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Division I
State of Washington

72753-2

NO. 72753-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MOHAMED IBRAHIM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY M. RAMSDELL, JUDGE
THE HONORABLE WILLIAM L. DOWNING, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether the trial court properly exercised its discretion in finding a “manifest necessity” for a mistrial based on a “late-disclosed defense witness.”
2. Whether the trial court properly exercised its discretion in denying a last-minute request for a material witness warrant for Berket Kebede.
3. Whether the trial court properly exercised its discretion in allowing the State to amend the information to add a count of Assault in the First Degree naming Berket Kebede as a victim once Kebede had been located and identified.
4. Whether the testimony of Vincent Williams that both Mardillo Barnes and Berket Kebede were standing next to him when the defendants fired at the group was sufficient to support Ibrahim’s conviction for assaulting Kebede with a firearm and intending to inflict great bodily harm (Assault in the First Degree).
5. Whether the trial court properly sentenced Ibrahim to consecutive sentences under RCW 9.94A.589(1)(b) for three convictions for Assault in the First Degree, when the convictions involved three different victims?

6. Whether the Information was required to specifically inform Ibrahim that he could be found guilty as an accomplice or as a result of the doctrine of transferred intent?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Mohamed Ibrahim was charged by Information and Amended Information, together with codefendant Yusuf Shire, with three counts of Assault in the First Degree, each with a firearm allegation, and one count of Unlawful Possession of a Firearm in the First Degree.¹ CP 1-14, 190-92, 235-37. The State alleged that, in the early morning hours of May 18, 2013, Ibrahim and Shire opened fire on Mardillo Barnes, Vincent Williams and Berket Kebede, wounding Barnes in the hand. Id.

The defendants proceeded by way of a joint jury trial. 5RP 31 - 11RP 79.² The first trial ended with the trial court sua sponte declaring a mistrial due to a late-disclosed defense witness. CP 49; 11RP 69, 75-76. At a second trial, the jury found Ibrahim guilty of three counts of Assault

¹ Shire has separately appealed (No. 72734-6-I), and the two appeals have been linked for consideration by this Court.

² The verbatim report of proceedings consists of 21 separately-paginated volumes, which will be referred to in this brief as follows: 1RP (11/26/13), 2RP (11/27/13), 3RP (12/2/13), 4RP (12/3/13), 5RP (12/4/13), 6RP (12/5/13), 7RP (12/9/13), 8RP (12/10/13), 9RP (12/11/13), 10RP (12/16/13), 11RP (12/17/13), 12RP (9/3/14), 13RP (9/4/14), 14RP (9/8/14), 15RP (9/9/14), 16RP (9/10/14), 17RP (9/11/14), 18RP (9/16/14), 19RP (9/17/14), 20RP (9/18/14), 21RP (11/21/14). [Note that the volume for 12/5/13 is mistakenly labeled 12/4/13; the footer on that volume correctly identifies the date.]

in the First Degree, each with a firearm enhancement, and one count of Unlawful Possession of a Firearm in the First Degree. CP 268-70; 20RP 5-6.

Ibrahim requested an exceptional sentence below the standard range, relying on the Washington Supreme Court's decision in State v. Graham.³ 21RP 11-15; CP 279-91. The court recognized that it had discretion to impose such a sentence but declined to do so, finding a standard-range sentence appropriate. 21RP 18. The court imposed a low-end sentence: 120 months on one first degree assault conviction, 93 months on the second, and 93 months on the third, consecutive to each other and to the three 60-month firearm enhancements. The 54-month sentence on the firearm charge was ordered to run concurrently. The result was a total of 486 months of incarceration. 21RP 6-7, 18; CP 292-300.

2. FACTS OF THE CRIMES.

On the evening of May 17, 2013, Mardillo Barnes, Vincent Williams and Berket Kebede were riding around with a couple of female friends; they stopped in a bar to drink and shoot some pool, and they smoked some marijuana. 15RP 109-12; 17RP 11-14. By the early morning hours of May 18th, things were winding down, and the group

³ 181 Wn.2d 878, 337 P.3d 319 (2014).

ended up just north of the intersection of 85th and Fremont Avenue North. 15RP 109, 113; 17RP 12, 16-17. The three men were standing around near a fenced field adjacent to the housing development where Barnes and Williams lived, eating and getting ready to call it a night. 15RP 113-14, 116; 17RP 15-16.

As the trio stood there, two African-American men approached.⁴ 17RP 23. One was short and wore dark clothing; the other was taller and wore a sweater with blue or purple stripes, gloves, and a baseball cap. 17RP 24-26. The shorter man, whom others referred to as "Louie," engaged in a brief and seemingly friendly conversation with Kebede, and asked Barnes something like where he was from. 17RP 27, 31-32. Williams had seen the shorter man around before. 17RP 27. Williams identified him the next day in a photo montage as Yusuf Shire, and identified him again in court during the trial. 17RP 27-28, 65-66; 18RP 70-75. The taller man was a stranger to Williams prior to this incident. 17RP 29. Williams identified Mohamed Ibrahim on the day after the shooting in a separate photo montage, and identified him again in court. 17RP 29, 66-67; 18RP 70-75.

⁴ The description that follows, of the two men and of the shooting, was provided by Vincent Williams. Mardillo Barnes claimed that he noticed nothing before the shooting started, and that he had no idea who shot him. 15RP 129-32. Berket Kebede did not testify at the trial.

Shire and Ibrahim backpedaled about four or five steps, still facing the group, and Shire fired a gun into the air, saying something like "I do this." 17RP 40-42. From the sound, Williams thought the gun was a revolver. 17RP 46. Shire then leveled the gun, aimed at Williams and his friends, and fired about five shots. 17RP 42-44. Ibrahim then pulled out what appeared to be a 9mm semi-automatic pistol and fired about six shots. 17RP 45-48.

Although all three were in the line of fire when the shooting began, it appeared to Williams that the shooters were focused on Mardillo Barnes. 17RP 43-44, 49. As Barnes ran across the street, the bullets seemed to follow him. 17RP 49. Both Williams and Kebede hid behind cars. 17RP 49, 58. Shire and Ibrahim disappeared into the same apartment complex from which they had emerged moments before. 17RP 50-52.

When the shooting stopped, Williams began screaming Barnes's name. 17RP 59. Williams followed a trail of blood across the street and located Barnes in a back yard with a "puddle of blood" beneath him. 17RP 53. Barnes had been shot in the hand, and he was "freaking out." 17RP 54. Williams hung around long enough to make sure Barnes got into an ambulance. 17RP 61-62. Williams did not talk to police that night. 17RP 61.

Several additional witnesses saw parts of the incident unfold. Thomas English lived in a townhouse at 8549 Fremont Avenue North. 14RP 66. He was smoking a cigarette on his patio around 1:00 a.m. when he saw two African-American men run through the courtyard of his apartment complex toward Fremont. 14RP 68-69. One was “pretty short,” while the other was taller; English did not pay attention to what they were wearing. 14RP 68-69.

Within minutes, English heard nine or ten gunshots. 14RP 71-72. They came in quick succession, in two groups separated by a “brief hesitation” measured in seconds. 14RP 73-74. The shots sounded “very close” – “[n]ot even a block away,” and they came from the direction in which the two men had run. 14RP 74, 77-78.

Shortly thereafter, two African-American men with the same height differential ran back through the well-lit courtyard, passing within 20 feet of English. 14RP 69, 76-78. This time, English paid more attention to their appearance, noting that the shorter man, who passed by first, was wearing a dark “hoodie” and dark pants. 14RP 70. He was crouched down, running fast, and holding a gun in his hand. 14RP 83-84. The taller man ran by next, 10 or 15 seconds behind the first; he wore a blue-and-white striped hoodie and baggy pants. 14RP 70, 85. This man

was running clumsily, stumbling, with his hands down his pants. 14RP 70, 83-84.

English went inside briefly, and then decided to go back out and see if anyone needed assistance. 14RP 87. He saw an African-American man who had an injury to his hand. 14RP 87. When police and paramedics showed up, English gave the police his name and address and returned home. 14RP 87, 89.

David Bentler also lived near the intersection of 85th and Fremont. 14RP 18-19. Late in the evening on May 18, 2013, Bentler heard a series of gunshots; after pausing the music he was listening to, he heard another series of shots. 14RP 19, 26. They sounded very close. 14RP 26. After waiting about 30-45 seconds, Bentler went to his window to see what was going on. 14RP 28.

