

NO. 35773-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JIMMEE CHEA,

Petitioner.

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DIVISION II
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STATE OF WASHINGTON

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

The Honorable Karen L. Strombom

BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR

1. The jury instruction on accomplice liability unconstitutionally relieved the state of its burden of proving every element of the crimes.

2. There was insufficient evidence to convict petitioner of five counts of aggravated first degree murder under accomplice liability.

3. The jury instruction and special verdict form on the aggravating factor were deficient because they failed to require the jury to find that petitioner personally engaged in the aggravating act.

4. The trial court abused its discretion by failing to conduct an inquiry into jury misconduct.

5. Petitioner was denied his constitutional right to effective assistance of trial counsel.

6. Cumulative error denied petitioner his constitutional right to a fair trial.

7. Petitioner was denied his constitutional right to effective assistance on direct appeal.

Issues Pertaining to Assignments of Error

1. Did the jury instruction on accomplice liability unconstitutionally relieve the state of its burden of proving every element

of the crimes because the instruction was ambiguous and there was a reasonable likelihood that the jury misapplied the instruction?

2. Was there insufficient evidence to convict petitioner of aggravated first degree murder under accomplice liability when the evidence failed to prove that petitioner had knowledge of the intent to commit multiple murders as part of a common scheme or plan?

3. Was the jury instruction and special verdict form deficient because they failed to require the jury to find that petitioner personally engaged in the aggravating act?

4. Did the trial court abuse its discretion by failing to conduct an inquiry into jury misconduct?

5. Was petitioner denied his right to effective assistance of counsel because trial counsel failed to conduct an appropriate investigation to determine what defenses were available?

6. Did cumulative error deny petitioner his right to a fair trial?

7. Was petitioner denied his right to effective assistance of counsel on direct appeal?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On July 20, 1998, the state charged petitioner, Jimmee Chea, Ri Le, Samath Mom, Khanh Trinh, Sarun Ngeth, Marvin Leo, John Phet, and Veansa Sok with five counts of aggravated first degree murder and five counts of first degree assault, while armed with a firearm.² CP 1-11. On March 21, 2001, John Chak was arrested as an accomplice and entered into a plea agreement with the state in exchange for his testimony. RP³ 3972-75. Sok entered a plea and agreed to testify for the state. RP 4477-79. Ngeth entered into a plea agreement with the state and Leo pled guilty as charged. RP 5779, 5960. Chea and Phet stood trial before the Honorable Karen L. Strombom and was convicted as charged by a jury on June 27, 2002. RP(6/27/08) 1-27.

On June 28, 2002, the court sentenced Chea and Phet to five life sentences without parole, consecutive standard range sentences for the first degree assaults, and consecutive firearm sentence enhancements for each count. RP (6/28/02) 2-5, 7-8; CP 70-86. Chea appealed and this

¹ In accord with RAP 10.3 (a)(4), the statement of the case only contains facts and procedure relevant to the issues presented for review.

² Le fatally shot his brother Trinh and himself at the time of their arrest. RP(2/9/00) 59, 68, 74. Mom committed suicide in jail after his arrest. RP (2/9/00) 59, 68.

³ The verbatim report of proceedings for the trial are designated as RP; sequentially-numbered pretrial hearings are designated as IRP; all other hearings are designated by date.

Court affirmed Chea's convictions in an unpublished opinion filed on May 3, 2005.⁴ Chea filed a personal restraint petition which was granted by this Court on December 11, 2007.

2. Substantive Facts⁵

On July 5, 1998, just before two in the morning, five people were killed and five others were injured by gunfire at the Trang Dai Café, a Vietnamese restaurant and karaoke bar in Tacoma.⁶ RP 2522-36. Witnesses to the shooting could not identify the gunmen who were dressed in dark clothing and never spoke. RP 2630, 2637-39, 2773-79, 2788, 2808-09, 2907, 2949, 3079, 3097-98, 3103, 3180, 3295-98, 3305, 3308, 3760. Ballistics experts determined that at least five different guns were fired inside and outside the café but police never recovered any weapons connected to the shooting. RP 2680-81, 2695-96, 2822, 3411-12, 3477, 5404-09, 5413, 5418, 5420.

The police obtained a videotape from surveillance cameras installed at a neighboring business that showed two cars backing into an alley behind the Trang Dai Café near the time of the shooting. RP 2999-

⁴ State v. Phet, 127 Wn. App. 1016 (2005), review denied, 156 Wn.2d 1004 (2006).

