

FILED
SUPREME COURT
STATE OF WASHINGTON
10/30/2018 8:56 AM
BY SUSAN L. CARLSON
CLERK

SUPREME COURT NO. 96468-8
COURT OF APPEALS NO. 77180-9-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

EMANUEL DEMELVIN FAIR,
aka ANTHONY P. PARKER

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington seeks review of the published opinion filed in State v. Fair, No. 77180-9-1, slip op. (Wa.Ct.App. Div. I, filed October 8, 2018). Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. In a murder prosecution where investigators could not determine whether the crime was committed by one or by more than one person, did the Court of Appeals err by prohibiting the prosecution from arguing that evidence of a second suspect's possible involvement did not necessarily exonerate the defendant, because the second suspect could have assisted the defendant in committing the crime.

2. Whether the Court of Appeals erred in holding that the jury should not be instructed on accomplice liability even though the defense has argued, and will argue, that any evidence of another person's involvement in the crime is, per se, a reasonable doubt that the defendant committed the murder.

C. STATEMENT OF THE CASE

1. FACTS OF THE CRIME

Arpana Jinaga lived alone in an apartment at the Valley View Apartments in Redmond, Washington. RP(2/14/17) 322-26. On October 31, 2008, she and several other tenants hosted a Halloween party, attended by residents of the apartment complex and their relatives and friends. Id. at 374-77.

One person attending the party was defendant Emanuel Fair. At the time, he was staying in the apartment of Leslie Potts. RP(2/21/17) 571-74. Potts had not known Fair for long and only spent time with him on a few occasions. Id. at 573.

Neighbor Cameron Johnson showed up to the party late. RP(2/14/17) 400-02. He appeared to be drunk and brought some bottles of liquor to Jinaga's apartment. RP(2/15/17) 447-48.

The party lasted until the early hours of the following morning, Saturday, November 1, 2008. Around 2:30 a.m., Fair and Johnson went to Johnson's apartment and then down to Johnson's car to listen to music.¹ The police could not find any witness who saw Fair after he spent time with Cameron Johnson. RP(3/21/17) 521-22.

¹ RP(3/21/17) 495-97; RP(3/22/17) 696-97; Ex. 151 at 7-13, 39; Ex. 158 at 2.

At approximately 3:00 a.m., a few remaining partygoers, including Jinaga, retired to a first-floor apartment. RP(2/15/17) 488-90. Jinaga later left and was never seen again. Id. at 493.

At approximately 8:00 a.m., Jinaga's next-door neighbor, Kyle Rose, was awakened by sounds coming from her apartment. RP(2/27/17) 494-97. He heard "a horrible growling" which persisted for about twenty seconds until he heard a thud. Id. After the sound stopped, Rose then heard steps and the sound of running water, which persisted for as long as an hour. Id.

On Monday, November 3, 2008, after Jinaga's family in India had not heard from her for several days, Jay Bodicherla, a family friend, went to her apartment complex. RP(2/14/17) 322-30. Cameron Johnson was nearby, and he directed Bodicherla to Jinaga's apartment. Id. at 330-34. The two men entered the apartment together and discovered Jinaga's nude body, partially covered with a cloth, face down on the carpet in her bedroom. Id. at 332-36.

Jinaga had been strangled to death, her teeth were broken and there were numerous blunt-force injuries to her head. RP(2/23/17) 216-49, 257. She had been gagged with her

underpants and duct tape was used to hold the gag in place.²

There was evidence of a sexual assault. Id. at 246-47.

Jinaga's body was coated with oil. RP(2/21/17) 646. Her hands had been doused with a blue liquid. RP(3/2/17) 995, 1008-09. A distinct odor of bleach was in the air, and bleach stains were on the carpet throughout the apartment. RP(2/16/17) 75; RP(3/2/17) 994-95. Jinaga's bed had been stripped of coverings, a fleece blanket had been partially burned and a comforter was soaking in the bathtub. RP(3/2/17) 1026-30, 1088.

The police found more evidence in a dumpster in the apartment complex's parking lot: Jinaga's Halloween costume and a plastic bag that contained both her bloodstained bathrobe and a bottle of motor oil. RP(2/22/17) 119, 157-58; Ex. 148.

