Supreme Court No. 96468-8
(COA No. 77180-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EMANUEL FAIR,

Respondent,

v.

STATE OF WASHINGTON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Both the trial court and the Court of Appeals appropriately ruled that under settled law, the prosecution is not entitled to a jury instruction on accomplice liability when no evidence "whatsoever," in the trial court's words, showed the defendant worked with another person to commit the crime. Settled law also prohibits the State from presenting accomplice liability in its closing argument when the court did not instruct the jury on the law of accomplice liability due to the lack of evidence supporting this legal theory. This Court should deny the prosecution's petition for review.

B. IDENTITY OF RESPONDENT

Emanuel Fair, respondent here and below, is currently awaiting trial after a hung jury. He asks this Court to deny review of the Court of Appeals decision affirming the trial court's rulings and allow the trial to proceed as soon as possible. RAP 13.3(a)(1), (2) and RAP 13.4(b).

C. COURT OF APPEALS DECISION

The unpublished[1] Court of Appeals decision was issued on October 8, 2018. No party moved for reconsideration.

[1] The State's petition for review erroneously says the Court of Appeals opinion was published. Pet. at 1.

D. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals affirmed the trial court's ruling declining to give an accomplice liability instruction based on well-settled law requiring a factual basis before giving the jury an instruction on this legal theory of criminal liability. A trial court's decision governing jury instructions is affirmed on appeal absent an abuse of discretion. Should this Court deny review when the courts below appropriately ruled that without a factual basis tending to show accomplice liability, the court should not instruct the jury on the law of accomplice liability?

2. The Court of Appeals agreed the trial court correctly informed the prosecution they may not argue about accomplice liability to the jury when there is no factual basis showing the mandatory legal predicate for accomplice liability. Should this Court deny review of the unpublished Court of Appeals decision when settled law supports the court's ruling?

E. STATEMENT OF THE CASE

A family friend found Arpana Jinaga dead in her apartment on a Monday morning, days after she hosted a Friday night Halloween party to which she invited her entire apartment complex. 2/21 RP 645.[2]

Ms. Jinaga's next door neighbor Cameron Johnson was drunk the night of the party. 2/14 RP 448. At three a.m., as the party ended, he called Ms. Jinaga several times on his cell phone, hoping to have sex with her. 2/22 RP 109; 3/21 RP 545. When questioned by police a few days later, Mr. Johnson denied calling Ms. Jinaga and said he heard Ms. Jinaga having sex at 3 a.m. in her apartment with someone else. 3/22 RP 607, 622. When confronted with his phone's call log, Mr. Johnson said, "oh crap." 3/22 RP 622. Before the police got a search warrant for Mr. Johnson's phone, he deleted his phone's call logs and text messages. 3/1 RP 834-36; 3/22 RP 626. Ms. Jinaga's cell phone and camera were never found. 2/21 RP 658.

A witness described a man consistent with Mr. Johnson's physical appearance standing outside Ms. Jinaga's door at around 3 a.m., appearing to talk to her. 3/16 RP 133, 151-52.

[2] The verbatim report of proceedings (RP) cited herein refers to court proceedings occurring in 2017.

At about eight a.m., after the party, Ms. Jinaga's other next door neighbor heard loud thuds and running water. 2/27 RP 494-95.

At about 10 a.m., Mr. Johnson printed out directions to a pawn shop and drove from Redmond to the Canadian border. 2/22 RP 183-84. At the border, Mr. Johnson tried to "blow through" without stopping. 2/21 RP 662. The customs guards searched his car and refused him entry to Canada. *Id*. at 662, 738-39.

In the days after the incident, Mr. Johnson repeatedly told the police he had no memory of the evening. 3/22 RP 942; Ex. 36, p. 3; Ex. 61, pp. 2, 6, 8-10. He asked others whether he might have killed Ms. Jinaga and not remembered or did it in his sleep. 2/21 RP 717; 3/22 RP 666, 700; 4/4 RP 58, 67.

Emanuel Fair attended the Halloween party at the last minute invitation of a friend who lived in the apartment complex. 2/14 RP 381, 441. Mr. Johnson had never met Mr. Fair before. Ex. 151, pp. 9, 27, 34; Ex. 158, p. 3. Mr. Johnson did not arrive at the party until close to midnight. 2/16 RP 44-42. He and Mr. Fair spoke about music for "maybe a half hour max." Ex. 158, p.2. The two men never had further contact. 3/22 RP 690. After the party, Mr. Fair spent several more days at the apartment complex, helping people clean up from the party and

watching football with others who lived in the complex. 2/14 7RP 405-06; 2/27 RP 433.

