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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DARREL JAMES KOHLSTAEDT,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 18-1-02487-2

BRIEF OF RESPONDENT

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I. INTRODUCTION

After the Defendant stole his ex-girlfriend Kelsey Shank's truck, he threatened to engage police in a shootout rather than be arrested on warrants. The threat was admissible, but the court instructed Ms. Shank not to mention the warrants. She testified instead that the Defendant did not want to return to prison. Neither party had anticipated this testimony. The court denied a motion for mistrial, but granted the Defendant's request for an instruction striking the testimony.

There is no likelihood that this single reference affected the verdict. The evidence included the accomplice's confession, corroborating security video, simultaneous text messages, the missing key taken out of the victim's purse, and the Defendant's distraction of the victim with loud music in the early morning hour in order to mask the noise of the theft. The instruction requested by the Defendant, not to consider any reference to prison, is not a judicial comment on the factual merits of the case.

When Ms. Shank reported the theft to the police, the Defendant sent his accomplice a text message to "get rid" of the truck, her clothing, and her shoes. She did so by setting them on fire. The prosecutor argued that the arson was a reasonable outcome of the text. The jury disagreed and did not convict on this count. The Defendant claims that the prosecutor's argument

on the arson prejudicially misstated the law as to the theft count. However, the accomplice liability arguments in each case were unrelated, where the State's evidence and theory established that the Defendant gave detailed instructions directing his accomplice to wait for his signal and then take the truck and drive it to his friend's house.

II. RESTATEMENT OF THE ISSUES

- A. Did the court abuse its discretion in denying a motion for mistrial predicated on a single comment in testimony that the parties did not anticipate in their motions in limine and where there was not a substantial likelihood that the comment affected the verdict?
- B. Was the repetition of a defense-requested instruction (striking evidence from consideration) a judicial comment on the factual merits of the case?
- C. Was the prosecutor's argument as to a dismissed count prejudicial error as to a different count?

III. STATEMENT OF THE CASE

The Defendant Darrell Kohlstaedt has been convicted by a jury of theft of a motor vehicle – domestic violence. CP 183, 185, 229.

The Crime: Kelsey Shank had owned the 1997 Chevy Z71, crew-cab, long-bed, 4x4 truck since she was 15 years old. RP 103-04. It was stolen shortly after her 30th birthday. CP 1, 11. She had dated the Defendant Kohlstaedt for a couple years. RP 100-04. Although almost 13 years her senior, while they were together, the Defendant lived in Ms. Shank's house in Spanaway with her and her son and "almost always" drove her truck. CP

1, 11; RP 101, 104, 106. When he moved out of her house, he moved into his parents' house. RP 106.

On May 24, 2018, the relationship had ended, and the Defendant had already moved his property out of Ms. Shank's home. RP 102-06, 164. However, he continued to come and go as he pleased, entering by way of the garage keypad. RP 163-64. They cancelled plans to go out after spending the night arguing. RP 105. Elsewhere a young "acquaintance" Kendra Nestegard had been visiting with her friend Jeremy whose motorhome was parked at the Spanaway WalMart. RP 237, 366. She scrolled through her phone book, sending out messages trying to find a ride home. RP 164-65, 194-95. The Defendant took the opportunity to leave the argument. RP 105. He picked up Ms. Nestegard and drove her from place to place while she did drugs. RP 194-97, 252.

At one in the morning, they stopped at Ms. Shank's home. Exh. 11; RP 196-97. Ms. Nestegard believed that the Defendant intended to retrieve his personal property from Ms. Shank's truck. RP 198-99, 233. However, the stereo inside actually belonged to Ms. Shank, the Defendant having gifted it to her. RP 106. Ms. Nestegard walked up to the truck and was captured on security video (that the Defendant had himself installed) while the Defendant remained out of view. Exh. 11; RP 107, 116-17, 200. After they ascertained that the truck was locked, they left the area. RP 201.

They returned about an hour later, and the Defendant entered Ms. Shank's house alone. Exh. 3A; RP 203, 212-13. With Ms. Shank asleep, the Defendant removed the Chevy key from the keychain in her purse and brought it to Ms. Nestegard who was waiting outside. RP 119-20, 123, 136, 201, 203-04, 233-34.