Bentler saw a white, late '90s model Toyota Camry parked in a driveway, with two people outside the car. 14RP 25-26, 29. One got into the back seat directly behind the driver. 14RP 29. Bentler did not recall what seat the second man got into, although he knew it was not the driver's seat. 14RP 29. As soon as the two men were in the car, it sped off down the road. 14RP 19, 29-30. Bentler immediately called 911. 14RP 30.

Mardillo Arnold and his wife Carolyn Barnes-Arnold lived with their four sons, the oldest of whom was 27-year-old Mardillo Barnes, at 8521 Fremont Avenue North. 15RP 162-63; 17RP 139-40. On the night in question, Arnold was awakened by a loud explosion, followed by several more. 17RP 142-43. He knew right away that it was gunshots; they sounded like they were right outside his bedroom window. 17RP 143. There was a brief pause after the first shot, then he heard about six more. 17RP 144.

Arnold ran to the window and looked out. 17RP 143. He saw a young black man wearing dark clothing run past, in what looked like a jogging top with a hood. 17RP 147-48. Arnold jumped into his pants and ran downstairs and out the door. 17RP 147. Outside, he encountered Vincent Williams, who looked very scared. 17RP 150. Hearing from Williams that his son Mardillo (Barnes) had been shot, Arnold ran into the street and screamed his son's name. 17RP 151. Barnes came running from behind a house, holding his arm and bleeding heavily. 17RP 152-54. Arnold used his own belt for a tourniquet, called 911, and waited with Barnes until an aid car came. 17RP 153-57.

Like her husband, Carolyn Barnes-Arnold was awakened by a loud boom, followed by five or six additional gunshots. 15RP 171. As she got up to go to the window, her husband passed her on his way out the

bedroom door. 15RP 173-74. Upon reaching the window, she saw someone run by. 15RP 174. He had on a black shirt or hoodie, and his head was covered. 15RP 174-75. By this time, her husband was on his way down the stairs. 15RP 174. The running man cut through the building along a walkway that leads into the courtyard. 15RP 175-76.

Barnes-Arnold ran down the stairs and out the door. 15RP 177. Vincent Williams and "Kit"⁵ were there, looking scared and panicked. 15RP 177-79. Williams was screaming that he thought Barnes had been shot. 15RP 180. Williams told Barnes-Arnold that "Louie" was one of the two shooters.⁶ 15RP 180. She could not recall the second name Williams gave her. 15RP 192.

Police responding to the 911 calls stopped a white 1996 Toyota Camry four-door sedan in the 7700 block of Third Avenue Northwest. 14RP 147, 149, 216; 15RP 16-17, 36; 16RP 31-32. David Bentler drove to the scene and identified the car as the one he had seen earlier. 14RP 35-38. There were five people in the car, two in the front and three in the back. 14RP 219; 15RP 20. Although most of the occupants put their hands up when told to do so, the passenger sitting behind the driver's seat, who proved to be Mohamed Ibrahim, kept bending down and moving

⁵ Berket Kebede; also referred to at times as "Ket" or "Kip." 11RP 20, 25-26.

⁶ Barnes-Arnold had seen someone who went by "Louie" in the neighborhood. 15RP 180-81. She identified Shire in court as "Louie." 15RP 181.

around. 15RP 67-68; 18RP 47. The passenger seated in the rear passenger-side seat, who turned out to be Yusuf Shire, was also seen reaching down. 18RP 53, 57.

Police removed all five from the car and conducted a show-up identification.⁷ 14RP 178-89, 217-19; 16RP 34-37. Thomas English identified Shire and Ibrahim as the men he saw running through his building's courtyard. 14RP 90-91, 103, 184; 16RP 34; 18RP 41-43. His identifications, made with certainty, were based primarily on clothing, height and ethnicity. 14RP 103.

Vincent Williams also identified the defendants. Detective Janes spoke with Williams at the scene on the afternoon following the shooting. 18RP 67-68. Williams gave Janes street names of the two who had done the shooting, and Janes was able to link these names to Shire and Ibrahim. 18RP 70. Janes prepared two six-person photo montages, one containing Shire's photo and the other containing Ibrahim's. 18RP 69-72. Williams identified both defendants with 100% certainty. 17RP 65-68; 18RP 73-75. Williams also identified both defendants in court. 17RP 28-29.

Other evidence supported the identifications. Police recovered a 9mm semi-automatic pistol from the floor underneath the driver's seat of the Camry, directly in front of the place where Ibrahim had been seated.

⁷ The removal and the show-up procedure were captured on several in-car videos, which were played for the jury. 14RP 219-21; 15RP 41-43.

15RP 69-70; 16RP 32; 18RP 47, 58. A glove was found on the floorboard in that area. 18RP 47. While the capacity of the gun was 16 cartridges, only one bullet remained in the gun. 16RP 61-64, 178-80. Six shell casings recovered from the scene of the shooting had been fired from this gun. 16RP 93, 100, 119, 137-38, 183-86; 18RP 47.

Police recovered a second gun, a .38 caliber revolver, from under the front passenger seat of the Camry. 16RP 47-48. This gun was directly in front of where Shire had been seated. 18RP 57-58. Fingerprints from Shire's left thumb and left middle finger were found on the cylinder. 16RP 221-23. The revolver had a capacity of five or six cartridges; when found by police, it contained three unfired rounds and one expended round. 16RP 53-55, 186.

Neither Ibrahim nor Shire testified at the trial.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY FOUND A
MANIFEST NECESSITY FOR A MISTRIAL.

Ibrahim contends that the trial court erred in sua sponte declaring a mistrial when the defense produced Berket Kebede on the final day of trial, ostensibly to testify that the defendants were not the shooters. He argues that he was thus placed in double jeopardy at the second trial, and that his convictions must accordingly be reversed and the charges

dismissed. To the contrary, the trial court properly exercised its discretion in finding that, under all of the circumstances, there was a “manifest necessity” for a mistrial. The convictions should stand.

a. Relevant Facts.

The identity of the third victim was a mystery from the outset. Based on a statement that Vincent Williams gave to police, the State believed his name was “Kip” or “Barquet.” CP 66, 72-73. Williams could not or would not provide any further information to help in identifying this person. CP 73. Believing that “Kip” might be a member of the Barquet family, which was “fairly well known” to Seattle police, the State directed its efforts toward “scouring records looking for someone in the family that was either in that area or the same age.”⁸ 12RP 23.

Vincent Williams testified at the first trial that someone named Berket⁹ (whom Williams also referred to as “Ket”) was present at the time of the shooting. 6RP 41, 45. Williams said that Berket was standing right next to himself and Mardillo Barnes when “Louie” [Shire] started firing at

⁸ The mistake is understandable. Brief research reveals criminal cases against a number of members of the Barquet family. *See* 2008 WL 434879 (Gregory Barquet); 2003 WL 23019949 (Michael Barquet); 1995 WL 917004 (Robert Barquet); 1995 WL 1054133 (Derrick Barquet); 1993 WL 13142319 (Christopher Barquet); 1993 WL 13142320 (Ronald Barquet).

⁹ The name is variously transcribed as “Barkett,” “Barket,” “Berkett,” and “Berket” in the transcript prepared for Ibrahim’s appeal. *See, e.g.*, 6RP 41; 8RP 131; 11RP 20, 22. For purposes of continuity with the Brief of Respondent filed in codefendant Yusuf Shire’s appeal (No. 72734-6-I), and in conformance with the record (CP 108, 236), the State will use the spelling “Berket” in this brief.

the group. 6RP 53. Barnes also acknowledged knowing someone named Berket or Kip or Kit (whom Barnes called “Ket”), but insisted that he had “no idea” what the man’s real name was. 8RP 131.

Despite his best efforts, Detective Janes was unable to locate this person. Mardillo Arnold did not know who Berket was. 9RP 187. Mardillo Barnes refused to give police any information. 9RP 187. Vincent Williams told Janes that he knew the man only as Berket, and didn’t know where he could be found. 9RP 187. Janes was left with little to go on.¹⁰ 9RP 187-88.

Nearing the end of the first trial, at the end of the day on December 16, 2013, the State announced that it had one more witness, whose testimony would be brief. 10RP 182. The court informed jurors that they would hear closing arguments the following morning. 10RP 183-84. The next morning, the State announced that its final witness was present. 11RP 3. The court and the parties then spent a few moments finalizing the jury instructions. 11RP 3-19.