The morning that Jinaga's body was found, a detective contacted Leslie Potts at her apartment. RP(2/21/17) 604; RP(3/1/17) 874-76. Potts falsely told the detective that she was alone even though Fair was inside. RP(2/21/17) 604; RP(3/1/17) 874-76. Fair later left her apartment that night when it was dark. RP(2/21/17) 605.

² RP(2/28/17) 587-607; RP(3/2/17) 978-91; RP(3/6/17) 1216-45.

Detectives attempted to identify and interview everyone who attended the party. RP(2/23/17) 317-18; RP(3/1/17) 877-78. Fair appeared in a number of the Halloween party photographs, but he was not immediately identified. RP(2/23/17) 318. Potts claimed that she did not know his full name and referred to him as “E” and “Emanuel.” RP(2/23/17) 318-19; RP(3/1/17) 879-80.

The initial investigation focused on Cameron Johnson, Jinaga’s neighbor. Johnson engaged in a number of suspicious activities after the murder. His phone records revealed that he had called Jinaga at 3:00 a.m. on the night of the murder, but he stated he did not remember making the calls.³ RP(2/22/17) 108-09, 149. Johnson volunteered to detectives that he had driven to Canada on the day after the Halloween party and that he had been denied entry. Id. at 151.

A large amount of evidence was sent to the Washington State Patrol Crime Laboratory (“WSPCL”) for DNA analysis. The police had obtained 23 DNA reference samples from persons who had attended the Halloween party. RP(2/21/17) 667; RP(3/1/17) 904; RP(3/6/17) 1102. By November 21, 2008, detectives had

³ Johnson’s calls to Jinaga were made shortly after Fair and Johnson had gone to Johnson’ apartment and used a computer music program “Fruity Loops.” Ex. 151 at 7-13, 39; RP(3/1/17) 789-808; RP(3/21/17) 495-97.

finally identified Fair and obtained a DNA sample from him.

RP(3/16/17) 96.

At the end of January 2009, WSPCL reported that Fair's DNA profile was found on (1) Jinaga's bloodstained bathrobe discarded in the dumpster, and (2) several sheets of toilet paper found in Jinaga's bedroom.⁴ Subsequent DNA analysis established that (1) Fair's DNA was on the duct tape used to gag Jinaga, and (2) Fair's Y-STR DNA profile was on a swab of Jinaga's neck at her autopsy.⁵

In addition, Cameron Johnson's DNA was the primary profile found on the oil bottle found in the bag with the red robe.

RP(3/6/17) 1196-97. Other than Fair and Johnson, none of the DNA profiles taken from party-goers appeared on evidence associated with the murder.

In an interview with police, Fair stated that he spent time with Cameron Johnson at the party and that he and Johnson went to Johnson's apartment and then down to Johnson's car to listen to music. Ex. 151 at 7-13, 39. The police could not find any witness

⁴ RP(3/6/17) 1152-66,1248-50; RP(3/8/17) 1566-70; RP(3/27/17) 804-07.

⁵ RP(2/22/17) 281-89; RP(3/6/17) 1140-42, 1217-24; RP(3/8/17) 1571; RP(3/13/17) 1629-41; RP(3/21/17) 529; RP(3/27/17) 798-99.

who saw Fair after he spent time with Cameron Johnson.

RP(3/21/17) 521-22.

Fair also claimed that on the night of the Halloween party, he had retired to Potts' apartment at approximately 1:30 or 2:00 a.m., and that he stayed there the rest of the night. Ex. 151 at 5-6, 29-30, 38. However, Fair's cell phone records revealed that he was awake and making many phone calls between 2:00 a.m. and 5:00 a.m.; during a time that he was with Johnson and when Johnson was also making calls. RP(2/22/17) 108-09; RP(3/16/17) 37-56; Ex. 133. Fair made multiple calls to Leslie Potts, at the same time he claimed to be with her in her apartment. RP(3/16/17) 48; RP(3/21/17) 520; Ex. 133.

2. PROCEDURAL FACTS

The State charged Fair with one count of first-degree murder with a sexual motivation allegation. CP 1-2. Prior to trial, the State agreed that evidence relating to Cameron Johnson's possible involvement in the murder was admissible, explaining, "the State's position is that Johnson may have participated in the crime with Fair and that evidence implicating Johnson does not exculpate Fair.

