

NO. 73332-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

LESLEY VILLATORO,

Appellant.

FILED
June 2, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

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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 quickly enlisted the help of a neighbor to summon aid and reported the home invasion. As a result, law enforcement quickly located and engaged Horne in a high-speed chase that ended in his death.

With Horne dead, the focus was on appellant Lesley Villatoro, Horne's girlfriend and the mother of his youngest children, as someone upon whom to lay blame. Based on Villatoro's statement 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" compiled by Horne to kill Baker, Villatoro was charged as an accomplice to attempted first degree murder, first degree burglary, first degree robbery and three counts of first degree kidnapping.

Villatoro was convicted and is serving more than 40 years in prison, but maintains she is innocent.

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict on any charge.
2. The trial court erred in denying the defense trial and post-trial motions to dismiss for lack of evidence.
3. The trial court's failure to properly instruct the jury deprived Villatoro of a fair trial and a unanimous jury verdict.
4. The trial court erred by failing to file written findings of fact and conclusions of law following a CrR 3.6 motion hearing.

Issues Pertaining to Assignments of Error

1. To convict as an accomplice, the prosecution must prove actual knowledge of the crimes the principle intended to commit.

(a) Was the evidence insufficient to convict Villatoro as an accomplice to the attempted murder, burglary, robbery and three kidnappings committed by Horne, when there was no direct evidence she had actual knowledge of the crimes Horne intended to commit until after the fact, and where the circumstantial evidence was so tenuous that to conclude she had actual knowledge requires engaging in speculation and conjecture, and piling inference upon inference?

(b) Did the trial court err in denying defense motions to dismiss all counts for lack of evidence at both the conclusion of evidence and again after the guilty verdicts were entered?

2. 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.

3. Pretrial, the court held a CrR 3.6 motion hearing on the admissibility of evidence obtained by the State during its investigation. Did the trial court err in failing to file written findings of fact and conclusions of law memorializing its decision as required by CrR 3.6?

B. STATEMENT OF THE CASE

1. Procedural Facts

In May 2014, the Whatcom County Prosecutor charged Lesley Villatoro (d.o.b. 1/16/86) as an accomplice to six first degree offenses, including attempted murder, robbery, burglary and three counts of kidnapping. Each charge included both deadly weapon and firearm allegations. CP 3-6. The prosecutor alleged Villatoro acted as an accomplice to Chad Horne (d.o.b. 5/1/80), who on May 2, 2014, invaded the home of Stephanie Baker, restrained her and her two young children before cutting Baker's throat and attempting to shoot her with a revolver, and then fled in Baker's car, only to die at the conclusion of a high-speed chase with law enforcement. CP 7-10.¹

¹ A subsequently added charge of taking a motor vehicle was later dropped. CP 14-17, 40-43.

A jury trial was held in early 2015, before the Honorable Charles B. Snyder. 1RP-2RP.² The court heard defense motions to suppress both Villatoro's statements to law enforcement (CrR 3.5 hearing), and physical evidence recovered by law enforcement (CrR 3.6 hearing). 1RP 6-118; 2RP 264-319. The court filed written findings of fact and conclusions of law for the CrR 3.5 hearing, but not the CrR 3.6 hearing. CP 344-47.

Villatoro was convicted 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 (~43.75 years) was imposed. CP 326-43. Villatoro appeals. CP 304-322.

2. Substantive Facts

(a) *Background of Villatoro and Horne*

Villatoro and Horne began dating in 2012, in Arizona. Supp CP ___ (sub no. 84, [Transcript of] Videotaped Deposition of Jamie Cumbia, filed 2/2/15), at 20;³ 2RP 385-86.⁴ By August 2012, Villatoro and Horne had

² 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.

³ Jamie Cumbia, Chad Horne's younger sister, provided a videotaped deposition on January 9, 2015, which was played to the jury at trial. 2RP 234, 261. A transcript of the deposition was filed (sub no. 84), and will be cited herein rather than to the video deposition as it was never admitted as an exhibit, and was not transcribed into the verbatim report of proceedings for trial. It will be referred to hereafter as "Dep."

fallen on hard financial times, so they moved from Phoenix to Bellingham and into the home of Horne's sister, Jamie Cumbia, and her husband, Chris Cumbia.⁵ Dep. at 8.

Horne worked briefly at Home Depot in Bellingham before he and Villatoro moved to Texas in January 2013, where they stayed only a few months before relocating back to Arizona. Dep. at 8-11. In February 2013, Villatoro gave birth to twin girls, fathered by Horne. 2RP 350. By August 2013, Villatoro, Horne, their twin daughters and Villatoro's eight-year-old daughter from a prior relationship, had all moved back to Washington into the Cumbia's home in Blaine where they were allowed to stay rent-free in the garage in exchange for watching their preschool age son (J.C.) while they worked. Dep. at 12-13; 2RP 341.

Neither Horne nor Villatoro had steady employment after returning to Washington in 2013. Chris found Horne a job, but he quit after a day. Dep. at 14. Villatoro, who suffers from ADD, was taking on-line classes to get certified for a healthcare related job, which allowed her to get some financial assistance through education grants, but she and Horne were otherwise destitute, and therefore relied on public assistance and the generosity of the Cumbias. Dep. at 15-16, 39-40; 2RP 360, 378.

⁴ The portion of 2RP from pages 339-396 is a transcription of Ex. 59, the taped interview of Villatoro at her home on the day of the incident, May 2, 2014. 2RP 338.

⁵ For clarity, the Cumbias will be referred to by their first names. No disrespect is intended.

Jamie said the families got along well despite tight quarters, numerous young children and not a lot of money. Dep. at 16-17, 36-41, 44-45. She described Villatoro as quiet, not very social, and with a flat affect. Dep. at 65. She noted Villatoro and Horne were "really big on germs" and would make anyone entering their living space use sanitizer, and used a lot of Lysol. Dep. at 18. Jamie claimed her family did not use bleach, and she was unaware of Villatoro or Horne using it. Dep. at 18.

