

73332-0

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No. 73332-0-I

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

STATE OF WASHINGTON, Respondent,

v.

LESLEY VILLATORO, Appellant.

FILED
Oct 06, 2016
Court of Appeals
Division I
State of Washington

AMENDED BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether, taking the evidence in the light most favorable to the State, there is sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was an accomplice to, i.e., knowingly assisted in, her boyfriend's commission of attempted murder, first degree burglary, three counts of first degree kidnapping and first degree robbery where the boyfriend's commission of those offenses is indisputable; the defendant lived with her boyfriend and they spent virtually all their time together; they were financially destitute; they were planning on moving back to Arizona; defendant purchased items that were used in the commission of those crimes within a two week period beforehand, items they did not normally have or use at home; defendant communicated with her boyfriend about the purchase of one of those items before buying it; defendant drove her boyfriend to the scene of the crimes in her car along with a black duffle bag that had in it a large buck knife, flex cuffs, duct tape, a black mask, ammunition for her boyfriend's gun which defendant knew he owned; where the boyfriend wore all black including black pants and a black hoodie even though it was a nice spring day and the boyfriend usually wore a white shirt and had worn a white t-shirt and shorts within the two weeks beforehand; defendant waited for her boyfriend at a nearby church parking lot, as they had pre-arranged, along with a full gas can, a change of clothes for her boyfriend, a bottle of bleach, gloves and a police scanner in the car; during the commission of the crimes her boyfriend said "Yeah, I have some time here;" where the boyfriend drove away the victim's black Tahoe that had been parked out front and made one of two hoax 911 calls to divert police attention from the crimes, stayed within a couple mile radius of the crime scene and then drove by the church lot where defendant was supposed to be waiting when he was being chased by police; where defendant left the church lot to go home after hearing sirens and after returning home went online and looked up a local news website, a site she

had never visited the entire previous month, and saw an article about an incident involving a police chase and the black Tahoe in the area she had just been, and later did a Google search on his name, but where she never told her boyfriend's sister, with whom they were living and she had been communicating with the entire afternoon about her concern for his whereabouts, that she had done those online searches; where she told police she had seen her boyfriend put a duffle bag into the car but denied that she had seen him remove it and where she denied that they had this duffle bag; where she told police that they had recently been in the area of the crime scene because they had been looking at houses because they wanted to move out of where they were living, although they were planning on moving to Arizona the next month; and where defendant initially told a detective that they had gone to a park first and that her boyfriend had walked away from the park, while later telling other detectives that she had driven him right to the house where the victim lived, though she claimed she didn't know what house her boyfriend went to, and that her boyfriend was visiting a person named John, a person whom her boyfriend hadn't had contact with in the last two years.

2. Whether the defendant has demonstrated a manifest error of constitutional magnitude such that she may raise an alleged violation of her right to a unanimous jury from the court's failure to instruct the jury that it had to deliberate collectively *at all times* where the court instructed the jury not to discuss the case with anyone, including one another, until the time for deliberation, where the court cautioned the jury not to discuss the case multiple times throughout the case, where the jury was told to disregard all deliberations and begin anew when a juror had to be replaced with an alternate, and where the jury was polled and found to be unanimous and there is no evidence in the record that the jurors did not deliberate collectively at all times.
3. Whether the case should be remanded for entry of findings of fact and conclusions of law regarding a defense motion to suppress where those findings of fact have been tentatively entered, pending approval from the Court for their entry.
4. Whether appellate costs should be awarded in this case where the State has indicated it will not seek such costs if it prevails on

appeal given that the defendant was on public assistance at the time of the crimes, her lengthy sentence and that the sentencing judge only imposed the mandatory fees.

C. FACTS

1. Procedural facts

Appellant Lesley Villatoro was charged, as an accomplice, with one count of Attempted Murder in the First Degree, Burglary in the First Degree, three counts of Kidnapping in the First Degree, and one count of Robbery in the First Degree, for acts she and her boyfriend committed on or about May 2nd, 2014. CP 3-6, 14-17, 40-43. Each charged count carried a deadly weapon and a firearm enhancement. CP 3-6, 14-17, 40-43. Villatoro was found guilty by a jury and sentenced to a mitigated downward exceptional sentence of 525 months. CP 253-58, 326-43. Villatoro filed a motion for new trial based on insufficiency of the evidence as well as some issues regarding the jury. CP 259-60, 278-95. The court denied that motion. CP 325.

A CrR 3.6 hearing was held that continued into the trial, but no findings related to it were entered at that time. CP 64, 68-71. The prosecutor has since drafted, and the trial judge has approved, the findings regarding the suppression motion. (Appendix A). The State has filed a motion with this Court pursuant to RAP 7.2 to permit entry of those findings.

2. Substantive Facts

On May 2nd, 2014 Chad Horne, gun in hand, forced his way into Stephanie Baker's home in Ferndale, bound her hands with zip tie flex cuffs¹, placed her 22 month old in a high chair in another room, directed her five year old to stay in another room, slit Baker's throat with a seven inch blade knife, shot at her with a revolver, and then left in her Tahoe SUV. RP 525. Unbeknownst to Horne, Baker managed to open her front door with her hands tied and seek help at a neighbor's. Baker lost 50-75 percent of her blood and was lucky to survive the attack. RP 257. Horne, on the other hand, seen nearby in Baker's Tahoe shortly afterwards, was chased by police and ended up killing himself after the officers performed a PIT maneuver to stop the Tahoe. RP 164, 168-69. Inside the Tahoe on the passenger seat was a bottle of bleach, and on the passenger floorboard was a black duffle bag that Baker had seen with Horne when he had tried to kill her, with a black mask on top of it. RP 521-22, 529, 734. Inside the black duffle bag was the knife² in its sheath, 45 caliber ammunition, duct tape and three more pairs of flex cuffs³. RP 171, 522; Ex. 39, 89-91.

¹ Flex cuffs are interwoven zip ties. RP 519-20.

² The knife had blood on it that matched Baker's DNA. RP 488-89.

³ Another set of flex cuffs was found outside the Tahoe after Horne was removed from the Tahoe. RP 526.

Horne lived with Villatoro, their infant twins and Villatoro's school age daughter Kailey⁴ in Horne's sister's garage in Blaine. CP 358⁵, 361. They had first moved in with Horne's sister, Jamie Cumbia, and her husband Chris in August 2012 for about 6 months because they were having financial difficulties living in Arizona. CP 357. Horne worked for Home Depot for a few months during this six month period in Washington. CP 358. Horne and Villatoro didn't have any friends they socialized with during this time and spent most of their time together. CP 359-60.

Horne and Villatoro left Washington State but returned in August 2013 with their infant twins. They lived again with the Cumbias rent free in exchange for looking after the Cumbias' four year old son Justin⁶. CP 358-62. Both Horne and Villatoro didn't work. CP 363. Chris had gotten Horne a job, but Horne quit after one day. CP 363. Neither had any financial means aside from public assistance, though Villatoro went to school to obtain grant checks. CP 363-64, 389. Horne and Villatoro didn't have any friends in the area, spent virtually all their time together and

⁴ Kailey had a different father. CP 358, 363.

⁵ The videotaped deposition of Jamie Cumbia was played for the jury, but apparently the tape was not admitted into evidence. The transcript was filed with the court, and the references refer to the clerk's paper numbers assigned to the transcript. It appears the videotaped deposition was designated twice. CP 90-146, 350-456. The State's references are to the second set of clerk's papers numbers.

⁶ The Cumbias also had two school age children. CP 361.

were always in contact with one another. CP 359-60, 374, 385-87. They didn't even spend much time with Jamie and the Cumbia family even though they were living in the same house.⁷ CP 365-66.

About a month before the day of the attack, Horne told his sister that they were moving back to Arizona on June 1st, but were waiting for Villatoro's school financial aid check before doing so. CP 368. While Horne told Jamie that Villatoro had a financial aid check coming, Jamie never saw them with any such checks and believed their only income came from family gifts and public assistance. CP 368, 398, 451.

