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NO. 54212-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

DARRELL KOHLSTAEDT,
Appellant.

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

The Honorable John R. Hickman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by denying Mr. Kohlstaedt's motion for a mistrial when Ms. Shank testified to the fact that Mr. Kohlstaedt had previously been to prison in violation of ER 404(b), ER 403, and the trial court's rulings on Mr. Kohlstaedt's motions in limine.
2. The trial court commented on the state's evidence when it reinstructed the jury after deliberations were underway and emphasized inadmissible testimony related to Mr. Kohlstaedt having been to prison before being charged in this case.
3. The state committed prosecutorial misconduct when the prosecutor misstated the law regarding accomplice liability two separate times during closing argument and the misstatement lowered the state's burden to prove Mr. Kohlstaedt's criminal liability.

Issues Presented on Appeal

1. Did the trial court abuse its discretion by denying Mr. Kohlstaedt's motion for a mistrial when Ms. Shank

testified to the fact that Mr. Kohlstaedt had previously been to prison in violation of ER 404(b), ER 403, and the trial court's rulings on Mr. Kohlstaedt's motions in limine?

2. Did the trial court comment on the state's evidence when it reinstructed the jury after deliberations were underway and emphasized inadmissible testimony related to Mr. Kohlstaedt having been to prison before the charges in this case?
3. Did the state commit prosecutorial misconduct when the prosecutor misstated the law regarding accomplice liability two separate times during closing argument and the misstatement lowered the state's burden to prove Mr. Kohlstaedt's criminal liability?

B. STATEMENT OF THE CASE

Substantive Facts

Darrell Kohlstaedt and Kelsey Shank were in a dating relationship for two years. RP 101-02. In May of 2018, Mr. Kohlstaedt and Ms. Shank lived together but had ended their dating relationship. RP 104-06. Ms. Shank owned a green 1997 Chevrolet

Z71 truck during their relationship. RP 103. After the breakup, Mr. Kohlstaedt moved most of his belongings out of the house but still had a few things there including a stereo that he installed in Ms. Shank's truck but did not gift to her. RP 106. Mr. Kohlstaedt had permission to drive Ms. Shank's truck during their relationship. RP 104.

On May 24, Mr. Kohlstaedt and Ms. Shank spent the day arguing and Mr. Kohlstaedt eventually left the house. RP 119. Ms. Shank recalled that he returned to the house at some point that night because she woke up when her friend opened the door for him, but did not know what he did while he was there. RP 119. Mr. Kohlstaedt returned the next day and the couple began to argue again. RP 121. Ms. Shank thought it was odd that Mr. Kohlstaedt spent much of the time looking at his cell phone and at one point went into the bedroom and played music out of a speaker. RP 121.

Later that day, Mr. Kohlstaedt and Ms. Shank went to drive somewhere but discovered that Ms. Shank's truck was missing when they went outside. RP 122. Ms. Shank contacted the police. RP 136. She told the responding officer that she had two keys to the truck. RP 136. The officer asked to see both keys, but Ms.

Shank discovered that one of the keys to her truck had been removed from its usual key ring. RP 136.

After Ms. Shank reported her truck stolen, firefighters responded to reports of a car fire near the 4000 block of 416th Street East in Eatonville. RP 271. The firefighters arrived to find a truck with its engine compartment and cab engulfed in flames on a dirt road just off 416th Street East. RP 272-74. The firefighters put the fire out and searched the area immediately around the burnt truck. RP 276. They discovered a smartphone on the ground about 15 feet from the truck's bed. RP 276. A Pierce County Sheriff's deputy responded to the scene and the firefighters gave him the smartphone. RP 277.

The police secured a search warrant for the smartphone and its registration information revealed that it belonged to Kendra Nestegard. RP 263-64. They also discovered Facebook messages between Ms. Nestegard and Mr. Kohlstaedt. RP 211, 264.

