down the driver's side of the UPS truck and Mr. Place chasing the other down the passenger side of the truck. (RP 262, 289)

During this chase, the man on the passenger side dropped the package he was carrying and displayed a gun that may have been pointed in Mr. Walker's direction. (RP 263-64, 267-68, 281-83, 291, 293, 305-06, 311-12, 314) Mr. Place and Mr. Walker immediately stopped upon seeing the weapon, and the two unidentified males climbed into the passenger side of an SUV to drive away. (RP 266, 295, 310) Mr. Walker testified that the one with the weapon got in the rear passenger door. (RP 295-96, 310)

Mr. Walker contacted police and gave a description of the SUV (RP 295, 310), after which Officer Tarin Miller stopped a vehicle with a

similar license plate and description about 12 blocks from the Graphic Label (RP 382, 508-11). When the vehicle was stopped, a man left the car from the rear passenger side, ran and jumped a fence. (RP 511-12) Officer Tarin Miller gave chase, during which time she saw the man toss away a firearm. (RP 407, 421, 431, 512-13, 517) Officer Miller was unable to stop the man with her Taser and he jumped another fence. (RP 514) Other officers arrived to assist Officer Miller, and a K-9 scent tracking dog eventually dragged a man from beneath a tarp behind some nearby cabins after about 10 minutes of searching.[1] (RP 339, 343, 346, 348, 405-07, 513) Officer Miller identified the man as the same one she had been chasing since the traffic stop, the defendant in this case, Mr. Adrian Samalia. (RP 348, 513)

Meanwhile, the SUV that Officer Miller had stopped was no longer there after Mr. Samalia's arrest. (RP 519) It was later determined that the SUV was registered to a woman named Stacey Melton. (RP 326, 382) At trial, Ms. Melton testified that, on the day and general time in question, she had dropped off her boyfriend Travis Cliett and Mr. Samalia in the area of the Graphic Label. (RP 382, 384, 388) She further testified that they then rejoined her in the SUV, Mr. Cliett climbing into the front passenger seat with a large box and the defendant climbing into the rear

[1] Please note that the transcript incorrectly identifies the K-9 handling officer as "Officer Taylor" for the witness testifying even though Officer Bruce Rogers was providing this particular testimony. (RP 336, et seq.)

passenger side. (RP 385, 388-89) She admitted that she had been stopped by a police officer that day, but, at her boyfriend's direction, she drove away when the officer gave chase to Mr. Samalia. (RP 389-90) Ms. Melton then drove away and falsely reported the car stolen. (RP 391-93)

Ms. Melton testified that her testimony was being provided in exchange for a very serious charge against her being dropped and a significantly lower sentence. (RP 432-34, 437-38) However, the defendant was not permitted to admit Ms. Melton's plea into evidence or cross examine her on how much prison time she was actually avoiding in exchange for her testimony. (RP 393-98, 400-02, 441, 520)

In addition to the above testimony, other officers testified that they had participated in the case by conducting witness interviews (RP 270-71, 298, 471, 477), helping search for suspects and generally investigating the case. (RP 407, 463-68) For example, Officer Chris Taylor testified that he eventually executed a search warrant on the SUV and found Mr. Samalia's identification in the car. (RP 324-25) Officer Taylor also testified that he heard the initial dispatch and listened to Officer Tarin Miller's communications as she pursued the suspect from the SUV. (RP 321, 323) The officer was then cross examined as to whether he was just assuming or speculating that Mr. Samalia was the person chased by Officer Miller since he never actually saw those events unfold and since

Mr. Samalia's identification could have been in that SUV that he searched for six months. (RP 331-32) Officer Taylor responded as follows:

> "Because another officer stopped that car. Saw Mr. Samalia run from it. He was detained shortly thereafter in a very immediate proximity to where the car was. Based on my training experience I know these officers aren't lying."

(RP 332-33) (emphasis added). Defense counsel immediately objected and moved to strike this experienced officer's prejudicial statement, which the court granted with instruction that the jury disregard the officer's response regarding lying or not lying. (RP 333-34) The defendant later moved for a mistrial due to the extreme prejudice from this comment, but the motion was denied. (RP 662)

Mr. Samalia's five-day trial on the charge of first-degree robbery with a firearm began on April 8, 2013. (CP 4-5) After much disagreement about how best to instruct the jury on the appropriate law (RP 486-87, 550, 555-75; CP 46, 50, 71, 87-89), the jury was finally instructed and closing arguments given (RP 578-90, 592-637; CP 73-97). During the State's closing, it argued that the defendant had either pulled a gun to stop Mr. Place and Mr. Walker from chasing him, or to retain possession of the stolen property that his accomplice had (RP 596), even though only the latter would support a robbery conviction under the law (CP 89). The State also displayed a PowerPoint slide that the defendant had run because of "Consciousness of GUILT" and concluded the

PowerPoint with the statement that the defendant was "GUILTY." (RP 603-04, 627; CP 165, 167) The court sustained the defendant's objection and directed the State to take down this last slide, though it denied the motion for mistrial based on the PowerPoint slide as well. (RP 604, 662)

The jury exhibited its confusion in deliberating on this case when it asked for clarification on the difference between robbery and the lesser included theft. (RP 649-50; CP 102) After being returned to its jury instructions, the jury announced a verdict against Mr. Samalia of guilt for first-degree robbery and a special verdict that, yes, he was armed with a firearm when committing the crime.[2] (RP 654; CP 102-104)

Mr. Samalia moved to set aside the verdict and receive a new trial, arguing that the instructions were faulty and that the prejudice from Officer Taylor's testimony and the improper PowerPoint during closing argument could not be cured with instructions to the jury. (RP 662) The court denied the defendant's motion. (CP 125-30) Mr. Samalia received a mid-standard-range sentence of 108 months. (RP 693; CP 131-38) This appeal timely followed. (CP 139) Additional facts may be referenced below as pertinent to that particular issue raised on appeal.

[2] In a bifurcated bench trial on a separate charge, the court acquitted Mr. Samalia of unlawful possession of a firearm, finding insufficient evidence of prior convictions. (CP 113)

E. ARGUMENT

Issue 1: Whether the evidence was insufficient to establish first-degree robbery where (a) the only evidence of use of force was in flight from the robbery rather than to retain possession of stolen property, and (b) there was no evidence that the defendant knew his charged accomplice retained a stolen package during their attempt to escape.

