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Court of Appeals
Division II
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NO. 53877-6-II

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

STATE OF WASHINGTON, Respondent

v.

THOMAS PHILLIP LEAE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-01558-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The State presented sufficient evidence to prove that Leae acted as an accomplice to felony murder beyond a reasonable doubt.**
- II. The Prosecutor did not commit reversible misconduct during closing argument.**
- III. The State did not improperly elicit an opinion from the detective that Ms. Siufanua was not acting alone.**
- IV. The Detective was properly permitted to testify as to blood splatter that was within his knowledge and was helpful to the trier of fact.**
- V. Defense counsel was not ineffective for failing to object to portions of the prosecutor's closing argument.**
- VI. The State agrees this Court should strike the interest accrual and supervision fee from the judgment and sentence.**
- VII. The State agrees that references to the merged count of Robbery should be stricken from the Judgment and Sentence.**

STATEMENT OF THE CASE

The State agrees with the appellant's statement of the case.

ARGUMENT

I. The State presented sufficient evidence to prove that Leae acted as an accomplice to felony murder beyond a reasonable doubt.

Leae claims the state did not present sufficient evidence to prove that he acted as an accomplice to felony murder. When all the evidence is reviewed in the light most favorable to the State, there is sufficient evidence from which a reasonable juror could find that Leae acted as an accomplice to felony murder beyond a reasonable doubt. Leae's claim fails.

When a defendant claims evidence is insufficient to sustain his conviction, this Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *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. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d

1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Evidence that is direct or circumstantial may be equally presented to the jury. Circumstantial evidence is no less reliable than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975). The reviewing Court does not disturb the jury's credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Leae was charged with Murder in the First Degree by being an accomplice to Ailiana Siufanua's conduct of robbing and killing Bentley Brookes. CP 1-2, 183. To prove Leae guilty of this, the State had to prove that Leae or an accomplice committed robbery in the first degree, that Leae or an accomplice caused the death of Bentley Brookes in the course of or in furtherance of that crime, that Bentley Brookes was not a participant in the robbery, and that any of those acts occurred in the State of Washington. CP 185. The State's theory was that Leae assisted Ms. Siufanua in committing the robbery of the pawn shop owned by Bentley Brookes, and that Ms. Siufanua killed Bentley Brookes during the course of or in furtherance of the robbery. To prove that a robbery was committed, the State had to prove that Leae or an accomplice unlawfully, and with the intent to commit theft, took personal property from the person of or in the presence of Bentley Brookes, and that the taking was against Bentley Brookes' will by the use or threatened use of immediate

force, violence, or fear of injury. CP 187; RCW 9A.56.190. To prove that Leae acted as an accomplice, the State had to show that Leae, “with knowledge that it [would] promote or facilitate the commission of the crime, he [] (i) solicit[ed], command[ed], encourage[d], or request[ed] such other person to commit it; or (ii) aid[ed] or agree[d] to aid such other person in planning or committing it.” RCW 9A.08.020(3)(a). The State proved the elements of these crimes beyond a reasonable doubt and that Leae acted as an accomplice to Ms. Siufanua in committing the crimes.

The evidence showed that Ms. Siufanua entered Pacific Bullion, the business co-owned by Bentley Brookes, on November 25, 2015. RP 486, 510-11. Ms. Siufanua pulled a gun out of her pocket and pointed it at Mr. Brookes. RP 486, 505-10. She then fired the gun, hitting Mr. Brookes in the face. RP 486, 505-07. Ms. Siufanua then stepped over Mr. Brookes’ fallen body and removed items from the display case, the drawers in a credenza and the desk, putting them in the backpack she carried, and then left the store. RP 486, 506. From this evidence it is without question that there is sufficient evidence to show that Ms. Siufanua committed a robbery and killed Mr. Brookes. There is also sufficient evidence to support that Leae acted as her accomplice. The State produced evidence that Leae was in Pacific Bullion on November 12, 2015, less than two weeks before the murder. RP 610, Ex. 115, 116, 117. The video