Less than two weeks before May 2nd, Horne and Villatoro purchased a black duffle bag at Walmart, a duffle bag that was very similar in appearance to the one that Horne had with him during the attack and in the Tahoe afterwards. RP 751, 832; Ex. 135. They also purchased a roll of duct tape and a bottle of bleach⁸. Ex. 135.

Two days later while Villatoro was at the Walmart pharmacy, Horne texted⁹ Villatoro and asked her whether she was "getting the other

⁷ Horne was pretty close with his sister, though, and they texted back and forth on a daily basis. CP 396.

⁸ Bleach is a sterilizing agent that is very effective at getting rid of DNA. RP 485. While Villatoro and Horne were "big on germs" and used Lysol a lot, they did not use bleach and the Cumbias didn't have bleach in the house. CP 367.

⁹ While Villatoro and Horne both had smartphones, they could not afford to pay for cell phone service, so they sent messages to one another via Facebook when they could access free Wi-Fi. RP 342, 351. These communications will be referred to as text

stuff.” Villatoro responded that she might as well. RP 745, Ex. 148. A few minutes later Villatoro texted Horne, “Gas can \$17 for 5 gallons.” Horne responded, “Awesome.” RP 746, Ex. 148. Villatoro purchased a red gasoline can, another black duffle bag (which appeared to be identical to the other one), as well as miscellaneous other items at that time. RP 622, 747, 831-32; Ex. 134.

One week later on May 1st, Horne’s birthday and the day before the attempt to kill Baker, Horne purchased a bottle of Target brand (Up & Up) bleach. RP 598-99; Ex. 131. Although Jamie offered to watch Horne’s and Villatoro’s twins so they could celebrate his birthday, he declined, claiming he wasn’t feeling well and that they planned on celebrating by going to the Olive Garden the next day for lunch. CP 360, 404-05. That night Horne called his children that lived in Arizona with his ex-wife and told them that he was moving back to Arizona. RP 191, 196-97. Villatoro was aware of this phone call. RP 377, Ex. 59.

The next morning, around 9:30 a.m., Villatoro drove Horne, along with their twins and Justin from the Cumbia residence in Blaine to Baker’s

messages for ease of reference. Villatoro had purchased her cell phone with a financial aid stipend. RP 378; Ex. 59.

house in Ferndale, which took about 25-30 minutes.¹⁰ RP 338, 341, 343-44, 349, 741; Ex. 59. Villatoro dropped Horne off right outside Baker's residence, in a neighborhood off of Smith Road, where the road dead-ended and where Baker's black Tahoe SUV was parked out front in the driveway. RP 33, 37, 42, 353-55; Ex. 58. Horne was dressed in all black, a black zip-up hoodie, black long pants, and black sneakers, even though it was a nice day outside and Horne usually wore a white shirt and had been wearing a white shirt and shorts within the past two weeks. RP 96, 342, 361, 601, 757-58; Ex. 59, 131.

Inside the trunk of the car was the black duffle bag that had the black mask, the Walmart brand bottle of bleach, ammunition for the revolver Horne used, duct tape, zip tie flex-cuffs, and the buck knife that had an over seven inch blade. RP 522, 525; Ex. 89, 90, 91, 118, 734, 748. Villatoro had seen Horne put the duffle bag in the trunk. RP 779. Also inside the trunk was a backpack that had a police scanner and a change of clothes and red sneakers for Horne in it. There was also the Target brand bottle of bleach, the gas can that was now full with gasoline, and two sets

¹⁰ Ex. 49 is a large map of the couple mile area in which the incident, the hoax phone calls and the ensuing chase occurred. A smaller, paper sized version was substituted for the original map, which was returned to the prosecutor.

of gloves¹¹. RP 540-44; Ex. 117, 118, 119, 120, 121, 122, 124. Inside the center console of the car were four lighters¹², even though there was no evidence that Horne and Villatoro smoked. RP 564-65, 741-42. Villatoro and Horne also had no need for a five gallon gasoline can at home. CP 376-77.

Villatoro said the plan that morning was for Villatoro to wait for Horne to take him back home. RP 344. Villatoro told Horne that she would wait for him for about 30 minutes, but then she was going to go home. RP 344-45; Ex. 59. Horne kissed her and told her to pop the trunk. RP 372; Ex. 59. Villatoro knew that Horne had put something in the trunk and had gotten something out of the trunk, but claimed she didn't know what it was. RP 350-52; Ex. 59. The plan was for her to meet up with Horne at the Good Shepherd Church which was a few blocks away. RP 344-45; Ex. 59.

After dropping Horne off Villatoro went to Michael Moore Park, a park that was a couple blocks from the Baker house and fronted Smith Road. RP 353, 357-58; Ex. 49, 140. The park had no trees and was about a 30 second drive from the Good Shepherd Church down Smith road. RP

¹¹ Horne was wearing an additional pair of gloves when he was taken to the hospital and another pair was found on the ground outside the Tahoe, for a total of four pairs of gloves. RP 524-25.

¹² There was at least 2 persons DNA on the lighters, but there was insufficient DNA to run a test. RP 481-82.

358, 362; Ex. 59, 140. Villatoro allowed Justin to play at the park and then drove down to the church parking lot to wait for Horne. RP 361-62; Ex. 59. Within a short period of time Villatoro heard ambulance sirens and left the church parking lot. RP 361-63; Ex. 59. As she was leaving, she could see that the ambulances hadn't gotten very far. RP 363-64, Ex. 59.

Meanwhile, shortly before 10 a.m., Horne had forced his way into the Baker residence by pointing his silver revolver¹³ at Baker. RP 96-97. He had placed his black duffle bag, with the bleach, extra interlocked zip ties, duct tape and ammunition on a bench just outside the front door. RP 102. Once inside, he had told Baker he would not harm her or her children, that he just wanted her car. RP 97. He wasn't interested in anything else in the house despite Baker's offer of her wallet and anything else he wanted. RP 98-99. He directed Baker to start the car while he waited at the front door with her 22 month old daughter. RP 34, 100-01. When Baker returned, Horne seemed concerned about the time and said, "Yeah, I have some time. I have some time here." RP 103. He asked Baker if she had a cell phone and if she had called anyone. RP 103-04. Baker told him she hadn't and gave him the phone, which he looked at for 20-30 seconds. The phone prominently displayed the time. RP 104.

¹³ Villatoro said the gun was a "hand-me-down" from Horne's grandfather and that Horne was not supposed to possess a gun because he had been convicted of armed robbery when he had been a juvenile. RP 346-47; Ex. 59.

Continuing to hold the gun, he took Baker's daughter and put her in the dining area in a high chair and ordered her five year old son to go into the television room and to stay there. RP 104-05, 107. Horne directed her to get on the floor and bound her hands behind her back with the flex-cuffs. RP 107. While she was sitting on the floor near the pool table, Horne reached around her and slit her throat with a knife he had in his left hand. RP 104, 108-09. Baker was bleeding profusely and started to struggle. RP 110-11. Horne laid on her to stop her movement and then got up and shot her with his revolver, but missed. RP 110-11. Thinking she must have been shot, Baker laid still and Horne left. RP 110-12. Realizing she would die if she didn't get help, Baker got up, managed to open the front door and followed the Tahoe as Horne was driving away in it, being careful to make sure Horne didn't see her. RP 111-13. She ran to the yard of her neighbor Bob Long, who was outside and had seen the Tahoe being driven away by a male stranger. RP 114-15, 122-23. Long saw the Tahoe leave the neighborhood by taking a route that would have taken it past Michael Moore Park, where Villatoro had gone with the children. RP 123, 127, 132; Ex. 49. Long's wife called 911 at 10:03 a.m. RP 122.

At 10:05 a.m. Rocky Chervenock¹⁴ made a hoax 911 call claiming there was a person with a gun at Ferndale High School. RP 188, 194, 329, 712; Ex. 52. Rocky was the estranged husband of Jessica Chervenock, a woman Baker had been seeing romantically and who had just spent the night at the Baker residence, but who had left earlier that morning. RP 38-39. Rocky and Jessica were separated and Rocky was aware of Jessica's relationship with Baker, but Rocky didn't want his relationship with Jessica to be over and had made things difficult for Jessica and Baker. RP 86-87. Rocky knew where Baker lived.¹⁵ RP 87.