Shire’s attorney then abruptly informed the court that he had interviewed Berket Kebede. 11RP 20-21. Counsel elaborated that “Berket Kebede would testify that he knows all the parties in the case, that

¹⁰ Like the prosecutors, Janes was apparently under the impression that he was looking for a member of the Barquet family. 9RP 187.

he was present at the shooting, that he did see the shooters and that [the] shooters are not Mr. Shire or Mr. Ibrahim.” 11RP 22. Counsel represented that Kebede was present in the hallway outside the courtroom.¹¹ 11RP 25.

The State scrambled to interview Kebede, which was accomplished by detectives with all counsel present. CP 108-89. Kebede admitted that Shire had called him from jail on multiple occasions, and that he had visited Shire in jail four or five times. CP 144, 168-69, 178, 180. Kebede gave police his phone number.¹² CP 150-51, 169.

Kebede also revealed that he had been present in court for a portion of Vincent Williams’s testimony.¹³ CP 160. Kebede said that he had encountered Shire’s attorney, Ned Jursek, on the day after Williams’s testimony. CP 160. Kebede and Jursek had talked for about ten minutes on a bench outside the courtroom. CP 162. Kebede had told Jursek that he was a witness to the events in question, and had given Jursek his phone number. CP 161-62.

¹¹ Not surprisingly, the court’s response was, “Who is Mr. Kebede again?” followed by, “I thought he was Kep Barkett.” 11RP 25.

¹² Prosecutors subsequently reviewed more than 220 jail calls made by the defendants, and discovered multiple calls to Kebede’s number from both defendants. The first call from Shire to Kebede was made on May 31, 2013, only two weeks after the shooting; the first call from Ibrahim to Kebede came a week later, on June 8th. These calls were made more than six months before Shire’s disclosure of Kebede as a witness for the defense. CP 1, 66, 76; 11RP 20-21.

¹³ Vincent Williams testified on December 5, 2013. 6RP 32-183.

Jursek told the court that he first had contact with Kebede on December 10th, in the hallway outside the courtroom during an afternoon break. 11RP 48. Jursek had used the intervening week to investigate Kebede's potential testimony, discuss it with his client and with colleagues, and weigh how to proceed. 11RP 48-50. Jursek nevertheless insisted that Kebede should be allowed to testify that very day (December 17th), leaving the State no time to prepare cross-examination or gather rebuttal evidence. 11RP 50.

The court expressed considerable skepticism about Kebede's belated revelations. The court pointed out "the fact that [Kebede] was sitting in the courtroom for part of the testimony. And apparently both of the Defendants know him, and would have been aware that he's in the courtroom, and apparently if they think he's helpful to their defense, would have told somebody that that's the guy we need, and on and on it goes." 11RP 46. The court added: "But [Kebede] knows this substantial injustice is being perpetrated on these two gentlemen for months on end, and he was there, and he knows that they didn't have any involvement. And yet he goes and visits them, but he doesn't do anything to lend a hand in getting these gentlemen vindicated, or out of custody, or the right guys arrested?" 11RP 52-53.

The court also expressed frustration. “Well I know the defense doesn’t have an obligation to put on evidence. But it always rankles me when I know that it’s fairly obvious that people have continuing contact with other individuals who are supposedly helpful to them, and then it doesn’t happen until you’re talking about jury instructions. All of a sudden a miracle happens.” 11RP 50. The court nevertheless concluded that it could not exclude Kebede’s testimony. 11RP 45-46, 59-60, 65-66.

The question became how best to proceed. The State proposed that the court inquire of jurors whether they could return on January 14th to finish the trial. 11RP 60. The lead prosecutor, Julie Kline, had given significant advance notice of her upcoming vacation, scheduled for December 17, 2013 through January 13, 2014. CP 65. During this time, Kline was to get married and travel out of the country on a honeymoon. Id.

The State pointed out that it could not realistically be prepared to cross-examine Kebede on a day’s notice. 11RP 65. Rebuttal witnesses would need to be gathered. 11RP 55. In addition, the State would have to identify and listen to numerous jail phone calls to determine when the defendants had been in contact with Kebede and what had been said. 11RP 56; CP 66 (State ultimately combed through more than 220 jail

phone calls), 76 (both defendants had been in contact with Kebede since shortly after being charged with these crimes).

Both defendants objected to the proposal to recess trial until January 14th. 11RP 62-64. The court ultimately rejected that alternative, citing concerns that jurors would feel coerced, that they would ultimately blame the defense for the delay, and that their notes would be inadequate to refresh their memories on the nuances of testimony after such a long delay. 11RP 36, 72, 75-76.

The court also refused to require the State to proceed on such short notice, noting that Kebede's proposed testimony was significant, and the State would need time to do the "significant amount of background investigation" necessary to effectively cross-examine him. 11RP 67, 75. "I wouldn't do it to the defense. I don't think it's appropriate for me to do it to the State either." 11RP 75.

The court ultimately found a manifest injustice and sua sponte declared a mistrial, noting that its action was necessitated by a late-disclosed defense witness. 11RP 69, 75-76. "So I'm going to hold to the mistrial, and I don't think jeopardy attaches because in essence it was a late disclosed defense witness that necessitated the mistrial, and I will find manifest necessity for all the reasons I've said already." 11RP 76.

The case proceeded to a second trial on September 3, 2014, before the Honorable William Downing.¹⁴ 12RP 3. Ibrahim moved to dismiss based on double jeopardy. CP 50-64. The State responded. CP 65-189. After reading the written submissions, Judge Downing heard oral argument on this issue. 12RP 7-35.

Shire's attorney detailed the investigation he had conducted during the week between the day that Kebede first contacted him (December 10, 2013) and the date on which he revealed this contact and announced his intention to call Kebede as a witness (December 17, 2013).¹⁵ Counsel had felt the need to have Kebede interviewed by an investigator, listen to numerous jail phone calls, discuss the issue with his client, staff the issue with several other attorneys, and weigh the pros and cons of calling Kebede as a witness. 12RP 8-9. Counsel asserted that "it was important for me to do that due diligence." 12RP 9.

Ibrahim's attorney accused the State of making no effort to locate Kebede. 12RP 14. She argued that Judge Ramsdell could have forced DPA Kline to give up a few days of her vacation in order to investigate

¹⁴ The Honorable Jeffrey Ramsdell had presided over the first trial. 1RP 1. At the second trial, DPA Julie Kline was replaced by DPA Stephen Herschkowitz; DPA Paul Sewell served as second chair at both trials. 1RP 2; 12RP 2.

¹⁵ The transcript mistakenly lists the date on which defense was first contacted by Kebede as "Tuesday, December 13th." 12RP 7. This is contradicted by counsel's earlier statement that Kebede first approached him on Tuesday, December 10th (11RP 48); by counsel's subsequent statement that the "following day" was Wednesday, December 11th (12RP 8); and the calendar, which shows that December 10th fell on a Tuesday in 2013.

and prepare to respond to Kebede's proposed testimony. 12RP 16-17.

She argued that DPA Sewell could have finished the trial. 12RP 17. And in spite of the fact that both defense attorneys had objected to such a course of action, she argued that Judge Ramsdell should have polled the jury to see if they could return in four weeks. 11RP 62, 63-64; 12RP 18.

Judge Downing questioned the State on its efforts to locate Kebede, noting that the court was sometimes "a little shocked" at the "lack of diligence that the police department puts into locating witnesses in this type of case." 12RP 22. DPA Sewell responded that Mardillo Barnes's parents had indicated that they knew the witness only as Ket, and that he was a friend of their son's from the neighborhood. 12RP 15, 22-23.

Sewell explained that the name had misled the prosecution:

To be perfectly honest the State was under the impression that he was a member of the Berket [Barquet] family, which are fairly well-known by the Seattle Police Department and so that was the avenue that we were going by. I personally was scouring records looking for someone in the family that was either in that area or the same age. So that, of course, ended fruitless because he wasn't a member of that family. It was only when he came forth that we found out – during the trial we found out – his real identity and his real name.

12RP 23.