Reviewing the facts, as required, in a light most favorable to the State, Mr. Samalia displayed a firearm only in his attempt to escape after abandoning property that was peaceably taken. While these facts would support a theft conviction (as considered by the jury, RP 649-50), the facts do not support Mr. Samalia's first-degree robbery conviction. Further, there was insufficient evidence that Mr. Samalia knew his accomplice retained any package during their attempted escape, so a robbery conviction cannot stand under an accomplice theory either.

The state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); Wash. Const., Art. 1, §3; U.S. Const. Amend. XIV. Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

"Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In reviewing for sufficient evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient

if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491.

a. The defendant abandoned the property he had taken and then displayed a firearm in his attempt to escape; these facts cannot sustain a first-degree robbery conviction.

Mr. Samalia was convicted of first-degree robbery. "A person commits robbery when he…unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury…" RCW 9A.56.190. "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial." *Id.* (emphasis added). Robbery is committed in the first-degree where the person is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon. RCW 9A.56.200(1)(a) (i), (ii).

Robbery is only established where force is used to obtain or retain the property, or to prevent or overcome resistance to the taking. *State v. Johnson*, 155 Wn.2d 609, 610-11, 121 P.3d 91 (2005). Importantly, the use of force (i.e., the display of a firearm for purposes here) cannot merely be associated with an attempt to escape after unlawfully but peaceably taking property of another. *Id.* Force while attempting to escape or to resist apprehension following an abandoned theft is not robbery. *Id.*

In *State v. Johnson*, the defendant had taken a television from Walmart without paying for it. 155 Wn.2d 609. When the defendant was confronted in the parking lot by a store security guard, he abandoned the television, started to run away and punched the security guard while running away. *Id*. Our Supreme Court held that, since the defendant "was not attempting to retain the property when he punched the guard but was attempting to escape after abandoning it…," his robbery conviction must be reversed. *Id*. at 611.[3]

Like in *State v. Johnson, supra*, Mr. Samalia's display of force was only in his attempt to escape rather than to effectuate a robbery. Viewing the facts, as required, in a light most favorable to the State (including the collective testimony of Ms. Melton, Mr. Walker, Mr. Place and Officer Tarin Miller), there was evidence from which a jury could find that Mr. Samalia participated in the initial theft from the UPS truck and that he later displayed a firearm. However, Mr. Samalia also clearly abandoned any property that had been taken from the UPS truck before any showing of force.

Mr. Place testified that he saw two men each taking a package from his UPS truck, at which time Mr. Place gave chase. The man that

[3] *C.f., State v. Handburgh*, 119 Wn.2d 284, 830 P.2d 641 (1992) (defendant had taken a bicycle outside the owner's presence, but a fistfight ensued when the owner tried to recover the bicycle; the robbery conviction was supported by force used to retain the stolen property).

Mr. Place chased (Mr. Samalia) then immediately abandoned the package he had taken and kept running. But Mr. Place continued his pursuit, so the defendant displayed a firearm and then got into the back of a waiting SUV and drove away. Ms. Melton confirmed that Mr. Samalia was the one who got into the back of this SUV.

The facts show that Mr. Samalia took a package from the UPS truck while the driver was absent. In other words, Mr. Samalia peaceably took the package rather than obtaining it by force. Next, Mr. Samalia did not retain the package by force or overcome resistance to the taking by force. Like the defendant in *State v. Johnson, supra*, Mr. Samalia immediately abandoned the package he had taken when he was confronted and ran away. Mr. Samalia only displayed a firearm after he had abandoned the package in order to effectuate his escape from the ongoing pursuit. These facts cannot establish first-degree robbery since any force used by Mr. Samalia was to escape rather than to retain property. (See also RP 543 where trial court held that: "weapon was brandished for the purpose of interjecting fear for the purpose of having them stop pursuit.")

b. There was insufficient evidence that Mr. Samalia knew Mr. Cliett had retained property when Mr. Samalia displayed the weapon in his attempt to escape, so Mr. Samalia's conviction as an accomplice should be reversed.

As set forth above, taking the personal property of another with the intent to commit theft may support a robbery conviction. *State v. Truong*,

168 Wn. App. 529, 277 P.3d 74, 79 n.7, *review denied*, 175 Wn.2d 1020 (2012). But this definition of robbery further requires some degree of force, such as "violence during flight immediately following the taking." *State v. Manchester*, 57 Wn. App. 765, 770, 790 P.2d 217 (1990); *see also, Handburgh*, 119 Wn.2d at 290 (force to retain property taken establishes robbery). A "taking is ongoing until the assailant has effected an escape." *Manchester*, 57 Wn. App. at 770; *Johnson*, 155 Wn.2d 609 (robbery conviction reversed where force was used after abandoning the property in order to merely escape).

"A robbery conviction may be based on accomplice liability." *Truong*, 168 Wn. App. 529, 277 P.3d at 75. The State need not establish that a defendant actually or constructively possessed the property that was taken where he was working as an accomplice. *Id*. at 78. However, "mere knowledge of the ongoing criminal activity" is insufficient to establish accomplice liability. *Id*. at 79. The State must prove that the defendant "shared in the criminal intent of the principal, thus 'demonstrating a community of unlawful purpose at the time the act was committed.'" *Id*. at 79 (quoting *State v. Castro*, 32 Wn. App. 559, 564, 648 P.2d 485 (1982)).

A person is guilty of a crime committed by another person where he is an accomplice of such person. RCW 9A.08.020(1)(c). An

accomplice is one who "[w]ith knowledge that it will promote or facilitate the commission of the crime, … encourages…, aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a)(i)-(ii).

However, "[t]he culpability of an accomplice as defined in the statute does not extend beyond the crimes of which the accomplice has knowledge." *In re Wilson*, 169 Wn. App. 379, 390, 279 P.3d 990 (2012) (citing *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2000)). "The fact that a purported accomplice knows that the principal intends to commit 'a crime' does not necessarily mean that accomplice liability attaches 'for any and all offenses ultimately committed by the principal.'" *Id*. (quoting *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000)). "To be an accomplice, a person must have knowledge that he or she was promoting or facilitating the crime charged." *Id*. (citing *Cronin*, 142 Wn.2d at 580-82).[4]

Finally, "[a] person knows or acts knowingly or with knowledge when: (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he or she has information which would lead a reasonable person in the same situation to believe that

[4] To reiterate, "[a]n accomplice need not have knowledge of each element of the principal's crime… General knowledge of 'the crime' is sufficient. Nevertheless, knowledge by the accomplice that the principal intends to commit 'a crime' does not impose strict liability for any and all offenses that follow." *Robert*, 142 Wn.2d at 513 (explaining *State v. Davis*, 101 Wn.2d 654, 682 P.2d 883 (1984) (accomplice need not know that the principal was armed where he had general knowledge that the principal intended to commit theft by force, i.e., robbery).

facts exist which are described by a statute defining an offense." RCW 9A.08.010(1)(b). And, "[a] person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.080.010(1)(a).