Rather than an 'other suspect,' Johnson can also be characterized as an uncharged accomplice." CP 97.

However, before opening statement, the trial court granted the defense motion to prohibit the State from discussing the possibility that Fair and Johnson committed the crime together. RP(2/1/17) 15-16. After the prosecutor's opening statement, the defense moved for a mistrial, claiming that the prosecutor violated this ruling when discussing facts that linked Fair and Johnson. RP(2/14/17) 285. The court denied the motion, observing the prosecutor's statement of the facts was accurate. Id. at 286.

Prior to closing argument, the defense moved to prohibit the State from arguing that Johnson may have acted as an accomplice and opposed the giving of an accomplice instruction. The defense insisted that "it's about whether they have proven their case against one person *to the exclusion of everybody else.*" RP(4/4/17) 95 (italics added).

The State stated that its position was that Fair was the principal in the murder and that any prohibition on arguing that Johnson may have been involved resulted in a false binary choice: that either Fair or Johnson committed the crime. Id. at 48, 78-79. The prosecutor asked that the State be allowed to argue that the

evidence implicating Johnson did not necessarily exculpate Fair.

Id. at 80.

The trial court ruled that an accomplice instruction would not be given, holding there was insufficient evidence that linked Fair and Johnson. Id. at 76. The trial court further prohibited the State from arguing that Fair and Johnson could have committed the murder together. Id. at 76-77.

During closing argument, the defense argued to the jury that any evidence of Cameron Johnson's involvement in the murder was, per se, reasonable doubt that Fair committed the crime.

RP(4/6/17) 1252-93.

Shortly after deliberations began, the jury sent out an inquiry about accomplice liability. They asked: "Is it a reasonable doubt if there is a second person involved in the act?" CP 206; RP(4/11/17) 1369-70. The trial court did not answer the question and instructed the jury to re-read their instructions. CP 207. The jury later reported that it was unable to reach a unanimous verdict, and the court declared a mistrial. CP 208-09.

In anticipation of the second trial, the State asked the court to revise its ruling, instruct on the law of complicity, and remove the restrictions it had placed on the State's argument. CP 240-49. The

defense opposed any change in the ruling, but also noted that, according to their polling of the jury, at least five jurors thought Fair and Johnson committed the murder together. CP 250-54. The trial court denied the motion, though it acknowledged that the jury had recognized on its own that Johnson and Fair may have acted together. RP(7/7/17) 29-32; CP 270.

On August 18, 2017, the Court of Appeals granted discretionary review. In an unpublished decision, the Court of Appeals affirmed the trial court's decision to not provide an accomplice instruction, holding there was insufficient evidence. State v. Fair, No. 77180-9-I, slip op. at *3-4 (Wa.Ct.App. Div. I, filed October 8, 2018). The Court further upheld the restrictions on the State closing argument, holding "it was proper for the trial court to prohibit the State from arguing accomplice liability." Id. at *5.

However, the Court of Appeals opined that the trial court's restrictions "went too far" and held that "[t]he State must be allowed latitude to rebut the defense argument. The State may argue that the evidence of Johnson's guilt does not preclude a finding of Fair's guilt, so long as the State does not assert that the two were accomplices." Id.

The Court of Appeals' opinion does not explain how evidence of Johnson's guilt would not preclude a finding of Fair's guilt, other than the possibility that the two men were both involved in the murder.

The State now seeks review.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED

The trial court in this case issued a two-pronged ruling that both deprived prosecutors of a legitimate argument – that evidence of Cameron Johnson's complicity does not exonerate Fair – and that deprived the jury of the means to understand that argument through an instruction regarding the law of complicity. The Court of Appeals' decision recognizes that the restriction on the prosecutor's argument was error, but its opinion fails to correct that error. The decision conflicts with settled law and is of substantial public interest.

1. THE COURT OF APPEALS' DECISION IS INTERNALLY INCONSISTENT AND CONFLICTS WITH SETTLED CASE LAW GOVERNING CLOSING ARGUMENT.

