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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 297101

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JOEL CAMERON CONDON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmes
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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence to support Mr. Condon's conviction for first degree premeditated murder as charged in Count 1?
2. Whether the court erred by not instructing the jury that they could consider the lesser-included offense of second degree intentional murder?
3. Whether the defendant's due process rights were violated by the use of tainted eyewitness identification testimony?
4. Whether the court erred in excluding the testimony of an expert on memory and eyewitness identification?
5. Whether the deputy prosecutor improperly vouched for the State's evidence, or otherwise committed prosecutorial misconduct?
6. Whether the defendant was denied effective assistance of counsel, when his attorney did not object to the admission of the co-defendant's statement to law enforcement?
7. Whether the accomplice liability statute is unconstitutionally overbroad?

8. Whether, in determining the defendant's standard range, the court considered criminal history which had not been proven by the State?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was sufficient evidence for a rational trier of fact to conclude that the defendant premeditated his intent to kill the victim.
2. The court did not err in not instructing on second degree murder as a lesser-included offense, as the second, or factual *Workman* prong was not met.
3. The identification process was not overly suggestive, and in any event there was no prejudice to the defendant since his accomplice testified at trial as to the defendant's involvement in the crimes charged.
4. The court properly excluded the testimony of Dr. Loftus, as the testimony would not have been helpful to the jury, especially in light of the fact that the defendant's accomplice testified against him at trial.
5. The prosecutor did not commit misconduct, as the arguments largely referenced the evidence; any comments directed at

defense counsel's tactics were brief, and they did not affect the outcome of the proceeding.

6. Mr. Condon has not met his burden of proof of showing deficient performance on the part of his attorney, or that but for any deficient performance, the outcome of the proceeding would have been different.
7. Another division of this court has held that the accomplice liability statute is not unconstitutionally overbroad.
8. At sentencing, the defense did not dispute Mr. Condon's prior criminal history, and agreed that his offender score was a nine-plus.

II. STATEMENT OF FACTS

The Statement of the Case contained in the Appellant's opening brief is accurate, but the State supplements that narrative with the following.

On the evening of January 20, 2009, Carmelo Ramirez was in his Toppenish home with his wife, Enedina Gregorio, and his children. His son, Jesus Ramirez, testified at trial that he saw the hinge and parts of the front door fly off, and two men came inside. **(RP 721)**

One of the men, who was the tallest, was holding a gun. **(RP 722)**
The two men were yelling something in English. **(RP 727)**

Jesus went to his room with his sister, after which his mother followed them and instructed the children to leave the house via a window. **(RP 723-24)**

Ms. Gregorio had been married to Carmelo Ramirez for 14 years. **(RP 735)**

In court, she identified the defendant, Joel Condon, as the individual who had the gun. **(RP 738-90)** The other suspect, grabbed her and threw her face down upon a couch, her hands behind her back. **(RP 740; 743-44)** She later identified this man from a photo montage, Jesus Lozano Farias. **(RP 741-42)**

When Carmelo's friend arrived for dinner, Condon fired at Carmelo, and he and Lozano fled. **(RP 746)**

Ms. Gregorio recognized Condon at a lineup, in particular she recognized pock marks on his face. **(RP 749; 759-60)** She was one hundred percent certain that Lozano and Condon "are the ones." **(RP 762)**

Dr. Reynolds testified at trial that Mr. Ramirez suffered three wounds as a result of two bullets which struck him. One passed through his thighs, another through the fleshy part of an elbow, then into the chest,

nicking the aorta and causing his death. **(RP 775)** The bullet trajectories were angled downward. **(RP 777)**

Mr. Lozano agreed to testify for the State. He knew Condon as “Wak Wak”, and identified him in court as the individual who shot Mr. Ramirez. **(RP 788)** They had met on the street, and smoked weed one or two times a day for a few weeks. **(RP 789-90)**

On January 20, 2009, they, together with another individual named “Eight Ball”, and Eight Ball’s girlfriend, ended up in Toppenish. **(RP 790)** They decided to rob a residence where Eight Ball believed they could get drugs and money. **(RP 792-94)**

