SUPREME COURT NO. 945624

NO. 73332-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LESLEY VILLATORO,

Petitioner.

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

The Honorable Charles R. Snyder, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

OTHER JURISDICTIONS

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

INTRODUCTION

Chad Horne invaded Stephanie Baker's home, kidnapped her and her children, slit Baker's throat, tried but failed to shoot her in the head, and then fled in Baker's car. Horne then met with an apparent accomplice, "Rocky", and each made hoax 911 calls from the same phone, apparently to divert law enforcement from discovering Horne's murder of Baker.

Unbeknownst to Horne and "Rocky", however, Baker survived and promptly contacted law enforcement, who quickly located and engaged Horne in a high-speed chase that ended in Horne's death. With Horne dead, the State charged Lesley Villatoro, Horne's girlfriend and mother of his youngest children, as an accomplice to Horne's crimes based on Villatoro's admission she dropped Horne off in Baker's cul de sac, and evidence she bought or was with Horne when items were purchased that law enforcement believed were part of a "murder kit."

A. IDENTITY OF PETITIONER

Petitioner Lesley Villatoro, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Villatoro seeks review of the court of appeals decision in State v. Villatoro, __ Wn. App. __, 2017 WL 1315505 (Slip Op. filed April 3, 2017). A copy of the slip opinion is attached as Appendix A. On April 13, 2017, the court of appeals issued an order denying Villatoro's motion to reconsider. A copy of that order is attached as Appendix B.

C. REASONS TO ACCEPT REVIEW

This Court should accept review because the court of appeals decision conflicts with decisions of this Court,[1] and raises an issue of substantial public interest and significant questions of law under the State constitution that should be decided by this Court, to wit; whether under art. 1, § 21, juries should be instructed that deliberation may occur only when all 12 jurors are present in order to ensure the verdicts rendered are constitutionally valid? RAP 13.4(b)(1), (3) & (4).

This Court should also accept review because the court of appeals decision conflicts with other decisions of the court of appeals holding that the State's burden to prove every element of the charge offense beyond a reasonable doubt is not satisfied when the existence of an essential fact rest on speculation and conjecture. RAP 13.4(b)(2).

D. ISSUES PRESENTED FOR REVIEW

1. Was Villatoro deprived of her constitutional right to a fair trial and unanimous jury verdict where the court failed to instruct that deliberations must include all jurors at all times.

2. Does the failure to instruct the jury on how to deliberate in order to reach constitutionally valid verdicts constitute structural error for which prejudice is presumed?

3. Was the evidence insufficient to convict Villatoro as an accomplice to attempted murder, burglary, robbery and kidnappings, when

[1] See e.g., State v. Lamar, 180 Wn2d 576, 327 P.3d 46 (2014).

there was no direct evidence of actual knowledge of the crimes Horne intended to commit until after the fact, and where the circumstantial evidence was so tenuous it requires resorting to speculation and conjecture and piling inference upon inference to conclude she had the requisite knowledge for accomplice liability?

E. STATEMENT OF THE CASE [2]

The State charged Villatoro as an accomplice to attempted murder, robbery, burglary and three counts of kidnapping, all in the first degree. CP 3-6. The State alleged Villatoro acted as an accomplice to Horne, who on May 2, 2014, invaded the home of Stephanie Baker, restrained her and her two young children, attempted to kill Baker, and then fled in Baker's car, only to die while fleeing from law enforcement. CP 7-10.[3]

Villatoro was convicted by a jury as charged. CP 253-58; 2RP 1209-14. The court denied Villatoro's motion for a new trial based on claims of insufficient evidence and irregularities in the jury. CP 259-60, 278-95, 325. A mitigated exceptional sentence of 525 months and a day was imposed. CP 326-43. Villatoro appealed. CP 304-322.

On appeal Villatoro argued her convictions should be reversed because the evidence was insufficient to convict, and that even if there was sufficient evidence, the trial court's failure to properly instruct the jury on how to conduct deliberations required reversal.

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[2]A more detailed statement of the case is provided in Villatoro's opening brief in the court of appeals. Brief of Appellant (BOA) at 3-23.

The court of appeals rejected both claims. Appendix A. With regard to the jury instruction claim, the court concluded that although the error was of constitutional magnitude, it was not manifest because the record failed to show the jury ever deliberated with less than all twelve jurors in attendance. Appendix A at 10-11.

In a motion to reconsider, Villatoro asked the court to reconsider the jury instruction issue in light of a revised claim that the failure to instruct juries that deliberations may only occur when all twelve jurors are present constitutes "structural error" for which actual prejudice need not be shown. That motion was summarily rejected. Appendix B.

