

29555-9-III

FILED

COURT OF APPEALS

SEPTEMBER 9, 2011

DIVISION III

Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LACEY HIRST-PAVEK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF OKANOGAN COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support the conviction for aggravated first-degree murder.
2. The trial court erred in denying Ms. Hirst-Pavek's CrR 3.6 motion to suppress the warrantless seizure of employment and rental car records.
3. The trial court erred in ruling that the citizens of the State of Washington have no reasonable expectation of privacy in employment records.
4. The trial court erred in ruling that the citizens of the State of Washington have no reasonable expectation of privacy in rental car agency.
5. The trial court erred in imposing the penalty for aggravated murder, life without parole.
6. The prosecutor committed misconduct in closing by misstating the law relevant to an essential element of accomplice liability for murder conviction.
7. The trial court erred in overruling the objection to the prosecutor's misstatement of the law.

B. ISSUES

1. Absent evidence that the accused intended to cause the death of another person, does a conviction for aggravated first-degree murder violate due process?
2. Under the broad protections of the Washington Constitution, Article I, § 7, do citizens of Washington State have a reasonable expectation of privacy in employment records?
3. Under the broad protections of the Washington Constitution, Article I, § 7, do citizens of Washington State have a reasonable expectation of privacy in rental car agency records?
4. The court instructed the jury that in order to find any aggravating circumstance, the defendant must have been a major participant in the acts causing the death of the victim. In the absence of any evidence that the defendant participated in any of the acts causing the victim's death, did the court err in imposing the sentence for aggravated first degree murder?
5. In closing argument, the prosecutor told the jury that the intent of the accused to cause the death of another is not an

element of accomplice liability for aggravated first degree murder. Was this prejudicial misconduct?

6. In closing argument, the prosecutor told the jury that the intent of the accused to cause the death of another is not an element of accomplice liability for aggravated first degree murder. Did the trial court commit reversible error by overruling a defense objection to this argument?

C. STATEMENT OF THE CASE

During December 2008, Ms. Hirst-Pavek discovered her husband was having an affair, and the “other woman” was pregnant. (RP 677-78); The other woman was Michelle Kitterman. (RP 333; 407; 624) In her distress, Ms. Hirst-Pavek made derogatory remarks at work about Ms. Kitterman, and she proclaimed that she wanted Ms. Kitterman to go away or disappear. (RP 332, 355, 373, 380, 389, 394, 679).

Ultimately, Ms. Hirst-Pavek arranged for a few local drug users/dealers to beat up Ms. Kitterman, under the excuse that Ms. Kitterman was likely going to act as a snitch against the users/dealers, and she needed to be frightened into silence. (RP 1001; 1027) The local users/dealers included Brent Phillips, Tansy Mathis and Dave Richards, aka “the tax man.” (RP 1004; 719; 723; 740) They took Ms. Kitterman

out on a back road in Republic, Washington. (RP 1004) Mr. Richards started to beat her up, then grabbed an ice pick and stabbed her multiple times. (RP 1004-05) Afterwards, Ms. Mathis arranged for Brian Hohman to visit Ms. Hirst-Pavek and tell her to “keep her mouth shut.” (RP 1007) Ms. Mathis also asked Mr. Hohman to kill Brent Phillips. (RP 1016)

Ms. Kitterman’s body was discovered on March 1, 2009. (RP 819). She had been pregnant and had been stabbed multiple times. (RP 310). On March 31, after talking with detectives, Ms. Hirst-Pavek was arrested and charged as a principal or accomplice with aggravated murder, or alternatively felony murder, and first degree manslaughter of an unborn quick child. (CP 451-52).

Prior to trial, Ms. Hirst-Pavek moved to suppress the evidence. (CP 510-83) In part, she argued that the warrantless seizure of her employment records and car rental records violated her right to be free from warrantless searches. The court denied the motion and held that Ms. Hirst-Pavek had no expectation of privacy in either type of record. (CP 469-80) The court found that the employment time records did not reveal intimate or discrete details of Ms. Hirst-Pavek’s life:

Although the records before the court are sketchy, the court presumes that the fact of Ms. Hirst-Pavekk’s employment and that she worked for Sunrise Chevrolet was known to [her] family and friends. Further, the days Ms. Hirst-Pavek worked and the hours she worked were

presumably known to Sunrise Chevrolet's owner, management and fellow employees.

