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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

THOMAS P. LEAE

Appellant.

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

The Honorable Gregory Gonzales, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the Sixth Amendment and deprived appellant Thomas Leae of the due process of law by entering conviction in the absence of proof beyond a reasonable doubt he acted as an accomplice to felony murder as charged in Count 1.

2. The prosecutor committed misconduct that deprived Mr. Leae of his right to a fair trial when the prosecutor misstated the law of accomplice liability during closing argument.

3. The prosecutor engaged in misconduct that deprived Mr. Leae of his right to a fair trial and this misconduct substantially prejudiced him when the prosecutor argued facts not in evidence.

4. Improper opinion testimony by a police officer violated the appellant's right to a fair jury trial.

5. The trial court should not have admitted Detective Zapata's "expert" testimony about blood spatter and blood transfer evidence without ensuring he was qualified as an expert.

6. The interest accrual provision and Department of Corrections supervision fee in the appellant's judgment and sentence that are no longer authorized pursuant to the Supreme Court's decision in *State v. Ramirez*¹ and after enactment of House Bill 1783 and should be stricken.

¹191 Wn.2d 732, 426 P.3d 714 (2018).

7. The trial court erred in failing to remove all references to the robbery in the first degree after holding it merged with the conviction for first degree murder.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Sixth Amendment and the Fourteenth Amendment's Due Process Clause require the State prove each element of an offense to the jury beyond a reasonable doubt. Was evidence that Mr. Leae was associated with Ailiana Siufanua during the approximately two week period before Ms. Siufanua killed Bentley Brookes during the robbery of a coin and jewelry store sufficient to prove beyond a reasonable doubt that Mr. Leae intended to assist Ms. Siufanua in robbing Mr. Brookes and that he therefore acted as an accomplice to the robbery, and is therefore guilty of first degree felony murder? Assignment of Error 1.

2. Did the prosecutor commit flagrant and ill-intentioned misconduct during closing argument when he misstated the law of accomplice liability by telling the jury that it could convict Mr. Leae as an accomplice if he was present and was “essentially lending moral support” to Ms. Siufanua? Assignment of Error 2.

3. A prosecutor commits misconduct when he argues facts not introduced into evidence. Here, the prosecutor claimed that “everything points to the defendant” having provided the murder weapon to Ms. Siufanua, despite any evidence supporting this contention. Did the

prosecutor commit flagrant or ill-intentioned misconduct that prejudiced Mr. Leae's right to a fair trial, warranting reversal? Assignment of Error 3.

4. Opinion testimony on guilt invades the province of the jury and violates the constitutional right to a jury trial. Witnesses must therefore never offer an opinion, even by inference, as to a defendant's guilt. During appellant's trial for first degree murder as an accomplice, a lead detective in the case stated that police "were able to determine that [Ailiana Siufanua] was not acting alone." Did this improper opinion testimony deny Mr. Leae his constitutional right to a fair and impartial trial? Assignment of Error 4.

5. A person who is not an expert may only testify regarding matters about which she or he has personal knowledge. Did the trial court err by admitting Detective Zapata's "expert" testimony regarding blood transfer and blood spatter without ensuring he was qualified as an expert? Assignment of Error 5.

6. Should the case be remanded to the trial court to strike the interest accrual provision and community supervision fee in the judgment and sentence that are no longer authorized after *Ramirez* and following enactment of House Bill 1783? Assignment of Error 6.

7. The trial court erred in failing to delete all references to the conviction for robbery in the first degree in the judgment and sentence after finding that it merged with murder in the first degree? Assignment of Error 7.

C. STATEMENT OF THE CASE

1. Procedural history and trial testimony

Thomas Leae went to several businesses in Vancouver, Washington, selling or pawning items in mid and late November, 2015. These businesses included Lucky Pawn and Pacific Bullion. 5Report of Proceedings (RP)² at 592, 598, 630. On one occasion he was accompanied by Ailiana Siufanua when selling or pawning items. Mr. Leae and Ms. Siufanua also shopped together at a WinCo store in Vancouver on November 18, 2015 and stayed at a motel in Kalama, Washington on two separate occasions in late November, 2015. 7RP at 919-21, 924., 951, 952, Exhibits 120, 121, 122, 179.

Pacific Bullion, a coin, metals and jewelry store located at 701 Main Street in downtown Vancouver, was staffed solely by Bentley Brookes, who co-owned the business with his brother, Norbert Anderson. 8RP at 990-91. The shop sold jewelry, gold bullion, diamonds, silver coins, numismatic collectible coins, silver bars, gold coins, and other silver

² The record of proceedings consists of the following transcribed volumes: 1RP – April 9, 2018, April 20, 2018, June 7, 2018, September 21, 2018, August 14, 2018, October 5, 2018, January 10, 2019, March 1, 2019, April 16, 2019, June 4, 2019; 2RP – July 8, 2019 (jury trial, day 1, morning session); 3RP – July 8, 2019 (jury trial, afternoon session); 4RP – July 9, 2019 (jury trial day 2); 5RP – July 10, 2019 (jury trial, CrR 3.5 motion, day 3, morning session); 6RP – July 10, 2019 (jury trial, day 3, afternoon session); 7RP – July 11, 2019 (jury trial day 4); 8RP – July 12, 2019 (jury trial day 5); 9RP – July 15, 2019 (jury trial day 6, morning session); 10RP – July 15, 2019 (jury trial, day 6, afternoon session); 11RP – July 16, 2019 (jury trial, day 7), July 17, 2019, (jury trial, day 8), and July 31, 2019 (sentencing).

items. 8RP at 993-94.

On November 25, 2015, Ailiana Siufanua,³ wearing red converse high tops and an olive drab green parka with a hood, entered Pacific Bullion while carrying a backpack in her hand. 4RP at 486, 510-11. Mr. Brookes was seated at a desk in the shop and stood up and went to the counter when she entered the store. 4RP at 500. Ms. Siufanua's hair was in a partial bun when she entered the store. 4RP at 511. Ms. Siufanua placed the backpack on the display counter and then pulled a gun from her pocket and held it up to Mr. Brookes. 4RP at 486, 505-07, 509-10. She fired the gun, hitting Mr. Brookes in the face, causing him to fall to the ground. 4RP at 486, 505-07. Ms. Siufanua stepped over Mr. Brookes' body and removed items from the display cases and put them in the backpack, and then removed items from drawers in a credenza and from the desk, and then left the store, again stepping over Mr. Brookes' body. 4RP at 486, 506. When she left the store, the bun hair style was released and her hair was down. 4RP at 511-12. Exhibit 172.

The State charged Mr. Leae by information filed on July 26, 2016 in Clark County Superior Court with first degree murder, pursuant to RCW 9A.32.030(1)(a), (c) and RCW 9A.08.020(3), and first degree robbery, pursuant to RCW 9A.56.200(1)(a)(i), (ii), and (iii). Clerk's Papers (CP) 1-2.

³ Defense counsel conceded during closing argument that the woman at the motel and in the video seen committing the murder was Ms. Siufanua. 10RP at 1310.

The State filed an amended information on July 3, 2019 to add a charge of first degree rendering criminal assistance and the court entered a not guilty on behalf of Mr. Leae, who did not address the court during proceedings. 1RP at 50-52; CP 78-79.

The case came on for trial on July 8, 9, 10, 10, 11, 12, 15, 16, and 17, 2019, the Honorable Gregory Gonzales presiding. 2RP (5/13/19) at 58-187, 3RP (5/13/19) at 192-367, 4RP at 372-561, 5RP (5/14/19) at 568-664, 6RP at 672-797, 7RP at 803-981, 8RP at 987-1088, 9RP at 1094-1201, 10RP at 1207-1326, and 11RP (5/14/19) at 1332-1414.

Following a CrR 3.5 suppression hearing, the court found statements by Mr. Leae to California Highway Patrol officer John Rosendale were intelligently, freely, and voluntarily made following *Miranda* warnings. 5RP at 663.

The State presented testimony from twenty-six witnesses.

