

No. 33910-6-III (consolidated)

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ADAM SHAUN JENNINGS,
Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Christopher Culp, Judge

BRIEF OF APPELLANT ADAM SHAUN JENNINGS

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....11

 1. Adam Jennings’ conviction for first degree murder violated his Fourteenth Amendment and Washington Constitution, Article 1, § 3 right to due process because the state failed to prove beyond a reasonable doubt that he, as either principal or accomplice, committed the crime of premeditated first degree murder.....11

 2. Adam Jennings was denied his constitutional right to counsel.....21

 3. Prosecutorial misconduct violated Adam Jennings’ right to a fair and impartial trial.....29

 4. Cumulative error requires reversal.....33

 5. Appeal costs should not be imposed.....34

D. CONCLUSION.....37

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Glasser v. United States</i> , 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).....	22
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).....	22
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)...	12
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	11
<i>Smalis v. Pennsylvania</i> , 476 U.S. 140, 106 S.Ct. 1745, 990 L.Ed.2d 116 (1986).....	12
<i>Wood v. Georgia</i> , 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981).....	22
<i>In re Richardson</i> , 100 Wn.2d 669, 675 P.2d 209 (1983).....	27
<i>Personal Restraint of Heggney</i> , 138 Wn. App. 511, 158 P.3d 1193 (2007).....	18
<i>Personal Restraint of Lord</i> , 123 Wn.2d 296, 868 P.2d 835 (1994), clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849 (1994).....	33
<i>State v. Asaeli</i> , 150 Wn. App. 543, 208 P.3d 1136 (20009).....	17
<i>State v. Baylor</i> , 17 Wn. App. 616, 565 P.2d 99 (1977).....	16
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	35, 36
<i>State v. Boast</i> , 87 Wn.2d 447, 553 P.2d 1322 (1976).....	16

<i>State v. Cantu</i> , 156 Wn.2d 819, 132 P.3d 725 (2006).....	18
<i>State v. Castro</i> , 32 Wn. App. 559, 648 P.2d 845 (1982).....	21
<i>State v. Cleveland</i> , 58 Wn. App. 634, 794 P.2d 546 (1990).....	31
<i>State v. Contreras</i> , 57 Wn. App. 471, 788 P.2d 1114 (1990).....	32
<i>State v. Dixon</i> , 150 Wn.App. 46, 207 P.3d 459 (2009).....	31, 33
<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <i>review denied</i> , 131 Wn.2d 1018 (1997).....	32
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	11
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201, 1257 (2006), <i>as corrected</i> (Dec. 22, 2006) <i>overruled on other grounds by State v. W.R., Jr.</i> , 181 Wn.2d 757, 336 P.3d 1134 (2014).....	31
<i>State v. Hatfield</i> , 51 Wn. App. 408, 754 P.2d 136, 138 (1988).....	22
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	17, 18
<i>State v. Luna</i> , 71 Wn. App. 755, 862 P.2d 620 (1993).....	16
<i>State v. Luvene</i> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	11
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	32
<i>State v. Murray</i> , 10 Wn. App. 23, 516 P.2d 517 (1973).....	16
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	35
<i>State v. Peasley</i> , 80 Wash. 99, 141 P. 316 (1914).....	15, 16
<i>State v. Rose</i> , 175 Wn.2d 10, 282 P.3d 1087 (2012).....	11
<i>State v. Rotunno</i> , 95 Wn.2d 931, 631 P.2d 951 (1981).....	17

<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	11
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612, <i>rev. denied</i> , 185 Wn.2d 1034 (2016).....	35, 36
<i>State v. Trout</i> , 125 Wn. App. 403, 105 P.3d 69 (2005).....	15, 16
<i>State v. Vasquez</i> , 178 Wn.2d 1, 309 P.3d 318 (2013).....	13, 18, 21

Statutes

U.S. Const. amend. 6.....	21, 26
U.S. Const. amend. 14.....	11, 12
Const. art. 1, § 3.....	11, 12
Const. art. 1, § 22.....	21, 26
RCW 9A.08.020(3).....	14
RCW 9A.32.030(1)(a).....	12
RCW 10.73.160(1).....	35

Court Rules

RAP 14.2.....34

RAP 15.2(f).....34, 35

RPC 1.7.....26

RPC 1.7 at Comment 2.....26

RPC 1.7 at Comment 14.....26

RPC 1.10(a).....22

Other Resources

American Bar Association (ABA) Standard 4–3.5(c).....23

Commentary to ABA Standard 4–3.5.....23–24, 25

General Court Order, Court of Appeals, Division III
(filed June 10, 2016).....35

2 LaFave & Israel, *Criminal Procedure* § 11.9.....22

2017 Washington Court Order 0004 (C.O. 0004)
(dated January 4, 2017, effective upon publication).....36

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the conviction for first degree murder—premeditated.

2. Adam Jennings was denied the constitutional right to counsel.

3. Prosecutorial misconduct in closing and rebuttal arguments prejudiced Adam Jennings.

4. Cumulative error deprived Adam Jennings of a fair trial.

Issues Pertaining to Assignments of Error

1. Whether Adam Jennings' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of premeditated first degree murder.

2. Whether Adam Jennings' right to effective assistance of counsel was violated by joint representation resulting in a conflict of interest.