(CP 475) The court concluded Ms. Hirst-Pavek had no expectation of privacy in her employment time records, and no citizen in Washington is reasonably entitled to hold an expectation of privacy in employment records. (CP 476)

The court similarly found that rental car records did not reveal intimate or discrete details of Ms. Hirst-Pavek's life: "The fact that she rented a car for two days and that the vehicle was driven 597 miles do not reveal any particular details regarding what Ms. Hirst-Pavek was doing or who she was doing it with and particularly inasmuch as Ms. Hirst-Pavek indicated she was not in possession of the car." (CP 478-79)

Numerous State witnesses testified to statements Ms. Hirst-Pavek had made. Robert Ramin, a co-worker, told the jury that Ms. Hirst-Pavek said to him she wanted Ms. Kitterman to disappear and that she was calling police in an attempt to get Ms. Kitterman arrested on drug charges. (RP 333). Gloria Tasker, another co-worker, testified that Ms. Hirst-Pavek's work attendance became sporadic after she learned of her husband's affair and that Ms. Hirst-Pavek told Ms. Tasker she wanted Ms. Kitterman to get an abortion. (RP 407).

Marcella Raymer, an acquaintance, testified that Ms. Hirst-Pavek confided to her that she hated Ms. Kitterman and that she wanted someone “to take care of her.” (RP 575). Jasmine Walts, another acquaintance, testified that it was her belief that Ms. Hirst-Pavek was trying to get Ms. Kitterman out of the way by getting her arrested for drug possession. (RP 624). Andrea Orlando testified that Ms. Hirst-Pavek told her she wanted Ms. Kitterman beat up or sent back to Seattle. (RP 662).

Brent Phillips, a co-defendant who earlier pled guilty to first degree premeditated murder of Ms. Kitterman, testified about the events that led to the murder. He stated that Dave Richards and Tansy Mathis approached him about “taxing” a snitch. (RP 719, 723, 740). He explained that he was Mr. Richards’s “tax man”, which meant that he collected debts from people who failed to pay for the drugs Mr. Richards sold. (RP 716). Mr. Phillips testified that on the evening of the murder, he was uncertain about the ultimate plan, asking Ms. Mathis, “[w]hat’s going on are we doing a drug deal or tax[ing] somebody or what?” (RP 740). According to Mr. Phillips, Ms. Mathis then told him, “We’re gonna tax a snitch.” (RP 740). Mr. Phillips further testified that events went far afield of this original plan and that Ms. Kitterman was ultimately killed. (RP 747-749, 770).

After the State rested, defense counsel moved for dismissal, arguing there was no evidence that Ms. Hirst-Pavek intended to have Ms. Kitterman killed. (RP 1616). The trial court denied the motion.

During rebuttal closing argument, the State explained several of the instructions to the jury. But the State misstated the law and argued that Ms. Hirst-Pavek's intent was not necessary in order to convict her of aggravated first degree murder:

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime by solicit [sic], commands, encourages, or aid or agree to aid another person whether their [sic] present or not and the instructions go on to tell you that the [sic] on or about a particular date the defendant or an accomplice with the defendant's knowledge acted with the intent.

*So in this case, did the defendant have intent?
Yeah. Is it necessary? No.*

MR. HAMMETT: Objection, your Honor misstatement of the law.

MR. SLOAN: Your Honor, it's arguing from the instruction.

MR. HAMMETT: He said the defendant did not have to have any intent.

THE COURT: What instruction are you arguing from?

MR. SLOAN: Your Honor for example number "12" the defendant or an accomplice with the defendant's knowledge acted....

THE COURT: Correct.