The two drove around in the Defendant's vehicle for three hours while the Defendant convinced Ms. Nestegard to steal Ms. Shank's truck. RP 204-06. He told her he needed her to drive the truck to another friend's house, and he showed her where his friend lived. *Id.* He claimed he only intended to remove the stereo, which he claimed was his. *Id.* In fact, there was never any dispute over the stereo. RP 106-07. And the Defendant could not explain why the truck had to be moved when no special expertise was necessary to remove a stereo perched on the backseat of the crew cab. RP 141, 206-07, 228, 335.

They returned a third time at dawn. Exh. 11; RP 105, 119, 207-08. This time, the Defendant dropped Ms. Nestegard off a block away, instructing her to wait for his text message and then take the truck while he created a distraction. RP 208-09. Inside the house, he closed Ms. Shank's bedroom window, turned on music, and engaged Ms. Shank in an argument. RP 103, 121, 203. All the time, he was in constant contact with Ms. Nestegard through FaceBook Messenger, coordinating the theft. Exh.s 3B-

3E; RP 121-22, 203, 210-15. When he confirmed the theft was complete, the Defendant propositioned Ms. Nestegard by message, only to be soundly rebuffed by his significantly younger acquaintance. CP 3; RP 215, 366.

The Defendant and Ms. Nestegard waited for Ms. Shank to discover that her truck was missing. Exh. 3D-3E. When she did, she turned to the Defendant to ask if he knew where her truck was; he claimed he did not. RP 135-36. He drove the single mom around to look for the truck and then to her mother's house to pick up the vehicle title. RP 136-37. He left when she reported the theft to the police. RP 137.

The Defendant messaged Ms. Nestegard to get rid of the truck and all the clothes she had been wearing during the theft. RP 215-18. She complied, driving the truck down a dirt road near Roy until it ran out of gas. RP 218-19, 224-25, 253-54. She then removed her sweatshirt and set fire to it and the truck with the aid of a gas can. RP 224, 254.

Firefighters and police located the truck. RP 138-39, 261. The stereo had been removed before the truck had been torched. RP 141. First responders recovered Ms. Nestegard's cell phone nearby, dropped when she removed her sweatshirt. RP 226-27, 262-64, 276. From this phone, Deputy Anthony Filing was able to capture Ms. Nestegard's messages with the Defendant. RP 264. Reviewing security video, Ms. Shank identified that it

was Ms. Nestegard who stole the truck at five in the morning using Ms. Shank's own key. Exh. 11; RP 107-08, 116-18, 123, 136.

When Ms. Shank confronted the Defendant about the vehicle theft a couple weeks later, he asked to meet her in person. RP 90-91, 146-47, 150-51, 167. By the train tracks, he told her he was on the run and had warrants. RP 91-93, 147. He had a gun and he would engage in a shootout if confronted by police. RP 92-93. The Defendant fired a handgun in the air, scaring Ms. Shank. CP 56; RP 11, 41, 94-96, 168. Even a year after the incident, Ms. Shank became tearful with the memory of the threat. RP 94-96, 364.

The Trial: The Defendant and Ms. Nestegard were charged with Theft of a Motor Vehicle and Arson in the Second Degree. CP 1-4. Ms. Nestegard pled guilty as charged and agreed to testify against the Defendant with the understanding that the prosecutor would recommend a reduced sentence. RP 193-94.

Before the Defendant's trial, the State added a count of unlawful possession of a firearm. CP 55-56. The Defendant asked to sever the count, explaining that the proof of that crime was likely to include at least one of the Defendant's many felony convictions as well as his threat to commit "suicide by cop." CP 89, 224-26; RP 10. Counsel argued that this evidence would unduly prejudice the jury's consideration of the other counts. RP 10.

The prosecutor responded that the Defendant's threat spoke to his consciousness of guilt. RP 11, 39. The court severed the count,¹ but ruled that the Defendant's threat to engage in a shootout was admissible to show consciousness of guilt and an attempt to play on the emotions of a witness. CP 91; RP 16-19, 39-42, 87-96.

