S. Ct. Case No. 95057-7

COA #34956-0-III

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

-vs-

BEN ALAN BURKEY,

Petitioner.

PETITIONER FOR DISCRETIONARY REVIEW

RAP 13.1(a)

Ben Alan Burkey

Pro Se Petitioner

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FEDERAL CASES

STATE CASES

I. IDENTITY OF PETITIONER

The Petitioner is hereby identified as Ben Alan Burkey.

II. CITATION OF COURT OF APPEALS (COA) DECISION

Petitioner seeks review of the Court of Appeals decision in dismissing his Personal Restraint Petition (PRP) filed on February 1, 2018, in the third division of the COA. Under directive of the COA, a motion for reconsideration was not filed. (COA letter stated Mr. Burkey did not need to file a motion to reconsider to seek review in the Supreme Court).

III. ISSUES PRESENTED FOR REVIEW

(1) Whether an evidence hearing is warranted for an effective appeal process?

(2) Whether the COAs' decision (Claim A) pertaining to Mr. Burkey's state and federal right to effective assistance of counsel and to be free of a conflict of interest conflicts with state and federal Supreme Court precedent?

(3) Whether the COAs' decision (Claim B) pertaining to Mr. Burkey's state and federal right to a fair trial with due process without the introduction of evidence that was known to be false or unreliable conflicts with state and federal Supreme Court precedent?

(4) Whether the COAs' decision (Claim C) pertaining to instruction No. 12 conflicts with state and federal Supreme Court precedent?

(5) Whether the COAs' decision (Claim D) pertaining to the Prosecutor's closing argument conflicts with state and federal Supreme Court precedent?

(6) Whether the issues raised during direct, Statement of Additional Grounds, violated Mr. Burkey's federal rights, which requires reversal?

(7) Whether the COAs' decision should be reversed and thus this cause should be reversed and remanded for a new trial?

IV. STATEMENT OF THE CASE

Petitioner hereby incorporates the Statement of the Case from his direct appeal, Court of Appeals, Div. III, Cause No. 34093-III, Appellant's Opening Brief, pgs. 4-16, and Appellant's Statement of Additional Grounds (SAG), pgs. 1-2, as though they were fully stated herein. The following is supplementally added:

Mr. Burkey met Rick Tiwater when Mr. Burkey's sister introduced Mr. Tiwater to him and ask him if he could help Mr. Tiwater. See PRP, Ex. A, pg. 40 at 11-16, pg. 48 at ¶2.

It was alleged that Mr. Tiwater had agreed to testify against a man named Terrence Kinard. See Ex. A, pg. 48 at ¶¶3-5. (AKA "T-baby" and misspelled in transcripts as "Terrence Conard"). Mr. Burkey knew Mr. Kinard and talked to him to resolve any type of issues between Mr. Kinard and Mr. Tiwater. See PRP, Ex. A, pg. 40 at 11-22, pgs. 48-49 at ¶¶6-9. Mr. Tiwater had alleged that he had no intentions of testify against Mr. Kinard and all he wanted to do was leave town. Id. Mr. Burkey agreed to help Mr. Tiwater. Id.

After Mr. Burkey's first trial, Bevan Maxey was retained for Mr. Burkey's appellate counsel and Mr. Burkey's second trial counsel. See PRP, Ex. A, pg. 1 and pg. 49 at ¶¶13-15. Mr. Makey started representing Mr. Burkey approximately 10 years prior and was paid to represent Mr. Burkey at his second trial in the first week of June in 2015. Id. Terrence Kinard was mentioned well over thirty times in Mr. Burkey's second trial. Ex. A, pgs. 50-51 at ¶¶26-27.

Prior to Mr. Burkey's second trial, Mr. Maxey was substituted as counsel on behalf of Mr. Kinard on or about July 27, 2015. Ex. A, pgs. 2-3. Mr. Burkey's friend and financial supporter, Maurice Wallace, had a conversation with Mr. Maxey which he informed Mr. Maxey that Mr. Kinard was mentioned many times at the first trial and would be a valuable witness. See PRP, Ex. A, pg. 1. Mr. Wallace declared

that Mr. Maxey claimed Mr. Kinard had problems of his own and he did not want to involve Mr. Kinard in Mr. Burkey's case. Id. Mr. Burkey further pleaded with Mr. Maxey to contact Mr. Kinard and subpoena him as a material key witness as they had discussed for years for his defense. Ex. A, pg. 50 at ¶¶19-24 (PRP).

After Mr. Burkey's first trial, the State pressed charges of perjury upon the State's key witness, Patty Lascelles, pursuant to inconsistent statements between Mr. Burkey's first trial and James Tesch's trial. See PRP, Ex. A, pgs. 4-37.

During the second trial, over defense counsel's strong objections, Detective Tim Hines read heavily redacted trial transcripts from Mr. Burkey's first trial of allegedly unavailable witnesses and further read transcripts of Mr. Burkey's testimony from the first trial. RP 491- (What 303 the detective actually read has yet to be transcribed). Prior to reading Mr. Burkey's testimony from the first trial, the Court informed the jury and the public:

> At this time you will be given testimony from a previous proceeding. The witnesses' testimony was taken under oath outside of this courtrom and is recorded WORD FOR WORD. This testimony was taken in the presence of the lawyers for both parties. The testimony from the previous proceeding will be read aloud to you. Insofar as possible you MUST consider this form of testimony in the same way as you would consider testimony of witnesses who are present in the courtroom. You must decide how believable the testimony is and what value to give it. A copy of the testimony from a previous proceeding WILL NOT be addmitted into evidence and WILL NOT go to the jury room with you. RP 491-492.

Detective Hines had to stop and start several times while reading the testimony from the previous trial because pages were missing and everybody's copies of the transcript were different. RP 492-498. The trial court further informed the jury that the "lawyers' statements [were] not evidence, however, "the lawyers' remarks, statements, and arguments [were] INTENDED TO HELP [the jury] UNDERSTAND THE EVIDENCE AND APPLY THE LAW. RP 558 at 13-15; (emphasis and alterations added). The trial court further instructed the jury as follow:

> **Instruction 12.** A person is guilty of **"a"** crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such person in the commission of **"the"** crime.
>
> A person is an accomplice in the commission of **"a"** crime if, with knowledge that it will promote or facilitate the commission of the specific crime charged, he or she either, one, solicits, commands, encourages, or requests another person to commit the crime; or, two, aids or agrees to aid another person in planning or committing **"the"** crime.
>
> The word aid means all assistance whether given by words, acts, encouragement, support, OR PRESENCE.
>
> A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of **"the"** crime. However, more than mere presence and knowledge of the criminal activity of another must be sown to establish that the person present is an accomplice. A person who is an accomplice in the commission of **"a"** crime is guilty of that crime whether present at the scene or not. RP 563-564 at 8-5.

