No. 46633-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Anthony Ralls,

Appellant.

Pierce County Superior Court Cause No. 13-1-01703-4

The Honorable Judge Bryan Chushcoff

Appellant's Reply Brief

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I. THE COURT SHOULD NOT HAVE DEVIATED FROM THE STANDARD INSTRUCTION SET ON THE LAWFUL USE OF FORCE.

A person authorized to use deadly force in self-defense does not lose that right because of other thoughts or feelings. *See* RCW 9A.16.050. Here, many witnesses testified that Houston shot first at Mr. Ralls and his companions. RP (7/1/14) 154-162; RP (7/2/14) 279-280, 410-417, 445-446; RP (7/3/14) 507; RP (7/8/14) 880-903, RP (7/14/14) 1276-1277, 1411-1412; RP (7/28/14) 2445. This entitled Mr. Ralls and his companions to use deadly force, even if some of them also desired revenge for Houston's earlier crimes. RCW 9A.16.050.

Actions that qualify as self-defense require acquittal; there is no exception for "mixed-motive" acts of self-defense. RCW 9A.16.050. The court's "retaliation" instruction misstated the law because it stripped Mr. Ralls and his companions of *all* right to use self-defense even if the state failed to disprove the elements of self-defense beyond a reasonable doubt. CP 112. Taken as a whole, the court's instructions did not make the self-defense standard "manifestly apparent to the average juror." *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (internal quotation marks and citation omitted). The error is presumed prejudicial. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

In addition, the court's instructions improperly commented on the evidence, violating Wash. Const. art. IV, § 16. Jurors heard about "revenge" and "retaliation" from the judge *and* the prosecutor. CP 112; RP (7/29/14) 2595-2632; RP (7/30/14) 2747-2776. They did not receive special instructions about lack of involvement, ignorance of others' intentions, or the other matters favored by the defense. From this, jurors may have inferred that the judge supported the prosecution's version of events over the defense version. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007).

The standard instructions on self-defense would have allowed the prosecution to argue its retaliation theory without misstating the law or commenting on the evidence. *See* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.02 (3d Ed); WPIC 16.04; WPIC 16.07; *see also* Brief of Appellant Ralls, pp. 24-26. The standard instruction set makes clear that acts taken solely for purpose of retaliation do not qualify as lawful force. Thus, the pattern instructions "accurately state the law, are not misleading, and allow both sides to argue their theory of the case." *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 117, 323 P.3d 1036 (2014).

Respondent erroneously relies on three cases that do not control here. Brief of Respondent, pp. 28-29 (citing *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993); *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049

(1999), *as amended* (July 2, 1999) and *State v. Bolar,* 118 Wn. App. 490, 78 P.3d 1012 (2003)).

Neither *Janes* nor *Bolar* involved a retaliation instruction such as that given here. *Janes* involved the trial court's refusal to instruct on self-defense in a battered-child case. *Janes*, 121 Wn.2d at 240. *Bolar* involved the sufficiency of the state's evidence disproving self-defense. *Bolar*, 118 Wn. App. at 506-507.

In *Studd,* the appellant conceded the legal correctness of a retaliation instruction under the facts of that case.[1] *Studd*, 137 Wn.2d at 550. Mr. Ralls does not concede the legal correctness under the facts here. Taken at face value, the instruction required jurors to reject Mr. Ralls's self-defense claim even if the state failed to disprove self-defense beyond a reasonable doubt. The instruction is not legally correct under the facts of this case. *See* Brief of Appellant Ralls, pp. 16-26.

Furthermore, the *Studd* court's holding (that the instruction "did not unfairly emphasize the State's theory of the case or, in any way, comment upon the evidence") cannot be mechanistically applied here. The decision necessarily rested on evaluation of the challenged instruction in the

[1] The *Studd* opinion gives only a brief summary of the substantive facts: "Lee Cook shot and killed Troy Robinson. Cook had been robbed at gunpoint by Robinson during the course of a drug transaction." *Studd*, 137 Wn.2d at 540-41. The appellant argued that the retaliation instruction "ha[d] never been approved," and that it "improperly emphasized the state's theory." *Studd*, 137 Wn.2d at 550.

context of the court's other instructions, only two of which were mentioned in the opinion.[2] *Id.,* at 539-541.