Addressing preliminary motions in limine, the court ruled that Defendant's crimes of dishonesty would be admissible only if he testified. CP 91; RP 38. The defense expressed concern that, if questioned about her own criminal history, Ms. Shank might mention that the Defendant had been her co-defendant in a misdemeanor theft out of Yelm. RP 46-47. The court instructed Ms. Shank immediately before she took the stand on both days of her testimony that she should not refer to the Defendant as her co-defendant when asked about that case. RP 46-47, 53-54, 99-100, 134. She was also instructed not to mention any warrants. RP 96-99.

When the prosecutor asked Ms. Shank what prompted the conversation at the tracks, she did not mention the warrants.

Q. What is he saying before the incident that we're referring to that we're going to get to?

A. 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

¹ After observing Ms. Shank's distress at trial, the State decided not to proceed on the severed count. CP 180-82; RP 404. *See also* RP 162 ("I don't want to be here. I don't want anything to do with it.").

or something. I don't remember exactly verbatim. And he shot a gun off, and he said he would suicide by cop.

Q. Okay. So you were having an argument?

RP 151. The court solicited the Defendant's objection. RP 152 ("You need to voice an objection if you have one."). Outside of the presence of the jury, defense counsel acknowledged that the parties had not "expressly" discussed excluding the fact that the Defendant had been to prison. RP 152. Neither attorney anticipated it, because the information had not come up in her interview. RP 152, 157.

The judge noted, if Ms. Shank had mentioned this in past interviews, the court would have instructed her against it. RP 154.

The problem with this witness is that she is – doesn't understand "Only answer the question that's asked." And it was a pretty broad question. So I think she answered it but she had no instructions not to mention the going back to prison situation.

RP 154. Defense agreed that Ms. Shank had not intentionally violated the order. RP 156. "I do think this is a stressful experience. I do think she is doing her best." *Id.* See also RP 158-59 (witness expressing that she had not understood the instruction to prohibit this testimony).

Defense counsel complained that this testimony effectively communicated that the Defendant had felony convictions. RP 152. "It's not something the jury can forget without a cautioning instruction." RP 153. The prosecutor asked for a limiting instruction, advising "we expect

that the jury will follow the court's instructions." *Id.* The Defendant asked for a mistrial, arguing that the information "changes the light in which they view Mr. Kohlstaedt." RP 153, 155.

The court denied the motion for mistrial, finding the propensity evidence weak. RP 154, 156. "I don't think it's so damaging as it takes away the Defendant's ability to argue its theory of the case." RP 156. "I'm not going to grant a mistrial on that statement alone." RP 154-55.

The court cautioned the Defendant: "Sometimes mentioning it makes it more important that the jury may interpret. But I'll do what counsel wants." RP 154. The Defendant requested the instruction:

Ladies and gentlemen, just before I excused you during the testimony of this witness, an objection was made by counsel as to a response that was given to a question that was asked. Part of the response was that *allegedly the defendant was afraid of going back to prison* was a statement that the witness made. You're to disregard that entirely. You're not to consider it as evidence in this case. And the Court is instructing you to, again, just disregard it and not consider it in any way, shape, or form as evidence in this case or testimony in this case.

RP 160 (emphasis added). And the judge cautioned the witness again. RP 157-60.

During deliberations, the jury asked for clarification.

During the testimony of Kelsey, we were asked to strike part of the testimony referring to the conversation near the railroad tracks. Which part of that testimony is admissible?

RP 373. The Defendant proposed to ignore the question that his requested instruction had evoked, advising the jury to find the court's instruction in their handwritten notes. RP 373. "Hopefully one of the twelve of them has it in their notes." *Id.*

The judge noted that such a response would be appropriate to a request to repeat testimony, not an instruction. RP 374. Confusion as to an instruction would prejudice the Defendant. RP 374 ("Do you see the dilemma?"). The court responded to the jury: "You were instructed not to consider any reference to prison in your deliberations." RP 375.

In closing argument, the prosecutor argued that the Defendant was complicit, because he solicited, commanded, encouraged, and requested the theft and destruction of the truck. RP 337, 342. The prosecutor described the Defendant as the architect of the crimes and Ms. Nestegard as his "patsy" or "dupe." RP 342 ("puppet master"), 365.