After Eight Ball disappeared, Wak Wak went first, kicking in the door. **(RP 796)** Mr. Ramirez began fighting with Lozano, and after Ramirez got him in a headlock, Wak Wak “came and just shot him or – just shot him twice I guess.” Condon was 3 to 4 feet from the victim. **(RP 797)**

Lozano dropped his cell phone in the residence. **(RP 798)**

In a later statement to Detective Jackson of the Yakima Sheriff’s Office, he described the shooter as tall, light skinned, with tattoos on his neck. Specifically, the tattoo on the right side of Wak Wak’s neck was of a scroll. **(RP 804; 823)** He denied knowing that Wak Wak was armed before the burglary. **(RP 809)**

Counsel for Mr. Condon cross-examined Lozano, suggesting that the plea agreement with the State was “a substantial reason to testify today and tell us all of these stories”. **(RP 820)** Further, counsel suggested that his initial description of Condon was vague, that Lozano had practiced his testimony, and could not provide the name of the shooter during his initial interview with the detective. **(RP 821)**

After Lozano’s testimony, the State called Detective Jackson to play Mr. Lozano’s statement, **(Ex. 105)** in order to rebut defense counsel’s implication that Lozano had a motive to lie. The court ruled that the statement would be admissible under ER 801(1)(d). **(RP 835)** The defense did not offer a specific objection to the statement, and counsel observed that Lozano’s statement was “utterly incoherent, bizarre, pointless, rambling . . .” **(RP 836)**

The statement was played for the jury. **(RP 850; Ex. 105)**

The State introduced several recordings of jail phone calls placed by Condon. **(RP 890)** In one conversation, Condon alludes to the fact “he’s on his way to extradition in California right now”, an apparent reference to Lozano. In other conversations, Condon and a Ms. Amanda Ramirez discuss the case being in the news, and being nervous about it. **(RP 923-30)**

Detective Jackson checked the phone numbers stored in the cell phone left at the scene of the shooting, and tracked one of the numbers to a Ryan Marshandt in Omak. Sharing the description of Wak Wak given by Lozano with the Omak Police Department, and specifically the scroll tattoo, an officer in that department recognized him as Joel Condon. **(RP 886-88)**

Detective Jackson described for the jury the in-person lineup process he used with Condon. First, he found inmates, and one officer, who had a similar appearance to Condon, had them dress in identical inmate clothing, and placed Ace bandages on the necks of all involved so that the tattoos on Condon would not be visible. **(RP 930-32; Ex. 115)**

Enedina Gregorio froze in place, visibly frightened when she saw the lineup, identifying Condon within 10 seconds. **(RP 936-37)**

Joel Condon has a scroll tattoo on his neck, with the words "Savage until Death". **(RP 949)**

At Mr. Condon's sentencing on February 11, 2011, his counsel discussed his criminal history and offender score:

As far as Mr. Condon is concerned, if you look at the judgment and sentence and look at the criminal history, there are six juvenile convictions that are 14 years old, essentially for taking a motor vehicle and escape first and second degree, which essentially constitutes not cooperating with a probation officer or something. So he's charged with escape.

From my point of view, the offender score is nine-plus. The chart only goes up to nine. It doesn't really add up to all that much, but no one can even take that into consideration because the law withdraws from the court's ability to craft a proper sentence.

(2-11-11 RP 12-13)

III. ARGUMENT

1. **There was sufficient evidence of premeditated intent to kill Carmelo Ramirez.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

In this case, Condon asserts that there was insufficient evidence to support the jury's verdict on first degree premeditated murder. The State maintains that the circumstantial evidence of his premeditation was sufficient to support the verdict.

The Washington Supreme Court has defined premeditation as "the mental process of thinking before-hand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982), *quoted in* State v. Bushey, 46 Wn. App. 579, 584, 731 P.2d 553 (1987).

