

NO. 33910-6-III and 33932-7-III (consolidated)

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON

PLAINTIFF/RESPONDENT,

V.

JOHN W. JENNINGS and ADAM S. JENNINGS

DEFENDANTS/APPELLANTS

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BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

Respondent accepts and adopts the statement of the case presented in Appellants' briefs with the following corrections and supplemental facts.

### I. Correction of Facts

Appellant for John Jennings' brief indicates that Bonnie Scott testified that John Jennings told her "if any hunters come on my property I will shoot them." The record indicates that Ms. Scott testified that John Jennings stated "if any hunters come on my property *we'll* shoot them." [RP 843]

Appellants assert that John Jennings raised the issue of conflict of interest regarding counsel in a May 25, 2015 letter to the court. John Jennings' letter to the court dated May 25, 2015, filed on May 29, 2015 read as follows:

I am writing you to request an attorney at litium [*sic*] be apointed [*sic*] to research this case and offer a friend of the court brief. I believe this is needed to insure [*sic*] a fair trial if need be. I further believe that a conflict of interest existence [*sic*] between the needs of myself and my son and our court appointed [*sic*] attorneys. It would seam [*sic*] to me our attorneys have their own aginda [*sic*] and are not wanting to zealously defend us. Furthermore I believe Ms. MacDougal has only her political aginda [*sic*] in mind and Mr. Blount cann't [*sic*] think of anything but his future personal financial affluence. [CP 220]

Mr. Prince did not appear on behalf of John Jennings until approximately September 22, 2015. [CP 213]

## II. Supplemental Facts

Mr. Carrigan saw a grouse in the meadow while driving down Cow Camp Road. [RP 493] He stopped the car and walked out into the meadow. [RP 493] He fired one shot from his shotgun at the grouse. [RP 497] The grouse began to fly away so he shot a second time at the grouse. [RP 497] Almost immediately after the second shot, Mr. Stover heard the first shot fired from the defendants' cabin. [RP 500] Mr. Carrigan was hit by the shot and fell to the ground. He then got up and started walking toward Mr. Stover and the truck. [RP 500] A second shot came from the defendants' cabin. [RP 501] Mr. Carrigan was hit by the second shot, dropped to his knees, and rolled over. [RP 501]

There was a clear line of sight between where the victim was shot and the defendants' cabin. [RP 528] Specifically, the line of sight was to the window in Adam Jennings' bedroom. [RP 654-55] The bullet recovered from Mr. Carrigan's body was consistent with that of a CCI Stinger bullet. [RP 772-773]

The property was initially searched at the time of the incident on September 3, 2013. [RP 547] A second search warrant was executed on November 19, 2013. [RP 547, 738] John and Adam Jennings continued to

reside in the cabin during the time between the first and second search warrants. [RP 553]

A couple days prior to the shooting, John and Adam Jennings went into the mercantile where Bonnie Scott worked. [RP 841] John and Adam Jennings engaged in a conversation with Ms. Scott where they discussed that “hunters are a pain” and what they were going to do to keep hunters off their property. [RP 842] At that point, John Jennings said “If any hunters come on my property we’ll shoot them.” [RP 843] John Jennings was not laughing when he made the comment. [RP 844] After John Jennings made the statement, Adam Jennings nodded yes. [RP 844] John Jennings then pulled back his coat, pulled up a firearm to show Ms. Scott, and then put it back down. [RP 845] When John Jennings was in jail, he wrote a letter to Ms. Scott talking about returning to the area and that letter, based on John Jennings statements about shooting hunters, caused her concern. [RP 849]

John Jennings made statements to law enforcement about the activities they performed on their property to attempt to keep people off of their property. [RP 698-699] They stacked wood to block one area from Cow Camp Road. [RP 698] In multiple locations around the residence, logs were stacked and secured in a barricade type fashion. [RP 377-78; Exhibits 66-70] Adam Jennings ran barbed wire along another side of the

property “from the Cow Camp side so they have to come clear around the (inaudible) and it would still leave us a lot of time to, you know, yell and scream at people.” [RP 699]

Targets were set up all throughout the property. [RP 440-44; 530] Multiple targets had .22 rounds that had been shot at them. [RP 553] Thousands of rounds had been shot at the targets and surrounding trees. [RP 554] The shots were all fired in a direction away from the residence. [RP 556] The targets were all set up so that if you were standing at the cabin, you would be facing the targets. [RP 557] Targets were placed at varying distances and heights throughout the property. [RP 663] John Jennings told law enforcement that they had not shot at the targets in months or even years. [RP 714] However, some of the bullet holes in the metal targets were unweathered with fresh metal showing, indicating they were fresh holes. [RP 664]