Having recently broken up with Ms. Shank and having access to the key, he would be a likely suspect. RP 335. Therefore, he arranged for a woman's figure to be captured on video. RP 335. He told Ms. Nestegard that he only wanted the stereo which he claimed belonged to him. RP 336. When the Defendant messaged her to "get rid" of the truck, her clothes, and her shoes, Ms. Nestegard realized she was involved in something much

more serious. RP 336. And when the Defendant did not return her texts, she panicked. RP 336.

He may not have physically poured the gas in the truck. He may not have physically lit that match, but he caused that fire. He set Kendra up.

....

Burning is a way of getting rid of something. It is in the realm of a reasonable outcome that you can expect as part of an instruction to get rid of something.

RP 338.

In its turn, the defense argued that Ms. Nestegard was unreliable due to her drug use and a motivation to minimize her own liability. RP 351-52, 361. As to the theft, the defense argued the Defendant intended to take the truck and then return it promptly so “that Ms. Shank would be none the wiser that the truck was even gone.” RP 348. An alternative theory was that the Defendant did not intend Ms. Nestegard to drive the truck at all, but only to remove the stereo. RP 350. As to the second count, the Defendant argued that he never intended arson. RP 360-61. Ms. Nestegard had misconstrued the directive to “get rid” of the truck, which could have been accomplished by parking it and walking away. RP 346, 360-61.

In rebuttal, the prosecutor noted that the defense theories were not supported in the law or evidence. RP 363. As to the theft count, the law did not require that an intent to deprive a person of property had to be for any particular length of time. CP 158; RP 362. And the evidence was that

he commanded her “to drive that truck away.” RP 363. Regarding the arson, the prosecutor argued: “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 that he directed her to commit.” RP 366. The thieves were trying to distance themselves from the crime by, for example, getting rid of Ms. Nestegard’s clothing. RP 367. Simply walking away from the truck would not dispose of forensic evidence tying Ms. Nestegard to the theft. *Id.* “[I]n this case, the arson is a reasonable outcome from his command to get rid of that truck.” *Id.*

When the Defendant objected, the court first noted the objection for the record and then responded:

Thank you for your objection. The jury is going to be instructed, as they already have been, to consider opening and closing argument as simply argument.

RP 366, 368. *See also* CP 153.

The jury was not persuaded by the prosecutor’s remarks, hanging on the arson count and convicting the Defendant only of the theft. CP 174-76, 179, 183-85; RP 395-403. The Defendant received a Drug Offender Sentencing Alternative. CP 229, 231, 234. The State has decided not to retry this count. CP 204-06; RP 404.

IV. ARGUMENT

A. The trial court did not abuse its discretion in denying the motion for mistrial based on a single statement.

The Defendant challenges the denial of his motion for mistrial. The standard of review for such a challenge is abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541, 545 (2002). A reviewing court will find an abuse of discretion “only when” “no reasonable judge would have reached the same conclusion.” *Id.* The Defendant must show a substantial likelihood that the single statement affected the jury’s verdict and that “nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973, 982 (2010).

In this case, there can be no allegation that the prosecutor violated any pretrial ruling. Not only was the witness properly instructed in accordance with the pretrial ruling, but the court itself provided that instruction. While Ms. Shank is not a party, there is no claim that she willfully disregarded any instruction.

The Defendant complains that his criminal history was inadmissible under ER 404(b). BOA at 17-18. This is incorrect. The rule excludes prior bad acts only when they are offered “to prove the character of a person in order to show action in conformity therewith.” It does not exclude the same evidence when it is offered for other purposes. *State v. Perez-Valdez*, 172

Wn.2d 808, 815, 265 P.3d 853, 856 (2011). Here, the conversation was not offered to prove action in conformity with character. It was offered to show consciousness of guilt and an attempt to manipulate the victim. RP 96. There was no violation of the evidence rule. The testimony was admissible as the court had ruled in preliminary motions. *Id.* The court's intent was only to tailor how that admissible evidence came in.