Premeditation must involve "more than a moment in point of time." RCW 9A.32.020 (1). It is the deliberate formation of the intent to take a human life. State v. Robtoy, 98 Wn.2d 30,43, 653 P.2d 284 (1982). It is a "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987), *quoting* State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

Further, actual deliberation can be proved by circumstantial evidence where inferences drawn by the jury are reasonable and evidence supporting the jury's findings is substantial. State v. Luoma, 88 Wn.2d 28, 33, 558 P.2d 756 (1977).

Also, the planned presence of a weapon necessary to carry out a killing has been held to be adequate evidence to allow the issue of premeditation to go to a jury. State v. Bingham, 105 Wn.2d 820, 827, 719 P.2d 109 (1986), *cited in* State v. Massey, 60 Wn. App. 131, 144, 803 P.2d 340 (1990).

Here, it was Mr. Condon who elected to bring a loaded gun with him to the victim's residence, he had the gun out when he kicked in Carmelo Ramirez' door, and it remained out as he threatened Ramirez and his family. He was ready to use it, not only with which to steal drugs and/or cash, but also to kill. As the prosecutor stated during closing, when things began to fall apart with the burglary scheme, when Ramirez struggled with Lozano, it was Condon who elected to use his weapon to fire two rounds, from close range, downward into Mr. Ramirez' body.

A rational trier of fact, then, could find, that Mr. Condon thought over, for more than a moment, his intent to kill Mr. Ramirez.

2. The court did not err in denying the request for a lesser-included instruction, as the factual prong of *Workman* was not met.

It is true that a defendant has a statutory right to present a lesser included offense to a jury. RCW 10.61.006. Two conditions must be met:

First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.

State v Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Stated another way, a criminal defendant is entitled to a jury instruction on a lesser included offense if (1) each element of the lesser offense is a necessary element of the charged offense and (2) the evidence supports an inference that only the lesser crime was committed. State v. Huyen Bich Nguyen, 165 Wn.2d 428, 434, 197 P.3d 673 (2008), *cited in* State v. Sublett, 156 Wn. App. 160, 191, 231 P.3d 231 (2010).

As to the first, or legal prong of Workman: “if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime.” State v. Frazier, 99 Wn.2d 180, 191, 661 P.2d 126 (1983).

To satisfy the second, or factual prong there must be a “factual showing more particularized than [the sufficient evidence already] required for other jury instructions. Specifically, we have held that the

evidence must raise an inference that *only* the lesser included . . . offense was committed to the exclusion of the charged offense.” State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The “evidence must affirmatively establish the defendant’s theory of the case— it is not enough that the jury might disbelieve the evidence pointing to guilt.” Id., at 456, *citing* State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds*, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

A defendant has an absolute right to have the jury consider a lesser included offense “on which there is evidence to support an inference it was committed.” State v. Parker, 102 Wn.2d 161, 166, 683 P.2d 189 (1984). Failure to so instruct is reversible error. Id.

In determining whether it is appropriate to give an instruction on a lesser included offense, the trial court views the evidence in a light most favorable to the defendant. Id., *citing* State v. Pittman, 134 Wn. App. 376, 385, 166 P.3d 720 (2006).

The elements prong of Workman is met with respect to first degree premeditated murder and second degree intentional murder. The elements of the former offense being: (1) causing the death of another; (2) premeditation; and (3) intent to cause to death. RCW 9A.32.030(1)(a), and the elements of latter being: (1) causing the death of another; and (2)

intent to cause death. RCW 9A.32.050. State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990).

However, the court in Bowerman held that a second degree murder lesser included instruction was not warranted where the defendant asserted a diminished capacity defense, and thus claimed to lack the capacity to form the intent to kill the victim. “If the jury believed Bowerman’s defense then it could not have found her guilty of second degree murder. Therefore, the only choices the jury would have had were to find Bowerman guilty of aggravated first degree murder, or to find her not guilty of any crime. Under those circumstances, a lesser included instruction is not warranted.” Id., at 806, *citing* State v. Much, 156 Wash. 403, 410, 287 P. 57 (1930); State v. Snook, 18 Wn. App. 339, 346, 567 P.2d 687 (1977).