In *State v. Grendahl*, the accomplice knew that the principal intended to commit theft from a shopper when the principal went into a Jo Ann Fabrics store to steal a purse. *State v. Grendahl*, 110 Wn. App. 905, 906, 43 P.3d 76 (2002). But there was insufficient evidence that the accomplice knew the principal intended to use force to effectuate the planned taking of that property. *Id*. And the instructions allowed the jury to convict if the accomplice assisted in the unlawful taking of property, even if he merely intended to be an accomplice to commit theft. *Id*. at 911. The Court of Appeals reversed the accomplice's robbery conviction, noting that "knowledge by the accomplice that the principal intends to commit 'a crime' does not impose strict liability for any and all offenses that follow." *Id*. at 910-11.

Here, there was evidence that Mr. Samalia knew and intended to act as both principal and accomplice in the peaceable but unlawful taking of property from the UPS truck, i.e., theft. But, like in *Grendahl, supra*, there is insufficient evidence that Mr. Samalia intended to commit robbery, either as principal or accomplice. Once Mr. Samalia abandoned

the package he had taken and effectuated his escape, there is no evidence he intended to retain any taken property, let alone commit robbery. Indeed, there is no evidence that Mr. Samalia knew Mr. Cliett had retained a package that was taken from the UPS truck or that Mr. Samalia's display of a weapon during his escape was intended to effectuate the taking of property by Mr. Cliett. In fact, Mr. Walker and Mr. Place testified that, when confronted, the two accused persons ran down opposite sides of the UPS truck, presumably out-of-sight and out-of-contact with one another.

The court even found after defendant's motion to dismiss that the evidence showed Mr. Samalia only "brandished a weapon" for "the purpose of having them [Mr. Place and Mr. Walker] stop pursuit." (RP 543) But brandishing a weapon to effectuate one's escape does not constitute robbery. There is insufficient evidence that Mr. Samalia knew Mr. Cliett had taken or retained property, or importantly, that Mr. Samalia's weapon display would help retain that property by a showing of force. Mr. Samalia's weapon display was to further his escape, not to retain any stolen property.

This case is unlike *State v. Truong, supra*, where the accomplice was in very close proximity to the principal when a robbery was committed on a bus. There, the accomplice was present and used force while the principal contemporaneously removed the property from the

victim. *Truong*, 277 P.3d 74. There can be no doubt that the defendant there knew property had been obtained or retained by force by the principal. Whereas here, Mr. Samalia lacked the intent necessary for any taking after he abandoned the package he carried and pursued his escape. Mr. Samalia obviously had knowledge of the planned and committed theft, but he did not share the requisite criminal intent necessary for robbery "at the time the act was committed." *Castro*, 32 Wn. App. at 564. Mr. Samalia's robbery conviction should be reversed for insufficient evidence.

Issue 2: Whether the court erred by providing the jury with misleading instructions and refusing to instruct on the defendant's legally supported theory of the case that (a) defendant's showing of force for purposes of mere escape does not constitute robbery, and (b) defendant could only be convicted of robbery as an accomplice if he intended to commit robbery rather than mere theft.

Critical in this case was the jury's decision whether Mr. Samalia knowingly displayed a weapon to retain the property taken by his accomplice, Mr. Cliett, or whether he only displayed that weapon to effectuate his and/or Mr. Clientt's escape. Yet, the trial court refused to instruct the jury on the current state of the law of robbery, that force must be associated with obtaining or retaining the property taken and not simply force in an attempt to escape after abandoning property. *Johnson*, 155 Wn.2d 609-11.

Also, the trial court refused to give defendant's proposed intent instruction, that the known or expected result must also be the actor's

object of purpose. These deficient instructions, combined with the other misleading instructions as a whole, allowed the jury to convict Mr. Samalia as an accomplice even if he only intended theft. The jury evidenced its confusion in its question to the court, struggling to see the difference between robbery and theft. The jury's confusion is exactly what defense counsel hoped to avoid by clarifying and correctly stating the law regarding robbery, intent and accomplice liability. This case should be remanded for a new trial with instructions that are not confusing or misleading and allow the defendant to argue his theory of the case.

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). "Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) (citing *State v. Riley,* 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999)). As a matter of due process, a trial court must generally allow a defendant to present his theory of the case, and the court must instruct the jury on the defendant's theory of the case, so long as the law and evidence support it. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005); *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009); *State v. Fry*, 168 Wn.2d 1, 14, 228 P.3d 1 (2010).

Moreover, instructions must make the relevant legal standard manifestly apparent to the average juror and must not be misleading or confusing. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). "[F]ailure to [properly instruct] is reversible error." *Ginn*, 128 Wn. App. at 878. An erroneous instruction is only harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002).

a. **Without an instruction that force in mere escape does not constitute robbery, the defendant could not adequately present his theory of the case and the jury was confused or misled on the proper law for conviction.**

The jury was instructed in pertinent part as follows:

> "A person commits the crime of robbery when he unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence or fear… The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial."

(CP 84; WPIC 37.50) The court refused to add the defendant's proposed clarifying language to this instruction, that "Force used merely in an attempt to escape after abandoning the property is not a robbery." (RP 567; CP 72, citing *Johnson*, 155 Wn.2d 609).

In 2005, our Supreme Court clarified the law of robbery in this State. *Johnson*, 155 Wn.2d 609. Even though the robbery statute required

a defendant to obtain or retain taken property with some show of force in order to constitute robbery, and even though juries were instructed in accordance with this law (see RCW 9A.56.190 and WPIC 37.50), some defendants were nonetheless erroneously convicted for displaying force during their escape after a theft occurred, even if they had abandoned the property they had taken. *See e.g., id*. Thus, the Supreme Court clarified that force while attempting to escape or to resist apprehension following an abandoned theft is not necessarily a robbery. *Id*. at 610-11. If a defendant "was not attempting to retain the property when he [made the showing of force] but was attempting to escape after abandoning [stolen property]…," robbery is not established as a matter of law. *Id*. at 611.

