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THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARCUS ALLEN,

Petitioner.

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

SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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A. INTRODUCTION

A trial is not a sporting event and the State's duty to seek justice is not measured by the victories obtained.¹ The dignity of the court and the process suffers when a trial devolves to such levels, and the defendant is denied a fair trial. That is precisely what occurred here.

The prosecutors' closing argument was riddled with improper and prejudicial statements. Those misstatements of the law were made both orally and with the assistance of visual aids – much like the use of a scoreboard to exhort fans during a football game. And as with such a sporting event, spectators sat in the courtroom adorned with matching t-shirts expressing support for their side. The dignity and decorum of the process was eroded to such a degree that Dorcus Allen was denied a fair trial. This Court should reverse his convictions and afford him a trial that comports with the constitutional commands.

B. ISSUES PRESENTED

1. A prosecutor violates the Fourteenth Amendment's Due Process Clause when he misstates the law and endeavors to relieve the State of its burden of proving each element of an offense. The prosecutors purposefully and repeatedly told the jury, over Mr. Allen's objection and in direct contradiction of long-settled Washington law, that Mr. Allen was

¹ See *State v. Montgomery*, 56 Wash. 443, 105 P. 1035 (1909).

guilty so long as he “should have known” Maurice Clemmons intended to commit murder. Did the State’s purposeful misconduct violate the Fourteenth Amendment’s Due Process Clause?

2. The Sixth and Fourteenth Amendments impose an affirmative duty upon the trial court to ensure the jury’s verdict is the product of the evidence presented at trial and is free of influence from outside sources. The trial court concluded it could not limit courtroom spectators from wearing t-shirts memorializing the victims of Clemmons’s crimes, even when those t-shirts were visible to the jurors during trial. Did the trial court’s failure to ensure the jury’s verdict was free of improper influences deprive Mr. Allen of his Sixth and Fourteenth Amendment rights?

3. The general accomplice liability statute, RCW 9A.08.020, does not apply to sentencing enhancements or factors. Sentencing enhancements and aggravating factors may only apply to an accomplice if the statute establishing the enhancement or factor provides for accomplice liability. Did the court err in imposing an exceptional sentence in Mr. Allen’s case?

C. STATEMENT OF CASE

Mr. Allen worked for a landscaping company Clemmons owned. In May 2009 Clemmons began throwing rocks through his neighbors’ windows. 42 RP 3305. When police responded, Clemmons wrestled with

and punched the officers. *Id.* at 3307. At one point he began telling an officer to shoot him. *Id.* at 3308.

Clemmons demonstrated other bizarre behavior. On several occasions he invited family to barbecues and told them celebrities such as Barack Obama, Oprah Winfrey, and LeBron James would be in attendance. 42RP 3309, 3322. On other occasions Clemmons claimed to be Jesus Christ, and travelled to New York City to so proclaim himself. 37RP 2769.

About six months following his arrest for punching police officers, Clemmons posted bail and was released from jail on the Monday before Thanksgiving. That week, and particularly at his family's Thanksgiving dinner, Clemmons expressed an animosity towards police officers that family members found shocking. 37RP 2749-52. Clemmons proclaimed to his family that if police came for him, he would be waiting with a gun. Clemmons also stated he would go to a school and kill white children. 37RP 2753. Clemmons would not listen to reason. 37RP 2777. Mr. Allen was present at that Thanksgiving dinner.

On the following Sunday, Maurice Clemmons called Mr. Allen and told him that he wanted Mr. Allen to wash the company truck. Ex 288. Mr. Allen and Clemmons drove to a carwash at 212th and Steele in Pierce County. *Id.* Mr. Allen crossed 212th to an *ampm* store, where he purchased

a cigar and obtained change for the carwash. 37RP 2762. Unbeknownst to Mr. Allen, Clemmons, too, left the carwash. *Id.*