Jamie claimed that sometime in April 2014, Horne told her he and Villatoro planned to move back to Arizona in June, and that he had a job there working with reptiles, one of his passions. Dep. at 49-50. She claimed Horne even sent her a picture of the house he hoped to live in once there. Dep. at 50. Horne's ex-wife, however, testified Horne told their daughter on May 1st (his 34th birthday), that he was not moving to Arizona until the end of summer. 2RP 191, 196, 199; Dep. at 55.

On Thursday, May 1, 2014, Jamie texted Horne and offered to watch his children so he and Villatoro could celebrate his birthday. Dep. at 55. Horne declined, telling her was not feeling well, but explained that he, Villatoro and the kids planned to celebrate the next day by going out to lunch. Dep. at 55, 60. Horne arranged for Jamie to leave J.C.'s car seat at home for use when they went to lunch. Dep. at 62.

(b) *Villatoro's May 2, 2015*

On May 2nd, Jamie got a text from Villatoro at about 1 p.m. informing her that Horne had gone to visit a friend from Home Depot in the morning, but failed to meet up afterwards as planned to go to lunch. Dep. at 66. Jamie was surprised Horne was visiting a friend because she was unaware he had any, but admitted it was possible. Dep. at 67. Jamie and Villatoro discussed the possibility that Horne was high or drunk and simply lost track of time. Dep. at 68-70.

When Jamie checked with Villatoro at about 3 p.m., there was no word from Horne. Dep. at 74. Villatoro informed her, however, that she discovered the prepaid phone she shared with Horne was gone, so she sent a text in case Horne had it with him, but he had not replied. Dep. at 74-76. Villatoro explained the plan had been for Horne to visit with "John", presumably to smoke some marijuana, for about 45 minutes before meeting her at a nearby church so they could go to lunch. Horne told Villatoro that if he was not at the church on time, or if Villatoro simply got tired of waiting, she could leave and he would meet her at home, but he never appeared and never contacted her. Dep. at 77, 79. Jamie tried to console Villatoro, offering that Horne may have simply over-imbibed and was waiting to sober up before contacting her. Dep. at 81-82.

At about 5 p.m., Villatoro informed Jamie she had still not heard from Horne. Dep. at 86-87. Villatoro lamented that she did not know who Horne's friend was, or even which house he lived in, so there was no way to track him down. Dep. at 87-88.

Later, Villatoro told Jamie the police called inquiring about a cell phone they found and asking for information about Horne and Villatoro, including their dates of birth, address, and whether they knew anyone named "Rocky." Dep. at 89-90. The police told Villatoro they would be by the house that evening to meet with her. Dep. at 90. Villatoro expressed growing concern that something bad had happened. Dep. at 92, 94-95. Law enforcement arrived shortly after 6 p.m. Dep. at 96-97

Ferndale Detective Melanie Campos and Bellingham Detective Sue Howell where the officer sent to interview Villatoro. 2RP 333-34, 737, 740, 770. They initially questioned her about what she had done earlier that day, and when she had last seen Horne. 2RP 774. Villatoro told them she had last seen Horne at about 9:30 a.m., when she dropped him off to meet "John", who he had worked with a Home Depot, to visit, smoke marijuana and celebrate Horne's birthday. 2RP 775. Villatoro explained that she drove Horne to a neighborhood near W. Smith Rd. in Ferndale and dropped him off, and that Horne had her open the trunk before she drove away, but she did not know what if anything he removed.

2RP 777, 779-80. Villatoro explained Horne was to meet her in a half hour, but when that time had passed and Horne failed to appear, she and the children went home. 2RP 277-78.

When asked if Horne owned any guns, Villatoro recalled that he had a revolver his grandfather gave him. 2RP 779.⁶

The detectives eventually informed Villatoro that Horne had stolen a car, and ended his own life following a chase by law enforcement. 2RP 780. Villatoro reacted physically to the news, becoming very upset, emotional, crying and gasping for breath. 2RP 781. A "support officer" came to help Villatoro deal with the news, before continuing their interview, which would be audio-taped thereafter. 2RP 782; Ex. 59.

In the taped portion of the interview Villatoro, who was emotional and periodically sobbing throughout, reiterated that Horne went to visit a former Home Depot colleague named "John" for a half hour or so, and thereafter was to meet up with Villatoro and the children to go to lunch, but he never appeared. 2RP 342-43; Ex. 59.

The detectives pressed Villatoro for details, including how Horne and "John" got in touch, where exactly she dropped him off, what he was

⁶ Villatoro subsequently told the detectives that Horne was prohibited from having a gun registered in his name due to a prior felony conviction in Arizona for a bank robbery, committed when he was 17 years old, and spent five years in prison, many years before they met. 2RP 347.

wearing and what he had with him. 2RP 339-96, 787-815.⁷ Villatoro did not know how Horne and "John" had re-connected, admitting she knew nothing about "John" other than Horne had worked with him at Home Depot. 2RP 342, 345, 357. Villatoro recalled Horne had on black pants, a black hoodie and black shoes when she dropped him off. 2RP 342.

Villatoro did not know the name of the place she dropped Horne off, but was able to describe how to get there. She recalled driving south from Blaine towards Ferndale on Interstate 5 and taking the W. Smith Rd. exit, and then heading east on W. Smith Rd., off of which she took a left into a housing development, and then two rights into a cul de sac, where she made a u-turn at the end before letting Horne out. 2RP 343-44, 348-50, 352, 355. As he got out, Horne kissed Villatoro and asked her to "pop the trunk," but she did not see what if anything he took out. 2RP 351-52, 355, 372. Villatoro did not know which house Horne went to after he got out. 2RP 343, 356, 373. She and the children went to the nearby park so J.C. could play while they waited. 2RP 344, 355.