Rocky's hoax 911 call was made at a location along Hovander Road, near HERTCO, a business where he worked and was working that day. RP 328-30, 631-40, 755. Hovander Road turns into Smith Road and the location was within minutes by vehicle of the Baker residence. Ex. 49; 130. Six minutes later, after Rocky had given that same cell phone¹⁶ to Horne, Horne made a hoax call to 911, claiming there was a guy with a gun at Home Depot. RP 189, 194, 329, 712-13, 754-55; Ex. 53. However,

¹⁴ Appellant states this call was made by Horne and the second one by Chervenock, but it was the other way around. RP 194, 712-13.

¹⁵ Detectives also investigated Rocky and his connection with Horne and Villatoro, but despite serving 70 search warrants and an exhaustive investigation, they didn't uncover any such connection. RP 849-61.

¹⁶ This cell phone was never found despite an exhaustive search for it. RP 222-23. The number for the phone was (360)510-8262. RP 329. Horne had another cell phone, a "cheap prepaid" Alcatel phone that was found on him at the scene where he died. The number for that phone was 510-6078. RP 218, 228, 351, 408.

the dispatcher recognized the cell phone number and cut him off. RP 189; Ex. 53. The call was made within the same vicinity as the first hoax call and probably was made at the same location as the first one because the black Tahoe was seen three minutes later at that location. RP 221, 328-30, 510, 631-40, 75; Ex. 49, 130.

At 10:14 a.m. Brad Harris, responding to the 911 call regarding Baker, saw the black Tahoe, which had a significant dent in the back, along Hovander Road and called it in. RP 37-38, 122, 508-10. Horne pulled out behind the fire vehicle, but turned left along another road while the fire vehicle continued traveling along Smith Road. RP 511-12. Within minutes the Tahoe was seen waiting in a nearby alley by Chief Haslip¹⁷. Dep. Rathbun saw the Tahoe when it started traveling back along the road that met up with Smith Road. RP 143-44, 163; Ex. 50. A chase ensued as Horne drove the Tahoe back to and along Smith Road and then straight past the Good Shepherd Church at 10:21 a.m., where Villatoro had just been or was still waiting for Horne. RP 145-47, 164; Ex. 49, 50.

¹⁷ Chief Haslip, who was in an unmarked vehicle, did not initially realize that the SUV he saw was the one other officers were looking for. After Dep. Rathbun saw the SUV, turned around and activated his emergency lights, Haslip realized it was and joined in the pursuit. RP 143-45, 157-59.

After she got home Villatoro did a search on “Whatcom County news” around noon on her cell phone¹⁸ and repeatedly accessed the Bellingham Herald website throughout the afternoon, although she never had accessed the website in the entire month of April. RP 366-67, 441-42, 748, 750-52, 768; Ex. 59, 63. At one point that afternoon, she accessed an article concerning a man who had been chased by police in a stolen vehicle on Smith Road and who had shot himself. RP 366, 750; Ex. 59, 63. Villatoro failed to tell Jamie that she had checked online to see if something had happened to Horne or that she had heard sirens when she’d been at the park but she did tell Jamie that she would prefer that Horne be arrested rather than something else happen to him. CP 374-75, 441, 448. Before Villatoro spoke in person with officers, she had accessed the website that stated the man on Smith Road had been a suspect in an attack on a Ferndale woman. RP 753-54; Ex. 59, 63. When she spoke with the detectives later, she told them that she had accessed the news online that day and that the guy on Smith Road “ended up – that was Chad.” RP 366.

A detective called the Cumbia residence around 5:30 p.m. and informed Villatoro that he was trying to locate the owner of a lost cell phone, with the number #510-6078. RP 218, 366, 764-65; Ex. 59.

¹⁸ Villatoro had an iPhone which was searched and a web history compiled. Ex. 63. The times listed are in Universal Time Code and are off by 7 hours. To get the local time, 7 hours needs to be subtracted from the listed time. RP 444-49.

Villatoro told the detective that the phone belonged to Horne and said that she had last seen him when *they had gone to a park near Ferndale and he had walked off to meet a friend*¹⁹, John, that he was supposed to have been back in 30 minutes, that she left when he didn't return and that she hadn't heard from him since. RP 218-19, 230-31. After this phone call, Villatoro did a Google search on Chad Horne's name. Ex. 63.²⁰

When she was contacted by detectives later that evening around 8 p.m.²¹, and before the detectives told her that Horne was dead, Villatoro told them that Horne and she had gone to an area off West Smith Road so Horne could meet his Home Depot friend John²² from two years ago²³ and smoke some marijuana to celebrate his birthday, that he hadn't met back up with her 30 minutes later as had been arranged, so she went home. RP

¹⁹ While Villatoro texted Jamie earlier that day that she had dropped off Horne to spend time with an old friend, Jaime thought it was surprising that Horne would be with a friend because she didn't know him to have any local friends and hadn't seen him with any. CP 371-72, 415-17, 426, 450. It was also surprising to her that Villatoro went to a park because they never let Villatoro's daughter go to a park because of their concern about germs. CP 372.

²⁰ Ex. 63 was transferred to the Court of Appeals before counsel had an opportunity to review it. The prosecutor referenced this search in closing, so counsel is assuming this information is in that exhibit. RP 1165.

²¹ Appellant states that law enforcement arrived at the Cumbia house shortly after 6 p.m., but the detectives waited for other officers to arrive before approaching the house. RP 770-71.

²² Detectives tried to track down "John," but while there were entries for "John" in Horne's contacts on his phone, none of the Johns who had worked at Home Depot in 2012 had had any contact with Horne recently. RP 846, 870.

²³ Villatoro acknowledged in the subsequent interview that Horne didn't really hang out with any friends and that he hadn't been in touch with any of his Home Depot friends since they had moved back to Whatcom County. RP 344-45, 385-86; Ex. 59.

774-780, 783. During the subsequent recorded interview, Villatoro told them that she had dropped Horne off at a dead-end in the road, not at the park, which dead-end in fact was where Baker's house was located²⁴. RP 352-56; Ex. 58, 59. She also said Horne and she didn't frequent the area, but had been to Smith Road after Easter because they had been looking at houses in that area since they didn't want to live in the Cumbia's garage forever. RP 358-59, 770; Ex. 59. Villatoro acknowledged that the houses in the area were pretty expensive, costing around \$300,000, which was far beyond their means. RP 359-60; Ex. 59. According to Jamie, Villatoro and Horne had no plans to buy a house in Whatcom County, but were planning on moving to Arizona. CP 368; RP 875-76. Villatoro's internet history showed that she had been looking to rent an apartment in Arizona. RP 875-76.

When specifically asked if Horne had any other duffle bags, aside from his blue Adidas one and her light blue one, Villatoro stated, "I don't think so." RP 370, 372; Ex. 59. She failed to mention that he had a black duffle bag, one that Horne had bought at Walmart less than two weeks before, even though she had been there with him when he purchased it, and she failed to mention the one she had bought just 10 days before. RP

²⁴ In the recorded interview Villatoro again claimed she thought Horne was going to meet up with some friend named John and hang out and maybe smoke some pot. RP 342, 344-45, 357, 373; Ex. 59.

370, 372, 619-21; Ex. 59, Ex. 134, 135. She also had told the detectives, before her statement was recorded, that she had seen Horne put a duffle bag into the trunk of the car. RP 779.

At the end of the interview the only question Villatoro asked the detectives about what Horne had done was whether he had been by himself. RP 393-94; Ex. 59. While Jamie was hysterical that night and weekend, Villatoro didn't say much. When asked how she was doing, Villatoro simply told Jamie that she was okay. CP 378.