John Jennings told law enforcement that he had some firearms in the residence. He said that some were locked up and his son, Adam, had pistols by the bed. [RP 384] All of the firearms in the house were registered to John Jennings or were unregistered and were bought from stores. [RP 711] When asked if any of the weapons he owned were given to Adam Jennings and which was Adam’s favorite, John Jennings replied “Um, he carries pretty much what I carry. It’s a .22 pistol. And I’ve got a

7.62 by 25 Tokarev, a 9mm semiautomatic.” [RP 712] John Jennings indicated a .22 caliber rifle had been stolen and he had reported it, but law enforcement had no record of him reporting a firearm stolen. [RP 718-719]

A key to the gun safe was located in Adam Jennings’ bedroom, in a drawer under the bed. [RP 542, 552] The room was identified as Adam Jennings’ room based on clothing and medication belonging to Adam in the room, as well as the only other bedroom in the cabin being identified as John Jennings’ room. [RP 542]

Binoculars were found on a barrel next to the window in Adam Jennings’ room. [RP 660] The window also had a gun rack next to it. [RP 660] A box of CCI Stinger ammunition was found in the same location. [RP 670] The ammunition included both unmodified Stinger ammunition and Stinger ammunition modified into hollow points. [RP 679] A loaded weapon was also found in Adam Jennings’ bedroom. [RP 676]. Other brands of .22 ammunition were also found in Adam Jennings’ bedroom. [RP 680-83] A speed loader was also located in Adam Jennings’ room, loaded with .22 ammunition. [RP 687]

Appellants’ preliminary hearing was held on November 20, 2013 and Emma Paulson appeared as indigent defense counsel for both

Appellants. [Steinmetz RP 6-7] Nicholas Blount filed a notice of appearance on behalf of John Jennings on November 27, 2013.

A letter submitted by John Jennings on October 1, 2014 requested the court remove his then attorneys Nicholas Blount and Anthony Castelda due to “incompetence” and discovery issues. [CP 236] On December 18, 2014, John Jennings wrote a letter which only addresses his medical issues in the jail. [CP 226] April 22, 2015, John Jennings wrote a letter to the court requesting a change of venue and that Judge Christopher Culp recuse himself. [CP 222]

A letter filed on May 29, 2015, *supra*, John Jennings requested an attorney be appointed to review counsel for himself and his son, Adam. [CP 220] However, John Jennings attorney at that time was Nicholas Blount. [CP 220] John Jennings allegation was not that there was a conflict in representation between his attorney and his son’s attorney, rather John Jennings alleged that “our attorneys have their own agenda and are not wanting to zealously defend us. Furthermore I believe Ms. MacDougall has only her political agenda in mind and Mr. Blount cannot think of anything but his future personal financial affluence.” [CP 220]

On June 22, 2015, Melissa MacDougall and Michael Prince separated their partnership by use of a separation of partnership agreement. [CP 294-299, Exhibits 1-2] Prior to that date, Mrs.

MacDougall and Mr. Prince were law partners and held the Okanogan County Contract for Indigent Defense. [CP 294-299, Exhibit 1] As of June 22, 2015, Melissa MacDougall solely managed the Indigent Defense Contract and she and Mr. Prince were no longer law partners in the same firm. [CP 294-299, Exhibit 1] As of June 22, 2015, Mr. Prince was an independent contractor. [CP 294-299, Exhibit 1]

On July 23, 2015, John Jennings wrote a letter to the court which addressed the facts of the case itself and raised no issues with counsel. [CP 216]

Mike Prince first appeared on behalf of John Jennings on September 14, 2015, standing in for Myles Johnson at a status conference hearing. [Steinmetz RP 175] Myles Johnson substituted in for Nicholas Blount as lead counsel on October 1, 2015. [CP 207]

Mr. Prince did not first formally appear on behalf of John Jennings until approximately September 22, 2015, when he filed a motion and declaration for a trial continuance. [CP 213] In the declaration, Mr. Prince indicated he and Myles Johnson had just recently been appointed to represent John Jennings. [CP 213] On October 1, 2015, Mr. Prince indicated that he would be remaining on the case, only as co-counsel to second-chair the trial. [Steinmetz RP 223]

According to the Declaration of Melissa MacDougall, Mr. Prince represented Adam Jennings in a *prior* District Court case involving Driving with Suspended License in the Third Degree. [CP 294-299, Exhibit 1] According to Mrs. MacDougall, she, Mr. Prince, and Adam Jennings discussed the prior representation and did not feel a conflict was present in the representation of John Jennings by Mr. Prince. [CP 294-299, Exhibit 1]

No other letters were written to the court by John Jennings. Adam Jennings did not write any letters to the court. There is no instance in the record where either Adam or John Jennings raised the issue of Mr. Prince having a conflict of interest on the case. The trial commenced on November 16, 2015. [RP 1]

### **ARGUMENT**

- A. There was sufficient evidence to convict both John Jennings and Adam Jennings of first degree murder under accomplice liability.

