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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DARCUS DEWAYNE ALLEN, APPELLANT

Appeal from the Superior Court of Pierce County

Court of Appeals # 42257-3-II

The Honorable Frederick Fleming

No. 10-1-00938-0

RESPONDENT'S SUPPLEMENTAL BRIEF

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A. ISSUES PERTAINING TO SUPREME COURT REVIEW.

1. Did the Court of Appeals correctly find that despite the prosecuting attorney's misstatement of the law of *mens rea* in closing argument, the defendant received a fair trial when the jury was: 1) correctly instructed on the law; 2) instructed to disregard any argument that was inconsistent with the court's instructions; and 3) directed - at the defendant request - to reread the court's instructions when it sent out a question during deliberations regarding *mens rea*?
2. Did defendant's failure to request a curative instruction following the improper argument waive any argument that the given instructions were insufficient to instruct the jury on the correct law?
3. Whether the statutory language of RCW 9.94A.535(3)(r) and (v) may be applied to all participants in a crime?
4. Whether the trial court properly exercised its discretion in balancing some spectators right of expression with the defendant's right to a fair trial?

B. STATEMENT OF THE CASE.

The detailed substantive facts of this case can be found in the Court of Appeals decision below. See *State v. Allen*, 178 Wn. App. 893, 317 P. 3d 494 (2014). For the purpose of brevity, they will not be repeated here.

Briefly; on November 29, 2009, at about 8 a.m., Maurice Clemmons walked into a Pierce County coffee shop with two guns. He shot and killed four Lakewood Police officers and then fled the scene,

wounded. The defendant, Darcus Allen, had driven him to the coffee shop in a white truck, and later met him nearby to flee the area. *Id.*, at 900-901.

Allen was charged with four counts of aggravated first degree premeditated murder. CP 1-4. The charges included firearm sentencing enhancements and allegations for an exceptional sentence. *Id.* After hearing all of the evidence, the jury found the defendant guilty of premeditated first degree murder, but not the aggravating factors. CP 2041-2044. The jury found the firearm sentence enhancements (CP 2053-2056) and the circumstances for an exceptional sentence (CP 2049-2056). The trial court imposed exceptional sentences of 1200 months on each count, consecutive to each other. CP 2189; 2181.

The defendant appealed. The Court of Appeals affirmed his conviction and sentence. *See Allen, supra*. This Court then accepted review.

C. ARGUMENT.

1. WHERE THE JURY WAS PROPERLY INSTRUCTED, THE PROSECUTING ATTORNEY'S MISSTATEMENT OF THE LAW IN CLOSING ARGUMENT DID NOT DENY THE DEFENDANT A FAIR TRIAL.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577

(1991). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Carver*, 122 Wn.2d 300, 306, 93 P. 3d 947 (2004). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by*, *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002); *see State v. Warren*, 165 Wn.2d 17, 195 P. 3d 940 (2008).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994). Where defense counsel objected to a prosecutor's remarks at trial, the trial court's rulings are reviewed for abuse of discretion. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006).

The major issue in this case was whether the defendant knew that Clemmons was going to go into the coffee shop to kill police officers. The argument at issue was regarding the *mens rea* element for accomplice liability. Knowledge may be inferred from circumstantial evidence. If information is sufficient to cause a reasonable person in the same situation to believe that a fact exists, the trier of fact may infer that the defendant had knowledge. *State v. Perebeynos*, 121 Wn. App. 189, 196, 87 P. 3d

1216 (2004); *State v. Shipp*, 93 Wn.2d 510, 610 P.2d 1322 (1980). The prosecuting attorney in the present case argued this concept to the jury. The prosecutor acknowledged the challenge of determining what a person knows, absent an admission. 29 RP 3544. He accurately pointed out that the jury could use circumstantial evidence, and with that evidence, infer that if a reasonable person would have known a fact, the defendant did. 29 RP 3545.

The state must prove that the defendant did know that he was assisting in the crime. A jury is permitted to infer the defendant's personal knowledge if an ordinary person would have had knowledge under the circumstances but such an inference is not mandatory. *State v. Shipp*, 93 Wn.2d, at 517. This is different than proving what the defendant "should have known." A defendant might correctly argue: "Maybe I should have known, but I did not." In arguing that the defendant did know and the permissible inference, the prosecutor conflated the subjective "did" with the objective "should have."