When asked how she knew about the park, Villatoro explained she and Horne had previously been to the neighborhood and others scouting out places to live once they could move out of the Cumbia's garage. 2RP

⁷ The audio-taped interview of Villatoro on May 2, 2014, was played for jury once in its entirety during Detective Campos's testimony, and another time play only in part during Detective Howell's testimony, and was transcribed into the record both times. 2RP 339-96, 787-815.

358-59. Villatoro described the park as a "ghetto park," and that she and Horne had remarked that they would not let their children play there, even if they were old enough to do so. 2RP 358. Villatoro eventually left the park and went to the nearby church parking lot to wait, but then left for home after the twins became too restless. 2RP 361-62. Villatoro recalled an ambulance going by shortly before she headed for home. 2RP 361-63.

No one was home when Villatoro and the children returned. 2RP 366, 380. Thereafter, Villatoro and Jamie remained in regular contact about Horne the rest of the afternoon. Dep. at 22-25, 64-97.

When asked, Villatoro acknowledged she had been to the Bellingham Herald on-line news service that day and recalled seeing reports about Costco expanding, a school lock-down, and a man, Horne as it turned out, shooting himself on Smith Rd. 2RP 366. Villatoro broke down emotionally once again when it dawned on her that the man who shot himself was Horne. 2RP 366; Ex 59. A forensic analysis of Villatoro's phone showed she accessed the on-line Bellingham Herald several times from 11:54 am and 6:52 am on May 2nd. Ex. 63. 2RP 447.

The detectives also questioned Villatoro about whether Horne owned any duffle bags. Villatoro recalled he had a blue Addidas duffle bag, which she believed was in the garage as she was being questioned. 2RP 372. She also offered that she had a light blue duffle bag. Id. When

asked whether Horne owned a hockey mask, bungee cords or zip ties, Villatoro could not recall him ever owning any such items. 2RP 389-90.

(c) *Horne's May 2, 2015*⁸

According to Stephanie Baker, at about 10 am on May 2, 2015, she was in the backyard of her home on Patriot Lane in Ferndale when her doorbell rang. 2RP 33, 95. When she answered it there was a man, Horne, dressed in black, pointing a silver revolver at her. 2RP 96-97, 119; Ex. 34. Baker tried to close the door, but Horne forced his way in and told Baker to sit on the floor. She complied. 2RP 97.

When Baker begged him not to hurt her or her two young children, Horne replied, "I only want your Tahoe." 2RP 98, 106. Horne then asked her repeatedly where her husband was, to which Baker replied she was separated and that no one else lived there. Id.

Horne next asked for the Tahoe keys, and then had Baker show him how to operate the key fob. 2RP 99-100. When Baker informed Horne the driver's door had to be unlocked manually, Horne had Baker unlock and start the Tahoe for him while he remained in the house with her children until she returned. 2RP 100-02.

⁸ Although Horne was not alive to testify at trial, his actions on May 2, 2015, can be traced through the testimony of Stephanie Baker, who he tried to kill, various emergency personnel who responded to the report Baker had been assaulted, and the other prosecution witnesses.

On her way back to the house, Baker noticed Horne had a black duffle bag with him she had not noticed before. Id. Baker got the impression Horne was on a schedule when he remarked after her return that he had "some time" to waste. 2RP 103.

Horne secured Baker's youngest child in a highchair, and directed her oldest to stay in front of the television and watch a show. 2RP 104-05. Horne then told Baker he needed to bind her hands, so she let him zip tie her hand together. 2RP 107.

The next thing Baker recalled was Horne slicing her throat, pushing her over and then laying on top of her as she bled, struggled and attempted to scream. 2RP 108-10. After about 20 to 30 seconds, Horne got off of her, but then fired his revolver, after which she remained still despite not being hit by a bullet. 2RP 110-11.

Baker looked up in time to see Horne getting into her Tahoe. 2RP 112. She went outside, remaining back enough so Horne would not see her, and made her way into the cul de sac in search of help as Horne drove away. 2RP 112-13. A neighbor, Bob Long, saw Baker was hurt and cut the zip ties off and had her hold pressure on the wound while aid was summoned. 2RP 114-15. Baker, who was unable to speak as a result of the wound and was having difficulty breathing, lost consciousness when

aid arrived. 2RP 114-16. Baker spent six days hospitalized, and had a tracheotomy tube in place for two months. 2RP 117.

Long had seen a man driving Baker's Tahoe away shortly before seeing Baker coming towards him. 2RP 122. He had his wife call 911 while he helped Baker. 2RP 122-23. Long also saw the Tahoe headed south away from the neighborhood driven by a man meeting Horne's description. 2RP 123; Ex. 34. Long described both the Tahoe, which had a distinct dent, and the driver to 911. 2RP 122, 127-28.

At 10:05 a.m., a 911 operator received a hoax call from a cell phone reporting a man was shooting people at Ferndale High School. 2RP 188-89, 735-36; Ex. 52. Six minutes later, at 10:11 a.m., 911 received another hoax call from the same cell phone, this time reporting a man with a gun was robbing the Bellingham Home Depot. 2RP 189, 329; Ex. 53.

The phone from which the hoax calls were made was never recovered. 2RP 736. It was determined, however, that the calls were made from approximately the same location, which is near a company in Ferndale called "Hertco." 2RP 328-30.

Horne's ex-wife recognized the caller's voice claiming there was a shooter at the high school as that of her ex-husband. 2RP 191, 195. A voice recognition expert identified the caller's voice reporting the robbery

at Home Depot as that of Rocky Chervenock,⁹ the estranged husband of Jessica Chervenock, who was in a relationship with Baker at the time. 2RP 38, 712. The expert agreed the first caller was Horne. 2RP 712.