The Defendant opted for an instruction. He acknowledges that the jury is presumed to follow that instruction. Brief of Appellant (BOA) at 17. *See also State v. Mohamed*, 186 Wn.2d 235, 244, 375 P.3d 1068, 1073 (2016). However, he compares his case to a markedly dissimilar case, where the court of appeals was not willing to rely upon this presumption. BOA at 16-18.

In that case, the defendant was charged with second degree assault for threatening to kill his roommate with a knife. *State v. Escalona*, 49 Wn. App. 251, 252, 742 P.2d 190 (1987). The state's case was "weak," relying entirely on the victim's testimony which was inconsistent even at trial. *Escalona*, 49 Wn. App. at 252-53, 256. The victim testified that he did not recognize the exhibit as the knife, then that he did. *Id.* at 252-53. And he testified that he had not seen a gun, but then that he had. *Id.*

In cross examination, defense counsel suggested that, because he had been stabbed before, the victim was oversensitive to what was merely a display of anger. *Id.* at 253.

Q. By four people?

A. Yes.

Q. Not Mr. Escalona?

A. No.

Q. That was before you knew Mr. Escalona?

A. Yes.

Q. And you were very nervous on this particular day, is that correct?

A. This is not the problem. Alberto already has a record and had stabbed someone.

Id.

Escalona's counsel's deficient performance (in eliciting the information, in failing to be aware of the information, and in failing to file a motion in limine) produced evidence that Escalona had done in the past exactly that act he was alleged at trial to have intended with a different victim. There is no comparison with the facts of our case. Our case does not rely upon a single witness' inconsistent testimony. The information which leaked was not of an identical crime or even a specific crime. The information had already been ruled admissible for a purpose other than to show action in conformity with character. And our case does not have the complication of ineffective assistance of counsel.

At trial, the Defendant alleged that the single statement that he had been to prison in the past “changes the light in which [the jurors] view Mr. Kohlstaedt.” RP 155. The trial court disagreed. The fact that he had been to prison for an unknown crime was, as the judge said, weak propensity evidence for this crime. RP 156. This is especially true in the context of all the other unchallenged evidence which placed him in a very poor light indeed.

The jury had heard that Mr. Kohlstaedt took advantage of others. He was a man approaching middle age who depended on Ms. Shank, a significantly younger single mom, for his housing. Even after the relationship ended, he took advantage of her – coming and going as he pleased, using her shower and bed, making plans only to break them, and keeping her awake at all hours.

The jury heard that he was a person who lied and did not take responsibility. When the truck was discovered missing, he feigned ignorance and innocence. When confronted, he staged theatrics in an effort to manipulate his victim. And he lied to Ms. Nestegard that this theft was about a stereo. It was not.

If it had been about the stereo, he had many more reasonable options. First, he could have asked Ms. Shank for it – as an honest person would. We know he was not averse to confrontation, having engaged Ms.

Shank in perpetual arguments. At least some of those arguments were mere ploys; conflict was his tactic of choice to distract or manipulate. Second, he could have taken the stereo openly. Even if she had opposed the reappropriation of gifted property, and she testified under oath that she did not (RP 107 (guaranteeing she would have permitted it)), the jury knew she had no desire to prosecute him. RP 162. Or, third, he could have taken it surreptitiously *on his own*. He was able to obtain Ms. Shank's key at any time, including while she was asleep. He knew where the cameras were and where the computer was. He could have worn a costume, covered the lens, repositioned the camera, tripped the power, or unplugged the system. If the stereo had been his end game, there would never have been any need to involve a second driver. He lied to his accomplice.

The jury knew the Defendant was a person who spent all night driving around with an much younger female acquaintance while she did drugs in his vehicle and then proposition her in vulgar terms although she had no interest in him.

The Defendant, while manipulative, was no mastermind. He plotted only a few steps ahead at a time. He took precautions to not be captured on videotape. But at a time when Ms. Shank knew the Defendant to be in Ms. Nestegard's company, he allowed her to be caught on video twice. The second time was after the sun had come up, when her image was quite clear.