Both John and Adam Jennings assert that there was insufficient evidence to convict them as either principal or accomplice for the murder of Michael Carrigan. Both appellants do not appear to challenge the sufficiency of the evidence that the fatal shots were fired from Appellants' cabin, merely that there was insufficient evidence that each appellant

committed an “overt act” as required under accomplice liability.

Therefore, Respondent responds only to that assertion.

The standard of review on a challenge to the sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); *State v. McPherson*, 111 Wn.App. 747, 756, 46 P.3d 284 (Div. 3, 2002). When the sufficiency of evidence is challenged on appeal, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201; *McPherson*, 111 Wn.App. at 756. A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201; *Mines*, 163 Wn.2d at 391; *McPherson*, 111 Wn.App. at 756.

The reviewing court considers circumstantial evidence equally reliable as direct evidence. *McPherson*, 111 Wn.App. at 756. Finally, credibility determinations are for the trier of fact and are not subject to review. *Mines*, 163 Wn.2d at 391. The jury is the sole and exclusive judge of the evidence. *State v. Johnson*, 159 Wn.App. 766, 774, 247 P.3d 11 (2011). The appellate court’s role is not to reweigh the evidence and

substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The reviewing court will affirm a conviction if *any rational trier of fact could have* found the essential elements of the crime. *State v. Trout*, 125 Wn.App. 403, 409, 105 P.3d 69 (Div.3 2005). A jury can infer the specific criminal intent of a criminal defendant where it is a matter of logical probability. *Id.* citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Under RCW 9A.32.030(1), a person is guilty of first degree murder when “with a premeditated intent to cause the death of another person, he or she causes the death of such a person or of a third person.”

Under RCW 9A.08.020,

(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.

(2) A person is legally accountable for the conduct of another person when: ...

(c) He or she is an accomplice of such other person in the commission of the crime.

(3) 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; ...

To convict a defendant as either an accomplice or a principle, the jury need only be convinced that the crime was committed and that the defendant participated in it. *Trout*, 125 Wn.App. at 410. To convict a defendant under accomplice liability, the jury needs only conclude that the accomplice participated in the crime; the jury need not unanimously conclude as to the manner of their participation. *State v. Walker*, 178 Wn.App. 478, 487, 315 P.3d 562 (Div.2 2013) aff'd in part 182 Wn.2d 463 (2015). The jury could convict all participants of a crime, even the lookout, as long as the State proves that at least one participant committed the criminal act and one participant- not necessarily the same one- possessed the required intent. *Id.* It is not necessary that the jury be unanimous as to whether each defendant was the principal or accomplice, so long as the jury agrees that both participated in the crime. *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991) (the jury need not decide which of the two co-defendants actually shot and killed the officer, so long as both participated in the crime).

When it cannot be determined which of two defendants actually committed a crime, and which one encouraged or counseled, it is not necessary to establish the role of each. *State v. Baylor*, 17 Wn.App. 616,

618, 565 P.2d 99 (Div.2 1977). 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 as specified in [former] RCW 9.01.030. *Id.*

A defendant may be convicted for a crime under accomplice liability if the defendant actually assists or is in a state of being *ready to assist*. *State v. Renneberg*, 83 Wn.2d 735, 739, 522 P.2d 835 (1974). The State need only show that the defendant was ready to assist the principal in the crime and that he shared in the criminal intent of the principal. *State v. Truong*, 168 Wn.App. 529, 541, 277 P.3d 74 (Div.1 2012) review denied 175 Wn.2d 1020.

The saying of something that either directly or indirectly contributes to the criminal offense is sufficient to make one a principal. *Baylor*, 17 Wn.App. at 618 citing *State v. Redden*, 71 Wn.2d 147, 426 P.2d 854 (1967). To convict a defendant under accomplice liability, the State need not prove that the accomplice shared the specific *intent* of the crime, merely that the accomplice had *knowledge* that their assistance would help facilitate that crime. *Hoffman*, 116 Wn.2d at 104.