3. Whether prosecutorial misconduct violated Adam Jennings' right to a fair and impartial trial.

4. Whether cumulative error requires reversal of the conviction of first degree premeditated murder.

B. STATEMENT OF THE CASE

On September 2, 2013, Michael Carrigan was hunting on the east side of Cow Camp Road in the Pontiac Ridge area of northeastern Okanogan County. Beck RP 272, 276–77, 492–94, 496–97.

Adam Jennings and his father, John Jennings, were living on the west side of Cow Camp Road in a shack-like cabin. The area has many trees. Beck RP 414, 513; Exhibit 102; Exhibit 184.

George Stover, a friend of Michael Carrigan's, remained in their pickup while Mr. Carrigan was hunting in the field. Tim Carrigan, Mr. Carrigan's brother, was hunting in a different area at that time. Stover heard a gunshot from the right side of the road. He believed it came from the area of the Jennings' cabin. He did not see anyone outside. Beck RP 448, 453, 489–90, 494, 498, 500.

Michael Carrigan went to the ground after the shot. When he got up and started back toward the pickup Stover saw blood on Mr. Carrigan's hands. A second shot rang out and Mr. Carrigan fell again. He went to his knees and rolled over onto his back. Beck RP 500–01.

Stover drove to an area where he could make a 911 call.

Deputies from the Okanogan County Sheriff's Office responded from thirty (30) miles away. Deputy Holloway observed Mr. Carrigan lying on his back in the field. Other deputies arrived and the people in the cabin were asked through a loudspeaker to come out. Adam Jennings and his father came out to where the deputies were located, using canes as they walked. Beck RP 271, 275, 277, 279–80, 298, 503–05.

The deputies did not find any indication of other persons in the area. Beck RP 281.

John Jennings told deputies he heard two shots and immediately got on the floor. He had been preparing tea for himself and his son. He stated he didn't have anything to do with the shooting. John Jennings was not arrested, and a deputy drove him to a motel for the night. Beck RP 362–64, 383–84, 694.

Adam Jennings was arrested on an outstanding warrant on a failure to appear in a suspended license matter, and was transported to jail. Steinmetz RP 289, 295; Beck RP 384.

During execution of a search warrant at the Jennings' cabin on September 3, 2013, law enforcement found a spent .22 casing on the

porch and a .22 revolver and ammunition in the cabin. They found a key to a gun safe in a drawer under a bed in Adam Jennings' bedroom. Beck RP 387, 399, 400, 539, 541–42.

Sergeant Richmond of the Washington State Patrol operated a total station to provide an overview of the incident scene. Beck RP 515, 523–25; Exhibit 115.

Deputy Kinman provided John Jennings a ride back to the cabin after the search was completed. John Jennings stated he did not want to talk about the incident any more. Beck RP 371, 380.

On September 4, 2013, Dr. Gina Fino, a forensic pathologist, conducted an autopsy. Initial x-rays revealed a single projectile and smaller metal fragments near Mr. Carrigan's heart. Beck RP 592, 597, 603, 610, 626.

Dr. Fino located an entrance wound from a gunshot in Mr. Carrigan's right upper back. There was no soot or stippling around the wound. The path of the bullet was from the back to the front, right to left, and slightly downward. She recovered a bullet from the tissue around Mr. Carrigan's heart. Beck RP 614, 618, 623, 626.

There was also an abrasion of Mr. Carrigan's lower back. Dr. Fino described it as a concentric contusion **suggestive** of impact by a projectile, **but not conclusive**. She opined it could also be a blunt impact injury incurred when Mr. Carrigan's body struck the ground. Beck RP 619–20 (emphasis added).

On November 29, 2013, Adam Jennings and his father were arrested during execution of a second search warrant. The key to the gun safe was again in Adam Jennings' bedroom. Numerous firearms were seized including .22 rifles and revolvers (one each from the respective bedrooms). A large cache of .22 caliber ammunition was also seized. Beck RP 546–47, 552, 670, 674–76, 680, 736.

During the course of the search Detective Heyen observed bar marks on a window sill in Adam Jennings' bedroom in the southeast corner of the cabin. Up until a week before, John Jennings hung his scoped rifle there. A pair of binoculars was located on a barrel in that room, near the window. Beck RP 637, 657, 659–60; 717–18; Exhibit 33.

Adam Jennings was interviewed by Detective Sloan. He said he heard a “boom” really close and hit the floor. He had been sitting in a

chair rolling a cigarette. He described the source as gunfire coming from the south, but he wasn't counting shots. When it was over, he looked out the window and heard a rig driving away. He said his father did not shoot Mr. Carrigan. Adam Jennings denied shooting Mr. Carrigan. Beck RP 855–56, 871–75, 874, 886.

John Jennings was interviewed by Detective Heyen. He described the same events as he had before with additional detail. He was making tea, heard a loud bang which he recognized as a gunshot, and dropped to the floor. He heard additional gunshots. Some were closer and some were not as loud as the first shot. Mr. Jennings further described the gunshots as being from a shotgun (loud) and from a single shot (quieter). Beck RP 694–95, 700.