Unfortunately, the Washington Pattern Instruction that defines robbery (WPIC 37.50) has not been updated to reflect the law as stated *State v. Johnson*. And yet, this law in *State v. Johnson* was absolutely critical to Mr. Samalia's defense. The defense was that, even if Mr. Samalia had taken a package from the UPS truck, or even if he displayed a firearm, he only made this showing of force after abandoning the property he had taken in order to effectuate his escape. The jury could very well have found that Mr. Samalia only showed force after abandoning taken property in order to escape. And yet, such facts cannot constitute robbery as a matter of law. The defendant is entitled to argue his theory of the

case and to have the court instruct the jury on the appropriate law. Mr. Samalia's proposed instruction was supported by the facts of this case and the law. The court erred by refusing to give the proposed instruction.

Furthermore, the instruction as given to the jury was confusing or misleading regarding Mr. Samalia's available defense, particularly in light of the State's closing argument. In seeking this robbery conviction, the prosecutor argued to the jury:

> "The purpose of taking out the gun was to use force or fear by the defendant to retain possession of the property that he and his accomplis [sic], Travis Cliett, had taken. Or his other goal is to stop them from following them."

(RP 596) (emphasis added). While the prosecutor's first suggestion could form the basis for a robbery, the latter suggestion cannot. The prosecutor's argument exacerbated the jury instruction problem and undermined the defendant's legal theory by suggesting that a weapon displayed to stop someone from following was sufficient to convict of robbery. But this is not true under well settled law.

The jury's confusion was clear. It informed the trial court that it needed "clarification between the words 'robbery' and 'theft'…" CP 102. Indeed, Mr. Samalia all but admitted the theft in closing argument. But the jury needed clarification as to whether Mr. Samalia's showing of a firearm to effectuate his escape after abandoning taken property could constitute robbery. The instructions did not sufficiently allow Mr. Samalia

to argue his theory of the case, they confused and misled the jury, and they allowed the State to obtain a robbery conviction even if the defendant's goal was just to get Mr. Place and Mr. Walker to stop chasing him after he dropped the package. As such, a new trial is warranted in this case.

b. **The instructions as a whole misled or confused the jury on accomplice liability and intent, allowing the defendant to be improperly convicted even if the jury found that he or his accomplice only intended to commit theft.**

The jury was instructed in pertinent part as follows:

> "To convict the defendant of the crime of First Degree Robbery, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That…the defendant or an accomplice unlawfully took personal property…
> (2) That the defendant or an accomplice intended to commit theft of the property;
> (3) That the taking was against Vernon Place's will by the defendant or an accomplice's use or threatened use of immediate force, violence or fear…;
> (4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
> (5) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice (a) was armed with a deadly weapon; or (b) displayed what appeared to be a firearm or other deadly weapon; and
> (6) That the acts occurred in the State of Washington."

(CP 89; WPIC 37.02) (emphasis added).

The jury was further instructed that a "person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." (CP 88; WPIC 10.01) The court refused

defendant's proposed addition to this pattern instruction that "intent exists only if a known or expected result is also the actor's object of purpose." (RP 487-88, 555-57, 574-75; CP 88); *State v. Calliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983).

And, the jury was instructed that:

> "A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime of First Degree Robbery, he either:
> (1) Solicits, commands, encourages or requests another person to commit the crime; or
> (2) Aids or agrees to aid another person in planning or committing the crime…
> A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime…"

(CP 82).

The jury instructions in this case misled or confused the jury and allowed an accomplice robbery conviction even if Mr. Samalia or his accomplice did not know the other intended to commit robbery. The facts showed that Mr. Samalia displayed a weapon only after abandoning the package he had taken and while trying to escape. So, the jury needed to determine whether there was evidence beyond a reasonable doubt that Mr. Samalia knew Mr. Cliett still retained a package when the weapon was displayed, intending to help Mr. Cliett retain that property with a firearm.

"An accomplice must associate himself with the venture and participate in it as something he wishes to bring about and by action to

make it succeed. *Castro*, 32 Wn. App. at 563. Even if a person "had knowledge of commission of the crime, [this] would not subject [him or her] to criminal liability unless [he or she] shared in the criminal intent of the principal, demonstrating a community of unlawful purpose at the time the act was committed." *Id*. at 563-64. Yet, the jury was misled to believe that, even if the principal or accomplice only knew of or intended theft (CP 89), he could nonetheless be convicted of robbery as an accomplice based on later events with no additional showing of culpability.

The law on accomplice liability is that, although one person participating in the crime may elevate the degree of a crime without his accomplice necessarily having knowledge of every element of that specific crime, that does not mean that the accomplice is liable for a different substantive crime altogether without knowingly or intentionally participating in that different crime. *Grendahl*, 110 Wn. App. at 910-11 (citing *Roberts*, 142 Wn.2d at 513); *State v. Trout*, 125 Wn. App. 403, 410, 105 P.3d 69 (2005) (citing *State v. King*, 113 Wn. App. 243, 288, 54 P.3d 1218 (2002)). In other words, knowledge by the accomplice that the principal intends to merely commit "a crime" does not impose strict liability for any and all offenses that follow. *Id.* "[T]he culpability of an accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge." *Trout*, 125 Wn. App. at 410. Accordingly, "a

defendant cannot be convicted of robbery as an accomplice if he intends merely that the principal commit theft." *Trout*, 125 Wn. App. at 410 (citing *Grendahl*, 110 Wn. App. at 911).

The pattern instructions given in this case were the same as those that were found to be misleading and a misstatement of the law in *State v. Grendahl*, 110 Wn. App. at 908-09. Like in this case, the to-convict instruction in *Grendahl* imposed accomplice liability for a crime (robbery) even if the defendant's intent was to commit a different crime (theft). *Id.* at 911; CP 89 line 6. This Court acknowledged that the instruction defining accomplice, like in this case, properly used the phrase "the crime" rather than the phrase "a crime." *Id.* n.2. Nonetheless, this Court found that the instructions as a whole impermissibly relieved the State of the burden of proving an element of the crime of robbery. *Id.* The instructions permitted the jury to convict the defendant of robbery as an accomplice if he assisted in the unlawful taking of property, even if he merely intended to commit theft and not robbery. *Id.*

The instructions in this case were likewise misleading and deficient. Defense counsel attempted to remedy the problem so that the defendant could only be convicted if the jury found intent wherein "a known or expected result is also the actor's object of purpose." *Calliguri*, 99 Wn.2d 501; RP 487-88, 555-57, 574-75. But the court resisted defense

counsel's efforts to clarify the necessary elements for robbery, even while seeming to acknowledge that the current instructions may allow the defendant to be convicted as an accomplice whether or not he knew the other individual retained the package when he pulled the weapon. (See trial court's discussion at RP 556-57)

Adding further confusion, Instruction 13 stated that intent could be established where "acting with the objective or purpose to accomplish a result that constitutes a crime." (Emphasis added). This suggested that Mr. Samalia's intent to commit a crime (theft) would satisfy the mens rea for the separate crime of robbery. What was left without any clarification, like in *Grendahl, supra,* was the instructions allowing Mr. Samalia to be convicted of robbery even if he only intended to commit theft.