City of Blaine Police Chief Michael Haslip heard the report of a shooter at Ferndale High School and responded along with other law enforcement agencies. 2RP 138-40. On his way to the high school Haslip learned of a stabbing on Patriot Lane. 2RP 141. Haslip also learned one of the aid cars responding to the Patriot Lane incident reported spotting the suspect's vehicle, and that another law enforcement officer, Deputy Ryan Rathbun, was involved in locating the vehicle, so Haslip went to provide back-up to Rathbun. 2RP 142-43. Unbeknownst to Haslip, on his way to the area he ended up behind Horne in Baker's Tahoe. 2RP 144. It wasn't until Rathbun passed Haslip and pull in between him and the Tahoe that Haslip realized he had been following the suspect vehicle. Id.

After passing Haslip, Rathbun employed a "precision intervention technique" to stop Horne. 2RP 165. By the time he and Haslip could get to Horne, however, he was unconscious with a severe head wound from which he eventually died. 2RP 151, 168. The medical examiner listed the cause of death as self-inflicted gunshot wound to the head. 2RP 405.

⁹ A Google search for "Rocky Chervenock" reveals he works at Hertco in Ferndale, nearby where the hoax 911 calls were made. See <http://www.zoominfo.com/p/Rocky-Chervenock/2075719361>

(d) *The Subsequent Investigation*

Inside the Tahoe law enforcement found a black duffle bag big enough to hold the other items found in the vehicle, including a large knife, a revolver with two spent cartridges, zip ties, duct tape, a cell phone and a gallon of bleach. 2RP 168, 171, 217, 488, 522, 546. The cell phone was used to figure out Horne's identity by calling its preprogrammed telephone numbers until someone recognized the number. 2RP 217-18. One of the numbers connected to Jamie Cumbia, Horne's sister, who recognized the call as coming from Horne's cell phone. 2RP 218. Jamie then put Villatoro on the phone, who confirmed it was Horne's cell phone, that she lived with him in the Cumbias garage in Blaine, and explained he had gone to visit a friend in the morning, but failed to meet up with her as planned and she did not know where he was. 2RP 218-20. The officer lied to Villatoro, claiming they had recovered the phone as lost and were trying to figure out who it belonged to. 2RP 219.

After Villatoro was identified, several law enforcement officers, went to the Cumbia home in Blaine to speak with her at about 6:30 p.m. 2RP 220, 333; Dep. at 96-97. While at the home law enforcement also search Villatoro's car, and in the trunk they found a full five gallon gas can, a full gallon of bleach, and a backpack containing what appeared to be clothes and shoes for Horne and a police scanner. 2RP 539-43. Four

lighters were also found in the car's center console, but nothing to indicate anything was ever smoked in the car. 2RP 564-65, 742.

Utilizing Facebook posts between Horne and Villatoro, and the UPC codes off the bleach bottles and gas can, law enforcement obtained surveillance video from both a local Walmart and a Target store depicting Villatoro and/or Horne purchasing various items of interest in the investigation. For example, a video from Target shows Horne, alone, buying a gallon of bleach at about 1:15 pm on May 1, 2014, and placing it in the trunk Villatoro's car. 2RP 599-600, 602-03; Ex. 131.

Another video from Walmart at 1:33 p.m. on April 23, 2014, shows Villatoro by herself purchasing milk, bananas, some crayons, a five gallon gas can and a black duffle bag. 2RP 622, 746; Ex 134. A Facebook message exchange between Villatoro and Horne while she was at the store that day indicates she sought Horne's approval to spend \$17 on the gas can. 2RP 746: Ex. 148.

Another Walmart video at 11:37 a.m. on April 21, 2014, shows Horne, Villatoro and their twin toddlers purchasing bleach, a black duffle bag, some candy and various other items. 2RP 621-22: Ex. 135.

There is also a still photograph taken at an AM/PM store on May 1, 2014, depicting Horne alone appearing to fill a container in the trunk of Villatoro's car with gasoline. 2RP 834-35; Ex. 162.

(e) *Defense Motion to Dismiss*

After both parties rested (2RP 882, 891), defense counsel moved to dismiss the prosecution in its entirety. Counsel argued the prosecution failed to present substantial evidence sufficient for a jury to find all the elements of any charged offense had been proved beyond a reasonable doubt. In particular, counsel noted the lack of evidence that Villatoro had actual knowledge of Horne's criminal plans on May 2nd. 2RP 892-910.

The court asked the prosecutor what evidence supported finding Villatoro had actual knowledge Horne planned to kidnap Baker's two young children. 2RP 913. The prosecutor responded that from the multiple sets of zip ties Horne took to Baker's home, a jury could reasonably conclude Villatoro had actual knowledge Horne was prepared to kidnap whoever was in the home provided the jury found she was aware of the plan to kill Baker and knew what he took with him. 2RP 913-16.

The court denied the defense motion to dismiss, agreeing with the prosecution that if the jury accepted the prosecution's theory of the case, it could find Villatoro had advance knowledge of the crimes Horne planned to commit. 2RP 918-23. In so ruling, the court commented on the lack of evidence about why Villatoro would have assisted Horne in his crimes, noting "We can speculate. The jury will have to decide whether that's important to them, . . ." 2RP 920.