MR. SLOAN: ... with intent. So I guess we know what the defendant wanted to do, but that's not required in the elements. She had knowledge that this other person was

gonna act and had intent to carry that out. It's enough and it's in the instructions.

(RP 1737-38) (emphasis added) The court did not sustain the objection, nor did the court provide a curative instruction. Instead, the State simply continued argument. (RP 1738 et seq.)

The jury was provided with special verdict instructions that included a deadly weapon aggravating factor. Instruction No. 29 stated:

You will also be given Special Verdict Forms A and B – Deadly Weapon, for the crimes charged in counts 1A and 2.

If you completed Verdict Form A and found the defendant not guilty of each crime in Verdict Form A, then do not use Special Verdict Form A. If you have found the defendant guilty of any crime using Verdict Form A, then you will consider Special Verdict Form A and fill in the blanks with the answer “yes” or “no” according to the decisions you reach.

If you completed Verdict Form B - Lesser Included, and found the defendant not guilty of each crime in Verdict Form B, then do not use Special Verdict Form B. If you have found the defendant guilty of any crime using Verdict Form B -Lesser Included, then you will then consider Special Verdict Form B - Lesser Included - and fill in the blanks with the answer “yes” or “no” according to the decision you reach.

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If, after due consideration, you cannot unanimously agree that the aggravating

circumstances exist, you must fill in the blank with the answer "no."

(CP 79).

The court also provided the jury with special verdict questions related to two aggravating circumstances: whether the defendant solicited another person to commit the murder and paid or agreed to pay money for committing the murder and whether the defendant knew Ms. Kitterman was pregnant. (CP 87, 89) Instruction 31 stated:

If you find the defendant guilty of premeditated murder in the first degree as defined in Instruction 11, you must then determine whether the following aggravating circumstance exists:

1. The defendant solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that the aggravating circumstance has been proved beyond a reasonable doubt, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

If you unanimously agree that the specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance.

For any of the aggravating circumstance [sic] to apply, the defendant must have been a major participant in acts causing the death of Michelle Kitterman and the aggravating factor must specifically apply to the defendant's actions. The State has the burden of proving

this beyond a reasonable doubt. If after due consideration, you cannot unanimously agree that the aggravating circumstances exists, you must fill in the blank with the answer “no.”

(CP 87)

Similarly, Instruction 32 stated:

If you find the defendant guilty of Murder in the First degree ... then you must determine if the following aggravating circumstances exists:

Whether the defendant knew that the victim of the crime of Murder in the First Degree – Premeditation or Murder in the Second Degree – Intentional Murder, or Murder in the Second degree – Felony Murder was pregnant.

The State has the burden of proving the existence of the aggravating circumstance beyond a reasonable doubt. In order for you to find the existence of an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt. If, after due consideration, you cannot unanimously agree that the aggravating circumstance exists, you must fill in the blank with the answer “no.”

(CP 89)

The jury found Ms. Hirst-Pavek guilty on all counts and also found that she or an accomplice was armed with a deadly weapon at the time of the crimes. (CP 80-81, 85). The jury also answered “yes” regarding the aggravating circumstances. (CP 88, 90).

The court sentenced Ms. Hirst-Pavek to life imprisonment without the possibility of parole. (CP 25). She appeals.

D. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR AGGRAVATED FIRST DEGREE MURDER BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MS. HIRST-PAVEK INTENDED TO CAUSE THE DEATH OF MS. KITTERMAN.

In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. Amend. 14; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 435 (2000); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). “The standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.” *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). A claim of insufficient evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). While circumstantial evidence is no less reliable than direct evidence, evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983). “If a reviewing court finds insufficient evidence to

prove an element of the crime, reversal is required.” *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

In order to convict Ms. Hirst-Pavek of aggravated first degree murder, the State had to prove that she, as a principal or accomplice, “[w]ith a premeditated intent to cause the death of another person . . . cause[d] the death of such person or a third person” and a finding of one or more aggravating circumstances. RCW 9A.32.030(1)(a); RCW 10.95.020.