November 12, 2015, Leae at Pacific Bullion

Mr. Brookes operated Pacific Bullion with his brother, Norbert Anderson. 8RP at 990-91. The store had no other employees. 8RP at 994. The store was operated on a day to day basis by Bentley Brookes. His brother, Mr. Anderson, provided the capital for the business and Mr. Brookes operated the store on a day to day basis. 8RP at 993. The store was open six days a week and Mr. Anderson would sometimes fill in for his brother so that he could have time off. 8RP at 995. The store had a four-

camera surveillance system that recorded video but not audio. 8RP at 995.

Vancouver Police Sergeant Joseph Graaff, supervisor of the digital evidence cybercrime unit, stated that Mr. Leae came into the store by himself at about 4:00 p.m. on November 12, 2015. 5RP at 592, 598. Following the shooting on November 25, Sgt. Graaff obtained surveillance video from the store. 4RP at 602-04. Store surveillance video from November 12 showed a person entering Pacific Bullion alone. 5RP at 598. Viewing still images from the video, Sgt. Graaff identified Mr. Leae as the person in the store surveillance video on November 12. 5RP at 610. Exhibits 115, 116, 117. Surveillance video downloaded from the store DVR was entered as Exhibit 175 and played to the jury. 5RP at 600; 8RP at 997-99. In the video, Mr. Leae is seen entering the shop and engaging with Mr. Brookes for approximately four minutes and then leaving the store. 5RP at 607-12. The video showed a transaction between Mr. Brookes and Mr. Leae and Mr. Brookes producing his wallet. 5RP at 621-23. In the video, Mr. Leae entered the store and engaged with Mr. Brookes for about four minutes and then left. 5RP at 606-07.

Norbert Anderson testified that in the video, Mr. Brookes was examining merchandise shown by the customer who entered the store, and that Mr. Brookes then checked the price of gold on a computer monitor located in the work area of the shop, and then looked at an eBay website, where the business offered items for sale. 8RP at 999-1000. Mr. Anderson

stated that the business had items listed on eBay on display in the store, and that if an in-store item was bought by a customer, the eBay sale would be withdrawn and the item sold to the customer. 8RP at 1000. Mr. Anderson stated that his brother then got money out of the drawer and gave it to man and placed a piece of merchandise in the drawer, which he called “a purchase transaction.” 8RP at 1000-01. Mr. Anderson noted on cross examination that during the transaction his brother initially took out his wallet and then went to the cash drawer. 8RP at 1012.

Mr. Anderson stated that cash and change were kept in two drawers and that Mr. Brookes occasionally paid for items with money from his wallet if he wanted to purchase an item for himself, but that he did not know why he took out his wallet during the transaction on November 12, and that it could have been to get money or to give the man a business card. 8RP at 1012, 1013.

November 12, 2015, Leae and Siufanua, WinCo in Vancouver, Washington

Video from a Vancouver WinCo grocery store showed Mr. Leae and Ms. Siufanua in the store together on the morning of November 12, 2015. 7RP at 919-21, 924. Exhibits 120, 121, 122. Using a receipt obtained by police following a high speed chase resulting in a fatal crash in California, WinCo loss prevention employee Garrett Plessner obtained surveillance video from a WinCo grocery store in Vancouver showing the purchase of bottled iced tea recorded by the receipt, which took place

November 12, 2015. 7RP at 915-17. Store surveillance video depicted two people identified as Mr. Leae and Ms. Siufanua coming into the building and another video showed them exiting the store. 7RP at 920.

November 14-15, 2015 and November 26-27, 2015, Leae and Siufanua, Motel 6, Kalama, Washington

Following a tip regarding a comment made on social media that an employee at a motel in Kalama recognized a suspect in the murder of Mr. Brookes, the male thought to be associated with her, and the suspect car, Vancouver Police Department Detective Carole Boswell contacted employees at a Motel 6 in Kalama and obtained receipts of two different stays at the hotel by Mr. Leae. 7RP at 951, 952. The receipts were for November 14, 2015, and November 26, the night after the murder.

Michelle Shertzer worked as manager at Motel 6 in Kalama in November, 2015. 8RP at 1040. Ms. Shertzer said that Mr. Leae checked into the motel after midnight on November 14, and that when they did not check out on time on November 15, she knocked on the door, which was answered by a dark complected, heavy set woman. 8RP at 1042, 1043, 1046. She said that later she saw a picture of Mr. Leae as a person who was wanted for questioning in conjunction with the murder, and contacted her daughter, who posted on social media that Mr. Leae had stayed at the motel, and then was contacted by police regarding the post. 8RP at 1050-51.

Ms. Shertzer was shown a photo “line up” and identified Mr. Leae as the person who had checked in. 8RP at 1053. Exhibit 161.

Courtney Brumitt was a desk clerk at Motel 6 in late November, 2015, and she testified that Mr. Leae checked in “in the middle of the night.” 8RP at 1056. A receipt was introduced showing that Mr. Leae checked into the motel on November 26 and checked out on November 27. 8RP at 1059. Exhibit 125. Ms. Brumitt said that Mr. Leae had blood on his hands and kept “reaching down at his sock,” and that his girlfriend was standing outside the building between two cars. 8RP at 1056, 1057. Ms. Brumitt said that Mr. Leae called the motel after they checked out on November 27, asking if a pair of shoes they left were still in the room. 8RP at 1058. She stated that they found the shoes in the motel lost and found bin but did not know if he came back to claim the shoes. 8RP at 1058-59. She was shown a photo line-up by a detective and identified Mr. Leae as the person who checked into the motel. 8RP at 1063.

November 18, 2015, Leae and Siufanua, Pacific Bullion

The state introduced surveillance video showing two persons at Pacific Bullion together at about 1:00 p.m. on November 18, 2015. 5RP at 611. Screen captures from the video were entered as Exhibits 112, 113, and 114. 5RP at 613. Sgt. Graaff identified Mr. Leae and Ms. Siufanua as the persons in the November 18 video. 5RP at 616.

Mr. Anderson testified that the November 18, store video shows Mr. Brookes talking to Mr. Leae and Ms. Siufanua, and then obtaining scales used to weigh scrap gold or silver and then getting money from a

drawer, and taking out his wallet. 8RP at 1001, 1012. He stated that his brother bought something from them and that it was a successful transaction because “he’s giving them the money.” 8RP at 1001.

November 18, 2015, Leae at Lucky Loan

On November 18, 2015, Mr. Leae pawned four guitars at Lucky Loan, a pawn shop located diagonally across the intersection from Pacific Bullion. 5RP at 628. Pawn shop employee Jeff Lemuel identified Mr. Leae as the person who pawned the guitars on that date and testified that he came into the store alone. 5RP at 630.

November 25, Siufanua murders Mr. Brookes in Pacific Bullion

Keith West, a dealer in silver coins, sold coins to Mr. Brookes about once a month over the course of a year. 4RP at 531. Mr. West would check the price of silver bullion, agreed on a price with a particular coin dealer, and then drive to the shop and conduct the transaction. 4RP at 532. Mr. West would come to the shop shortly after reaching an agreement in the price due to rapid fluctuations in the silver market. 4RP at 532. He stated that Mr. Brookes was good to deal with because he would always honor the agreed upon price. 4RP at 532. Mr. West went to Pacific Bullion fifteen to seventeen times over during the year and a half that they conducted transactions. 4RP at 532.

Mr. West called Mr. Brookes on the morning of November 25, 2015 and reached an agreement on a price for silver coins and was at Pacific

Bullion within an hour. 4RP at 534. After arriving in Vancouver he entered the shop and saw a body and pool of blood on the floor, left the shop and ran to the Lucky Loan pawn shop located cross the intersection from Pacific Bullion and had the owner call 911, and then went back across the intersection to store to verify that “this was going on.” 4RP at 536-37. Mr. West remained at the door and guarded the scene until police arrived. 4RP at 538. Police were dispatched to the store at approximately 11:50 a.m. 6RP at 675.