(f) *Closing Arguments*

In closing remarks, the prosecution theorized Horne and Villatoro were engaged by Rocky Chervonock to kill Baker, because she was having an affair with his wife and ended his marriage. 2RP 1007-08, 1016, 1166. The prosecution recognized that to convict Villatoro, it had to prove she had both knowledge of the plan to kill Baker and the intent to assist. 2RP 1004-05. In arguing it met its burden, the prosecution emphasized the following evidence in closing:

- Jamie Cumbia's claim that Horne and Villatoro had no friends, and did not socialize much, even with the Cumbias despite living in their garage, and instead they spent virtually all of their time together. 2RP 1007, 1160.
- Horne, who was depicted on recent store videos wearing shorts and a light-colored t-shirt, was wearing black pants, a black hoodie and black shoes on May 2nd, and Villatoro was aware of his alleged abnormal attire when she dropped him off. 2RP 1010-11.
- Villatoro knew Horne got something out of the trunk of her car when she dropped him off because he had her open the trunk when he got out. 2RP 1011.
- Villatoro's admission she was at a park near W. Smith Rd. and heard a siren allegedly at about the time Horne drove by the park being chased by police. 2RP 1025, 1033, 1047.
- Villatoro's denial that she and Horne had a black duffle bag, when there was video from the week preceding the incident showing her

both buying one while with Horne, and another without him. 2RP 1041-43, 1155-56, 1162.

- Villatoro's purchase of a five-gallon gasoline can and the associated messaging between her and Horne about the cost of the can and "getting the other stuff." 2RP 1044, 1156-57.
- The two gallons of bleach, one purchased by Horne on his own and another purchased when Horne and Villatoro when together. 2RP 1044-45.
- The discovery of the full five-gallon gasoline can, gallon of bleach, change of clothes for Horne and a police scanner in the trunk of Villatoro's car after the incident. 2RP 1045.
- Villatoro's internet searches after the incident, which included viewing a story about a man shooting himself after a police chase, despite not having looked at the news with such frequency in the preceding month, and a search of Horne's name on Google at one point. 2RP 1047-49

The prosecution urged the jury to infer from this constellation of evidence that Villatoro must have known about the plan to kill Baker. In particular, the prosecution placed substantial emphasis on Villatoro's failure to acknowledge she and Horne had recently purchased black duffle bags, one of which the prosecution claimed was the receptacle for the "murder kit." 2RP 1011-12, 1016, 1035-36, 1038-45, 1155-57, 1162. As to Villatoro's exculpatory exchange with Jamie Villatoro throughout the afternoon, the prosecution claimed it was merely Villatoro's attempt to create exculpatory evidence. 2RP 1046-50, 1166, 1169.

Defense counsel argued the prosecution's reliance on the "duffle-bag-lying explanation" revealed how truly weak the State's case was. 2RP 1060. Counsel noted that under the circumstances - she was being questioned on what was undoubtedly the worst day of her life - her failure to recall buying a duffle bag a week before was not the smoking gun the prosecution wanted it to be, particularly in light of the failure of the detectives to better flesh out her knowledge on duffle bags. 2RP 1060, 1064-65. Counsel suggested the duffle bags were likely purchased for their children in anticipation of the upcoming move back to Arizona. 2RP 1065, 1106. Finally, counsel noted that when Villatoro was asked about the duffle bags, it was when the detectives had been questioning her about what Horne bought on April 30th, for which there is no evidence duffle bags were purchased. 2RP 1145-46.

As for Villatoro's ongoing conversation with Jamie Cumbia the day of the incident, counsel urged the jury to consider whether Villatoro struck them as a person able to engage in such a conversation with relative calm, knowing all along Horne was dead. 2RP 1114-21.

With regard to the bleach, change of clothes and police scanner, defense counsel noted there was no evidence showing Villatoro was aware they were in the trunk, and noted that if Villatoro was really guilty, it would be odd that she could put on such a convincing act of ignorance

about the situation for Jamie and the detectives, yet fail to take the obvious step of removing those items before police arrived. 2RP 1121-23.

In conclusion, defense counsel noted the evidence relied on by the prosecution to claim Villatoro must have acted as an accomplice to the attempted murder of Baker was at least as indicative of innocence as it was of guilty. Counsel argued that the prosecution's evidence failed to overcome the presumption of innocence, and that in order to convict jurors would have to engage in unfounded speculation. 2RP 1146-54.

(g) *Deliberations*

Following closing arguments, the court released the two alternate jurors who had been seated with instruction not to discuss the case with anyone until notified by the court that a verdict was reached. 2RP 1172-73. As to the remaining jurors, the court explained:

For the rest of you, it's time now for you to begin deliberations, so I'm going to adjust my instructions to you. You may discuss the case amongst yourselves. Obviously, you have to in order to deliberate. You may share your notes. All of the information is available to each and every one of you while you deliberate.

At any time when you are out of the courthouse, if you do not reach a verdict by the end of the day, you may go home. All the other instructions that I've given you about not talking to anyone else, not let anybody talk in your presence about it, looking for information, gathering information from anyplace, those will still stay in place, and they will continue to apply to you until you reach a verdict.

2RP 1173.

On the sixth day of deliberations, the court informed the parties that after the parties had left the previous day, having been summoned to court to discuss how to respond to a jury inquiry, "and after some of the jurors had left for the evening[,]" the presiding juror informed the court in writing:

This has been brought to my attention. We have a juror who appears to have had 2 small seizures (Friday and today). When asked by a juror if he has a seizure history he said yes. This trial is especially emotional for him and he has cried twice. Worried about his health.

CP 250; 2RP 1192. The court noted that the presiding juror was referring to "Juror Number 6[,]" and that the bailiff had informed the court Juror 6 had fallen down when entering the courthouse that morning, but was declining to go to the hospital, apparently stating that he wanted to continue with deliberations, but had not yet made a final decision. 2RP 1192. Later that morning the court informed the parties that Juror 6 had been taken to a hospital and therefore could no longer serve. 2RP 1195. An alternate juror was then chosen, who arrived later that morning to serve. 2RP 1197. The court then addressed the reconstituted jury, instructing them to "disregard all previous deliberations and begin deliberations again with the new juror. So I will release you to begin your deliberations in the jury room. Good luck." 2RP 1199.