Appellants assert that no overt act was proven and then defines an overt act as “a direct, ineffectual act done toward commission of a crime and, where the design of a person to commit a crime is clearly shown,

slight acts in furtherance of this design will constitute an attempt.” [*Brief of John Jennings* 21] However, this definition was made in reference to an *attempt* to commit a crime. See *State v. Nicholson*, 77 Wn.2d 415, 420, 463 P.2d 633 (1969). RCW 9A.08.020, however, need not rely on such a definition as the overt acts pertaining to accomplice liability are contained within the statute itself- “solicits, commands, encourages, or requests” and “aids or agrees to aid.” Thus, Appellants’ definition of overt act is inapplicable to accomplice liability.

The evidence in this case was sufficient for a rational trier of fact to find Adam Jennings guilty as the principal. The fatal shots were fired from the window in the room belonging to Adam Jennings. [RP 528] Targets had been set up around the residence in a manner that Adam Jennings would be firing shots from his bedroom window, in the same direction as the fatal shots killing Mr. Carrigan. [RP 440-44, 530, 556, 663] Adam Jennings had binoculars, a gun rack, firearms, a speed loader and ammunition set up around the window as preparation for firing at any hunters who came on the property. [RP 660, 670, 676, 680-83, 687] The bullet fragment found in Mr. Carrington’s body was consistent with a CCI Stinger bullet which matched ammunition found in Adam Jennings’ room. [RP 772-773, 670] Adam Jennings had unrestricted access to multiple .22 caliber firearms. Adam Jennings’ window had markings on the lower sill

consistent with a firearm rubbing on the sill. [RP 637] Furthermore, Adam Jennings had nodded in agreement with John Jennings' statement to Bonnie Scott that any hunters that came on their property would be shot- the very act that occurred in this case- thereby indicating his intent to shoot and kill anyone, like Mr. Carrigan, who came on the property. [RP 843-844]

Despite appellate counsel for John Jennings contention that John Jennings could not have fired the shot because he is blind in one eye and walks with a cane, such facts do not support that John Jennings could not have fired the gun. John Jennings admitted to law enforcement that he frequently shot the guns and that he could hit targets upward of 150 yards away with the use of a scope. [RP 708] John Jennings stated that he tried to go out every once in a while to plink away and that he takes the guns out to shoot. [RP 713].

The evidence further supports that both John and Adam Jennings, regardless of who fired the fatal shot, had planned and prepared for just this type of situation and were therefore both accomplices in the crime. Both men had barricaded themselves on their property, setting up log barricades as defensive measures. [RP 377-78] They had run barbed wire along the property to give them more time to "yell and scream" at people coming on the property- essentially giving them more time to prepare to

fire on people they deemed as intruders. [RP 699] They set up targets all throughout the property at different heights and distances. [RP 663] The targets all faced the cabin so the inference is that they had practiced shooting at different locations and distances from the vantage point of their cabin. [RP 556] Some of the targets had fresh, unweathered holes indicating recent firing. [RP 664] They had amassed a stockpile of firearms and ammunition.

Adam Jennings had set up firearms, a speed loader, binoculars, a gun rack, and a significant amount of ammunition by the window in his bedroom. [RP 660, 670, 679, 680-83, 687] The window also had evidence of marks on the bottom sill indicative of a firearm resting on it. [RP 637]

Due to a prior conviction, Adam Jennings was ineligible to possess or own firearms. [CP 33-56, Exhibit 297] John Jennings told law enforcement that all the guns in the cabin were his. [RP 711] He further admitted to giving the firearms to Adam Jennings. [RP 712-713] The key to the gun safe, containing John Jennings firearms, was found in Adam Jennings bedroom. [RP 542, 552] This means that, either John Jennings fired the fatal shot, or he supplied the murder weapon to Adam Jennings who fired the fatal shot. This is a permissible inference for the jury to make.

The most telling piece of evidence against both Adam and John Jennings was the statement to Bonnie Scott a mere two days prior to the shooting. Two days prior to the shooting, John and Adam Jennings had been in Ms. Scott's store. [RP 841] John and Adam Jennings talked about how "hunters are a pain." [RP 842] John Jennings said "If any hunters come on my property we'll shoot them." [RP 843] Adam Jennings then nodded in agreement. [RP 844] John Jennings then opened his jacket and showed Ms. Scott a firearm. [RP 845] This was not said in a joking way. [RP 844]

A mere two days later, a hunter, Mr. Carrigan, came on their property and he was shot. The defendants had followed through with their plan to shoot any hunters that came on their property. It was exactly *that* plan. Both had planned, prepared, and encouraged each other in the act. Despite Adam Jennings' appellate counsel's inappropriate and disparaging argument that this statement could be "social banter reflecting the age-old sentiments of the customers at the store...and residents of many rural areas," residents of rural areas such as Okanogan County do not frequently threaten to kill people and brandish weapons in everyday social banter. The jury of rural Okanogan County citizens clearly agrees that this was a serious statement given their verdict.

