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DIVISION II

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STATE OF WASHINGTON

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THE COURT OF APPEALS, DIVISION II FOR THE STATE OF WASHINGTON

State of Washington,)
 Respondent,) No. 47593-6-II
 v.)
Jesus Solis-Vazquez,) STATEMENT OF ADDITIONAL GROUNDS
 Appellant.) pursuant to RAP 10.10

COMES NOW the appellant, Jesus Solis-Vazquez, pro se, brings forth the following statement of additional grounds:

First Ground

The trial court abused its discretion by including the jury instruction of accomplice liability when there was insufficient evidence to support such instruction.

In general, the jury requirements of the Sixth Amendment and the Due Process Clause together require that [e]ach element of a crime be proved to the jury beyond a reasonable doubt. U.S. v. Span, ___ F.3d ___ (9th Cir. 2015) 2015 WL 3541800. See also U.S. v. Roach, ___ F.3d ___ (9th Cir. 2015) 2015 WL 4098302 (there is sufficient evidence to support a conviction if, viewing the evidence in light most favorable to the prosecution, any trier of fact could have found essential elements

of the crime beyond a reasonable doubt). The prosecution bears the burden of proving all elements of the offense charged and must persuade the fact finder beyond a reasonable doubt of the facts necessary to establish each of those elements. *State v. Smith*, 174 Wn.App. 359 (2013).

The State must prove that Solis-Vazquez actually knew he was promoting or facilitating others in the commission of the crime. See also *State v. Shipp*, 93 Wn.2d 510, 517 (1980) (accomplice must have actual knowledge that principle was engaging in the crime eventually charged). While the State must prove actual knowledge, it may do so through circumstantial evidence. *State v. Allen*, 182 Wn.2d 364, 374 (2015). Because the charges against Solis-Vazquez were based on accomplice liability, what he knew and did not know is critically important. *Id.*

To convict, at the very least, Solis-Vazquez must had knowledge of "the crime" to be committed and that he acted with knowledge that his conduct would promote or facilitate that crime. *State v. Walker*, 182 Wn.2d 463, 494 (2015). The State did not provide any evidence Solis-Vazquez promoted or facilitated the crimes.

The State must prove accomplice had knowledge of the crime to be committed, but the State does not have to prove that accomplice knew details of that crime, such as its degree or elements. *In re Pers. Restraint of Sarausad*, 109 Wn.App. 824, 835-36 (2001). In order for accomplice liability to attach, Solis-Vazquez must know the general nature of the specific crime that the principal intends to commit. Solis-Vazquez stated that he did not know what was going on. RP pg 500, 503. The State did not provide any evidence to contest his statements. In order for

accomplice liability to attach, the defendant must know the general nature of the specific crime that the principle intends to commit.

In *arguendo*, even if the State proved Solis-Vazquez had knowledge, they did not prove he intended to promote or facilitate the crime. The fact that a purported accomplice knows that the principle intends to commit "a crime" does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principle. See *State v. Roberts*, 142 Wn.2d 471, 513 (2000). In order for one to be deemed an accomplice, that individual must have acted with knowledge that he was promoting or facilitating the crime for which that individual was charged. *State v. Cronin*, 142 Wn.2d 568, 579 (2000).

A person's mere presence or assent to a crime are insufficient to establish culpability as an accomplice. *Roberts*, 80 Wn.App. at 355. See also *State v. Rotunno*, 95 Wn.2d 931, 933 (1981) (mere presence at the commission of a crime, even coupled with knowledge that the presence will aid in the commission of the crime is not sufficient). An accomplice need not have the same state of mind as a principal, but he must know that his actions will encourage or promote the principal's commission of the crime. *State v. Larue*, 74 Wn.App. 757, 762 (1994).

There was nothing to suggest Solis-Vazquez was aiding, promoting, encouraging, or facilitating a crime. The State provided no evidence to support such a theory. Solis-Vazquez contends that the State has not met their burden of proof to require an accomplice liability instruction. The State did not prove knowledge and culpability.

During discussions for jury instructions, defense counsel objected

to the accomplice instruction based upon similar grounds. RP pg 386-414. Counsel also claimed that the State failed to show that they were working together. RP pg 391-92.

The trial court abused its discretion by including the accomplice instruction. A trial court abuses its discretion if its decision (1) adopts a view that no reasonable person would take and thus manifestly unreasonable, (2) rests on facts unsupported in the record and is thus based on untenable grounds, or (3) was reached by applying the wrong legal standard and is thus made for untenable reasons. *State v. Johnson*, 180 Wn.App. 92, 100 (2014).