F. ARGUMENTS

1. REVIEW IS WARRANTED TO DECIDE IF THE FAILURE TO INSTRUCT THAT DELIBERATIONS MAY ONLY OCCUR WHEN ALL TWELVE JURORS ARE PRESENT CONSTITUTES STRUCTURAL ERROR.

The court of appeal rejected Villatoro's claim that failure to instruct the jury on how to reach a constitutionally valid unanimous verdict requires reversal, concluding that Villatoro failed to show actual prejudice. Appendix A at 10-11. As noted at oral argument on February 21, 2017,[4] undersigned counsel had further developed this instructional error argument in subsequently filed appellate briefs by asserting the

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[3] A subsequently added charge of taking a motor vehicle was dropped. CP 14-17, 40-43.

[4] Undersigned counsel notes that the recording of the February 21st oral argument in this case and all others argued before Division One of the court of appeals that day have been deleted from the Court's web site. See http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showDateList&courtId=a01&archive=y

failure to instruct the jury on how to reach a constitutionally valid unanimous verdict constitutes structural error for which prejudice is presumed. Villatoro asked the court to consider this new argument,[5] and find that structural error occurred that entitles Villatoro to a new trial.

As set forth in the opening brief, criminal defendants in Washington have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22[6]; State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential elements of this right is that the jurors reach unanimous verdicts, and that the deliberations leading to those verdicts be "the common experience of all of them." State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979) (citing People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976)). Thus, constitutional "unanimity" is not just all twelve jurors coming to

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[5] See RAP 2.5(a)(3); Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849, 851 (1986); State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064, 1067 (1983), reversed on other grounds, State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483, 487 (1989) (some constitutional claims may be raised for the first time on appeal, even in a motion to reconsider and/or petition for review).

[6] Wash. Const. art I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash Const. art I, § 22 provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county

agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is unconstitutional.

This Court recently concurred with the California Supreme Court's description of how a constitutionally correct unanimous jury verdict is reached, and how it is not:

> "The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint."

Lamar, 180 Wn.2d at 585 (quoting Collins, 17 Cal.3d at 693).

This heightened degree of unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew, as occurred here. 2RP[7] 1199; State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60, 70 (1993) (citing CrR 6.5). Failure to so instruct deprives a criminal defendant of her right to a unanimous jury verdict and requires reversal. Lamar, 180 Wn.2d at 587-89; State v. Blancaflor, 183 Wn. App. 215, 221, 334 P.3d 46 (2014); Ashcraft 71 Wn. App. at 464. A trial court's failure to properly

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> in which the offense is charged to have been committed and the right to appeal in all cases: . . .

[7] There are 11 volumes of verbatim report of proceedings referred to as follows: 1RP - January 26, 2015; 2RP - eight-volume, consecutively paginated set for the dates of January 27 & 29, 2015, and February 2-5, 9-11, 13, 17-20, 2015; 3RP - March 3 & 24, 2015; and 4RP - January 27, 2015.

instruct the jury on the constitutionally required format for deliberating towards a unanimous verdict is error of constitutional magnitude that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

As discussed in more detail in Villatoro's court of appeals briefing, standardized jury instructions developed in Washington (WPICs), if provided, make clear deliberations may only occur after all the evidence is in, and only then when jurors are in the jury room. What they fail to make clear, however, is that any deliberations must always involve all twelve jurors. Missing is an instruction informing the jury that it must suspend deliberations whenever one of them is absent. Without such instruction, there is no valid basis to assume the verdicts rendered were the result of "the common experience of all of [the jurors]," which our State constitution requires. State v. Fisch, 22 Wn. App. at 383.

Here, what instructions the court did provide failed to make clear the constitutional unanimity requirement that deliberation occur in the jury room, only then when all twelve jurors are present. The Lamar Court held this type of error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. 180 Wn.2d at 588 (citing State v. Lynch, 178 Wn.2d 487, 494, 309 P.3d 482 (2013)).

The test for determining whether a constitutional error is harmless is "[w]hether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Brown,

147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Restated, "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different but for the error. A reasonable probability exists when confidence in the outcome of the trial is undermined." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). It is undermined here and the prosecution cannot show harmlessness.

The court of appeals rejected the above argument on the basis that the record fails to show the jury conducted any deliberations that included less that all twelve jurors. Appendix A at 10-11. Even if Villatoro has failed to show actual prejudice (which she does not concede), reversal is still warranted. As discussed below, the failure to instruct a jury on how to achieve constitutional unanimity constitutes "structural error" for which reversal is required without a showing of actual prejudice because it renders the entire proceeding fundamentally flawed.