The very statement and nod by John and Adam Jennings was evidence of their joint plan and further encouragement to each other to follow through with their plan. They both had engaged in the planning and preparing for such an occasion. Appellants' statement of their intent to shoot any hunter on their property cannot be ignored by the jury or this Court, especially when that statement is made a mere two days before Mr. Carrigan was shot for going on their property.

The jury also heard the version of events John Jennings gave, regarding hearing the shots and both he and Adam Jennings dropping to the floor. Had the jury believed this version of events, neither of the Appellants would have been convicted. Therefore, the jury essentially had to have believed that John Jennings was not truthful about what had occurred. John Jennings also stated that they had not shot at the targets in months or even years. [RP 714] However, the targets showed unweathered metal on the bullet holes which indicates recent firing of the firearms. [RP 664] John Jennings' dishonest version of events is further circumstantial evidence that he took part in the events of the shooting and his intent to cover up the crime. Had he not, he would have no reason to be dishonest about it. This is a credibility determination made by the jury.

The question for the jury was whether both John and Adam Jennings, regardless of who fired the fatal shot, had *encouraged, aided, or*

*agreed to aid* the other in the *planning or commission* of the crime. RCW 9A.08.020. Appellants had both agreed that any hunters coming on their property would be shot, thus encouraging each other in the act and direct evidence of their plan that would come to fruition two days later.

Their plan and preparation is evidenced by their target practice from the vantage point of their cabin, firing on targets at different heights and distances. They placed log barricades and barbed wire fencing up in order to direct intruders into their line of sight. That line of sight corresponded with Adam Jennings' bedroom window. Adam Jennings had stockpiled ammunition, firearms, and binoculars at the window in anticipation of any hunters that came on the property so he could shoot them. Since all of the firearms belonged to John Jennings, he would have had to supply Adam Jennings with the murder weapon if Adam Jennings fired the fatal shot, otherwise John Jennings fired the fatal shot.

John Jennings attempted to cover up the crime by providing a false account of what happened to law enforcement, based on the jury's credibility determination. This planning, preparation, and encouragement are the exact overt acts included within RCW 9A.08.020. Therefore, a rational trier of fact could find both John and Adam Jennings guilty of premeditated murder beyond a reasonable doubt.

B. There was sufficient evidence to support the charge of delivery of a firearm to an ineligible person against John Jennings.

Appellant, John Jennings, challenges whether sufficient evidence was presented that he “delivered” firearms to Adam Jennings, and that there was a reasonable basis for him to believe that Adam Jennings was ineligible to possess firearms. The same standard of review for sufficiency described *supra* applies here.

RCW 9.41 does not define the term “deliver” and there is no WPIC for the term deliver; therefore, the jury is to consider the common definition. Guidance for the definition can be found by referencing RCW 69.50.101(g), the definition of “deliver” for the crime of delivery of a controlled substance. Under that statute, deliver means “the actual or constructive transfer from one person to another.” RCW 69.50.101(g). Under RCW 69.50.101(g), a transfer can be either actual or constructive. *State v. Campbell*, 59 Wn.App. 61, 63, 795 P.2d 750 (Div.1 1990).

A constructive transfer is “the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the instance or direction of the defendant.” *Id.* Under constructive transfer, a defendant can be convicted of “delivery” for merely having control over a firearm and affirmatively allowing an ineligible person to retrieve and use the firearm. It is not

necessary that the defendant actually pick up the firearm, carry it to the ineligible person, and directly hand it to them.

In this case, there was substantial evidence that John Jennings delivered firearms to Adam Jennings. John Jennings indicated that *all* the firearms in the cabin were his or registered to him. [RP 711] Multiple firearms were found in Adam Jennings' bedroom. [RP 676] John Jennings told law enforcement about Adam Jennings carrying *his* firearm and using *his* firearms to shoot at the targets. [RP 712-13] When asked if any of the weapons he owned were given to Adam and which ones were Adam's favorites, John Jennings replied "Um, he carries pretty much what I carry. It's a .22 pistol." [RP 712] Therefore, John Jennings admitted that he had given Adam Jennings firearms.