Minutes later, Clemmons walked into a Forza Coffee shop a few blocks away and murdered four Lakewood Police Department officers. Clemmons then returned to the carwash, arriving minutes after Mr. Allen returned from the *ampm*. Ex 288. Clemmons demanded they leave immediately. *Id.* Mr. Allen drove the truck away from the car wash. *Id.*

Maurice Clemmons was killed by a Seattle police officer a few days later in the early morning of December 2, 2009. 37RP 2826-30. About an hour later a SWAT team stormed through the door of Mr. Allen's motel room and arrested him. 38RP 2924-25. Officers conducted a lengthy interrogation, during which Mr. Allen conveyed his lack of knowledge about Clemmons's intended acts. 39RP 2944; Ex 288. At the close of the interview, the lead detective commented that he had no doubt that Mr. Allen was being truthful. Ex 288.

Despite this belief, the Pierce County Prosecutor charged Mr. Allen with four counts of aggravated first degree murder, alleging two aggravating factors under RCW 10.95.020: the victims were law enforcement officers performing their duties at the time of the murder, and there was more than one victim killed as part of a common scheme or plan. CP 1-4. The State later amended the charge to allege the aggravating

factor set forth in RCW 9.94A.533 regarding offenses against law enforcement. CP 817-23.

A jury convicted Mr. Allen of four counts of first degree murder. CP 2041-44. The jury returned a special verdict form finding the aggravating factor alleged under RCW 9.94A.535, and found Mr. Allen or an accomplice were armed during the crime. CP 2049-56. The trial court imposed an exceptional sentence of 420 years. CP 2180-82.

D. ARGUMENT

1. The deputy prosecutors' flagrant misconduct in closing argument deprived Mr. Allen's of a fair trial.

a. The State repeatedly misstated the law concerning proof of knowledge.

A person cannot be convicted as an accomplice of a crime unless the State proves "that individual . . . acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged." *State v Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (emphasis in original); RCW 9A.08.020. "The Legislature . . . intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge.'" *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2000). The mens rea of "knowledge," requires actual subjective knowledge on the part of the person. *State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980).

The record establishes Mr. Allen and Clemmons arrived together at a car wash a few blocks from the scene of the shooting. Ex 288. Mr. Allen went to a convenience store across the street from the carwash. 37RP 2762. Unbeknownst to Mr. Allen, Clemmons, too, left the carwash. *Id.* It was during Mr. Allen's absence, that Clemmons committed his crimes.

The State's proof of Clemmons' guilt was overwhelming. However, Clemmons was dead and not on trial. Instead, the person on trial for four counts of aggravated first degree murder was Mr. Allen. The State's case against Mr. Allen, however, was substantially weaker even under the State's accomplice theory.

Again, the State had to prove Mr. Allen actually knew he was assisting Clemmons in the commission of four murders. RCW 9A.08.020; *Cronin*, 142 Wn.2d at 579; *Shipp*, 93 Wn.2d at 514-15. What the State actually proved at trial was that Mr. Allen was wholly unaware of what Clemmons intended to do, or even that Clemmons had left the car wash. The State proved that during the time Clemmons was committing the offense, Mr. Allen was not waiting at the truck. Instead, Mr. Allen walked, not ran, to a convenience store, purchased a cigar, and got change. 37RP 2762. Those are not the acts of a person that knows he is assisting in the murders of four police officers.

Recognizing that its case fell short, the State purposefully crafted an improper closing argument designed to bridge this gap. The State presented a closing argument which from start to finish focused on redefining the term knowledge to include what Mr. Allen “should have known.” The State repeated numerous times Mr. Allen was guilty so long as the jury found “he should have known.” In direct contradiction of *Shipp*, the State said

And under the law, **even if he doesn’t actually know**, if a reasonable person would have known, he should have known, he’s guilty

(Emphasis added.) CP 3546. The prosecutors repeated similar claims throughout closing argument, and again in rebuttal.

There can be no doubt of the purposeful nature of the State’s misconduct. In advance of argument, the State prepared PowerPoint presentations to accompany its argument. Those presentations highlighted “should have known” as an alternative and lesser mens rea.