According to Stover, Mr. Carrigan fired his shotgun twice. Stover then heard two additional shots. Beck RP 496–98, 501.

John Jennings told law enforcement he's legally blind in one eye but can see out of it. If using a long gun, he needs a scope to be able to see one hundred and fifty (150) yards. He continued to suffer medical problems during trial. Beck RP 708, 1026–028, 1043–046.

John Jennings stated all of the firearms in the house belonged to him. He said he and Adam Jennings had used the guns for target shooting. Law enforcement found evidence of mostly old target shooting activities in the area to the north of the cabin. Beck RP 663–64, 673, 710, 713–14.

Some of the recovered firearms and the bullet recovered from Mr. Carrigan's body were sent to the Washington State Patrol Crime Lab (WSPCL) for analysis. The bullet was identified as a .22 long rifle (CCI brand – Stinger). Beck RP 757, 767–68, 770, 773.

Richard Wyant, the WSPCL firearm examiner, excluded the .22 rifles as being the weapon that fired the fatal bullet. Beck 779–80.

Mr. Wyant could not eliminate the .22 caliber High Standard revolver. The results were inconclusive. There were no individual marks observable on the test fired bullets. There were only similar class characteristics. He opined that another weapon altogether may have fired the fatal bullet. Beck RP 767–68, 780, 784.

Mr. Wyant was asked to examine the fatal bullet in relation to fired bullets recovered from the target shooting area. He filed a report dated January 15, 2014. He was unable to identify any of the recovered

bullets as being fired from same gun as the fatal bullet. The results were again inconclusive. Beck RP 744–46, 786–88.

Mr. Wyant was also asked to determine the range and penetration capability of the High Standard revolver. He used the sights on the revolver to target a gel test dummy. He determined the revolver could penetrate a human body at a hundred and fifty (150) yards. Beck RP 789, 791, 795.

Mr. Wyant and Matthew Noedel, a forensic consultant retained by the defense, agreed the fatal bullet did not reflect slippage and gas erosion. However, the bullets test fired from the revolver did show slippage and erosion. Beck RP 809–10, 957–98, 972, 1007.

Officer McCormick of the Department of Fish and Wildlife gave the jury a general overview of the incident scene reflecting the location of the cabin and Mr. Carrigan's body. Beck RP 408–09, 414–15.

Sergeant Christensen of the Department of Fish and Wildlife identified the window in Exhibit 33 as the window in Adam Jennings' bedroom. He indicated that a line of sight measurement, using a laser range finder, from the shotgun lying in the field to that window, was

one hundred and thirty-four (134) yards. Beck RP 423, 436, 438–39, 445; Exhibit 103.

Sergeant Richmond observed that the trees between the cabin and the site of the body did not block line of sight from the cabin window. Beck RP 528–29.

During the interview with Detective Sloan, Adam Jennings asked the detective how to contact his attorney Michael Prince. Detective Sloan said he did not know any attorney named Prince. Mr. Prince was or had recently represented Adam Jennings in Okanogan County District Court on a driving while license suspended charge. Steinmetz RP 189, 289, 291–93, 295, 299–300.

Bonnie Scott, who works at the Chesaw General Store, and Adam Jennings were present when John Jennings apparently stated “[i]f any hunters come on my property we’ll shoot them.” Beck RP 838–39, 841, 843.

On November 18, 2013, Adam Jennings was charged with premeditated first degree murder as principal and/or accomplice and first degree unlawful possession of a firearm. Adam J. CP 268–70.

On December 17, 2013, Adam Jennings' case was joined with that of his father pursuant to agreement between the attorneys. Adam J. CP 257. The original trial date of December 7, 2013, was continued on multiple occasions pursuant to either a waiver or agreement. Adam J. CP 225, 229, 242–43, 248, 249, 250, 251, 252, 254, 256, 261.

On November 16, 2015, an amended information was filed. The charges remained the same. Adam J. CP 187–89.

Counsel for Adam Jennings stipulated to a prior serious felony conviction that made him ineligible to possess a firearm. Beck RP 896–99; Exhibit 297. Adam Jennings was found guilty of both offenses. The jury answered a special verdict form (being armed with a firearm) in the affirmative. Adam J. CP 93, 95.

On November 24, 2015, the court imposed a high end standard range sentence of 393 months inclusive of the 60 months firearm enhancement. Adam J. CP 21, 23–24.

This appeal followed. Adam J. CP 2.

C. ARGUMENT

1. Adam Jennings' conviction for first degree murder violated his Fourteenth Amendment and Washington Constitution, Article 1, § 3 right to due process because the state failed to prove beyond a reasonable doubt that he, as either principal or accomplice, committed the crime of premeditated first degree murder.

In considering a sufficiency of the evidence challenge, the reviewing court must determine “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” *State v. Luvane*, 127 Wn.2d 690, 712, 903 P.2d 960 (1995) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), quoted in *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). “A claim of insufficiency [of evidence] admits the truth of the State's evidence and all inferences that reasonably can be drawn [from it].” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court must reverse for insufficient evidence if no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012).