The prosecution gave Mr. Johnson immunity from prosecution for several interviews, promising nothing he said could be used against him. 3/22 RP 694-95. Even with immunity, Mr. Johnson never indicated Mr. Fair was involved in some aspect of Ms. Jinaga's death. Ex. 158, p. 2-4. He consistently said he spent at most 30 minutes with Mr. Fair, listening to music, and never spoke to him again. *Id*. Phone records show both men made calls in the early morning hours to other people, but they did not call each other or anyone in common. Ex. 132.

Police found Mr. Johnson's DNA on a bottle of motor oil that was used to cover Ms. Jinaga's body. 3/2 RP 1090-91.

Police also found DNA evidence from other people. DNA from Aaron Gurtler's semen was on a towel near Ms. Jinaga's body and was mixed with Ms. Jinaga's blood on a sheet covering her body even though he had not been to her apartment in several weeks, and she kept her apartment "very, very tidy." 2/14 RP 373; 3/6 RP 1240; 3/7 RP 1327, 1332-34; 3/22 RP 675.

A bootlace that could have strangled Ms. Jinaga was found in the dumpster, in plastic bag along with her bathrobe and a bottle of

motor oil she purchased (with Mr. Johnson's DNA on it). 2/21 RP 697; 3/22 RP 591, 717. The bootlace had Josiah Lovett's DNA on it. 3/7 RP 1318. Mr. Lovett was a neighbor who denied going to the party or entering Ms. Jinaga's apartment. 3/1 RP 750-51.

Other unknown male DNA was also discovered on her wrist. 4/3 RP 1057. The donor of this DNA was never discovered. *Id*. Unknown DNA from multiple males was found on duct tape, the string of a tampon near Ms. Jinaga's body, and her underwear which appeared to have been used as a gag. 4/3 RP 1069-70; 3/14 RP 1734, 1750-51.

Mr. Fair's connection to the crime consists of a few potential DNA traces: on the shoulder of Ms. Jinaga's bathrobe, a tissue with faint blood stains, a mixed sample of DNA on the end of a piece of duct tape that may have been used as a gag during the incident, and "y-str" or male DNA on her neck. 3/7 RP 1409; 4/3 RP 1045-51, 1059, 1062-68, 1071-73. The defense strenuously contested the statistical validity of the DNA evidence's connection to Mr. Fair. The defense also explained the innocuous opportunities Mr. Fair had to touch or indirectly transfer microscopic skin cells to these items during the party. *See*, *e.g.*, 3/7 RP 1293-1302, 1357-59, 1368-86, 1463; 4/6 RP 1332-35; 4/13 RP 1078. During the party, he was accidentally hit in the

mouth and had a bloody lip, so he used a tissue in Ms. Jinaga's apartment; he likely used her bathroom during the party where her robe hung; he may have touched the duct tape holding decorations during the party; and photographs show he touched Ms. Jinaga and others while posing during the party. 2/22 RP 214/3 RP 1014; 4/6 RP 1332-35.

The jury deliberated for eight working days before the court declared a mistrial. Later, some jurors said most favored acquittal, 9-3, when they reported a deadlock, but the court ordered more deliberations and they moved to a 6-6 split. CP 253. Five of the people who voted for guilt when deliberations ended thought Mr. Johnson was involved and this belief did not affect their vote. CP 253-54.

Before holding a new trial, the prosecution sought discretionary review. Mr. Fair's case is stayed pending this review, and he waits in the King County jail.

When granting the motion for discretionary review, a Court of Appeals commissioner did not find any legal error by the trial court, but thought the case raised an issue about which reasonable minds might differ. Comm. Ruling at 4. The Court of Appeals affirmed the trial court's rulings, holding the judge's decisions were solidly grounded in the law and the facts of the case.

The facts are further explained in the Court of Appeals opinion, at 1-7, and the Brief of Respondent, at 2-10.

F. ARGUMENT

The Court of Appeals relied on settled law to conclude there must be evidence of accomplice liability for a court to instruct the jury on the law of accomplice liability and for the prosecution to argue for conviction based on accomplice liability.

1. Settled law governs when a court may instruct the jury on accomplice liability.

The prosecution concedes there was no evidence Mr. Fair is guilty as an accomplice, yet it protests the court's refusal to instruct the jury on the law governing accomplice liability. As the Court of Appeals ruled, no case law supports the notion that an accomplice liability instruction is warranted when there is insufficient evidence of complicity predicated on accomplice liability. Slip op. at 9.

For a person to be liable as an accomplice, a person must aid, agree to aid, solicit, command, or encourage a person to commit the charged crime while knowing that it will promote or facilitate the crime. RCW 9A.08.030. A person is not an accomplice by aiding *any* crime. *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000).

The person must have acted with knowledge that his conduct would promote or facilitate the crime charged. *Id*.