The State also responded to defense claims that a recess of a day or two would have sufficed, and that DPA Sewell could have completed the

first trial. 12RP 16-17. The prosecutor pointed out that it would occupy more than a day or two just to get a transcript of the interview with Kebede.¹⁶ 12RP 30. In addition, the State had to sift through more than 220 jail phone calls, as well as jail visitation logs. 12RP 25, 30; CP 66, 76. Background information on Kebede had to be gathered. 12RP 30. Material witness warrants followed by arrest would likely have been required to obtain the presence of rebuttal witnesses. 12RP 34.

As to DPA Sewell, the record is clear that he was co-trying this case solely to gain felony trial experience. CP 65. At the time of this trial, he had tried only one felony case to a jury. CP 65-66, 82. Sewell would never have been assigned to try a co-defendant case involving multiple class A felonies on his own, and he was obviously neither prepared nor qualified to do so. CP 82.

Judge Downing found that neither bad faith nor misconduct precipitated the mistrial. 12RP 35-36. The court agreed that there was a manifest necessity for the mistrial. 12RP 37. Pointing out that defense counsel had taken about a week to do his “due diligence” on Kebede before bringing him forth as a witness, the court concluded that “the State would need at least a week as well to find who this individual is, to get transcripts of any defense interviews, to interview him, to listen to all the

¹⁶ The transcript of this interview is 82 pages in length. CP 108-89.

relevant phone calls, to conduct any other background investigation that was necessary and to arrange for any potential rebuttal testimony that might be required as [a] result of the witness.” 12RP 37.

The court concluded that a month-long recess was not a viable option. 12RP 38. The court did not think that jurors could fairly process information after taking a month off from the trial over the holidays. 12RP 38. Nor would it have been fair to ask them whether they were willing to try. 12RP 38-39. The court denied the motion to dismiss.¹⁷ 12RP 39.

b. Judge Ramsdell Properly Exercised His Discretion
In Declaring A Mistrial.

Both the federal and the state constitutions protect a criminal defendant from double jeopardy. U.S. CONST. amend. V (“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”); WASH. CONST. art. I, § 9 (“No person shall be . . . twice put in jeopardy for the same offense.”). These protections are coextensive, and article I, section 9 is given the same interpretation that the United States Supreme Court gives to the corresponding protection under the Fifth Amendment. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). In a

¹⁷ Ibrahim has not assigned error to this ruling.

criminal case, jeopardy attaches when the jury is empaneled and sworn.

State v. George, 160 Wn.2d 727, 742, 158 P.3d 1169 (2007).

The prohibition on double jeopardy does not automatically bar retrial when a criminal proceeding is terminated without finally resolving the merits of the charges. Arizona v. Washington, 434 U.S. 497, 505, 98 S. Ct. 824, 54 L. Ed.2d 717 (1978). Rather, a defendant's "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." Id. See Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974 (1949) (" a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments").

Where a mistrial is declared over defendant's objection, the State must show a "manifest necessity" in order to avoid the double jeopardy bar. Washington, 434 U.S. at 505. The "manifest necessity" standard cannot be applied mechanically, without attention to the particular problem facing the trial judge. Id. at 506. See Illinois v. Somerville, 410 U.S. 458, 462, 93 S. Ct. 1066, 35 L. Ed.2d 425 (1973) (rejecting mechanical formula "by which to judge the propriety of declaring a

mistrial in the varying and often unique situations arising during the course of a criminal trial”).

Improper conduct on the part of defense that prejudices the State’s case may give rise to manifest necessity for a mistrial. Porter v. Ferguson, 174 W. Va. 253, 256-57, 324 S.E.2d 397 (1984) (citing cases). The fact that the defendant or his counsel engaged in the misconduct that caused the mistrial does not necessarily trump the defendant’s double jeopardy rights, but it diminishes them considerably by increasing the level of deference to the trial court’s decision. Glover v. Eighth Judicial Dist. Court, 125 Nev. 691, 698-99, 220 P.3d 684 (2009). *See* Quinones v. State, 215 Md. App. 1, 79 A.3d 381 (2013) (improper remarks by defense counsel created manifest necessity for mistrial); Bailes v. Jolliffe, 208 W. Va. 481, 541 S.E.2d 571 (2000) (improper question by defense counsel created manifest necessity for mistrial).

The Supreme Court has consistently reaffirmed the “broad discretion reserved to the trial judge in such circumstances.”¹⁸ Somerville, 410 U.S. at 462. “Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a

¹⁸ Washington courts agree. *See, e.g., State v. Eldridge*, 17 Wn. App. 270, 276-77, 562 P.2d 276 (1977), *rev. denied*, 89 Wn.2d 1017 (1978); State v. Jones, 26 Wn. App. 1, 5, 612 P.2d 404, *rev. denied*, 94 Wn.2d 1013 (1980).

mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." Gori v. United States, 367 U.S. 364, 368, 81 S. Ct. 1523, 6 L. Ed.2d 901 (1961). The Supreme Court has "consistently declined to scrutinize with sharp surveillance the exercise of that discretion." Id. The Court has recognized that "a criminal trial is, even in the best of circumstances, a complicated affair to manage." United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 27 L. Ed.2d 543 (1971).

Washington courts have discerned several guiding principles to aid in determining whether a trial judge exercised sound discretion in granting a mistrial for "manifest necessity." State v. Melton, 97 Wn. App. 327, 332, 983 P.2d 699 (1999). These include: 1) whether the court gave both defense counsel and the prosecutor a full opportunity to explain their positions; 2) whether the court gave careful consideration to the defendant's interest in having his trial concluded in a single proceeding; and 3) whether the court considered alternatives to a mistrial. The failure to expressly address all of these factors is not necessarily fatal. Id. at 333-34. "[T]he fundamental question is whether [the trial court] acted in a precipitate or unreasoning fashion." Id. at 333.

The trial court gave all counsel ample opportunity to argue their positions, focusing on the available alternatives (factors 1 and 3). The

issue first arose when Shire's attorney announced that he had been in contact with Berket Kebede. 11RP 20. The court heard from the parties at length as to the appropriate next step. 11RP 25-75. Shire's counsel urged the court to allow Kebede to testify that very afternoon, only hours after the State first learned that defense counsel had been in touch with Kebede. 11RP 50. Failing that, both defense attorneys urged the court to allow Kebede to testify on the following day. 11RP 62, 64. As a further fallback position, Ibrahim's attorney suggested that "a couple of days" would be sufficient to wrap up the trial. 11RP 74.

The State suggested that the court *could* exclude Kebede based on "willful nondisclosure and the other issues with this particular witness' testimony."¹⁹ 11RP 44. The State's preferred remedy was a longer recess, and the State asked the court to question the jurors to determine whether they could return on January 14, 2014 to complete the trial. 11RP 60, 71.

Both defendants objected to the State's proposed recess.²⁰ 11RP 62, 63-64. Both the State and counsel for Ibrahim expressed opposition to a mistrial. 11RP 36, 71, 74.

¹⁹ "Other issues" included Kebede's presence in court during Vincent Williams's testimony. 11RP 34. The State was not prepared to formally ask for the remedy of exclusion until further investigation could be conducted. 11RP 32, 35-36.

²⁰ In light of this, Ibrahim's uncited assertion that "both the State and defense" urged the court to poll the jury to see if they could return on January 14th (BOA at 32) is puzzling.

The trial court carefully considered the alternatives, and explicitly invited comment from counsel. *See, e.g.*, 11RP 29 (“And then, maybe, come back and tell me what you would like me to do about this.” [directed at counsel before recess to interview Kebede]), 62 (“So what’s your thought on the recess until January 14th or whatever it was?” [asked of counsel for Shire]), 63-64 (“So you don’t have any quarrel with a recess of some sort, but January 14th is what too –“ [asked of counsel for Ibrahim]), 60 (“So, Ms. Kline, what would you like me to do in light of your circumstances. In light of what I feel I’ve [be]come compelled to do with regard to this witness?” [asked of lead prosecutor]).²¹

The court concluded that it could not exclude Kebede’s testimony. 11RP 45-46, 59-60. The court rejected the defense proposal for a brief recess, noting that the State needed to do “significant” additional investigation in light of Kebede’s proposed testimony. 11RP 67. The court also rejected the State’s proposal for a more lengthy recess, concerned that asking jurors whether they could return on January 14th would be coercive, that it would not be fair to jurors based on representations already made as to the length of the trial, that jurors would likely blame the defendants when they surmised that a defense witness

²¹ Counsel also had a 2 hour and 20 minute lunch recess for further research. CP 442.

caused the delay,²² and that the proposed recess was too long for jurors to retain in their memories what had transpired thus far.²³ 11RP 36, 67, 72, 75-76.