This Court has repeatedly recognized that “prosecutors have ‘wide latitude to argue reasonable inferences from the evidence’”

and “are free to argue their characterization of the facts presented at trial and what inferences these facts suggest in closing argument.” In re Phelps, 190 Wn.2d 155, 166-67, 410 P.3d 1142 (2018). The Court of Appeals’ opinion below is inconsistent with this settled law and imposes crippling restrictions on the State’s closing argument. In effect, the court’s holding requires the State to prove that Fair committed the murder alone and that no one else assisted him in the crime. At the first trial, the defense repeatedly argued that any evidence of anyone else’s involvement in the crime was a reasonable doubt that Fair committed the murder. RP(4/6/17) 1252-93. This theme was repeated again and again. Id.

This argument would be appropriate if there was evidence that a single person committed the murder. For example, in a case where witnesses reported that a single person shot and killed a victim, evidence that the shooter was someone else could raise a reasonable doubt as to the defendant’s guilt.

However, in this case, Arpana Jinaga was brutally killed in the privacy of her own apartment over an uncertain period of time. She was restrained and assaulted. There were no witnesses to this murder. There was DNA evidence from two people – Fair and

Johnson – on items associated with the victim. Investigators could not determine whether one or two individuals were involved in the murder. RP(2/21/17) 655. Even the defense admitted multiple persons could have been involved in her death. CP 257. Under such circumstances, two individuals might each be complicit in her death.

The Court of Appeals recognized that the trial court unfairly restricted the State's ability to respond to the repeated defense arguments that evidence of Johnson's involvement was a reasonable doubt that Fair committed the murder.⁶ Yet the appellate court's attempt to correct the trial court's ruling is internally inconsistent, ineffectual, and conflicts with well-settled law. The Court of Appeals held that, "[t]he State may argue that the evidence of Johnson's guilt does not preclude a finding of Fair's guilt, so long as the State does not assert that the two were accomplices." Slip op. at *5.

However, evidence that Johnson committed the murder would, in fact, exonerate Fair *unless* another person was complicit

⁶ The State has not asked either the trial court or the Court of Appeals to prohibit the defense from making this argument. Rather, it has simply asked for the latitude to fairly respond in light of settled law regarding accomplice liability.

in committing the crime. Where there is evidence that two people participated in the crime, evidence that a second person participated simply does not exonerate the other. Therefore, under the Court of Appeals' opinion, while the prosecutor can say, "evidence of Johnson's guilt does not exonerate Fair," she cannot explain why that is so.

This restriction strips away the legal and theoretical underpinnings of the prosecutor's argument. It continues to force a binary choice on the jury: *either* Fair committed the murder *or* Johnson committed the murder. The possibility that Johnson assisted Fair, that the two committed the crime together, and the legal underpinnings for this possibility, is apparently *verboden*, although the jury will undoubtedly ponder this possibility, as it did before, because it is so obvious.⁷

The testimony at trial established that Fair and Johnson were alone together at the end of the night, and no one saw them again. Both men's DNA was found on several incriminating items

⁷ During the first trial, the prosecutor's simple act of recounting the basic facts about Johnson and Fair led the defense to move for a mistrial, claiming it ran afoul of the court's prohibition suggesting they committed the crime together. RP(2/14/17) 285-86. The trial court denied the motion, noting the facts recounted were accurate. *Id.* at 286.

in the same bag in a dumpster. Even with the restrictions at the first trial, the defense later reported that, according to their polling of the jury, at least five jurors thought Fair and Johnson committed the murder together. CP 253-54.

The Court of Appeals' ruling erroneously permits the defense to mislead the jury into believing that evidence that two people committed a crime necessarily means that one of them must be acquitted. This restriction has the effect of adding another element to the State's burden of proof: that Fair acted alone in committing the murder. This is not required under the law for good reason: the fact that there is not sufficient evidence to charge an accomplice should not and does not require the State to prove the principal committed the crime alone. This Court should accept review to correct this error.

2. THE COURT OF APPEALS ERRED BY HOLDING THAT THE JURY SHOULD NOT BE INSTRUCTED ON THE LAW OF ACCOMPLICE LIABILITY.

The State has argued and will continue to argue that Fair is the principal in the murder. Ms. Jinaga was strangled, and Fair's DNA was found on her neck. His DNA is on the duct tape that was used to gag her. His DNA is mixed with her blood on her bathrobe.