The following day, at 9:40 am, the jury submitted a request asking if the newly seated juror could view the audio recording of Villatoro's May 2nd interview, which the other jurors had already reheard two days prior. CP 251; 2RP 1190-91, 1201. At the request of the parties, the entire jury was brought into court to rehear the interview. 2RP 1201-04.¹⁰

On Friday, February 20th, the jury found Villatoro guilty as charged. CP 253-58; 2RP 1209-14.

C. ARGUMENTS

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT VILLATORO OF ANY OFFENSE.

The evidence is insufficient to convict Villatoro of any offense. This is because the prosecution failed to prove beyond a reasonable doubt that Villatoro had actual knowledge of the crimes Horne intended to commit, or that she was knowingly prepared to or did knowingly assist him in committing those offenses. Although there is evidence Villatoro purchased items that might 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 that Villatoro knew when she dropped Horne off that he intended to force his way into Baker's

¹⁰ Later that day, the court responded to another jury inquiry after reaching consensus of the parties regarding a correction to one of the to-convict instructions. CP 252; 2RP 1204-08.

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 failed to do, reverse and dismiss all of the 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 of the United States Constitution 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 prosecution, 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).

To convict Villatoro as an accomplice to attempted first degree murder, the prosecution had to prove beyond a reasonable doubt:

- (1) That on or about the 2nd day of May, 2014, the defendant [or an accomplice¹¹] did an act or was an accomplice to an act that was a substantial step towards commission of Murder in the First Degree;
- (2) That act was done with intent to commit Murder in the First Degree; and
- (3) That the act occurred in the State of Washington.

CP 224 (Instruction 15).

To convict Villatoro as an accomplice to first degree burglary, the prosecution had to prove beyond a reasonable doubt:

- (1) That on or about the 2nd day of May, 2014, the defendant or an accomplice entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice was armed with a deadly weapon or assaulted a person; and
- (4) That any of these acts occurred in the State of Washington.

¹¹ The "or an accomplice" language was omitted from this instruction, but the jury noticed its absence and were directed by the court to add it to the instruction. CP 252.

CP 229 (Instruction 20).

To convict Villatoro as an accomplice to the first degree kidnapping of Jessica Baker, the prosecution had to prove beyond a reasonable doubt:

(1) That on or about the 2nd day of May, 2014, the defendant or an accomplice intentionally abducted S.R.B.^[12];

(2) That the defendant abducted the person with intent

(a) to facilitate commission of Murder in the First Degree or flight thereafter,

or

(b) to inflict bodily injury on the person;

and

(3) That any of these acts occurred in the State of Washington.

CP 232 (Instruction 23).

To convict Villatoro as an accomplice to the first degree kidnappings of Baker two young children, E.B. and J.B., the prosecution had to prove beyond a reasonable doubt:

(1) That on or about the 2nd day of May, 2014, the defendant or an accomplice intentionally abducted [E.B. or J.B.];

¹² The to-convict instructions for the three kidnapping charges identified the complaining witnesses by initials instead of by name. CP 232-35 (Instruction 23-25). In closing, the prosecutor identified for the jury who the initials in each instruction stood for. 2RP 1023.

(2) That the defendant or an accomplice abducted that person with intent to facilitate commission of Murder in the First Degree or flight thereafter, and

(3) That any of these acts occurred in the State of Washington.

CP 234-35 (Instructions 24 and 25).

The jurors were also instructed:

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, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 224 (Instruction 14)

In order to be an accomplice, however, an individual must 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 particular 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 well short of establishing Villatoro's guilt as an accomplice to any of

Horne's crimes. There is no direct evidence Villatoro participated directly in any of Horne's criminal acts.¹³ There is also no direct evidence Villatoro had any knowledge Horne intended to commit any crimes on May 2nd, 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, purportedly to visit with his friend "John," 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 in mid-April when Horne purchased items he took to Baker's home on May 2nd, 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.

Not surprisingly, the prosecution's explanation during closing argument for why Villatoro was an accomplice to Horne's crimes was thin on substance, and ultimately required jurors to make purely speculative leaps of logic in order to arrive at the necessary factual finding.¹⁴ 2RP 920. For

¹³ 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.

¹⁴ 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.

example, the prosecution placed great emphasis on Jamie Cumbia's claim Villatoro and Horne had no friends, did not socialize and spent every minute together, arguing it meant Villatoro must have known Horne's plans to kill Baker because they did everything together. 2RP 1007, 1160. The prosecution's claim goes too far. It encourages jurors to unreasonably infer 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 plans to kill Baker because she admitted being aware on May 2nd that Horne wore a black hoodie, black pants and black shoes. Based on how he appeared in two store videos from mid-April, 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 for that person, or 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 very fact meant to be inferred, i.e., it requires assuming Villatoro knew Horne's plan to kill because the sirens heard 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 purchased by Villatoro and associated message exchange between her and Horne also fails to provide the link needed to show beyond a reasonable doubt that she was in cahoots with Horne's attempt to kill Baker. Although the prosecution speculates the gas can was purchased so gas could be used to destroy 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 as a basis to show 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 plan to kill Baker 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. In fact, the Washington State Crime Laboratory uses it to clean their instruments. 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 Horne planned to kill Baker 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.

There was more evidence presented linking Rocky Chervonock to the attempt on Baker's life than there was to link Villatoro. Rocky made the first of two hoax 911 calls, which, when combined with his status as the estranged husband of Baker's lover, provides a strong inference he knew about Horne's efforts to kill Baker and actively assisted. 2RP 712.

On the other hand, there is no evidence Villatoro had any knowledge of Horne's plans, or that she was prepared to assist. Instead, at most the evidence shows she knew after-the-fact she had dropped Horne off near where some unusual events were occurring later in the day, that she was concerned she had not heard from him, and relayed her ever heightening concern to Horne's sister throughout the day while she cared for the children. She did not flee, she did not remove seemingly incriminating evidence from the trunk of her car, she did not attempt to contact Rocky, she did nothing to indicate she had knowledge of Horne's criminal intentions on May 2, 2014, or that she was prepared to assist with those intentions in any way. There is simply no evidence, direct or circumstantial, from which to reasonable infer Villatoro possessed such knowledge and intent.