surveillance from this incident shows Leae engaging Mr. Brookes for approximately four minutes and then leaving Pacific Bullion. RP 606-12, 621-23. On that same date, November 12, 2015, Leae and Ms. Siufanua were seen together at a WinCo store in Vancouver. RP 919-21, 924; Ex. 120, 121, 122. In the following days, Ms. Siufanua and Leae were together at a motel in Kalama, a town north of Vancouver. RP 1042-46, 1050-53. On November 18, 2015, Ms. Siufanua and Leae were together at Pacific Bullion. RP 611-13; Ex. 112, 113, 114. Then on November 26, 2015, the day after Mr. Brookes' murder, Leae and Ms. Siufanua were together at the same motel in Kalama. RP 1059; Ex. 125. Leae was seen with blood on his hands. *Id.*

On the day of the murder, near the time of the murder, in the vicinity of Pacific Bullion, video surveillance from a C-Tran bus shows a silver Honda Accord with a license plate of "AND 848" with two people in the car. The front passenger matched the description of Ms. Siufanua seen on the video surveillance at Pacific Bullion. RP 942-45. The driver of the Honda had an "afro" hairstyle, facial hair and wore a "big hood." RP 1139-40. Ms. Siufanua's family told police they had spoken to her and Leae together on November 30, 2015. RP 732-35, 1187-89. On that same date, November 30, 2015, Leae and Ms. Siufanua were in a Honda Accord driving southbound on Interstate 5 in California. RP 838. A California

Highway Patrol Officer attempted to stop the vehicle for speeding; the Honda accelerated to approximately 100 miles per hour. RP 838. Another officer joined the pursuit of the vehicle; the Honda's headlights were not on. RP 689, 718. The officers pursued the Honda for approximately 8 miles when the car exited the freeway. RP 868. The Honda turned left under the freeway overpass and slowed to about 25 miles per hour; at that time a third Highway Patrol Officer performed a pursuit intervention technique (PIT) maneuver and turned the Honda 180 degrees to face the pursuing police vehicles. RP 691-92, 868. The officers got out of their vehicle, but then the Honda drove up the freeway exit ramp and continued driving southbound in the northbound lane of Interstate 5 with no headlights activated. RP 692. Officers eventually caught up with the Honda, traveling between 60 and 80 miles per hour; sometimes the Honda was driving on the shoulder of the highway, and sometimes in the center divider. RP 696-97, 869. The officers drove parallel to the Honda in the southbound lane for about ten miles. *Id.* Eventually, the Honda crashed into a tree between the northbound lane and the exit ramp to a rest area. RP 698-99, 870-72. The passenger, Ms. Siufanua was killed. RP 709, 876. Leae was identified as the driver of the vehicle; he suffered a broken leg. RP 700. Leae had his Washington Driver's License on him and \$1,600 in cash. RP 704.

Police searched the Honda and located various items of interest. They found a receipt from WinCo dated November 12, 2015, silver coins, a voucher for Leae dated October 23, and October 29, 2015, silver items, jewelry, a backpack containing DVDs, a laptop computer, and a paystub for Ms. Siufanua. RP 785-86, 1191. Many of the items found in the vehicle were identified as having come from Pacific Buillion. RP 1005-08, 1019-24, 1027, 1032-33. When speaking to police after the accident, Leae told them that he owned the Honda, and was in the process of buying it. RP 717-18.

All this evidence, taken together, along with all the reasonable inferences drawn therefrom, gave the jury sufficient evidence from which to find that Leae was the person in the vehicle with Ms. Siufanua on the day of the murder, that he drove her to the scene and away from the scene after she committed the robbery and murder. When the evidence is reviewed in the light most favorable to the State, it is clear that Leae's presence, in his vehicle, the vehicle which brought Ms. Siufanua to and away from the scene of the crime, promoted or facilitated Ms. Siufanua in the robbery and murder of Mr. Brookes, and that this was Leae's intent. This evidence amply supports the jury's finding that Leae acted as an accomplice to Ms. Siufanua. While a lot of the evidence may be circumstantial, circumstantial evidence may be relied on equally as direct

evidence. The State presented sufficient evidence from which a reasonable jury could have found, and did find, that Leae acted as an accomplice to Ms. Siufanua. This Court should affirm Leae's conviction for felony murder.