The following exchange took place at approximately 2:12 AM on May 25th:

[MR. KOHLSTAEDT]: I'm going up the stairs now.

[MS. NESTEGARD]: How's it going?

[MR. KOHLSTAEDT]: I've got it.

RP 212-13; Ex. 3A, 3E. The pair exchanged more messages at approximately 5:57 AM:

[MR. KOHLSTAEDT]: I'm in the room. I'm turning music on now.

[MS. NESTEGARD]: So does that mean go?

[MR. KOHLSTAEDT]: It's on. You're good right?

[MS. NESTEGARD]: Did you hear the loud noise or not? Did you hear me?

[MR. KOHLSTAEDT]: No.

[MS. NESTEGARD]: Perfect.

RP 213-14; Ex. 3(C-E). Later in the day, Mr. Kohlstaedt messaged Ms. Nestegard "get rid of that truck and all the clothes you were wearing." RP 216; Ex. 3E.

The house Mr. Kohlstaedt and Ms. Shank lived in had three security cameras set up to record footage of areas around the property. RP 107, 265. The police were able to retrieve security footage from the night before Ms. Shank's truck went missing. RP 109-11. One of the cameras caught footage of Ms. Shank's truck as it sat in the driveway. RP 112-13; Ex. 11. Footage recorded at 1:04 AM showed a female enter the screen and try the truck's door

handle, but the door was locked. RP 116-18; Ex. 11. Ms. Shank believed she recognized the female to be Kendra Nestegard, who is a friend of Mr. Kohlstaedt. RP 117-18.

Additional footage showed the events occurring in the driveway at the time Mr. Kohlstaedt came home the next morning. RP 120-21. Mr. Kohlstaedt parked his vehicle outside of the house and went inside. RP 207-08. An unidentifiable person then used a key to enter Ms. Shank's truck before driving away. RP 123; Ex. 11.

The police interviewed Ms. Nestegard and she admitted to taking Ms. Shank's truck because Mr. Kohlstaedt wanted to retrieve his stereo. RP 199. She confirmed that she is the woman in the security footage who tried the truck's door handle. RP 198. When she found it locked, she and Mr. Kohlstaedt decided to return the next morning so Mr. Kohlstaedt could take Ms. Shank's extra key. RP 203.

Ms. Nestegard also confirmed that the Facebook messages she and Mr. Kohlstaedt exchanged referred to him going upstairs to take Ms. Shank's key and him playing loud music to hide the noise of the truck starting in the driveway. RP 208-09, 213-14. After Ms. Nestegard took the truck, she drove it to a house that belonged to

one of Mr. Kohlstaedt's friends where she waited for him to come and retrieve the stereo. RP 205-06. Mr. Kohlstaedt never came to the house and texted Ms. Nestegard to "get rid of that truck and all the clothes you were wearing." RP 216.

After receiving this message, Ms. Nestegard drove the truck toward a wooded area until it began to sputter due to low fuel. RP 254. She pulled onto the dirt road and found a gas can in the bed of the truck. RP 224. Ms. Nestegard testified that she was in "panic mode" and decided to use the gas to light the truck on fire rather than continue driving. RP 254. She tipped the gas can over in the bed of the truck, lit a piece of paper on fire, and dropped it onto the fuel. RP 224. Ms. Nestegard removed her sweatshirt to throw it into the fire and unknowingly knocked her smartphone out of her pocket. RP 226. She then hitchhiked home. RP 226.

Procedural Facts

The state charged Ms. Nestegard with one count of theft of a motor vehicle and one count of arson in the second degree and charged Mr. Kohlstaedt as her accomplice to the theft. CP 3-4. Kohlstaedt's charges included a domestic violence enhancement due to his relationship with Ms. Shank. CP 3-4. The jury ultimately

hung on the arson count which the trial court dismissed. RP 400.