A similar result was reached in Sublett, *supra*. There the Court of Appeals held that while manslaughter is a lesser included offense of premeditated murder, the facts in that case did not warrant a lesser included instruction. The defendant was charged with the alternate crimes of premeditated and felony murder. He testified, however, that he did not participate in any assault against the victim, and did not know whether the victim was alive or dead at the time he participated in a robbery. Id., at 192. The court considered that his testimony “essentially a denial that he

had participated in Totten's murder. Accordingly he was not entitled to a jury instruction on the lesser included offense of second degree manslaughter. Id.

Condon relies upon both State v. Schaffer, 135 Wn.2d 355, 957 P.2d 214 (1998), and State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011), in arguing that the court here erred in denying his request for a lesser included instruction on second degree intentional murder. That reliance is misplaced.

First, in Schaffer, the defendant was charged with the alternative crimes of first degree premeditated murder, and second degree felony murder. A conviction on the alternative charge of felony murder was reversed as the court held that the jury should have been instructed as to the offense of manslaughter as a lesser included offense of first degree premeditated murder. Id., at 358.

However, Schaffer can be distinguished from the facts present here, as the defendant claimed self-defense, believing he was in imminent danger at the time of slaying. A defendant who believes that he is in imminent danger, but recklessly or negligently uses more force than is necessary is guilty of manslaughter, and a lesser included instruction is appropriate on such facts. Id., at 358.

In Grier, the Supreme Court held that while there was no ineffective assistance of counsel demonstrated in withdrawing lesser included instructions, the defendant was entitled to lesser included instructions as to manslaughter to the alternative charges of second degree intentional murder and second degree felony murder. Grier, 171 Wn.2d at 42. Again, the defense asserted in Grier, self-defense, is quite different from the instant case.

Condon's reliance on Vujosevic v. Rafferty, 844 F.2d 1023 (3rd Cir. 1988), is also misplaced. The Court of Appeals did indeed hold that refusal to give a lesser included instruction was reversible error, but the defendant had presented evidence in that case which would have supported a jury finding of guilt on a charge of aggravated assault-a lesser included offense to aggravated manslaughter. Id., at 1027.

In Mr. Condon's case, on the other hand, the defense held the State to its burden of proof, attacking the identification of Mr. Condon by Ms. Gregorio, the motives of Mr. Lozano and Mr. Davis to testify against Condon, and the lack of forensic evidence tying him to the crime scene. **(RP 1138-1153)** The defense theory was simply that the State had not proven its case against him.

If the jury had agreed with defense counsel, and was not convinced beyond a reasonable doubt of Mr. Condon's involvement in the home

invasion, then it could not have found him guilty of any offense. If the jury was convinced of his involvement in the burglary, but not premeditation, the only murder charge on which they could have convicted was the alternative, felony murder.

The evidence did not raise an inference that *only* second degree intentional murder was committed, and the court did not err in refusing to give the instruction.

3. The lineup was not impermissibly suggestive.

Generally, matters of “[u]ncertainty or inconsistencies in the [identification] testimony affects only the weight of the testimony and not its admissibility” and therefore, are submitted to the jury. State v Gosby, 85 Wn.2d 758, 760, 539 P.2d 680 (1975), *see, also*, State v. Vaughn, 101 Wn.2d 604, 610, 682 P.2d 878 (1984).

In order to demonstrate that an in-court identification is inadmissible because it violated a defendant’s due process rights, the defendant must first establish that the identification procedures are impermissibly suggestive. Vaughn, 101 Wn.2d at 609-10. The court must then determine whether the impermissibly suggestive procedures created “a very substantial likelihood of irreparable misidentification.” State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985), *quoting Simmons v. U.S.*, 390 U.S.377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

The proper inquiry for the likelihood of an irreparable misidentification involves weighing factors indicating witness reliability against the “corrupting effect of the suggestive identification.” McDonald, 40 Wn. App. at 746, *quoting* Manson v. Braithwaite, 432 U.S. 98, 114, 97 S. Ct. 2243 53 L. Ed. 2d 140 (1977). The relevant factors include “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation.” State v. Maupin, 63 Wn. App. 887, 897, 822 P.2d 355 (1992), *quoting* Braithwaite, 432 U.S. at 114.