The very first slide following one bearing pictures of the officers provided:

Those officers are dead because
Dorcus Allen helped Maurice Clemmons.
He knew or **should have known**
Clemmons would murder the officers

(Emphasis added.) Ex 351-52.

That was followed by another slide titled “SHOULD HAVE KNOWN,” which slowly crossed off one mental state after the next until it read:

- ~~Premeditate~~
- ~~Intend~~
- ~~Purpose~~
- ~~Plan~~
- ~~Want~~
- ~~Hope~~
- ~~Care~~
- ~~Know~~
- Should Have Known

Ex 351-52, at 30-31. The State presented numerous other slides highlighting “should have known” as an alternative mens rea sufficient to convict Clemmons regardless of his actual knowledge. Ex 351-52. The repeated misstatements were flagrant and denied Mr. Allen a fair trial.

The Sixth and Fourteenth Amendments and article I, section 3 guarantee the right to a fair trial. *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). A prosecuting attorney is the representative of the community; therefore it is the prosecutor’s duty to see that justice is done. *Berger v. United States*, 295

U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1934). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

On appeal, the State has agreed its arguments were improper. The Court of Appeals found the arguments were improper. The only question is whether the repeated misconduct deprived Mr. Allen a fair trial. It plainly did.

b. *The prosecutors' misconduct denied Mr. Allen a fair trial.*

This Court has recognized the flagrancy of misconduct is illustrated by repeated misstatements of the law. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Prejudice is established if there is a substantial likelihood that the misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 704.

In many respects, this case mirrors the facts in *State v. Davenport*, 100 Wn.2d 757, 675 P.3d 1213 (1984). In that case the jury was properly instructed on the law, but those instructions did not contain any instructions pertaining to accomplice liability as the State had never

charged the defendant as an accomplice. *Id.* at 760. Nonetheless, in closing the prosecutor told the jury it could convict the defendant as an accomplice. *Id.* The trial court overruled the defendant's objections and denied a subsequent motion for new trial. *Id.* at 759. During its deliberations, the jury submitted an inquiry to the court asking whether it could convict the defendant as an accomplice. *Id.* The court directed the jury to read its instructions. *Id.* This Court concluded the misconduct had a substantial likelihood of affecting the verdict.

The Court recognized that "a prosecuting attorney misstating the law of the case to the jury is a serious irregularity having grave potential to mislead the jury." *Davenport*, 100 Wn.2d at 763. That potential was not mitigated by the fact the jury was properly instructed on the law. By overruling defense objections, the trial court "lent an aura of legitimacy to what was otherwise improper argument." *Id.* at 764. Second, the jury's inquiry illustrated that the jury was both influenced by the prosecutor's misstatement and considered the prosecutor's erroneous statement to be a proper explanation of the law. *Id.* at 764. Finally, the trial court's response to the jury to "rely on the law given in the Court's instructions" was not a curative instruction because it did not tell the jury "the State's comment was improper and not to be considered." *Id.*

As in *Davenport*, the jury was properly instructed on the law including a proper definition of knowledge. Just as in *Davenport* the trial judge overruled timely objections to the prosecutors' misstatement of that law, suggesting the argument was proper. Just as in *Davenport* the jury submitted an inquiry to the court inquiring about the prosecutors' misstatement, revealing that the jury was considering the misstatement and believed it to be a correct statement of the law. Just as in *Davenport* the trial court responded to the jury's inquiry by directing them to reread their instructions. And just as in *Davenport* the court did not tell the jury that the prosecutors' comments were improper and should be disregarded.

But here the prejudice is even greater. In *Davenport*, there was a single misstatement of the law. Here the misstatement was repeated time and again. It was made orally and visually by way of the prosecutors' PowerPoint presentation accompanying their argument. The misstatement of the law was not a single point in the State's argument, it was the State's closing argument.