The prosecutor referred the jury to instruction no. 9 which provided a clear and accurate statement of the law. The prosecutor also told the jurors that they would be applying that instruction during deliberation. 29 RP 3544-3545. The court also instructed the jury that the law was contained in its instructions and that they must disregard any remark, statement, or argument that was not supported by the law in those

instructions. CP 2017. The jury was clearly instructed that they could infer the defendant's knowledge by applying a reasonable person standard but they were not required to do so. *See* Instruction 9, CP 2026.

A prosecutor's misstatement of the law in closing argument does not warrant a new trial where the jury was properly instructed. *State v. Classen*, 143 Wn. App. 45, 64-65 n. 13, 176 P.3d 582 (2008). Here, the jury was correctly instructed on each of the elements it needed to find in order to convict the defendant. A jury is presumed to follow the instructions given. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

In the present case, the jury was properly instructed that:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Instruction 9, CP 2026. The defendant did not object to this instruction.

The jury was also correctly instructed that:

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law

from my instructions to the facts that you decide have been proved, and in this way decide the case.

...

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

See Instruction 1(emphasis added), CP 2016, 2017.

The Court must review this argument in the context of the entire closing and the court's instructions. The Court's focus is less on what the prosecutor said; but rather on the effect which was likely to flow from the remarks. *See State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Id.*, quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932). *See also Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984); *State v. Weber*, 99 Wn.2d 158, 164, 659 P. 2d 1102 (1983).

Here, the prosecuting attorney argued that the jury was permitted to infer from the circumstantial evidence that the defendant knew that Clemmons intended to kill the police officers. 29 RP 3544. The prosecutor referred specifically to the instruction. 29 RP 3545, 3546. The prosecutor pointed out that his phrase "he should have known" was a summary or

shorthand way to describe the combined concepts of circumstantial evidence and subjective knowledge. 29 RP 3545. He went on to properly argue, based on the evidence, that: “if a reasonable person would have known that Maurice Clemmons was going to go in there and kill these cops, then his getaway driver knew, too.” 29 RP 3545.

Here, the defendant did object to the prosecutor’s closing argument. *Cf. Emery, supra*. The initial objection was regarding shared premeditation, 29 RP 3545. The court’s ruling was correct under *State v. Berube*, 150 Wn.2d 498, 79 P.3d 1144 (2003), and *Hoffman, supra*. The defendant then also objected to the “should have known” argument. 29 RP 3545-3546. The court overruled, saying: “It’s argument.” 29 RP 3546. The defendant did not request that the jury be instructed or re-instructed. During rebuttal, the State again argued the knowledge instruction: “What did he know, what should he have known.” 29 RP 3614. The defendant again objected that this was an incorrect statement of the law. *Id.* The court stated: “It’s argument.” *Id.* The defendant again failed to request a curative instruction.

The “should have known” aspect of the prosecutor’s argument was improper. Under the law, a person may only be convicted for the criminal act that he or she intends or knows, as the elements of the crime require. The jury may conclude, from circumstantial evidence, that a reasonable person knowing all the facts and circumstances that the defendant knew

would have known, and therefore that the defendant acted knowingly. The jury may not find a person guilty of a crime where the defendant did not have guilty knowledge, but, from all the facts and circumstances, should have.

The prosecutor went on to repeat that a reasonable person would know what Clemmons' intent was, and that the defendant was assisting in it, therefore the defendant knew. 29 RP 3566. Again the prosecutor argued: "He knew. Really, how could he not." *Id.* The prosecutor went on to further argue that the evidence showed that the defendant had the required knowledge: "He knew, and he knew his actions would help that murder." 29 RP 3567.

It would have been more correct and legally accurate for the prosecuting attorney to have focused on how the circumstantial evidence proved the defendant's intent, rather than including the "should have known" theme. However, the prosecuting attorney also repeatedly correctly argued the same legal principle of "knowledge" in this context. He referred the jury to Instruction 9. 29 RP 3546. The jury was correctly instructed and followed the law.

The prosecutor's argument was made in the initial closing. The defendant objected, but did not request a jury instruction. In his closing, the defendant had the opportunity to likewise argue the meaning of Instruction 9. The defendant could have also pointed out the language of

the instruction and argue that the State was misrepresenting the meaning of the second paragraph. The defendant did touch on that briefly. 29 RP 3604.

The defendant made a strong factual argument that, while Clemmons did commit these murders, the defendant did not know what Clemmons was going to do, and the defendant had nothing to do with it. 29 RP 3583. He argued that the evidence showed that Clemmons was delusional and unpredictable. 29 RP 3576-3577. He disputed the evidence and the prosecutor's conclusions.