A person acts with intent when he or she acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a). “Evidence of intent . . . is to be gathered from all of the circumstances of the case.” *State v. Ferreira*, 69 Wn. App. 465, 468, 850 P.2d 541 (1993) (quoting *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), review denied, 114 Wn.2d 1002, 788 P.2d 1077 (1990)). Intent “can be inferred as a logical probability from all the acts and circumstances.” *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). This includes inferring that a defendant intends the natural and probable consequences of his or her acts. *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983). Intent is more than merely “knowledge” that death will result; intent exists only if a known or expected result is the actor’s purpose. *Caliguri*, 99 Wn.2d at 506 (citing RCW 9A.08.010(1)(a)).

The State wholly failed to introduce any evidence that would provide even a reasonable inference that Ms. Hirst-Pavek intended to have Ms. Kitterman killed. Not one of the fifty witnesses provided anything more than evidence Ms. Hirst-Pavek was upset and intended to have Ms. Kitterman frightened, beat up, or sent back to Seattle. For example, Ms. Tasker testified that although Ms. Hirst-Pavek was upset with Ms. Kitterman, Ms. Hirst-Pavek never indicated that she wanted to harm Ms. Kitterman. (RP 404). Ms. Raymer testified that Ms. Hirst-Pavek spoke of wanting to hire people to “take care of” Ms. Kitterman, but when pressed during cross-examination, Ms. Raymer conceded that Ms. Hirst-Pavek never told her she wanted Ms. Kitterman killed. (RP 575, 581). Moreover, during two interviews with detectives, Ms. Raymer denied that Ms. Hirst-Pavek stated she wanted Ms. Kitterman killed. (RP 581-82).

Ms. Walts testified that she assumed Ms. Hirst-Pavek simply wanted Ms. Kitterman arrested for drug possession and Ms. Orlando thought Ms. Hirst-Pavek wanted Ms. Kitterman beat up or sent back to Seattle. (RP 614, 662). Notably, Mr. Phillips, a direct participant in the crime, testified that the plan was simply to accompany Ms. Mathis and Mr. Richards to the Okanogan area for a drug deal or a “tax job.” (RP 770).

The evidence indicates that the events of March 1 escalated beyond Ms. Hirst-Pavek's intent. Brian Hohman, who purchased drugs from Ms. Mathis and Mr. Richards, testified that Ms. Mathis called him after the murder and told him that she and Mr. Phillips had agreed to beat up a snitch for pay, but that the situation had gotten out of hand and Mr. Phillips grabbed an ice pick and stabbed Ms. Kitterman. (RP 1001, 1004, 1031). During cross examination, Mr. Hohman stated that Ms. Mathis told him there had never been a plan to kill Ms. Kitterman:

Q: It's my understanding that you told the police that somebody was supposed to beat up the lady because she was gonna roll on somebody?

A: That's what Tansy told me.

Okay. Did she tell you that the, that, that this was a murder for hire deal?

A: No.

Q: Did she ever tell you they planned to kill her before they went over there?

A: No.

Q: She just said they were, she was gonna roll, this lady was gonna roll on her and when you say roll on her what's that?

A: Rat her out.

Q: So they were ...gonna beat her up and scare her so she didn't talk?

A: Yes.

(RP 1027)

During interviews with a detective, Ms. Hirst-Pavek admitted that she said "lots of things to lots of people", including expressing the wish that Ms. Kitterman would just "go away." (RP 1459). However, she told

the detective that she never asked Ms. Mathis to kill Ms. Kitterman. She told him that Ms. Mathis informed her it would cost \$10,000 to have someone killed and "I told her I'm not willing to do that." (RP 1459, 1485). Additionally, another witness testified that the day after Ms. Kitterman was found, Ms. Hirst-Pavek showed up at his house crying and saying, "[i]t wasn't supposed to happen like that." (RP 642).