The error requires reversal unless the record "affirmatively shows no prejudice could have resulted." *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).[3]

Respondent does not even attempt to show that the error was harmless beyond a reasonable doubt, much less to demonstrate the affirmative lack of prejudice required for judicial comments. *Brown*, 147 Wn.2d at 341; *Levy,* 156 Wn.2d at 725; *see* Brief of Respondent, pp. 26-30. Nor could Respondent make such a showing, given the prosecutor's heavy reliance on the instruction in closing. CP 812-836; RP (7/29/14) 2595-2632; RP (7/30/14) 2747-2776.

Mr. Ralls's conviction must be reversed. *Id.*

II. THE COURT IMPROPERLY STRIPPED MR. RALLS OF HIS RIGHT TO CLAIM SELF-DEFENSE BY GIVING AN UNWARRANTED AGGRESSOR INSTRUCTION.

A. The court erroneously relied on lawful conduct to justify the aggressor instruction.

The aggressor doctrine does not apply to lawful conduct. *See State v. Thompson*, 47 Wn. App. 1, 8, 733 P.2d 584 (1987); *State v. Hardy*, 44

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[2] These two were an instruction based on former WPIC 16.02 and an "act on appearances" instruction. *Id.*, at 539-541.

[3] This is a higher standard than that normally applied to constitutional errors. *Id.*

Wn. App. 477, 484, 722 P.2d 872 (1986); *see also* Brief of Appellant' Ralls, pp. 27-32. Accordingly, lawful conduct cannot strip a person of the right to claim self-defense.

At trial, the prosecutor requested an aggressor instruction based on the defendants' lawful conduct. CP 111. The prosecutor then argued to the jury that this lawful conduct "provoked" Houston into shooting at Mr. Ralls and his companions. RP (7/29/14) 2595-2632; RP (7/30/14) 2747-2776. The prosecutor did not cite a single unlawful act, either in his request for the instruction or in his argument to the jury.

The prosecutor's argument was inappropriate, and the instruction should not have been given. *Hardy,* 44 Wn. App. at 484. Respondent erroneously asserts that "provocative actions need not be illegal" to justify the instruction. Brief of Respondent, p. 22 (citing *State v. Wingate,* 155 Wn 2d 817, 122 P.3d 908 (2005)).

The *Wingate* court did not claim to remove the unlawfulness requirement from the aggressor doctrine. There, witnesses testified that the defendant drew his gun first and aimed it at others. As in *Riley,* which involved similar conduct, this unlawful act justified the aggressor instruction. *Id.,* at 823 (citing *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999)). On appeal, Respondent again relies on the defendants' lawful conduct as provocation. Brief of Respondent, pp. 19-20. Respondent finds

aggression in the arrival of two cars "together," in testimony that the first car "had its lights off," and in the question "what up Blood?" allegedly asked by one of the cars' occupants. Brief of Respondent, p. 19.[4]

None of these acts were unlawful. Nor were they likely to provoke a belligerent response from a reasonable person. They do not support the instruction or the prosecutor's improper closing argument. *Hardy,* 44 Wn. App. at 484. Respondent also demonstrates a misunderstanding of the aggressor rule by pointing to the shot fired at Jeter. Brief of Respondent, p. 20. The provoking act justifying an aggressor instruction "cannot be the actual assault." *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011); *see also State v. Wasson*, 54 Wn. App. 156, 159-60, 772 P.2d 1039 (1989); *State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986). The shot fired at Jeter does not justify the instruction or the prosecutor's closing. *Wasson*, 54 Wn. App. at 159-60. The same is true of any shots fired at Houston.[5] *Id.*

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[4] Without citation to authority, Respondent also asks the court to find aggression based on the way the Jeep's occupants reacted to Mr. Ralls and his companions. Brief of Respondent, pp. 19-20. This court may assume that Respondent found no authority in support of this argument. *Woods View II, LLC v. Kitsap Cnty.*, 188 Wn. App. 1, 41, 352 P.3d 807 (2015). Mr. Ralls and his codefendants should not be denied the right to claim self-defense based on the actions of others. Lawful conduct is not rendered aggressive based solely on how others react to it.

[5] Respondent implies that the shooting itself justifies the aggressor instruction, citing testimony that the codefendants fired the first shots. Brief of Respondent, p. 20. Because these shots formed the basis for the charges filed, they do not justify the instruction. *Wasson*, 54 Wn. App. at 159-60.