Police obtained a warrant to enter the store and after obtaining video from the store surveillance system, still pictures of the suspect were downloaded from the video clip and released to the public on November 27. 9RP at 1183, 1184. Exhibit 177.

Surveillance video from the store was shown to the jury depicting the murder. 7RP at 931-37. Det. Boswell testified regarding the surveillance video. 7RP at 931-37. The video showed a female wearing a green jacket entering the store with a backpack and approach the counter and set the backpack on the counter. 7RP at 932. Mr. Brookes walked to the counter and the female, identified as Ms. Siufanua, produced a gun from her right side jacket pocket. 7RP at 936. Mr. Brookes stepped around the counter and tried to reach for the gun and Ms. Siufanua shot him and he fell to the ground. 7RP at 936. After shooting him, Ms. Siufanua went directly behind the counter and did not search Mr. Brookes’ body. 7RP at

833. Ms. Siufanua stepped over his body and went behind the credenza and removed items from the display case and put them into the backpack. 7RP at 835. She also took a cell phone from the desk, then picked up the backpack, left the store and walked toward 7th and Main Street. 7RP at 935, 937. Detective Boswell testified that Ms. Siufanua reached with her left hand and pulled out a tie that was in her hair. 7RP at 937.

The video showed Mr. West entering the store and checking on Mr. Brookes on the floor, and then leaving the building. 6RP at 679. Mr. West entered the shop a second time, looked around and then left the building and then brought a man and a woman into the shop. 6RP at 681.

Detective Boswell also obtained video from exterior cameras mounted in a Vancouver C Tran bus that was travelling on Broadway and 7th in Vancouver. 7RP at 939. A portion of the bus video reviewed by Det Boswell depicted the route of the bus while on Broadway, a block from Pacific Bullion at 701 Main Street, and was taken approximately a minute prior to the homicide. 7RP at 939, 949, 950.

The C Tran video showed that the bus was approaching 7th and Broadway in Vancouver. 7RP at 939, 947. The C Tran bus video showed a silver Honda Accord without wheel covers and with a license plate reading "AND 848." 7RP at 942, 944, 945. Two people were in the car. 7RP at 942. A person in the front passenger seat of the car was wearing a green jacket and had the hair at the top of her head in a bun. 7RP at 941, 944. Det.

Boswell stated that the driver had a “round hair, style, maybe an afro.” 7RP at 944.

Vancouver Police Department Detective Jason Mills testified that the partially visible license plate of the Honda visible in the C Tran bus video was “AND 84” with the final number being 8, 0 or 6. 7RP at 978-80.

Clark County Deputy Sheriff Lawrence Zapata was a detective for Vancouver Police Department at the time of the offense in 2015. 9RP at 1173-74. Detective Zapata was assigned as lead detective on the case. 9RP at 1176. Detective Zapata used the surveillance video to generate a “wanted flyer” from still photographs of the female to release, first to law enforcement, and later to the news media on November 27, 2015. 9RP at 1182. Exhibit 177. The photographs resulted in many tips from the public, including a tip from Chaz Davis. 9RP at 1185.

Vancouver Police Department Detective Neil Martin met with Chaz Davis on December 2, 2015. 7RP at 962-64. Det. Martin stated that Mr. Davis had identified Ms. Siufanua as a person he had seen near the coin shop on November 25, 2015 from a photograph released to the public. 7RP at 964.

Chaz Davis was driving on Main Street in Vancouver and saw an “old blue-ish or gray-ish” car pull up and park “kitty corner” to the 7th Avenue transit station and Main Street near the coin shop, and saw a woman get out of the passenger side of the car. 9RP at 1132, 1146, 1155.

Later when he returned home, he saw a report of the murder and contacted police. 9RP at 1132, 1145. He stated that the female in the car was big and that she was not white, but was light skinned. 9RP at 1137-38. Mr. Davis said that the driver had a “big hood” and an “afro” hairstyle and had facial hair. 9RP at 1139-40. The woman entered the coin shop about one minute after the car was recorded by the C Tran bus camera. 7RP at 949.

On November 30, 2015, Detective Zapata received a call from Detective Neil Martin that members of Ms. Siufanua’s family were proceeding to the Vancouver Police Department, where they met with police that evening. 9RP at 1187-88. Detective Zapata spoke with the father of Ms. Siufanua and other members of her family on November 30 and they identified the person in the flyer as Ailiana Siufanua and told police that she and Mr. Leae had talked with the family earlier that day. 9RP at 1187-89.

Aitu Siufanua, the father of Ailiana Siufanua, said that before Thanksgiving 2015, Ailiana left the house in Des Moines, Washington and did not return home. 6RP at 729, 731. Mr. Siufanua did not know where she was and did not know who she was with other than that he was identified as “Thomas,” 6RP at 729. Mr. Siufanua was contacted by someone who said his daughters’ picture was on social media and that he looked it up and learned that “it had something to do with a shooting.” 6RP at 732.

Mr. Siufanua said that he had contact with his daughter when he called her cell phone on November 30, 2015, the Monday following

Thanksgiving, and he told her that he wanted her to come home and turn herself in. 6RP at 732. He spoke with his daughter for twenty-five to thirty minutes during the call. 6RP at 732. He stated that during the call he also talked to “Thomas” and asked him to “bring Ailiana home.” 6RP at 733. He stated “Thomas” promised that he would take care of his daughter. 6RP at 733. Following the call, Mr. Siufanua drove to Vancouver in an effort to find his daughter there. 6RP at 733. Later that night Mr. Siufanua received a call from a coroner in California to identify Ailiana as the person killed in the crash. 6RP at 735.

Detective Zapata learned about the wreck in California the following morning and that Ms. Siufanua had been killed in the crash, and made the decision to go to California with Detective McShea. 9RP at 1190.

November 30, Siufanua is killed and Leae is injured in a crash during a high speed police chase on Interstate 5 in northern California

California Highway Patrol officers were involved in a high speed chase on Interstate 5 in Calusa and Yolo Counties, California starting at approximately 10:15 p.m. on November 30, 2015. 6RP at 687-88, 690. California Highway Patrol Officer Marcos Castillo attempted to stop a 1999 Honda Accord on southbound Interstate 5. 7RP at 838. After receiving a report of the speeding vehicle, Officer Castillo, who was travelling northbound, turned around in the median, saw a silver Honda Accord with its headlights off travelling southbound. 7RP at 838. He caught up with

the vehicle and determined it was travelling at 82 miles an hour in a 70 mile per hour zone. 7RP at 838. Officer Castillo activated his lights and siren and the car accelerated to approximately 100 miles an hour. 7RP at 838. The Officer was informed that car the stolen from Washington. 7RP at 839. Highway Patrol Officer John Rosendale joined the pursuit as the car passed his location at approximately 100 miles per hour. 6RP at 689, 718. Patrol Officer Rosendale saw that the car's headlights were not on. 6RP at 690. The pursuit went for approximately eight miles and the car then exited the freeway at Arbuckle, California, turned left under the freeway overpass and slowed to about 25 miles per hour, at which point Highway Patrol Officer Tim Lovato performed a pursuit intervention technique (PIT) maneuver, turned the car 180 degrees facing the pursuing police vehicles. 6RP at 691-62, 7RP at 868. The officers got out of their cars, at which time the Honda drove up the freeway exit ramp and continued southbound in the northbound lane of Interstate 5 without lights. 6RP at 692. Patrol Officer Lovato testified that as he performed the PIT maneuver, he briefly saw the female passenger, and was struck at how calm she appeared and that she seemed to have "just calmness over her." 7RP at 871. The Highway Patrol Officers got on the northbound lane in anticipation that the car would reverse direction, but lost sight of the car, and so the pursuing officers changed lanes and continued southbound in the appropriate lane. 6RP at 693, 7RP at 869. Officers caught up with the car traveling at between 60 and 80 miles

per hour, sometimes on the shoulder and sometimes in the center divider, and drove parallel to the car in the southbound lane for about ten miles. 6RP at 696-97, 7RP at 869. The car, still travelling without lights, crashed into a tree between the northbound lane and an exit ramp at a rest area. 6RP at 698-99, 7RP at 870-72. The engine was pushed into the passenger area of the car and the passenger, later identified as Ailiana Siufanua, was killed. 6RP at 709; 7RP at 876. The driver, identified as Thomas Leae, had a broken leg and the bone was sticking through his skin. 6RP at 700. After being stabilized on a backboard, Patrol Officer Rosendale searched him and located his Washington driver's license and \$1600 in cash. 6RP at 704. Mr. Leae was then turned over to paramedics and transported by helicopter to the University of California Davis Medical Center in Sacramento. 6RP at 705. Officer Lovato testified that a large kitchen knife was in the front floorboard area of the car "where the dash kind of used to be." 7RP at 880-81. The Washington state license plate number of the wrecked 1999 Honda accord was AND 8486. 6RP at 718.