However, given the defense arguments based on evidence that Johnson may also have been involved in the crime, the jury should have been instructed on the law governing complicity. They were not instructed about it at the first trial, and their first question to the court was about accomplice liability. They asked: "Is it a reasonable doubt if there is a second person involved in the act?" CP 206; RP(4/11/17) 1369-70. This question from the jury was not surprising given that defense counsel repeatedly argued that evidence of anyone else's involvement was, per se, a reasonable doubt that Fair committed the murder.

In considering the evidence presented at trial, the jury did not ask whether it is a reasonable doubt if a *different* person was involved in the crime. Such a question would indicate that the jurors believed someone *other than* Fair committed the murder. Rather, the jury asked whether it is a reasonable doubt that a *second* person was involved in the crime, which is the argument that the defense made to the jury in closing argument and which the State was not permitted to rebut.

The answer to this question is plainly "no." Certainly under the facts of this case, evidence that a *second* person may be involved in the crime does not necessarily create a reasonable

doubt as to the guilt of the *first* person, as long as the jury is convinced that the first person committed the elements of the crime. The law of accomplice liability recognizes more than one person can be involved in a crime and that both persons do not need to be charged. A person may be convicted of murder even if another participant has never been charged, State v. Walker, 182 Wn.2d 463, 481-84, 341 P.3d 976, cert. denied, 135 S. Ct. 2844 (2015), or if the co-participant has been acquitted or convicted of a different crime. RCW 9A.08.020(6).

The only way for the jury to understand this point would be through instructions of law submitted by the court. Washington courts have repeatedly recognized that, "Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997).

The Court of Appeals analyzed the issue of whether an accomplice instruction was appropriate as a sufficiency of the

evidence issue, i.e., whether there was sufficient evidence to convict Fair as an accomplice to Johnson. However, the State does not seek to convict Fair as an accomplice; the evidence is that he was a principal in the murder. RP(4/4/17) 79-80.

An accomplice instruction is appropriate in order for the jury to understand the defense and State arguments about Johnson. The defense theory of the case – that evidence implicating Johnson is necessarily a reasonable doubt as to Fair’s guilt – presumes a definition of accomplice liability that does not accord with the law. The jury’s question during deliberations demonstrates its confusion on this issue, and the next jury is equally likely to be confused. An instruction defining complicity does not require the defense to change any part of their argument, but it will permit the jury to assess defense counsel’s arguments in light of the law, rather than simply accept or reject their arguments based on mere assertion.

The Court of Appeals erred when it held such an instruction should not be given and this ruling unfairly limits the State’s ability to respond to a defense argument that is misleading and an unfair statement of the law. The decision undermines a central tenet of complicity law in Washington and conflicts with numerous holdings of this Court, making review appropriate under RAP 13.4(b)(1). To

the extent this decision undermines settled law and undercuts the ability of the State to separately prosecute co-participants in serious rapes and murders, the decision is a matter of substantial public interest that should be determined by the Supreme Court, making review appropriate under RAP 13.4(b)(4).

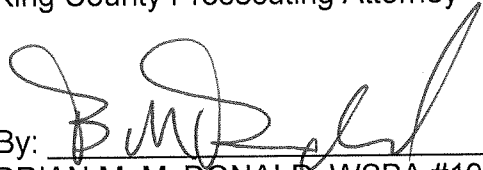
E. CONCLUSION

For all the foregoing reasons, and to prevent a second jury from being unable to decide this case because they are not being provided the law that would inform their deliberations, this Court should grant review.

DATED this 30th day of October, 2018.

Respectfully submitted,

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APPENDIX A

2018 OCT -8 AM 10:16

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 77180-9-1
Appellant,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
EMANUEL DEMELVIN FAIR, aka ANTHONY P. PARKER,)	
)	
Respondent.)	FILED: October 8, 2018
_____)	

BECKER, J. — Emanuel Fair’s trial for first degree murder ended in jury deadlock. We granted review to decide whether jurors should have been given an accomplice instruction. We agree with the trial court that the accomplice instruction proposed by the State was not warranted. There was evidence implicating a suspect other than Fair, but no evidence that the two were complicit in the criminal act.