"Structural error is a special category of constitutional error that 'affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" State v. Wise, 176 Wn.2d 1, 13–14, 288 P.3d 1113 (2012) (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

Where there is structural error, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and

no criminal punishment may be regarded as fundamentally fair." Rose v. Clark, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). Structural error is not subject to harmless error analysis. Fulminante, 499 U.S. at 309-10. Nor is a defendant required to show specific prejudice to obtain relief. Waller v. Georgia, 467 U.S. 39, 49, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

There can be no confidence in the constitutionality of Villatoro's convictions. They are fundamentally flawed because there is no basis to assume the verdicts rendered were unanimous as required by the State constitution and as interpreted by this Court. Lamar, 180 Wn.2d at 585.

Although we assume jurors following the instructions given, there is no basis to assume they know what to do in the absence of instruction. State v. Smith, 181 Wn.2d 508, 519 n.13, 334 P.3d 1049 (2014); State v. Emery, 174 Wn.2d 741, 764 n.14, 278 P.3d 653 (2012). To the contrary, we assume the citizenry needs to be informed in certain contexts the specifics of the constitutional framework involved. See e.g., Miranda v. Arizona, 383 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)[8]; State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927 (1998)[9].

[8] The Fifth Amendment requires that a person interrogated in custody by a state agent must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda, 383 U.S. at 444; also State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988) (finding Miranda warnings are required to overcome presumption that self-incriminating statements are involuntary when obtained by custodial interrogation). Where Miranda warnings are not provided, statements elicited from custodial interrogation are not admissible as evidence at trial. Miranda, 383 U.S. at 444, 476-77.

The same is true in the context of jury trials. Certain concepts a criminal jury must understand to properly deliberate are so important to the framework of a criminal trial that the failure to properly instruct on them requires reversal. For example, the failure to correctly instruct a criminal jury on the "reasonable doubt" standard constitutes structural error for which reversal is automatic. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

> Although most constitutional errors have been held amenable to harmless-error analysis, see Arizona v. Fulminante, 499 U.S. 279, 306–307, 111 S. Ct. 1246, 1263, 113 L. Ed.2d 302 (1991) (opinion of REHNQUIST, C.J., for the Court) (collecting examples), some will always invalidate the conviction. Id., at 309–310, 111 S. Ct. at 1264–1265 (citing, inter alia, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963) (total deprivation of the right to counsel); Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (trial by a biased judge); McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L.Ed.2d 122 (1984) (right to self-representation)). The question in the present case is to which category the present error belongs.

Sullivan v. Louisiana, 508 U.S. at 279.

The same reasons that a flawed reasonable doubt instruction requires automatic reversal apply here.

> The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

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[9] A warrantless search based on consent is constitutional only when the consent is knowingly and voluntarily given.

508 U.S. at 279.

Just as "a misdescription of the burden of proof . . . vitiates all the jury's findings" because it renders the mechanism by which guilty is determined fundamentally flawed, so too does the failure to educate a jury that its deliberations must comply with the constitutional requirement that they occur only when all 12 jurors are assembled together in the jury room. Id., at 281; Lamar, 180 Wn.2d at 585. This Court should grant review to decide whether the failure to adequately instruct a jury on how to reach constitutionally unanimous verdicts constitutes structural error for which reversal is required. RAP 13.4(b)(1), (2) & (4).

2. THE EVIDENCE WAS INSUFFICIENT TO CONVICT.

The evidence is insufficient to convict Villatoro of any offense. This is because the State failed to prove beyond a reasonable doubt she had the requisite knowledge and intent for accomplice liability. Although there is evidence Villatoro purchased items that may have been intended for or were used in Horne's crimes (e.g., the gas can, bottle of bleach and black duffle bag), and evidence she drove him to the cul de sac where Horne's crimes occurred, there is no evidence from which to reasonably infer Villatoro knew when she dropped Horne off that he intended to force his way into Baker's home, kidnap her and her two children, attempt to kill her, and then steal her car. Absent such evidence, the prosecution failed to overcome the presumption of innocence, and this Court should do what

the trial court and court of appeals failed to do, grant review and reverse and dismiss all charges with prejudice.