Detective McShea and Detective Zapata went to California and after obtaining a warrant, participated in a search of the Honda Accord. 6RP at 748-49. Various items were located in the car, including a receipt from a WinCo in Vancouver dated November 12, 2015, silver coins, a voucher for Thomas Leae dated October 23 and October 29, 2015, silver items, jewelry, a grey backpack containing DVD movies, a laptop computer, and

a pay stub for Ailiana Siufanua. 6RP at 785-86; 9RP at 1191.

At trial, Mr. Anderson identified grape shears for cutting grape stems, a tungsten ring, a silver goblet, and a mirror as items from the coin shop. 8RP at 1005-08. Lyubov Stenhouse and Steven Stenhouse frequently sold precious metals to Mr. Brookes, 8RP at 1019-22. At trial, Ms. Stenhouse identified plastic bags containing platinum, gold and silver items she sold to Mr. Brookes shortly before he was killed. 8RP at 1022-24, 1027. Steven Stenhouse also identified items they had sold to Mr. Brookes, and identified a ring with a turquoise piece, the mirror, a water pitcher, a chocolate pot, and a tea caddy that were recovered by police from the Honda in California. 8RP at 1032-33.

Patrol Officer Rosendale went to UC Davis Medical Center at approximately 2:00 a.m. and talked with Mr. Leae in the trauma center at about 3:40 a.m. 6RP at 709-10. After being given his constitutional warnings, Mr. Leae agreed to talk with Officer Rosendale. 6RP at 712-14. Officer Rosendale stated that Mr. Leae told him that he was coming from a casino in northern California and that he had been living in a motel in Sacramento for three months. 6RP at 714. He said he was borrowing the car from a friend, and then said he was in the process of buying the car for \$200 to be paid every two weeks, but could not provide the name the of the seller and did not know how much was still owed or the purchase price of the car. 6RP at 717-18. Using information provided by Mr. Leae, Officer Rosendale

called his mother and he notified her of the crash and confirmed Ailiana Siufanua's identity. 6RP at 719. Detective Zapata also met with Mr. Leae at UC Davis Hospital. 9RP at 1192-93.

Mr. Siufanua talked by phone with Thomas Leae while he was in the hospital and he stated that Mr. Leae said that he said that he was sorry. 6RP at 736.

The defense rested without calling witnesses. 10RP at 1259.

Testimony of Detective Zapata

Detective Zapata testified that Mr. Leae became a suspect in the homicide in mid-December. 9RP at 1193. The prosecution asked the detective what evidence resulted in the decision to consider Mr. Leae a suspect and defense counsel objected on the basis that the question invaded the province of the jury. 9RP at 1193. The objection was sustained. 9RP at 1193. During direct examination of Detective Zapata, the State asked the witness when Mr. Leae became a "co-suspect" with Ms. Siufanua in the murder. 9RP at 1194. The defense objected on the basis that it called for an opinion of guilt of the defendant. 9RP at 1194. The court allowed the prosecution to elect testimony about how Mr. Leae became a suspect based on evidence including the coins and materials recovered from the wrecked car, and the surveillance videos and C-Tran video. 9RP at 1197-98. Following a recess the State asked the following:

Q: So prior to taking the lunch break, I had asked you about at what point your investigation included Mr. Leae as a suspect in the case.

A: Yes, that was mid-December.

Q: Mid-December. Okay. And that was based on what?

A: A culmination of the evidence of what we've seen today with the video—or in the past week of this trial, the videos, the receipts, evidence that was recovered from the vehicle, the identification of some of the evidence that was recovered from the vehicle, as being property that was in the store.

Q: Okay. Now, so during the course of this investigation, were you able to determine if the female shooter in the case, Ailiana—

A: Ailiana.

Q: —Siufanua was acting alone?

A: We were able to determine that she was not acting alone.

A: Okay. All right. And—

10RP at 1210-11. Defense counsel objected and the court sustained the objection on the basis of the form of the question, and said the prosecution should “rephrase the question at some point he was a primary focus and then give the basis for it,” adding that that “the only way we sanitize it without asking the specific question.” 10RP at 1210-11. The court also stated that the question was “somewhat of a opinion conclusion.” 10RP at 1213. The court also told counsel that “circumstantially everything's been tied together,” and that the testimony would be “a cumulative position” unless there are additional facts that can be elicited from the officer. 10RP at 1217-18.

After resuming testimony, Detective Zapata stated that he determined that Ms. Siufanua lived in Des Moines, Washington and Mr. Leae lived in Renton, Washington. 10RP at 1219. He then testified at length regarding blood splatter evidence from the homicide and the proximity of Ms. Siufanua to blood in the video, and stated:

A: So also as you've seen in the photographs is that this has hit the floor, but it's still wet. So any contact that she has with that blood is going to change the blood. So it starts off as a drop. Her foot goes into it. Because blood is so light, and her body has weight to it, her foot hits it, and blood comes up. So the potential of her having blood on her shoe, especially her left shoe it is very high.

Q: Okay.

A: And when I say high, I'm not just talking about the bottom of the shoe, but I'm talking about the top side of the shoe as well.

Q: Okay. So with that, were you surprised that you did not—that you were not able to recover or locate any clothing that Ailiana was wearing during the course of this crime?

A: I was—no, I wasn't surprised that we didn't recover clothing.

Q: Why not?

The defense objected was sustained on the basis of speculation.

10RP at 1225.

During redirect, Detective Zapata stated that

[i]t's my opinion that she probably had some dry blood on the bottom of that shoe at some point in time, but it dried—is dry, or because it had been stepped on so much and it having contact, that there was nothing to transfer, any longer, so I wouldn't see a transfer of blood from that shoe in the car especially on the floor board.

10RP at 1242.

When asked about her clothing, Detective Zapata stated;

Her clothing would be interesting because again I would have to speak in theory. In theory what's on her is small. It's not large. It's something that she would probably visibly wouldn't be able to see without close inspection or having some information that she had blood on her. So my belief is that it was there, but it wasn't to the amount that it was actually readily transferable.

10RP at 1243.

2. Closing arguments

Defense counsel conceded during closing that the car seen driving south on Broadway in Vancouver was the car that crashed in California 10RP at 1307. Defense counsel argued that no one identified Mr. Leae as the driver of the car seen at 7th and Main on the C Tran video. 10RP at 1309.

During closing, the prosecutor argued without defense objection:

So where would [Ailiana Siufanua] have access to a firearm? Who was she with that would get her access to a firearm? what is—everything point to the defendant.

10RP at 1290.

The prosecutor also argued:

The word aid means all assistance whether by given words, acts, encouragement, support, or presence. It goes on that a person who is present and is willing to assist essentially lending moral support to the principal, the actor, is aiding in the commission of that crime. So you have to—you don't have to actually do a whole lot. As long as you're willing, and you're there to lend moral support, you are aiding in the commission of that crime.

10RP at 1296.