D. ARGUMENT

- 1. Taking the evidence in the light most favorable to the State, there was sufficient evidence for the jury to find beyond a reasonable doubt that Villatoro knowingly assisted Horne in his commission of Attempted Murder, Burglary, Kidnapping and Robbery based on all the evidence and the reasonable inferences that could be drawn therefrom.**

Villatoro asserts that there was insufficient evidence to convict her of any of the charged crimes, alleging there was no evidence from which the jury could reasonably infer that she had actual knowledge or knowingly assisted Horne in attempting to kill Baker, in forcing his way into Baker's home at gunpoint, kidnapping Baker and her two children, and then stealing Baker's car in order to flee the scene. Villatoro does not assert that there was insufficient evidence that *Horne* committed any of

the crimes charged. Villatoro's actions in purchasing items Horne used and driving him to Baker's house and waiting for him afterwards was sufficient evidence that she in fact assisted him in the commission of those offenses. The jury could reasonably infer that Villatoro did so knowingly or with actual knowledge from the evidence of her actual assistance considered in the context of her untruthful statements, omissions and contradictions. Villatoro saw Horne get into her car with a duffle bag, the duffle bag that was Horne's "murder kit." Horne was dressed in all black even though it was a nice day out and he had been wearing shorts recently and usually wore a white shirt. The jury could reasonably infer her knowledge of what was in the duffle bag and a plan to kill Baker because she wasn't truthful when she told the detectives that Horne didn't have another duffle bag, though she'd been present when he purchased one and failed to mention that she herself had purchased one within the last two weeks, and in fact had admitted that she had seen Horne put a duffle bag into the car that day. The jury could reasonably infer Villatoro's knowing assistance because she drove him to Baker's house and admitted they had driven around the area recently, but lied to the detectives when she told them the reason Horne and she had previously been to the Smith Road area was to look at houses because they wanted to move out of the Cumbia's garage, when in fact they were intending to move back to

Arizona. The jury could also consider in inferring her actual knowledge that she had looked on the internet for news about what had happened to Horne throughout the afternoon after returning home, but failed to mention that to Horne's sister even though she was texting Jamie throughout the day regarding her concern about not having heard from Horne. It was also a reasonable inference that Villatoro knew that Horne planned to commit the crimes and specifics of the plan regarding her assistance afterwards because she and Horne were almost always together or in constant contact, she and Horne had obviously discussed her getting the "other stuff," i.e., the gas can, she waited for him for a while down the road, inside of her car at the time was the bleach, the five gallons of gasoline, lighters, a change of clothes for Horne and a police scanner, particularly given that Horne had stayed within a couple mile radius of the crime scene afterwards. The fact that Villatoro decided to leave the church parking lot before she was supposed to, right after hearing sirens, and that Horne purposefully drove by the church where she was waiting while being pursued by law enforcement, also supports the reasonable inference that she was supposed to help Horne after he attempted to kill Baker. The jury also could consider that after being asked whether she had any questions, all she asked the detectives about what Horne had done was whether someone else had been with him. The jury could assimilate

all of the evidence of her deception and omissions and consider it in context of her actual acts of assistance and reasonably conclude that she knowingly assisted Horne in a plan to commit burglary, murder, kidnap and robbery.

Under a sufficiency of the evidence analysis, the test is “whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Washington courts apply the federal constitutional standard in reviewing the evidentiary sufficiency of a criminal conviction. State v. Tyler, ___ Wn. App. ___ (Aug. 15, 2016), 2016 WL 4272999 at ¶16. Under this standard, the “only question ... is whether [the jury’s] finding was so insupportable as to fall below the threshold of bare rationality.” Coleman v. Johnson, 132 S. Ct. 2060, 2064, 182 L.Ed.2d 978 (2012); *see also*, Musacchio v. United States, 136 S. Ct. 709, 715, 193 L. Ed. 2d 639 (2016) (“Sufficiency review essentially addresses whether ‘the government’s case was so lacking that it should not have even been submitted to the jury.’”)

In applying this test, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” Joy, 121 Wn.2d at 339. Such a challenge admits the truth of the State’s evidence and all reasonable inferences therefrom. State v.

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court's limited review "does not intrude on the jury's role 'to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" Musacchio, 136 S. Ct. at 715; *see also*, State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989) (appellate court defers to the trier of fact on issues of credibility of witnesses and persuasiveness of evidence).

Under this due process standard, a jury has broad discretion to decide what inferences to draw from the evidence presented at trial. Coleman, 132 S. Ct. at 2064. This is a deferential standard: appellate courts are not to engage in a "fine-grained factual parsing." *Id.* "The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference." State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999) (quoting State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)). "[T]he specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Circumstantial evidence is as reliable as direct evidence. State v. Cross, 156 Wn. App. 568, 581, 234 P.3d 288 (2010), *remanded on other grounds*, 172 Wn.2d 1009 (2011). "A verdict does not rest upon

speculation or conjecture when founded upon reasonable inferences drawn from circumstantial evidence.” Lamphiear v. Skagit Corp., 6 Wn. App. 350, 356, 493 P.2d 1018 (1972). While a jury may not engage in speculation because speculation is not based on the evidence, it may draw reasonable inferences from direct or circumstantial evidence:

[A]n inference is reasonable only if the conclusion flows from logical and probabilistic reasoning: [i]f there is an experience of logical probability that an ultimate fact will follow from a stated narrative of historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts.

United States v. Arras, 373 F.3d 1071, 1073–74 (10th Cir. 2004) (quoting United States v. Jones, 44 F.3d 860, 865 (10th Cir. 1995)).

“One is an “accomplice” of another if the person aids or agrees to aid the other in planning or committing the crime, with the knowledge that it will promote or facilitate the commission of such crime.” Washington v. Farnsworth, 185 Wn.2d 768, 780, 374 P.3d 1152 (2016); RCW 9A.08.020(3)(a)(ii). An accomplice has the requisite knowledge when she acts with knowledge that her conduct will promote the specific crime charged. *Id.* A person has adequate knowledge for accomplice liability under Washington law if the person “has information which would lead a reasonable person in the same situation to believe” s/he was promoting or facilitating the charged crime. State v. Allen, 182 Wn.2d 364, 374, 341

P.3d 268 (2015), *citing* RCW 9A.08.010(1)(b)(ii). A jury's finding that the defendant had actual knowledge of the charged crime(s) may be based on circumstantial evidence. Allen, 182 Wn.2d at 374.

In applying this test here, Villatoro admits the truth of all the State's evidence, and all reasonable inferences from the evidence are construed in favor of the State and against her. Villatoro was charged as an accomplice to attempted murder in the first degree, burglary in the first degree, kidnapping in the first degree and robbery in the first degree. Villatoro does not contend that the evidence was insufficient to convict Horne, or Villatoro, of the underlying elements of the crimes charged, just that there was insufficient evidence of Villatoro's accomplice liability. The jury was instructed properly on the elements for complicity to commit attempted First Degree Murder, First Degree Burglary, First Degree Kidnapping as to Baker and her two children, and First Degree Robbery. CP 219, 229, 232, 234, 235, 237; see Appendix B. As to accomplice liability, the jury was instructed in relevant part:

...

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime charged, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime charged; or
- (2) aids or agrees to aid another person in planning or committing the crime the crime (sic) charged.

The word “aid” means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and read 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 223. The jury was also instructed that:

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 239.

Villatoro asserts there is no direct evidence that she “participated directly” in any of Horne’s crimes. On the contrary, there is direct evidence of her assistance in fact to Horne. She purchased items that Horne used and/or planned to use in the commission of the crimes, she drove him, along with a duffle bag that contained items Horne used in the crimes, to the Baker residence and waited for him afterwards with items in her car that could be used to destroy evidence of his commission of the crimes. The only question was whether she did so knowingly or with actual knowledge of the crimes Horne committed.