V. ARGUMENT

1. Evidentiary Hearing

The COA relied on a large amount of facts that were not supported by the record which warrants an evidentiary hearing. Furthermore, the majority of the testimony which was read by Sgt. Hines, has not yet been transcribed to allow appellate counsel, the Petitioner, and this Court know what the jury actually heard. The COA claimed that "the existing transcript of the prior testimony contain[ed] no gaps or ommissions." The record shows something quite different. Sgt. Hines got caught several times changing names or other portions of the transcripts as he saw fit. See RP 502-504 (Sgt. Hines admitting to making many mistakes after getting caught); RP 437 (Mr. Maxey not having a copy of the right redacted transcripts DURING TRIAL!); RP 438 at 22-25 (misstating Ms. Lascelles testimony). Mr. Maxey further attempted to preserve the redacted copy of the transcripts that was read by Sgt. Hines for the appellate process. See RP 440 at 1-21; RP 441 at 7-18.

The COA claims that the assault against Mr. Tiwater started when Mr. Burkey initially hit Mr. Tiwater and then summoned Mr. Tesch to continue the assault until Mr. Tiwater had deceased. The record does not support this assertion. Ms. Lascelles testified that Mr. Tesch came over and assaulted

Mr. Tiwater after 11:30 PM. See PRP, Ex. B, pgs. 5 & 16 (Ms. Lascelles' testimony from first trial ("1RP") 545-546). When Mr. Burkey "initially hit Mr. Tiwater," it was many hours earlier in the day when Mr. Burkey slapped Mr. Tiwater because he was smoking crack in front of his child and since Mr. Burkey was not charged with this incident, it should never have been put in front of the jury. See 1RP 798-800 (Mr. Burkey testifying incident happened in late afternoon); 1RP 493 at 10-16 (Mr. Fowler testifying incident happened around 8:00 PM).

The COA claimed that Mr. Burkey summoned Mr. Tesch to the house to "continue" the assault. This assertion is not supported by the record. Although there is evidence that Mr. Burkey sent Ms. Lascelles over twice to Mr. Tesch after 11:00 PM, this was because Mr. Tiwater would not leave even **AFTER** Ms. Lascelles and Mr. Burkey **ask him to twice to leave** as they wanted to go to bed. Mr. Tiwater insisted on seeing Mr. Tesch prior to leaving and hence, Mr. Burkey sent over Ms. Lascelles to relay the message. See 1RP 602-603 (testimony of Ms. Lascelles - PRP, Ex. B, pgs. 15-17). Furthermore, the record shows that Mr. Burkey jumped off the couch he was sleeping on and told Mr. Tesch to stop when he started violently beating Mr. Tiwater. Id., pg. 17 at 9-20. This does not constitute the actions of someone who is involved in "continuing an assault."

The COA claims that Mr. Burkey and Mr. Tesch drove Mr. Tiwater to a remote wooded area where "they" continued "their" fatal attack. This assertion is not supported by the record. The record shows that Mr. Burkey was under the impression that him and Mr. Tesch were taking Mr. Tiwater home. See PRP, Ex. B, pgs. 11-12 (testimony from Ms. Lascelles stating Mr. Tesch ordered Mr. Burkey to get into Mr. Burkey's car with Mr. Tiwater; Mr. Burkey told Ms. Lascelles he was taking Mr. Tiwater to Mike Nevins house where he live between 2:30-4:30 AM).

The COA further relied on a hearsay statement that was made by Troy Fowler claiming Mr. Burkey told him that Mr. Tiwater had fallen into a camp fire and would not be seen again. This statement should not be relied upon as it is clearly inadmissible hearsay coming from an unreliable source. (Every person that testified had extensive criminal records).

The COA claimed that Ms. Lascelles attempted to hide or destroy bloody clothes and a golf club at the direction of **BOTH** Mr. Tesch **AND** Mr. Burkey. This assertion is not supported by the record. According to the record, Mr. Tesch told Ms. Lascelles to get rid of the evidence or he was going to kill both her and her six year old son. See PRP, Ex. B, pg. 13 (1RP 570 at 3-10); 1RP 577 at 2-6 (Mr. Tesch tells Ms. Lascelles to wash the Thunderbird); 1RP 617 at 3-5 (Mr. Tesch tells Ms. Lascelles to burn the chaps).

The COA as the State relied heavily on Ms. Lascelles testimony even though the State attempted to charge Ms. Lascelles for perjury after testifying at Mr. Burkey's first trial. The State was also well aware that between 2003 through 2012, Ms. Lascelles had an extensive criminal background for crimes of dishonesty. (10/22/03 - Possessionz of stolen property, Cause No. 2 P00040043); (11/03/03 - Rendering Criminal Sentence 1, Cause No. CR 0055930); (09/06/08- Identity Theft, Cause No. B 00073571); (11/19/08 - Identity Theft 1, Cause No. A 00003873); (06/06/09 - Organized Retail Theft 1, Cause No. 09-1-02323-0); (01/21/12 - Organized Retail Theft, Cause No. 091023230). This information was never presented to defense counsel nor the jury.

Therefore, Mr. Burkey ask that this Court grant an evidentiary hearing to produce a transcript of what Sgt. Sgt. Hines actually read to the jury AND to clear up the many facts that lead to the COA ultimate decision to deny Mr. Burkey's petition.

2. Conflict of Interest/Ineffective Assistance

The COA has addressed the proper legal analysis but has ultimately failed to see the evidence presented.

(a) Confliting Interests. The record clearly shows that Mr. Maxey represented first Mr. Burkey, and then Mr. Kinard. See PRP, Ex. A, pgs. 1-3 (Notice of Appearance for Kinard), pgs. 49-52 at ¶¶13-29 (Decl. of Mr. Burkey).