He had Ms. Nestegard steal the truck with Ms. Shank's own key, when only he had access to that key. He anticipated Ms. Shank discovering the truck missing, but failed to consider that she would call the police. He told Ms. Nestegard where to take the truck, but gave no advance instruction on how she should dispose of it. In other words, the jury could conclude from unchallenged evidence that the Defendant had a proclivity both for wrongdoing and for getting caught.

This was the light the unchallenged evidence put him in.

The evidence for his liability for the theft was significant. Besides his accomplice's testimony, there was his odd behavior creating a loud distraction in the early morning. There were his text messages chronicling the event. There was his deception when the theft was discovered. And there was his histrionic threat to commit suicide by cop if anyone attempted to hold him responsible.

In the face of this record, the Defendant cannot show that the court abused its discretion in finding that this single statement about having been to prison so tainted the proceedings as to deny the Defendant a fair trial.

B. The court's iteration of an instruction striking testimony from consideration was not a comment on the factual merits of the case.

The Defendant argues that the court's response to the jury question was an improper judicial comment. BOA at 19.

A judge is prohibited from commenting to a jury on the factual merits of a case. WASH. CONST. art. IV, §16. A jury instruction, which does not accurately state the law and instead essentially resolves a contested factual issue, constitutes an improper comment on the evidence. *State v. Sinrud*, 200 Wn. App. 643, 649, 403 P.3d 96, 100 (2017).

However, the judge's response to the jury question did not comment on a factual issue. It provided an abbreviation of the earlier instruction, which had been given at the Defendant's request, as to what was admitted for consideration. It instructed the jury *not* to consider any reference to prison. A valid instruction on the law does not become a comment on a factual matter simply because it is repeated. And the Defendant provides no authority to show otherwise.

The Defendant cites to *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1, 4 (1970) for the premise that the instruction "conveyed a negative opinion on Mr. Kohlstaedt's character to the jury." BOA at 21. The case does not support such a proposition. In *Jacobsen*, the court of appeals found the lower court "did not convey to the jury, either directly or by implication, any suggestion as to the court's opinions or feelings as to the credibility, sufficiency or weight of the photographic evidence" by permitting the jury to view the exhibits in the jury room. *Jacobsen*, 78 Wn.2d at 494-95.

The Defendant argues that the jury was not “aware the trial court had struck Ms. Shank’s reference to prison.” BOA at 20. This is not a fair interpretation of the jury question. Clearly they remembered the instruction had been given or they would not have raised the question. But between the twelve jurors there was some uncertainty or disagreement in their recollection over the precise language of the instruction.

The Defendant argues that the instruction striking the reference to prison had the effect of emphasizing the testimony. BOA at 21. But this is precisely what the judge warned the Defendant was the risk of such an instruction. It was the Defendant’s choice to request the instruction. He cannot complain now. The challenge is precluded under the invited error doctrine.

The law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant’s request. To hold otherwise would put a premium on defendants misleading trial courts; this we decline to encourage.

State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514, 515 (1990).

There was no judicial comment on the facts. Only an instruction striking evidence from the jury’s consideration.

C. The prosecutor’s argument as to a dismissed count was not prejudicial error.

The Defendant claims that the prosecutor’s argument misstated the law on accomplice liability. BOA at 22 (citing *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268, 272 (2015)). Where a timely objection was made (RP 366-67), the Defendant must show both error and prejudice. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268, 272 (2015).

To clarify, the challenge in *Allen* was not to the law on accomplice liability, but rather the definition of knowledge within the context of accomplice liability. *Allen* was the getaway driver when Maurice Clemmons murdered four police officers. There the prosecutor “misstated the standard upon which the jury could find *Allen* had actual knowledge of his accomplice’s acts.” *Allen*, 182 Wn.2d at 374.

An accomplice is someone who solicits, commands, encourages, or requests an act, “with knowledge” that it will promote or facilitate the commission of the crime. RCW 9A.08.020(3)(a)(i). *Allen* expresses no confusion with this statute. The concern is with the “knowledge” definition in RCW 9A.08.010(1)(b):

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) He or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) He or she has information which would lead a reasonable person in the same situation to

believe that facts exist which facts are described by a statute defining an offense.