Ms. Nestegard entered into a plea agreement with the state wherein she agreed to testify against Mr. Kohlstaedt in exchange for a reduction in charges and no jail time. RP 236. Mr. Kohlstaedt proceeded to a jury trial. CP 30-32.

During motions in limine, the trial court granted Mr. Kohlstaedt's motion to exclude any reference to his criminal history, prior bad acts, or warrants unrelated to this case. RP 46-49, 53-54; CP 91.

i. Mr. Kohlstaedt's statements to Ms. Shank

After the state charged Mr. Kohlstaedt and the trial court issued a warrant for his arrest, he contacted Ms. Shank and asked to meet with her. RP 90-91. The pair met and Ms. Shank asked Mr. Kohlstaedt questions about her burnt truck. RP 92. Mr. Kohlstaedt made statements about how he never intended to steal the truck or have Ms. Nestegard burn it and how he was now "on the run" from a warrant. RP 93. Mr. Kohlstaedt became angry and took out a handgun and fired it into the air before threatening to commit "suicide by cop" if the police confronted him. RP 92-93.

The state sought to admit the statements Mr. Kohlstaedt

made to Ms. Shank at this meeting to show consciousness of guilt. RP 37, 87-88. Mr. Kohlstaedt objected to admission of the statements pursuant to ER 404(b) and ER 403. RP 38-39, 96; CP 91. The trial court overruled Mr. Kohlstaedt's objection:

[TRIAL COURT]: I think it's probative to a jury. They can give what weight they want to it. But it's certainly a consciousness of guilt or an attempt to play on the emotions of this witness in terms of "If you go through with this, I'm going to blow my brains out" kind of situation. And I think that's -- I think that's relevant.

RP 96. Ms. Shank went on to testify about Mr. Kohlstaedt's threat to commit suicide by cop during the state's case-in-chief. RP 151.

ii. Defense motion for a mistrial

When the state questioned Ms. Shank about her meeting with Mr. Kohlstaedt, the prosecutor asked her what Mr. Kohlstaedt said during the meeting. RP 151. Ms. Shank provided the following response:

[MS. SHANK]: That *he wasn't going to go back to prison again* and that it wasn't his fault, he didn't do it, and that he never told her to torch the truck, this and that. He said that he would die before he went to go -- or before he went back to prison or something. I don't remember exactly verbatim. And he shot a gun off, and he said he would suicide by cop.

RP 151 (emphasis added). Mr. Kohlstaedt's trial counsel immediately voiced an objection and asked for a hearing outside

the presence of the jury. RP 151-52. Mr. Kohlstaedt moved for a mistrial based on Ms. Shank's testimony that Mr. Kohlstaedt said he would not "go back to prison" because it violated the trial court's pretrial ruling excluding information about Mr. Kohlstaedt's criminal history. RP 152-53.

The trial court agreed that the testimony was inadmissible but denied Mr. Kohlstaedt's motion and offered to provide a limiting instruction directing the jury to disregard Ms. Shank's response. RP 156-57. When the jury returned to the courtroom, the trial court directed the jury's attention to Ms. Shank's comment about prison and instructed them to disregard it. RP 160.

iii. Closing arguments

During the state's rebuttal closing argument, the prosecutor made the following argument to the jury regarding accomplice liability:

[PROSECUTOR]: The question is not whether or not – well, let me pose it to you this way. The question is not did he tell her to burn the truck. The question is, is burning the truck a reasonable and potential outcome of the crime he directed her to commit.

RP 366. Mr. Kohlstaedt's trial counsel immediately objected to this argument as a misstatement of the law. RP 366. The trial court

noted the objection for the record but allowed the argument to stand. RP 366.