Without citation to authority, Respondent also relies on discussions between the codefendants prior to the encounter. Brief of Respondent, p. 20-22.[6] These discussions and any other actions unknown to the alleged victims cannot be considered "reasonably likely to provoke a belligerent response." WPIC 16.04; CP 111.[7] By the instruction's plain language, only acts known to the alleged victim implicate the aggressor doctrine.

Nor does the "undisputed fact that the defendants sought out Bernard Houston with guns"[8] justify the aggressor instruction. *See Brower*, 43 Wn. App. at 895-97, 902. Carrying weapons to an encounter does not constitute aggression. *Id.*

Finally, for the first time on appeal, Respondent (apparently) relies on Jeter's claim, unsupported by any other testimony, that one of the cars' occupants pointed a gun toward the Jeep before the shooting started. Brief of Respondent, p. 19.[9] But even this testimony does not support the instruction under the facts of this case.

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[6] Respondent can be presumed to have found no authority supporting this argument. *Woods View II,* 188 Wn. App. at 41. Indeed, Respondent apparently concedes that provocation is a question "of action," not motive. Brief of Respondent, p. 22.

[7] For example, the *Brower* court held that a pair of men who armed themselves and went to reclaim a truck and cocaine from another person were not the aggressors in an altercation that developed. *Brower*, 43 Wn. App. at 895-97, 902.

[8] Brief of Respondent, p. 23.

[9] Respondent does not specifically claim that this allegation supports the instruction.

First, Jeter did not claim that one of the defendants drew first. He did not testify that Houston drew his gun only after one of the cars' occupants aimed at the Jeep.[10] RP (7/8/14) 888-902.

Second, the prosecuting attorney did not rely on Jeter's unsupported assertion in requesting the instruction, and did not mention it in arguing to the jury that the defendants were the aggressors. RP (7/29/14) 2559-2576, 2595-2632. The aggressor doctrine did not come into play based on Jeter's account; rather the prosecutor's focus at trial was entirely on information unknown to Houston and Jeter (such as the discussions held prior to the encounter) and on the lawful activity of Mr. Ralls and his companions. RP (7/29/14) 2595-2632. Although the court may affirm based on grounds that were not presented to the trial judge,[11] it would be anomalous to uphold the instruction based on a theory that was not presented to the judge *and* not argued to the jury.

The trial court should not have instructed on the aggressor doctrine. *State v. Stark*, 158 Wn. App. 952, 961, 244 P.3d 433 (2010). Reversal is required unless harmless beyond a reasonable doubt. *Id.* Respondent

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[10] According to Jeter, Houston "got out of the Jeep and dove for cover over a fence before Mr. Jeter even realized that the defendants were there." Brief of Respondent, p. 19. The physical evidence—most notably the location of Houston's body and his gun—contradicted Jeter's version of events. RP (7/1/14) 149-152. Even so, it is possible that Houston took aim from behind the fence before anyone in the car drew a weapon.

[11] *See* RAP 2.5(a).

does not argue that any error was harmless; thus, Mr. Ralls' conviction must be reversed and the case remanded for a new trial. *Id.*

B. Respondent does not address the instruction's failure to adequately convey the objective standard of the aggressor doctrine.

The court's aggressor instruction did not require jurors to evaluate the reasonableness of any belligerent response. CP 111. Instead, the instruction only required jurors to examine whether or not an act is "reasonably likely" to elicit a belligerent response. *See* Brief of Appellant Ralls, pp. 32-34. This required jurors to ignore Mr. Ralls's self-defense claim even if jurors concluded that his companions' actions were "reasonably likely" to provoke an *unreasonably* belligerent response. CP 111.

Respondent fails to address this, which can be treated as a concession. Brief of Respondent, pp. 14-25. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, Mr. Ralls rests on the argument set forth in his opening brief. *See* Brief of Appellant Ralls, pp. 32-34.

III. THE COURT'S ACCOMPLICE INSTRUCTION DID NOT MAKE MANIFESTLY CLEAR THE STATE'S OBLIGATION TO PROVE BOTH KNOWLEDGE AND INTENT.

Accomplice liability requires proof of both knowledge *and* intent. Brief of Appellant Ralls, pp. 35-41 (citing *State v. Truong*, 168 Wn. App. 529, 539, 277 P.3d 74 (2012); *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)). The "knowledge" element is explicit in

the statute;[12] the "intent" element is implicit and is required to avoid constitutional difficulty. *See* Brief of Appellant Ralls at p. 37 (citing *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011) and *State v. Coleman*, 155 Wn. App. 951, 960-961, 231 P.3d 212 (2010)).