The State must establish that an accomplice "*actually* knew that he was promoting or facilitating" the charged crime. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (emphasis in original). Accomplice liability may not rest on speculation about what someone should have known. *Id*.

Being present at the scene of a crime is insufficient to prove accomplice liability, even if the person's presence "bolsters" or "gives support" to the perpetrator. *In re Wilson*, 91 Wn.2d 497, 491-92, 588 P.2d 1161 (1979); *see also State v. Asaeli*, 150 Wn. App. 543, 568-69, 208 P.3d 1136 (2009) (insufficient evidence of accomplice liability for car driver who was "merely present at the scene with some knowledge of potential criminal activity").

"It is error to submit to the jury a theory for which there is insufficient evidence." *State v. Munden*, 81 Wn. App. 192, 195, 913 P.2d 421 (1996). Speculation about potential criminal culpability is not a basis for a jury instruction. "[S]ome evidence must be presented affirmatively to establish" the theory for which a jury instruction is sought. *State v. Rodriguez*, 48 Wn. App. 815, 820, 740 P.2d 904 (1987),

quoting *State v. Wheeler*, 22 Wn. App. 792, 797, 593 P.2d 550 (1979). A party is entitled to an instruction on its theory of the case only "if there is evidence to support that theory." *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980); *see also Young v. Grp. Health Co-op. of Puget Sound*, 85 Wn.2d 332, 339, 534 P.2d 1349 (1975) ("jury instructions can encompass only those theories of liability which are supported by substantial evidence").

There is no dispute here that the evidence does not support accomplice liability. The prosecution does not allege Mr. Fair should be convicted as an accomplice. 4/4 RP 48. It concedes it had "no evidence" that "Fair was just an accomplice." *Id*. at 80. It also has no evidence anyone else served as an accomplice.

The trial court correctly ruled, "there has to be some evidence" supporting the particular elements of accomplice liability in order to give an instruction on this theory of culpability. 4/4 RP 76. The judge explained, "we don't have any evidence that links the two of them," as needed for accomplice liability. 4/4 RP 76. There was no evidence "whatsoever" showing Mr. Fair acted with Mr. Johnson. *Id*. "It's pure speculation that they were doing this together," and the evidence

showed "no connection between the two of them that would justify the giving of an accomplice instruction." *Id*.

The Court of Appeals appropriately affirmed the trial court's ruling that the evidence did not justify an accomplice liability instruction.

2. Settled law bars the prosecution from seeking a conviction on an unavailable theory of legal liability or purely speculative scenarios.

It has long been the case that the prosecution may not urge jurors to consider accomplice liability when the jury is not instructed on this doctrine. *State v. Davenport*, 100 Wn.2d 757, 760-61, 763, 675 P.2d 1213 (1984). The prosecution must confine its arguments to "the law as set forth in the instructions given to the court." *Id*. at 760. The State does not address *Davenport* in its petition.

The prosecution is never permitted to encourage the jury to convict a person based on speculation. Evidence of criminal liability must not rest on speculation, surmise or conjecture. *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013); *State v. Hummel*, 196 Wn. App. 329, 282 P.3d 592 (2016), *rev. denied*, 187 Wn.2d 1021 (2017).

In any case, the prosecution "must function within boundaries" during closing argument. *State v. Monday*, 171 Wn.2d 667, 676, 257

P.3d 551 (2011). Its duties include "insuring that an accused receives a fair trial." *State v. Boehing*, 127 Wn. App. 511, 517, 111 P.3d 899 (2005). It is proper for the prosecution to analyze the evidence presented, but improper to encourage jurors to speculate about matters not in evidence or legal criteria that are not part of its burden of proof. *Id*.; *see State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012) (reversible error to urge jury to decide case based on speculation about events outside the record); *Boehning*, 127 Wn. App. at 521-22 (prosecutor's explanations about why charges were dismissed mid-trial irrelevant and impermissible).

The only case the prosecution cites in its petition for review regarding its desire to use accomplice liability in its closing argument is *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 410 P.3d 1142 (2018), claiming this case shows prosecutors have wide latitude to argue their characterization of the facts presented and available inferences. Pet. at 12. *Phelps* is inapposite for several reasons. First, the issue in *Phelps* was the prosecutor's use of trial testimony to argue that the years the defendant spent building an intimate relationship with a teenager amounted to "grooming." 190 Wn.2d at 160, 167. This label was a factual descriptor of the evidence and not a basis of legal liability. *Id*. at

168. This distinction was critical for this Court because it showed the prosecutor was characterizing the evidence presented and not making arguments that were not supported by the evidence or inserting new legal theories not supported by the instructions. *Id*. at 168-69.