No prejudice resulted from the prosecutor's misstatement of the law. Both sides argued the meaning and application of the instructions. Both argued the evidence and their theories of the case. The defendant was able to respond to and rebut the prosecutor's arguments by pointing out a correct jury instruction.

During deliberations, the jury sent out a question: "If someone 'should have known' does that make them an accomplice?" CP 2014. The court read this to the parties. 30 RP 3632. The State recommended that the court refer the jury back to its instructions. *Id.* at 3632-3633. The defense agreed. 30 RP 3633. The court wrote a response reflecting the agreed instruction and asked the parties to review it. 30 RP 3634, 3635. The defendant failed to request a more detailed instruction, or even one specifically referring the jury to Instruction 9.

The Court of Appeals applied the correct analysis of improper argument. 178 Wn. App. at 907-908. The Court also noted that the defendant had opportunity to request curative instructions during the closing argument and in response to the jury question, and chose merely to refer the jury back to the original instructions. *Id.*, at 909.

It is within the trial court's discretion whether to give further instruction to a deliberating jury. *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008) (citing *State v. Brown*, 132 Wn.2d 529, 612, 940 P.2d 546 (1997)). However, where a jury's question to the court indicates an erroneous understanding of the applicable law, it is incumbent upon the trial court to issue a corrective instruction. *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). Here, there is no dispute that the court's instructions were legally correct.

2. FACTORS FOR A SENTENCE OUTSIDE
(ABOVE) THE STANDARD SENTENCING
RANGE MAY APPLY TO ALL PARTICIPANTS
IN A CRIME.

In Washington, one who is a participant in a crime is as guilty of committing the crime as any other participant, whether principal or accomplice. *See* RCW 9A.08.020; *State v. Carter*, 154 Wn.2d 71, 78, 109 P.3d 823 (2005). 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, 104–105, 804 P.2d 577 (1991). The elements of

a crime are the same for all participants. *See State v. Teal*, 152 Wn.2d 333, 339, 96 P. 3d 974 (2004).

In general, RCW 9.94A, the Sentencing Reform Act (SRA), makes no distinction between the sentences of crime participants, e.g. principal or accomplice. They are sentenced the same. The calculation of offender scores and the standard ranges make no distinction between principal and accomplice. The SRA only uses the word “accomplice” in the context of the firearm and deadly weapon sentencing enhancements. *See* RCW 9.94A.533(3) and (4); RCW 9.94A.825.

- a. The language used in the sentencing provision determines whether it is applicable to any participant in a crime.

In *State v. McKim*, 98 Wn.2d 111, 653 P.2d 1040 (1982), this Court determined whether the deadly weapon statute, which increased punishment for an “accused [who] was armed with a deadly weapon, as defined by RCW 9.95.040, at the time of the commission of the crime” could be applied to a defendant who was not personally armed during the commission of an offense, but whose accomplice was armed. Noting that the accomplice liability statute, RCW 9A.08.020, made a participant in a crime “equally liable [with other participants] only for the substantive crime,” this Court then turned to the language of the deadly weapon statute itself to assess whether it imposed liability on accomplices. *McKim*, at 117. Following *McKim*, when the Legislature enacted the

SRA's provisions regarding deadly weapon and, later, firearm enhancement, it expressly referenced accomplices. *See* RCW 9.94A.533(3) and (4).

Whether a crime participant is subject to an aggravating circumstance depends upon the actions of the participant and the language of the particular subsection of RCW 9.94A.535(3). In *State v. Hawkins*, 53 Wn. App. 598, 769 P.2d 856 (1989), the defendant was convicted of murder, under accomplice liability. The court imposed an exceptional sentence, aggravated by deliberate cruelty to the victim. *Id.*, at 606. Hawkins objected, arguing that the aggravating factor could not be applied to him, as he was "only" an accomplice. The Court of Appeals disagreed, saying: "[W]e will not split hairs in an effort to determine the greater or lesser roles of these three participants." *Id.*

In *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999), the defendant was convicted of participating in a first degree burglary and first degree assault. Finding deliberate cruelty, particular vulnerability, and abuse of a position of trust, the trial court imposed an exceptional sentence above the standard range. Sweet asserted that he had been in the vehicle and never entered the house, although there was circumstantial evidence to the contrary. *Id.*, at 479. Sweet, like Hawkins, argued that the aggravating factor did not apply to him as an accomplice. 138 Wn.2d at 482. The

Supreme Court rejected this argument and affirmed his exceptional sentence. *Id.*, at 484.