Arpana Jinaga was killed on November 1, 2008, at approximately 8:00 a.m. on a Saturday morning. Her nude body was found two days later in the bedroom of her Redmond apartment. Her body was covered in an oily substance, as were other items in the apartment. Medics determined that Jinaga had been strangled to death. There was evidence of sexual assault. There was

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also evidence the apartment had been broken into—it appeared the front door had been forced open.

A primary suspect at first was Cameron Johnson, Jinaga's neighbor. His DNA (deoxyribonucleic acid) was on a bottle of motor oil found in a bag in a dumpster near the crime scene. The motor oil was later determined to be the substance on Jinaga's body. There were two calls made from Johnson's phone to Jinaga's phone around 3:00 a.m. the morning she was killed. There was evidence that Johnson drove to the Canadian border later that day and attempted to cross before being turned back.

In police interviews, Johnson said that he had attended a Halloween party hosted by Jinaga the night before her death. He admitted that he was sexually attracted to Jinaga and wanted to "hook up" with her that night. He claimed that did not happen. He said he went to bed in his own apartment, alone, sometime after midnight. He awoke around 3:00 a.m. to "moaning" originating from Jinaga's apartment. Johnson said that he soon fell back asleep and stayed in bed until around 10:00 a.m. He said he did not remember calling Jinaga in the middle of the night. He could not explain why his DNA was on the bottle of motor oil. When asked about his trip to the Canadian border, Johnson said that he "just wanted to go for a drive." When told that police had found in his car a printout from November 1 showing pawn shop locations, Johnson responded, "I don't remember that at all."

Fair, another guest at the Halloween party (but not a resident of the apartment complex), was identified as a suspect after testing showed that his

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DNA was on Jinaga's neck. His DNA was also on duct tape found at the crime scene that may have been used as a ligature, and on Jinaga's bathrobe. The bathrobe was discovered in the same bag as the oil bottle marked with Johnson's DNA.

During an interview on August 18, 2009, detectives asked Fair about Johnson. Fair said that he and Johnson met during the party. They talked about a music editing program. Fair said they went to Johnson's car in the parking lot of the apartment complex sometime around midnight and briefly listened to music before returning to the party. Fair did not recall seeing Johnson again. Johnson agreed with Fair's account of the time he and Fair spent together at the party.

Fair said that after the party ended around 1:00 a.m., he returned to a friend's apartment (in the same complex) and went to sleep. Fair's phone records showed various calls to three women between 2:00 and 5:00 a.m. None of those calls were to Jinaga.

Fair and Johnson each denied any involvement in Jinaga's death and denied any knowledge of the other's potential involvement.

The State charged Fair with first degree murder on October 29, 2010. The information alleged that the murder was premeditated and committed during the course of a burglary and rape. A special allegation of sexual motivation was also included. No charges were filed against Johnson.

During pretrial hearings, the State posited that Johnson may have assisted Fair in committing the murder. An accomplice can be charged with, and liable for, a particular crime committed by his principal. State v. Munden, 81 Wn.

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App. 192, 197, 913 P.2d 421 (1996). There must be proof that the alleged accomplice aided or otherwise participated in the crime. See RCW 9A.08.020(3)(a). The State described Johnson as an "uncharged accomplice" and asserted that he "may have been involved in some way." The court granted a motion by Fair to prohibit the State from arguing along these lines in opening statement, reasoning that there was no evidence Fair and Johnson "did anything together."

Trial occurred between February and April 2017. The court allowed Fair to introduce evidence about Johnson under the "other suspect" rule, applicable to evidence that a specific person besides the defendant committed the charged crime. State v. Ortuno-Perez, 196 Wn. App. 771, 778, 782, 385 P.3d 218 (2016). The jury heard that Johnson's DNA was on the oil bottle. The jury also heard about Johnson's drive to the border.

Johnson, called by Fair as a witness, answered a limited set of questions after invoking his privilege against self-incrimination. He told jurors that he was interviewed by detectives four times and received immunity for two of those interviews; that he was not granted immunity for his trial testimony; and that he was never arrested, charged, or prosecuted in connection with Jinaga's death. The jury heard recordings of the police interviews with Johnson. They also heard a recording of Fair's interview. Fair did not testify.