The trial court believed an accomplice instruction was needed to prove possession with intent. RP pg 390. The record shows that this is not the case. Mere proximity of drugs and large amount of cash found on the defendant was enough for the jury to find him guilty. The trial court also based the need for the accomplice instruction the belief that merely because they were in the car together and that drugs, guns, cash, and ammunition was present. RP pg 392. Based on our case law, the State had to prove more. Therefore, the trial court included the accomplice instruction based on unsupported facts and unreasonable reasons. The trial court violated Solis-Vazquez's Sixth Amendment and the Due Process Clause.

Second Ground

The prosecutor committed prosecutorial misconduct by stating his own personal belief about facts not in the evidence.

A prosecutor is a quasi-judicial officer with an independent duty to ensure a fair trial. *State v. Fisher*, 165 Wn.2d 727, 746 (2009).

Misconduct by a prosecutor can deprive a defendant of his constitutionally guaranteed right to a fair trial. Fourteenth Amendment; *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04 (2012). Therefore, prosecutors must not urge guilty verdicts on improper grounds. *State v. Belgarde*, 110 Wn.2d 504, 507-08 (1988).

The State provided evidence that nobody knew anything about the drugs. RP pg 456. Then the prosecutor encouraged the witness to state his personal belief that "somebody had to know," implying that they were lying. RP pg 457-58. It is misconduct for a prosecutor to compel a witness to express an opinion about whether another witness is telling the truth. *State v. Hughes*, 118 Wn.App. 713, 725-26 (2003). See also *State v. Copeland*, 130 Wn.2d 244, 290 (1996). The officer's opinion about "somebody had to know" something was implying one or all of the suspects were lying. This made the jury believe that Solis-Vazquez knew about the drugs being there.

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Brett*, 126 Wn.2d 136, 174-75 (1995). In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747 (2009). But references to evidence outside of the record constitutes misconduct. *Id.*

The State provided evidence that Delo ran and officers pursued him. Delo then got away. During the search of the area where Delo was last seen, the officers found a bundle of drugs. The evidence shows that the wrapping of the bundle does not match the wrapping of the bundle found in

the car. The State's theory was the bundles found under a trailer was Delo's.

There was no evidence to support such a theory. The only evidence presented was the drugs were found around where Delo was last seen. The wrappings on the two bundles don't match and are even different colors. The State is suggesting that after Delo got away, he took the time to get rid of the drugs by hiding them. There nothing to support that theory.

Solis-Vazquez contends that these are not Delo's drugs. That Delo did not take the time to hide the drugs after he got away, that he had no reason to. A reasonable person in the similar situation would not have gotten rid of their drugs. Once a person thinks that they have gotten away, there would be no reason to get rid of the drugs. If Delo intended to get rid of the drugs, he would have done so while running away, not after when he was safe. So the evidence does not support the theory that the drugs belonged to Delo.

Furthermore, in closing arguments, the prosecutor states that Solis-Vazquez sold drugs to Delo, and that is the reason Delo had drugs and Solis-Vazquez had over \$1900. Nothing in the record supports such a claim. Closing arguments provides an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to present altered versions of admitted evidence to support the State's theory of the case. *State v. Walker*, 182 Wn.2d 463 (2015); see also *In re Pers. Restraint of Yates*, 177 Wn.2d 1 (2013) (in the context of closing arguments, misconduct includes making arguments that are unsupported by the admitted evidence).

"A prosecutor may not use his or her position of power and prestige to sway a jury and may not express an individual opinion of a defendant's guilt, independent of the evidence actually in the case. The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of a prosecutor's argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will put special weight to the prosecutor's arguments; not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office."

"The commentary on American Bar Association Standards for Criminal Justice std. 3-5.8 emphasizes: The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office."

"The case law and professional standards described above were available to the prosecutor and clearly warned against the conduct here."

In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706-07 (2012)

Defense counsel did not object to the prosecutor's conduct at trial. But Appellant had demonstrated that the prosecutor's conduct was improper and so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury. If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy. Copeland, 130 Wn.2d at 284.

On the alternative, it was ineffective assistance of counsel for failing to object. A convicted defendant claiming ineffective assistance of counsel does not rebut the presumption that counsel was effective unless the defendant demonstrates that (1) counsel's representation fell below

an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense. In re Pers. Restraint of Gomez, 18 Wn.2d 337 (2013). Deficient performance is an act or omission that falls outside the wide range of professionally competent assistance. Id. The Sixth Amendment provides that defense counsel has a constitutional duty to provide assistance that is effective. Strickland v. Washington, 466 U.S. 668, 686 (1984). An objection and an appropriate jury instruction may have cured any resulting prejudice. State v. Warren, 165 Wn.2d 17, 28 (2008).

Conclusion

Based on the foregoing arguments, Appellant requests that this court grant him a new trial.

Respectfully submitted this 14th day of January, 2016.

JESUS SODI
Signature