Adam Jennings also had the key to the gun safe in his room. [RP 542, 552] Many of the firearms were not locked up in the gun safe. By the very act of bringing firearms into the small cabin and either not securing them, or by giving Adam Jennings the key to the gun safe, John Jennings gave- or "delivered"- the firearms to Adam Jennings. John Jennings indicated he purchased all of the firearms, therefore, in order for Adam Jennings to have them and use them, John Jennings would have had to provide him with the firearms. The firearms belonging to John Jennings were under his control, he then allowed Adam Jennings to carry

and use the firearms, therefore, either actually or constructively transferring the firearms to Adam Jennings.

At the time of Adam Jennings' disqualifying conviction, he lived with John Jennings. [RP 952] John Jennings is also Adam Jennings' father. [RP 953] On those facts alone, a rational trier of fact could conclude that John Jennings had a reasonable basis to know that his son, who lived with him at the time, had been convicted of the offense.

C. No conflict of interest existed in Mike Prince's representation of John Jennings or Melissa MacDougall's representation of Adam Jennings.

Reversal of a conviction is required only if a defendant or his attorney makes a timely objection to a claimed conflict and the trial court fails to conduct an adequate inquiry. *State v. Regan*, 143 Wn.App. 419, 426, 177 P.3d 783 (Div.3 2008) citing *Holloway v. Arkansas*, 435 U.S. 475, 488, 98 S.Ct. 1173 (1978). Trial courts may assume that defense counsel has no conflict of interest, and the state trial courts have no duty to inquire unless the court "reasonably should know that a particular conflict exists." *State v. Davis*, 141 Wn.2d 798, 863, 10 P.3d 977 (2000). A trial court is not required to initiate an inquiry into a possible conflict of interest unless (1) the court knows of an actual conflict or (2) the court reasonably should know of a conflict. *Id.* at 861. Trial courts may assume, absent special circumstances, that the representation of a criminal

defendant by one or more lawyers entails no conflict. *Id.* This assumption is premised upon the necessity that trial courts rely upon the good faith and good judgment of defense counsel. *Id.*

If the defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show that his lawyer had an actual conflict that adversely affected the lawyer's performance. *Regan*, 143 Wn.App. at 426 citing *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708 (1980); *Davis*, 141 Wn.2d at 861. The rules regarding conflict of interest apply to any situation where defense counsel represents *conflicting interests*. *Regan*, 143 Wn.App. at 426 citing *In re Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983). The mere possibility of a conflict of interest is not sufficient to "impugn a criminal conviction." *Davis*, 141 Wn.2d at 861. Therefore the question is whether defense counsel actually had "conflicting interests." An "actual conflict" is "a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties." *Regan*, 143 Wn.App. at 428 citing *Michens v. Taylor*, 535 U.S. 162, 171, 122 S.Ct. 1237 (2002).

In this case, neither Adam Jennings nor John Jennings made any assertion of conflict of interest at the trial court level. The only facts in the record that Appellants claim shows an attempt to raise the issue, is a reference to a May 25, 2015 letter to the court where John Jennings

asserted a conflict of interest regarding Mrs. MacDougall and his then attorney Mr. Blount. [CP 220] However, a review of that letter shows that John Jennings was not asserting a conflict of interest regarding the prior law partnership of Mr. Prince and Mrs. MacDougall, or Mr. Prince's prior representation of Adam Jennings in the driving suspended case. [CP 220] His assertion was that Mrs. MacDougall had a conflict in representing Adam Jennings because of her "political agenda" and Mr. Blount had a conflict because he was concerned only with his own affluence. [CP 220]

Furthermore, Mr. Prince had not even joined John Jennings' defense by the time of that letter as he did not appear for John Jennings until mid-September of 2015. [Steinmetz RP 175; CP 213] Nowhere in the record did either John or Adam Jennings raise the issue of conflict of interest that is now being asserted. Therefore, they must show that there was an actual conflict of interest that adversely affected their lawyers' performance in this case. *Davis*, 141 Wn.2d at 861; *Regan*, 143 Wn.App. at 416.

Appellants' statement of the case do not point to any part of the record that indicates that Mr. Prince currently represented Adam Jennings in an ongoing District Court case or that Mr. Prince did any work on either

Adam Jennings or John Jennings cases prior to when the law partnership dissolved on June 22, 2015.