It was only after extensive discussion of alternatives, with full input from all counsel, that the trial court declared a mistrial. 11RP 76. The record demonstrates a careful and thoughtful exercise of the trial court's broad discretion in this regard.

In declaring the mistrial, the court explicitly noted the double jeopardy concern (factor 2). 11RP 76. The fact that the court did not discuss at greater length the defendants' interest in having their trial concluded in a single proceeding is not dispositive. *See Melton*, 97 Wn. App. at 334 (finding no abuse of discretion in court's decision to declare mistrial even though court did not expressly acknowledge defendant's interest in having case tried in single proceeding before empaneled jury); *Washington*, 434 U.S. at 516-17 (absence of explicit finding of manifest necessity for mistrial does not render decision constitutionally defective where record provides justification for ruling). Moreover, the fact that the

²² Counsel for Shire explicitly shared this concern. 11RP 75.

²³ Other courts have expressed similar concerns. *See Jones*, 26 Wn. App. at 6 (delay created "grave risk" that jurors would be prejudiced against defendant or prosecution; such delay and risk supported declaration of mistrial even though continuance might have been "technically possible"); *United States v. Chapman*, 524 F.3d 1073, 1083 (9th Cir. 2008) (in evaluating declaration of mistrial, trial court's determination that jury's attention span could not withstand potentially lengthy delay "must be given substantial deference").

court cited Melton, supra, and Jones, supra, indicates that the court considered the double jeopardy implications of a mistrial. Indeed, the very fact of the lengthy discussion, during which the court invited counsel's input and considered alternatives to a mistrial, is evidence that the court considered the importance of concluding the trial in a single proceeding. The record shows that the court carefully exercised sound discretion in this regard.

Ibrahim accuses the State of creating the circumstances that necessitated a mistrial because the prosecutors were in other trials for several weeks starting on October 28, 2013. BOA at 24; CP 312-19. Putting aside the fact that this is a circumstance over which the State had little or no control, Ibrahim ignores a far more significant cause of delay. On August 23, 2013, Ibrahim retained new counsel; trial was accordingly continued from September 16, 2013 to October 28, 2013, a total of six weeks. CP 311, 406-07. He further accuses the State of causing delay by failing to make witnesses available for defense interviews. But as counsel for Shire explained to the court, the three primary eyewitnesses (Mardillo Barnes, Vincent Williams, Thomas English) were problematic from the start, and the State did what it could to make them available to the defense

for interviews.²⁴ Appendix A²⁵; *see* 1RP 5; CP 410-15 (Vincent Williams picked up on material witness warrant on the weekend before trial started); 15RP 158 (Mardillo Barnes failed to appear until told that a warrant could be issued).

Ibrahim also claims that the trial court failed to consider alternatives to a mistrial. BOA at 29-34. His claim that the court did not consider a brief recess is contradicted by the record. Defense counsel repeatedly urged the court to require the prosecutor to cross-examine Kebede on the very day that he surfaced, or to remain “on the job” for a few additional days in spite of her long-scheduled time off for her wedding and honeymoon. *See, e.g.* 11RP 50, 57-58, 62, 64, 74. The court, noting that the State reasonably needed time to investigate Kebede and his claims, declined this option. 11RP 75.

²⁴ Ibrahim complains about times when State’s witnesses were not available, and delay resulted. But this happens in any trial, and actually caused minimal delay. *See, e.g.*, 1RP 85-87 (officers unavailable for CrR 3.5 hearing, but court uses time for other matters).

²⁵ The pages of transcript contained in Appendix A (246-50) are from the VRP filed in codefendant Shire’s appeal (No. 72734-6-1). These pages are for some reason omitted from the VRP filed in Ibrahim’s appeal. *Compare* 5RP 7 (Ibrahim) *with* RP 247 line 15 to RP 250 line 15 (Shire).

Ibrahim's claim that the court did not consider polling the jury to see whether they could return on January 14th is even more clearly contradicted by the record. This alternative was repeatedly urged by the prosecutor. 11RP 36, 60, 71, 73. Contrary to counsel's suggestion that the defendants supported this option (BOA at 32), both clearly objected. 11RP 62, 63-64. The court considered this alternative at length before ultimately rejecting it based on multiple valid reasons. 11RP 36, 67, 72, 75-76.

Ibrahim's claim that the trial court did not "realistically consider" excluding Kebede's testimony (BOA at 29-30) is puzzling. This was the first option raised, and the first considered by the court. 11RP 32-33, 35-36, 44. Judge Ramsdell clearly wrestled with this option, even citing the cases that he had read in reaching his decision. 11RP 45-46, 59-60, 66. The court's rejection of this alternative cannot be equated to a refusal to consider it.²⁶

The possibility of co-counsel Paul Sewell completing the trial was never suggested to Judge Ramsdell by any of the parties. Defense counsel likely understood that Sewell did not have the necessary experience to

²⁶ Ibrahim's suggestion on appeal that exclusion "would have been preferable" to a mistrial (BOA at 34) cannot be credited. Ibrahim never suggested exclusion to Judge Ramsdell. And when Judge Downing suggested that a mistrial was more beneficial to the defendants than exclusion would have been, Shire's attorney wholeheartedly (and reasonably) agreed. 12RP 12.

continue on the case alone. Sewell had tried only a single felony case to a jury up to that point, and was not in a position to take over this trial.²⁷ CP 65-66, 82.

Ibrahim's other suggestions for alternatives (#2 and #5, BOA at 29-30), belatedly suggested only on appeal, are nothing more than permutations of the continuance alternative. The court, faced with ensuring fairness to the jurors and to the parties, would almost certainly have rejected these proposals had they been offered.

Ultimately, a trial court is not required to consider every imaginable alternative to mistrial that an appellate lawyer may conceive of years after the fact. The "fundamental question" is whether the court acted "in a precipitate or unreasoning fashion." Melton, 97 Wn. App. at 333. Judge Ramsdell's consideration of the alternatives to a mistrial was neither.

Finally, Ibrahim's claims of prejudice from the mistrial and subsequent retrial (BOA at 21) are greatly exaggerated. It is true that the testimony of the surgeon who treated Barnes's injured hand was excluded

²⁷ Ibrahim's speculation that Sewell would have been called on to finish the trial if the defense had called witnesses (BOA at 32) was never a realistic concern. Both defense attorneys confirmed at the outset that they were not endorsing any witnesses. 1RP 12. At the end of the second-to-last day of trial, the judge told the jury that the State had one more witness, and that closing arguments were planned for the next morning. 10RP 183-84. And both defendants agreed that the court could omit WPIC 5.05, which addressed the credibility of a defendant's testimony. 10RP 210-12.

at the first trial, and admitted at the second. However, given that Ibrahim was no longer charged with inflicting great bodily harm (*compare* CP 1-2 *with* CP 235-36), Dr. Vedder's brief testimony (16RP 9-23) about the nature of the injury was of little significance.

Ibrahim also overstates any change in Vincent Williams's testimony from the first trial to the second. At the first trial, Williams testified that he and Barnes and Kebede were standing close together when the shooting started. 6RP 53-54. Williams said that Ibrahim "pulled out his gun and began to fire in our general direction," and then "began to aim across the street." 6RP 151. Williams acknowledged that he could not say that Ibrahim was aiming specifically at Barnes, as both Barnes and Kebede ran across the street. 6RP 152. Williams agreed that Ibrahim did not seem to be specifically targeting him. 6RP 161.

At the second trial, Williams testified that he thought the defendants were aiming for Barnes. 17RP 49. He said that the bullets seemed to follow Barnes as he ran across the street. *Id.* He reiterated, however, that all three were in the line of fire when the defendants were shooting at them. 17RP 50. This testimony is not significantly different from the first trial. In any event, given the accomplice liability instruction, which defendant's bullets were aimed at which victim(s) was not especially significant.

Ibrahim also claims prejudice from the amendment before the second trial, which added a third count of first degree assault with Berket Kebede as the victim. CP 191, 236. But the very act of bringing forth Kebede as a witness made it virtually inevitable that the defendants would face a third count. Shire's attorney recognized this, explaining that this concern was a part of his "due diligence" before deciding to reveal to the court and to the State that Kebede had contacted him. 12RP 9. And Judge Downing pointed out that the ordinary response to a motion to amend at that point in the first trial would have been "to ask for a mistrial and to go back to square one and start over the trial with the three first-degree assault counts." 12RP 13.