Jury instructions must make this standard manifestly clear. *Kyllo*, 166 Wn.2d at 864. The court's accomplice instruction here did not meet this requirement. CP 101. Respondent erroneously argues that the state need not prove "intent rather than knowledge" to convict an accomplice. Brief of Respondent, p. 31. This is incorrect for two reasons.

First, where a conviction may be based on words alone (as under Instruction No. 9), the words must actually be "*directed to inciting or producing* imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969) (emphasis added). In other words, the speaker must *intend* to incite or produce criminal activity.

Washington courts have found that the accomplice liability statute comports with this constitutional requirement. According to the *Coleman* and *Ferguson* courts, "'the criminal *mens rea* to aid or agree to aid the commission of a specific crime... avoids protected speech activities... that only consequentially further the crime.'" *Ferguson*, 164 Wn. App. at 376 (quoting *Coleman*, 155 Wn. App. at 960-961).

[12] RCW 9A.08.020(3)(a).

Respondent's argument—that proof of intent is not required—conflicts with *Coleman* and *Ferguson.* This argument would render the accomplice liability statute unconstitutionally overbroad under *Brandenburg*, because it would sweep up protected speech activities "that only consequentially further the crime." *Coleman*, 155 Wn.App. at 960-961.

Second, Mr. Ralls does not suggest that the state's burden is to show intent "*rather than* knowledge." Brief of Respondent, p. 31 (emphasis added). Instead, the prosecution must prove both intent to further the crime *and* knowledge that the actors words or conduct will further the crime. *See* Brief of Appellant Ralls, pp. 36-41.

The court's accomplice instruction—even if it could be interpreted in a manner consistent with *Brandenburg, Coleman,* and *Ferguson*—did not make the intent requirement "manifestly apparent to the average juror." *Kyllo*, 166 Wn.2d at 864 (internal quotation marks and citation omitted). The court phrased its instruction in the statutory language. But "'[t]the standard for clarity in a jury instruction is higher than for a statute.'" *State v. Bland*, 128 Wn. App. 511, 515, 116 P.3d 428 (2005) (quoting *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996) *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009)). This is so because jurors cannot rely on the rules of interpretation

familiar to lawyers and judges. *State v. Harris*, 122 Wn. App. 547, 553-554, 90 P.3d 1133 (2004).

In the context of an instruction, the phrase "aids or agrees to aid" does not make the intent requirement "manifestly apparent." *Kyllo*, 166 Wn.2d at 864.[13] The language fails to explicitly identify "intent" as necessary to conviction as an accomplice. Jurors might have felt compelled to convict if Mr. Ralls *knew* that his words or actions would embolden the shooter, even if his actual *intent* was to prevent violence. CP 101.

Mr. Ralls does not argue that conviction required proof of intent to kill. Respondent's hypothetical arguments suggesting otherwise do not assist. Brief of Respondent, pp. 31-32. Instead, the prosecution was required to prove that Mr. Ralls *knew* his words or conduct would promote acts of extreme indifference to human life, and that he *intended* his words or conduct to promote such acts of extreme indifference. The instruction relieved the prosecution of its burden to prove his intent. CP 101.

Because the instruction relieved the state of its burden, it requires reversal unless harmless beyond a reasonable doubt. *Brown*, 147 Wn.2d at 341. Respondent makes no effort to argue harmlessness. Brief of Re-

[13] In civil cases (and criminal cases predating the "manifestly apparent" standard), instructions in the language of a statute are "appropriate only if the statute is applicable, reasonably clear, and not misleading." *Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002).

spondent, pp. 30-33. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

IV. WHEN CONSIDERED FROM THE PERSPECTIVE OF A REASONABLE JUROR AND IN THE CONTEXT OF THE JURY'S QUESTION, THE COURT'S RESPONSE MISSTATED THE LAW AND INCLUDED A COMMENT ON THE EVIDENCE.

When a deliberating jury "makes explicit its difficulties," the court should "clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946). A conviction for murder "ought not to rest on an equivocal direction to the jury on a basic issue." *Id.,* at 613. Furthermore, "the judge's last word is apt to be the decisive word." *Id*, at 612.