Due process requires the state to prove each element of a charged crime beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art I, § 3; *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If the state fails to prove an essential element, due process mandates dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 990 L.Ed.2d 116 (1986).

To convict Adam Jennings or his father of first degree premeditated murder as principal, the State had to prove that one of them caused the death of Michael Carrigan with premeditated intent. RCW 9A.32.030(1)(a). There is no doubt Mr. Carrigan was killed by a fatal shot. The State could not determine who actually pulled the trigger. The State thus proceeded against Adam Jennings and his father as each being a “principal or accomplice” in a premeditated murder. Nevertheless the State was still required to prove, beyond a reasonable doubt, that Adam Jennings was either a principal or an accomplice to a premeditated crime. It did not do so. Because there is insufficient evidence that Adam Jennings acted as a principal actor, or was ready to

assist a principal in the crime and that he shared in the criminal intent of the principal, the conviction should be reversed and dismissed.

The closest the State came to identifying a firearm which may have been used was the inconclusive results on the .22 High Standard revolver. There was no direct evidence Adam Jennings pulled the trigger. Circumstantial evidence of his being a principal actor is weak: Adam Jennings was in the cabin, there was a line of sight from his bedroom window to the location where Mr. Carrigan was shot, he'd previously used some of the guns found in the house for shooting out of the window at targets on trees located in the opposite direction from where Mr. Carrigan was shot, and he was present a few days before the shooting when his father made a statement at a local store that "[i]f any hunters come on my property we'll shoot them." Additional evidence established Adam's father was also present in the house they shared and had used guns for target shooting out of that same window.

Inferences based on circumstantial evidence must be reasonable and "cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). On these sparse facts, the jury would have

had to engage in impermissible guesswork to conclude Adam Jennings or his father acted as principal actor.

A person is an accomplice of another person in the commission of a crime if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) Aids or agrees to aid such other person in planning or committing it; or
- (b) His or her conduct is expressly declared by law to establish his or her complicity.

RCW 9A.08.020(3). The State presented no evidence Adam Jennings solicited, commanded, encouraged, or requested his father to shoot Mr. Carrigan. The issue is whether Adam Jennings aided or agreed to aid his father in planning or committing the crime of premeditated first degree murder.

A critical piece of evidence presented by the State against Adam Jennings and his father was the testimony of Bonnie Scott. She indicated that a few days before the incident, Adam Jennings was present with his father in the local store during a discussion among regulars about the upcoming hunting season, commiserating about the “[s]ame old stuff, that hunters are a pain.” Ms. Scott indicated Adam Jennings nodded yes when his father made the statement, “If any

hunters come on my property we'll shoot them.” Beck RP 841, 843–44.

In context the father’s statement could be social banter reflecting the age-old sentiments of the customers at the store in Okanogan County and residents of many rural areas—accepting and at the same time frustrated by the annual prospect of hunters encroaching upon and possibly disrupting their solitude, property, or livestock. Even if considered a threat, however, accomplice liability requires more than Adam Jennings’ mere assent. *State v. Peasley*, 80 Wash. 99, 100, 141 P. 316 (1914).

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act. **Accomplice liability requires some form of overt act**; the doing or saying of something that either directly or indirectly contributes to the criminal act; some form of demonstration that expresses affirmative action, **and not mere approval or acquiescence, which is all that is implied in assent.**

State v. Trout, 125 Wn. App. 403, 427, 105 P.3d 69 (2005) (Schultheis, J. (dissenting) (citations omitted). The only action attributed to Adam Jennings during the course of this statement is Adam’s nodding his head. And that does not invoke criminal liability.

In this state when it cannot be determined which of two defendants actually committed a crime, and which encouraged or counseled, it is not necessary to establish the role of each. It is sufficient if there is a showing that **each defendant** was involved in the commission of the crime, **having committed at least one overt act**

State v. Baylor, 17 Wn. App. 616, 618, 565 P.2d 99 (1977) (emphasis added). An “overt act” is the “doing or saying of something that either directly or indirectly contributes to the criminal act, some form of demonstration that expresses affirmative action, and not mere approval or acquiescence.” *Trout*, 125 Wn. App. at 427 (quoting *Peasley*, 80 Wash. at 100).

For accomplice liability to attach there must be evidence that the accomplice did something in association with the principal to accomplish the crime. *State v. Murray*, 10 Wn. App. 23, 28, 516 P.2d 517 (1973); *State v. Boast*, 87 Wn.2d 447, 455–56, 553 P.2d 1322 (1976). The person giving aid must participate in the crime charged “as something he wishes to bring about, and by action to make it succeed.” *Boast*, 87 Wn.2d at 456. “Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was *ready to assist* in the crime.” *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) (emphasis

added); *see also State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981).

The State did not establish that Adam Jennings pulled the trigger. The State presented no evidence that he solicited, commanded, encouraged or requested his father to shoot Michael Carrigan. There was no evidence Adam Jennings aided or agreed to aid his father in planning or committing the crime of premeditated first degree murder. There was no evidence he had knowledge of ongoing criminal activity. The State did not establish that Adam Jennings did anything on September 2, 2013, other than be present in the cabin when the shooting occurred. Even if coupled with some knowledge of potential criminal activity, Adam Jennings' mere presence at the scene is insufficient to establish accomplice liability. *State v. Asaeli*, 150 Wn. App. 543, 568, 208 P.3d 1136 (2009).