First the COA claimed that Mr. Burkey failed to present ANY evidence that his interest were adverse to Mr. Kinards, and then claimed that Mr. Kinard's testimony regarding Mr. Burkey'sw lack of ill will toward Mr. Tiwater would be of questionable relevance. See COA Opinion pg. 16 n.3. The COA also claimed that Mr. Kinard's testimony would of been readily impeachable based on his criminal record. This makes no sense, as stated above, Lascelles, Panessa, and Fowler all had extensive criminal records which the State failed to disclose their criminal records and therefore Mr. Maxey was not able to present. See RP 26 at 22-24. Since it was the State's theory that Mr. Tesch and Mr. Burkey killed Mr. Tiwater for being a snitch against Mr. Kinard, any testimony from Mr. Kinard would of been highly probative. Since the record shows that Mr. Maxey would not let Mr. Kinard testify because it would not be good for Mr. Kinard's criminal cause, clearly shows that Mr. Maxey was trying conflicting causes. See PRP, Ex. A pg. 1, 50 at ¶¶19-24. The COA claims that Mr. Maxey presented stronger evidence through attorney Patrick Stiley. Yet being true, two people testifying to the same events is stronger evidence than one. The COA claims that Mr. Kinard's charges had nothing to do with Mr. Burkey's charges. This is irrelevant. What is relevant is that Mr. Maxey chose to not have Mr. Kinard testify in favor of Mr. Kinard's best interest.

(b) adverse performance. The COA asserts that the conflict of interest was merely "possible or theoretical" conflict which cannot impugn a criminal conviction. (quoting Gomez, 180 Wn.2d 337, 349, 325 P.3d 142 (2014)(citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). But the conflict here is not theoretical. Mr. Kinard's name was mentioned over thirty times during this trial and his testimony would of made him the defense's key witness. There was no sound trial tactics in failing to interview and use Mr. Kinard as a witness which shows that there was an actual conflict of interest.

The COA claims that Mr. Maxey's choice to not allow Mr. Burkey take the stand, knowing that Sgt. Hines was going to read his previous trial testimony, was "reasonably strategic." This argument is not based on sound logic. Anybody seeing an arm of the State reading Mr. Burkey's trial testimony while he is sitting right there is first prejudiced by the fact that an arm of the State is reading it, and second is prejudiced because the jury could ONLY conclude that Mr. Burkey was not testifying because he had something to hide. The COA simply relied on the boilerplate ideology that "[j]urors are presumed to follow court instructions" as they were instructed to consider the evidence as it came from Mr. Burkey. The conviction, based on the evidence provided,

and the Prosecutor's intentional prejudicial closing argument shows that the jury did not follow the court's instruction. Mr. Burkey's federal and state right to effective assistance of counsel and right to have counsel free of conflict was violated and therefore his conviction should be vacated and remanded for a new trial.

3. Use of Unreliable/Perjured Testimony

A claim of prosecutorial misconduct by the introduction of evidence that is known to be false is reviewed de novo. Fusato v. Wash. Interscholastic Ass'n., 93 Wn. App. 762, 767, 970 P.2d 774, 1999 Wash. App. LEXIS 147. The COA relied soley on the trial court's determination that there was no perjured testimony. See Opinion, pg. 18 and 14. Here, the record clearly shows that the evidence used at trial was perjured or false testimony which should be reviewed de novo. See PRP, Ex. A, pgs. 4-37. In Mr. Burkey's Statement of Additional Grounds, Mr. Burkey relied on Ohio v. Roberts, 448 U.S. 56, 65-66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), Mr. Burkey argued that presenting the evidence before determining the reliaility of Ms. Lascelles prior to determining if the testimony was reliable was erroneous. The COA claimed that Crawford v. Washington, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), superceded Ohio v. Roberts. However, in State v. Wilcoxon, 185 Wn.2d 324, 340 n. 8, 373

P.3d 224, 2016 Wash. LEXIS 463, this Court held that "**Roberts, Crawford, AND Davis deal with the proper means of accessing reliability in deterining what evidence may be admitted directly against the defendant without violating confrontation clause.**"). Even if this claim is not a confrontation violation, it is a due process violation as the State was well aware that the testimony regarding the perjured statements was false undermining Ms. Lascelles entire testimony. Ms. Lascelles further had an extensive criminal background of crimes of dishonesty. See page 9 herein. As the COA put it, the State relied heavily on Ms. Lascelles' testimony to make Mr. Burkey's conviction stand. See Opinion, pgs. 3-4. This evidence should be reviewed de novo to ensure that Mr. Burkey's state and federal right to due process by receiving a trial free from evidence that was known to be false was not violated.

4. Jury Instructions

The highly respected Honorable Richard B. Sanders and Honorable Tom Chambers held that this accomplice liability instruction (WPIC 10.51) should never be given in connection with two or more charged crimes. State v. Borrero, 197 Wn.2d 353, 370, 58 P.3d 245, 2002 Wash. LEXIS 594. The COA held that this instruction is in compliance with this Court's decision in State v. Cronin, 142 Wn.2d 568, 578-80, 14 P.3d

752 (2000), and State v. Roberts, 142 Wn.2d 471, 509-513, 14 P.3d 713 (2000). Yet in Roberts, 142 Wn.2d at 568, this Court held that "[t]he fact that a purported accomplice knows that the principal intends to commit 'a crime' does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal." This Court held in Roberts, 142 Wn.2d at 509-513, that general knowledge of "the crime" is sufficient for conviction under the accomplice liability statute; however, knowledge by the accomplice that the principle intends to commit "a crime" does not impose strict liability for any and all offenses that follow. As such, this case has multiple offenses that the State has charged Mr. Burkey with under the accomplice liability theory. This instruction is not adequate under multiple convictions as held by Honorable Richard Sanders and Honorable Tom Chambers. This instruction violates the state and federal constitution because the instruction does not prtray that "[o]ne does not aid and abet unless, in some way, [Mr. Burkey] associated himself with the undertaking [of each crime], participated [in each crime] in it as in something he desired to bring about, and seeked by his action [of each crime] to make it succeed." State v. Amezola, 49 Wn. App. 78, 89, 741 P.2d 1024, 1987 Wash. APp. LEXIS 4116 (quoting Wilson, 91 Wn.2d at 491 (quoting State v. J-R Distrib.

Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949 (1974)). Furthermore, the Ninth Circuit has held that this instruction does not adequately portray that an accomplice can be held liable for the crime committed by the principal only if he knew that the principal would commit the "particular crime." See Sarausad v. Porter, 479 F.3d 671 (9th Cir. 2007). Mr. Burkey's state and federal right to proper jury instructions was violated and this Court should vacate Mr. Burkey's conviction and remand for a proper trial.