⁵ Different names for the same person are referenced in the transcripts but last names are used here to maintain consistency.

⁶ Four patrons, Duy Quang Le, Hai Quang Le, Nhan Ai Nguyen, Tuong Hung Dang Do, and a waitress, Ngoc Tuyen Thi Vo, were killed. Five others, Khanh Van Huynh, Phat Ngoc Nguyen, Son Hoang Kim, Hoai Nguyen, and Huynh Thi Do were injured.

3002, 3014, 3018, 3217, 3371, 3393, 3396. An investigation linked the cars to Chea and Sok. RP 3206-3212, 3222, 3437. Police knew that Chea belonged to a Cambodian gang called the LOCs and suspected that they might be involved in the shooting. RP 3437-38. Twenty people were rounded up and taken to police headquarters. RP 3642. When police questioned Sok, he admitted his involvement in the shooting and implicated the others, which led to the arrest of Chea, Phet, Ngeth, and Leo. RP 3466-76.

At trial, Sok testified that on July 4, 1998, he was in Idaho camping with his parents and returned to his home in Tacoma around six or seven in the evening. RP 4338. He went to see fireworks with his girlfriend and after taking her home, he decided to see if Ngeth was at home. RP 4339-46. Ngeth and Leo were coming out of Ngeth's house as Sok drove up so they got in his car and they went driving around because they had no plans. RP 4522-23. They ended up at Jack-In-The-Box for something to eat and received a phone call from Trinh who asked if they wanted to "put in work," which means "a drive-by." RP 4525, 4530-31. Sok agreed to wait for Trinh back at Ngeth's house. Ten minutes later Chea arrived in his car with Trinh, Le, Mom, and Phet. RP 4388-91. Chea asked them if they wanted to "put in some work," which meant "we were going to try to go find some -- something to do. Somebody to shoot

at.” RP 4395-96. Le mentioned that he saw Kim earlier at the Trang Dai Café and wanted to “get him.” RP 4396. Sok told Chea that he had his Tek 9 and Ngeth’s .380 and someone from Chea’s car put a gym bag with guns in Sok’s trunk. Mom got out of Chea’s car into Sok’s car and at that time Sok saw Chak in Chea’s car. RP 4399-4403.

They went to look for a car to steal “[s]o that when we do put in work, we wouldn’t have to use our own car.” RP 4403-04. They found a Honda Accord parked on a street and Le and Trinh broke into the car but could not get it started. RP 4406-07. Le told Sok they would go by the café anyway so Sok followed Chea’s car. They stopped at a Red Apple store near the café where Le and Chak got out to call the café to find out if Kim was there. RP 4414-16, 4559. Le told them that Kim was at the café so Sok followed Chea down an alley behind the café where they parked. RP 4417-18. Sok stayed in his car while Mom and Leo got out carrying Sok’s Tek 9 and Ngeth’s .380. Le, Trinh, Phet, and Chak got out of Chea’s car and took the guns out of Sok’s trunk. Chea remained in his car. RP 4422-24. Le, Trinh, Phet, Chak, Mom, and Leo covered their faces with bandannas and went through the alley to the café with guns in hand, “I’m just thinking that they was gonna go to the front of the café and just shoot from the outside.” RP 4424-28. Within Fifteen to twenty seconds, Sok heard gunfire and then moments later he saw Le and Chak running

back from the alley with Mom and Leo following and Trinh and Phet behind them. Everyone got in the cars and they drove off to Le and Trinh's house. RP 4428-34. They stayed there about an hour and then Sok left with Ngeth and Leo. RP 4438.

Sok knew of no plan for that night. RP 4551-52, 4577. No one talked about anything specifically, just that they were "going out to do something." RP 4650. When asked if Le was running the show, Sok replied, "He was doing a lot of the talking, yes." RP 4568-69. Sok acknowledged that when they went to the café, "it was everyone's choice whether they got out or stayed in" the cars. RP 4601.