3. Jury questions, verdict, and sentencing:

The jury submitted a total of five inquiries to the court. On the morning of July 16, 2019 the jury asked to see the C Tran video from November 25, 2015 (Exhibit 171). 11RP at 1332, 1334; CP 203. The

side facing the back clip was played, and then the forward “windshield” view. 11RP at 1337. The jury then asked to see the video “frame by frame when the suspect vehicle comes in.” 11RP at 1337. The prosecutor played the rear facing camera on the side. 11RP at 1337. About 24 minutes after viewing the video clips, the jury asked if there were still photographs from the C Tran bus footage. 11RP at 1338. CP 204. The court directed the jury to refer to the instructions and evidence that was presented. 11RP at 1340, 1341. The jury submitted another question, requesting to see the rear facing C Tran bus video frame by frame and zoom in on the occupants of the vehicle. 11RP at 1341. CP 206. After discussion, the court stated that the video would not be enlarged or “zoomed in” because that is not how the requested video evidence was originally displayed to the jury, and that the video was only “zoomed in” for the license plate and not the occupants of the car. 11RP at 1349-50, 1352. The video was played frame by frame for the jury. 11RP at 1354. The jury also asked to see the November 12 video footage from the coin shop and Exhibit 175 was played to the jury. 11RP at 1368. The jury also asked to watch the video of both people in the store on November 18, 2015. 11RP at 1359. The jury also asked to see each of the videos individually, which were then played. 11RP at 1362. The jury also asked to see the video of November 12 in the coin shop and the court played

one of the camera angles for the jury. 11RP at 1368.

The jury found Mr. Leae guilty of first-degree murder (Count 1), first degree robbery (Count 2), and third degree rendering criminal assistance (Count 3). 11RP at 1370. The jury found by special verdict that Mr. Leae or an accomplice was armed with a firearm at the time of the commission of Counts 1 and 2. 11RP at 1369-70; CP 250, 251, 252, 253, 254. The court found that Count 2 merged with Count 1. 11RP at 1387; CP 542. In Section 2.3 of the judgment and sentence, the handwritten provision that "Count 2 merged with Count 1" is interlineated. CP 542. The judgment and sentence stated that he was found guilty of first degree assault in Count 2. CP 540.

Based on an offender score of "9+," the court sentenced Mr. Leae to 480 months as the base sentence and a 60 month firearm enhancement in Count 1, and 96 months for Count 3, to be served concurrently, for a total of 540 months, followed by 36 months of community custody. 11RP at 1406; CP 544. The State filed a sentencing memorandum and argued that the California conviction for session degree murder was comparable to the Washington offense of first degree manslaughter. 11RP at 1390; CP 256. The court made a specific finding that the sentence should be served consecutively to the sentence in California cause number CRF-2015-7042-1, pursuant to RCW 9.94A.589(3). 11RP at 1407-08; CP 544.

The court imposed a \$500.00 crime victim assessment. CP 546. The judgment and sentence also stated that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.”

CP 547. Section 4.2 (B)(7) of the judgment and sentence provides that the defendant “shall pay supervision fees as determined by DOC.” CP 543.

Timely notice of appeal was filed August 19, 2019. CP 579.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. LEAE ACTED AS AN ACCOMPLICE TO FELONY MURDER

a. The prosecution must prove that the accused person committed all essential elements of a crime.

The State charged Mr. Leae as an accomplice with first degree felony murder with a firearm enhancement under RCW 9A.08.020(3) and RCW 9A.32.030(1)(a), (c). CP 1-2. This Court should reverse his conviction for first degree murder because the evidence against him is insufficient.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const, amend. 14; Const, art. 1, § 3; *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

In determining the sufficiency of the evidence, the test is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *Green*, 94 Wn.2d at 220-22). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and

interpreted most strongly against the defendant.” *Salinas*, 119 Wn.2d at 201 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, affd, 95 Wn.2d 385, 622 P.2d 1240 (1980)). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

The court reviews sufficiency of the evidence de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

RCW 9A.08.020(3)(a), the general accomplice statute, and RCW 9A.32.030, the felony murder statute, supply alternative grounds under which an accused may be found guilty of murder whenever the accused is not the shooter. Although one participant in a predicate felony, alone, commits a homicide during the commission of, or flight from, such felony, the other participant in the predicate felony has, by definition, committed felony murder. *State v. Carter*, 154 Wn.2d at 79, 109 P.3d 823. When legal culpability is imposed for the actions of another, the State must prove

beyond a reasonable doubt that the person is guilty as an accomplice. RCW 9A.08.020; *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2001); U.S. const. amend. XIV; Const. art. I, §§ 21, 22.

Under RCW 9A.08.020(3)(a) a person may be convicted as an accomplice to another's crime only if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) Aids or agrees to aid such other person in planning or committing it.

The evidence must show that the accomplice aided in the planning or commission of the crime and that he had knowledge of the crime. *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). Under Washington case law, RCW 9A.08.020 requires that an accomplice must associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed. *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); *State v. LaRue*, 74 Wn. App. 757, 762, 875 P.2d 701 (1994). Mere knowledge or presence of the defendant is not sufficient to establish accomplice liability. *State v. Parker*, 60 Wn. App. 719, 724-25, 806 P.2d 1241 (1991); *Wilson*, 91 Wn.2d at 491; *State v. Allen*, 178 Wn. App. 893,

903, 317 P.3d 494 (2014). Rather, the State must prove that the defendant was ready to assist the principal in the crime and that she shared in the criminal intent of the principal, thus “demonstrating a community of unlawful purpose at the time the act was committed.” *State v. Castro*, 32 Wn. App. 559, 564, 648 P.2d 485 (1982); see also *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); *Wilson*, 91 Wn.2d at 491. Evidence that a person is merely present at the scene of a crime, even with knowledge of the crime, is insufficient to prove accomplice liability. *State v. Jameison*, 4 Wn. App. 2d 184, 205, 421 P.3d 463 (2018). The accomplice must “associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed.” *Id.*

Accomplice liability does not extend to acts or crimes that are merely foreseeable. *State v. Stein*, 144 Wn.2d 235, 246, 27 P.3d 184 (2001). Moreover, “knowledge by the accomplice that the principal intends to commit ‘a crime’ does not impose strict liability for any and all offenses that follow.” *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 717 (2000).

a. To be guilty of felony murder, the State needed to prove Mr. Leae was an accomplice to Ms. Siufanua

The predicate felony in this case was first degree robbery.

Washington's first degree murder statute RCW 9A.32.030 provides in relevant part:

- (1) A person is guilty of murder in the first degree when ...
- (c) He or she commits or attempts to commit the crime of ... (1) robbery in the first or second degree ... and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants[.]

When the crime charged is felony murder, then the State must prove that the defendant was an accomplice to the underlying felony. *State v. Carter*, 154 Wn.2d 71, 80-81, 109 P.3d 823 (2005). To convict Mr. Leae of felony murder based on first degree robbery, the prosecution had to prove that he was an accomplice to the robbery. *Carter*, 154 Wn.2d at 80-81.

The State argued only that Mr. Leae was an accomplice to the murder; accordingly, it had to prove that he had knowledge that he was promoting or facilitating the crime and that he aided Ms. Siufanua in planning or committing the crime. RCW 9A.08.020(3). The State argued that when Mr. Leae went into Pacific Bullion on November 12, 2015 and November 18 in order to “case” the business for a future robbery and that they both went into the store on November 18 for purposes of “reconnaissance of the store.” 10RP at 1297, 1318. The video of the November 12 transaction shows that Mr. Brookes appeared to take money from his wallet to pay Mr. Leae during the robbery. The

surveillance video of the murder on November 25, 2015, however, shows that after shooting Mr. Brookes, Ms. Siufanua did not take money from the victim's wallet. The State argued that she "didn't know about about the money because the one time that she was in the store on the 18th of November, he didn't pull out his wallet." 10RP at 1320. The fact that she was unaware that Mr. Brookes had money in his wallet supports the argument that Mr. Leae was not casing the store on November 12 and 18 in preparation for a robbery because there is no evidence that he told Ms. Siufanua about the money in Mr. Brookes' wallet when he was in the store on November 12. The video shows Mr. Brookes taking out his wallet—and logically, he took money from his wallet. Norbert Anderson stated that his brother sometimes paid for items he wanted for himself out of his wallet. The evidence supports the conclusion that Mr. Leae did not report to Ms. Siufanua that Mr. Brookes carried a wallet on his person and had money in the wallet, and supports the contention that Mr. Leae not help plan and did not know she was going to commit a robbery.