5. Egregious Prejudicial Closing Argument

The COA addressed an enormous amount of prosecutorial misconduct with addressing one out of twenty-nine well supported claims with the boilerplate rational that a prosecutor has "wide latitude in closing argument to draw reasonable inferences from the evidence and express such inferences to the jury. (citing State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). But this Court has repeatedly held that "[a] prosecutor may not refer to evidence not presented at trial." See State v. Magers, 164 Wn.2d 174 ¶42, 189 P.3d 126, 2008 Wash. LEXIS 753; State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). Yet, the Prosecutor introduced an egregious amount of evidence that was not supported by the record. See PRP, pgs. 20-37.

In State v. Pierce, 169 Wn. App. 533, 556 ¶60, 280

P.3d 1158, 2012 Wash. App. LEXIS 1652, the COA found it improper to deliver first person, attributing a litany of fabricated statements to the alleged murder victim during closing argument because "[t]he first person singular rhetorical devise had the dual effect of placing the prosecutor in the victim's shoes and turning the prosecutor into the [victim's personal representative." (citing Hawthorne v. U.S., 486 A.2d 164 (D.C. 1984)). In Pierce, the COA further stated that it was even more prejudicial for the prosecutor to put himself in the defendant's shoes by presenting a first person narrative of what the defendant "must have been thinking." Id. There is several instances of the Prosecutor disregarding Pierce. See PRP, pgs. 21-22 at ¶¶3-4, pg. 29 at ¶17, and pg. 31 at ¶22.

This Court has also held that "[i]t is well established that a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case." State v. Glasmann, 175 Wash.2d 696, 286 P.3d 673, §[8] (2012); See also Gray v. Netherland, 510 U.S. 152, 116 S. Ct. 2074 (1996); Darden v. Wainwright, 477 U.S. 168 (1986)(Petitioner's conviction was obtained as a result of prosecutorial misconduct); Berger v. U.S., 295 U.S. 78 (1935) (Prosecutor's misstatement of material fact were used to

obtain Petitioner's conviction). Here, the prosecutor's misrepresentation of the facts and theatrics were legion and it is quite apparent, considering the actual real facts, that the evidence was quite favorable in Mr. Burkey's favor which shows that the State's closing argument was prejudicial. (Prejudicial enough that no curative instruction could have cured the cumulative errors as a whole). The State also expressed his personal opinion on the defendant's guilt. See PRP, pg. 35, at ¶28 (Making opinions such as "Undisputed," "That's Iffy," and "Absolute" on the evidence presented).

As Mr. Burkey received a life sentence, this Court should at least look at the evidence presented to it as the COA obviously failed to do so as there is no way that a prosecutor's "wide latitude" entails allowing the State free reign to cross the lines during closing that this Court has established. Mr. Burkey's State and federal right to a fair trial with due process of law was violated by the State's improper closing argument and therefore Mr. Burkey's conviction should be overturned and remanded for a new trial using credible evidence.

6. Statement of Additional Grounds

At the time of drafting this petition, Mr. Burkey has not yet received appellate attorney's Petition For Review, although she has indicated that she was planning to file one.

As such, Mr. Burkey would ask that this Court address and review the consolidated Direct appeal (if not addressed by appellate counsel) and his Statement of Additional Grounds on both state and federal questions of law to fully exhaust his state law remedies. Furthermore, Mr. Burkey would add to his argument pursuant to the SAG the following:

A: Ineffective Assistance of Counsel

The COA alleges that there is no set period of time for trial that is indicative of deficient performance. Yet, on a common sense scenario, 17 days is highly questionable. The main argument is that it was not the trial transcripts that defense counsel had not the time to review prior to trial; it was the redacted version of the transcripts that Sgt. Hines ultimately read to the jury that was dumped on defense counsel the day of trial. Furthermore, once the State came up with the idea to use the transcripts, Mr. Maxey then had to change his whole trial strategy as he was under the impression that several witnesses simply would not be testifying. As far as prejudice, there is no way to show this type of prejudice other than showing Mr. Maxey scrambling at and right before trial. See e.g. RP 26 at 22-25 (Mr. Maxey not having been provide with conviction history of any witnesses); RP 35 (A week before trial and witness is found to be unavailable); RP 36-37 (Mr. Maxey strongly objecting to transcripts coming in).

B. Impeachment Evidence Regarding Ms. Lascelles

The COA claimed that "nothing in the record show[ed] Ms. Lascelles had been convicted of a previous crime that would be relevant under ER 609(a). This is partly because the State did not disclose this information to Mr. Maxey. This Court should seek this information in an evidentiary hearing as Ms. Lascelles, inter alia witnesses, have extensive criminal backgrounds of crimes of dishonesty. The COA further claimed that Ms. Lascelles testimony benefited Mr. Burkey. See Opinion, pg. 15. Yet, in the same opinion the COA stated that Ms. Lascelles' testimony supported the State's theory. See Opinion, pgs. 3-4. Without Ms. Lascelles testimony, the State really did not have a case. (Even with her testimony minus the perjured parts, the State did not have a case). It was error that the jury was not informed of the extensive criminal history of several of the witnesses and there is a good chance that had they known, the outcome very well would have been different.

Mr. Burkey ask that this Court review the issues raised in his SAG on both a state and federal level and vacate his sentence and remand this cause for a new trial with competent evidence.

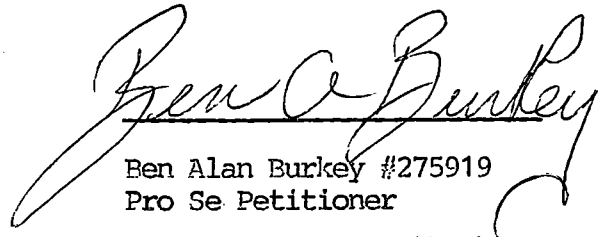
7. Conclusion

Mr. Burkey pleads that this Court will review his PRP

and SAG in its entirety with the evidence presented and find the injustice that was served. In the trial court's own words: "It is difficult, to some extent, to try to get a flavor for what was going on based upon the transcript testimony rather than having live witnesses here," (RP 686 at 18-20) if it was hard for the trial court, then one can only imagine how difficult it was for the jury to make and light of Mr. Burkey's innocence. Mr. Burkey prays that this Court will see the injustice and vacate this life sentence and remand with instructions to give Mr. Burkey a new trial.

Dated this 28 day of February, Two Thousand and Eighteen years after the death of our Lord and personal savior.