The prosecution relied upon a number of pieces of circumstantial evidence to prove Villatoro's knowledge of Horne's planned crimes. While individually they would not be sufficient to conclusively show knowledge, taken together, along with other evidence, a jury could reasonably infer that she knowingly assisted Horne, beyond a reasonable doubt. First, less than two weeks before the attack Horne and Villatoro purchased a bottle of bleach, an item they did not use in their area of the Cumbia residence. They also bought a black duffle bag, the duffle bag she denied had been purchased, and some duct tape. Two days later, Villatoro purchased a five gallon gasoline can, an item Horne and she had previously discussed purchasing and which they did not have a use for at home, and another black duffle bag, again a bag she failed to mention to the police. Villatoro saw Horne, dressed all in black – not his usual attire according to her, put a duffle bag into the trunk of the car before she drove him to the Baker house. Still inside the trunk after Horne removed the duffle bag was the now full gasoline can, the bottle of bleach, a couple pairs of gloves, a change of clothing for Horne and a police scanner. There were also some lighters in the center console next to her driver's seat. Villatoro moved from waiting for Horne at a park within a couple blocks of the Baker residence to the church down the road. After hearing sirens, Villatoro left the church parking lot, failing to wait the time that

she had agreed to wait for Horne. Horne remained within the area instead of fleeing after he committed the crime. He drove past the church parking lot where she was supposed to be while he was being chased by police. Villatoro went home and accessed news websites that carried stories of the car chase of a suspect in an assault on a woman in the very area she and Horne had just been. She failed to mention this information to Horne's sister even though they were messaging back and forth about their concern for Horne's whereabouts throughout the afternoon. Villatoro told the first detective she spoke to that she and Horne had gone to a park in Ferndale and that he had walked off to meet his friend John, but told the other detectives that she had dropped Horne off in front of a house, specifically describing how she had driven to a house that in fact was the Baker residence, and *then* she had taken the children to a park. She told the detectives that they had been in the area looking at houses because they wanted to move out of the Cumbia residence, but they in fact were planning on moving to Arizona. The jury could permissibly, reasonably, infer from *all* this evidence that Horne had a plan to kill Baker and that Villatoro was aware of this plan and was assisting him in bringing it about. In fact, Villatoro concedes that the jury could reasonably infer from the evidence that Horne had a plan to kill Baker that involved the bottles of bleach, i.e., the covering up of the crime.

Taking the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Villatoro knowingly assisted Horne in his plan to kill Baker. The evidence clearly shows that she assisted Horne by purchasing items used in the crime of attempted murder and in driving him to the scene and waiting to assist him in destroying the evidence. The jury could reasonably infer that she knew it was a plan to kill Baker because inside the duffle bag that she transported in her car to the Baker residence was ammunition for Horne's revolver and a hunting knife with an over seven inch blade. Taking the evidence in the light most favorable to the State there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Villatoro was guilty of Burglary in the First Degree because Villatoro dropped Horne off at Baker's residence, a residence of someone they did not know, while being aware of Horne's plan to unlawfully enter Baker's house with the intent to kill Baker with either a gun or knife, items she had transported to the scene. Taking the evidence in the light most favorable to the State there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Villatoro was guilty of three counts of Kidnapping in the First Degree because while being aware of Horne's intent and plan to kill Baker with either a gun or knife, Villatoro transported the duct tape and flex cuffs to

the scene. Taking the evidence in the light most favorable to the State there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Villatoro was guilty of Robbery in the First Degree because there was sufficient evidence that Horne intended to take and torch Baker's SUV because the plan involved Villatoro waiting a ways down the road instead of nearby within a short walking distance, there was a full can of gasoline in Villatoro's car trunk, lighters in the car, even though there was no evidence that either of them smoked, and multiple gloves. The evidence was sufficient to convict Villatoro of the crimes charged because a jury could reasonably infer from the direct and circumstantial evidence that Horne had a well-thought-out plan to kill Baker and to destroy any evidence connecting him to the crime and Villatoro was aware of that plan and assisted him in carrying it out by purchasing items he used in the crime, driving him to the scene and waiting for him afterwards.

Villatoro urges this Court to engage in the type of "fine-grained factual parsing" that is inappropriate in a sufficiency of the evidence review. It is a reasonable inference, not speculation, that Villatoro knew what was inside the duffle bag from the fact that she lied about their not having another duffle bag, an otherwise innocuous item, when they had just bought two of them, and particularly given that she saw Horne put a

duffle bag inside the trunk and admitted that he took something out when she dropped him off at Baker's house. And inside that duffle bag was his knife, the ammunition for his revolver, the zip tie flex cuffs, duct tape and a black mask.

The evidence that Horne and Villatoro spent almost all of their time together or were in constant communication with one another is important circumstantial evidence that supported the inference, along with the evidence of her deception, that she would have been and was aware of Horne's detailed plan to kill Baker. It is a matter of logical probability that Villatoro knew what Horne was doing and planning if they were together, either in person or via messaging, almost all the time, particularly given the messaging that did occur regarding the gas can. It is highly unlikely that Horne could have devised such an elaborate plan with Rocky as an accomplice without Villatoro's knowledge: she had stated Horne didn't really hang out with other people and the only person she mentioned that she thought Horne had spent time with since their return to Whatcom County was this John person. RP 344-45, 355. This circumstantial evidence, combined with the evidence of Villatoro's presence at the scene and deception, reasonably support the inference that Villatoro knew of Horne's plan.

While Villatoro asserts it would not be a reasonable inference to conclude that Villatoro knew of Horne's plan from the fact that Horne was dressed all in black when she drove him to the scene, that argument isolates that evidence from the other evidence. Villatoro herself said that Horne usually wore a white shirt, in fact the shirt that was in the trunk of the car along with the other clothes for Horne. It had been a beautiful spring day and yet Horne was dressed in black pants and a black hoodie, while he had been wearing a white shirt and shorts within the past 10 days. By itself, the fact that he was wearing all black that day may not have been sufficient evidence for the jury to conclude that Villatoro knew about Horne's plan, but combined with the other evidence and with her untruthful and contradictory statements, the jury could reasonably conclude that Villatoro knew about Horne's plan.

This reasonable inference was also supported by the evidence that Villatoro waited for Horne and then left the church lot before she was supposed to shortly after hearing sirens. Again, each piece of circumstantial evidence cannot be reviewed in isolation, apart from the other direct and other circumstantial evidence. The jury was permitted to look at all the circumstantial, and direct, evidence and to make reasonable inferences therefrom, inferences derived from logical and probabilistic reasoning, not speculation.

Villatoro also asserts the fact that there was a five gallon can of gasoline, a bottle of bleach, a change of clothing for Horne and a police scanner does not lend itself to the inference that Villatoro knew of Horne's plan because she may not have known they were in the trunk. The evidence must be taken in the light most favorable to the State and inferences drawn in favor of the State and against the defendant. The evidence to support this inference isn't limited to the fact that the car belonged to Villatoro and that she drove it that day. The evidence presented included the fact that Villatoro and Horne spent almost all their time together, they lived in a small garage area, Villatoro herself had bought a bottle of bleach, the one that ended up in Baker's Tahoe, that items for these crimes had been purchased over the course of two weeks, not just the day before. The logical inference that she knew what was in the trunk and therefore knew of Horne's plan is also supported by her deceptive statements regarding the duffle bag.

The evidence showing Villatoro accessed the Bellingham Herald news website after she got home, and throughout the afternoon, while she had not accessed that news website in the entire previous month, although not definitive in and of itself, does logically and reasonably support the inference that she was aware of Horne's plan to kill Baker, particularly given that she had accessed the article describing the chase and that she

had done a google search on Horne's name that afternoon as well, but failed to tell Jamie that she had.

The jury was also permitted to consider the evidence that Villatoro had not been truthful with the officers when she explained that she and Horne had been in the Smith Road area once before, to look at houses in the area shortly before the day of the crime. She gave officers the impression that they had been there to look at houses because they no longer wanted to live with the Cumbias and wanted to move into a house there. However, the evidence presented was that they were planning on moving back to Arizona and didn't have any intention of moving to somewhere else in Washington: Horne's sister testified that Horne stated they would be moving back to Arizona in June; Horne had told his kids he was moving back, and Villatoro and Horne had searched for apartments to rent in Arizona. Moreover, they obviously couldn't afford any of the houses in the Smith Road area because they didn't have any money.

Villatoro attempts to divert the Court's attention to Rocky Chervenock who assisted Horne's attempted get-away by phoning in a hoax 911 call. Horne's plan was not limited to one accomplice, however, and despite the thorough investigation, the police were unable to develop further evidence to connect Rocky to Horne or Villatoro.

Villatoro encourages this Court to try to choose between inferences that should be drawn from the evidence. That is not the Court's duty here. In this defential review, the Court's obligation is to interpret all reasonable inferences in favor of the State and to defer to the jury on the persuasiveness of the evidence. The Court is solely to determine whether the inferences the jury made in arriving at its verdict of guilty were reasonable ones supported by the evidence.