Guess, speculation and conjecture were required for the jury to convict Villatoro as an accomplice to Horne's crimes. This violated Villatoro's due process rights because it unfairly relieved the prosecution of its burden to prove every element of every charged offense beyond a reasonable doubt. Winship, 397 U.S. at 364. Because the prosecution failed to overcome the presumption of innocence and establish Villatoro was guilty as an accomplice to any of the charge crimes, this Court should vacate her judgment and sentence and dismiss the charges with prejudice.

See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

2. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY DELIBERATIONS MUST INCLUDE ALL TWELVE JURORS AT ALL TIMES DEPRIVED VILLATORO OF A FAIR TRIAL AND UNANIMOUS JURY VERDICTS.

By failing to instruct that deliberations must involve all twelve jurors collectively at all times, the trial court violated Villatoro's right to a fair trial and unanimous verdicts. This Court should therefore reverse and remand for a new trial.

In Washington, criminal defendants have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22¹⁵; State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential element of this right is that the jurors reach unanimous verdicts,

¹⁵ 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 in which the offense is charged to have been committed and the right to appeal in all cases: . . .

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

The Washington Supreme 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."

State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting Collins, 17 Cal.3d at 693).

This heightened degree of unanimity necessitates, for example, that when a deliberating juror is replaced, the reconstituted jury must be instructed to begin deliberations anew, as occurred here. 2RP 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 instruct the jury on the constitutionally required format for deliberating towards a unanimous verdict is an error of constitutional magnitude that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

Sometimes jurors receive instructions that touch on the need for this heightened degree of unanimity, such as in California, where at least one jury was instructed they "'must not discuss with anyone any subject connected with this trial,' and 'must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.'" Bormann v. Chevron USA, Inc., 56 Cal. App. 4th 260, 263, 65 Cal. Rptr. 2d 321, 323 (1997) (quoting BAJI No. 1540, a standardized jury instruction); see also, United States v. Doles, 453 F. App'x 805, 810 (10th Cir. 2011) ("court instructed the jury to confine its deliberations to the jury room and specifically not to discuss the case on breaks or during lunch."). In this regard, the Washington Supreme Court Committee on Jury Instructions recommends trial courts provide an instruction at each recess that includes:

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well — you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

WPIC 4.61.

The Committee also recommends an oral instruction following jury selection explaining the trial process, and includes the following admonishment about the process after closing arguments are made:

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. “No discussion” also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

WPIC 1.01, Part 2.

The same instruction also provides:

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

Id.

The Committee has also prepared a Juror Handbook. WPIC Appendix A. It advises readers that as a juror, "DON'T talk about the case with anyone while the trial is going on. Not even other jurors." Id., at 9. It does not contain, however, an admonishment that deliberation must include all twelve jurors at all times.

These WPIC-based admonishments, if provided, make clear that deliberations may only occur after all the evidence is in, and only then when jurors are in the jury room. What they failed to make clear is that any deliberations must involve all twelve jurors.

Thus, for example, in a four-count criminal trial, the pattern instructions do not prohibit the presiding juror from assigning three jurors to decide each count, with the understanding the other nine jurors will adopt their conclusion on that count for purposes of the unanimous verdict requirement. While such a process might reasonably be calculated by jurors to help them speed up the deliberative process, it cannot lead to a valid verdict because it violates the constitutional requirement that deliberations leading to a verdict be "the common experience of all of [the jurors]." State v. Fisch, 22 Wn. App. at 383.

Here, the instructions the court did provide to Villatoro's jury fail to make clear what the constitution requires; that deliberation occur in the

jury room, only then when all twelve jurors were present, and only as a collective instead of in groups of less than twelve. For example, following jury selection and before any evidence was heard, the trial court instructed the jury in a manner somewhat similar to that set forth in WPIC 1.01, Part

2. 2RP 17-32. It included the following passages:

Until you are in the jury room for those deliberations, you must not discuss the case with other jurors or anyone else, or remain within hearing of anyone discussing it. No discussion also means no email, text messaging, blogging or any other form of electronic communications.

2RP 19.

As I cautioned you, do not discuss the case amongst yourselves; I'm also going to caution you not to read each other's notes. Keep them to yourselves. You may share them once deliberations begin, but not until that time. . . .

2RP 23.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberations, and that includes your fellow jurors or anyone else. As I said, you may do so during your deliberations but not until then.

2RP 24.

Similarly, at a little under half the recesses during trial, the trial court reminded the jury, "do not discuss the case amongst yourselves or with anyone else or allow anyone to discuss it in your presence," or with very similar verbiage. 2RP 44, 152, 235-36, 262, 503, 591, 676, 759, 864,

892; 4RP 239. But the court did not follow the recommendation to read WPIC 4.61 at every recess, and failed to give any such admonishment at over half of the recesses taken by the jury. See e.g., 2RP 120, 174, 186, 260, 396, 467, 549, 573, 604, 626, 723, 836 (no admonishment given);

In the written instructions provided at the conclusion of trial, the court informs the jury "During your deliberations, you must consider the instructions as a whole." CP 210 (last page of Instruction 1). And the following instruction informs the jury that they "have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 211 (Instruction 2).

Instruction 7 reminds the jury it may not stray from the dictates of the instructions and may not consider information not admitted at trial. CP 216. It also provides: "Until you are released from this jury, you may not communicate to anyone, other than your fellow jurors, about this case." Id.

Instruction 29 instructed the jury how to initiate and carry out the deliberative process. CP 240-42. Like the first two instructions, Instruction 29 also reminds the jurors they each have the right to be heard during deliberations. CP 240.