Here, Detective Jackson testified as to the conduct of the lineup. As the trial court noted, the appearance of Mr. Condon and the other individuals in the lineup was similar; they wore identical clothing, and necks were covered up. Ms. Gregorio visibly reacted at the sight of Condon, and she identified him quickly as the shooter. Specifically, she recalled the pock marks on his face, visible to her even though he wore a hood at the time of the murder. She denied seeing any television coverage of Mr. Condon’s arrest, before the lineup, and though she may have been to court previously, there was nothing about the lineup itself which demonstrate that it was an impermissibly suggestive procedure.

Indeed, the strength or consistency of Ms. Gregorio's identification was tested on cross-examination in front of the jury.

Further, the State did not, in the end, rely solely upon the identification of Ms. Gregorio; an individual who knew Condon, his accomplice Mr. Lozano, testified as to the events in the Ramirez household. Further, Mr. Davis testified as to admissions Mr. Condon made while in the jail. The court did not err.

4. The court properly excluded Dr. Loftus' testimony.

ER 702 states that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

A trial court's ruling on the admission of evidence is reviewed for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). A trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

To be admissible, evidence must be relevant. ER 402; State v. Luvane, 127 Wn.2d 690, 706, 903 P.2d 960 (1995).

The decision to admit or to exclude expert eyewitness identification testimony is within the trial court's sound discretion. State

v. Hernandez, 58 Wn. App. 793, 801, 794 P.2d 1327 (1990), *review denied*, 117 Wn.2d 1011, 816 P.2d 1223 (1991).

Under ER 702, expert testimony is admissible if it assists the trier of fact in understanding the evidence. When considering the admissibility of testimony under ER 702, a court engages in a two-part inquiry: “(1) does the witness qualify as an expert; and (2) would the witness’ testimony be helpful to the trier of fact.” State v. Guillot, 106 Wn. App. 355, 363, 22 P.3d 1266, *review denied*, 145 Wn.2d 1004, 35 P.3d 381 (2001).

In State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003), the Supreme Court held that:

where eyewitness identification of the defendant is a key element of the State’s case, the trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. In making this determination the court should consider the proposed testimony and the specific subjects involved in the identification to which the testimony relates, such as whether the victim and the defendant are of the same race, whether the defendant displayed a weapon, the effect of stress, etc. This approach corresponds with the rules for admissibility of relevant evidence in general and admissibility of expert testimony under ER 702 in particular.

Id., at 649.

In Cheatam, mistaken identity was an issue, and that the victim and defendants were of different races. Further, a gun was used, but the court held that there was no abuse of discretion in excluding Dr. Loftus' testimony, as it was debatable whether Dr. Loftus' testimony would be both relevant and helpful. Id., at 649-50.

Indeed, it is within an average juror's understanding that a crime victim would likely be distracted if her assailant displayed a deadly weapon, or that a person with a weak memory may be more susceptible to information received after an event. Dr. Loftus' testimony would not have been relevant or helpful under ER 401, 402 or 702.

Also, there is no abuse of discretion in refusing to admit expert opinion on eyewitness when the prosecution has other evidence linking the defendant to the crimes charged. State v. Coe, 109 Wn.2d 832, 844, 750 P.2d 208 (1988). The State presented just such evidence, including the testimony of Mr. Lozano.

5. Condon has not met his burden of showing prosecutorial misconduct.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State

v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996), *overruled in part on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002).

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), *citing State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983); State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004), *citing State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. Further, a prosecutor's closing statements are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.

Carver, 122 Wn.2d at 306, *cited in* State v. Jackson, 150 Wn. App. 877, 882, 209 P.3d 553 (2009).