Respectively submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. BEN ALAN BURKEY, Appellant.	)	No. 34093-7-III (consolidated with No. 34956-0-III) UNPUBLISHED OPINION
In the Matter of the Personal Restraint of BEN ALAN BURKEY, Petitioner.	)	

PENNELL, J. — After his original convictions were reversed for a public trial violation,[1] Ben Alan Burkey was convicted of murder, kidnapping, conspiracy to commit kidnapping, robbery, and assault, all in the first degree. He appeals his convictions and has also filed a timely personal restraint petition. We affirm Mr. Burkey's convictions and dismiss the petition. However, we remand for resentencing and correction of a scrivener's error.

[1] *State v. Burkey*, No. 25516-6-III (Wash. Ct. App. May 21, 2015) (unpublished), https://www.courts.wa.gov/opinions/pdf/255166.unp.pdf.

FACTS

In September 2005, Rick Tiwater's murdered body was found in the woods of north Spokane County. Forensic evidence led police to target their investigation on Mr. Burkey. Eventually, law enforcement theorized Mr. Burkey and another man named James Tesch had assaulted and murdered Mr. Tiwater in retaliation for Mr. Tiwater being a perceived law enforcement informant or "snitch." The assault against Mr. Tiwater started during the evening at Mr. Burkey's home, where Mr. Burkey initially hit Mr. Tiwater. Then, after being summoned to the home by Mr. Burkey, Mr. Tesch arrived and continued the assault by kicking Mr. Tiwater, dragging him into the kitchen, and striking him on the head with a ball peen hammer. With Mr. Tiwater unconscious, Mr. Tesch and Mr. Burkey transported Mr. Tiwater to a remote wooded area where they continued their fatal attack. By the time his body was discovered by law enforcement, Mr. Tiwater had suffered several blunt force injuries as well as burns to his head, chest, and hands. Mr. Burkey and Mr. Tesch were charged with several criminal offenses, including first degree assault and first degree murder. The two men were tried separately.

Several witnesses testified to the events leading up to Mr. Tiwater's death. Some of the witnesses from Mr. Burkey's initial trial in 2006 were unavailable for retrial in 2015. The State therefore obtained leave to present the witnesses' testimony through trial

transcripts. Mr. Burkey testified at his first trial, but not the second. At the second trial, the State introduced transcript evidence of Mr. Burkey's original testimony as part of its case in chief.

Troy Fowler was one of the witnesses whose testimony was presented through a transcript. Mr. Fowler said he was at Mr. Burkey's house with Mr. Tiwater and Mr. Burkey on the evening of the murder. Mr. Tesch was not yet present. Mr. Fowler saw Mr. Burkey strike Mr. Tiwater several times. He also heard Mr. Burkey call Mr. Tiwater a snitch. Mr. Fowler testified Mr. Burkey called Mr. Tesch to come over and help figure out if Mr. Tiwater was an informant. Mr. Fowler then left Mr. Burkey's home before Mr. Tesch arrived. Mr. Fowler testified he talked to Mr. Burkey the next day. Mr. Burkey said Mr. Tiwater had fallen into a campfire and would not be seen again.

The State also presented transcript testimony from Mr. Burkey's girlfriend, Patricia Lascelles. Ms. Lascelles's testimony was less directly helpful to the State than Mr. Fowler's testimony. Ms. Lascelles denied seeing Mr. Burkey strike Mr. Tiwater. She also claimed Mr. Burkey told Mr. Tesch to stop while Mr. Tesch attacked Mr. Tiwater inside the home. But Ms. Lascelles also supplied testimony relevant to the State's theory, in that she: (1) admitted Mr. Burkey had sent her to Mr. Tesch's home with instructions to have Mr. Tesch come over, (2) described Mr. Tesch's attack on Mr. Tiwater,

(3) explained that Mr. Tesch and Mr. Burkey drove off in Mr. Burkey's car with Mr. Tiwater's body in the back seat, (4) testified that Mr. Burkey and Mr. Tesch returned home in the car the morning after the attack bearing bloody clothes and a golf club, but without Mr. Tiwater, and (5) admitted she attempted to hide or destroy the bloodied evidence at the direction of both Mr. Tesch and Mr. Burkey.

The police recovered physical evidence from Mr. Burkey's home that corroborated Ms. Lascelles's attempted destruction of evidence. They also obtained surveillance footage from a nearby gas station showing Mr. Burkey and another man present with Mr. Burkey's car around 5:00 a.m. the day after the attack began. Mr. Burkey did not appear upset or disoriented in any way.

In statements presented to the jury through law enforcement witnesses and the prior trial transcript, Mr. Burkey blamed Mr. Tesch for Mr. Tiwater's murder. Mr. Burkey admitted he was present during Mr. Tesch's entire violent attack. However, Mr. Burkey denied any involvement. Mr. Burkey explained he tried to tell Mr. Tesch to stop. He also claimed he was fearful of Mr. Tesch and only agreed to help dispose of Mr. Tiwater's body and other evidence after Mr. Tesch threatened to kill Mr. Burkey and his son.

When asked about Mr. Fowler's allegation that Mr. Burkey had hit Mr. Tiwater prior to Mr. Tesch's arrival at his home, Mr. Burkey admitted to only minor wrongdoing. Mr. Burkey said he slapped Mr. Tiwater after discovering Mr. Tiwater had used drugs in front of Ms. Lascelles's son. Mr. Burkey claimed this incident was unrelated to Mr. Tesch's later attack.

The jury convicted Mr. Burkey of all five pending counts. At sentencing, the trial court found Mr. Burkey's convictions for first degree kidnapping (count II) and first degree robbery (count IV) merged with his first degree murder conviction (count I). The trial court then imposed 548 months of confinement for the murder, with 68 months for the kidnapping and 171 months for the robbery to run concurrently. The court further imposed 51 months of confinement on the conspiracy charge (count III) and 123 months for the assault (count VI), both to run consecutively with the sentence for count I. For the deadly weapon enhancements, an additional 24 months was added to counts I, II, IV, and VI, and 12 months was added to count III, with all these enhancements to run consecutive to the base sentence. The court also imposed community custody terms of 36 months for counts I and VI, and 18 months for count IV.

Mr. Burkey appeals. He has also filed a statement of additional grounds for review, and a report as to continued indigency. A personal restraint petition filed by Mr.

Burkey has been consolidated with his direct appeal.