"The presumption of innocence is the bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn. 2d 303, 315, 165 P.3d 1241, 1248 (2007). Every defendant is entitled to the presumption, "which is overcome only when the State proves guilt beyond a reasonable doubt as determined by an impartial jury based on evidence presented at a fair trial." State v. Walker, 182 Wn.2d 463, 480, 341 P.3d 976, 986, cert. denied, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015). Likewise, due process under the Fourteenth Amendment requires the prosecution to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P. 3d 559 (2005).

Evidence is insufficient to overcome the presumption of innocence and support a conviction unless viewed in the light most favorable to the State, any rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006); State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972); State v. Carter, 5 Wn. App. 802, 490 P.2d 1346 (1971), review denied, 80 Wn.2d 1004 (1972).

The jury here was instructed on the elements it must find beyond a reasonable doubt to convict Villatoro of each charged offense. CP 224 (Instruction 15, to-convict for attempted first degree murder), 229 (Instruction 20, to-convict for first degree burglary), 232-35 (Instructions 23-25, to-convicts for first degree kidnappings). The jury was also instructed on the requirements to find accomplice liability. CP 224 (Instruction 14).

In order to be an accomplice, however, an individual must also have the purpose to promote or facilitate the conduct forming the basis for the charge. State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000) (citing Model Penal Code § 2.06 cmt. 6(b) (1985)). Stated another way, an individual cannot be an accomplice unless "he associates himself with the undertaking, participates in it as something he desires to bring about, and seeks by action to make it succeed." In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting State v. J-R Distribs., Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)). Prior participation in some type of criminal activity will not suffice; he must knowingly promote or facilitate the crime at issue. State v. Bauer, 180 Wn.2d 929, 943-944, 329 P.3d 67 (2014).

Awareness and physical presence at the scene of an ongoing crime – even when coupled with assent – are not enough to prove accomplice liability unless the purported accomplice stands "ready to assist" in the crime at issue. Wilson, 91 Wn.2d at 491; State v. Luna, 71 Wn. App. 755,

759, 862 P.2d 620 (1993). Moreover, foreseeability that another might commit the crime also is insufficient. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001).

Even in the light most favorable to the prosecution, the evidence at trial fell short of establishing Villatoro's guilt as an accomplice to any of Horne's crimes. There is no direct evidence Villatoro participated in any of Horne's criminal acts.[10] There is also no direct evidence Villatoro had any knowledge Horne intended to commit any crimes, or that she had any intent to assist him in those crimes in anyway.

Likewise, the circumstantial evidence fails to support a reasonable inference Villatoro knew of Horne's criminal intent when she dropped him off in Baker's cul de sac, or that she was ready to assist him in his criminal endeavor. 2RP 342-43. At most, the evidence shows Villatoro purchased or was present weeks before the incident when Horne purchased items he took to Baker's home, that she dropped him off near Baker's home wearing dark clothes, and that she became aware of the incident that led to Horne's death well before she knew it was Horne who had died. 2RP 342, 366, 622, 746; Exs 134 & 135.

The prosecution's explanation during closing argument for why Villatoro was an accomplice to Horne's crimes was necessarily thin on substance, and ultimately required jurors to make speculative leaps of

[10] Curiously, there is direct evidence linking Rocky Chervonock to Horne's crimes - the identification of him as making the first hoax 911 call - yet he was apparently never charged. 2RP 195, 712; Ex. 53.

logic to arrive at the necessary factual finding.[11] 2RP 920. For example, the prosecution emphasized that Horne's sister, Jamie Cumbia, claimed Villatoro and Horne had no friends, did not socialize and were always together, arguing it meant Villatoro must have known Horne's criminal plans because they did everything together. 2RP 1007, 1160. This claim goes too far. It encourages the unreasonably inference that by spending most of their time together they must know what the other one is intending to do, including any criminal intent they may harbor. This argument is especially weak because Jamie Cumbia's claim they isolated themselves is contradicted by direct evidence in the form of videos depicting both Horne and Villatoro shopping without the other. Exs. 131 & 134.

The prosecution also implied Villatoro must have been knowingly involved in Horne's criminal plans because she admitted being aware that Horne wore a black hoodie, black pants and black shoes when he got out of her car in Baker's cul de sac. Based on how he appeared in two store videos from the previous month, the prosecution claimed Horne's usual attire is shorts and t-shirts. 2RP 1010-11. Again, the inference the prosecution sought the jury to make goes too far and is unreasonable. Two store videos, taken over the span of a few days in early spring showing the same person dressed both days in short pants and a t-shirt, does not lead to a reasonable inference that any other outfit is abnormal, or

[11] In denying the defense motion to dismiss, the trial court seemed to inadvertently acknowledge speculation was required to find Villatoro guilty when it noted the lack of evidence for "why" she would assist Horne, noting "We can speculate. The jury will have to decide whether that's important to them." 2RP 920.

that Villatoro would have considered odd his attire on May 2nd. Such speculation is inappropriate in a criminal proceeding. Colquitt, 133 Wn. App. at 796.