In *State v. Silva-Baltazar*, 125 Wn.2d 472, 886 P.2d 138 (1994), this Court examined the statutory language of RCW 69.50.435, the school zone sentencing enhancement, to determine its applicability to accomplices. This court held that the enhancement could be applied to accomplices under some circumstances, even though the statute did not expressly reference them.

These cases instruct that the court's duty is to determine the intent of the Legislature as to the applicability of a sentencing factor to accomplices based upon the language of the statute.

- b. The statutory language of RCW 9.94A.535(3)(r) and (v) permits application to all accomplices.

The application of the exceptional sentence statute to an accomplice depends on which aggravating circumstance in RCW 9.94A.535 is being considered. The aggravating circumstances set forth in 9.94A.535 cover a broad range of factors. Some of the circumstances focus on the defendant's actions such as when the defendant manifests deliberate cruelty to the victim, RCW 9.94A.535(3)(a), or uses his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense, RCW 9.94A.535(3)(n). Other circumstances discuss what the defendant knew or should have known about his victim,

such as being particularly vulnerable, RCW 9.94A.535(3)(b), or pregnant, RCW 9.94A.535(3)(c). Other circumstances do not focus on the defendant's actions or what he knew, but on the impact of the crime, e.g. a rape of child resulting in the victim's pregnancy, RCW 9.94A.535(3)(i), or the victim's injuries substantially exceeding the level of bodily harm necessary for the element of crime, RCW 9.94A.535(3)(y). Some aggravating circumstances simply describe some aspect of the offense: it involved a high degree of sophistication or planning, RCW 9.94A.535(3)(m), or an invasion of the victim's privacy, RCW 9.94A.535(3)(p).

Examination of the varied wording of these aggravating circumstances indicates that the Legislature intended some of them to apply to any participant in the substantive crime while others must be attributable to a particular defendant, depending on the facts of a case. Generally, the Legislature's use of the phrase "the defendant" in setting forth an aggravating circumstance signals its intent that the circumstance be assessed against the individualized defendant while use of the term "the current offense" signals its intent that the aggravating circumstance can be applied to any participant in the crime.

The language the Legislature used in RCW 9.94A.535(3)(r) and (v) does not focus on the actions or motivations of a particular defendant:

(r) The offense involved a destructive and foreseeable impact on persons other than the victim

...

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

Rather this language focuses on the resulting nature of the crime and the status of the victim.

In this case, the aggravating factor pertains to the nature of the offense committed. There is no reference to "the defendant" or even an indirect reference to the entity committing the crime. These factors do not change from one participant to the next. Once the jury finds the crime meets the criteria set forth in the aggravating circumstance, it is applicable to all the participants in the crime and need not be assessed on an individualized basis. Such an aggravating circumstance should apply equally to all participants in a crime regardless of whether they are the "principal" or "accomplice;" minor or major participant.

Here, the State alleged sentencing aggravating factors that the victims were law enforcement officers performing their official duties at the time, and that the offense involved a destructive and foreseeable impact on a person other than the victim, under RCW 9.94A.535(3)(r) and(v). The jury found the presence of factor (v), the victims were law enforcement officers. It was equally applicable to all participants in the crime regardless of whether acting as a principal or a minor participant.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHERE IT BALANCED SPECTATORS' RIGHTS UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 10 OF THE STATE CONSTITUTION WITH THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

In a criminal trial, the court must balance fundamental constitutional principles and rights of those present. *See* Article 1, §§ 10 and 22 of the Washington Constitution; 5th, 6th and 14th Amendments to the United States Constitution. The 1st Amendment of the United States Constitution guarantees freedom of expression. The 5th and 6th Amendments accord an accused the rights to a fair, public, trial. Article 1, §§ 10 and 22 of the Washington Constitution require a public trial and an open courtroom. *See, e.g., State v. Bone-Club*, 128 Wn.2d 254, 259-260, 906 P.2d 325 (1995). The public in general and the accused each have a right to an open, public trial. Each may assert and enforce these rights. *See Bone-Club, supra*, and *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210, 848 P.2d 1258 (1993).

A silent showing of sympathy or affiliation in a courtroom, without more, is not inherently prejudicial. *State v. Lord*, 161 Wn.2d 276, 284, 165 P. 3d 1251 (2007). In *Lord*, the trial court allowed the presence of spectator buttons depicting the victim for a portion of the trial. When courtroom conduct is challenged as inherently prejudicial to the defendant, the court must determine whether “an unacceptable risk is presented of

impermissible factors coming into play” to affect the jury. *Lord*, at 285, citing *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). The court considers the scene presented to the jury and determines whether it was “so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial.” *Lord*, 161 Wn.2d at 285.