The State proceeded against both Adam Jennings and his father because it could not determine who actually pulled the trigger. The State failed to prove beyond a reasonable doubt that Adam Jennings was either a principal or an accomplice. Adam Jennings recognizes that

... [a] jury is not required to determine which participant acted as a principal and which participant acted as an accomplice. *State v. Hoffman*, 116 Wn.2d 51, 104–05, 804 P.2d 577 (1991).

The jury need only conclude unanimously that both the principal and accomplice participated in a crime. *Hoffman*, 116 Wn.2d at 104–05.

Personal Restraint of Heggney, 138 Wn. App. 511, 524, 158 P.3d 1193 (2007) (emphasis added). “The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof, though they are not favored in the law.” *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006). However, inferences based on circumstantial evidence must be reasonable and “cannot be based on speculation.” *Vasquez*, 178 Wn.2d at 16.

The prosecuting attorney, in closing argument, could not point to any act by Adam Jennings which was an overt act as principal or accomplice. Thus, his argument urged the jury to speculate about joint participation in the crime by unceasingly using the unifying terms “they” and “the defendants:”

...[T]he defendants shot and killed Michael Carrigan. (Beck RP 1079)

... The defendants in this case told people ... ‘We’ll shoot them.’ The defendants’ murder of Michael Carrigan was premeditated. (Beck RP 1079)

... They thought about it, they thought between the first and second shot. They thought – beforehand. (Beck RP 1083)

... In this case – both defendants were involved in various aspects of the crimes charged. We’re really talking (inaudible) crime – murder (inaudible). (Beck RP 1086)

... They were – they were accomplices in this case, they’re both defendants and accomplices. (Beck RP 1087)

... In this case both defendants were responsible for the murder of Michael Carrigan. ... In this case, the evidence does show beyond a reasonable doubt the defendants murdered Michael Carrigan ... (Beck RP 1087)

... Now, in this case, -- how do we know the defendants were involved? How do we know the defendants murdered Michael Carrigan?

In addition to their statement, a couple of days before, they prepared for this. You have a pretty good sense of the mindset, through the testimony, through the physical photographs. They prepared. They armed themselves.

And – you’ll see these photographs when you go back – you look and there’s a lot more than that. They armed themselves with the weapons, the caliber, the type of ammunition specifically. They killed Michael Carrigan. (Beck RP 1089)

... They armed themselves. They had modified weapon – I’m sorry – modified ammunition.

... They practiced. (Beck RP 1089–90)

... They also had – a line of sight. And (inaudible), “well, gee, they had – they had a view.” They had a specific line of sight. (Beck RP 1090)

... They had logs stacked up – defensive positions. They had material up here, solid material, before you got over to the stacked log defensive type of position. (Beck RP 1093)

... Does that exclude the defendants? Absolutely in now [sic] way. The defendants had multiple weapons. They had weapons that we know could not be accounted for. (Beck RP 1095–96)

... The defendants in this case had between, the least, being very conservative, an hour and a half, upwards of two hours, from the time Michael Carrigan was shot until the time they finally came out at the call of law enforcement. Nobody else around them. Nobody else seeing what they're doing. They had plenty of time to do whatever they wanted. (Beck RP 1096)

... We also know – that the defendants intended to do it. They said so. (Beck RP 1097)

... [T]hey're armed, how they were set up. They had the intent and they had the opportunity and they took it. (Beck RP 1097)

... [T]hey were prepared for it. They were going to defend themselves. They had basically done all these things to protect themselves. The log stack, the – speakers, the lights, -- kept to themselves. They shot all this time. They practiced. They had everything ready. They had loaded weapons ready and accessible, -- at all time. They were armed when they left their house. (Beck RP 1098)

... And they practiced. And they practiced. Mr. Carrigan was that opportunity, and they took it. (Beck RP 1099)

... The defendants killed Michael Carrigan. (Beck RP 1100)

The State could not prove principal liability as to either Adam Jennings or his father. In trying to establish accomplice liability the State accused each of them of being the principal. “They were – they were accomplices in this case, they're both defendants and accomplices.

Beck RP 1087. Inferences based on circumstantial evidence must be reasonable and “cannot be based on speculation.” *Vasquez*, 178 Wn.2d at 16. The jury’s verdicts were impermissible speculation because the jury could not reasonably infer from the State’s evidence that either “defendant was ready to assist the principal in the crime and that he shared in the criminal intent of the principal, thus ‘demonstrating a community of unlawful purpose at the time’ ” Mr. Carrigan was murdered. *State v. Castro*, 32 Wn. App. 559, 564, 648 P.2d 845 (1982).

Because there is insufficient evidence that Adam Jennings acted as a principal actor, or was ready to assist a principal in the crime and that he shared in the criminal intent of the principal, the conviction should be reversed and dismissed.