The prosecution also implied Villatoro's admission she was aware Horne removed something from the trunk when she dropped him off meant she must have known he planned to kill Baker. 2RP 1011. But again, there is no link provided to make the leap from removing something from the trunk to breaking into a home, restraining all occupants before trying to kill one of them and then fleeing in the homeowner's car. It instead requires speculating that Villatoro knew Horne removed a "murder kit" from the trunk and that she knew who he intended to use it against.

Likewise, the prosecution's reliance on Villatoro's admission she heard sirens shortly before deciding to take her screaming children home instead of waiting for Horne, to argue she must have known of Horne's plans to kill Baker, is misplaced. Such an inference requires another unreasonable leap in logic because it requires assuming the fact meant to be inferred, i.e., it requires assuming Villatoro knew Horne's plan to kill because the sirens would otherwise have had no significance to Villatoro.

Similarly, the prosecution placed significance on Villatoro's failure to admit or recall buying a black duffle bag, claiming she was lying because she knew the black duffle bag was used to store the "murder kit." 2RP 1043. Villatoro was involved with the purchase of two black duffle bags in the ten days before the incident, one on April 21st, when she was

with Horne, and another on April 23rd, when she was alone. Exs. 134 & 135. The record does not show why Villatoro failed to acknowledge the black duffle bags. She may have simply forgotten (she does have ADD), they may have been purchased for someone else (like her children) and so she did not consider them hers, or she may have been lying to cover up her involvement in the attempted murder of Baker. The problem is there is no basis to prove which if any of these is the true reason beyond mere guess, speculation and conjecture, and that is not enough. Colquitt, 133 Wn. App. at 796.

The five-gallon gas can purchase by Villatoro and associated message exchange between her and Horne fails to provide the link needed to show beyond a reasonable doubt that she was in cahoots with Horne's crimes. Although the prosecution speculates the gas can was purchased with plans of filing it with gas in order to burn Baker's Tahoe, it was just that, speculation. 2RP 1161.

Like the gas can, the prosecution's reliance on the purchase of bleach by both Villatoro and Horne to claim Villatoro knew of Horne's murderous intent on May 2nd is equally misplaced. 2RP 1044-45. Horne did have one of the recently purchased bottles of bleach with him in the Tahoe, and it therefore is not unreasonable to infer he intended to use it somehow as part of his crime spree. 2RP 546. It may also be reasonable to infer the bleach placed in the trunk of Villatoro's car on May 1st by Horne was also part of his plan to kill Baker. 2RP 540, 602-03; Ex. 131.

But to infer Villatoro must have known and been a participant in Horne's criminal plan based on her purchase of bleach while with Horne on April 21st, again infers too much. Ex. 135. That there was bleach found in Villatoro's car trunk the day of the incident, along with the full five-gallon gas can, a change of clothes for Horne and a police scanner, does not provide the evidentiary link to make such an inference because there is no basis to reasonably infer Villatoro knew those items were there. 2RP 540-43. That she failed to remove them prior to police coming to interview her certainly suggest she was unaware they were there, which suggests she knew nothing of the plan at all. That it was her car does not lead to the logical inference she knew what was in the trunk. The evidence presented tends to refute such knowledge, such as the video of Horne placing a gallon of bleach in the truck on April 23rd, and the picture of Horne filling a container in the trunk with gas on May 1st, both times without Villatoro being present. Exs. 131 & 162. That the clothes in the trunk were for Horne instead of Villatoro provides no support for finding Villatoro knew what was in the trunk.

There is evidence that bleach is good at decontaminating things. 2RP 485. There is also evidence Horne and Villatoro were unusually germ-averse, and would ask the Cumbias to disinfect before entering their living space. Dep. at 18. As such, the evidence makes it more likely Villatoro thought the bleach was for their vigil against germs than to help cover up a murder. That the Cumbias did not use bleach and Jamie was

unaware whether Villatoro and Horne did does not support a reasonable inference that Villatoro knew Horne intended to use bleach in the murder of Baker. Dep. at 18. Such an inference requires speculation inappropriate for a criminal proceeding. Colquitt, 133 Wn. App. at 796.