In sum, Mr. Samalia never displayed a weapon in an attempt to retain the package he had taken. The package was clearly abandoned before any showing of force. Thus, the jury was required to find that Mr. Samalia displayed the firearm to knowingly or intentionally facilitate the taking by Mr. Cliett. Yet, the instructions relieved the State of having to prove these elements by allowing Mr. Samalia's conviction as an accomplice, no matter what later transpired, merely because he and/or Mr. Cliett intended to commit theft from the unattended UPS truck. The

instructions misstated the law and, as stated above, obviously confused the jury as to the difference between robbery and theft. (RP 649-50; CP 102)

Issue 3: Whether the court erred by denying defendant's right to confront and impeach witnesses Stacey Melton, a convicted accomplice in this matter, when he was prohibited from asking her what first-degree robbery sentence she expected to avoid in exchange for her testimony against the defendant.

Due process guarantees the right to effective cross examination and confrontation of the State's witnesses. *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); U.S. Const. amend VI; Wash. Const. Art. 1 §22. Evidence of bias is especially relevant to assess witnesses' credibility. *State v. Lubers*, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996). The right to cross examine adverse witnesses is "especially important with respect to accomplices or other witnesses who may have substantial reason to cooperate with the government." *United States v. Mayans*, 17 F.3d 1174 (9th Cir. 1994). As such, inquiry into the details of an accomplice's guilty plea is "highly relevant" for assessing credibility and may be "essential" for effective cross examination. *Id*. at 1184.

Criminal defendants have "the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 Led.2d 40 (1987). So long as evidence is minimally relevant, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial."

State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Alleged violations of the state and federal confrontation clauses are reviewed de novo, while a trial court's ruling on admissibility is reviewed for abuse of discretion. *State v. Medina*, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002); *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A defendant enjoys more latitude to expose the bias of a key witness. *Darden*, 145 Wn.2d at 619.

Here, Ms. Melton had a particularly strong reason to be biased in this case. She expected to avoid an enormous reduction in the sentence she would serve through her plea agreement to a lesser charge. Yet, the defendant was not allowed to put this evidence before the jury to impeach the full extent of that bias when the trial court denied his motion to admit Ms. Melton's plea agreement and to question Ms. Melton regarding the sentence term she was avoiding.

As set forth above, the potential bias of the State's key witness, such as Ms. Melton, is especially relevant in assessing credibility and determining guilt. Only where such evidence is so prejudicial that it will disrupt a fair fact-finding process at trial should this evidence be excluded. In this case, the prejudice was in excluding this highly relevant evidence of bias, not in admitting it. Mr. Samalia had the constitutional right to confront Ms. Melton in a manner that would best demonstrate her bias and

motive to lie about his involvement in the charged crime. Mr. Samalia was denied this right to confront the most important witness against him (the only witness who placed him at the scene of the crime), and he is therefore entitled to a new trial.

Issue 4: Whether the court erred by denying defendant's motion for a mistrial (a) after flagrantly improper opinion testimony by an officer that "I know these officers aren't lying" and (b) based on prosecutorial misconduct during closing argument including a PowerPoint that essentially shouted that defendant was "GUILTY."

The court erred by denying the defendant's motion for a mistrial after he was substantially prejudiced by one officer's testimony that he knew the other officers weren't lying and based on the prosecutor's PowerPoint slides that Mr. Samalia was "GUILTY."

A trial court's decision denying a motion for mistrial is reviewed for abuse of discretion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). The trial court's decision to deny a motion for a mistrial will be overturned "when there is a 'substantial likelihood' the prejudice affected the jury's verdict.'" *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (quoting *State v. Crane*, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991)). A mistrial should be granted where the prejudice to the defendant

is so great that nothing short of a new trial can insure that the defendant will be tried fairly. *Hopson*, 113 Wn.2d at 284.

To determine whether a trial irregularity is so prejudicial so as to warrant a mistrial, this Court examines "(1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000) (citing *Hopson*, 113 Wn.2d at 284). A jury is presumed to follow a court's instruction to disregard improper testimony or argument. *State v. Coe,* 175 Wn.2d 482, 514-15, 286 P.3d 29 (2012). However, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135-36, 88 S.Ct. 1620 (1968).

a. The officer's flagrant and non-responsive comment that he knew the other officers weren't lying was so prejudicial that it could not be cured by an instruction and should have resulted in a mistrial.

Officer Taylor testified that he knew Mr. Samalia was the properly identified defendant in this case because he had spoken with the other officers and "[b]ased on my training experience I know these officers aren't lying." (RP 332-33) Officer Taylor's testimony was a serious invasion into the fact-finding province of the jury. And, it involved

cumulative evidence in that it commented on the credibility of at least five law enforcement witnesses in this case. The curative instruction that was given to the jury could not cure the prejudice to the defendant; a new trial is the only fair remedy in this case.

Ultimate guilt determinations are questions for the jury. *State v. Welchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); 5D WAPRAC ER 704(6), (9) and (11). Neither a lay nor expert witness can testify that a defendant is guilty. *State v. We*, 138 Wn. App. 716, 725, 158 P.3d 1238 (2007), *review denied*, 163 Wn.2d 1008 (2008) (citing *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)). "To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of a case, including, (1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense,' and (5) 'the other evidence before the trier of fact.'" *State v. King*, 167 Wn.2d 324, 219 P.3d 642 (2009).

A witness may not express an opinion, either directly or indirectly, about another witness's credibility. *State v. Jones*, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). Opinion testimony from law enforcement officers is especially problematic because it "carries a special aura of reliability" and is more likely to influence the jury and thereby deny the defendant a fair and impartial trial. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125

(2007); *State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004) *review denied*, 154 Wn.2d 1009 (2005); *State v. Notaro*, 161 Wn. App. 654, 661-62, 255 P.3d 775 (2011); *We*, 138 Wn. App. at 730 (J. Schultheis dissent).