ANALYSIS

Prior bad act evidence

Mr. Burkey claims his trial was tainted by the improper introduction of bad act evidence. Specifically, he points to the State's evidence that Mr. Burkey had head-butted Mr. Tesch's girlfriend in front of Mr. Tesch on the day of the murder. The State contends the head-butting evidence was not presented for an improper character purpose. Instead, it was relevant to refute Mr. Burkey's claim that he was fearful of Mr. Tesch and had not willingly assisted with the murder. We agree with the State.

Otherwise inadmissible evidence can become relevant and admissible as a result of defense trial tactics, including comments made in opening statements. *State v. Rupe*, 101 Wn.2d 664, 686-88, 683 P.3d 571 (1984). That is what happened here. During opening statement, defense counsel presented the theory that Mr. Burkey feared Mr. Tesch and was merely a passive observer of Mr. Tesch's assaultive conduct. This theory was further developed during cross-examination of the law enforcement witnesses who had interviewed Mr. Burkey. Because the evidence that Mr. Burkey head-butted Mr. Tesch's girlfriend in front of Mr. Tesch tended to show Mr. Burkey was not fearful of Mr. Tesch, it was relevant to rebut the defense's theory of the case. The trial court did not

abuse its broad discretion in admitting this evidence.

Lack of unanimity jury instruction

Mr. Burkey argues for the first time on appeal that the trial court violated his right to a unanimous verdict by failing to require juror agreement on which acts constituted the crime of first degree assault. Mr. Burkey claims Mr. Tiwater had been assaulted numerous times in the hours before his murder and any of the attacks could have constituted first degree assault. According to Mr. Burkey, these circumstances required the court to issue a unanimity instruction pursuant to *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

We disagree with Mr. Burkey's characterization of the record. A unanimity instruction is required when the prosecutor presents evidence of several distinct acts, any one of which could form the basis of a charged crime. *Id.* at 571-72. But that is not what happened here. According to the State's theory of the case, the assault on Mr. Tiwater was an ongoing crime that started in Mr. Burkey's home and then continued into the woods. 3 Verbatim Report of Proceedings (VRP) (Dec. 14, 2015) at 595-96. The State claimed Mr. Burkey was involved in the assault from the very beginning and that both Mr. Burkey and Mr. Tesch were united in their effort to punish Mr. Tiwater for being a snitch. Under these circumstances, the individual acts of violence perpetrated against Mr.

Tiwater constituted a continuing course of conduct. *State v. Crane*, 116 Wn.2d 315, 326, 804 P.2d 10 (1991); *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). As such, no unanimity instruction was required. *Crane*, 116 Wn.2d at 326; *Love*, 80 Wn. App. at 361.

The State's theory of a continuing assault contrasted with the defense's theory that there had been two separate assaults of Mr. Tiwater: (1) a minor assault by Mr. Burkey (for which no charges had been brought), precipitated by Mr. Tiwater's use of drugs in front of Ms. Lascelles's son, and (2) a separate major assault perpetrated solely by Mr. Tesch. Given these opposing case theories, the lack of a unanimity instruction actually helped Mr. Burkey. As written, the instructions required the jury to make an all or nothing decision about Mr. Burkey's offense conduct, thereby increasing the odds of reasonable doubt. Mr. Burkey was not prejudiced by the lack of a unanimity instruction. Reversal is unwarranted in these circumstances. *See State v. Carson*, 179 Wn. App. 961, 979, 320 P.3d 185 (2014), *aff'd*, 184 Wn.2d 207, 357 P.3d 1064 (2015).

Alleged nondisclosure of impeachment evidence

Mr. Burkey argues the State improperly withheld material impeachment evidence pertaining to Patricia Lascelles's plea agreement with the State. We review this claim de novo. *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011).

Some background is warranted prior to analyzing the merits of Mr. Burkey's claim. As noted, the State presented Ms. Lascelles's testimony through a transcript from Mr. Burkey's first trial. The transcript contains a cross-examination of Ms. Lascelles by Mr. Burkey's prior attorney. During the cross-examination, no mention was made of Ms. Lascelles's plea agreement with the State.

After Mr. Burkey was convicted at his second trial, his attorney filed a motion for a new trial. Counsel claimed he had not been aware of Ms. Lascelles's plea agreement until after trial. The attorney representing Mr. Burkey at his second trial was not the same individual who represented Mr. Burkey at his first trial.

The trial court held a hearing on Mr. Burkey's new trial motion. After reviewing the parties' evidentiary submissions, the trial court found the State had disclosed Ms. Lascelles's plea agreement to Mr. Burkey's initial trial attorney. 4 VRP (Jan. 29, 2016) at 667-68; Clerk's Papers (CP) at 368-69. Accordingly, there had been no improper withholding. 4 VRP (Jan. 29, 2016) at 668. The trial court also found that the attorney who represented Mr. Burkey at his second trial could have easily discovered Ms. Lascelles's plea agreement. *Id.* Thus, Mr. Burkey had not met the legal standard for relief from his conviction.

Based on the trial court's findings, which we review with deference, *State v. Davila*, 184 Wn.2d 55, 74, 357 P.3d 636 (2015), it is apparent the State never withheld exculpatory impeachment evidence. By disclosing Ms. Lascelles's plea agreement to Mr. Burkey's initial trial counsel (the only attorney to ever cross-examine Ms. Lascelles), the State disclosed sufficient information to enable Mr. Burkey to take advantage of any exculpatory value from the plea agreement. *Mullen*, 171 Wn.2d at 896. Mr. Burkey was therefore not deprived of his right to a fair trial. Reversal is unwarranted.

Sentencing issues and scrivener's error

The parties agree on two sentencing errors as well as a scrivener's error in Mr. Burkey's judgment and sentence. Because there is no dispute that these errors require remand, our analysis is brief.

First, Mr. Burkey argues the trial court erroneously imposed sentences for robbery (count IV), kidnapping (count II), and murder (count I) after finding the three crimes merged. We accept the State's concession that the multiple sentences imposed by the court was error. *See State v. Williams*, 131 Wn. App. 488, 498, 128 P.3d 98 (2006). Given the trial court's merger finding, the convictions for robbery and kidnapping should have been set aside. No separate weapons enhancements were applicable. Nor were terms of community custody. Remand for resentencing is appropriate.