Chak testified that on July 4, 2008, Chea called him and then came to pick him up to "[j]ust hang out." RP 3898-99. Chea was wearing some red clothing although LOCs tend to wear blue, but Chak did not think it was abnormal because "sometimes we clown around and wear red." RP 3901. They went to Le and Trinh's house and Mom and Phet were there. While at the house, Chak heard Chea and Le talking about Kim "mean mugging" Chea, which means "giving dirty looks," a form of disrespect. RP 3901-03. At some point in time, Le and Trinh left to go buy red clothing and changed into the red attire when they returned. Then they all got into Chea's car and went to Ngeth's house where Ngeth was in Sok's car with Sok and Leo. RP 3904-09. Le got into Sok's car and

everybody talked about a drive-by directed at Kim. RP 3910. They went to look for a car to steal to use for the drive-by and found a Honda Accord. Chak and Le broke into the car but could not get it started. RP 3911-12. They drove to a Red Apple where Chea told Chak to call the Trang Dai Café to see if Kim was there and Le provided the phone number. Chak called and asked for Kim and when he answered Chak hung up. RP 3914-15.

Thereafter, they went to the café and backed into an alley where Chak, Mom, Phet, and Trinh got out of Chea's car and Le and Leo got out of Sok's car. Chea stayed in his car and Sok and Ngeth stayed in Sok's car. Le took the guns out of Chea's trunk and handed them out. They made their way through the alley and Le told Trinh and Phet to guard the back door of the café. RP 3916-20. Chak, Le, Mom, and Leo went to the front and Le told Chak to open the front door so he pushed it open and everybody rushed in. The other three began shooting but Chak did not fire, "I could have pulled the trigger, but I didn't." RP 3920-21. After about a minute of gunfire, they moved back through the alley to the cars. Le kept shooting at the walls of the café. Trinh and Phet were already at the cars. Everybody piled into the cars and went to Le and Trinh's house. RP 3921-23.

Chak knew of no other plan other than to steal a car and do a drive-by. RP 4064-67. He felt that Le was in charge. RP 4078. When they backed into the alley behind the Trang Dai café, he thought they were just going to the front and shoot at the building and windows. No one said to open fire inside the café. RP 4075-79. When asked whether he thought they went to the café because Kim mean mugged Chea, Chak replied, "If you are asking me for the reason, I think that it all got out of hand." RP 4097. Chak acknowledged that "no one really planned this thing out." RP 4232.

Kim testified that he would go to the Trang Dai Café two or three times a week. RP 3057. A few months before the shooting, he got into a fight with Le at the café because he believed Le stole from his friend. They took the fight outside and a shot was fired. Kim was arrested but never convicted of any crime as a result of the incident. RP 3063-66.

Kim recognized Chea but did not know his name or if he was in a gang. RP 3059-62. Kim saw Chea drive by the café a couple of months before the shooting and he raised his hand in anger at Chea but never glared hard at him because he has no gripe against Chea. RP 3067, 3096.

Kim was at the Trang Dai Café around nine or ten in the evening on July 4, 1998 with his cousin and friend. RP 3067-70. He received a call at the café that night and when he answered the phone the caller hung

up. RP 3074-75. About a half hour later, "two guy[s]" opened the front door and began shooting around the café. RP 3077. When he heard the gunshots, he got down on the floor. RP 3078-79. Kim was injured on his pinky finger and treated at the hospital. RP 3080. He could not see the faces of the shooters or describe what they were wearing. RP 3079.

Kim initially told detectives that he did not believe he was the target because he did not understand why Le would shoot up the café when Le could have taken a shot at him on the street. RP 3092. A year after the shooting, Kim informed detectives for the first time that he heard the shooters say, "Die, Vietnamese, die." RP 3093.

Fourteen-year-old Salean Chouap testified that on July 4, 1998, she was staying with her sister and husband, Trinh. Trinh's brother Le and his wife also lived at the house. Chouap went shopping with her sister and Trinh and he bought some red clothes. RP 4690-98. Chouap recalled waking up late that night because Ri was banging on the front door and screaming. She opened the door for him and went back to sleep upstairs. RP 4701-02. The next day, some of Trinh's friends came over to the house. Chouap saw Le and Chea put guns into a plastic garbage bag and Chea took the guns outside to a Black Thunderbird. RP 4703-04, 4712-14, 4722-23.

Leo, who pled guilty to all ten counts because he “felt guilty and remorseful” and “wanted to take full responsibility” for his actions, testified that Chea and Phet were not at the Trang Dai shooting. RP 5960-62, 6012, 6017. Leo previously told police that they were involved “just to make it look good” because he was getting a plea bargain. RP 6023-24. He named Chea and Phet because detectives were interrogating him and “putting words in his mouth.” RP 6032-33. During an interview, they showed him pictures of the other co-defendants and he “implicated them” because he was scared. RP 6043-46.