The Court of Appeals offered several bases upon which to excuse the prosecutor's misconduct. *State v. Allen*, 178 Wn. App. 893, 908-09, 317 P.3d 494, *review granted in part*, 180 Wn.2d 1008 (2014). The court noted the trial court properly instructed the jury on the law, specifically the definition of knowledge. *Id.* at 908. That was no less true in

Davenport. As in *Davenport*, a proper instruction cannot excuse the prosecutor's subsequent and repeated misstatements of the very law the jury was instructed upon. Further, just as in *Davenport* when Mr. Allen specifically objected to the misstatements the court overruled the objections, telling the jury there was nothing improper in what the State was arguing.

Nor can Mr. Allen be faulted for failing to request a curative instruction. As Judge Maxa's dissent properly notes, because Mr. Allen objected to the improper argument there was no need to ask whether a jury instruction could have cured the misconduct. *See State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Indeed, there is no reason to believe the trial court would have given an instruction as the court had twice overruled specific and timely objections to the State's misstatements, thus the court did not believe there was anything to cure.

The prosecutor's closing argument demonstrates the State placed victory above fairness. Such tactics damaged the dignity of the proceeding and denied Mr. Allen a fair trial. Contrary to *Glasmann*, and as recognized in Judge Maxa's dissent, by failing to reverse a case such as this where misconduct permeated the State's argument and became its theme, the Court of Appeals reduces to "empty words" the warning that such tactics will not be tolerated. *See Allen*, 178 Wn. App. at 927 (Maxa, J. dissenting)

(citing *Glasmann*, 175 Wn.2d at 712-13). This Court should reverse Mr. Allen's convictions to preserve the dignity of the proceedings and so Mr. Allen may have the fair trial which due process demands.

2. The trial court's failure to ensure the jury's verdict was free of improper influences from displays by courtroom spectators deprived Mr. Allen of his Sixth and Fourteenth Amendment rights.

Several courtroom spectators wore t-shirts which stated "You will not be forgotten, Lakewood Police" and then listed the names of the four officers. 40RP 3024. The t-shirts were visible from the jury box. Mr. Allen asked the court to direct the individuals to either remove or cover up the t-shirts. The trial court refused, concluding the spectators' rights to free speech could not be abridged, without any consideration of Mr. Allen's right to a fair trial. 40RP 3027.

The following day, when spectators again arrived wearing the t-shirts, Mr. Allen again objected and renewed his motion that the court take steps to ensure the jury was not unduly influenced. 41RP 3156. Again without any balancing of Mr. Allen's right to a fair trial, the court denied the motion. 41RP 3157.

- a. *The Sixth and Fourteenth Amendments require a trial court to ensure a defendant receives a fair trial in which the verdict is free of improper influences.*

[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The

failure to accord an accused a fair hearing violates even the minimal standards of due process.

(Citations omitted) *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). Essential to that right is that jurors' decisions are based solely on the evidence presented at trial. *Turner v. Louisiana*, 379 U.S. 466, 471, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). As Justice Holmes noted, "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S. Ct. 556, 51 L. Ed. 879 (1907). More recently the Court said:

[o]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

Holbrook v. Flynn, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978)). The trial court is charged with safeguarding this right. *Chandler v. Florida*, 449 U.S. 560, 574, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981) ("Trial courts must be especially vigilant to guard against any

impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law.").

A defendant's right to be adjudicated solely on the evidence presented at trial is threatened when improper influences are allowed to infiltrate the courtroom. The courtroom is intended to serve as "a neutral forum for the resolution of civil and criminal matters." *State v. Jaime*, 168 Wn.2d 857, 867, 233 P.3d 554 (2010); *see also Bridges v. California*, 314 U.S. 252, 271, 62 S. Ct. 190, 86 L. Ed. 192 (1941) ("The very [word] 'trial' connotes decisions on the evidence and arguments properly advanced in open court."). Due to its central role in maintaining a defendant's right to a fair trial, judges must be "wary of a [courtroom] setting that impermissibly influences a jury's decision-making process and jeopardizes the presumption of innocence." *Jaime*, 168 Wn.2d at 862. Thus, the trial court must work diligently to ensure that the courtroom is free from all factors that would improperly influence the jury. *Cox v. Louisiana*, 379 U.S. 559, 562, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965) (stating it is the state's responsibility to implement safeguards to assure the courtroom is free of outside influence).