The record reflects that Melissa MacDougall and Mike Prince were law partners who held the Okanogan County Indigent Defense Contract. [CP 294-299, Exhibit 1] On June 22, 2015, they executed a separation agreement and dissolved their law partnership. [CP 294-299, Exhibits 1-2] Mr. Prince did not appear for John Jennings until September of 2015, at which point he was not a law partner of Ms. MacDougall, rather he was an independent contractor. [CP 294-299, Exhibit 1; Steinmetz RP 175; CP 213] His representation of Adam Jennings was in a prior, unrelated case for driving with a suspended license. [CP 294-299, Exhibit 1] While Adam Jennings may have thought that Mr. Prince was his attorney when he was arrested and interviewed, that was not actually the case. His district court case had concluded. Furthermore, Mrs. MacDougall, Mr. Prince, and Adam Jennings discussed the matter and they felt as though no conflict was present. [CP 294-299, Exhibit 1]

Appellants assert that the stipulation to Adam Jennings prior conviction is evidence of the conflict; however, the stipulation was to Adam Jennings prior conviction for a felony, a case completely unrelated to Mr. Prince's representation of him in the suspended driving case. [CP 33-56, Exhibit 297]

The fact is, John Jennings, in his multiple letters to the court, never raised the issue of Adam Jennings or any conflict of interest. [CP 236, 226, 222, 220, 216] John Jennings did not write any letters to the court after Mr. Prince appeared on his behalf in the case and never raised the issue of conflict of interest with regard to Mr. Prince or his prior association with Mrs. MacDougall in court.

There are no facts to suggest that Mr. Prince had conflicting interests between his representation of John Jennings, either in the respect that he formerly represented Adam Jennings on an unrelated driving suspended charge, or that he was former law partners with Ms. MacDougall, Adam Jennings' counsel. There are no facts to support that Mr. Prince's performance was affected in any way. Mr. Prince was not lead counsel, he was second-chairing the trial. [Steinmetz RP 223] Myles Johnson was lead counsel for John Jennings. Appellants suggest that Mr. Prince's "conflict" prevented John Jennings' trial team from pursuing potential other defenses, suggesting that John Jennings could have pointed the finger at Adam Jennings as the shooter. However, this is merely speculation that such a defense was ever even contemplated. Both of their defenses had always been a complete denial of the allegations.

Despite Appellants' contention, Mrs. MacDougall and Mr. Prince were not members of the same firm at the time of the representation. Mr.

Prince did not represent Adam Jennings in a pending district court case. Mr. Prince had not participated in either case until September of 2015. Neither Appellant raised the issue of conflict of interest at the trial court level. Mr. Prince's prior association to Mrs. MacDougall or his prior representation of Adam Jennings had no impact on his performance as Mr. Jennings second-chair defense counsel. Therefore, there is no basis to reverse the conviction based on a conflict of interest. Respondent requests that if this Court has further factual questions, that this issue be remanded for a reference hearing to provide further facts to resolve this issue on the merits. RAP 9.11.

D. The prosecutor's statements in closing argument did not constitute misconduct.

To prevail on a claim of prosecutorial misconduct, the defendant must establish "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The burden to establish prejudice requires the defendant to prove that "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." *Id.* at 443. The failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could

not have been neutralized by an admonition to the jury. *Id.* When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecutor's comments as well as their prejudicial effect. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). A conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict. *Id.* at 86.

As a threshold matter, neither counsel for John or Adam Jennings objected to any of the statements made by the prosecutor during closing argument that are now being claimed as error on appeal. [RP 1079-1100, 1118-1132] No objection was made to the prosecutor's statements regarding the potential that there was another gun, the defendants' failure to call witnesses, or the prosecutor's use of the terms "they" or "the defendants." Therefore, the failure to object constitutes a waiver, and Appellants cannot challenge these statements on appeal unless they can show that they were "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Thorgerson*, 172 Wn.2d at 442. Appellants cannot meet this standard because the prosecutor's comments were either

proper closing argument under accomplice liability, or were minor and not ill-intentioned.

John and Adam Jennings were co-defendants, both charged as principal or accomplice. Therefore, they were *both* charged with the murder of Mr. Carrigan. The prosecutor's reference to "they" and "the defendants" is consistent with the State's theory of the case that both Appellants participated in the murder and the legal definition of accomplice liability. If they are both involved in the murder, whether principal or accomplice, then "they" both committed murder and the prosecutor's comments were a proper reflection of the legal concept of accomplice liability. See RCW 9A.08.020.

Appellants' assertion that the prosecutor engaged in misconduct by referencing that the defendants got rid of some weapons or that there may be another weapon that was not found is a mischaracterization of the prosecutor's argument and of the motion in limine ruling.