Chea testified that he was living at this parent’s house on July 4, 1998. After visiting a friend in the afternoon he went to Seattle and bought some marijuana from an acquaintance. He drove around Seattle for a couple of hours and then went to the waterfront in Tacoma but could not find any of his friends. He went home and did not see anyone although his sister was at home. Around 12:30 that night Trinh showed up and borrowed his car. RP 6355-58, 6441-42. Trinh borrowed Chea’s car frequently because he had custom cars and did not want to use them when he went to clubs. RP 6395-97. Chea learned about the Trang Dai shooting when he read the newspaper the next day. RP 6360-61.

On July 18, 1998, police raided Chea’s parents house. When Chea opened the door, the police told him to come outside and turn around, “A

lot of bad words. Get on my knees, put my face on the ground, and they came and cuffed me up and handcuffed my little sister.” RP 6373-74. After an hour-long search of the house, the police took Chea and his sister to the police station for questioning. RP 6374-75. The police placed Chea under arrest that day and booked him for the murders and assaults. RP 6445.

C. ARGUMENT

1. THE ACCOMPLICE LIABILITY JURY INSTRUCTION UNCONSTITUTIONALLY RELIEVED THE STATE OF ITS BURDEN OF PROVING EVERY ELEMENT OF THE CRIME.

The jury instruction on accomplice liability violated Chea’s right to due process because it relieved the state of its burden of proving beyond a reasonable doubt every element of first degree murder. Reversal is required because the unconstitutional error was not harmless.

Due process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Consequently, a jury instruction is constitutionally defective if it relieves the state of its burden of proving every element of the crime beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 521, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). The

standard for reviewing an ambiguous instruction is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed 2d 385 (1991). The challenged instruction must be considered in the context of the instructions as a whole and the trial record. Id.

In Sarausad v. Porter, 479 F.3d 671, 692-94 (9th Cir. 2007), cert. granted, Waddington v. Sarausad, ___ S. Ct. ___ (Mar. 17, 2008), the Ninth Circuit Court of Appeals held that accomplice liability jury instructions virtually identical to the jury instruction given here were unconstitutional because they were ambiguous and there was a reasonable likelihood that the jury misapplied the ambiguous instruction, thereby relieving the state of its burden of proving every element of the crime beyond a reasonable doubt.

The accomplice liability jury instructions given in Sarausad provided in relevant part:

You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.

A person is guilty 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.

Id. at 685 (Emphasis added by the Court.)

Similarly, the accomplice liability jury instruction given here provided in relevant part:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

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 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.

Jury Instruction 11 (Supp CP ___, Jury Instruction 11, 6/27/02).

The Court concluded that the jury instructions were ambiguous because they failed to provide an “explicit statement that an accomplice must have knowledge of the actual crime the principal intends to commit.” Id. at 690. The Court reasoned that the critical issue is the definition of the term “a crime” because “it could mean ‘the crime’ actually committed by the principal (whatever it turned out to be), or it could mean ‘the crime’ the accomplice had knowledge the principal intended to commit.” Id.

The Court noted that the accomplice liability instructions in Sarausad complied with the decision in State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2001). However, the Court determined that the instructions were inherently ambiguous because “[t]here is no sentence in the instructions specifically instructing the jury that a person can be guilty of ‘a crime’ as an accomplice only if that person knows that ‘a crime’ is ‘the crime’ the principal intends to commit.” Id. at 690-91.

The Court emphasized that on direct appeal, the Washington Court of Appeals held that the jury instructions were consistent with the Washington statute, and that both the instructions and the statute were based on the “in for a dime, in for a dollar” theory of accomplice liability. Id. at 691. The Court observed that the judges, who are well-trained professionals, read the statute and instruction as instructing the jury to convict Sasausad even if he did not know that the principal intended to commit murder. Id. (Emphasis added by the Court.) Given the Court of Appeals’ reading of the statute and instructions, the Court concluded that it “was hard pressed to read the very same statute and instructions as unambiguously instructing the jury to do precisely the opposite – to convict Sasaurad only if he knew that [the principal] intended to commit murder.” Id. (Emphasis added by the Court.)