The trial judge was faced with the same issue facing this court. Villatoro asserted in a post-conviction motion for new trial that there had been insufficient evidence to convict her of any of the crimes.²⁵ 3/3 & 3/24/15 RP 24-25. After reviewing the evidence of her assistance in Horne's commission of the crimes, the judge focused on the issue of Villatoro's knowledge:

The question is does the jury believe that there's sufficient (sic) there to think that she must have known based on all of the pieces that are put before them. As I noted, the jury was instructed that they must find that she had knowledge of the particular crimes charged. That was emphasized in closing argument.

²⁵ Villatoro asserts in footnote 14 that the trial judge acknowledged speculation would be required for the jury to find her guilty. That comment takes the judge's reference to speculation out of context, which comment was made in the course of a half-time motion to dismiss that was delayed until the end of the testimony. RP 760, 892-924. When he made the comment, the judge was indicating that they didn't know why, i.e., what Villatoro's motive was in assisting Horne. Her motive is what they could speculate about, and the State is not required to prove a defendant's motive. The judge's comment about the jury deciding whether it was important to them was whether Villatoro's motive in assisting Horne was important to them. RP 920.

Once there is evidence that she, that would be possible to draw an inference from that she could have known, then that is evidence sufficient for the jury to consider. The jury was given all of that evidence and asked to consider it. It is entirely within the province of the jury to make the determination of whether or not they believe that it is sufficient under the circumstances and under the instructions given by the Court.

3/3 & 3/24/15 RP 63-68. The judge, who was the one that heard all the evidence and observed the witnesses' testimony, acknowledged the case was based heavily on circumstantial evidence and that there was no direct evidence of Villatoro's knowledge, but denied the motion finding that there was sufficient evidence for the jury to conclude that Villatoro was an accomplice. 3/3 & 3/24/15 RP 63, 68.

The jury was entitled to make reasonable inferences based on all the evidence presented to determine whether or not Villatoro had the requisite knowledge to be liable as an accomplice. As the jury was instructed, "If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact." The jury was permitted to find based on Villatoro's acts of assistance in conjunction with her deceptive statements that Villatoro acted with knowledge of the plan to kill Baker. Taking the evidence in the light most favorable to the State, there was sufficient evidence for the jury to find, beyond a reasonable doubt, that Villatoro knowingly assisted

Horne in preparing for and carrying out his plan to kill Baker, which plan involved burglary, kidnapping and robbery.

2. **Villatoro may not raise an issue regarding the deliberation process under the auspices of a violation of juror unanimity for the first time on appeal where there is no indication that the jury did not deliberate collectively or in accordance with the judge's instructions.**

Villatoro asserts for the first time on appeal that the trial court violated her right to a unanimous jury because it failed to instruct the jury that all twelve of the jurors must deliberate *at all times* together. Villatoro, however, never requested such an instruction and never objected to the lack of such an instruction. No such instruction appears in the WPICS. The judge reminded the jurors numerous times that they weren't to begin considering the evidence until time for deliberations and directed the jurors to begin deliberations anew when one of the jurors had to be replaced. Villatoro has pointed to no concrete evidence that the jury didn't all collectively deliberate at all times. Pursuant to RAP 2.5(a), this Court should decline to address this specious issue for the first time on appeal.

An appellant may raise an issue for the first time on appeal if he/she can demonstrate a manifest error that affected a constitutional right. RAP 2.5(a). Exceptions to RAP 2.5(a), however, are to be construed

narrowly. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The appellate court does “not assume that the alleged error is of constitutional magnitude.” State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In order to show “manifest error,” an appellant must show that the alleged error had practical and identifiable consequences in the trial. *Id.* A manifest error is one that is an “obvious error that the trial court would be expected to correct even without an objection.” State v. Hood, __ Wn. App. __, (Sept. 26, 2016), 2016 WL 5375194 at ¶ 16. “If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest.” State v. Davis, 175 Wn.2d 287, 344, 290 P.3d 43 (2012). The burden is on the defendant to identify the constitutional error and how it actually prejudiced his defense. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

Defense counsel has an obligation to object to misleading jury instructions and an obligation to propose those s/he feels are necessary for the defense case. Hood, 2016 WL 5375194 at ¶ 16. Failure to object to the proposed instructions at trial generally waives the error. *Id.*

While juror unanimity implicates a constitutional right, Villatoro has failed to demonstrate how this “heightened degree of unanimity” is of constitutional magnitude. In other words, the constitutional right to jury

unanimity is sufficiently addressed by the court's instructions that the jury's verdict must be unanimous and the jury must not discuss the case with anyone, including other jurors, until deliberations have begun. Defense counsel should be obligated to request instructions to achieve any other "heightened degree of unanimity," or waive the issue.

The state constitution requires that a jury be unanimous in its verdict in a criminal case. State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). Polling of a jury generally indicates that the jury was unanimous. *Id.* at 587.

A jury is presumed to follow the instructions of the court. Lamar, 180 Wn.2d at 586. When a juror is replaced by an alternate, the jury must be instructed on the record to begin their deliberations anew. State v. Stanley, 120 Wn. App. 312, 85 P.3d 395 (2004); CrR 6.5. A jury is also presumed to follow a court's instructions to begin deliberating anew. State v. Wirth, 121 Wn. App. 8, 13-14, 85 P.3d 922 (2004).

In accord with the considerations of WPIC 4.61, the judge admonished the jury during voir dire:

In the meantime, I'm going to ask you to follow a couple of very simple instructions. You don't know anything about the case yet, but don't discuss it with anybody. You can tell people you are a juror, and that's all, and if they want to know what the case is about, say I cannot tell you until it's over.

Do not discuss the case amongst yourselves, with anyone else, or look for information anywhere. Do not allow anyone to discuss it in your presence. Do not allow anyone to talk about it in your presence.

Should something like that happen, somebody talk to you about it or raise the issue or you read anything inadvertently, we will take care of that on Thursday when you come back, but from now until you have reached a verdict, you are not to talk among yourselves or to anyone else about it, and I will talk to you more in detail when we come back and explain why we do that. You're not to look anywhere for information about the case.

RP 239; WPIC 4.61. Then, following voir dire, the judge advised the jury, in accordance with WPIC 1.01, in relevant part:

...

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 means no emails, text messaging, blogging or any other form of electronic communications. ...

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. ...

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

So, throughout this trial, you must maintain an open mind. You must not form any firm or fixed opinion about any issue in the case until the entire case has been submitted to you for your deliberations. That's why we don't want you discussing things.

RP 19, 23, 24, 30. At the first lunch recess the judge admonished the jury again, in relevant part:

In the meantime, do not discuss the case amongst yourselves or with anyone else or allow anyone to discuss it in your presence, or look for any information.

The judge admonished the jury in a similar vein at every lunch recess and at every recess at the end of the day. RP 44, 152, 235-36, 262, 410, 503, 591, 676, 759, 864, 892. The judge did not provide such an admonishment during short recesses or ones in which the jury stepped out so the court and parties could discuss an issue briefly. See e.g., RP 120, 174, 186, 549, 604, 627.

At the end of the trial, the jury was instructed that their verdict needed to be unanimous, that each one of them must agree in order to return a verdict, and that they needed to be unanimous regarding the special verdicts. CP 211, 241, 242 (Inst. 2, 29, 30). They were also instructed that they were to discuss each issue in the case “fully and fairly,” in a manner so that each juror “has a chance to be heard on every question.” CP 240 (Inst. 29). Prior to sending the jury out for deliberations, the judge instructed them:

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 that information is available to each and every one of you while you deliberate.

At any time 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 anybody else,

not let anybody talk in your presence about it, ... those will still stay in place, and they will continue to apply to you until you reach a verdict.

RP 1173.

After one of the jurors had to be replaced, the judge informed and instructed the jury that they had to disregard all previous deliberations and begin the deliberations again with the alternate juror. RP 1199. At the motion for a new trial, the judge indicated he believed they understood their obligation to begin deliberations anew from the looks on the jurors' faces. 3/3 & 3/24/15 RP 56-57. The jury was polled and asked if the verdict was their individual as well as the jury's verdict, and were found to be unanimous. RP 1213-1215.