For example, in *State v. Barr*, an officer testified that he knew the defendant was lying about the accusations based on the officer's training, and the heart of the case revolved around an assessment of credibility. *Barr*, 123 Wn. App. at 380-84. Although there was evidence to support the conviction, the Court in *Barr* remanded for a new trial due to the prejudice to the defendant that interfered with his right to receive a fair trial before an impartial jury. *Id.*

Here, defense counsel asked Officer Taylor whether he had personally witnessed the defendant on the day in question so that the officer could positively identify Mr. Samalia as the person who either committed the robbery or had run from Officer Tarin Miller. The simple and appropriate response to that question should have been "no." Officer Taylor never personally witnessed Mr. Samalia at the Graphic Label; there was a period of at least 12 blocks where no law enforcement or third-party witnesses observed the SUV, its occupants, or any possible change in occupants; and Officer Taylor never saw Mr. Samalia running from Officer Tarin Miller. But Officer Taylor testified that he knew Mr. Samalia was the proper defendant because he could rely on the other

officers saying so, that "[b]ased on my training experience I know these officers aren't lying." (RP 332-33) This unresponsive answer invaded the fact-finding province of the jury and was so prejudicial in this credibility-based trial that a curative instruction could not "un-ring the bell" of injustice.[5] The trial court correctly determined that Officer Taylor delivered impermissible opinion testimony and properly instructed the jury to disregard the testimony.

Unfortunately, the officer's testimony was so highly prejudicial that the curative instruction was inadequate under these circumstances to cure the problem. Even with an instruction, the jury couldn't be expected to ignore this experienced officer's testimony that the other officers investigating this case (six of whom testified counting Officer Taylor) were the truthful ones. The trial court should have granted the defendant's motion for a mistrial.

Again, in deciding if a mistrial should have been granted, this Court determines if there was a substantial likelihood the jury's verdict was affected, considering "(1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *Greiff*, 141 Wn.2d at 921. Here, the jury's verdict could not help but be affected. An officer sat on

[5] "One 'cannot unring a bell'…;" "after the thrust of the saber it is difficult to say forget the wound;" "'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'" *United States v. Dunn*, 307 F.3d 883, 886 (5th Cir. 1962) (citations omitted).

the stand and blurted out that he knew the defendant was the appropriately identified suspect because the other officers told him so and he had training and experience that taught him that officers do not lie. Officer Taylor had over seven years of experience and must have known that his comment would go straight to the jury's credibility determinations. This was a serious irregularity. Defense counsel did all he could at the time by asking the court to instruct the jury to disregard, but ultimately Officer Taylor's impermissible opinion testimony was so serious that no jury could be expected to set aside Officer Taylor's statements.

Officer Taylor's testimony was an impermissible comment on the veracity of five other officer witnesses in this case, so the irregularity certainly involved cumulative evidence. Although many officers testified that they saw someone running twelve blocks from the crime scene or even that they eventually found Mr. Samalia hiding, there was not a single witness who could positively identify Mr. Samalia as one of the men who took a package from the UPS truck near the Graphic Label. There was a significant period of time where no officers observed the SUV or its occupants so that the occupants could have changed or moved. And, Officer Tarin Miller was the only officer who saw the defendant's face when he ran from the SUV. There were many reasons that Mr. Samalia may have been running and trying to avoid contact with Officer Tarin

Miller, other than because he was involved in a theft or robbery from the UPS truck. But Officer Taylor's impermissible opinion testimony did not allow the jury to perform its fact finding role and even consider doubt as to whether the person who ran from Officer Tarin Miller was also the proper defendant for robbery. After all, officers apparently do not ever lie.

Like in *State v. Barr, supra*, this testimony that the officer was trained to know who lies and who does not was so prejudicial that a curative instruction could not dispel the prejudice. There is a substantial likelihood the jury's verdict was affected, and, thus, the court abused its discretion by refusing to grant a new trial in this case.

b. The prosecutor's closing PowerPoint slides that stated the defendant was "GUILTY" were so prejudicial that they should have resulted in a mistrial.

The court erred in denying defendant's motion for mistrial based on the prosecutor's improper PowerPoint slides during closing argument.

Prosecutors serve two equally important functions: They enforce the laws by prosecuting those who have violated peace and dignity of the state by breaking it, and they function as the representative of the people in a quasijudicial search for justice. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2001). Defendants are among the people the prosecutor represents. *Id*. The prosecutor owes a duty to defendants to see their rights to a constitutionally fair trial are not violated (*id*.) and to

"seek a verdict free of prejudice and based on reason." *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968); U.S. Const. amend. VI, XIV; Wash. Const. art. I, §§3, 22.

Prosecutorial misconduct is a form of trial irregularity that can form the basis for a mistrial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). "A defendant claiming prosecutorial misconduct bears the burden of establishing the [1] impropriety of the prosecuting attorney's comments and [2] their prejudicial effect." *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010). The prosecutor's allegedly improper comments are reviewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument and the jury instructions given." *Id*. Prejudice is established if "there is a substantial likelihood that the instances of misconduct affected the jury's verdict." *In re Glassman*, 175 Wn.2d 696, 704, 708, 286 P.3d 673 (2012).

"In general, a prosecutor errs by expressing a 'personal opinion about the credibility of a witness and the guilt or innocence of the accused…." *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). It is "well established that a prosecutor cannot use his or her position of power and prestige to sway the jury…" *Glassman*, 175 Wn.2d at 706-07 (citing cases). "'The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.'" *Id.* at 704

(internal quotation omitted). Moreover, "'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.'" *Id*. at 707 (quoting *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)).

"Prejudicial images may sway a jury in ways that [spoken] words cannot." *Glassman*, 175 Wn.2d at 707, 709-10 (citing *State v. Gregory*, 158 Wn.2d 759, 866-67, 147 P.3d 1201 (2006)) (finding prosecutorial misconduct could not be cured by jury instruction where State's PowerPoint slides, which have a greater impact on the jury than mere spoken words, displayed the word "GUILTY" several times over the top of the defendant's picture). PowerPoint slides should be carefully reviewed as they are more likely to leave a visual and lasting impression in jury's minds than mere spoken words. *See id*. "A prosecutor could never shout in closing argument…[that a defendant] is 'guilty, guilty, guilty!' and it would be highly prejudicial to do so." *Id*. at 708. Doing the same "visually through use of slides…" that a defendant is "GUILTY" is even "more prejudicial" and likely to create a conscious or subconscious bias in the jury. *See id*. at 708-10.