"The existence of a fact cannot rest in guess, speculation, or conjecture." *State v. Golloday*, 78 Wn.2d 121, 129-30, 470 P.2d 191 (1970), *overruled on other grounds*, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976), *quoting Home Ins. Co. of New York v. Northern Pac. Ry.*, 18 Wn. App. 798, 140 P.2d 507 (1943). The State's theory rests on speculation and conjecture, rather than proof beyond a reasonable doubt. The evidence falls far short of establishing that Ms. Hirst-Pavek intended to have Ms. Kitterman killed. Ms. Hirst-Pavek's conviction for aggravated first degree murder must be reversed.

2. UNDER ARTICLE I, § 7 OF THE WASHINGTON CONSTITUTION, THE CITIZENS OF WASHINGTON STATE HAVE A REASONABLE EXPECTATION OF PRIVACY IN EMPLOYMENT RECORDS.

The trial court ruled that, because a car rental agreement or an employee's time records contain information that may be known to others,

there can be no reasonable expectation of privacy in these documents. This is an issue of first impression.

Article I, § 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” It is well-settled that article I, § 7 is more protective than the Fourth Amendment, and a *Gunwall* analysis is no longer necessary. *State v. Vrieling*, 144 Wn.2d 489, 495, 28 P.3d 762 (2001) (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). The inquiry under article I, § 7 is broader than under the Fourth Amendment to the United States Constitution, and focuses on “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.” *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

A warrantless search is per se unreasonable unless it falls under one of Washington's recognized exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). Private affairs are those “‘interests which citizens of this state have held, and should be entitled to hold, safe from government trespass.’ ” *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997) (quoting *State v. Myrick*, 102 Wn.2d at 511).

In determining whether a certain interest is a private affair deserving article I, § 7 protection, “a central consideration is the nature of

the information sought—that is, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person’s life.” *State v. Jordan*, 160 Wn.2d 121, 126-27, 156 P.3d 893 (2007). In other words, the nature and extent of information obtained by the police – for example, information concerning a person’s associations, contacts, finances, or activities – is relevant in deciding whether an individual’s expectation of privacy is one which a citizen of this state should be entitled to hold. *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002) (citing *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990)).

The court also considers whether historical protections are afforded to the perceived interest. *McKinney*, 148 Wn.2d at 27. And, where the perceived interest involves the gathering of personal information by the government, the court examines the purpose for which the information sought is kept, and by whom it is kept. *Id.* at 32.

In *Jordan*, the Washington Supreme Court found that a motel registry constitutes a private affair because it reveals sensitive, discrete and private information about the guest. *Jordan*, 160 Wn.2d at 126-27. The information at stake is more than simply a guest’s registration information: “an individual’s very presence in a motel or hotel may in itself be a sensitive piece of information. There are a variety of lawful reasons why an individual may not wish to reveal his or her presence at a

motel.” The court offered the examples of “couples engaging in extramarital affairs, closeted same-sex couples, business people engaged in confidential negotiations, or celebrities seeking respite from life in the public eye.” *Id.* at 129. The court also noted the “sensitivity of the registry information in and of itself. Not only does it reveal one’s presence at the motel, it may also reveal co-guests in the room, divulging yet another person’s personal or business associates.” *Id.*, citing *McKinney*, 148 Wn.2d at 30.

Similarly, a plurality of the Washington Supreme Court found that power records that indicate electrical consumption have been recognized as “pervad[ing] every aspect of an individual’s business and personal life.” *In re Pers. Restraint of Maxfield*, 133 Wn.2d at 339. While a majority of the *Maxfield* court failed to agree that a review of power records constituted an impermissible intrusion into one’s private affairs, the majority did consider the extent to which such records reveal details about an individual’s life. The dissent indicated that power consumption records do not disclose “discrete information about an individual’s activities.” *Id.* at 354 (Guy, J., dissenting).

In this case, the court analyzed this novel issue and found that no citizen of Washington has a reasonable expectation of privacy in

employment records, nor in car rental agency records. (CP 469-80) The court's conclusion was error.