The judge here advised the jury not to engage in discussions with each other, or anybody else, until deliberations began. He did it at the start of trial and twice a day thereafter, at the lunch recess and the recess for the day. The import of the judge's instructions and admonitions was that they were not to be discussing the case except within the confines of the deliberation process. The jury was instructed that they had to be unanimous and when polled, indicated they were. There is nothing in this record to indicate that their verdicts were anything but unanimous, or that they didn't deliberate collectively. There certainly is nothing in the record

that would have made it manifest to the judge that the jury was not collectively deliberating toward a unanimous verdict.

Villatoro relies on State v. Fisch²⁶, and State v. Lamar²⁷, in making her argument for a heightened degree of constitutional protection of the right to a unanimous jury. However, neither of these cases requires such a heightened degree of constitutional protection. In Fisch, the jury had reached a verdict with respect to one defendant, but not the co-defendant, when a juror became ill and could no longer deliberate. The appellant argued that the jury might have reconsidered their decision as to the first defendant if they had completed their deliberations regarding the co-defendant. Fisch, 22 Wn. App. at 383. The court found this argument speculative and concluded that as all 12 jurors had deliberated and reached a unanimous verdict as to the first defendant, no substantial right of the first defendant had been infringed. *Id.* at 384.

In Lamar, the jury was instructed to bring an alternate juror “up to speed” after a juror became indisposed. Lamar, 180 Wn.2d at 579. The jury was not instructed to begin deliberations anew. *Id.* Finding the judge affirmatively instructed the reconstituted jury *not* to deliberate together, the court found a manifest error of constitutional magnitude because the

²⁶ State v. Fisch, 22 Wn. App. 381, 588 P.2d 1389 (1979).

²⁷ State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014).

alternate had not been given an opportunity to offer his views regarding whatever determinations the original jury had reached in its previous deliberations. *Id.* at 587-88. Here, however, the jury was instructed to disregard the previous deliberations and deliberate anew.

Villatoro has failed to demonstrate how any such heightened constitutional right was manifest in the context of the circumstances of this case. Villatoro's right to a unanimous verdict was constitutionally met when the judge informed the jury not to discuss the case until deliberations and that their verdict(s) must be unanimous. Just as a defendant is not entitled to a perfect trial, a defendant is not entitled to a perfect deliberation process.²⁸ If a defendant wishes the jury be informed to this heightened degree, then the defendant should be required to request such an instruction or waive it. Villatoro points to no actual events that even imply that the jury might not have collectively deliberated at all times in reaching its verdict. Villatoro only mentions that there were opportunities where it could have happened. This is insufficient to demonstrate a manifest error. Moreover, she has not shown how she was

²⁸ Villatoro suggests that the jury should have been told that if one of them needed to take a bathroom break, that their deliberations should cease until the juror returned. While ideal, this reasoning could reach the absurd: should the jury also be instructed that they should cease deliberating when one of them appears to be daydreaming or wondering when lunch might arrive?

prejudiced by the judge's failure to give a more detailed instruction on the deliberation process.

3. The trial court has now entered findings of fact and conclusions of law regarding the CrR 3.6 hearing.

Villatoro next asserts that the trial court erred in failing to enter CrR 3.6 findings. She does not assert any underlying issue regarding the court's decision at this time, just the failure to enter findings. She asserts that this is the obligation of the trial court and the prevailing party. Villatoro moved to suppress "all evidence obtained by law enforcement as a result of a warrantless search of the Defendant's Electronic Benefit Transfer account maintained by the Washington State Department of Social and Health Services" regarding the purchases she made at Walmart on April 21st and 23rd, 2014. CP 68-69. While it appears that defense counsel actually prevailed on his motion regarding transaction history from Villatoro's EBT account, the trial court had an obligation to enter the required findings, and the items were admitted, albeit on an alternative basis. 1/26/15 RP 113-15, RP 67-68, 72-73, 318-23. The parties and the judge have now signed off on drafted findings. See App. A. The State is moving separately under RAP 7.2 to permit entry of those findings. If this Court permits entry of those findings, remand is not necessary.

4. Appellate costs should not be awarded.

Villatoro asserts that appellate costs should not be awarded. Under Villatoro's specific circumstances, the State agrees. At sentencing, the judge determined that Villatoro did not have the present or future ability to pay any non-mandatory fees. 3/3 & 3/24/15 RP 106. The trial record showed that Villatoro had been on public assistance prior to her arrest. She is now facing a 525 month sentence. Should the State prevail on appeal, it will not be seeking appellate costs in this case.

E. CONCLUSION

The State respectfully requests that this Court deny Appellant's appeal and affirm her convictions for Attempted Murder, Burglary in the First Degree, Kidnapping in the First Degree and Robbery in the First Degree.

Respectfully submitted this 6th day of October, 2016.


HILARY A THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent
Admin. No. 91075

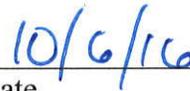
CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Christopher Gibson
NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison St
Seattle, WA 98122
sloanej@nwattorney.net
gibsonc@nwattorney.net



Legal Assistant



Date

APPENDIX

A

ORIGINAL

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WASHINGTON
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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY**

THE STATE OF WASHINGTON,)	
)	No.: 14-1-00526-4
Plaintiff.)	
)	
vs.)	FINDINGS OF FACT & CONCLUSIONS
)	OF LAW RE 3.6 MOTION
LESLEY ALEXANDRA VILLATORO,)	
)	
Defendant.)	

This matter having come on before the above-entitled Court for a CrR 3.6 Hearing on the 26th day of January, 2015, and the Defendant, **LESLEY ALEXANDRA VILLATORO**, being personally present and being represented by her counsel, Thomas Fryer, and the State of Washington being represented by David S. McEachran, Prosecuting Attorney for Whatcom County, and the Court being fully advised in the premises, now, therefore, enters the following

Findings of Fact

1. During the investigation of this matter the vehicle that Chad Horne had stolen from Stephanie Baker was searched with a search warrant on the 2nd day of May 2, 2014. A container of Great Value bleach was discovered

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- along with other items in this vehicle. Detective Howell determined that this type of bleach was sold at Walmart stores. [RP 265 //14-25-266//19].
2. Leslie Villatoro's 2012 Honda Civic automobile was searched pursuant to a search warrant on the 4th day of May, 2012. [RP 264//24-25]. During this search officers discovered a backpack that contained a change of men's clothing, including red Sketchers shoes, a police scanner, a bottle of Up & Up bleach, and a full five gallon gasoline container. [RP 265//1-13].
 3. Detective Howell determined that the Up & Up bleach found in Ms. Villatoro's vehicle was sold at Target Stores. [RP 266//1-5].
 4. On the 4th day of May, 2014, Detective Howell contacted Justin French, the Asset Protection Manager at the Bellingham Walmart, to see if he could trace the purchase of the Great Value Bleach found in Mr. Horne's possession. [RP 53//2-25; 54//1-24; 266//17-25].
 5. Mr. French indicated that he could trace the purchase of this bleach if Detective Howell could give him the Uniform Product Code (UPC) printed on the bottle of bleach and may be able to find video tape of the transaction. [RP 53//8-21]. His system at Walmart can go back to the very first unit of that item that was sold in the store. [RP 618//19-21].
 6. Officers of the Bellingham Police Department also went to Target with the UPC code from the Up & Up bleach container and discovered the transaction there. [RP 276//4-12; 598-599].
 7. Detective Darla Wagner was also involved in this investigation and contacted DSHS on the 5th day of May, 2014, to see if Ms. Vilatoro or Mr. Horne were receiving benefits and if either had an EBT card. [RP 62//14-25; 63] Detective Wagner made phone contact with a DSHS investigator on

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May 6, 2014, and was informed that Ms. Villatoro had an EBT account and Mr. Horne was an authorized user. [RP 64].