2. Adam Jennings was denied his constitutional right to counsel.

The right to counsel is guaranteed by the Sixth Amendment and the Washington Constitution. U.S. Const. amend. VI¹; Const. art. I, § 22². The constitutional right to counsel includes the right to

¹ “In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.”

² In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel....”

representation which is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981); *see also Holloway v. Arkansas*, 435 U.S. 475, 481–82, 98 S.Ct. 1173, 1177–78, 55 L.Ed.2d 426 (1978) (citing *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 464–65, 86 L.Ed. 680 (1942)). In evaluating possible conflicts of interest, the members of a law firm are generally treated as a single attorney. *State v. Hatfield*, 51 Wn. App. 408, 412, 754 P.2d 136, 138 (1988) (citing RPC 1.10(a); 2 LaFave & Israel, *Criminal Procedure* § 11.9 at 76 n. 2).

Adam Jennings was represented at trial by Melissa MacDougall and one of her associates. John Jennings was represented at trial by Michael Prince and Myles Johnson. Beck RP 4, 45–46. Mr. Prince is a law partner of Ms. MacDougall. They are in the same firm. They are co-contractors on the Okanogan County Public Defender contract, for which Ms. MacDougall serves as contract administrator. Steinmetz RP 62, 299–300; Steinmetz Suppl RP 70–71; Brief of Appellant (BOR) John Jennings at Appendices A and B. Mr. Prince was an attorney in the county contract defender system, and had recently, or was, representing Adam Jennings in Okanogan County District Court.

Adam Jennings considered Mr. Prince his attorney at time he was interviewed in jail about the events surrounding the murder. Steinmetz RP 189, 289, 291–95, 299–300.

American Bar Association (ABA) Standard 4–3.5(c) provides in part:

Except for preliminary matters such as initial hearings or applications for bail, **defense counsel should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another.**

(Emphasis added).

John Jennings raised the issue of improper representation in a letter to the Court dated May 25, 2015. The letter claimed conflicts of interest between “the needs of myself and my son and our court-appointed attorneys.” The trial court denied John Jennings’ request to have independent counsel review his then-current attorney’s performance. Steinmetz RP 138–41; John J. CP 220.

The commentary to ABA Standard 4–3.5 provides in part:

Criminal defendants have a constitutional right to conflict-free counsel. **This Standard is based upon the belief that conflicts of interest are either present or potentially present in the**

great majority of criminal cases where codefendant are represented by the same lawyer or firm, but there are instances when such common representation is either not likely to create a conflict or when common representation is, indeed, potentially advantageous to each codefendant as part of a ‘common defense.’

(Emphasis added).

Even though there was a common defense of denial by both defendants, it was improper for attorney MacDougall to represent Adam Jennings when attorney Prince, from the same firm, was representing his father.

A defense counsel has the obligation to bring forth all evidence with regard to potential defenses. The record reflects that either Adam Jennings or John Jennings fired the fatal bullet that killed Michael Carrigan. Only one bullet was recovered. Two shots may have been heard, but there was inconclusive evidence a second shot struck Mr. Carrigan. Only one of the Jennings could have fired the fatal bullet and there were significant issues concerning accomplice liability (*see* issue one, *supra*).

Due to presenting a common defense the record is silent as to evidence that might have been developed on behalf of each defendant

had he been separately represented. As demonstrated in the summation of guilt, the unified posture of the defense prevented Adam Jennings' attorney from attempting to dissociate him from his co-defendant's case by exploring this weakness of proof, effectively merging him and his father into one actor for crimes charged separately. Beck RP 1101–105. Attorney MacDougall's association with attorney Prince created a direct conflict of interest between Adam Jennings and his father. "... The presence of **even slight differences** in the backgrounds of defendants or **in their cases** (e.g., one defendant held a gun while the other served as a lookout) **means the strong advocacy to the prosecutor on behalf of one co-defendant necessarily undermines, by comparison, the position of the other defendants. ...**"

Commentary to ABA Standard 4-3.5.

Neither attorney MacDougall nor attorneys Prince and Johnson elected to have one co-defendant point the finger at the other co-defendant. Adam Jennings joins in his father's argument that the relationship between attorneys MacDougall and Prince adversely affected their ability to clearly analyze the State's case and to properly advise him and his father of their potential defenses, and that

“[s]ignificant exposure to an unjust conviction occurred with the joint representation.” BOA John Jennings at 35. Adam Jennings did not receive the necessary defense guaranteed by the Sixth Amendment and Const. art. I, § 22.

Rule of Professional Conduct (RPC) 1.7 governs representation of current clients where there is a conflict of interest. If the representation may be taken despite the existence of a conflict, i.e. the conflict is consentable, the clients must be told of the conflict and their written consent obtained. RPC 1.7 at Comment 2. “When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.” RPC 1.7 at Comment 14. There is no record Adam Jennings and his father were advised of the conflict of interest or that their consent was requested or obtained.

Two rules apply when a defendant is alleging ineffective assistance of counsel due to a conflict of interest by his attorney:

First, a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire. Second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance. In neither situation need prejudice be shown.

In re Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983) (citations omitted).