Rather than prepare for a robbery, the evidence shows that during the approximately two-week period in question, Mr. Leae appeared to be selling or pawning items in stores in downtown Vancouver. He had conducted successful transactions with Mr. Brookes two times, once on his

own on November 12 and once with Ms. Siufanua on November 18, and he pawned guitars at Lucky Loan across the street from Pacific Bullion on November 18.

The State presented evidence that the Honda Accord was seen in the vicinity of Pacific Bullion at the time of the murder, and that Ms. Siufanua committed the murder. As seen in his pattern in the two-week period prior to the murder, it was common for the two of them to be together, and it was usual for them to pawn or sell items in Vancouver, including at Pacific Bullion. There was no evidence, however, that Mr. Leae had any knowledge that Ms. Siufanua was going to commit robbery or murder when she went into the Pacific Bullion on November 25, and no evidence that he knowingly aided or assisted in the commission of the burglary or murder.

There is no evidence that Mr. Leae had seen the gun used in the murder, or even that he even knew that Ms. Siufanua had the gun on her person when she went into the store. Moreover, there is no evidence that Mr. Leae supplied a gun to Ms. Siufanua.

Contrary to the State's argument during closing, the evidence does not support the contention that Mr. Leae assisted her in the robbery and was "casing" the store; the evidence does not show that he told Ms.

Siufanua that Mr. Brookes carried money on his person, something that he presumably would have done if he was casing the business and passing information on to Ms. Suifanua. The November 25 video shows that she was indiscriminate in the robbery, taking coins, silver items, rings and even a cell phone, but shows that she did not search Mr. Brookes' body for money when she was taking items from the shop.

The record, taken in a light favorable to State, shows that he had no reason to believe that Ms. Siufanua was going to commit robbery or murder. Absolutely no evidence supports the argument that Ms. Siufanua was going to conduct anything other than a normal routine transaction such as he had conducted at the shop on November 12 and November 18. Accordingly, this Court should reverse the conviction and remand to the trial court with the direction that Count 1 be dismissed with prejudice.

2. THE PROSECUTOR'S FLAGRANT AND ILL-INTENTIONED MISCONDUCT DURING CLOSING ARGUMENT REQUIRES REVERSAL OF MR. LEAE'S CONVICTIONS

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Finch*, 137 Wn.2d

792, 843, 975 P.2d 967 (1999). Prosecutors have a duty to see that those accused of a crime receive a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Mr. Leae was deprived of his right to a fair trial by the prosecutors' misconduct in this case. "Prosecutorial misconduct may deprive a defendant of his right to a fair trial." *State v. Evans*, 163 Wn. App. 635, 642, 260 P.3d 934 (2011).

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. *State v. Coles*, 28 Wn.App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). A court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

a. Standard of review

The defendant bears the burden of proving that a prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); *Dhaliwal*, 150 Wn.2d at 578. In determining whether prosecutorial misconduct occurred, the court first evaluates whether the

prosecuting attorney's comments were improper. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prejudice is established where “ ‘there is a substantial likelihood the instances of misconduct affected the jury's verdict.’ ” *Dhaliwal*, 150 Wn.2d at 578 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)). In this case, counsel for Mr. Leae did not object to the prosecutor's argument below. A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). In determining whether the misconduct warrants reversal, a reviewing court considers its prejudicial nature and its cumulative effect. *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994).

b. The prosecutor misstated the law regarding accomplice liability

A prosecuting attorney commits misconduct by misstating the law. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). When the prosecutor mischaracterizes the law and there is a substantial likelihood

that the misstatement affected the jury verdict, the defendant is denied a fair trial. *State v. Gotcher*, 52 Wn.App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

The law regarding accomplice liability is well settled. Mere knowledge or presence of the defendant is not sufficient to establish accomplice liability. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Even if accompanied by knowledge that one's presence will aid in the commission of the crime, a person will not be subject to accomplice liability unless the person is also "ready to assist" in the commission of the crime. *Rotunno*, 95 Wn.2d at 933.

The jury was given instruction No. 10, which reads in part as follows:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, 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 182.

However, during closing arguments, the State argued to the jury that “the word aid means all assistance whether given by words, acts, encouragement, support, or presence. It goes on that a person who is present and is willing to assist essentially lending *moral support* to the principal, the actor, is aiding in the commission of that crime.” 10RP at 1296 (emphasis added). The prosecutor continued: “[a]s long as you’re willing, and you’re there to lend *moral support*, you are aiding in the commission of that crime.” 10RP at 1296 (emphasis added). This was obvious, flagrant, and ill-intentioned misconduct. The defense position at trial was that Mr. Leae was not in the car seen by Mr. Davis near Pacific Bullion on November 25, and that no evidence supported the contention that Mr. Leae knew what Ms. Siufanua was going to do. 10RP at 1309, 1311. But the prosecutor told the jury, that mere “moral support” was sufficient to make Mr. Leae an accomplice, even if he did not provide support, indicate that he was ready to assist, or share Ms. Siufanua's criminal intent.

c. The prosecutor compounded the prejudice with additional flagrant misconduct by arguing facts not in evidence

During closing, the prosecutor argued:

Ailiana Siufanua, like I said, was 18 years old living at home with her parents and her sisters. Never got into trouble. Never had any experience with firearms. They didn't have any guns in their house. Her father Aitu said that he never even fired a gun.

So where would she have access to a firearm? Who was she with that would get her access to a firearm? What is---everything points to the defendant. He brought her down here. He was the one that had the car. He has family down here. Okay. And he was the only one who had the opportunity to convince his girlfriend, his 18-year-old gullible girlfriend to commit this horrible crime.

10RP at 1290.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991). However, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant. *State v. Jones*, 71 Wn.App. 798, 808, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018, 881 P.2d 254 (1994). “It is a serious error for [the prosecutor] to make statements in closing argument unsupported by evidence, to misstate admitted evidence, or to misquote a witness' testimony.” *United States v. Earle*, 375 F.3d 1159, 1163 (D.C. Cir. 2004) (quotations omitted). See also *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002) (misconduct for prosecution to “propound inferences that it knows to be false, or has very strong reason to doubt”). A prosecutor commits misconduct by encouraging the jury to decide a case based on evidence outside

the record. *State v. Pierce*, 169 Wn. App. 553, 280 P.3d 1158 (2012).

In this case, the prosecutor made an unreasonable inference by arguing “where else would she have access to a firearm? Who else was she with that would get her access to a firearm?” 10RP at 1290. The prosecution committed flagrant and ill-intentioned misconduct by making an unreasonable inference by leading the jury to believe that no one other than Mr. Leae could have provided the gun used in the murder to Ms. Siufanua.

The State's argument regarding the origin of the gun was not derived from any evidence adduced at trial; the argument was simply invented from whole cloth.

Because the jury knows the prosecutor is an officer of the State, it is particularly grievous for a prosecutor to mislead the jury regarding a critical fact in a case. See *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015). “Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is reasonable ground to believe that the defendant has been prejudiced.” *State v. Pete*, 152 Wn.2d 546, 555, n.4, 98 P.3d 803 (2004).

Because Mr. Leae failed to object to these arguments he must show that it caused prejudice incurable by a jury instruction. A defendant cannot demonstrate flagrant and ill-intentioned conduct where a curative instruction could have cured any error. *State v. Corbett*, 158 Wn.App. 576, 594, 242 P.3d 52 (2010). The focus on this inquiry is not on the flagrant or ill-

intentioned nature of the remarks but rather on whether the resulting prejudice could have been cured. *Pierce*, 169 Wn. App. at 552. To assess whether prosecutorial misconduct prejudiced the defendant, a reviewing court does not assess whether sufficient evidence exists to convict the defendant; but instead assesses whether the misconduct encouraged the jury to base its verdict on the prosecutor's improper arguments rather than the properly admitted evidence. *In re Restraint of Glasmann*, 175 Wn.2d 696, 710-11, 286 P.3d 673 (2012).