Silent displays of affiliation by trial spectators, which do not explicitly advocate guilt or innocence, are permissible. *In re Personal Restraint of Woods*, 154 Wn.2d 400, 416, 114 P.3d 607 (2005). Woods, like the defendant in the present case, was charged with aggravated first degree murder. Woods was facing the death penalty.

In *Woods*, the defendant complained of black and orange remembrance ribbons worn by spectators during the trial. *Id.* at 417. Woods objected to the presence of the ribbons, and requested that they be removed. The trial judge allowed the ribbons, with the suggestion that the court could provide a jury instruction, if necessary, to mitigate any prejudicial effects. *Id.*

The Washington Supreme Court held that this matter was completely within the trial court's discretion. The Court applied the U.S. Supreme Court's decision in *Holbrook v. Flynn*, 475 U.S. at 572 as the controlling law and upheld the conviction. 154 Wn.2d at 416–418. The trial court must “look at the courtroom scene presented to the jury and

determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial.” 154 Wn.2d at 417.

Here, spectators wore shirts depicting the names of the deceased officers, with the words “You are not forgotten.” 24 RP 3024. The prosecuting attorney described the shirts as “subdued and respectful” and “tasteful and muted.” 24 RP 3025. Unlike the buttons in *Lord*, the shirts did not depict photographs of the officers. *Id.* The shirts did not have anything designed to draw the jurors’ attention. *Id.* The shirts did not advocate a verdict or any finding the jury was to make. The shirts did not express a point of view or opinion regarding the proceedings.

This case is similar to *United States v. Farmer*, 583 F.3d 131 (2d Cir. 2009). There, spectators in a murder trial wore t-shirts featuring the victim’s photograph. *Id.*, at 149-150. When the defense brought this to the court’s attention, the court described the shirts on the record and stated that it was reluctant to interfere with what persons wore to court. The court did not ban the shirts, but did ask the prosecutor to ask the spectators not to wear the shirts in question again. *Id.* The U.S. Court of Appeals held that the trial court acted within its discretion after considering the circumstances before it in court. *Id.*

Here, the spectators had the right to express themselves and be present in the courtroom. The defendant had a right to a fair trial. As in

Woods and *Farmer*, the trial court viewed the items, the shirts, and their purpose. After evaluating the scene presented in the courtroom, the court weighed the rights of the spectators and the rights of the defendant. He denied the motion. There was no error.

The following day, the defense again objected to the same shirts the spectators were wearing. 25 RP 3156. Counsel extended the objection to the officers in uniform that were present as spectators. 25 RP 3157. An officer wearing a uniform in court, as a spectator or otherwise, is permissible under *Flynn*, 475 U.S. at 571. In *Flynn*, four state troopers, armed and in uniform, sat in the front row of the spectators' section. They were part of a security detail that also included two deputy sheriffs and six Committing Squad officers; all in uniform. The Supreme Court found that the presence of 12 officers, all armed and in uniform, was not inherently prejudicial to Flynn's right to a fair trial. Here, the trial judge was able to assess the appearance and potential impact of the officers as spectators. There was no error.

Additionally, defendant failed to properly preserve this issue for review. The defendant did not make a motion for mistrial or for a curative jury instruction. Such inaction has been held to constitute waiver, unless manifest constitutional error is found. See *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not

request.”). A mistrial would have been appropriate only if the error or misconduct was so prejudicial that it could not be cured, and thus, the defendant did not receive a fair trial. *State v. Hopson*, 113 Wn.2d 273, 284–85, 778 P.2d 1014 (1989).

Here, defense counsel twice called the spectators’ shirts to the court’s attention. 24 RP 3024, 25 RP 3156. The defense requested that the court order that the shirts be covered or turned inside-out. 24 RP 3024. The defense did not request a curative instruction or a mistrial. Therefore, the defendant waived this argument on appeal.

D. CONCLUSION.

The Court of Appeals correctly applied the law in reviewing the defendant’s case. The State respectfully requests that the Court of Appeals and the conviction be affirmed.

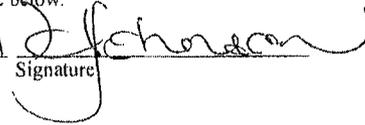
DATED: July 16, 2014.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ^{office} ~~U.S. Mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/16/14 
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Attached is the State's Supplemental Brief