Later in rebuttal, the state again argued that the alleged arson was “a reasonable outcome from his command to get rid of the truck.” RP 367. Mr. Kohlstaedt’s trial counsel again objected on the basis that the prosecutor was misstating the law, but the trial court only reiterated that the prosecutor’s statements were argument and not evidence. RP 368.

iv. Jury questions

During deliberations, the jury sent the trial court a question asking which part of Mr. Shank’s testimony about the meeting with Mr. Kohlstaedt was admissible. RP 373. The trial court proposed answering the question by instructing the jury not to consider any reference to prison in their deliberations. RP 375. Mr. Kohlstaedt objected to this proposal on the basis that doing so would draw the jury’s attention to the fact that Mr. Kohlstaedt had been to prison. RP 375. The trial court overruled the objection and responded to the jury’s question by instructing them not to consider a reference to prison while deliberating. RP 375-76.

The jury sent the trial court a second question asking

whether the trial court's instruction on accomplice liability applied to both counts. RP 382. The state and trial court proposed instructing the jury that accomplice liability could be applied to both counts but it was the jury's decision whether it actually did. RP 382. Mr. Kohlstaedt objected and asked the court to reiterate the instructions that were already read to the jury. RP 382-83. The trial court overruled Mr. Kohlstaedt and instructed the jury that the accomplice liability instruction "can be applicable to both counts. However, it is the jury's decision to decide if it applies to either count." RP 384.

After further deliberations, the jury sent the trial court another question asking what procedure they should follow if they could not reach a unanimous verdict as to one of the counts. RP 384. The trial court directed the jury to contact the judicial assistant if they could not reach a verdict on one or more counts. RP 385. The jury deliberated further but eventually sent the trial court a message that they had reached a verdict on one count but were deadlocked on the other. RP 390.

The trial court called the jury into the courtroom and asked the presiding juror whether there was a reasonable probability of the jury reaching a unanimous verdict on the count they were

deadlocked on. RP 392. The presiding juror responded that there was not a reasonable probability of them reaching a verdict on that count. RP 392. The trial court directed the jury to complete the verdict forms for the count they agreed on and to deliberate further on the other count. RP 392-93.

After further deliberations, the jury sent the trial court another message informing it that they were still deadlocked on one count. RP 395. The trial court polled the jury and each juror confirmed that they reached a unanimous verdict on one count but there was not a reasonable probability of reaching a verdict on the other count. RP 398-99. The jury found Mr. Kohlstaedt guilty of theft of a motor vehicle but could not reach a verdict on the charge of arson in the second degree. RP 400. The jury also found that the theft was a crime of domestic violence. RP 401. The trial court declared a mistrial on the arson charge. RP 400.

The trial court imposed a standard-range DOSA sentence. RP 443-45. Mr. Kohlstaedt filed a timely notice of appeal. CP 242.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING MR. KOHLSTAEDT'S MOTION FOR A MISTRIAL WHEN MS. SHANK'S TESTIMONY INCLUDED AN INADMISSIBLE REFERENCE TO HIS CRIMINAL HISTORY

The trial court abused its discretion when it denied Mr. Kohlstaedt's motion for a mistrial and Ms. Shank's testimony included an inadmissible reference to the fact that he had been to prison. The presentation of this testimony constitutes a major irregularity that deprived Mr. Kohlstaedt of his right to a fair trial.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). ER 404 is meant to exclude evidence tending to show that the defendant has a propensity for criminal behavior and therefore must be guilty of the current charge. *State v. Wade*, 98 Wn. App. 328, 333-34, 989 P.2d 576 (1999).

A trial court should declare a mistrial when inadmissible testimony is put before the jury and the testimony so taints the proceedings that the defendant was denied his right to a fair trial. *State v. Weber*, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983) (citing

State v. Nettleton, 65 Wn.2d 878, 880, 400 P.2d 301 (1965)). A trial irregularity prejudices a defendant's rights if it poses a substantial likelihood of affecting the jury's verdict. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citing *State v. Greiff*, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000)). A trial court's ruling on a motion for a mistrial is reviewed for an abuse of discretion. *Gamble*, 168 Wn.2d at 177 (citing *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006)).