With regard to the employment records, the court "presumed" the fact of Ms. Hirst-Pavek's employment was known to her family and friends, and that the hours and days worked were known to the company's owner, management and fellow employees. (CP 474-75) The court employed the incorrect standard. The test is not whether *anyone* knows information related to the information sought. In *Jorden*, the court found that a motel registry constituted a private affair. Yet the *Jorden* court did not address or acknowledge that the registry would be known to several people – the employees working the desk, the owners of the motel, and the banks or credit card companies to which a room might be charged. Instead, the *Jorden* court instructs that the information was private because the information at stake indicated more than the registrant's information.

If the court had used the proper standard in this case, the result would have been same as *Jorden* – employment records contain inherently private information because the information represents more than what appears at first blush. An employee might be taking extended lunch hours for a variety of reasons, or calling in sick or taking sick leave to deal with a private, serious medical condition. As in *Jorden*, multiple lawful

reasons exist why an employee would want the facts of his or her employment hours and leave requests to remain private. This court's analysis was flawed, and therefore the court's conclusion on this Constitutional issue of first impression was incorrect.

Similarly, the trial court found that no privacy interest existed in rental car agency records. Again, the trial court employed the incorrect standard in its analysis. On this issue, the court found that the fact that Ms. Hirst-Pavek rented a car for a few days did not reveal what she was doing or who she was doing it with, given the fact that she had admitted to police that she was not in possession of the car. But the court ignores the proper analysis from *Jorden*: was the information at stake more than simply the fact of the rental of the car? The rental of a car is not far removed from the rental of a motel room. A rental car may be procured for a secret romantic partner, a celebrity, or any of the other situations that deserve privacy as discussed by the *Jorden* court. The court's refusal to contemplate that rental car records can reveal sensitive and private information was error. As with the employment records, the court's analysis related to rental car records was flawed and therefore the court's conclusion on this issue of first impression was error.

The trial court made novel rulings on issues of first impression related to the reasonable expectation of privacy afforded under the Washington State Constitution, Article I, § 7. The court's analyses were flawed, and the court's conclusions were in error. As a result, this court should reverse the trial court's denial of the motion to suppress Ms. Hirst-Pavek's employment records and rental car records.

3. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT FINDING THAT MS. HIRST-PAVEK WAS A MAJOR PARTICIPANT IN THE ACTS CAUSING MS. KITTERMAN'S DEATH.

Under the law of the case doctrine, "jury instructions not objected to become the law of the case." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The State assumes the burden to prove beyond a reasonable doubt any elements without a statutory basis added to the "to convict" instructions. *Hickman*, 135 Wn.2d at 102. A defendant may assign error to non-statutory elements added to the "to convict" instructions; this includes challenging the sufficiency of evidence proving the added element. *Hickman*, 135 Wn.2d at 102.

The court instructed the jury, “For any of the aggravating circumstance to apply, *the defendant must have been a major participant in acts causing the death* of Michelle Kitterman and the aggravating factor must specifically apply to the defendant’s actions.” (CP 87; RP 1689) The State did not object to the giving of this instruction. Undisputed evidence showed that Ms. Hirst-Pavek was not present at the time and place of the murder. The acts that caused Ms. Kitterman’s death, broadly construing the evidence in favor of the State, consisted of Mr. Phillips, Ms. Mathis and Mr. Richards taking Ms. Kitterman to a back road in Republic, and Mr. Richards starting to beat her up, grabbing an ice-pick, and stabbing her several times. (RP 1004-05) Nothing in the record would support finding Ms. Hirst-Pavek was a major participant in any of these acts.

The State failed to present evidence sufficient to support the jury’s special verdict finding the aggravating circumstance of solicitation to commit murder as that circumstance was defined in the jury instruction. The court nevertheless imposed the sentence for aggravated murder, namely life without parole. (CP 28)

4. THE PROSECUTOR'S MISCONDUCT IN ARGUING THAT MS. HIRST-PAVEK'S INTENT WAS NOT NECESSARY IN ORDER TO CONVICT HER AS AN ACCOMPLICE OF AGGRAVATED, FIRST DEGREE MURDER CONSTITUTES REVERSIBLE ERROR.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). An appellate court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The law grants counsel wide latitude to argue facts in evidence and draw reasonable inferences during closing argument. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). A prosecutor may not, however, mislead the jury through misstatement of the law or the evidence. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

In this case, the State argued, over objection, that Ms. Hirst-Pavek's intent was not necessary in order to convict her as an accomplice to aggravated first degree murder. This statement was blatant error.