The statute is only constitutional if subsection (ii) is understood to provide a permissive inference of actual knowledge based on circumstantial evidence and not an alternative “reasonable person would have known” definition. *State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980). By law, an accomplice must have actual knowledge that the principal was engaging in the crime eventually charged. *Allen*, 182 Wn.2d at 374 (citing *Shipp*, 93 Wn.2d at 517).

The WPIC was rewritten long ago to address the concern in *Shipp*. The Defendant does not challenge either instruction No. 8 (defining accomplice liability) or No. 15 (defining knowledge). Rather he challenges whether the prosecutor’s argument misstated and, therefore, prejudicially undercut the law as correctly recited in Instruction No. 15.

It is not uncommon for argument, especially in rebuttal, to be an imperfect expression of what is intended. This is why the court instructs the jury:

The lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 153.

Here in rebuttal, the prosecutor argued:

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 that he directed her to commit.

RP 366. This can be understood as an argument that the circumstantial evidence permits an inference of actual knowledge. However, it would have been more accurate to say: The question was, did he tell her to “get rid” of the truck with actual knowledge that it would promote or facilitate the burning of the vehicle. The judge advised that this was argument only and that the jury should look to the court’s instructions for an accurate recitation of the law. RP 368.

As the prosecutor was permitted to continue, he better illustrated his point:

What was one of the obvious options available to her? Dump it, do as defense counsel says, and park it in a gas station parking lot and walk away. That doesn’t resolve the fingerprint issues. That doesn’t resolve her clothing being on camera. Burn it. Yes, that resolves all the problems. Render it unrecognizable and any physical evidence along the way.

....

Now, had she driven to Cape Canaveral in Florida and stolen a spaceship and shot this truck off into outer space, we would not be standing here asking you to convict the defendant of stealing the space shuttle. We would have to say at that point she went rogue and it’s on her. But in this case the arson is a reasonable outcome from his command to get rid of that truck.

RP 367.

The Defendant mischaracterizes that this last sentence is a misstatement of the definition of knowledge. BOA at 11. It is not. The jury may infer actual knowledge of a fact if a reasonable person in the same situation would know the fact. CP 168. Here, the Defendant directed Ms. Nestegard to get rid of everything. “Getting rid” of the truck, her clothing and shoes, and all the evidence that tied Ms. Nestegard to the truck necessarily entailed much more than parking it and walking away. To get rid of the evidence, Ms. Nestegard would have to dispose of the clothes she was wearing – down to her shoes. And she would somehow have to wipe the truck of fingerprints and DNA.

The truck had a portable gas tank full of gas. This is something the Defendant was likely to know. He frequently drove the vehicle and kept some of his tools and other personal items inside. RP 104, 106. The only reasonable way to accomplish this both quickly and thoroughly was to burn the truck in a location where she would not be seen. Therefore, the jury could infer from the context and circumstantial evidence that the Defendant had actual knowledge that Ms. Nestegard would do exactly what she did.

Because Ms. Nestegard’s follow-up texts went unanswered, the jury could infer that the Defendant was not concerned that Ms. Nestegard would

misinterpret his direction. From the circumstantial evidence, the jury could have inferred actual knowledge.

They did not. They reached no verdict on the arson. Then the prosecutor dismissed the count. Because the prosecutor's discussion regarded the dismissed count only, there can be no showing of prejudice.

The Defendant compares his trial with that in *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015). The cases are not comparable. There the getaway driver Allen was convicted for four counts of first degree murder with aggravating factors for killings committed by Maurice Clemmons. *Allen*, 182 Wn.2d at 369, 373. Here, the jury did not convict on the count which was the subject of the prosecutor's discussion.

In *Allen*, the prosecutor repeatedly used the phrase "should have known." *Allen*, 182 Wn.2d at 372. "This is the knowledge instruction. What did he know, what should he have known. This is Instruction No. 9." *Id.* The prosecutor's slides read, "You are an accomplice if: ... you know **or should have known**," with the words "or should have known" in bold. *Id.* Additionally, of the four slides titled "Defendant Should Have Known," none indicated that the jury was required to find actual knowledge. *Id.*

But in Mr. Kohlstaedt's trial, the phrase "should have known" was not used at all. There was no powerpoint. There is a single sentence that

may be open to more than one interpretation in isolation, but was clarified with further argument to correctly state the law.