Adam Jennings considered Mr. Prince his attorney when he was arrested on September 4, 2013, on an outstanding district court warrant and was interviewed by police about this case. Steinmetz RP 289, 291–93, 295, 299–300. Attorney Prince represented Adam Jennings at his arraignment and at a hearing on September 13 or 14, 2015, and had appeared with attorney MacDougall on Adam Jennings’ behalf at hearings on May 4 and 11, 2015. Steinmetz Suppl RP 18, 91–92, 94; Steinmetz RP 122. Attorney MacDougall primarily represented Adam Jennings throughout these proceedings. *Passim*.

Mr. Prince first appeared in John Jennings’ case on September 13 or 14, 2015, on behalf of attorney Johnson, who was new on the case. On September 22, 2015, attorney Prince joined in a defense continuance motion. He admitted prior minor involvement with attorney MacDougall on the case. Steinmetz RP 174–77, 179, 188–89.

The trial court knew the MacDougall and Prince law firm held the public defender contract for Okanogan County. The court recognized when there are cases pending in a single law firm involving

criminal co-defendants the potential for a conflict of interest increases exponentially. In fact, the court had inquired very early on whether defense counsel from the law firm anticipated a motion to sever. Attorney MacDougall responded, “[p]otentially.” Steinmetz Suppl RP 62, 70–71; Steinmetz RP 62–64, 299–300. Yet once attorney Prince came into the picture on John Jennings’ behalf, the trial court made no in-depth inquiry concerning his prior involvement in the case with either attorney MacDougall or Adam Jennings. Steinmetz RP 195, *passim*.

Attorney Prince continued to appear both with attorney Johnson and independently up to the time of trial and was present during the trial. *Passim*. Attorney Prince completed the jury instructions for the two defendants. He conducted the cross-examination of the State’s expert and the direct examination of the defense expert. Attorney MacDougall stated she and counsel for John Jennings had “divided up duties,” and she had no involvement in the testimony of the experts portion of the case. Thus, attorney Prince was acting on behalf of both defendants during preparation of jury instructions and the examination

of the expert witnesses. Steinmetz Suppl RP 53–55; Beck RP 15, 804, 805–19, 825, 957–80, 1008–012.

Attorneys MacDougall and Prince’s involvement in the case amounted to joint representation in violation of the conflict of interest rules. Attorney MacDougall was not acting independently on Adam Jennings’ behalf. The trial court failed to inquire when it reasonably should have known of the particular conflict. The joint representation adversely affected attorney MacDougall’s ability to properly advise Adam Jennings of his potential defenses in light of the weakness of proof, resulting in substantial exposure to an unjust conviction. Adam Jennings’ conviction should be reversed and the case remanded for a new trial.

3. Prosecutorial misconduct violated Adam Jennings’ right to a fair and impartial trial.

The following statements were made by the prosecuting attorney in his rebuttal argument. The statements, together with the prosecuting attorney’s pervasive references to Adam Jennings and his father as a single unit (“they” and “the defendants”) in his closing argument, as argued above, violated Adam Jennings’ right to a fair and impartial trial

guaranteed by both the United States Constitution and the Washington State Constitution.

... The [defendants'] argument that, "Well, why do these other guns matter?" Well, they matter for other counts directly. But they matter for this count, the murder count, because in fact they show the defendants not only had multiple weapons, and all the ammunition and everything else that went along with that, but **they** also – manipulated and -- **got rid of some weapons** -- very clearly. That's why matters. Because, again it goes back to the argument, it's like, "Well, the officers don't find a weapon," and ...

Beck RP 1121 (alteration added) (emphasis added).

A number of firearms were recovered in the cabin, but not one the State could conclusively point to as the murder weapon. Time elapsed between the shooting and police arrival at the scene, and also between law enforcement contact with Adam Jennings and his father and their subsequent arrests on the charges in this case. The prosecuting attorney's reference directly violated the trial court's pretrial ruling excluding "officer opinion testimony or prosecutorial comments" about the defendants hiding guns—which the prosecutor had conceded was inappropriate. Steinmetz RP 398–400. The violation was blatant, was prejudicial because during closing argument the defense could not rebut with new evidence alleged facts not in

evidence, and could not have been cured by an instruction. The prosecutor's misconduct requires reversal. *State v. Gregory*, 158 Wn.2d 759, 867, 147 P.3d 1201, 1257 (2006), *as corrected* (Dec. 22, 2006) *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

The prosecuting attorney made the following additional statements during his rebuttal summation:

The defendants -- had the opportunity to have witnesses presented, have you all consider the evidence, to weigh -- you have reasonable doubt whether they committed the murder. None of which were offered (inaudible).

Beck RP 1131.

A prosecutor may not comment on the lack of defense evidence because the defendant has no duty to present evidence. *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990).

“A prosecutor may not ‘comment on the defendant’s failure to call a witness’ unless ‘it is clear the defendant was able to produce the witness and the defendant’s testimony unequivocally implies the uncalled witness’s ability to corroborate his theory of the case.’ ” *State v. Dixon*, 150 Wn.App. 46, 55, 207 P.3d 459 (2009) (*citing State v.*

Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990)). The missing witness doctrine may not be implied “if it would infringe on a criminal defendant’s right to silence or shift the burden of proof.” *State v. Montgomery*, 163 Wn.2d 577, 599, 183 P.3d 267 (2008). “The State must convict on the merits, and not by way of ... infringing on the right to remain silent, and improperly shifting the burden of proof to the defense. *State v. Fleming*, 83 Wn. App. 209, 214-216, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997).