In the final analysis, any claim that the declaration of a mistrial caused the defendants to lose the testimony of Kebede is speculative. First of all, given the extent to which Kebede's credibility would have been impeached with his consistent contact with the defendants before suddenly deciding to testify for them, it is questionable whether they would have benefited from his testimony. Nor is it clear that Kebede would have appeared to testify at the first trial had it recessed over the lunch hour, for a day or two, or for some unspecified period of time. After all, he assured the defense on the very morning of his scheduled testimony in the second trial that he would appear, yet he failed to do so. 19RP 4.

In sum, the trial court was faced with a late-disclosed defense witness who had been in court during the testimony of the State's key witness, Vincent Williams. Given the available alternatives, the trial court did not abuse its discretion in choosing a mistrial as the best way to avoid prejudice to all parties.

2. THE TRIAL COURT PROPERLY DENIED THE DEFENSE REQUEST FOR A MATERIAL WITNESS WARRANT FOR BERKET KEBEDE.

Ibrahim contends that the trial court erred in refusing to issue a material witness warrant for Berket Kebede on the morning that both parties were scheduled to rest. Ibrahim never asked the court for a material witness warrant, nor did he join codefendant Shire's request. He waived this claim. Moreover, given the timing, and the history of Kebede's last-minute appearances and disappearances, the trial court acted within its discretion in denying the request. In any event, in light of the abundant evidence of guilt, and the fact that Kebede's testimony would have been subject to extensive and damaging impeachment, Ibrahim suffered no prejudice.

a. Relevant Facts.

On September 16, 2014, the parties were bringing the second trial to a close. During a break in the cross-examination of the State's last witness, Detective Janes, the court asked defense for "an indication as to

where we go next.” 18RP 130. Shire’s attorney, Ned Jursek, told the court that he and his investigator had been trying to get in touch with Berket Kebede, and that Jursek had left a phone message for Kebede telling him that he would be needed in court the next morning. 18RP 130-31.

Later that same day, following a discussion of jury instructions, the issue of Kebede’s possible testimony arose again. The State indicated that it would call Kebede if he were to appear. 18RP 190. The court left open the alternative that the State could rest and the defense could call Kebede. Id. Jursek said that he had had no contact with Kebede since the previous December, and he thought the odds of Kebede appearing were slim. 18RP 193.

At this point, counsel for Ibrahim, Coleen St. Clair, notified the court that Kebede had called over the lunch hour that day and agreed to come to court the next morning at 8:30. 18RP 193-94.

The next morning, the State announced its intention to rest. 19RP 4. Jursek told the court that he had received a call from Kebede earlier that morning, indicating that Kebede had received the defense subpoena and would be in court at 9:00. 19RP 4.

Kebede failed to appear as promised. 19RP 4. The court asked Jursek whether he planned to rest if, after the brief testimony of the

defense investigator was completed, Kebede still had not appeared. 19RP

9-10. The following exchange ensued:

Jursek: I think the only other thing that I would have would be a motion for a material witness warrant. Unfortunately, the service information is as I've described to the Court and that's all I can offer the Court in terms of a basis for that.

Court: Okay.

Jursek: But I would be obliged to ask.

...
Court: Okay. And I think I would in light of the timing be obliged to decline the invitation.

Jursek: That's not a surprise.

Court: You know I might have a week ago, which is what I think Detective Janes might have had the impression had occurred. There was not a warrant for Mr. Kebede?

[brief discussion of misdemeanor arrest warrant in effect for Kebede]

Court: Okay. All right. But there's no material witness warrant at this point?

Jursek: Correct. Well, perhaps then I can just then move for a material witness warrant at this point.

Court: Yeah. And the record will reflect, as I suggested a moment ago, that that would be denied based on the timing. This is too much of a Déjà vu all over again with the last trial with Mr. Kebede's possible appearance on the last day of a two-week trial.

19RP 10-11. Ibrahim's counsel said nothing.

The State rested. 19RP 14. Following very brief testimony of the defense investigator (19RP 14-16), both defendants rested. 19RP 16. The court instructed the jury (19RP 20-39), and the case proceeded to closing arguments. 19RP 40-116.

b. Ibrahim Waived This Claim.

Ibrahim never requested a material witness warrant for Kebede, nor did he join in Shire's request. Given the forensic evidence tying Ibrahim to the shooting, Kebede, with his credibility issues, could easily have hurt rather than helped Ibrahim's case. Thus, the decision not to join in Shire's request could well have been strategic. Because any right to a material witness warrant is based in statute and court rule, Ibrahim has waived this claim. *See State v. Williams*, 137 Wn.2d 746, 975 P.2d 963 (1999) (failure to raise claim based on court rule requiring specific information be given to defendant at CrR 3.5 hearing waived where not raised below); RAP 2.5(a) (appellate court will not generally review claims not raised in trial court).²⁸

c. The Trial Court Properly Denied The Request For A Material Witness Warrant.

Both the federal and the state constitutions guarantee a criminal defendant the right to compulsory process. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ."); WASH. CONST. art. I, § 22 ("In criminal prosecutions the accused shall have the

²⁸ Even if error in refusing to issue a material witness warrant is constitutional, any error was not "manifest" within the meaning of RAP 2.5(a) for the reasons set out *infra*.

right . . . to have compulsory process to compel the attendance of witnesses in his own behalf . . .”).

A trial court has the power to compel the attendance of witnesses. RCW 2.28.010. Courts *may* exercise this power through issuance of a material witness warrant. *See* RCW 10.52.040 (“the court may direct that such witness shall be detained in the custody of the sheriff until the hearing or trial in which the witness is to testify”); CrR 4.10(a) (“the court may issue a warrant . . . for the arrest of a material witness”). A material witness warrant will issue only on a showing that: 1) the witness has refused to submit to a court-ordered deposition; 2) the witness has refused to obey a lawfully issued subpoena; or 3) it may become impracticable to secure the witness’s presence by subpoena. CrR 4.10(a). “A trial court’s decision to grant or deny a motion for issuance of a material witness warrant is reviewed for a manifest abuse of discretion.” City of Bellevue v. Vigil, 66 Wn. App. 891, 895, 833 P.2d 445 (1992).

The right to compulsory process is not absolute, but subject to established rules of procedure and evidence designed to ensure fairness and reliability in determining guilt or innocence. State v. McCabe, 161 Wn. App. 781, 787-88, 251 P.3d 264, *rev. denied*, 172 Wn.2d 1016 (2011). “Denial of a request for compulsory process will be disturbed only when the accused has been prejudiced thereby, considering such

factors as diligence, surprise, materiality, and the maintenance of orderly court procedure.” State v. Derum, 76 Wn.2d 26, 28, 454 P.2d 424 (1969).

Ibrahim cannot meet this test. It was no surprise to anyone (including the court) that Kebede did not willingly appear. Diligence would have required asking for a material witness warrant at an earlier date, or at least joining in co-counsel’s belated request.²⁹ And when the request comes on the morning that closing arguments are scheduled to begin, the maintenance of orderly court procedure militates in favor of denial.

And while it might appear that Kebede’s proposed testimony – that Shire and Ibrahim were not the shooters – was material, a closer look undermines this conclusion. Vincent Williams positively identified Ibrahim as one of the shooters; he picked Ibrahim out of a photo montage, and he identified Ibrahim in court during trial. Thomas English identified Ibrahim as one of the two men he had seen running away in the immediate aftermath of the shooting. Ibrahim was apprehended within minutes of the shooting in the car that had hurriedly left the scene. A 9mm semi-

²⁹ Ibrahim blames the State for not seeking a material witness warrant for Kebede. BOA at 37. But the prosecutor explained that subpoenas had been sent to several addresses, and that “part of the issue with regards to why the State hasn’t asked for a material witness warrant it’s [sic] usually the detectives need somewhere to start, but we don’t have that. . . . And I don’t [] even know if he’s properly served to even in good faith ask for a warrant.” 17RP 208-09. Assuming that Ibrahim actually wanted Kebede’s testimony, he had at least as much incentive to produce Kebede for trial as the State had, and could not reasonably have relied on the State to procure his presence.

automatic handgun was found under the seat in front of Ibrahim; the magazine, with a capacity of 16 cartridges, contained only one unfired bullet. Six shell casings recovered at the scene had been fired from this gun.