A party's violation of a pretrial ruling is a serious irregularity in any trial. *Gamble*, 168 Wn.2d at 178 (citing *State v. Thompson*, 90 Wn. App. 41, 46, 950 P.2d 977 (1998)). When a trial irregularity occurs, the trial court must determine its prejudicial effect by analyzing (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. *Gamble*, 168 Wn.2d at 177 (citing *Greiff*, 141 Wn.2d at 921).

The introduction of inadmissible evidence related to a defendant's criminal history is highly prejudicial. See *Gamble*, 168 Wn.2d at 178; *State v. Taylor*, 60 Wn.2d 32, 36-38, 371 P.2d 617 (1962) (police officer testified that the defendant had a parole

officer); *State v. Escalona*, 49 Wn. App. 251, 254-56, 742 P.2d 190 (1987) (witness testified that the defendant “had a record and had stabbed someone” during assault trial). In cases of such serious prejudice, a curative instruction does not always remedy the violation of the defendant’s rights. *Gamble*, 168 Wn.2d at 177 (citing *State v. Hopson*, 113 Wn.2d 273, 284-85, 778 P.2d 1014 (1989)).

Here, Ms. Shank testified that Mr. Kohlsdaedt told her he “wasn’t going back to prison again,” thereby informing the jury that that Mr. Kohlstaedt has a history of committing serious crimes. RP 151. This testimony was elicited during the state’s case-in-chief in violation of the trial court’s pretrial ruling that evidence of Mr. Kohlstaedt’s criminal history was to be excluded. CP 91.

The circumstances analyzed in *Escalona* are analogous to this case. In that case, the trial court similarly granted a defense motion in limine to exclude any reference to the defendant’s prior conviction. *Escalona*, 49 Wn. App. at 252. Nevertheless, a state’s witness testified that the defendant “had a record and had stabbed someone” before the allegations at issue in the trial. *Escalona*, 49 Wn. App. at 253. The defendant immediately moved for a mistrial,

but the trial court denied the motion. *Escalona*, 49 Wn. App. at 253. The trial court orally instructed the jury to disregard the testimony. *Escalona*, 49 Wn. App. at 253.

The defendant appealed his conviction and this court analyzed the case using the three factors discussed in *Gamble*. This court held that the irregularity was serious because the challenged testimony was inadmissible under ER 404(b) and should have been excluded pursuant to the trial court's ruling during motions in limine. *Escalona*, 49 Wn. App. at 255. The court also held that the evidence was not cumulative because the record did not contain any other evidence of the defendant's prior conviction. *Escalona*, 49 Wn. App. at 255.

However, the court considered the "difficult question" in the case to be whether the trial court's oral instruction to disregard the testimony was sufficient to cure the error. *Escalona*, 49 Wn. App. at 255. While it is settled law that juries are presumed to follow the court's instructions, the court observed that "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the mind of the jurors.'" *Escalona*, 49 Wn. App. at 255

(quoting *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

The court held that the inadmissible testimony regarding the defendant's prior conviction is the type of "inherently prejudicial" evidence that will taint a juror's perception of the case regardless of any curative instruction. *Escalona*, 49 Wn. App. at 255-56. Based on the admission of this testimony, this court held that the trial court erred by denying the defendant's motion for a mistrial and remanded the case for a new trial. *Escalona*, 49 Wn. App. at 256-57.

Ms. Shank's testimony revealing that Mr. Kohlstaedt had been to prison before the allegations in this case warrants the same relief this court granted in *Escalona*. Applying the first factor, the irregularity in Mr. Kohlstaedt's trial was serious because the testimony about him having been to prison would normally have been inadmissible under ER 404(b) and the trial court's rulings on his motions in limine. *Escalona*, 49 Wn. App. at 255. Additionally, the testimony was not cumulative because the record does not contain any other evidence of Mr. Kohlstaedt having been to prison.