The Court ruled in limine that it would exclude any officer opinion or prosecutor *opinion* about the defendants hiding guns. The court stated it would "exclude officer opinion or prosecutorial comments, *key word there, opinion*, about the defendants hiding guns... Facts yes, opinions no." [Steinmetz RP 400]

Counsel are permitted latitude to argue the facts in evidence and reasonable inferences in their closing arguments. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *Thorgerson*, 172 Wn.2d at 448. That is what the prosecutor did in this case.

The evidence in this case is that the bullet recovered from Mr. Carrigan's body did not match some of the firearms tested and with regard to the other firearms tested, the results were inconclusive. [RP 780-784] The ballistics expert testified that a different gun than any of the guns tested could have fired the fatal bullet. [RP 784] There were also portions of firearms found around the property and another weapon found hidden in an outbuilding. [RP 684] Furthermore, John Jennings indicated a .22 caliber rifle had been stolen and he had reported it, but law enforcement had no record of him reporting a firearm stolen. [RP 718-719] The evidence presented also showed that there was a significant gap of time between the shooting and the execution of the two separate search warrants. [RP 553] The appellants were both present at the cabin during those gaps in time. [RP 553] The prosecutor's argument was an argument regarding inference.

The prosecutor argued that because the bullet did not match any of the guns tested or the tests were inconclusive, it is logical to conclude that there was another weapon that had likely been destroyed or disposed of- the murder weapon. This is not an improper argument and did not violate the motion in limine. The prosecutor was arguing the inference that even though the bullet did not match the firearms tested or the results were inconclusive, it does not mean Appellants did not commit the crime- the murder weapon could be a completely different weapon that was never recovered. This is not prosecutorial misconduct. It is proper argument regarding inferences based on the evidence presented at trial. Further, since defense counsel did not object, they cannot show that this argument was made in bad faith or is flagrant.

Finally, Appellants assert that the prosecutor engaged in misconduct by commenting that the appellants had the opportunity to present witnesses and that none were offered. While this comment may not have been entirely “proper,” no objection was made by either Appellants’ counsel, therefore, Appellants must show that the comment was flagrant and ill-intentioned and that there is a substantial likelihood that the comment affected the verdict. Appellants have failed to meet this burden.

The jury was advised in Jury Instruction No. 1 that

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.... You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions. [RP 1063]

The prosecutor's comments did not argue that Appellants had a duty or a burden to present witnesses or evidence. It was a comment that Appellants did not present witnesses. There is no indication that it was ill-intentioned. Rather, the prosecutor stuttered in an apparent attempt to catch himself and correct the statement. Furthermore, there is no indication that the comment had any effect on the verdict. The jury was advised that the attorneys' statements are not evidence. The jury was already aware the Appellants did not present witnesses as they had sat through the trial and had seen that for themselves. Appellants have pointed to no indication that this remark could have had any effect on the verdict. Appellants simply ask this court to find the remark requires reversal without showing the required actual prejudice.

Neither the prosecutor's reference to Appellants as "they" or the prosecutor's argument regarding inferences of the murder weapon possibly being a gun that was never located were

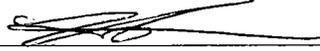
improper. Therefore no misconduct occurred with those statements. While the prosecutor's statement the Appellants did not call witnesses may not have been entirely proper, there was no objection made at trial and Appellants cannot show that the comment was flagrant, ill-intentioned, or had any meaningful or substantial effect on the verdict. Appellants asserted error must therefore be rejected.

### **CONCLUSION**

There was sufficient evidence that both John and Adam Jennings were either principals or accomplices in the first degree murder of Mr. Carrington. There was further sufficient evidence that John Jennings delivered a firearm to Adam Jennings, having a reasonable basis to know that Adam Jennings was ineligible to possess a firearm. No conflict of interest existed between Mike Prince's representation of John Jennings or Melissa MacDougall's representation of Adam Jennings. Finally, the prosecutor did not engage in misconduct during his closing argument. Therefore, Respondent requests this Court deny Appellants' asserted errors and affirm their convictions.

Dated this 16<sup>th</sup> day of October, 2017

Respectfully Submitted:



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I, Shauna Field, do hereby certify under penalty of perjury that on the 16th day of October, 2017, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Brief of Respondent:

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**October 16, 2017 - 3:43 PM**

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**Appellate Court Case Title:** State of Washington v. Adam Shaun Jennings  
**Superior Court Case Number:** 13-1-00394-3

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