II. The Prosecutor did not commit reversible misconduct during closing argument.

Leae claims the prosecutor misstated the law regarding accomplice liability and argued facts not in evidence during his closing argument, and thus committed reversible misconduct. The prosecutor did not misstate the law and argued reasonable inferences from the evidence during his closing argument. The prosecutor did not commit reversible misconduct.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained-of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper

remarks or conduct. A defendant who fails to object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing 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 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court’s instructions. *State v. Burton*, 165 Wn.App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a

prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id.* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn.App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn.App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn.App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *Davenport*, 100 Wn.2d at 762. The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Id. at 762-63.

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction

would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762. But even assuming Leae did or his attorney should have objected to the argued instances of prosecutorial misconduct, the complained-of comments do not establish prosecutorial misconduct or prejudice even under the lower standard of review. Thus, this Court should reject Leae's claim of prosecutorial misconduct.

Leae claims the prosecutor committed misconduct by asking the jury to consider where Ms. Siufanua would have had access to a gun, and that everything pointed to the defendant. The State agrees that this statement was improper. However, Leae was not prejudiced by this statement. The jury was instructed that the attorneys' arguments were not evidence. CP 172. The jury was further instructed to disregard any remark, statement, or argument that is not supported by the evidence. RP 172. Juries are presumed to follow instructions and thus we can presume that the jury followed this instruction. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). If it did, there could not have been prejudice to Leae as

the jury was told that the prosecutor's statements were not evidence and to disregard any statement he made that was not supported by the evidence. The jury knew to disregard this statement and did not need further instruction from the court regarding it. In *Warren*, the prosecutor argued facts not in evidence in the closing argument. *Warren*, 165 Wn.2d at 29. However, the trial court had instructed the jury that what the attorneys said was not evidence and that it was up to the jury to decide what the evidence was. *Id.* Leae's jury was instructed to do the same thing and the Court went even further to tell the jury to disregard anything that wasn't evidence. In *Warren*, the Supreme Court found that the defendant had not established prejudice for the prosecutor's misconduct in arguing facts not in evidence. The same is true in Leae's case; he has failed to show that the prosecutor's comment prejudiced him. The State's theory of the case was not that Leae provided the gun to Ms. Siufanua and was an accomplice to the murder in that regard. Instead, the State argued that Leae supported Ms. Siufanua by driving her to and from the scene and for encouraging her and being her moral support. Thus, the prosecutor's improper argument did not go to the State's theory of the case and would not have been the basis for the jury's conviction. Leae has not shown prejudice.

Leae also argues the prosecutor committed misconduct by misstating the law regarding accomplice liability. The prosecutor did not

misstate the law, but rather gave examples of what would constitute acting as an accomplice to aid the jury in understanding the instruction. This was a proper argument and even if it was not, it did not result in any prejudice to Leae. Leae argues that the prosecutor told the jury that mere moral support, with nothing further, established accomplice liability. But that is a mischaracterization of the prosecutor's argument. The prosecutor clearly told the jury that the accomplice had to be ready to assist by stating "it goes on that a person who is present and is willing to assist essentially lending moral support..." RP 1296. The prosecutor said that the accomplice had to be willing to assist; and later said that someone is an accomplice "as long as [they're] willing..." RP 1296. This was not a misstatement of the law and the prosecutor did not state or imply that someone could be found to be an accomplice who was not ready and willing to assist the principal. Leae's argument that this was misconduct is without merit. Furthermore, even if it were proper, the jury had the law from the trial court which clearly told them the elements of what had to be present for someone to be liable for the conduct of another. The jury, assumed to have followed the instructions, would have properly followed the elements of accomplice liability to make their own determination as to whether Leae's conduct supported those elements. There was no prejudice. Leae's convictions should be affirmed.

III. The State did not improperly elicit an opinion from the detective that Ms. Siufanua was not acting alone.

Leae argues the State admitted improper opinion evidence when the detective testified that Ms. Siufanua was not acting alone. The detective never opined that Ms. Siufanua was acting with Leae, nor did he mention Leae during this part of his testimony. The detective did not improperly imply or opine that Leae was guilty. Leae's claim that he did fails.