Just as the testimony that the defendant "had a record and had stabbed someone" in *Escalona* was inherently prejudicial, the

suggestion that Mr. Kohlstaedt has felony history during the state's case-in-chief is similarly prejudicial and raises the possibility that the jurors utilized Ms. Shank's comment as propensity evidence. *Escalona*, 49 Wn. App. at 255.

Ms. Shank's testimony was inadmissible, inherently prejudicial, and denied Mr. Kohlstaedt his constitutional right to a fair trial. The trial court abused its discretion when it denied Mr. Kohlstaedt's motion for a mistrial based on this testimony. Mr. Kohlstaedt respectfully requests that this court reverse his conviction and remand his case for a new trial.

2. THE TRIAL COURT ERRED WHEN IT COMMENTED ON THE STATE'S EVIDENCE BY EMPHASIZING MS. SHANK'S TESTIMONY THAT MR. KOHLSTAEDT HAD BEEN TO PRISON

The court impermissibly and repeatedly commented on the evidence when over objection, it restated its curative instruction in response to the jury's question and in doing so emphasized Ms. Shank's comment that Mr. Kohlstaedt had been to prison. RP 375-76. The jury's confusion surrounding the trial court's curative instruction is evident in their question asking for clarification on what exactly the trial court had struck. RP 373.

The Washington State Constitution prohibits trial judges from commenting on the evidence introduced during a trial. Wash. Const. art. IV, § 16. This provision specifically prohibits a trial judge from instructing the jury using “those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial.” *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

In determining whether actions or words constitute an impermissible comment on the evidence, appellate courts examine the individual facts and circumstances of each case. *Jacobsen*, 78 Wn.2d at 495. A trial judge’s opinion can be conveyed both directly and by implication. *Jacobsen*, 78 Wn.2d at 495. Appellate courts presume that judicial comments on the evidence are prejudicial and the State bears the burden of proving the error harmless beyond a reasonable doubt. *State v. Lane*, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995).

The jury’s question about the trial court’s curative instruction shows that the jury was not even aware the trial court had struck Ms. Shank’s reference to prison at the time deliberations began. RP

373. The trial court reintroduced the inadmissible and highly prejudicial evidence of Mr. Kohlstaedt's criminal history by repeating its curative instruction. RP 375-76. This emphasized Ms. Shank's testimony in a manner prejudicial to Mr. Kohlstaedt because it repeated an inadmissible reference to a prior bad act. *State v. Eichman*, 69 Wn.2d 327, 333-34, 418 P.2d 418 (1966) (repeated references to defendant's criminal history cause additional prejudice).

This impermissibly conveyed a negative opinion on Mr. Kohlstaedt's character to the jury. *Jacobsen*, 78 Wn.2d at 495. The State cannot overcome the presumption of prejudice because the trial court's comment allowed the jury allowed to consider prior incarceration in determining guilt on the current charges. ER 404(b); ER 403.

In light of the trial court's reiteration of Ms. Shank's inadmissible testimony, the probability remains that the jury viewed the testimony as propensity evidence and relied on it in making the "forbidden inference" that Mr. Kohlstaedt committed theft of a motor vehicle in part because he has a propensity for criminal behavior.

The trial court's comment is presumed to be prejudicial and

the State cannot overcome this presumption to show that the error was harmless. Mr. Kohlstaedt asks that this court reverse his conviction and remand his case for a new trial. *State v. Jackman*, 156 Wn.2d 736, 745, 132 P.3d 136 (2006) (remedy for judicial comment is retrial).

3. THE STATE COMMITTED
PROSECUTORIAL MISCONDUCT
WHEN IT MISSTATED THE LAW
REGARDING ACCOMPLICE LIABILITY
DURING CLOSING ARGUMENT

The prosecutor committed misconduct during closing argument when he repeatedly misstated the law regarding accomplice liability. Specifically, the prosecutor misstated Washington's standard for convicting a defendant as an accomplice in a manner that lowered the state's burden of proof. The correct standard is "actual knowledge". *Allen*, 182 Wn.2d at 373, 380.