Neither defendant testified at trial. Defense counsel presented a defense expert to challenge the State’s expert witness, and called no other witnesses. The remark about failure to call witnesses more likely than not influenced and had a prejudicial impact on the jury by implying the prosecutor knew something that defense counsel had not presented to the jury and making the jury wonder what the defendants were trying to hide.

The prosecuting attorney never identified a missing witness. The only reasonable inference to draw from the statements is that the defendants were the witnesses referred to by the prosecutor. The defendants had no duty to present evidence and the comments

impermissibly infringed on their right to remain silent. *Dixon*, 150 Wn. App. at 54–55. The remarks also improperly shifted the burden of proof to the defendants by implying the defendants should have presented evidence to support their defense. *Id.* at 55.

The above statements and pervasive references to Adam Jennings and his father as a single unit throughout the prosecuting attorney’s closing argument were unconscionable misconduct, and constitute reversible error.

4. Cumulative error requires reversal.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when the trial court’s cumulative errors were fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994), *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *Lord*, 123 Wn.2d at 332.

Adam Jennings has established prejudice based upon prosecutorial misconduct and a conflict of interest involving co-

representation of co-defendants in a first degree murder case. He was deprived of a fair trial, and retrial is necessary.

5. Appeal costs should not be imposed.

Adam Jennings asks this court to exercise its discretion not to award costs in the event the State substantially prevails on appeal.

Rule of Appellate Procedure (RAP) 14.2 was amended effective January 31, 2017, to permit clerks or commissioners to waive imposition of appellate costs in the event an adult offender has not substantially prevailed on review if they determine the offender does not have the current or likely future ability to pay such costs. The trial court's findings of indigency for purposes of appeal remain in effect on appeal, pursuant to RAP 15.2(f), unless there is a showing by a preponderance of the evidence that the offender's financial circumstances have significantly improved since that last determination of indigency.

Notwithstanding the rule change, this Court's general order remains in effect and requires an indigent appellant to request relief from appellate costs in the opening brief and the filing of a report as to

continued indigency within sixty days. General Court Order, Court of Appeals, Division III (filed June 10, 2016).

The appellate courts have discretion to refrain from ordering an unsuccessful appellant to pay appellate costs even if the state substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); RAP 14.2.

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. In the same way that imposition of legal financial obligations following a trial creates problematic ongoing consequences for the criminal defendant, so, too, costs on appeal grow at a compounded interest rate of 12%, lengthen court jurisdiction, interfere with employment opportunities, and create barriers to re-integration in the community. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Under *Sinclair*, it is "entirely appropriate for an appellate court to be mindful of these concerns." *Sinclair*, 192 Wn. App. at 391.

RAP 15.2(f) provides that "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the

appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent." 2017 Washington Court Order 0004 (C.O. 0004) (dated January 4, 2017, effective upon publication). The appellate court should also consider important nonexclusive factors such as an individual's other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual's age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant "cannot contribute anything toward the costs of appellate review." *Sinclair* 192 Wn. App. at 391.

Adam Jennings was 29³ years old at time he was sentenced to 393 months (32.75 years) of confinement. Adam J. CP 3, 6. The court found Adam Jennings remained indigent for purposes of appeal and was unable to pay for the expenses of appellate review and was entitled to appointment of appellate counsel at public expense. Adam J. CP 13–14, 16. The record establishes Adam Jennings suffers from dyslexia and has extreme difficulty reading and writing, needs help walking and uses a walking cane, and has prior hip and leg injuries. Steinmetz

Suppl RP 61; Steinmetz RP 166; Beck RP 298, 702, 886. He was ordered to pay restitution of \$6699. 50. Adam J. CP 8.

Appellate counsel anticipates filing a report as to Adam Jennings' continued indigency and likely inability to pay an award of costs no later than 60 days following the filing of this brief. In the event he does not substantially prevail on the state's appeal, Adam Jennings respectfully asks the court to consider his present and/or likely future inability to pay and not assess appellate costs against him.

D. CONCLUSION

For the reasons stated, the conviction of first degree premeditated murder should be reversed and the matter remanded for resentencing. Alternatively, the matter should be remanded for a new trial.

Respectfully submitted on February 22, 2017.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

³ Adam Jennings' date of birth is October 5, 1986. Adam J. CP 3.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 22, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant Adam Shaun Jennings:

Adam Shaun Jennings (#387218)
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla WA 99362

E-mail: ksloan@co.okanogan.wa.us
E-mail: sfield@co.okanogan.wa.us
Karl F. Sloan
Okanogan County Prosecuting Attorney

E-mail: nodblspk@rcabletv.com
Dennis Morgan, Attorney at Law
Attorney on Appeal for John Jennings

s/Susan Marie Gasch, WSBA #16485