Second, Mr. Burkey argues the community custody term imposed for his first degree assault conviction violates the prohibition on ex post facto laws. At the time of Mr. Burkey's 2005 offense conduct, the Sentencing Reform Act of 1981, chapter 9.94A RCW, only contemplated a variable community custody term of 24-48 months. Former RCW 9.94A.715 (2001), repealed by LAWS OF 2009, ch. 28, § 42(2); former WAC 437-20-010 (2000). Since 2009, RCW 9.94A.701(1)(b) has mandated a term of 36 months for a serious violent offense. LAWS OF 2009, ch. 375, § 5. Because application of the mandatory 36-month term to Mr. Burkey violates the prohibition on ex post facto laws, resentencing is appropriate. *State v. Coombes*, 191 Wn. App. 241, 250, 361 P.3d 270 (2015). At resentencing, Mr. Burkey should be subject to the laws in effect in 2005.

Finally, the jury convicted Mr. Burkey of first degree felony murder, which is a violation of RCW 9A.32.030(1)(c). Yet, the judgment and sentence indicates Mr. Burkey was convicted of premeditated murder under RCW 9A.32.030(1)(a). The parties agree this was error. It shall be corrected at resentencing. *See State v. Munoz-Rivera*, 190 Wn. App. 870, 895, 361 P.3d 182 (2015).

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Burkey raises five issues in his statement of additional grounds for review (SAG). Each is addressed in turn.

Ineffective assistance of counsel

Mr. Burkey argues he received ineffective assistance of counsel because his attorney only had 17 days to prepare after he was told the State would be allowed to use transcripts of testimony from the first trial. A claim of ineffective assistance requires proof of deficient performance and prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Neither requirement has been met.

Mr. Burkey has not demonstrated deficient performance. There is no set period of time for trial preparation that is indicative of deficient performance. *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The transcripts at issue here were short. No evidence indicates defense counsel had insufficient time for preparation. To the contrary, Mr. Burkey's trial counsel represented Mr. Burkey during his initial appeal. In that appeal, Mr. Burkey made a sufficiency challenge to the State's evidence. Given this circumstance, it is apparent that counsel had ample advance opportunity to review Mr. Burkey's trial transcripts.

Mr. Burkey also fails to show prejudice. The record does not contain any information suggesting the outcome of Mr. Burkey's case would have been different had counsel been given more time to prepare.

Lack of cautionary instruction on accomplice testimony

Mr. Burkey next argues the trial court erroneously failed to supply the jury with a cautionary instruction regarding Ms. Lascelles's purported accomplice testimony. He also argues defense counsel was deficient for not requesting such an instruction.

Mr. Burkey's substantive claim fails because a cautionary instruction is only required when an accomplice's testimony is uncorroborated by other evidence. *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), *overruled in part on other grounds by State v. McKinsey*, 116 Wn.2d 911, 810 P.2d 907 (1991). Even assuming Ms. Lascelles should be considered an accomplice, her testimony was amply corroborated by physical evidence and the testimony of other witnesses, including Mr. Burkey himself. Given these circumstances, the failure to issue a cautionary instruction was not reversible error. *Harris*, 102 Wn.2d at 155 ("If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.").

Mr. Burkey also cannot show defense counsel performed deficiently by failing to seek a cautionary instruction. Ms. Lascelles's testimony was largely favorable to Mr. Burkey. The defense decision not to emphasize Ms. Lascelles's credibility problems was reasonably strategic.

Use of transcripts from first trial without determining reliability

Relying on *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), Mr. Burkey argues the trial court violated his confrontation clause[2] rights by not determining the reliability of Ms. Lascelles's transcript testimony prior to admission. Mr. Burkey misapprehends the nature of the constitutional right to confrontation. The standard for a defendant's confrontation rights is no longer set by *Ohio v. Roberts*. The current law on confrontation rights is outlined in *Crawford v. Washington*, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Under *Crawford*, a testimonial statement, such as testimony from a prior trial, may be admitted so long as the State can show "unavailability and a prior opportunity for cross-examination." *Id.* at 68. This standard has been met. There was no confrontation violation.

State's use of allegedly perjured testimony

Mr. Burkey's next argument is that the State violated his right to a fair trial by knowingly using perjured testimony from Ms. Lascelles. *See State v. Larson*, 160 Wn. App. 577, 594-95, 249 P.3d 669 (2011). The argument has already been addressed by the trial court and the court determined, based on substantial evidence, that there had been no perjury. Given this circumstance, the State was entitled to rely on Ms. Lascelles's

[2] U.S. CONST., amend. VI; WASH. CONST., art. I, § 22.

testimony.

Impeachment evidence regarding Ms. Lascelles

Mr. Burkey claims his attorney should have attempted to impeach Ms. Lascelles's credibility with evidence of a prior conviction, as contemplated by ER 609. Nothing in the record shows Ms. Lascelles had been convicted of a previous crime that would be relevant under ER 609(a). Accordingly, Mr. Burkey has not shown deficient performance. In addition, Ms. Lascelles's testimony was beneficial to the defense's theory of the case. As a result, Mr. Burkey has failed to establish prejudice.

Cumulative or harmless error

Mr. Burkey last argues he deserves a new trial because of cumulative error. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because we find no error, the cumulative error doctrine does not apply.

PERSONAL RESTRAINT PETITION

Ineffective assistance of counsel based on conflict of interest

Mr. Burkey contends his trial counsel labored under an unconstitutional conflict of interest because counsel also represented a potential witness by the name of Terrance Kinard. We reject this claim. Mr. Burkey has not met his burden of proving his counsel provided ineffective assistance due to a conflict.

To show a constitutional violation of the right to conflict-free counsel, "a defendant must show that (a) defense counsel 'actively represented conflicting interests' and (b) the 'actual conflict of interest adversely affected' his performance." *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 348-49, 325 P.3d 142 (2014) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). "An actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant." *State v. White*, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995); *accord State v. Byrd*, 30 Wn. App. 794, 798, 638 P.2d 601 (1981); *see also* RPC 1.7. A "[p]ossible or theoretical" conflict of interest is "'insufficient to impugn a criminal conviction.'" *Gomez*, 180 Wn.2d at 349 (quoting *Cuyler*, 446 U.S. at 350).