It is reversible error to answer a jury question with a response that is misleading, unresponsive, or legally incorrect. *United States v. Anekwu*, 695 F.3d 967, 986 (9th Cir. 2012). Here, because of an ambiguity in the jury's question about accomplice liability, the court's answer was potentially misleading, unresponsive, and legally incorrect. *See* Brief of Appellant Ralls, pp. 41-50.

To determine whether an instruction is misleading, courts look at "the way a reasonable juror *could have* interpreted the instruction." *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (emphasis added) (citing *Sandstrom v.*

Montana, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)). Here, "a reasonable juror could have interpreted the instruction" in a way that was misleading, unresponsive, and legally incorrect. *Id.*

The jury asked a yes/no question: "If we determine a defendant is an accomplice, are they liable for the same crime?" CP 837.[14] The question shows that jurors intended the word "accomplice" to mean a "participant," generally, rather than a person legally responsible for the principal's crime.[15] Had they intended the word "accomplice" to have its legal meaning—that is, one whose complicity in the principal's crime had been established beyond a reasonable doubt—they would not have asked the question. CP 837.[16] Neither the judge nor the state showed any understanding of the ambiguities in the jury's question(s). Instead, both took it to be a self-answering tautology such as "Is an accomplice guilty as an accomplice?" Taking the question this way, both judge and prosecutor believed the answer to be "yes." RP (8/1/14) 2794, 2809, 2800, 2801, 2806, 2809.

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[14] The jury also expressed "confusion distinguishing between instructions #3 and #9."

[15] Furthermore, the question did not clarify whether jurors meant "liable for the same crime" as the codefendant, or as the shooter. CP 837.

[16] There do not appear to be any cases from any jurisdiction regarding the standard for interpreting jury questions. Due process likely requires courts to evaluate jury questions with care, attributing to a question all meanings that a reasonable juror could have intended. In other words, a jury question should be interpreted "the way a reasonable juror *could have*" intended it – the same standard used for evaluating an instruction." *Miller*, 131 Wn.2d at 90. In this case, applying this standard should have made the court realize that the question could be read as more than a simple tautology, equivalent to the question "Is an accomplice guilty as an accomplice?"

Defense counsel twice pointed out the ambiguity, warning the judge against "randomly guessing as to what they may be thinking," and asking "What if we're wrong?" RP (8/1/14) 2805. But the court did not heed counsel's warning, and answered (in part) "that a person *is* legally accountable for the conduct of another..." CP 838 (emphasis added).[17]

A reasonable juror "*could have* interpreted the [answer]" to mean "yes." *Miller*, 131 Wn.2d at 90 (emphasis added). Some jurors thus may have believed that Mr. Ralls, as a participant, was "liable for the same crime" as his codefendant and/or the shooter, regardless of whether or not he knew the general crime intended by the principal.[18] CP 837.

Respondent does not analyze the court's answer in the context of the jury's question. Brief of Respondent, p. 42. In a vacuum, the court's general statements regarding the law may have been legally correct. However, the answer to a jury question should not be considered in a vacuum; instead, it must be scrutinized in relation to the question.[19]

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[17] Contrary to Respondent's assertion, the judge did not simply "answer the question by reference to the original instructions." Brief of Respondent, p. 42. Defense counsel asked the judge to refer jurors to the instructions; the court declined to do so. RP (8/1/14) 2794-2795, 2805, 2808; CP 838.

[18] And regardless of whether or not he "desire[d] to bring about" the crime intended by the principal. *J-R Distributors, Inc.*, 82 Wn.2d at 593.

[19] And, as noted elsewhere, both question and answer should be evaluated to determine how "a reasonable juror could have" understood them. *Miller*, 131 Wn.2d at 90.

When considered in relation to the question, the court's answer could be understood (by a reasonable juror) as permission to convict any participant of murder, even if he were ignorant of "the" crime intended by the principal. *Cf. State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000), *as amended on denial of reconsideration* (Mar. 2, 2001); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). The court's answer to the jury's ambiguous question thus allowed jurors to convict Mr. Ralls as an accomplice even if they did not believe that he acted with general knowledge of the shooter's plan.[20] CP 837-838. This violated his Fourteenth Amendment right to due process, because it allowed conviction without proof of each element of the charged crime. *Roberts*, 142 Wn.2d at 513; *Cronin*, 142 Wn.2d at 579.