Here, the PowerPoint slides shouted in all capital letters that the defendant had "Consciousness of GUILT" and that he was "GUILTY."

CP 165, 167. The defense attorney objected and the court rightly found that this PowerPoint argument by the prosecutor was improper. Indeed, prosecutors are not permitted to express personal opinions on guilt, prosecutors cannot inflame the passions and prejudices of the jury, and prosecutors cannot use a visual aid to state what the prosecutor would not be able to shout at argument: that the defendant is GUILTY!

Although the final offensive slide was removed from the jury's view at the court's direction, the lasting prejudice to the defendant could not be avoided. As set forth in *Glassman, supra*, a PowerPoint slide is unique in that it can leave a lasting and prejudicial impact on jurors' minds that is "more prejudicial" than mere spoken words. Considering the circumstances of this case, there is a substantial likelihood that the jury's verdict was affected and should have been set aside. Indeed, the improper slides were not the only attempts to invade the fact finding function of the jury, especially considering Officer Taylor's impermissible opinion testimony. Also, the jury clearly exhibited confusion in reaching its verdict in this case, there were faulty instructions on the law, and the defendant was improperly limited in his ability to confront a material witness (*see supra*).

Considering the case as a whole, there is a substantial likelihood that the jury verdict was affected by the visual statements that the

defendant was GUILTY. The court abused its discretion by failing to order a new and fair trial.

Issue 5: Whether the court failed to take reasonable measures to guarantee an open and public trial when it merely directed security guards to unlock the courthouse, while the signage and other publicly posted hours indicated that the courthouse was closed at 4:00 p.m.

Trials are required to be open to the public unless, after proper inquiry into the relevant factors, the court finds it necessary to close that pertinent portion of trial. But here, despite the trial judge instructing courthouse security guards on some days of trial to keep the courthouse open, the "openness" of the courthouse was merely illusory. The courthouse remained "de facto" closed, despite the security guards unlocking the courthouse afterhours on some days, because the signage in front of the courthouse and the other publicly posted hours informed the public that the courthouse was actually closed. Reasonable measures were not taken to accommodate the public trial right and make the court open and accessible to a public that was aware of the after-hours proceedings.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Wash. Const. art 1, § 22; U.S. Const. amend. VI; *In re Personal Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). This includes the entire jury selection process. *Orange*, 152 Wn.2d at 804. Additionally, the public and press have an implicit First Amendment right to a public trial.

U.S. Const. amend. I; Wash. Const. art 1, § 10; *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *State v. Easterling*, 157 Wn.2d 167, 179, 137 P.3d 825 (2006).

"The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions...." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The constitutional guaranty of an open trial is also for the public, to see that proceedings be done in an open court for which a public may be aware, not for proceedings that are conducted privately. *Press-Enter. Co. v. Superior Court of California*, 464 U.S. 501, 509, 104 S.Ct. 819 (1984).

> "When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for [the public's] understandable reactions and emotions [to see justice done]. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected."

Id. (emphases added).

"Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials…" *State v. Leyerle,* 158 Wn. App. 474, 478, 242 P.3d 921 (2010) (citing *Presley v. Georgia*, 558

U.S. 209, 130 S.Ct. 721, 723, 175 L.Ed.2d 675 (2010)). This public trial right includes "open and accessible proceedings." *Leyerle,* 158 Wn. App. at 479-80 (citing *Easterling*, 157 Wn.2d at 174).

"Whether or not a courtroom was properly closed is adjudged by application of the five factor[6] set forth in *State v. Bone-Club*…" *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (Div. 3, 9/24/2013). Whether or not the right to a public trial has been violated is a question of law reviewed de novo. *Leyerle,* 158 Wn. App. at 478. A defendant's failure to "lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right." *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). Where the right to a public trial was violated, the remedy is to reverse and remand for a new trial. *Leyerle*, 158 Wn. App. at 478 (citing *Orange*, 152 Wn.2d at 814). "[P]rejudice is presumed where a violation of the public trial right occurs." *Bone-Club*, 128 Wn.2d at 261-62 (*citing State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923)).

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[6] The trial court herein did not believe it had closed the court, so the following criteria for properly closing a court were never considered: "(1). The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right. (2). Anyone present when the closure motion is made must be given an opportunity to object to the closure. (3). The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests. (4). The court must weigh the competing interests of the proponent of closure and the public. (5). The order must be no broader in its application or duration than necessary to serve its purpose." *Bone-Club,* 128 Wn.2d at 258-59 (alteration in original). Accord, *In re Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004); *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012).

Here, the defendant's and public's rights to an open and public trial were not met by merely unlocking the courthouse doors; the public cannot be expected to know to enter the courthouse of their own volition contrary to the public postings suggesting that the courthouse was closed. The question here is not whether the trial court properly closed the courthouse, since no inquiry was ever made to justify any such closure. The question here is whether the mere unlocking of the courthouse doors is sufficient to protect the defendant's and public's rights to an open and public trial.

The judge in this case made it clear that the Yakima County Superior Court courthouse closes weekdays at 4:00 p.m.[7] Yet, on each day of the week, trial went beyond 4:00 p.m. So, the judge instructed the courthouse security guards on at least three different days to keep the front doors of the courthouse unlocked. (RP 55, 252, 429; CP 172) Although the court instructed security guards to keep the courthouse open, the signage outside the courthouse and the superior court's website still displayed or announced the public closing hours as 4:00 p.m.[8]

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[7] Mr. Samalia has filed a contemporaneous motion to supplement this record with the transcript of a reference hearing that occurred in another case before this Court: State v. Andy, 31018-3-III. The record from that reference hearing confirms the judge's statement in this case that the courthouse closing hours changed to 4:00 p.m. The supplemental transcript in Andy indicates that the courthouse hours changed to 8:00 a.m. to 4:00 p.m. on September 14, 2011. (Supp VROP State v. Andy, 31018-3-III, pg. 14)

[8] Mr. Samalia's contemporaneously filed motion to supplement includes a picture of the sign in question, which is also admitted as Exhibit C in *State v. Andy*, 31018-3-III, and is requested to be incorporated into this appellate record.

Specifically, the sign indicated that the courthouse hours were until 4:00, although in very faint font at the bottom of the sign is a message that "Courtrooms open while in session." (*State v. Andy*, 31018-3-III, Supplemental record RP 153, 165, Exhibit C) It is inconceivable how this message would adequately inform the public that open and accessible proceedings are occurring within the courthouse. Of course courtrooms are open while they are in session. But how would a member of the public know that courtroom are open if all other posted hours on the signage indicate that the courthouse closed at 4:00 p.m.