Instruction 6 required that in order to find Ms. Hirst-Pavek guilty as an accomplice, one had to find she solicited or encouraged another to commit *the* crime or she aided in planning or committing *the* crime, and she undertook these acts with knowledge that it would facilitate the commission of the *the* crime.¹

Contrary to the State's misstatements in closing, the State must prove that Ms. Hirst-Pavek knew her actions would aid in the crime that was committed, not in any crime that ultimately occurred. The language of the accomplice liability statute establishes a *mens rea* requirement of "knowledge" of "the crime." RCW 9A.08.020(3)(a). The statute's history, derived from the Model Penal Code, establishes that "the crime" means the charged offense. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000). The culpability of an accomplice does not extend beyond the

¹ A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime. A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime. The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

(CP 55)

crimes of which the accomplice actually has “knowledge.” *Id.* The law of accomplice liability in Washington no longer reflects “in for a dime, in for a dollar.” *Sarausad v. State*, 109 Wn. App. 824, 83, 39 P.3d 308 (2001). Instead, the law now requires “the State to prove that an accused who is charged as an accomplice with murder in the first degree or second degree or manslaughter knew generally that he was facilitating a homicide, but need not have known that the principal had the kind of culpability required for any particular degree of murder.” *Id.* at 836.

In this case, in order to prove Ms. Hirst-Pavek was an accomplice to the charged crime of aggravated first degree murder, the State had to prove Ms. Hirst-Pavek’s knowledge that a homicide would occur. Under the definitional and to-convict instructions, the State had to prove Ms. Hirst-Pavek had *intent* to cause the death of another person. (CP 60-61)

The State’s argument was not harmless, and in fact severely prejudiced Ms. Hirst-Pavek. The court apparently overruled the objection and allowed the State to continue with argument. The critical issue in this case was whether Ms. Hirst-Pavek intended that Ms. Kitterman be killed. The evidence indicates that instead of intending that a homicide be committed, at most, what Ms. Hirst-Pavek intended was that Ms. Kitterman be assaulted. Ms. Hirst-Pavek was in for a dime, but not for a dollar. The State’s argument that Ms. Hirst-Pavek’s intent was not

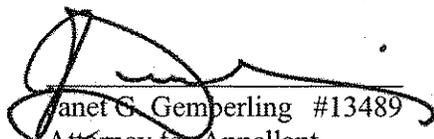
necessary was a blatant misstatement of the law. In light of the overwhelming evidence that Ms. Hirst-Pavek's intent was not to result in homicide, the State's misconduct in misstating the law and the court's failure to correct the misstatement, a substantial likelihood exists that the misconduct affected the verdict. This court should reverse and remand for a new trial.

E. CONCLUSION

For the reasons stated, Ms. Hirst-Pavek respectfully request that this Court reverse her conviction for aggravated first degree murder and vacate the aggravating factors and deadly weapon special verdicts.

Dated this 9th day of September, 2011.

GEMBERLING & DOORIS, P.S.


Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29555-9-III
)	
vs.)	CERTIFICATE
)	OF MAILING
LACY HIRST-PAVEK,)	
)	
Appellant.)	

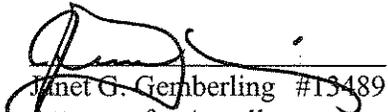
I certify under penalty of perjury under the laws of the State of Washington that on September 9, 2011, I mailed copies of Appellant's Brief in this matter to:

Jennifer Richardson
Attorney at Law
237 - 4th Ave N.
PO Box 1130
Okanogan, WA 98840

and

Lacy Hirst-Pavek
#345340
9601 Bujacich Rd NW
Gig Harbor, WA 98332

Signed at Spokane, Washington on September 9, 2011.


Janet G. Gemberling #13489
Attorney for Appellant