Citing, *inter alia*, Liparota v. United States, 471 U.S 419, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985), the Court illustrated that jury instructions must frequently clarify, not merely parrot, the statute of conviction. Sarausad, 479 F.3d at 692-93. Finding that the accomplice liability instructions, which essentially tracked the statutory language, were no less confusing than the statute itself, the Court held that the jury instructions were ambiguous. *Id.* at 692. Accordingly, the accomplice liability jury instruction given here, which was virtually identical to the instructions in Sarsausad, was inherently ambiguous.

Once it is determined that the jury instruction is ambiguous, the petitioner must next establish that there is a “reasonable likelihood” that the jury misapplied the ambiguous instruction in a way that relieved the state of its burden of proving every element of the crime beyond a reasonable doubt. The petitioner “need not establish that the jury was more likely than not impermissibly inhibited by the instruction” in order to satisfy the reasonable likelihood standard. *Id.* at 692 (citing Estelle, 502 U. S. at 72; Boyde v. California, 494 U.S 370, 380, 110 S. Ct. 1190, 10 L. Ed. 2d 316 (1990)).

Sarausad involved three defendants. Cesar Sarausad was nineteen years old and a member of a gang called the 23rd Street Diablos. *Id.* at 674. He was driving around with other gang members and they decided to go to

Ballard High School to retaliate against another gang, the Bad Side Posse. On the way to Ballard, they stopped and met some other gang members. Brian Ronquillo obtained a gun and got into Sarausad's car with Jerome Reyes riding in the back seat. Sarausad drove to Ballard where three rival gang members were standing outside the school. Sarausad slowed down as he drove closer to the curb and Ronquillo fired four to ten shots from the passenger seat. Two of the three were unharmed but one was shot and killed and another student was struck in the leg by a bullet fragment. *Id.* at 674-75.

The state offered plea agreements and lenient treatment to other gang members for their testimony. Sarausad was convicted of one count of second-degree murder, two counts of attempted second-degree murder, and one count of second-degree assault under accomplice liability. *Id.* at 675. The Ninth Circuit Court concluded that there was a reasonable likelihood that the jury misapplied the accomplice liability instructions because despite the thin evidence that Sarausad knew of Ronquillo's intent to commit murder suggests that the jury incorrectly believed that such proof was not required. *Id.* at 693.

Similar to Sasaurad, Chea, only eighteen years old at the time of the shooting, was convicted of five counts of aggravated first degree murder on thin evidence based on the testimony of co-defendants. The

record substantiates that there was no direct evidence that Chea, an alleged driver, knew that the shooters intended to commit murder.

According to Sok, "put in work" meant a drive-by and Le wanted to get Kim. RP 4525, 4530-31, 4395-96. Sok agreed that Le was running the show. RP 4568-69. Le and Chak went to call the café and found out that Kim was there. RP 4414-18, 4559. When Le, Trinh, Phet, Chak, Mom, and Leo got out of the cars and went through the alley to the café, Sok was thinking they "were gonna go to the front of the café and just shoot from the outside." RP 4424-28. Sok knew of no specific plan for that night, just that they were "going out to do something." RP 4551-52, 4577, 4650.

According to Chak, he heard Le and Chea talking about Kim "mean mugging" Chea, which means "giving dirty looks." RP 3901-03. Chak knew of no plan other than to steal a car and do a drive-by. RP 4064-67. He felt that Le was in charge. RP 4078. When they backed into the alley behind the café, Chak thought they were just going to the front and shoot at the building and windows. No one said to open fire inside the café. RP 4075-79. He believed "it all got out of hand." RP 4232.

It is evident from the testimonies of Sok and Chak, who were witnesses for the state, that Chea, who remained in his car, had no

knowledge that the actual shooters would commit murder. Neither Sok nor Chak testified that there was a plot to commit murder. Chak acknowledged that “no one really planned this thing out.” RP 4232. Furthermore, Kim, the intended victim, testified that he never glared hard at Chea and that he had no problem with Chea. RP 3059-62, 3067, 3096. Consequently, the evidence fails to show that Chea knew of a premeditated intent to commit murder.

As in Sarausad, the accomplice liability jury instruction given here, particularly in light of the fact that the trial court failed to provide an instruction on the definition of knowledge, relieved the state of its burden of proving every element of the crime beyond a reasonable doubt. Reversal is required because the unconstitutional error violated Chea’s right to due process and the error was not harmless. Sarausad, 479 F.3d at 690-94.