Finally, Villatoro's internet activity on May 2nd does not provide evidence sufficient to conclude she knew of Horne criminal plan and was prepared to support him in that endeavor. At most it shows she was aware there were unusual events occurring near where she had dropped him off, such as the school lockdown and the man who died after being chased by police, but not that those were related to anything Horne was up to, at least not until police told her he was involved. 2RP 366.

Like the jury and the trial court in response to Villatoro's post-trial motion to dismiss, the court of appeals employed speculation and conjecture to conclude the evidence was sufficient to convict Villatoro of all charges. This Court should grant review so that it can re-emphasize what most of the courts of appeals have long held, speculation and conjecture not appropriate to find the existence of facts necessary to convict.

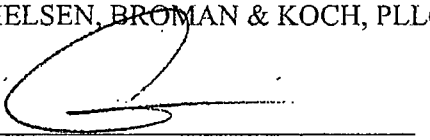
G. CONCLUSION

For the reasons stated, this Court should grant review under RAP 13.4(b)(1)-(4).

DATED this 15th day of May 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 73332-0-I
Respondent,	)	DIVISION ONE
v.	)	
LESLEY ALEXANDRA VILLATORO,	)	UNPUBLISHED
Appellant.	)	FILED: April 3, 2017

Cox, J. — A jury convicted Lesley Villatoro as an accomplice to attempted first degree murder, first degree burglary, first degree robbery, and three counts of first degree kidnapping. The evidence was sufficient to support the jury verdicts on these crimes. During this appeal, the trial court entered findings of fact and conclusions of law on the admission of certain evidence. So, there is no need to address the absence of such findings and conclusions prior to the appeal. We do not reach the claim of error, which Villatoro makes for the first time on appeal, that the trial court failed to give a jury instruction that she did not request below. The State properly concedes that it is not entitled to costs on appeal. We affirm.

Villatoro and Chad Horne began dating in 2012 when they lived in Arizona. They fell on hard financial times and moved to Washington, where they lived at the home of Jamie Cumbia, Horne's sister.

In February 2013, Villatoro gave birth to twins, fathered by Horne. Neither Villatoro nor Horne had steady employment during this time. They continued to live at Cumbia's home. They generally kept to themselves.

Shortly before commission of the crimes in this case, Villatoro and Horne purchased a duffel bag, duct tape, and bleach. Villatoro also purchased a gas can and another duffel bag. The State claimed at trial that these items were used or were going to be used in committing the crimes in this case.

On May 2, 2014, Villatoro drove Horne to the area near Stephanie Baker's home and dropped him off there. While doing so, she opened the car trunk and Horne removed something from it. She then drove to a park nearby with her children and Cumbia's child and waited for Horne.

Meanwhile, Horne forced his way into Baker's home. She and her two children were present. He pointed a gun at her and asked her about the key to her vehicle, a Tahoe, parked in front of her home. Horne directed Baker to start the Tahoe while he remained inside with her two children.

Horne later restrained Baker with zip ties, placed her youngest child in another room, and directed her eldest child to stay in that room. He then returned to Baker and, while she was restrained, cut her throat with a knife. He also shot at her. However, the bullet did not hit her. Horne fled the scene in Baker's Tahoe.

Despite her severe injury, Baker survived and sought help from a neighbor. The neighbor called 911. Baker survived these events and testified at trial.

Police officers responded to the 911 call from Baker's neighbor. They identified the stolen vehicle Horne was driving and a high speed chase followed. Horne drove past Villatoro's location with police in pursuit. They eventually stopped him. He died from a self-inflicted gunshot wound to the head.

Police interviewed Villatoro on the day of the crimes and taped the interview.

The State charged Villatoro as an accomplice to Horne's crimes. Specifically, the charges included one count of first degree burglary, three counts of first degree kidnapping, one count of first degree attempted murder, and one count of first degree robbery.

At trial, police officials and others testified. The recordings of Villatoro's interview were played at trial. She exercised her constitutional right to not testify. The jury found her guilty as charged. The trial court entered its judgment and sentence on the jury's verdicts.

Villatoro appeals.

SUFFICIENCY OF EVIDENCE

Villatoro argues that insufficient evidence supports the six convictions as an accomplice to Horne's crimes. We hold that the evidence was sufficient to support the jury's verdicts.