Kebede's highly impeachable testimony could never have overcome this evidence of guilt. Had Kebede testified, jurors would have heard that he had not come forward with his exculpatory information until more than six months after the defendants were arrested, despite having been in constant contact with them. This would undoubtedly have left jurors with strong doubts as to the truth of Kebede's testimony, and would likely have cast doubt on the credibility of the defense in general. *See also* CP 66-67 (additional impeachment material). Thus, even had Kebede testified, the outcome would have been the same. Any error was harmless.

3. THE STATE PROPERLY ADDED THE THIRD COUNT OF FIRST DEGREE ASSAULT.

Ibrahim contends that the trial court abused its discretion in allowing the State to amend the information prior to his second trial to charge an additional (third) count of first degree assault, listing Berket Kebede as the victim. This claim fails.

Prior to the start of the second trial, the State moved to amend the information to add a third count of Assault in the First Degree, naming

Berket Kebede as the victim.³⁰ 12RP 39; CP 190-92, 323, 363-64. Both defendants objected to the amendment, citing only CrR 8.3 and alleging governmental misconduct. 12RP 42-43. Finding that proper notice had been given,³¹ the trial court permitted the amendment. 12RP 44; CP 190-92, 363-64.

The trial court may permit amendment of the information at any time before verdict if substantial rights of the defendant are not prejudiced.³² CrR 2.1(d). The defendant has the burden of showing prejudice. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). Pretrial amendments should be liberally granted. State v. Vangerpen, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995). The decision to grant a motion to amend the information is reviewed for abuse of discretion. State v. Schaffer, 120 Wn.2d 616, 621-22, 845 P.2d 281 (1993).

On appeal, Ibrahim argues that the count naming Kebede was a “related offense” that should have been joined with the other counts at the first trial. In support, he cites to a case that discusses former CrR 4.3(c) (now CrR 4.3.1(b)).³³

³⁰ This is the Third Amended Information. CP 190-92. A Fourth Amended Information was filed solely to correct the spelling of Berket Kebede’s name. CP 235-37, 365-66.

³¹ Both defendants agreed that they had proper notice. 12RP 42.

³² An amendment charging a new crime is prohibited once the State has rested its case. State v. Vangerpen, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995).

³³ State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984).

Ibrahim waived this claim. His objection in the trial court was limited to CrR 8.3. Having failed to raise a claim of mandatory joinder under CrR 4.3.1 below, he should not be allowed to do so on appeal. *See State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009) (declining to reverse where trial court rejected specific ground on which defendant objected to evidence below, and argument on appeal was based on a rule not raised at trial).

In any event, the claim fails on its merits. The rule provides:

Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

...
A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense The motion to dismiss must be made prior to the second trial, and shall be granted *unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.*

CrR 4.3.1(b)(1), (3) (emphasis added).

Here, the State did not even know Berket Kebede's name until just before the first trial ended in mistrial. This was an important fact of which the State was unaware. Precluding the State from adding a third count of assault once the identity of the third victim was known would have

defeated the ends of justice. The third count was properly added before the second trial.

4. THE EVIDENCE WAS SUFFICIENT TO SUPPORT A CONVICTION FOR FIRST DEGREE ASSAULT OF BERKET KEBEDE.

Ibrahim claims that there was insufficient evidence of first degree assault as to Kebede. He argues that, because Kebede did not testify, there was no proof that he was actually injured, or that he was placed in fear. But these are not elements of the crime as charged. This claim should be rejected.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime proved beyond a reasonable doubt. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably may be drawn from it. Id. Circumstantial evidence is as reliable as direct evidence. Id. Credibility determinations are for the trier of fact, and are not subject to review. Id. The reviewing court will defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 874-75.

For count 3, the State had to prove that Ibrahim, or someone to whom he was an accomplice, intentionally assaulted Berket Kebede, that

the assault was committed with a firearm, and that Ibrahim intended to inflict great bodily harm. CP 250. Assault was defined, *inter alia*, as an intentional shooting, with unlawful force, that is harmful or offensive *regardless of whether physical injury was inflicted*. CP 246 (italics added). Nor did either of the other two alternative definitions of assault require bodily injury. *Id.* Only the third alternative required that the assaulted person be placed in fear. *Id.* Thus, the State was not required to prove that Kebede was injured, or that he was placed in fear.

Vincent Williams testified that, when Shire leveled his gun and started firing at the group, the other two (Mardillo Barnes and Berket Kebede) were standing right next to him. 17RP 42-44. Ibrahim, who arrived with Shire and ultimately fled the scene with Shire, pulled out a gun and fired approximately six shots. 17RP 23-29, 47-48, 50. Williams verified that all three named victims were in the line of fire when both defendants were firing at them. 17RP 50.

The jury was entitled to reasonably infer that, by firing a gun at Kebede, Ibrahim intended to inflict great bodily harm. CP 248. The jury could also reasonably infer that being fired upon was offensive. CP 246. And given the coordinated actions of the two defendants, the jury could reasonably infer that Ibrahim was aiding Shire in committing the crime, with knowledge that he was promoting or facilitating the commission of

the crime. CP 247. The jury was thus presented with sufficient evidence to find Ibrahim guilty as either a principal or an accomplice.

5. THE TRIAL COURT PROPERLY SENTENCED IBRAHIM TO CONSECUTIVE SENTENCES.

Ibrahim argues that the trial court erred in sentencing him to consecutive sentences for his three first degree assault convictions without explicitly finding that they arose from “separate and distinct criminal conduct.” Because the assaults against three separate victims are necessarily separate and distinct, this claim fails.

Ibrahim’s three sentences for convictions of first degree assault were imposed consecutively. CP 292, 295. First degree assault is a “serious violent offense.” RCW 9.94A.030(45)(a)(v). Sentences for multiple serious violent offenses that arise out of “separate and distinct criminal conduct” must be served consecutively to each other. RCW 9.94A.589(1)(b).

While “separate and distinct criminal conduct” is not statutorily defined, it is “well established” that if two offenses are not the “same criminal conduct,” they are necessarily “separate and distinct.” State v. Cubias, 155 Wn.2d 549, 552, 120 P.3d 929 (2005). “‘Same criminal conduct’ . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same

victim.” RCW 9.94A.589(1)(a). The absence of any one of these factors precludes a finding of “same criminal conduct.” State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Offenses necessarily arise out of “separate and distinct criminal conduct” when they involve separate victims. Cubias, 155 Wn.2d at 552. Where the record supports only one conclusion on the question of “same criminal conduct,” a sentencing court abuses its discretion if it arrives at a contrary result. State v. Aldana Graciano, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013).

Ibrahim asserts that neither the trial court nor the jury made a finding “regarding whether the offenses represented separate and distinct conduct.” BOA at 42. But the jury convicted Ibrahim of three assaults against three separate victims. CP 248-50, 268. The trial court sentenced Ibrahim according to the jury verdict. CP 292. It is clear that everyone at the sentencing hearing, including Ibrahim’s counsel and the court, was aware throughout that proceeding that consecutive sentences were required under RCW 9.94A.589(1)(b). *See generally* 21RP. The finding of “separate and distinct criminal conduct” was implicit and, under the facts of this case, it was required. This claim should be rejected.

6. IBRAHIM RECEIVED NOTICE OF ALL OF THE ELEMENTS OF THE CHARGED OFFENSES.

Ibrahim finally complains that the Fourth Amended Information did not inform him that he could be found guilty as an accomplice, or under a theory of transferred intent. These theories of liability are not elements of the crimes charged, and thus were not required to be spelled out explicitly in the information. In any event, Ibrahim had ample notice that the State intended to pursue these theories of liability.

In the Fourth Amended Information, the State alleged in counts 1-3 that “the defendants YUSUF HAISE SHIRE AND MOHAMED IBRAHIM in King County, Washington, on or about May 18, 2013, with intent to inflict great bodily harm, did assault [victim] with a firearm and force and means likely to produce great bodily harm or death” CP 235-36. The jury was instructed on accomplice liability. CP 247. The verdict form did not specify whether the jury found Ibrahim guilty as a principal or as an accomplice. CP 268.

An information need not specify whether a defendant is charged as a principal or as an accomplice. State v. Carothers, 84 Wn.2d 256, 263, 525 P.2d 731 (1974). Accomplice liability is not an alternative method of committing a crime. Id. Where a defendant is charged as a principal, he is put on notice of the nature of the charge. Id. Regardless of the degree or

nature of the defendant's participation, the elements of the crime remain the same. Id. at 264.