The court's response to the jury's ambiguous question did not make the relevant standard "manifestly apparent" to the average juror. *Kyllo,* 166 Wn.2d at 864. Instead, a reasonable juror "*could have* interpreted [it]"[21] to misstate the law, permitting conviction even absent proof beyond a reasonable doubt of the elements required for accomplice liabil-

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[20] And even if he did not have "'the criminal *mens rea* to aid or agree to aid the commission of a specific crime." *Ferguson*, 164 Wn. App. at 376 (quoting *Coleman*, 155 Wn. App. at 960-961).

[21] *Miller*, 131 Wn.2d at 90 (emphasis added).

ity. This prejudiced Mr. Ralls, injecting into deliberations the problems identified by the Supreme Court in *Roberts* and *Cronin*.

The answer also was a comment on the evidence, implying that if Mr. Ralls qualified as an accomplice, he was guilty of murder by extreme indifference rather than some lesser crime. The judge should have directed jurors to read the instructions, as suggested by defense counsel.[22] RP (8/1/14) 2794. Such a directive would have led jurors to realize that Mr. Ralls's knowledge[23] was critical to his liability for "the same crime" as the shooter (or, for that matter, "the same crime" as codefendant Miles).

The court's answer allowed jurors to infer that the judge believed Mr. Ralls *would* be guilty of murder if the jury found he was an accomplice to any crime.[24] This violated art. IV, § 16, and is presumed prejudicial. *Jackman*, 156 Wn.2d at 744.

The record "does not affirmatively show that no prejudice could have resulted." *Id.* Mr. Ralls's conviction must be reversed, and the case remanded for a new trial.

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[22] Contrary to Respondent's assertion, Mr. Ralls does *not* "now argue that the trial court should have gone beyond the jury's question and given additional instructions on the mental element of accomplice liability." Brief of Respondent, p. 43. Instead, the court should have referred the jury to the original instructions.

[23] And, as argued elsewhere in this brief, his intent or "'criminal *mens rea* to aid or agree to aid." *Ferguson*, 164 Wn. App. at 376 (quoting *Coleman*, 155 Wn. App. at 960-961).

[24] That this was the judge's belief in fact is evidenced from his assertion that the correct answer to the question was "yes." RP (8/1/14) 2794, 2809, 2800, 2801, 2806, 2809.

V. THE TRIAL JUDGE SHOULD NOT HAVE SEATED AN ALTERNATE JUROR AFTER UNCONDITIONALLY DISCHARGING HER, WITHOUT TAKING ANY STEPS TO ENSURE HER CONTINUING IMPARTIALITY.

At the start of deliberations, the trial judge unconditionally discharged the alternate jurors. RP (7/30/14) 2776. He later seated an alternate, over defense objection, without questioning her to ensure her continuing impartiality. RP (7/31/14) 2787-2788. This infringed Mr. Ralls's Sixth and Fourteenth Amendment rights to due process and to a jury trial. It also violated his state constitutional right to a fair trial by an impartial jury[25] and CrR 6.5, which "relate[s] directly" to that right. *State v. Ashcraft*, 71 Wn. App. 444, 462-63, 859 P.2d 60 (1993).

After being discharged, the alternate jurors were not eligible to deliberate. CrR 6.5. Furthermore, even if the alternates had been temporarily excused (rather than discharged), the judge failed to take the required steps to protect them from "influence, interference or publicity." CrR 6.5. Finally, the judge did not "conduct brief *voir dire*" to determine the alternate juror's continuing impartiality, as authorized by CrR 6.5.[26] Indeed, he did

[25] *See* Wash. Const. art. I, §§3, 21, and 22.

[26] Where the judge has taken "appropriate steps" to protect jurors from outside influence, the failure to conduct *voir dire* is not error. *State v. Dye*, 170 Wn. App. 340, 349, 283 P.3d 1130 (2012) affirmed on other grounds, 178 Wn.2d 541, 309 P.3d 1192 (2013); *State v. Chirinos*, 161 Wn. App. 844, 848, 255 P.3d 809 (2011). But see *State v. Stanley*, 120 Wn. App. 312, 318, 85 P.3d 395 (2004) (noting error, but declining to consider whether such failure requires reversal).

not even consult with counsel before summoning the alternate and announcing his decision. RP (7/31/14) 2783-2785.

Respondent fails to address Mr. Ralls's argument on appeal. Brief of Respondent, pp. 39-40. Instead, the state continues to argue against trial counsel's request to delay deliberations. Brief of Respondent, pp. 39-40.