2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT CHEA OF AGGRAVATED FIRST DEGREE MURDER UNDER ACCOMPLICE LIABILITY.

Reversal and dismissal is required because there was insufficient evidence that Chea, as an accomplice, committed first degree murder as part of a common scheme or plan.

In a criminal prosecution, due process requires that the state prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, sect. 3. “[T]he reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’ ” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970));⁷ Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001). A claim of insufficiency admits the truth of the state’s evidence and all inferences that can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

⁷ The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty.” In re Winship, 397 U.S. at 364.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1996), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

Washington's accomplice liability statute, RCW 9A.08.020, requires knowledge of the specific crime, and not merely any foreseeable crime committed as a result of the complicity. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). Absent that knowledge, Washington law does now allow conviction for crimes committed by co-conspirators, whether or not they are foreseeable. Id. at 248. The statute requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged. State v. Cronin, 142 Wn.2d 568, 578, 14 P.3d 752 (2000)(citing State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000)).

Under RCW 9A.32.030(1)(a), a person commits first degree murder when, "with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person. . . ." "A person is guilty of aggravated first degree murder if he or she commits

first degree murder as defined by RCW 9A.32.030(1)(a)” and one or more statutory aggravating circumstances exists. RCW 10.95.020.

The aggravating factor found here is that “[t]here was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person.” RCW 10.95.020 (10). To prove the existence of this aggravating factor, there must be a nexus between the murders. State v. Yates, 161 Wn.2d 714, 805, 168 P.3d 359 (2007). A sufficient nexus exists between the killings when an overarching criminal plan connects the murders. State v. Finch, 137 Wn.2d 792, 835, 975 P.2d 967 (1999). The aggravating factor refers to a larger criminal design, of which the charged crime is only part. State v. Pirtle, 127 Wn.2d 628, 662, 904 P.2d 245 (1995). See also, State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984)(killings were in furtherance of a gambling scheme); State v. Grisby, 97 Wn.2d 493, 496, 647 P.2d 6 (1982)(multiple killings in revenge for being sold bad quality drugs).

Accordingly, to establish that Chea committed aggravated first degree murder as an accomplice, the state had to prove beyond a reasonable doubt that Chea knew that the actual shooters would commit the murders and an overarching plan connected the murders. The record substantiates that the state failed to meet its burden of proof.

As argued above, see supra, pages 17-19, there was no collective plan to commit murder according to Sok and Chak, who entered into plea agreements with the state for their truthful testimony. Sok and Chak repeatedly stated that they knew nothing beyond stealing a car and doing a drive-by. No one ever said, "Hey, four of you guys are going to go up to the door and open fire on the inside." RP 4076. Chak agreed that "no one really planned this thing out." RP 4232-33. When asked about a rationale for the Trang Dai shooting, Chak regretfully responded, "If you are asking me for the reason, I think that it all got out of hand." RP 4097.

It is abundantly evident from the record that Chea, the alleged driver, had no knowledge that the actual shooters would commit multiple murders as part of a common scheme or plan. The testimony reflects that Chea had no more knowledge of any plan to commit murder than Sok or Chak. Furthermore, no nexus between the murders exists because there was no evidence of an overarching criminal plan that connected the five murders of people who happened to be at the Trang Dai Café on that fateful night.

Reversal and dismissal is required because there was insufficient evidence to convict Chea of aggravated first degree murder. Stein, 144 Wn.2d at 246; Hardesty, 129 Wn.2d at 303.

3. THE JURY INSTRUCTION AND SPECIAL VERDICT FORM ON THE AGGRAVATING FACTOR WERE DEFICIENT BECAUSE THEY FAILED TO REQUIRE THE JURY TO FIND THAT CHEA PERSONALLY ENGAGED IN THE AGGRAVATING ACT.

The jury instruction and special verdict form on the aggravating factor were deficient because they failed to require the jury to find that Chea personally engaged in the aggravating act of committing multiple murders as part of a common scheme or plan. Reversal is required because the instructional error allowed the jury to improperly find Chea guilty of aggravated first degree murder as a matter of strict liability and therefore the error was not harmless.