Due process requires the State to prove every element of a crime beyond a reasonable doubt.[1] The test for a sufficiency challenge 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."[2] An insufficient evidence claim "admits the truth of the State's evidence and all reasonable inferences from that evidence."[3]

Circumstantial evidence can be as reliable as direct evidence.[4] But "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation."[5] A jury's "verdict does not rest on speculation or conjecture when founded on reasonable inferences drawn from circumstantial facts."[6]

In Washington, an accomplice is not required to "'have specific knowledge of ***every element*** of the crime committed by the principal, provided he has general knowledge of that specific crime.'"[7] Further, "'[t]he crime' means the charged crime, but because only general knowledge is required, even if the

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[1] State v. Rodriquez, 187 Wn. App. 922, 930, 352 P.3d 200, review denied, 184 Wn.2d 1011 (2015).

[2] State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

[3] Rodriquez, 187 Wn. App. at 930.

[4] Id.

[5] State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

[6] Lamphiear v. Skagit Corp., 6 Wn. App. 350, 356, 493 P.2d 1018 (1972).

[7] In re Pers. Restraint of Domingo, 155 Wn.2d 356, 365, 119 P.3d 816 (2005) (quoting State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000)).

charged crime is aggravated, premeditated first degree murder . . . , 'the crime' for purposes of accomplice liability is murder, regardless of degree."[8]

We defer to the jury on questions regarding conflicting evidence, witness credibility, and the persuasiveness of evidence.[9]

Here, the trial court gave the jury the following unchallenged accomplice instruction:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of the crime if, ***with knowledge that it will promote or facilitate the commission of the crime charged***, he or she either:
>
> . . . .
>
> (2) ***aids or agrees to aid another person in planning or committing the crime charged.***
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. . . .
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.[10]

There was sufficient evidence for the jury to find beyond a reasonable doubt that Villatoro was Horne's accomplice to commission of the charged felonies.

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[8] Sarausad v. State, 109 Wn. App. 824, 835, 39 P.3d 308 (2001).

[9] Rodriquez, 187 Wn. App. at 930.

[10] Clerk's Papers at 223 (emphasis added).

Notably, Villatoro does not challenge on appeal the sufficiency of the evidence to show that Horne acted as a principal for the crimes for which she was found guilty as his accomplice. She concedes in her briefing that Horne "invaded Stephanie Baker's home, kidnapped her and her children, slit Baker's throat, tried but failed to shoot her in the head, and then fled in Baker's car."[11] Accordingly, the primary focus of this appeal is whether Villatoro had the requisite knowledge of the charged crimes and aided Horne in committing these crimes.

It is undisputed that Villatoro drove Horne to the scene of the crimes and dropped him off near Baker's home. From there, he forcibly entered Baker's home, displaying a gun. He then committed the other crimes at the scene before stealing her Tahoe.

What Villatoro knew when she dropped him off near the scene of the crimes is the primary disputed issue. The evidence at trial included videotapes of Villatoro and Horne purchasing a black duffel bag several weeks before the crimes committed against Baker and her children. Baker testified at trial to seeing such a duffel bag in her home. The evidence also showed that this duffel bag contained zip ties, a knife, bullets, and duct tape. A jury could reasonably infer from this evidence that this duffel bag contained items used in the crimes Horne committed against Baker and her children.

Videotape and other evidence also established that Villatoro purchased a gas can and another black duffel bag several weeks prior to the crimes Horne

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[11] Brief of Appellant at 1.

committed against Baker and her children. She was also present when Horne purchased bleach. The State presented evidence at trial that the bleach could be used to destroy DNA. A jury could reasonably infer from this evidence that Villatoro knew that these items were intended for use in the crimes Horne committed against the victims. This is particularly true when the evidence showed that Horne and Villatoro had no other use for these items where they lived. Moreover, a search of Villatoro's vehicle trunk revealed a backpack, a full five gallon gas can, another bottle of bleach, a change of men's clothing and shoes, a pair of gloves, and a scanner, that the State argued was a police scanner. A jury was entitled to reasonably infer that she knew of these items in the trunk and that they were to be used in connection with the crimes.

Additionally, the evidence showed that Villatoro saw Horne put the black duffel bag in the trunk of the car she used to drive him to the scene of the crimes. The evidence also showed that the two kept pretty much to themselves. A jury could reasonably infer that she knew what was in the duffel bag when Horne put it into the trunk of her car. While she claimed that she did not know what Horne took out of the trunk when she opened it, the jury was not required to believe her. Rather, it could reasonably infer that she knew he was taking the duffel bag, and its contents, and that she provided him access to those items by opening the trunk of her car.

Police interviewed her on the day of the crimes, following Horne's death. She denied knowledge of the purchase of the black duffel bags. This sharply conflicts with the videotaped and other evidence showing their purchase of these

items within a short time prior to the crimes. A jury was entitled to reasonably infer that she did not tell the truth in an effort to conceal her knowledge and participation in the crimes.