On appeal, Mr. Ralls does not claim that the judge's only option was to delay deliberations. *See* Brief of Appellant Ralls, pp. 50-53. Instead, the problem arose when the judge decided to seat an alternate who had been unconditionally discharged without ensuring her continuing impartiality. Respondent's failure to address the actual argument on appeal may be treated as a concession. *See Pullman*, 167 Wn.2d 212 n.4.

Also irrelevant is Respondent's quotation of the judge's instruction to begin deliberations anew. Brief of Respondent, p. 40. This was a proper instruction; however, it did not solve the problem of the alternate juror's impartiality. Having excused the alternate unconditionally, the trial judge should have ensured that she had not been exposed to publicity, discussed the case with others, stated her opinion as to the defendants' guilt, or otherwise compromised her independence and impartiality. At the very least, the judge should have conducted the "brief *voir dire*" contemplated by CrR 6.5 before seating the alternate.

The trial judge did not conduct the "formal proceeding" contemplated by CrR 6.5. *Ashcraft*, 71 Wn. App. at 462. The manner in which the alternate juror was excused and then seated violated Mr. Ralls's constitutional right to a fair trial by an impartial jury. *Id.;* U.S. Const. Amends. VI, XIV; art. I, §§ 3, 21, 22. The conviction must be reversed and the case remanded for a new trial. *Id.*

VI. THE TRIAL COURT FAILED TO MAKE AN ADEQUATE INQUIRY INTO MR. RALLS'S ABILITY TO PAY DISCRETIONARY LFOS FOLLOWING CONVICTION AND IMPOSITION OF A 28-YEAR SENTENCE.

A sentencing court must make a particularized inquiry into an offender's ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 841, 344 P.3d 680 (2015). The obligation to conduct the required inquiry rests with the court. *Id.*

Because of this, the sentencing court "must do more than sign a judgment and sentence with boilerplate language." *Id.* Instead, the record must reflect the court's individualized inquiry. *Id.* The burden is on the prosecution to show an ability to pay. *State v. Duncan*, 180 Wn. App. 245, 250, 327 P.3d 699 (2014) *review granted,* (Wash. Aug. 5, 2015).

Furthermore, a defendant's silence or a pre-imposition statement regarding employment should not be taken as proof of ability to pay. *Cf. Duncan,* 180 Wn. App. at 250 (noting most offenders' motivation "to portray themselves in a more positive light.") It is only after the court imposes

a term of incarceration that an offender can make a meaningful presentation on likely future ability to pay, since the offense of conviction and the length of incarceration will affect that ability.

Following *Blazina,* the Supreme Court will remand any case in which the record does not reflect an adequate inquiry. *See, e.g., State v. Leonard,* ---Wn.2d---, ---P.3d ---, No. 90897-4 (Oct. 8, 2015); *see also State v. Rivas*, 355 P.3d 1117 (Wash. 2015).[27]

For all these reasons, the court should vacate the trial court's imposition of discretionary LFOs. The case must be remanded for the trial court to make the individualized inquiry required under *Blazina.*

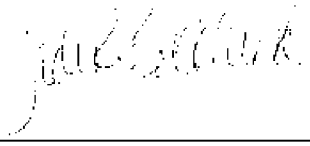
CONCLUSION

For the foregoing reasons, Mr. Ralls's conviction must be reversed and the case remanded for a new trial. In the alternative, the order imposing discretionary legal financial obligations must be vacated.

[27] Similar orders were also entered on August 5th in *State v. Cole*, No. 89977-1; *State v. Joyner*, No. 90305-1; *State v. Mickle*, No. 90650-5; *State v. Norris*, No. 90720-0; *State v. Chenault*, No. 91359-5; *State v. Thomas*, No. 91397-8; *State v. Bolton*, No. 90550-9; *State v. Stoll*, No. 90592-4; *State v. Bradley*, No. 90745-5; *State v. Calvin*, No. 89518-0; and *State v. Turner*, No. 90758-7.

Respectfully submitted on November 12, 2015,

BACKLUND AND MISTRY



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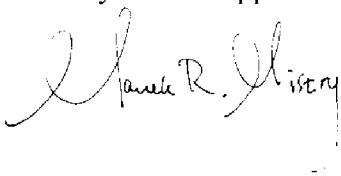

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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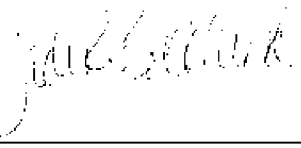
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 12, 2015.



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