Courtroom practices that improperly influence the jury also undermine a defendant's presumption of innocence. The presumption of innocence is "the undoubted law, axiomatic and elementary, and its

enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895). The presumption is undermined if a courtroom practice prejudices the jury against the accused. *State v. Finch*, 137 Wn.2d 792, 845, 975 P.2d 967 (1999). Justice Holmes noted that “[a]ny judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere.” *Frank v. Mangum*, 237 U.S. 309, 349, 35 S. Ct. 582, 59 L. Ed. 969 (1915) (dissenting). Because members of the jury are susceptible to influence by features of the courtroom environment, judges are tasked with “closely scrutinizing” courtroom practices that may compromise a defendant’s presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). When a case generates significant publicity, “[t]rial courts must be especially vigilant to guard against any impairment of the defendant’s right to a verdict based solely upon the evidence and the relevant law.” *Chandler*, 449 U.S. at 574.

b. *The trial court’s failure to keep improper influences from the courtroom deprived Mr. Allen a fair trial.*

A courtroom practice that creates “an unacceptable risk” of “impermissible factors coming into play” is inherently prejudicial to the right to a fair trial. *Williams*, 425 U.S. at 504-05. T-Shirts largely

displaying a written message of sympathy for the victims of a crime convey a clear message to the jury that they should find the defendant guilty.

This Court has previously found small displays of ribbons or buttons *containing no written messages* do not inherently prejudice the defendant. See *In re the Personal Restraint of Woods*, 154 Wn.2d 400, 416, 114 P.3d 607 (2004); *State v. Lord*, 161 Wn.2d 276, 165 P.3d 1251, (2007). In *Woods*, remembrance ribbons worn by spectators during a murder trial were permitted with the caveat that the judge could provide a jury instruction to mitigate any prejudicial effects. *Id.* at 417. Important to the court's decision was the fact that the ribbons "did not contain any inscription. They were simply ribbons that the wearers indicated they wore in memory of the victims." *Id.* at 417.

Similarly, in *Lord*, this Court found that *silent* showings of sympathy, without more, are not inherently prejudicial. 161 Wn.2d at 284, 290. In *Lord*, courtroom spectators wore small buttons bearing a photo of the victim. The Court found that because the buttons contained *no words*, they portrayed an ambiguous message and did not advocate guilt or innocence. *Id.* at 288. Additionally, because the jurors had already seen crime scene and in-life photographs of the victim that had been introduced

into evidence, the photographs on the buttons were not prejudicial to the defendant. *Id.* at 290.

Unlike ribbons or buttons containing no inscription, t-shirts displaying a written message convey a strong and explicit message to the jury that they should find the defendant guilty. In *Norris v. Risley*, courtroom spectators displayed two and one-half inch buttons with the text “Women Against Rape.” 918 F.2d 828, 829-30 (9th Cir. 1990). The court found the fact that buttons were visible to jurors and the written message they conveyed created an unacceptable risk of having prejudiced the jury. *Norris*, 918 F.2d at 831.

Here, spectators wore full, matching t-shirts, not small pins or buttons. The shirts prominently displayed “You will not be forgotten, Lakewood Police” and the names of the deceased officers. As in *Norris*, where the court found that the size of the buttons and text displayed created an “unacceptable risk . . . of impermissible factors coming into play,” the t-shirts worn by individuals in the courtroom here similarly threatened Mr. Allen’s right to a fair trial. *Id.* at 831. The presence of spectators wearing t-shirts bearing a message of support for the victims conveyed a message that Mr. Allen was guilty and constituted impermissible evidence neither introduced by the state nor subject to cross-examination. *See Id.* at 829-30. The largely printed message was

prominently displayed and spectators wearing t-shirts bearing this message in the formal setting of a courtroom were undoubtedly seen by the jury. As the buttons in *Norris* presented unacceptable risk to the defendant's right to a fair trial, the larger, more prominently displayed message here did as well.

c. The First Amendment does not permit trial spectators to engage in types of speech in the courtroom prejudicial to a defendant's Sixth and Fourteenth Amendment rights.