An accused has a constitutional right to be informed of the nature of the charge. State v. Rodriguez, 78 Wn. App. 769, 771, 898 P.2d 871 (1995), *rev. denied*, 128 Wn.2d 1015 (1996). "Washington courts have held that this right is not violated when a defendant is found guilty as an accomplice even though the information did not expressly charge aiding or abetting or refer to other persons." Id. Ibrahim's information *did* refer to the other participant in the assaults. And the law is clear that the information was not required to charge him specifically as an accomplice.

Ibrahim further argues that the information is constitutionally inadequate because it did not explicitly inform him that the State would pursue a transferred intent theory as to the assaults. In State v. Clinton, 25 Wn. App. 400, 403, 606 P.2d 1240, *rev. denied*, 93 Wn.2d 1026 (1980), the court noted the "overwhelming weight of authority at common law" approving the theory of transferring the defendant's intent to harm a particular individual to another, unintended victim. The court rejected Clinton's argument that, because he was charged with knowingly assaulting a particular victim, he was not sufficiently advised of the nature of the charge, to the prejudice of his defense. Id. at 403-04. *See State v. Aguilar*, 176 Wn. App. 264, 271, 275-77, 308 P.3d 778 (2013), *rev.*

denied, 179 Wn.2d 1011 (2014) (rejecting claim that doctrine of transferred intent must be included in charging language).

Ibrahim offers no authority to support his claims. He simply argues that, in spite of the case law cited above, he was “not fairly notified” of the State’s theory. AOB at 47. But the State filed its proposed jury instructions in the first trial a full nine months before closing arguments in the second trial. CP 444. Included in this document was a proposed instruction on accomplice liability, as well as an instruction on transferred intent. CP 464, 468. This was ample and fair notification. This claim should be rejected.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Ibrahim’s judgment and sentence.

DATED this 31 day of March, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

1 session, and I'll let the jury know that tomorrow 'cause I don't
2 think that's going to change at all. Okay?

3 MS. KLINE: Uh huh.

4 MR. SEWELL: Thank you, your Honor.

5 THE COURT: All right. Well thank you very much, folks.
6 Have a good evening. And we will see you tomorrow morning. Take
7 care.

8 Court recessed on Tuesday,
9 December 3, 2013 at 2:31 p.m.

10 RECESS/COURT RECONVENED

11 Court reconvened with all
12 parties present on Wednesday,
13 December 4, 2013 at 9:00 a.m.

14 The following is heard in the
15 absence of the jury:

16 THE COURT: All right. Good morning, folks. Are we ready
17 for opening statement, folks?

18 MR. JURSEK: I had an issue to address related to our
19 interview with Mr. English.

20 THE COURT: Oh, okay. Well then have a seat, folks. And
21 what might that be, sir?

22 MR. JURSEK: And — and I will try to be as — as coherent
23 as possible, and ramble as little as possible. There were some
24 logistical issues with last night, your Honor. Mr. English did
25 appear.

THE COURT: Okay.

1 MR. JURSEK: He was late, so we got the interview started
2 late, and that caused some logistical issues with me that resulted
3 in me not being able to work on this case 'til after 9:00 last
4 night. So --

5 THE COURT: Okay.

6 MR. JURSEK: -- I'm not as organized or prepared as I
7 would like to be, and -- and will try not to waste too much of the
8 Court's time. I, -- I know we have jurors in back.

9 Just in terms of background, your Honor. At the outset of this
10 case, you know, although we didn't get a witness list, it was
11 obvious who some of the State's witnesses were going to be. And --
12 and from the beginning, that's always obvious.

13 THE COURT: Right.

14 MR. JURSEK: Eyewitness evidence in this case has always
15 been a big issue. There were three primary eyewitnesses involved
16 in this case. Mr. Barnes, the named victim who got shot in the
17 hand --

18 THE COURT: Uh huh.

19 MR. JURSEK: -- his friend, Mr. Williams who was with him
20 when he got shot was a named victim, as well as a man named Thomas
21 English, who's a neighbor who just happened to live near the scene
22 of the shooting and was not involved in either group of individuals
23 that were meeting before the incident occurred.

24 THE COURT: Okay.
25

1 MR. JURSEK: All of those individuals, to varying degrees,
2 gave statements to the police. So we had those statements to look
3 at. And — and all three of those witnesses, to varying degrees,
4 were very problematic in terms of interviewing. The State was very
5 candid from the beginning in terms of their assessment of what
6 Mr. Barnes' and Mr. Williams' cooperation was going to be. And
7 even early on, there was talked about material witness warrants
8 perhaps for those witnesses.

9 Ultimately, shortly before trial, my understanding is Detective
10 Janes, with his powers of persuasion and diplomacy, was able to
11 persuade Mr. Barnes to come in. He did come in without needing to
12 be served with a material witness warrant and talked to the
13 defense.

14 THE COURT: Okay.

15 MR. JURSEK: Shortly before trial began, Mr. Williams was
16 picked up on a material witness warrant, and was released on
17 conditions, and did show up for a defense interview.

18 Mr. English was always much more problematic. We had talked to
19 the State about interviewing Mr. English months ago. And there was
20 every indication that he was a cooperative witness, and — and the
21 State, I think, had every reason to believe he was cooperative. He
22 was responsive to their phone calls, he indicated a willingness to
23 come in and do interviews.. We had discussed with the State doing
24 it as a joint interview, which just logistically makes a lot of
25 sense.

1 THE COURT: Okay.

2 MR. JURSEK: However Mr. English repeatedly either
3 rescheduled the interviews, or stood the defense up for the defense
4 interviews. By my count there were three occasions where he just
5 stood us up, where we'd made appointments to interview, had come,
6 you know, had investigators there, and --- and Mr. English was a no
7 show.

8 THE COURT: Okay.

9 MR. JURSEK: Last week after his last no show, the State
10 had offered to set up an interview with him last week, just because
11 of logistical issues in terms of schedules, preparation and other
12 work, and his past failures to appear for interviews. It was just
13 not practical for me or my investigator to interview him last week.

14 So he did show up on Monday, the date on his subpoena, I think
15 to everyone's surprise. And I think the Court was informed of
16 that.

17 THE COURT: Right.

18 MR. JURSEK: Logistically again on that notice, we were
19 not able to get him interviewed 'til last night. He did say some
20 things last night that affect the defense's case that were not
21 included in his taped statement, and is not apparent in the
22 statements of the police. And it's regarding a significant
23 eyewitness identification issue.

24 In his taped statement with Detective Huber, which was done
25 minutes after the in-car show-up of the Defendants --

1 THE COURT: Uh huh.

2 MR. JURSEK: -- Mr. English identifies Mr. Shire and gave
3 a statement that he saw Mr. Shire after he heard gunshots. He was
4 out on his back porch smoking a cigarette and saw Mr. Ibrahim and
5 Mr. Shire run past him. He describes Mr. Shire as a short black
6 male, describes him wearing a black shirt and black pants in his
7 taped statement.

8 When we met with him last night, he said he saw Mr. Shire.
9 That he was a short black male, that he identified him at the
10 show-up, but that he was wearing a brown hoodie and dark pants when
11 he saw him run past him when he was standing on the back porch.

12 THE COURT: Okay.

13 MR. JURSEK: There are a few oblique references in
14 discovery that at the time I read them didn't make sense to me, or
15 didn't appear significant in the report. There's a reference early
16 on to a description of two black males wearing hoodies. When
17 Mr. Shire is arrested and taken out of the car minutes after the
18 shooting, and the car's pulled over in the traffic stop, he has a
19 black shirt on, he has jeans on. There's no evidence of a brown
20 hoodie. And there's nothing in the police reports that talks about
21 a brown hoodie. But we had this early CAD description of two males
22 in hoodies.

23 And then there was a statement -- we received a number of
24 in-car video/audios from the SPD cruisers. And it's sometimes
25 confusing in terms of which car is associated with which officer.

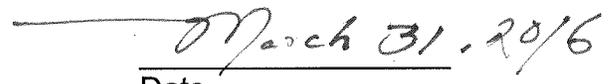
Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, **Jon Zulauf** at jonzulauf@zulaufandchambliss.com, containing a copy of the **Brief of Respondent**, in **STATE V. MOHAMED IBRAHIM**, Cause No. **72753-2-I**, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date