The instructions proposed by the State included a standard instruction defining "accomplice":

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) 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 shown to establish that a person present is an accomplice.

Typically, when accomplice liability is an issue, the instruction defining "accomplice" will be accompanied by a reference to that term in the to-convict instruction explaining that the jury must find that "the defendant or an accomplice" committed the criminal act. State v. Teal, 117 Wn. App. 831, 835, 73 P.3d 402 (2003), aff'd, 152 Wn.2d 333, 96 P.3d 974 (2004). Here, the State's proposed to-convict instruction did not include the words "or an accomplice" or any other language that would have allowed the jury to convict Fair on a theory of accomplice liability. The prosecutor asserted that the reason for including the definitional instruction was to counteract the anticipated defense argument that jurors faced a "binary choice" between Fair and Johnson. The prosecutor wanted to use the accomplice definition to suggest that the two men might have acted together to kill Jinaga, not to prove that they actually did. As support for the proposition that the two men might have acted together, the prosecutor observed that they spent time together during the party; their DNA was on items relevant to the crime found in the same bag; and they were both awake in the middle of the night calling and texting women.

Fair opposed giving the instruction. He argued it was not necessary to define "accomplice" for jurors because the State was not utilizing an accomplice liability theory as a basis to convict him. The court agreed with Fair:

I think that really what we have here is we have evidence that Mr. Fair committed the crime. We have his DNA on the bathrobe and on the neck swab. We have evidence that Cameron Johnson committed the crime. We have his DNA on the oil bottle.

Both of them have made inconsistent statements, Mr. Fair about whether he was asleep or not and Mr. Johnson about whether he called Ms. Jinaga or not.

But we don't have any evidence that links the two of them. They just met that day of the Halloween party. There is no evidence they knew each other before. They spent time talking and listening to music in his car, in Johnson's car. There is no evidence there was any contact whatsoever after the party.

And you have the phone records from both phones. They both called all sorts of people in the early morning hours after the party. There is no evidence they ever called each other.

I just don't see any connection between the two of them that would justify the giving of an accomplice instruction.

The court declined to give the instruction, and the court also prohibited the State from arguing accomplice liability in closing.

Fair used closing argument to emphasize the "other suspect" evidence. He urged that the evidence of Johnson's guilt created reasonable doubt as to Fair's guilt. In rebuttal, the prosecutor reminded jurors that Fair was on trial, not Johnson.

The case was submitted to the jury on April 6, 2017. Deliberations failed to produce a unanimous verdict. On April 19, 2017, the court declared a deadlock and discharged the jury.

In anticipation of retrial, the State moved for reconsideration of the denial of the accomplice instruction. At a hearing on July 7, 2017, the prosecutor

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argued that the court's rulings unfairly deprived the State of latitude to suggest that Fair and Johnson may have committed the crime together and left jurors with "an either/or proposition, either it's Cameron Johnson or Emanuel Fair." The court found no basis to change its decision.

We granted the State's request for discretionary review.

The State maintains that it was error to refuse to give the accomplice instruction. We review a trial court's choice of jury instructions for an abuse of discretion. State v. Hathaway, 161 Wn. App. 634, 647, 251 P.3d 253, review denied, 172 Wn.2d 1021 (2011). Instructions are constitutionally sufficient if they properly inform the jury of the applicable law, are not misleading, and allow the parties to argue their theories of the case. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). "Each side in a case may have instructions embodying its theory of the case if there is evidence to support that theory; it is error to give an instruction which is not supported by the evidence." State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993); see also Munden, 81 Wn. App. at 195. When determining if the evidence at trial was sufficient to support the giving of an instruction, we view the supporting evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

An accomplice theory requires proof that a person solicited, commanded, encouraged, or requested commission of the particular crime, or aided or agreed to aid commission of the crime. RCW 9A.08.020(3)(a). Mere presence is insufficient. State v. Knight, 176 Wn. App. 936, 949, 309 P.3d 776 (2013), review

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denied, 179 Wn.2d 1021 (2014). The State must show that the accomplice had actual knowledge that the principal was engaged in the crime eventually charged and actual knowledge that he (the accomplice) was furthering that crime.