8. Detective Wagner received the EBT card number via FAX and a record of transactions from that card use on the 7th day of May, 2014. [RP 65//1-12;267//7-17; 268//1-7]. She then worked with Detective Kelsh to investigate the use of the EBT card.
9. DSHS can share information with investigators from the Bellingham Police Department after they [DSHS] has opened a fraud or improper use investigation dealing with EBT cards. [RP 64//2-25;70//11-25]. The DSHS investigation was opened due to the investigation of Ms. Villatoro and Mr. Horne by the Bellingham Police Department for a home invasion burglary and robbery. [RP 270//4-11].
10. DSHS provides directions to EBT recipients that the funds are for food purchases only and that DSHS will be watching the use of the cards to make certain they are used properly. [RP 75//2025;76-77//17; 84//1-18].].
11. During this investigation a search warrant was also issued for the Facebook accounts of Mr. Horne and Ms. Villatoro on the 7th day of May, 2014. One of the Facebook messages was a conversation between Ms. Villatoro and Mr. Horne on April 23rd, 2014, in which Ms. Villatoro indicates she was at Walmart and in response to a question as to whether she is getting the other stuff, stated, "Gas can, \$17 for five gallons." [RP 272//1-25].
12. On the 12th day of May, 2014 Detective Kelsh of the Bellingham Police Department had the EBT number of Ms. Villatoro and used that at Walmart to get a list of the transactions made in conjunction with that account. [RP 290//1-19]. Later there was a match done from the UPC code on the gas can

1 with the transactions that Detective Kelsh had obtained from Walmart. [RP
3 290//21-25].

5 13. Detective Howell did not use the UPC code from the gas can until after
7 Detective Kelsh had gotten the list of transactions from Walmart. [RP
9 291//1-7].

11 14. Justin French, Asset Protection Manager for Walmart was given an EBT
13 number by Detective Kelsh and was asked to look for a purchase of bleach
15 within the specified dates. Walmart's system does not recognize full EBT
17 numbers. The search was conducted with the UPC number from the bleach
19 and the EBT was used in a subsidiary manner to cross check the purchases.
21 Mr. French went through all of the purchases of bleach that showed in the
system with the UBC numbers. 610//13-25; 611-14].

23 15. Justin French searched the records of Walmart for all purchases of bleach
25 and gas cans and found the transactions involving Ms. Villatoro and Mr.
27 Horne on the 21st and 23rd of May, 2014. [RP 612].

29 Based on the foregoing Findings of Fact, the Court hereby enters the following

31
33 **Conclusions of Law**

35 1. Detective Wagner contacted DSHS and inquired as to whether Ms Villatoro had
37 an EBT card and was legally given the number of that card after an investigation
was opened on Ms. Villatoro by DSHS. [RP 317//22-25;321//22-25].

39 2. Recipients of EBT cards have a lowered reasonable expectation of privacy in the
41 use of these cards, due to the fact that they are advised by DSHS that the use of
43 these cards will be scrutinized. [RP 308//13-25].

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1 3. Once Ms. Villatoro and Mr. Horne used their EBT cards at a business and
3 shared the fact that they had an EBT card and purchased items with it with a third
5 party, their expectations of privacy in the fact that they have an EBT card is
7 lowered. [RP 317//13-25].

9 4. Bellingham Police Detectives had the following information that they developed
11 from “independent sources” other than the EBT card or use of the EBT card
13 transactions:

15 a. A search warrant for Leslie Villatoro’s 2012 Honda Civic automobile on
17 the 4th day of May, 2012, revealed a full five gallon gas can, and a container
19 of bleach that was sold by Target Stores. [RP 310//14-19]. The bleach
21 container and the gas can have UPC numbers on them.

23 b. A search warrant executed on the stolen vehicle Chad Horne had been in
25 on May 2, 2014, revealed a container of Great Value bleach along with a
27 duffle bag. Detective Howell determined that this type of bleach was sold at
29 Walmart stores. [RP 310//14-19]. The bleach container has a UPC number
31 on it.

33 c. Search warrants were obtained for the Facebook Accounts of Ms.
35 Villatoro and Mr. Horne and messages were discovered that indicated Ms.
37 Villatoro was at Walmart on one of the dates in question and was buying a
39 five gallon gas can along with other items. [RP310//24-5; 311//1-2;313//16-
41 20].

43 d. Detectives from the Bellingham Police Department knew that the Great
45 Value bleach was sold at Walmart and they were told that the purchases of
47 this item could be traced by the UPC number. [RP 311//17-25].

5. Detectives having the above information from “independent sources” went to
Walmart security officer Justin French and indicated that they wanted to find these

1 products (bleach and five gallon gas can) purchased within specified dates and they
3 had the UPC codes and the EBT number and asked if he could find something that
5 matched up. Once a transaction could be identified, WalMart could also provide a
7 videotape of the transaction and the identity of Ms. Villatoro and Mr. Horne could
9 be verified. [RP 314//16-25; 315//1-5].

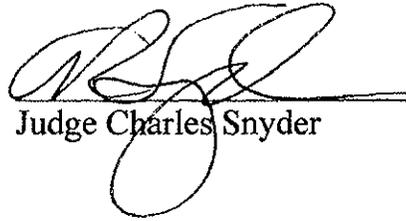
11 6. With all of the information that the Bellingham Police detectives had from
13 independent sources, the EBT card number was just used as confirmation that the
15 purchases were made with this card. [RP 313//1-12;319//7-11;611//15-25;612//1-
18].

17 7. The Bellingham Police Detectives obtained the bleach containers and gas can
19 lawfully pursuant to the execution of search warrants on the vehicle belonging to
21 Ms. Villatoro and the stolen vehicle that Mr. Horne was driving. Detectives also
23 obtained the EBT card number lawfully and the subsequent discovery of the
25 bleach, gas can and other purchases at Walmart by Ms. Villatoro and Mr. Horne
27 and the video tape of these transactions on January 21, 2014 and January 23, 2014,
were lawfully obtained.[RP 322//1-15].

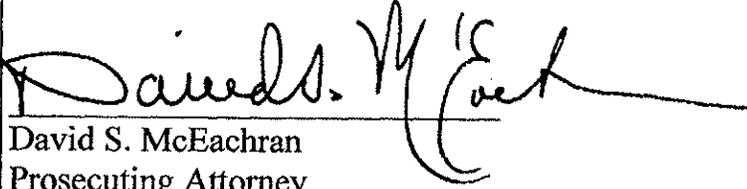
29 8. The transaction at Target was not done with the use of EBT cards, and the,
31 bleach and other items including the video tape concerning the purchases made by
33 Ms. Villatoro and Mr. Horne were lawfully obtained by Bellingham Police
35 officers.

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41 Done in open Court this 29 day of September, 2016.
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Judge Charles Snyder

Presented by:



David S. McEachran
Prosecuting Attorney
Wash. Bar # 2496

APPROVED AS TO FORM ONLY;
Copy Received and Presentment Waived:



Thomas Fryer
Attorney for Defendant
Wash. Bar # 22417

APPENDIX

B

INSTRUCTION NO. 10

To convict a person of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the date of the acts, the defendant acted with intent to cause the death of a person;
- (2) That the intent to cause the death was premeditated;
- (3) That the person died as a result of the defendant's acts; and
- (4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

To convict the defendant of the crime of Complicity in Burglary in the First Degree, Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 2nd day of May, 2014, 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.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

To convict the defendant of the crime of Complicity in Kidnapping in the First Degree, Count III, each of the following three elements of the crime must be proved 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.,

(2) That the defendant abducted that person with intent

(a) to facilitate the 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.

If you find from the evidence that elements (1) and (3), and any of the alternative elements (2)(a), or (2)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), or (2)(b), has been

INSTRUCTION NO. 24

To convict the defendant of the crime of Complicity in Kidnapping in the First Degree, Count IV, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 2nd day of May, 2014, the defendant or an accomplice intentionally abducted E.B.,
- (2) That the defendant or an accomplice abducted that person with intent to facilitate the commission of Murder in the First Degree or flight thereafter, and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2) and (3), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

To convict the defendant of the crime of Complicity in Kidnapping in the First Degree, Count V, each of the following three elements of the crime must be proved beyond a reasonable doubt:

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

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

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

If you find from the evidence that elements (1), (2) and (3), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 26

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