What is more, even if the courthouse security guards were physically present to let the public in after 4:00 p.m., this does not assuage the problem in this case. The public would not be aware that a security guard is available to admit them after 4:00 when the security guard does not stand by entrance doors. See Supplemental VRP in *State v. Andy*, 31018-3-III RP 64. Instead, the security guard stands near the metal detector. *Id*. A person approaching the entrance doors from the street would only see the closed sign, not the security officer, unless that person peered through the door at a certain limited angle. *Id*.

As to the posted internet hours, those were made public verbatim as follows after the courthouse hours changed in 2011:

> **Superior Court**
> **Location:** Yakima County Courthouse, Rm. 323
> **Hours of Operation:** *8:30 - 4:00 pm*
> **Phone:** (509)574-2710
> **E-mail**
>
> Scheduling for both Yakima County District Court and Yakima County Superior Court are done by the Court Administrator. Also on these pages, you will find the local court rules, forms and services provide by both District and Superior Court.

http://www.yakimacounty.us/departme.asp#S (Available 9/25/2013) (emphasis added by italics).

Interestingly, around the time that a similar open court issue was raised in *State v. Andy*, 31018-3-III (appellant's brief filed 10/30/2013), the courthouse hours were changed on its website so that they presently read as follows:

> **Superior Court**
> **Location:** Yakima County Courthouse, Rm. 314
> **Hours of Operation:** 8:00-4:00 p.m. *(Exception: Courthouse will remain open for public attending trials/hearings that go past 4:00 p.m.)*
> **Court Administrator Office Hours:** 8:30-4:00 p.m.
> **Phone:** (509)574-2710
> **E-mail**
>
> Scheduling for Yakima County Superior Court is done by the Court Administrator. Also on these pages, you will find the local court rules, forms and services provided by Superior Court.

http://www.yakimacounty.us/departme.asp#S (Available 1/24/2014) (recent changes to internet hours are italicized above).

On Monday, April 8th, this trial recessed at 4:30 p.m. after jury selection. (RP 55; CP 173) On Tuesday, court adjourned at 4:30 p.m. following opening statements. (RP 252; CP 173) On Wednesday, court adjourned at 4:21 p.m. after Ms. Melton's testimony concluded. (RP 429; CP 173) On Thursday, court adjourned at 4:20 p.m. after discussion regarding jury instructions. (RP 560; CP 174) And on Friday, court adjourned at 4:31 p.m. after discussions regarding the State's PowerPoint, and other scheduling discussions. (RP 643; CP 175)

Due process guarantees the right to an open and public trial. If the public is not "aware" of the open and public proceedings, this right loses all meaning. *See Press-Enter.*, 464 U.S. at 509. Even if a courthouse is technically unlocked, secret proceedings unfairly diminish or eliminate this public trial right. *See id.* The law requires "reasonable measure to accommodate public attendance" at court proceedings. *Leyerle*, 158 Wn. App. at 478; Presley, 558 U.S. 209. Moreover, court proceedings must not only be open, but they must be "accessible." *Leyerle*, 158 Wn. App. at 479-80; *Easterling*, 157 Wn.2d at 174.

Yakima County's policy of closing the courthouse at 4:00 p.m. while unlocking the courthouse doors during times of trial, with no clear direction to the public that the courthouse may be accessed after 4:00, is not a reasonable measure to accommodate public attendance. Seeing the

sign outside the courthouse that the building is closed or reading the county's website stating that the courthouse closed at 4:00 p.m., the public is unlikely to be "aware" of ongoing public proceedings after normal business hours. Although the courthouse is technically unlocked, it is not sufficiently "accessible." Unlocking the courthouse door, without more, cannot constitute "reasonable measures" to "accommodate public attendance." The proceedings in this case may as well have been behind locked doors. It is difficult to imagine many members of the public who would be brave enough to assert the public trial right and enter the courthouse when posted hours announce that the courthouse is closed.

This case presents an apparently unprecedented opportunity in this State to guide our lower courts on best methods for assuring an open and public trial. Reasonable measures can and must be taken to guarantee the right to an open and public trial when proceedings occur after hours.[9] Regardless of what measures would be best, what is clear is that the measures taken in this case by the Yakima County Superior Court did not make the courthouse sufficiently "accessible," did not make the public "aware" of the ongoing public trial, and were not "reasonable" to

[9] *C.f., Haas v. Warden, SCI Somerset*, 760 F.Supp.2d 484, 488-89 (E.D.Pa., 2010) (in order to protect the public trial right when the courthouse closed due to a power outage, the judge personally informed the media that open proceedings would be held at the nearby firehouse, security guards were posted at the courthouse doors to direct inquiring members of the public to the alternate forum, and a sign was posted outside the courthouse directing the public to the open trial at the firehouse public forum).

"accommodate public attendance." Significant portions of Mr. Samalia's trial were effectively closed and his conviction should be reversed in favor of a new and public trial.

Issue 6: Whether the cumulative error doctrine requires reversal and remand for a new trial in this case.

Even if this Court could determine that one or more of the errors are not prejudicial enough to warrant reversal, the cumulative effect of the prejudicial errors in this case warrants reversal. *See e.g. State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (holding, "a series of errors, each of which is harmless, may have a cumulative effect that is prejudicial.")

"It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless." *State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999). "Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence." *Id*. "Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error." *Id*. Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial." *Id*.

Here, the instruction, confrontation, improper opinion testimony, and open court issues were all constitutional errors. Their cumulative effect was incredibly prejudicial. Given the confusion demonstrated by this jury in convicting the defendant, this Court cannot conclude that any jury would have reached the same result. The remaining non-constitutional errors, individually and as a whole, all materially affected the outcome of the trial. There were inconsistencies in the evidence that could very well have provided basis for doubting this conviction, and the ultimate evidence relied upon to convict Mr. Samalia was insufficient. The jury was deprived of significant legal instruction and impeachment evidence, and Mr. Samalia was deprived of a fair, open trial with untainted testimony and argument put before an unbiased jury. The only fair remedy in this case is to reverse.

F. **CONCLUSION**

Based on the foregoing, Mr. Samalia respectfully requests that this Court reverse his first-degree robbery conviction with firearm enhancement and remand for entry of a third-degree theft conviction or, at a minimum, a new trial.

Respectfully submitted this 24th day of January, 2014.

/s/ Kristina M. Nichols_____
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