There was also other evidence to show Villatoro's knowledge of the crimes. Villatoro told police that she planned to wait for Horne at the park near Baker's residence for thirty minutes to take him back home. She heard ambulance sirens but did not hear from Horne. Horne drove past Villatoro's location with police in pursuit. Villatoro later left the scene and returned home. The jury could reasonably infer that she knew of Horne's crimes and sought to flee the scene in view of the developments.

Later that afternoon following her departure, Villatoro checked the online news, something she had not done during the previous month. There, she read a report about the police chase of what turned out to be Horne, which ended in his death. A jury was entitled to reasonably infer from these actions that she knew of Horne's crimes and soon learned about his whereabouts after police were notified and began pursuit.

Despite all this, she never informed Horne's sister of these unfolding events, despite their conversations throughout the day. The jury could reasonably infer from Villatoro's checking of the online news and her failure to share the developing news with Horne's sister that Villatoro had participated in the crimes as Horne's accomplice.

During closing below, Villatoro argued to the jury that there were contrary inferences to be drawn from the evidence. For example, she argued that

contrary inferences arose from her recorded interviews with police. But the jury did not, and was not required to, accept these arguments. As the finder of fact, the jury was entitled to reach the verdicts that it did.

On appeal, Villatoro takes a similar approach. Her characterization of the evidence as circumstantial does nothing to undermine the sufficiency of the evidence. That is because there is direct evidence from which the jury could base its decision.

Likewise, Villatoro may call the evidence speculative but, as we have discussed, it was not so.

Finally, Villatoro's argument that another person—Rocky Chervonock—could have been an accomplice does nothing to address application of the correct review standard to this record. Accordingly, we need not deal any further with that argument.

In sum, there was sufficient evidence of Villatoro's guilt beyond a reasonable doubt for each of the charged crimes. Dismissal is not warranted.

WRITING FINDINGS AND CONCLUSIONS

Villatoro argues that the trial court violated CrR 3.6 by failing to enter written findings of fact and conclusions of law as required by the rule. But such findings and conclusions have been entered since the initiation of this appeal. She does not challenge them, and we need not further address this point on appeal.

JURY INSTRUCTION

Villatoro argues that the trial court failed to give an instruction that she did not request below. Because this claim of error is not manifest, we do not reach it.

She contends that the trial court failed to instruct the jury that all twelve jurors must be involved during deliberations and that this failure violated her right to a fair trial and unanimous verdict.

Under RAP 2.5(a)(3), a party may raise, for the first time on appeal, a manifest error affecting a constitutional right.[12] An alleged error regarding lack of juror unanimity is of constitutional magnitude and, thus, may be raised for the first time on appeal.[13]

Manifest Error

The issue is whether this error is manifest. We conclude that it is not.

The party "must identify the constitutional error and show that it actually affected his or her rights at trial" in order to claim a manifest error affecting a constitutional right.[14] This requires that the party "make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial."[15] "If the facts necessary to

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[12] See also State v. Lamar, 180 Wn.2d 576, 582, 327 P.3d 46 (2014).

[13] See State v. Stockmyer, 83 Wn. App. 77, 86, 920 P.2d 1201 (1996).

[14] Lamar, 180 Wn.2d at 583.

[15] Id.

adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest."[16]

Here, this record shows that the trial court gave the jury unchallenged instructions on their duty to deliberate. There is nothing in this record to show what went on in the jury room. Thus, we simply do not know whether any of the claims Villatoro makes on appeal are real in this case. Absent such a showing, her assertions are entirely speculative, not manifest. Thus, she failed to establish a right to relief under RAP 2.5(a).

COSTS

The State properly concedes that it is not entitled to an award of costs on appeal. Accordingly, we deny any such an award.

We affirm the judgment and sentence and deny any award of costs to the State.

COX, J.

WE CONCUR:

Trickey, ACJ

[16] State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Appendix B

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

STATE OF WASHINGTON, Respondent, v. LESLEY ALEXANDRA VILLATORO, Appellant.	No. 73332-0-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Lesley Villatoro, has moved for reconsideration of the opinion filed in this case on April 3, 2017. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 13th day of April 2017.

For the Court:

Cox, J.

Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

May 15, 2017 - 3:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	73332-0
Appellate Court Case Title:	State of Washington, Respondent v. Lesley Alexandra Villatoro, Appellant
Superior Court Case Number:	14-1-00526-4

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