A defendant's Sixth and Fourteenth Amendment rights to a fair trial is superior to the First Amendment right of courtroom spectators. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (holding public's right to attend trials restricted by defendant's right to a fair trial). The First Amendment right of non-participants during a trial "must necessarily be subject to the maintenance of absolute fairness in the judicial process." *Estes v. Texas*, 381 U.S. 532, 539, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). A trial spectator's First Amendment right is constrained within the courtroom because "the Constitution hardly meant to create the right to influence judges or juries." *Pennekamp v. Florida*, 328 U.S. 331, 366, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946) (Frankfurter, J., concurring).

i. The First Amendment does not protect courtroom spectators' speech intended to sway a jury.

Wearing t-shirts bearing a message intended to influence a jury's determination of guilt or innocence in a courtroom is not protected speech under the First Amendment. Because the right to a fair trial requires that "the jury's verdict be based on evidence received in open court, not from outside sources," speech designed to impermissibly influence a jury's determination of guilt is not protected by the First Amendment. *Sheppard*, 384 U.S. at 351. As Justice Stevens more recently stated:

In my opinion, there is no merit whatsoever to the suggestion that the First Amendment may provide some measure of protection to spectators in a courtroom who engage in actual or symbolic speech to express any point of view about an ongoing proceeding.

Carey v. Musladin, 549 U.S. 70, 79, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (Stevens, concurring). Because the t-shirts threatened to undermine Mr. Allen's right to a fair trial, they are not a form of speech protected under the First Amendment.

Even if the First Amendment does provide trial spectators some speech protection, the trial court incorrectly concluded that the First Amendment guarantees court spectators the right to wear t-shirts advocating for Mr. Allen's guilt. Mr. Allen twice objected to court spectators wearing the t-shirts during the trial, and once objected to the

presence of uniformed officers in the courtroom. Each time, the trial judge denied his motion on grounds that it is “a matter of free speech” without considering the detrimental effect these practices had on Mr. Allen’s right to a fair trial. The courtroom scene prejudiced Mr. Allen and threatened “not to hold the balance nice, clear, and true between the state and the accused.” *Tumey v. Ohio*, 273 U.S. 510, 531, 47 S. Ct. 437, 71 L. Ed. 749 (1927). Due to the primacy of a defendant’s right to a fair trial over a non-participant’s First Amendment right, the trial court judge was obliged to take steps to safeguard Mr. Allen’s Sixth and Fourteenth Amendment rights even if it required limiting the spectators’ First Amendment rights.

ii. The public’s right of access to criminal trials is intended to protect a defendant’s right to a fair trial, not to permit courtroom practices that jeopardize that right.

The public right of access to criminal trial proceedings was not intended to afford spectators the ability to influence the jury. The right to a public trial is designed to benefit the defendant, and society as a whole, by ensuring he receives a fair trial by ensuring the “judge and prosecutor carry out their duties responsibly.” *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). By exposing courtroom proceedings to public scrutiny,

parties to the trial are incentivized to act professionally and in accordance with the dictates of their positions. *Id.*

If spectators are permitted to wear shirts advocating for a defendant's guilt, then the right to a public trial, intended to safeguard the a fair trial, undermines that right. Here, the trial court at other times made efforts to protect the Mr. Allen's right to an impartial jury by shielding the jury from outside influences generated by the media attention this case received. 40RP 3025. Yet the trial court then ruled that because the public has a right of access to criminal trials, they are permitted to wear t-shirts advocating for a defendant's guilt in the courtroom. *Id.* In doing so, the judge held that a courtroom practice prejudicial to Mr. Allen's right to a fair trial was permitted, if not required, on grounds intended to protect that very right. *Waller*, 467 U.S. at 46. The trial court should have determined that Due Process concerns required that the shirts be removed or covered, not that "justice" dictated that they be permitted in the courtroom. 40RP 3027.

iii. No essential state policy justified permitting the spectators' demonstration in the courtroom.