Trial courts are afforded broad discretion in deciding whether to admit evidence, including testimony. *State v. Demery*, 114 Wn.2d 753, 758, 30 P.3d 1278 (2001); *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993). A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *Demery*, 144 Wn.2d at 758. A trial court abuses its discretion only if no reasonable person would adopt the view taken by the trial court. *Id.* If reasonable people can disagree about the propriety of the trial court's decision, then no abuse of discretion occurred. *Id.*

Expert and lay witnesses may not testify as to the guilt of a defendant, either directly or by inference. *Heatley*, 70 Wn.App. at 577. This could undermine the jury's determination of the facts and invade upon a defendant's right to trial by jury. *Demery*, 114 Wn.2d at 759; *State*

v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). But an opinion is not always improper simply because it involves ultimate factual issues. *Heatley*, 70 Wn.App. at 578 (citing ER 704). Whether certain testimony constitutes an improper opinion on the defendant's guilt is something that is determined from the circumstances involved in each case. *State v. Cruz*, 77 Wn.App. 811, 814-15, 894 P.2d 573 (1995). Factors considered in this analysis are the type of witness involved, the nature of the charges, the type of defense, and the other evidence. *Heatley*, 70 Wn.App. at 579. Evidence is not improper when it is not a direct comment on the defendant's guilt, is helpful to the jury, and is based on inferences from the evidence. *Id.* at 577.

Leae claims that the detective's testimony made clear that he believed that Leae, himself, was an accomplice to the murder. However, the detective never opined on who Ms. Siufanua's accomplice was, only that she had an accomplice in order to commit the crime. This did not interfere with Leae's defense that he was not the person who assisted Ms. Siufanua in the offense. Thus, the statement by the detective was not a comment on the defendant's guilt. But even if it was, it was harmless error.

An error of constitutional magnitude is presumed prejudicial, and the State must prove the error was harmless beyond a reasonable doubt.

State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001). A constitutional error is harmless when the untainted evidence provides an overwhelming conclusion of guilt. *Id.* Removing the detective's statement from the evidence at trial – that Ms. Siufanua was not acting alone – does not affect the majority of the evidence against Leae that the State presented at trial. The untainted evidence does overwhelmingly point to Leae's guilt, and the detective's statement in no way contributed to the jury's verdict. Any potential error was harmless.

IV. The Detective was properly permitted to testify as to blood splatter that was within his knowledge and was helpful to the trier of fact.

Leae claims the detective was not qualified as an expert and therefore should not have been permitted to offer testimony regarding blood splatter and the likelihood that there was blood on Ms. Siufanua's shoe. Leae did not object to this testimony at the trial court level and should not be allowed to raise it for the first time on appeal. Further, the detective was qualified to offer such information, and this was helpful to the trier of fact. The trial court did not abuse its discretion in admitting this evidence. Leae's claim fails.

Leae did not object at the trial court level to the testimony from Detective Zapata regarding the splatter of the victim's blood upon being

shot. RP 1222-25. “As a general rule, appellate courts will not consider issues raised for the first time on appeal.” *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995) (citing RAP 2.5(a)). Only claims of constitutional magnitude may be raised for the first time on appeal. *Id.* Leae has not identified a claim of constitutional magnitude here. Admission of evidence via testimony is not necessarily of constitutional magnitude and only becomes such an issue if it infringes upon a defendant’s constitutional rights. The detective’s discussion of the blood splatter did not infringe on any constitutional right, and Leae only claims violation of an evidentiary rule in his briefing on this subject. Therefore, this issue should not be reviewed for the first time on appeal as it does not raise an issue of constitutional magnitude.

It also violates the fundamentals of fairness to permit a defendant to allow an error to go un-checked at the trial court level and then complain about it on appeal. Had the defendant objected at the trial court level, the State could have developed the record further to establish the witness’s qualifications as an expert. But the defendant’s silence in the face of this testimony evidenced his tacit agreement to the witness’s qualifications as an expert.