It is black letter law that an accomplice to any crime, including murder, is equally culpable as a principle under the accomplice liability statute RCW 9A.08.020. However, RCW 9A.08.020 is limited to accountability for crimes. Thus, an accomplice is equally liable only for the substantive crime and any sentence enhancement must depend on the accused's own misconduct, unless the legislature indicates otherwise. State v. Silva-Baltazar, 125 Wn.2d 472, 886 P.2d 138 (1994)(citing State v. McKim, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982)).

The legislature has indicated that an accused may be culpable as an accomplice for some, but not all, of the aggravating factors defined in

RCW 10.95.020 by phrasing the factors so that some require that the accused personally engaged in the aggravating acts, while others do not. For example, RCW 10.95.020(9) states, "The person committed the murder to conceal the commission of a crime," which requires that the accused committed the act personally. (Emphasis added.) In contrast, RCW 10.95.020(11) states, "The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes," which omits the element of a personal act.

The aggravating factor found here, RCW 10.95.020 (10), states, "There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person." (Emphasis added.) Like RCW 10.95.020(9), this factor requires that the accused personally engaged in the aggravating act.

The jury instruction given here provided in relevant part:

If you find a defendant guilty of Murder in the First Degree as defined in Instructions 12 through 21, you must then determine whether the following aggravating circumstance exists as to that defendant on that count:

There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person.

(Supp CP ____ Jury Instruction 22, 6/27/02).

The special verdict form required the jury to answer the question:

Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the defendant.

CP 36, 40, 44, 48, 52.

The jury instruction and special verdict form were deficient because they failed to specifically require the jury to find that Chea personally committed the multiple murders and the murders were a part of his plan. The state conceded that Chea was not the shooter. The jury therefore could not have concluded that Chea committed the murders as a part of his plan. Consequently, the instruction and special verdict form were fatally flawed because they allowed the jury to find Chea guilty of aggravated first degree murder, as a matter of strict liability for his complicity in the crimes. Reversal is therefore required and Chea's life sentences without parole must be vacated.

4. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONDUCT AN INQUIRY INTO JURY MISCONDUCT.

Reversal is required because the trial court abused its discretion by failing to conduct an inquiry into jury misconduct in violation of Chea's constitutional right to a fair trial.

The United States and Washington State Constitutions provide that the right to trial by jury shall be preserved and remain inviolate. U.S. Const. amend 7; Wash. Const. art. 1, sect. 21. The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of jury misconduct. In re Detention of Broten, 130 Wn. App. 326, 122 P.3d 942, 947 (2005). A constitutionally valid jury trial is a trial by an unbiased and unprejudiced jury, free of jury misconduct. State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991). In assessing whether prejudice occurred, the trial court must compare the particular misconduct with all the facts and circumstances of the trial. Id. at 342.

Communications by or with jurors constitute misconduct. Once established, it gives rise to a presumption of prejudice which the state has the burden of disproving beyond a reasonable doubt. State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30 (1986), review denied, 107 Wn.2d 1002 (1986)(citing Remmer v. United States, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 2d 654 (1954)). The trial court must objectively determine whether jury misconduct could have affected the jury's deliberations. State v. Barnes, 85 Wn. App. 638, 669, 932 P.2d 669 (1997). The trial court has discretion to take whatever remedial action is necessary to neutralize the effect of irregularities at trial. State v. Blum, 17 Wn. App. 37, 42, 561 P.2d 226 (1977).

During the course of the trial, defense counsel raised serious concerns about a particular juror. On April 23, 2002, counsel brought to the court's attention that "[i]t's become quite obvious that she is displaying physically a bias in this case and that she has essentially made up her mind." RP 2965-66. Counsel pointed out that even one of the detectives testifying for the state had noticed the particular juror smiling at him and other police officers. RP 2966. Counsel informed the court that the juror smiles approvingly when she passes the prosecution's table but scowls at the defense, "[I]t's become a pattern now day after day." RP 2967. The court asked whether the state had noticed the juror and the prosecutor acknowledged that he had noticed her smiling. RP 2968. The court stated, "I'll try and keep an eye out." RP 2968.