To prevail on a claim of prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012) (citing *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011)). A prosecutor commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d

268 (2015) (Allen II) (citing *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008)).

Because Mr. Kohlstaedt objected to the alleged misconduct at trial, the standard of review on appeal is whether there is a substantial likelihood the misconduct affected the verdict. *Allen II*, 182 Wn.2d at 375. In *Allen II*, our state Supreme Court analyzed a claim of prosecutorial misconduct based on an alleged misstatement of the law regarding accomplice liability. *Allen II*, 182 Wn.2d at 373-75. In that case, the prosecutor argued that the jury could find the defendant guilty if he “**should have known**” that his accomplice was going to kill the victims. *Allen II*, 182 Wn.2d at 371 (emphasis added).

The Supreme Court reversed, agreeing that the “should have known” language lowered the burden of proof from “actual knowledge” of the crime their accomplice is going to commit to be liable for the same charge. *Allen II*, 182 Wn.2d at 373, 380. The Court also recognized that when the prosecuting attorney misstates the law of the case, the misconduct is particularly serious and has “the grave potential to mislead the jury.” *Allen II*, 182 Wn.2d at 380 (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213

(1984)).

The Court explained that due to the confusing nature of accomplice liability, “a juror could understandably misinterpret Washington's culpability statute to allow a finding of knowledge if an ordinary person in the defendant's situation would have known” the fact in question, or in other words, if the defendant “should have known.” *Allen II*, 182 Wn.2d at 374.

This concept is applicable to Mr. Kohlstaedt's case because the prosecutor's argument that burning the truck was a “reasonable outcome” of Kohlstaedt's actions lowered the state's burden to prove he was liable as an accomplice, rather than requiring the true standard of actual knowledge. A reasonable outcome is a lower burden similar to “what an ordinary person...would have known” standard. *Allen II*, 182 Wn.2d at 374.

The state will likely argue there was no prejudice because the misstatements of law were made during the prosecutor's argument on the arson charge the jury which the jury did not enter a verdict. However, the jury submitted a question to the trial court asking whether accomplice liability applied to both counts. RP 382. Thus, the record establishes that the jury was confused about

whether the prosecutor's arguments regarding accomplice liability also applied to the theft of a motor vehicle charge.

Under *Allen II*, the prosecutor's argument was prejudicial because is (1) related to the key issue of accomplice liability; (2) the prosecutor repeated the misstatement; (3) the trial court overruled the objections in front of the jury, thereby implicitly suggesting that the argument was proper; and (4) the jury submitted a question asking for clarification on the standard for accomplice liability, thereby revealing that they were misled by the prosecutor's argument. *Allen II*, 182 Wn.2d at 375- 378. RP 366-68; 375-76, 382.

This court should reverse Mr. Kohlstaedt's conviction and remand his case for a new trial. *Allen II*, 182 Wn.2d at 382.

D. CONCLUSION

Mr. Kohlstaedt's trial suffered from multiple errors that deprived him of a fair trial. First, the trial court abused its discretion by denying Mr. Kohlstaedt's motion for mistrial after Ms. Shank provided inadmissible testimony informing the jury that he had been to prison. Second, the trial court commented on the state's evidence when it reinstructed the jury after deliberations had begun and

emphasized Ms. Shank's inadmissible testimony. Finally, the state committed prosecutorial misconduct during closing argument by misstating the law regarding accomplice liability. For these reasons, Mr. Kohlstaedt respectfully requests that this court reverse his conviction and remand his case for a new trial.

DATED this 27th day of July 2020.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcef@co.pierce.wa.us and Darrell Kohlstaedt/DOC#727782, Monroe Correctional Complex-IMU, PO Box 777. Monroe, WA 98272 a true copy of the document to which this certificate is affixed on July 27, 2020. Service was made by electronically to the prosecutor and Darrell Kohlstaedt by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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