In this case, the prosecutor's misconduct substantially prejudiced Mr. Leae because it went directly to the heart of the disputed issue in this case – whether Mr. Leae was an accomplice to Ms. Siufanua's crimes. See *Glasmann*, 175 Wn.2d at 708 (reversing a conviction due to prosecutorial misconduct because the misconduct addressed a critical element of the defendant's charge).

Here, Mr. Leae has met his burden to show reversible misconduct. Taken together, there is more than a substantial likelihood that the above improper arguments affected the verdict. The prosecutor argued facts not in evidence that Mr. Leae must have provided the gun to Mr. Siufanua and that “everything” pointed to that conclusion. The prosecution's argument that Mr. Leae and only Mr. Leae could have provided the gun finds absolutely no support in the record. The misconduct was prejudicial, and could not be cured by instruction, resulting in a violation of Mr. Leae's right

to a fair trial. As such, the convictions and sentence should be reversed.

3. MR. LEAE WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN DETECTIVE ZAPATA IMPROPERLY EXPRESSED HIS OPINION ON HIS GUILT BY STATING THAT MS. SIUFANUA WAS NOT ACTING ALONE

Mr. Leae's right to a fair trial was compromised when the jury heard testimony from lead Detective Zapata, that police “were able to determine that [Siufanua] was not acting alone.” 10RP at 1209. Counsel noted a timely objection to the statement. 10RP at 1209. This Court should find that Detective Zapata’s statement constitutes an improper opinion on Mr. Leae's guilt, thereby denying him a fair trial.

“No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This prohibition stems from the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution, which guarantee the right to a fair trial before an impartial trier of fact. A witness's opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of the jury. *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); *State v. Thompson*, 90 Wn. App. 41, 46, 950 P.2d 977. rev. denied, 136 Wn.2d 1002, 966 P.2d 902 (1998).

Here, the improper opinion testimony was particularly prejudicial because Detective Zapata is a law enforcement officer, meaning his

testimony carried an “aura of reliability” with jurors. *State v. Montgomery*, 163 Wn.2d 577, 595 183 P.3d 267 (2008) (quoting *Demery*, 144 Wn.2d at 765); see also *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (“Particularly where [an opinion on guilt] is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial.”), overruled on other grounds by *City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993).

Detective Zapata's opinion testimony made clear that he believed that Mr. Leae was an accomplice to the murder. This “opinion” went to the very “essence of the crime” - whether Mr. Leae was guilty of felony murder as an accomplice. The detective’s opinion was critical given that it went to the very heart of the issue the jury had to decide. Moreover, because testimony by police officers is particularly likely to influence a jury, this Court should conclude the improper opinion testimony affected the jury's verdict, find error, and reverse.

4. DETECTIVE ZAPATA'S TESTIMONY SHOULD HAVE BEEN EXCLUDED WHERE HE WAS NOT QUALIFIED AS AN EXPERT

Detective Zapata testified at length about blood spatter and blood transfer evidence. 10RP at 1222-25. The court permitted this testimony, even though the state did not seek to have the detective qualified as an expert. ER 702. Since the foundation was not laid for expert testimony,

Detective Zapata should have been limited to testifying from his personal knowledge. ER 702. Under these circumstances, the court improperly allowed the detective to testify beyond his “personal knowledge of the matter.” ER 602; ER 702. The court should not have permitted him to testify as an “expert.”

The error prejudiced Mr. Leae. The case was largely based on the defense that Ms. Siufanua acted on her own on November 25 and was not transported to the coin shop by Mr. Leae in the Honda. Detective Zapata discussed blood transfer and why it was reasonable that blood from the murder was not found in the Honda after it was wrecked in California. This improper testimony was highly prejudicial in that it went directly the crux of the defense that Mr. Leae was not in the Honda and did not transport Ms. Siufanua to or from the shop on November 25.

5. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO INSTANCES OF PROSECUTORIAL MISCONDUCT

Trial counsel failed to object to two instances of prosecutorial misconduct discussed in Section 2. Counsel had no tactical reason for failing to object. Failing to object to the prosecutor's improper arguments that the gun used in the offense had to have been provided by Mr. Leae, and the misstatement of law regarding accomplice liability, and failure to object to Detective Zapata's testimony regarding blood transfer falls below an objective standard of reasonableness for competent counsel.

a. Standard of Review

To prove ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). The threshold for deficient performance is high: A defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” “If counsel's conduct “can be characterized as legitimate trial strategy or tactics, performance is not deficient.” “*Grier*, 171 Wn.2d at 33, 246 P.3d 1260 (quoting *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). To show prejudice, the defendant must establish that “there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.”” *Grier*, 171 Wn.2d at 34, 246 P.3d 1260 (quoting *Kylo*, 166 Wn.2d at 862, 215 P.3d 177). If an appellant fails to establish either prong of the ineffective assistance of counsel test, the court need not inquire further. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726 (2007).

To demonstrate ineffective assistance of counsel based on the failure to object, the defendant must show (1) that the trial court would have

sustained the objection if raised, (2) an absence of legitimate strategic or tactical reasons for failing to object, and (3) that the result of the trial would have been different. See *State v. Johnston*, 143 Wn.App. 1, 20, 177 P.3d 1127 (2007). Because ineffective assistance of counsel claims present mixed questions of law and fact, the court reviews them de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Here, the State engaged in misconduct by asking the jury to infer that the weapon had to have come from Mr. Leae when there was no evidence in the record to support this inference, by misstating law regarding accomplice liability, and by eliciting testimony regarding the blood spatter evidence without certifying Detective Zapata as an expert. This was misconduct. Mr. Leae received ineffective assistance of counsel because of his defense counsel's failure to object to the prosecutor's prejudicial statements during closing argument.

Here, the prosecutor misstated the proof required to prove that Mr. Leae was an accomplice by arguing “that a person who is present and is willing to assist essentially lending moral support to the principal, the actor, is aiding in the commission of that crime,” and that “you don’t have to actually do a whole lot” to be an accomplice as long “as you’re willing, and you’re there to lend moral support, you are aiding in the commission of that

crime.” 10RP at 1296. As discussed above, this constitutes a misstatement of the standard for accomplice liability. Defense counsel also failed to object to Detective Zapata’s testimony regarding blood transfer. This was particularly prejudicial to the defense it went to the heart of the defense--- that Mr. Leae was not the driver of the car when it was seen near the shop on November 25. The defense conceded that the car seen outside Pacific Bullion on November 25 was the same car that wrecked in California, but argued that the State did not prove that Mr. Leae was the driver of the car at the time it was seen near the shop. 10RP at 1307, 1308-10, 1314. Detective Zapata’s testimony, however, was that Ms. Siufanua could have gotten into the car after the murder and that the absence of blood evidence or DNA evidence on the car was to be expected because she “had some dry blood on the bottom of that shoe at some point” but it had dried or that “there was nothing to transfer any more[,]” and that there was no blood on her clothing because “it was there, but wasn’t to the amount that it was actually readily transferable.” 10RP at 1242-43.

Detective Zapata’s comments on blood spatter evidence and the expression of his personal belief about blood being on her shoes and clothing but being either dried or in a such was small amount that it could not be transferred to the interior of the car was improper. Detective Zapata’s

testimony regarding blood spatter and blood transfer, which was largely unobjected to, except regarding the failure by police to recover clothing worn the murder,⁴ implied that Ms. Siufanua could have got into the Honda seen by Chaz Davis without leaving blood transfer, and by implication, that Mr. Leae drove Ms. Siufanua to the store on November 25. The prosecution referred to the detective's blood transfer testimony, arguing that Mr. Leae was an accomplice because he provided transportation for Ms. Siufanua and helped her avoid apprehension, and that there was no blood or DNA recovered from the car was "so what?", and that "[j]ust because she didn't bring in blood from the crime scene doesn't mean she wasn't there." 10RP at 1321.

b. Mr. Leae was projected by counsel's deficient performance

Counsel performs deficiently by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.* A claim of ineffective assistance of counsel can succeed only if the appellant can show that

⁴ 10RP at 1225.

counsel's failure to object to the prosecutor's improper statements prejudiced him. There was no valid tactical reason underlying defense counsel's failure to object to the inadmissible testimony. Moreover, because the detective was not qualified as a blood spatter/transfer expert, an objection to the testimony almost certainly have been granted.