On May 30, 2002, defense counsel informed the court that she saw the juror speaking to the prosecutor, "she started to engage in a conversation." RP 5123. The prosecutor responded that the juror just said "thank you" for adjusting a monitor in the courtroom and he did not respond. RP 5126-27. Defense counsel noted that the juror's overt behavior has caught the attention of the guards, "They have seen it. They have looked at her when she comes in and then they look back at us and just acknowledge that this issue is still ongoing." RP 5126. The defense requested that the court replace the juror because they did not believe she

could be fair and impartial. RP 5124-26. The court replied that it had not observed any inappropriate conduct but it would “take under consideration the motion to have her excused based on the contact with [the prosecutor]. That’s where we are at.” RP 5132.

On June 10, 2002, defense counsel reminded the court that it had not made a ruling on the motion to replace the juror. The court responded, “[a]nything else?” and continued to discuss other matters. RP 5731. On June 26, 2002, before closing argument, the court stated that it had been observing the juror, “I did not see anything that would support this court excusing her as a juror on this case, so I’m going to be denying the request to have her excused.” RP 6724.

It is apparent from the record that the court had cause to engage in an objective inquiry. Defense counsel brought grave concerns to the court’s attention. Chea further substantiates these concerns with the particular juror in his affidavit attached to his personal restraint petition. Defense counsel’s motion to replace the juror was not only based on their observations, but observations made by a detective, who was a witness in the case, and the guards who were present throughout the trial. Furthermore, the prosecutor acknowledged that the juror spoke to him.

Despite a substantial showing of juror misconduct, the court failed to conduct an appropriate inquiry. Although the court had the discretion

to do so, it did not engage in any inquiry with the juror, the detective, or the guards. Furthermore, the trial court flatly discounted the representations made by defense counsel who are officers of the court. In refusing to excuse the juror, the court merely stated that it had been observing her. In light of the magnitude of the case and the serious charges against the accused, the court's failure to engage in an appropriate inquiry constitutes an egregious dereliction of its duty to ensure a fair trial.

Reversal is required because the court abused its discretion in taking no remedial action in violation of Chea's constitutional right to a fair trial.

5. CHEA WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO CONDUCT APPROPRIATE INVESTIGATIONS TO DETERMINE WHAT DEFENSES WERE AVAILABLE.

Chea sufficiently argues that he was denied effective assistance of counsel because trial counsel failed to conduct an inquiry of his family members who would have supported his alibi defense, and he provides affidavits from his parents, sister, and brother. Chea's argument is contained in his personal restraint petition on pages 8 - 12 and is incorporated by reference.

6. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED CHEA HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The cumulative error doctrine applies when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial and warrants reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970), review denied, 78 Wn.2d 992 (1970).

Here, an accumulation of errors affected the outcome of the trial:

1) the jury instruction on accomplice liability unconstitutionally relieved the state of its burden of proving every element of the crime; 2) there was insufficient evidence to convict Chea of aggravated first degree murder under accomplice liability; 3) the jury instruction and special verdict form on the aggravating factor were deficient because they failed to require the jury to find that Chea personally engaged in the aggravating act; 4) the trial court abused its discretion by failing to conduct an inquiry into jury misconduct; 5) Chea was denied effective assistance of trial counsel.

Reversal is required because cumulative error denied Chea his constitutional right to a fair trial.

7. CHEA WAS DENIED HIS CONSTITUTIONAL
RIGHT TO EFFECTIVE ASSISTANCE OF
COUNSEL ON DIRECT APPEAL.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 2, sect. 22; Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant has received ineffective assistance of counsel when counsel's performance was deficient and the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The same test applies to claims of ineffective assistance of appellate counsel. In re Personal Restraint of Maxfield, 133 Wn.2d 332, 343-44, 945 P.2d 196 (1997).

To the extent that issues raised here were not raised or not sufficiently raised on direct appeal, appellate counsel's performance was deficient and Chea was prejudiced by the deficient performance because the same record presented here was available on direct appeal.

D. CONCLUSION

For the reasons stated, and as justice requires, this Court should reverse Chea's convictions.

DATED this 31st day of March, 2008.

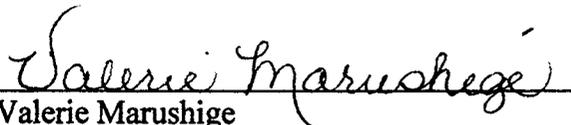

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Attorney for Petitioner

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Jimmee Chea, DOC # 843065, Clallam Bay Correction Center, 1830 Eagle Crest Way, Clallam Bay, Washington 98326-9723.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 31st day of March, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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09 APR - 1 PM 2:15
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