A reviewing court will disturb a trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

The Supreme Court has held that it is improper for a prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. State v. Thorgerson, 172 Wn.2d 438, 451-52, 258, P.3d 43 (2011). However, while observing that characterizing the defense as "sleight of hand" was entirely inappropriate, the court was not convinced that the comment could fairly be said to have had an impact on the jury's decision. Id.

Here, as well, while the comments by the prosecutor may not have been appropriate, the court was well within its discretion to deny the defense motion for a mistrial, and there has been no showing that the verdict would have been different.

A prosecutor may not vouch for a witness by expressing an opinion as to that witness's credibility. State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). In Horton, the prosecutor pronounced in closing, "I believe Jerry Lee Brown." The prosecutor in this case did state

a personal opinion as to whether any witness was or was not telling the truth.

Nor the prosecutor suggest that there was evidence, not admitted at trial, which would provide additional grounds for finding the defendant guilty, contrary to State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993) or State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). Instead, the prosecutor's comments about other trials could fairly be interpreted to highlight the strength of the evidence placed before the jury in this case.

6. There was no ineffective assistance of counsel.

In order to establish a claim of ineffective assistance of counsel, Condon must show that (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced by his counsel's deficient representation, such that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Furthermore, the basis for the claim of ineffective assistance of counsel must be apparent from the record. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). The courts also engage in a strong

presumption that counsel's representation was effective. Id., 127 Wn.2d at 335.

Additionally, deficient performance "is not shown by matters that go to trial strategy or tactics." State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), State v. Alires, 92 Wn. App. 931, 938, 966 P.2d 935 (1998).

A reviewing court looks to the facts of the individual case to see if the Strickland test has been met, resisting *per se* application of the holding in State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001), *citing* State v. Robinson, 138 Wn.2d 753, 767-68, 982 P.2d 590 (1999).

Here, it is true that counsel did not object to playing of Lozano's taped interview, though it was clear that the court intended to admit the interview as prior consistent statement under ER 801(1)(d), even if there had been no objection, since counsel opened the door by suggesting a motive for recent fabrication or motive to lie on the part of Mr. Lozano.

Counsel appears to have recognized that the interview may not have put Mr. Lozano in the best light, however: ". . . the performance of Mr. Padilla Lozano on his interview with Detective Jackson is at times utterly incoherent, bizarre, pointless, rambling . . . you get a headache listening to it because it's so incoherent . . ." **(RP 836)**

Even if counsel's performance was deficient, Condon has not met his burden of showing that, but for counsel's errors, there was a reasonable probability that the outcome of the trial would have been different.

7. The Court of Appeals has already found that the accomplice liability statute is not constitutionally overbroad.

Mr. Condon asks this court to find that the accomplice liability statute, RCW 9A.08.020 is unconstitutional in that it criminalizes speech and conduct which are protected by the First Amendment. Specifically, he maintains that the definition of "aid" has not been limited by Washington courts to bring it into compliance with Brandenburg v. Ohio, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

However, Division I of the Court of Appeals has passed on this argument, and found that RCW 9A.08.020 is not unconstitutionally overbroad. State v. Coleman, 155 Wn. App. 951, 961, 231 P.3d 212 (2010).

A statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute's plainly legitimate sweep. Id., citing Virginia v. Hicks, 539 U.S. 113, 122, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003);

City of Seattle v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333

(1990), *cert. denied*, 500 U.S. 908 (1991)

The court held that by virtue of the statute's text, its sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime. *Id.*, citing Brandenburg, 395 U.S. at 448.

8. There was agreement at sentencing that Mr. Condon had an offender score of 9.

Mr. Condon maintains on appeal that he only stipulated to two prior felony convictions, and that the State did not allege, or present evidence as to any other convictions. The record would indicate otherwise.

Counsel recognized that there were at least six juvenile convictions, and that Mr. Condon had an offender score of "nine-plus" 2-11-11 RP 12-13)

Far from remaining silent, there was an affirmative acknowledgement of Mr. Condon's offender score, and the State did not have to present judgments to prove all the prior convictions.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm Mr. Condon's convictions and sentences.

Respectfully submitted this ^{13th} day of April, 2012.

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