RCW 9A.08.020(3)(a); State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

On appeal, as below, the State relies primarily on the fact that an item bearing Johnson's DNA (the oil bottle) was found with an item bearing Fair's DNA (the bathrobe). The State also cites evidence that around 2:30 a.m., Johnson's laptop was used to access the music editing program Johnson and Fair had discussed during the party. According to the State, this proves that Fair and Johnson were together later, around the same time that a call was made from Johnson's phone to Jinaga's.

The State implies it can be inferred from the DNA evidence that Johnson handled the oil bottle and Fair handled the bathrobe and that each man was present in Jinaga's apartment after the party. Assuming without deciding that both inferences are reasonable, we cannot say that the presence of both items in the same bag after the murder gives rise to a reasonable and nonspeculative inference that Fair and Johnson were in the apartment together when the murder was committed or that either of them knowingly aided the other's commission of the murder. It is similarly speculative to say that because Fair and Johnson had talked about the music editing program earlier in the evening, the two men were together near 2:30 a.m. when Johnson's computer was used to access that program. Even assuming they were, that would not tend to show they were together at the time of the murder, which occurred over five hours later,

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according to evidence introduced by the State. An issue should not be submitted to jurors when the evidence supporting it is speculative and conjectural. State v. Mriglot, 88 Wn.2d 573, 578, 564 P.2d 784 (1977).

The jury sent a question to the court during deliberations: "Is it a reasonable doubt if there is a second person involved in the act?" The court referred the jury to their instructions. The State points to the jury's question as affirmation that an accomplice instruction was needed. But the possibility that jurors were unsure how to answer that question does not change the standard the State was required to meet to get an accomplice instruction.

The State also cites Fair's closing argument to show an accomplice instruction was needed. Defense counsel was entitled to argue that the evidence concerning Johnson cast doubt on Fair's guilt. "Other suspect" evidence is admissible specifically because it suggests reasonable doubt as to the defendant. State v. Giles, 196 Wn. App. 745, 757, 385 P.3d 204 (2016), review denied, 188 Wn.2d 1007 (2017). When evidence of another suspect comes in, obtaining a conviction is likely to be more difficult, but that is not a reason to provide a jury instruction unsupported by the record. The State seeks the definitional instruction not to convict Fair as Johnson's accomplice, but rather to help jurors understand that Fair could be guilty of the murder notwithstanding evidence that another suspect might have been involved in the act. The cases cited by the State do not show that an accomplice instruction is warranted when there is insufficient evidence of complicity. See, e.g., State v. Allres, 92 Wn. App.

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931, 935, 966 P.2d 935 (1998) (accomplice instruction was properly given when the record adequately showed the defendant's participation as an accomplice).

On the record before the trial court, the State's request for an accomplice instruction was correctly denied.

A second issue is whether the court unduly restricted what the State could say in closing argument. To counter the expected defense argument that the evidence of Johnson's guilt created reasonable doubt about Fair's guilt, the prosecutor wanted to tell jurors that "evidence implicating Mr. Johnson doesn't necessarily exculpate Mr. Fair," and "The fact that there is evidence implicating Mr. Johnson doesn't mean Mr. Fair didn't do the crime." The court refused to allow this argument, in part because it was too close to arguing accomplice liability and in part because the phrasing of the argument made it hard to understand. The court told the prosecutor, "If you get up in front of the jury and say, 'Evidence implicating Cameron Johnson doesn't exonerate Emanuel Fair,' the jury will be saying, 'What? What does that mean?' That's not permissible."

Because the State's accomplice theory lacked evidentiary support, it was proper for the trial court to prohibit the State from arguing accomplice liability. We affirm the limitations on argument imposed by the court to the extent that they prevent the State from arguing that Johnson was Fair's accomplice or vice versa. The court went too far, however, by prohibiting the State from arguing that evidence implicating Johnson did not exculpate Fair. The State must be allowed latitude to rebut the defense argument. The State may argue that the evidence

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of Johnson's guilt does not preclude a finding of Fair's guilt, so long as the State does not assert that the two were accomplices.

The case is remanded to the trial court for further proceedings not inconsistent with this opinion.

Becker, J.

WE CONCUR:

Schubert, J.

Luppelwick, CJ.

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

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