Mr. Burkey has not pointed to any evidence indicating his interests were adverse to Mr. Kinard's. Mr. Kinard was never implicated in the murder of Mr. Tiwater. Nor was he a relevant witness.[3] The charges that gave rise to defense counsel's representation of

[3] Mr. Burkey claims Mr. Kinard could have testified about Mr. Burkey's lack of ill will toward Mr. Tiwater. This testimony was of questionable relevance, particularly given the fact that Mr. Kinard was not present at the time of the offense. To the extent Mr. Kinard's testimony was relevant, it would have been readily impeachable based on Mr. Kinard's criminal history. Defense counsel provided stronger evidence of Mr. Burkey's lack of ill will toward Mr. Tiwater through the testimony of attorney Patrick Stiley.

Mr. Kinard had nothing to do with Mr. Burkey. Mr. Burkey's claim that defense counsel may have nevertheless been facing a conflict is insufficient to overturn a conviction. *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

State's use of Mr. Burkey's testimony from first trial

Mr. Burkey makes several claims regarding the State's use of his prior trial testimony during its case in chief. Mr. Burkey does not challenge the admissibility of his prior testimony. Instead, he makes less direct claims of error. None are persuasive.

First, Mr. Burkey complains defense counsel was ineffective because counsel did not want Mr. Burkey to take the stand even after the court ruled Mr. Burkey's prior testimony could be used in the State's case in chief. We reject this claim. Had Mr. Burkey taken the stand, he could have been cross-examined based on any slight inconsistency with his prior testimony. Defense counsel's recommendation that Mr. Burkey exercise his right to remain silent on remand was reasonably strategic.

Mr. Burkey also argues he was prejudiced because a police detective read his former testimony to the jury. But the jury was instructed to consider the testimony as if it came from Mr. Burkey, not the detective. Jurors are presumed to follow the court's instructions absent evidence to the contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). There is no such evidence here.

Lastly, Mr. Burkey suggests the use of his prior testimony forced him to choose between remaining silent or testifying in order to stop a witness for the State from reading his testimony. Mr. Burkey's reasoning is unfounded. Mr. Burkey's prior testimony was admissible as a statement by a party opponent. ER 801(d)(2). As such, its admissibility did not turn on Mr. Burkey's availability as a witness or decision to testify. *Compare* ER 801(d)(2) (statement of party opponent not hearsay) *with* ER 804(b)(1) (prior witness testimony admissible only if witness unavailable).

Alleged perjured testimony by Ms. Lascelles

This argument fails for the same reason noted in the analysis of the issue in Mr. Burkey's SAG. There was no perjured testimony.

Incorrect accomplice liability jury instruction

Mr. Burkey argues the language of the jury instruction on accomplice liability misstated the law for two reasons. First, he argues the jury was instructed it could convict him as an accomplice if he acted with knowledge he was promoting any crime. He is wrong. Mr. Burkey cites the following sentence from the accomplice liability instruction as error: "A person is an accomplice in the commission of *a crime* if, with knowledge that it will promote or facilitate the commission of the specific crime charged . . . ." CP at 236 (emphasis added). Mr. Burkey complains about the emphasized language. But the

instruction clearly goes on to say Mr. Burkey is only an accomplice if he had knowledge his actions would promote the specific crime charged. This accords with the Washington Supreme Court's requirements for the accomplice liability instruction. *See State v. Cronin*, 142 Wn.2d 568, 578-80, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 510-13, 14 P.3d 713 (2000).

Mr. Burkey also argues the jury instruction explained in a confusing manner what it means to "aid" someone. Again, he is wrong. The instruction stated:

> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP at 236.

This language clearly and unambiguously states what "aid" means for the purposes of accomplice liability. It then goes on to further explain that someone who is present at the scene and ready to assist has provided aid, but merely being present without more is not enough. The instruction then clarifies that presence is not always required. The instruction provides the general definition of "aid" and then some clarifying points. It is neither confusing nor misleading.

Alleged improper closing argument

A defendant bears the burden of showing that the prosecutor's comments are both improper and prejudicial. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). Alleged improper arguments by the prosecutor must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Mr. Burkey has provided quotations from different parts of the prosecutor's closing argument and argues these statements were misconduct because they misstated the evidence, were not supported by the evidence, and were otherwise improper. For example, Mr. Burkey takes issue with the prosecutor's argument: "But that's the individual that Mr. Burkey was waiting for to back him up when they were finally going to administer punishment to Mr. Tiwater." 3 VRP (Dec. 14, 2015) at 581. Mr. Burkey calls this a fabrication because the words "back him up" or "administer punishment" were not used in the trial testimony. He is correct that those exact words were not used. But Mr. Fowler testified Mr. Burkey called Mr. Tesch over to help figure out if Mr. Tiwater was a snitch. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The prosecutor's argument about backing up

or administering punishment was a reasonable inference given Mr. Fowler's testimony and other testimony supporting the State's theory in general. Mr. Burkey may disagree with the State's inference, but that does not make the inference improper or the prosecutor's actions misconduct. Mr. Burkey presents 29 parts of the prosecutor's closing argument alleging misconduct. All of his arguments have the same flaw as the one above, ignoring the prosecutor's latitude to argue inferences from the evidence. There was no misconduct here.[4]

MOTION FOR PRODUCTION OF TRANSCRIPTS

Mr. Burkey argues the State should be compelled to produce the unredacted transcripts of his prior testimony to "assure that the record on appeal is sufficiently complete." Motion for Production of Transcripts, *In re Pers. Restraint of Burkey*, No. 34956-0-III, at 2 (Wash. Ct. App. Jan. 3, 2017). But he does not explain how these transcripts will aid this court's review. The existing transcripts of the prior testimony contain no gaps or omissions. Further, the record indicates the redacted portions of the transcripts relate to objections that were raised during the first trial. Defense counsel wanted to make sure any of those objections that needed to be preserved could be so, but

[4] Mr. Burkey also argues defense counsel was ineffective for failing to object to the alleged prosecutorial misconduct. Since there was no misconduct, there was likewise no ineffective assistance for failing to object. *State v. Larios-Lopez*, 156 Wn. App. 257, 262, 233 P.3d 899 (2010).

neither of the parties wanted those objections read to the jury. The reason for the redactions is adequately explained in the record, and Mr. Burkey has provided no other justification for compelling production of unredacted transcripts.

APPELLATE COSTS

Mr. Burkey has complied with this court's general order by submitting a continued indigency report, and has requested a waiver of appellate costs in his opening brief. We grant the request.

CONCLUSION

We affirm Mr. Burkey's convictions, dismiss his personal restraint petition, and deny the motion to compel production of transcripts, but remand for resentencing and correction of the scrivener's error.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, A.C.J. (result only)