In *Allen*, when the defendant objected, the court responded with two words: “It’s argument.” *Allen*, 182 Wn.2d at 372. The opinion characterized this comment as “overruling” the objection. It would also be fair to characterize such a ruling as a denigration of the prosecutor’s description of the law as mere argument, rather than a correct recitation of the law.

In the instant case, the court first “noted” the Defendant’s objection. RP 366. And then thoughtfully responded:

Thank you for your objection. The jury is going to be instructed, as they already have been, to consider opening and closing argument as simply argument.

RP 368.

In *Allen*, the jury asked: “If someone ‘should have known’ does that make them an accomplice?” *Allen*, 182 Wn.2d at 378. At Mr. Kohlstaedt’s trial, the jury made no similar inquiry.

The Defendant argues that the jury question on accomplice liability demonstrates the jury was confused on the definition of knowledge *in the context of the theft count*. BOA at 24. This is not a reasonable interpretation of the record. The evidence and argument on the theft count lacked the nuance of the arson. In the arson, the knowledge question was: by sending

Ms. Nestegard a panicked message to “get rid” of the truck, did the Defendant have actual knowledge that this would promote the burning of the truck? In the theft, the knowledge question was: in his hours’ long discussion during which he drove her to his friend’s house and told her to take the truck on his signal, drive it this location, and remove the stereo, did the Defendant have actual knowledge that this would promote the taking of the truck?

The prosecutor consistently and vigorously argued that the Defendant, as the puppet master, had actual knowledge that Ms. Nestegard was taking the truck. RP 335, 341-42. Ms. Nestegard had testified that the Defendant told her to drive the truck to a friend’s house, remove the stereo there, and wait for him. RP 205-06, 215. When Ms. Shank noticed the truck missing, the Defendant did not text Ms. Nestegard to express surprise or to instruct her to return the truck.

The defense proposed that the Defendant did not intend Ms. Nestegard to drive the truck away, but only to remove the stereo. RP 350, 355-57. No evidence supported this argument. And the State did not respond that the Defendant would still be liable under those facts if he should have known Ms. Nestegard would have taken the truck. Instead, the prosecutor argued in rebuttal that the Defendant commanded Ms. Nestegard to drive the truck away. RP 363.

The jury asked questions about both the accomplice liability and knowledge instructions. CP 177-78. The accomplice liability instruction, Instruction No. 8, reads in relevant part: “A person is legally accountable for the conduct of another person when he or she is an accomplice of such person in the commission of the crime.” CP 161. The jury asked:

Question: In Instruction No. 8, does “the crime” refer to both charges as a collective or 2 separate crimes?

Response: Instruction No. 8 can be applicable to both counts. However it is the jury’s decision to decide if it applies to either count.

CP 178. It appears the jury was questioning if liability for the theft necessitated liability for the arson. The jury decided it did not – convicting on one count only. This question does not demonstrate confusion on what knowledge was required for liability.

The Defendant does *not* allege that the jury’s question on the knowledge instruction demonstrates confusion on the theft count. The State discusses the jury question anyway. The question was limited to the first paragraph.

Question: Can the judge please clarify instruction No. 15, paragraph 1?

Response: No.

CP 177. This first paragraph relates to subsection (i) of RCW 9A.08.010(1)(b), not the troublesome subsection (ii), which is the subject of this challenge.

INSTRUCTION NO. 15

A person knows or acts knowingly or with knowledge with respect to a fact or circumstances when he or she is aware of that fact or circumstance. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

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

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 168.

Because the jury's question expressed no confusion about the second paragraph, it is not reasonable to interpret either that (1) the question arose out of the prosecutor's statement at RP 366 or (2) the prosecutor's statement on the arson count bled into deliberations on the theft count.

In consideration of the evidence and argument on the theft conviction, the single statement in rebuttal, which relates only to the dismissed arson count, was not prejudicial error.

V. CONCLUSION

For the above-stated reasons, the State asks the Court to affirm the Defendant's conviction and sentence.

RESPECTFULLY SUBMITTED this 21st day of September, 2020.

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9-21-20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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