However, even if this Court chooses to review this issue, there was no abuse of discretion by the trial court. Trial courts are afforded broad

discretion in deciding whether to admit evidence, including testimony. *State v. Demery*, 114 Wn.2d 753, 758, 30 P.3d 1278 (2001); *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993). A trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *Demery*, 114 Wn.2d at 758. A trial court abuses its discretion only if no reasonable person would adopt the view taken by the trial court. *Id.* If reasonable people can disagree about the propriety of the trial court's decision, then no abuse of discretion occurred. *Id.*

Detective Zapata had over 24 years of experience as a police officer at the time of the trial. RP 1173. He had been a detective for over 19 of those years. *Id.* By simply investigating homicides for over a decade, the detective had the necessary experience to qualify as an "expert" under ER 702. ER 702 allows a witness to testify as to scientific evidence if it would be helpful to the trier of fact, and if the witness is so qualified to testify. ER 702. There are no minimum qualifications for an "expert" under this rule. Practical experience is sufficient to qualify a witness as an expert. *Acord v. Pettit*, 174 Wn.App. 95, 302 P.3d 1265, *review denied*, 178 Wn.2d 1005, 308 P.3d 641 (2013). Detective Zapata had practical experience sufficient to qualify him as an expert in this field based on his many years of experience as a homicide detective. The trial court did not abuse its discretion in allowing this testimony. Leae's claim fails.

V. Defense counsel was not ineffective for failing to object to portions of the prosecutor's closing argument.

Leae argues that his trial counsel was ineffective for failing to object to two “instances of prosecutorial misconduct” and Detective Zapata’s blood splatter testimony. As discussed above, the prosecutor did not commit misconduct and therefore any objection would not have changed the outcome of this appeal under the lower standard of review for objected-to prosecutorial misconduct, and the detective was properly qualified to testify to the blood splatter information and such information was properly admitted by the trial court and therefore no objection would have changed this evidence. Accordingly, Leae’s counsel was not ineffective.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense

attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the

outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

As discussed above, even assuming the lower standard of review for objected-to prosecutorial misconduct, Leae’s claim fails. The prosecutor did not misstate the law regarding accomplice liability and the comment regarding the gun had no prejudicial impact on the case. Further, it is well known that defense counsel does not “commonly object during closing argument ‘absent egregious misstatements.’” *In re Personal Restraint of Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting *United States v. Necochea*, 986 F.2d 1273, 1281 (9th Cir. 1993)). Further, Detective Zapata properly testified to his knowledge of blood splatter, the evidence in this case that he knew based on his detailed analysis of the crime scene footage. Any objection to this testimony would have been overruled. Leae’s attorney was not ineffective; his claim fails.

VI. The State agrees this Court should strike the interest accrual and supervision fee from the judgment and sentence.

Leae's judgment and sentence provided that he should pay a supervision fee and that interest shall accrue on his LFOs. CP 545-46. RCW 10.82.090 provides that no interest shall accrue on non-restitution legal financial obligations. RCW 10.82.090(1). Therefore, the trial court's order that the LFOs should bear interest violates RCW 10.82.090 and should be corrected. Also, because the trial court found Leae was indigent, it should not have ordered that he pay a supervision fee and the State agrees with Leae that it should be stricken.

VII. The State agrees that references to the merged count of Robbery should be stricken from the Judgment and Sentence.

Leae's judgment and sentence contain references to the robbery count the jury also found him guilty of committing. However, the robbery conviction was properly merged with the murder conviction pursuant to the trial court's ruling. RP 1387. The State agrees that the judgment and sentence should not reference the merged offense of robbery. *See State v. Turner*, 169 Wn.2d 448, 464-65, 238 P.3d 461 (2010). This Court should remand for the trial court to strike the references to the robbery conviction from the judgment and sentence.

CONCLUSION

Pursuant to the above arguments, this Court should affirm Leae's conviction for murder and should remand to the trial court to strike the supervision fee, the interest on the LFOs and the references to the robbery conviction from Leae's judgment and sentence.

DATED this 8th day of September, 2020.

Respectfully submitted:

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