Missing, however, are any written or oral jury instructions informing the jury of its constitutional duty to deliberate only when all

twelve jurors are present, and only as a collective. Nor does it reveal the court ever admonished the jurors that they were precluded from discussing the case with anyone during any recess, as recommended by WPIC 4.61 ("During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends."). To the contrary, Instruction 7 informs jurors they are free to talk about the case amongst themselves once deliberations commenced, with no restriction that it only be when all twelve are present. CP 216. Likewise, the court's oral instruction at the conclusion of trial informed jurors the prohibition of discussing the case amongst themselves was lifted, but they were still barred from discussing it with others. 2RP 1173.

The court's failure to instruct the jury that deliberation may only occur when all 12 jurors are present and only as a collective constituted manifest constitutional error. Lamar, 180 Wn.2d at 585-86. This error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. Lamar, 180 Wn.2d at 588 (citing State v. Lynch, 178 Wash.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 had the error not occurred. 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 because the prosecution cannot meet its burden to show harmlessness.

That Villatoro's jurors had opportunities for improper deliberations is not just theoretical. For example, the record shows that only some jurors had left towards the end of the fourth day of deliberations, when the presiding juror informed the court about Juror 6's apparent seizure and fragile emotional state. CP 250; 2RP 1192. That some of the jurors had left and others remained before communicating concerns about Juror 6 to the court raises the specter that either group - those who remained or those who did not - could have engaged in deliberations without the others.

Similarly, the next morning all of the jurors convened for deliberations except Juror 6, who had fallen at the courthouse and was eventually hospitalized. 2RP 1192, 1195. Although an alternate juror was subsequently seated and the jury instructed to begin deliberations anew, there is a reasonable likelihood the eleven jurors that were there discussed

the case amongst themselves before the alternate arrived because they had been instructed that was allowed. CP 216 (Instruction 7).

Like the original jury, over the three days it took the reconstituted jury to reach verdicts, jurors had the opportunity to deliberate in collectives of less than all 12 jurors. See 2RP 1199 (court instructions reconstituted jury to begin deliberations anew on February 18, 2015) and 2RP 1209-12 (guilty verdicts entered on February 20, 2015). There is also the very likely scenario of one or more jurors leaving to briefly use a bathroom or make a phone call while the remaining jurors continued to discuss the case. The record fails to show the jury was ever properly instructed not to engage in such improper deliberations. As such, the jury was ignorant as to how to reach constitutional unanimity.

In light of the court's written and oral instructions, which only limited their ability to discuss the case to fellow jurors, there is a reasonable possibility some jurors discussed the case without the benefit of every other juror's presence, whether by phone, over lunch, simply walking to and from the jury room, or even in the jury room itself. Nothing informed them such discussions were not allowed. There was nothing provided to inform them their verdicts must be the product of "the common experience of all of them." Fisch, 22 Wn. App. at 383. If even just one of the jurors was deprived of deliberations shared by the other

eleven, then the resulting verdict is not "unanimous." Lamar, 180 Wn.2d at 585; Collins, 17 Cal.3d at 693. This Court should reverse and remand for a new trial. Lamar, 180 Wn.2d at 588.

3. THE TRIAL COURT VIOLATED CrR 3.6 BY FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Trial courts are required to enter written findings of fact and conclusions of law after a hearing on a motion to admit an accused's statements or to suppress evidence. CrR 3.5(c); CrR 3.6 (b); State v. Hickman, 157 Wn. App. 767, 771 n.2, 238 P.3d 1240 (2010); State v. Tagas, 121 Wn. App. 872, 90 P.3d 1088 (2004). The trial court and prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1(d), which requires entry of written findings of fact and conclusions of law after bench trial). The purpose is to have a record made to aid the appellate court on review. State v. Pulido, 68 Wn. App. 59, 62, 841 P.2d 1251 (1992) review denied, 121 Wn.2d 1018 (1993). When the trial court fails to enter findings and conclusions, "there will be a strong presumption that dismissal is the appropriate remedy." State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997) (quoting State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992); cf. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (trial court's failure to enter written findings and

conclusions mandated by CrR 6.1(d) required remand for entry of findings and conclusions).

This Court should remand for entry of the required findings. Head, 136 Wn.2d at 622-23; State v. Austin, 65 Wn. App. 759, 761, 831 P.2d 747 (1992) (trial court failure to enter a finding on an element of the crime warrants remand for appropriate findings).

4. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Villatoro "is indigent and cannot pay any of the costs of the appeal and" therefore she was entitled to appointment of appellate counsel and production of an appellate record at public expense. Supp. CP __ (Sub. No. 123D, Order Authorizing Appeal In Forma Pauperis, Appointment of Counsel, filed March 24, 2015). If Villatoro does not prevail on appeal, she asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting

such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Villatoro's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding here, concluding instead, "she would have practically no ability to pay [non-mandatory fees] and other legal financial obligations," so it instead waived all non-mandatory fees, including court costs and fees for a court-appointed attorney. CP 331-32; 3RP 106.

Without a basis to determine that Villatoro has a present or future ability to pay, this Court should not assess appellate costs against her in the event she does not substantially prevail on appeal.

D. CONCLUSION

The evidence was insufficient to convict Villatoro of any charged crime. Reversal and dismissal is required. And even if this Court concludes there was sufficient evidence to convict, the trial court's failure to properly instruct the jury on how to deliberate in a constitutionally valid manner requires reversal and remand for a new trial.

DATED this 2nd day of June 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'C. Gibson', written over a horizontal line.

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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73332-0-1
)	
LESLEY VILLATORO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2ND DAY OF JUNE 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LESLEY VILLATORO
DOC NO. 381597
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACICH ROAD NW
GIG HARBOR, WA 98332

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF JUNE 2016.

X *Patrick Mayovsky*