A prejudicial courtroom practice may be permitted in some circumstances if necessary to further an "essential state policy." *Williams*,

425 U.S. at 505. A prejudicial practice that is merely convenient does rise to the level of an essential state policy. Rather, a prejudicial practice is only permitted if the “process of justice” would be frustrated if it were not permitted. *Id.* at 505 n.2; 505.

Permitting the spectators’ demonstration in the trial court did not serve an essential state. Unlike the presence of uniformed troopers to maintain security and custody over a defendant who had been denied bail, *Holbrook*, 472 U.S. at 571-72, or, as a last resort, shackling a contumacious defendant who made it wholly impossible to proceed with a trial, *Illinois v. Allen*, 397 U.S. 337, 342, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), permitting spectators to wear t-shirts expressing sympathy for the victims was not required for security purposes or essential for the trial to proceed in an orderly fashion. Rather, it was contrary and detrimental to the State’s interest in ensuring Mr. Allen’s right to a fair trial by permitting a showing of support for one side.

Further, the atmosphere of the courtroom is indispensable to the maintenance of a fair trial, and “must be maintained at all costs.” *Estes*, 381 U.S. at 540; *Allen*, 397 U.S. at 1061 (“It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country.”). Allowing court spectators to wear clothing bearing messages of support for one side

undermines the role of the courtroom as a neutral forum in which to resolve criminal matters. *Jaime*, 168 Wn.2d at 867. It transforms the courtroom from a “neutral place to conduct the business of law” into an environment more appropriately found at a sporting arena, where spectators wear their teams’ colors and bear messages of support for the side they favor. Upholding the impartial environment of the courtroom is an essential state interest, necessary to secure a defendant’s constitutional rights, and must be safeguarded.

Although the family of a deceased victim of a crime has an understandable interest in expressing their grief, a criminal trial is not the proper forum for doing so. Crime victims and their survivors have a voice in the form of prosecution, and are permitted a further role in the sentencing phase of trial. Const. Art. I, § 35. As long as a defendant’s right to a fair trial is not compromised, crime victims, their families, and supporters are, like other members of the public, afforded the right of access to criminal trials. Const. Art. I, § 10; *Dreiling v. Jain*, 151 Wn.2d 900, 908-09, 93 P.3d 861 (2004). But prosecutors, not spectators supporting victims, are the party to present relevant evidence regarding the victim. *Turner*, 379 U.S. at 472-73. The trial court failed to meet its obligation to ensure Mr. Allen received a trial free of the improper influences of courtroom spectators

3. Because accomplice liability does not extend to aggravating factors the Court must reverse Mr. Allen's sentence.³

“A trial court only possesses the power to impose sentences provided by law.” *In re the Personal Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). This Court has repeatedly held it is for the Legislature to establish the relevant sentencing procedure and that courts may not infer nor imply authority beyond that provided. *State v. Davis*, 163 Wn.2d 606, 611, 184 P.3d 689 (2008); *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). Mr. Allen has argued there is no statutory authority permitting application of an aggravating factor based upon accomplice liability. In response, the State identifies none.

Prior to 1975, Washington's accomplice-liability statute, former RCW 9.01.030, provided in relevant part:

Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent . . . is a principal, and shall be proceeded against and punished as such.

Thus, the prior statute expressly permitted punishing an accomplice in the same fashion as the principal actor. The current statute, however, does not

³ Because Mr. Allen is entitled to a new trial it is not strictly necessary for this Court to reach this claim except to the extent it is likely to recur at a new trial. This argument is presented and more fully briefed by the respondent in *State v. Hayes*, 89742-5.

include language that an accomplice shall “be punished” as a principal. *Compare* RCW 9A.08.020. Because it is silent on the point of punishment RCW 9A.08.020 cannot be the basis to impose a sentencing enhancement on an accomplice. *State v. McKim*, 98 Wn.2d 111, 115-16, 653 P.2d 1040 (1982). Instead, “the operative language” of the applicable sentencing statute must provide a basis to apply accomplice liability for the sentencing provision. *Id.* at 116. Thus, *McKim* concluded an accomplice was not subject to a mandatory minimum triggered by the principal’s use of a weapon, because the weapon statute was silent on its application to an accomplice.