Second, the defendant waived his complaint about the State's grooming argument by never objecting. *Id*. at 166, 170. Third, as a personal restraint petition, the defendant did not meet the added "hurdle" of proving actual and substantial prejudice. *Id*. at 172. Three justices concurred, explaining the prosecutor's arguments were impermissible but the defendant had not satisfied the heightened actual and substantial prejudice necessary for relief in a PRP. *Id*. at 173 (Fairhurst, J., concurring). *Phelps* does not permit the State to inject a theory of culpability into the case in closing argument, especially when it is not supported by the facts and is objected to by the defense.

The prosecution's petition for review ambiguously claims Mr. Johnson could have been "involved" and asserts this amorphous involvement justifies an accomplice liability instruction and argument. But accomplice liability does not apply unless a person is an accomplice under RCW 9A.08.030. As this Court held in *Cronin*, "in for a dime, in for a dollar" is an inaccurate and fundamentally

misleading argument for the prosecution to make in the context of potential accomplices. 142 Wn.2d at 581. It is reversible error to encourage the jurors to believe accomplice liability may rest on amorphous involvement. *Id*.

Mr. Fair objected to the prosecutor's efforts to characterize evidence implicating other people as perpetrators of the crime as akin to accomplice liability. The court appropriately ruled that the prosecution may not urge jurors to consider other suspects to be accomplices when no evidence supported that assertion. The Court of Appeals properly affirmed the trial court's ruling that directed the State not to use a legally unavailable claim of accomplice liability as a basis for urging a conviction in its argument.

3. The prosecution presents no basis for this Court's review under RAP 13.4(b).

Despite baldly repeating that the Court of Appeals decision "conflicts with settled law," the prosecution never follows this claim by citing conflicting cases. Pet. at 11, 13, 18, 19. The entire petition for review only cites four cases, and only briefly notes these cases for general propositions. Its failure to articulate a conflict shows the flimsy

nature of the petition and the lack of grounds to review under RAP 13.4(b)(1) or (2).

The petition for review also asserts there is substantial public interest in granting review but the only "interest" it describes is its own desire to prosecute Mr. Fair. Pet. at 19. The prosecution's inability to muster a legal conflict or a valid significant and public interest demonstrates the unpublished decision does not meet the criteria for review under RAP 13.4(b).

4. The petition misleads this Court about the facts of the case.

The petition distorts the record to overstate the potential for accomplice liability and misleads this Court about the nature of the evidence presented below. Its mischaracterizations of the record further undercut the merits of the petition for review.

For example, the petition insists "investigators" did not know if more than one person committed the crime. Pet. at 1, 13. But this claim comes from a single statement by the initial detective, who said he did not know how many people were involved. 2/21 RP 655. This detective retired shortly after Ms. Jinaga died, he had little experience with homicide investigations, and the bulk of the crime scene investigation occurred after his retirement. 2/21 RP 615-16, 697. The prosecution

takes this one statement out of context to grossly overstate the forensic value the speaker intended. The prosecution presented no evidence that more than one person knowingly aided another when committing the crime.

The petition similarly distorts the record by taking out of context a line in a defense motion to claim the defense agreed multiple people could have been involved in the murder. Pet. at 13, citing CP 257. But defense counsel's very next sentence said there is "absolutely no evidence" that more than one person committed the crime. CP 257.

It also mischaracterizes defense counsel's closing argument. The State incorrectly claims the defense argued "any evidence" of someone else's "involvement" necessarily made Mr. Fair not guilty. Pet. at 1, 9, 16, 18. But the defense argued the evidence showed someone else committed the murder. *See* 4/6 RP 1252 (evidence showing "someone else murdered Arpana, that's a reasonable doubt" of Mr. Fair's guilt). It told the jury its role was not to "figure out" what happened, as if reading a mystery novel, but to decide if the prosecution "proved beyond every reasonable doubt that Emanuel Fair murdered Arpana." *Id*. The prosecution's petition for review hinges on the falsehood that Mr. Fair misleadingly urged jurors to treat evidence of Mr. Johnson's

"involvement" as proof Mr. Fair could not be guilty. In fact, Mr. Fair appropriately argued that significant evidence showed Mr. Johnson, Mr. Gurtler, Mr. Lovett, or another person was the perpetrator, and this constitutes a reason to doubt Mr. Fair committed the crime.

In sum, the trial court was familiar with the evidence and appropriately resolved the pertinent jury instructions and scope of permissible arguments based on settled law. The Court of Appeals similarly rested its decision on longstanding legal principles. This Court should deny the petition for review.

G. CONCLUSION.

Respondent Emanuel Fair respectfully requests that the Court deny review.

DATED this 29th day of November 2018.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. EMANUEL FAIR, Respondent.	)))))))))	NO. 96468-8

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