Here, the evidence against Mr. Leae in support of acting as an accomplice to felony murder was sparse; he was seen with Ms. Siufanua on November 18 at Winco and Pacific Bullion, he was a customer at Pacific Bullion on November 12, and he and Ms. Siufanua were seen together at a motel in Kalama, and they called Ms. Siufanua's father on November 30. A person with "poofy hair" was seen in the car near Pacific Bullion on November 25 and the same car was later involved in a high speed chase in California in which Ms. Siufanua was killed and items from Pacific Bullion were recovered. Although the evidence shows that he was associated with Ms. Siufanua, nothing shows that he had any idea that she was going to commit robbery or murder. The previous transactions were all legal and no presented no indication that he was involved in criminal activity. There was no showing that he provided a gun to her. The State's contention that mere "moral support" was sufficient to show that he aided or assisted Ms. Siufanua misstated the law and trivialized the proof required.

All of this, along with the State's improper argument that he provided the weapon, was prejudicial to Mr. Leae. There was absolutely no proof that he was aware of a gun, let alone supplied a gun, yet by using this unsupported contention, the State created the highly damaging implication that he was an accomplice out of whole cloth. The jury cannot reasonably be expected to have acquitted Mr. Leae in light of this phantom argument.

Mr. Leae was also prejudiced by counsel's failure to object to the blood transfer testimony.

There was no direct proof that he acted as an accomplice in the robbery or murder. Thus, there is a reasonable probability that defense counsel's failure to object affected the outcome of Mr. Leae's trial. *Kyllo*, 166 Wn.2d at 86. Counsel's failure to object deprived Mr. Leae of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* Mr. Leae's convictions for felony murder and rendering criminal assistance must be reversed, and the charges remanded for a new trial. *Id.*

b. Cumulative ineffective assistance of counsel

Each of the trial counsel's errors individually prejudiced Mr. Leae, and viewed as a whole, counsel's cumulative errors are overwhelming. Due to counsel's failure to object to the trivialization and misstatement of the proof required for accomplice liability, failure to object to the blood transfer and

blood spatter testimony, and in particular failure to object to the State's argument that no one other than Mr. Leae could have provided the weapon used in the commission of murder Mr. Leae was denied his right to effective counsel. It is sufficiently probable that counsel's errors affected the trial outcome. These errors are harmless only if the State can show that the mistakes in no way affected the final outcome of the case. The State cannot meet that burden here. These alleged instances of ineffective assistance, taken together, cumulatively deprived him of a fair trial.

6. THIS COURT SHOULD STRIKE THE INTEREST ACCRUAL AND SUPERVISION FEE PROVISIONS FOLLOWING RAMIREZ AND HOUSE BILL 1783

a. Recent statutory amendments prohibit discretionary costs for indigent defendants

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature has amended former RCW 36.18.020(2)(h) in Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783) and as of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee, former RCW 36.18.020(2)(h), on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The amendment applies prospectively and is applicable

to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 739, 746-50.

House Bill 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” *Ramirez*, 191 Wn.2d at 746 (citing Laws of 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”).

Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

In this case, the court imposed a \$500 crime victim fund assessment. CP 546. Shortly after the sentencing hearing the court found Mr. Leae unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 577. Thus, the record indicates that Mr. Leae was indigent under RCW 10.101.010(3) at the time of the sentencing hearing on July 31, 2019.

b. Remand is necessary to strike the interest accrual provision and supervision fee

Mr. Leae challenges the interest accrual on non-restitution LFOs assessed in Section 4.3 of the judgment and sentence. CP 546. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence states that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. CP 547. The 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.” As amended, RCW 10.82.090 now provides:

- (1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of the effective date of this section [June 7, 2018], no interest shall accrue on non-restitution legal financial obligations.

See Laws of 2018, ch. 269.

Under RCW 10.82.090(1) and (2)(a) the interest accrual provision in the judgment and sentence pertaining to non-restitution LFOs must be stricken.

In Section 4.3(B)(7) of the judgment and sentence, the court also directed Mr. Leae to pay a community supervision fee to the Department of Corrections. CP 545. The relevant statute provides that this is discretionary: “Unless waived by the court ... the court shall order an offender

to ... [p]ay supervision fees as determined by the department.” RCW 9.94A.703(2)(d). For this reason, costs of community custody, including monitoring costs, are discretionary and are subject to an ability to pay inquiry. *State v. Lundstrom*, 6 Wn.App.2d 388, 396 n. 3, 429 P.3d 1116 (2018). Because Mr. Leae is indigent, this Court should strike this condition.

7. ALTERNATIVELY, ALL REFERENCES TO FIRST DEGREE ROBBERY SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE BECAUSE THE COURT MERGED THE ROBBERY CONVICTION WITH FIRST DEGREE MURDER

Mr. Leae is entitled to have all references to the merged conviction for robbery in the first degree deleted from the judgment and sentence.

Our state constitution provides, “No person shall be twice put in jeopardy for the same offense.” Art. I, § 9; accord, U.S. Const. Amend. V. If double jeopardy results from a conviction for more than one crime, the remedy is vacation of the lesser offense. *State v. Weber*, 159 Wn.2d 252, 265-66, 149 P.3d 646 (2006).

Here, the trial court found the murder in the first degree and the predicate offense of robbery in the first degree merged for jeopardy purposes. 11RP at 1387; CP 542. But a court may still violate double jeopardy either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form, that the conviction nonetheless remains valid. *State v. Turner*, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010). See also *State v.*

Fuller, 169 Wn. App. 797, 833, 282 P.3d 126 (2012). To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction. *Turner*, 169 Wn.2d at 464-65.

Here the trial court merely “whited out” the reference to the robbery on the judgment and sentence and interlineated “Count 2 merged with Count 1” in section 2.3 of the judgment and sentence. The court left complete and undisturbed a reference to the jury verdict of first degree robbery in section 2.1 of the judgment and sentence. CP 540. The court's failure to excise *all* references to the robbery in the first degree conviction still leaves Mr. Leae in jeopardy. The case should be remanded to the trial court with directions to amend the judgment and sentence to reflect only the first degree murder and rendering criminal assistance convictions and special verdicts related only to those convictions. *Fuller*, 169 Wn. App. at 833.

E. CONCLUSION

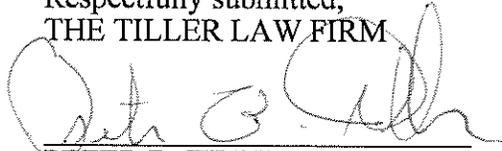
For the reasons stated, Mr. Leae respectfully asks the Court to reverse and dismiss his conviction for first degree murder with prejudice, or alternatively, reverse both convictions and grant him a new trial.

In the alternative, Mr. Leae respectfully requests this Court to remand for resentencing with instructions to strike the discretionary costs of the interest accrual to the extent it applies to non-restitution LFOs, to strike

and the DOC supervision fee and remand to strike any reference to robbery in first degree.

DATED: May 7, 2020.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", is written over a horizontal line.

PETER B. TILLER-WSBA 20835
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Of Attorneys for Thomas Leae

CERTIFICATE OF SERVICE

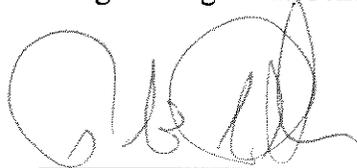
The undersigned certifies that on May 7, 2020, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Rachael Rogers Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 7, 2020.



PETER B. TILLER

THE TILLER LAW FIRM

May 07, 2020 - 2:37 PM

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