The Legislature demonstrated its understanding of the need to include express triggering language to increase an accomplice’s punishment when it revised the deadly weapon enhancement statute after *McKim*. The revised statute permits the penalty enhancement when “the offender or an accomplice was armed with a deadly weapon.” *See State v. Silva-Baltazar*, 125 Wn.2d 472, 481, 886 P.2d 138 (1994) (quoting former RCW 9.94A.125 and discussing statutory change following *McKim*).

The Legislature has not changed the complicity statute since *McKim*. RCW 9A.08.020 continues to define when a person may be found “guilty of a crime” based on another person’s conduct. It does not authorize increased punishment under the Sentencing Reform Act. *See In*

re Personal Restraint of Howerton, 109 Wn. App. 494, 501, 36 P.3d 565 (2001) (*McKim*'s analysis "is sound" regarding the complicity statute's inapplicability to sentence enhancements). Imposing an enhanced sentence flows from the express and deliberate authorization in the governing sentencing statute, regardless of how the underlying crime is defined. *State v. Kelley*, 168 Wn.2d 72, 83, 226 P.3d 773 (2010).

The aggravating factor at issue here provides:

The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

RCW 9.94A.535(3)(v). Plainly, nothing in the "operative language" of that statute provides for accomplice liability. Thus, under *McKim* it could not authorize an exceptional sentence.

In its brief below, the State suggests the Legislature telegraphed its intent to permit certain aggravators to apply to accomplices while others do not. According to the State's novel theory, where in defining the aggravator the Legislature merely described the circumstances of a crime, the Legislature intended such aggravators to apply to accomplices. On the other hand, where the Legislature defined the aggravator in terms of the specific conduct or knowledge of an individual the State surmises the Legislature did not intend the aggravator to apply to accomplices.

Importantly, the State does not offer any support for this strained interpretation of legislative intent. Moreover, the State's theory ignores the legislative response to *McKim*, *i.e.*, specifically amending the weapon enhancement statute to include "or an accomplice." That response illustrates the Legislature knows how to state its intent to extend accomplice liability to sentencing factors. Similarly, the Legislature has expressly extended other sentencing provisions to accomplices. *See* RCW 9.94A.533(5) ("additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility"); RCW 9.94A.533(3) ("additional times shall be added to the standard sentence range ... if the offender or an accomplice was armed with a firearm"); RCW 9.94A.533(4) (adding punishment "if the offender or an accomplice was armed with a deadly weapon").

Penal statutes are given "a strict and literal interpretation." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The Court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *Id.* Where it has intended accomplice liability to trigger sentencing factors the Legislature has expressly said so. The absence of any similar language in RCW 9.94A.535(3)(v) can only be read to mean the Legislature did not intend it to apply to accomplices.

But even accepting the State's novel argument that one can divine legislative intent from whether the aggravator focuses upon an actor or conduct generally, the aggravator at issue here plainly focuses upon the actor and his knowledge. The aggravator requires that "the offender knew that the victim was a law enforcement officer." Thus even under the State's contrived theory, RCW 9.94A.535(3)(v) does not apply to Mr. Allen as he was not the actor. Because RCW 9.94A.535(3)(v) does not apply to an accomplice, Mr. Allen's exceptional sentence should be reversed.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Allen's convictions and remand for new and fair trial.

Respectfully submitted this 17th day of July, 2014.

s/Gregory C. Link
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Washington Appellate Project – 91072
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 89917-7
v.)	
)	
DARCUS ALLEN)	
)	
Petitioner.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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PIERCE COUNTY PROSECUTOR'S OFFICE	
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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF JULY, 2014.



X _____

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Supplemental Brief of Petitioner

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