NO. 102787-7

SUPREME COURT OF THE STATE OF WASHINGTON

ABBAS ZHGAIR,

Respondent,

v.

STATE OF WASHINGTON,

Petitioner.

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

RESPONDENT'S SUPPLEMENTAL BRIEF
(corrected copy)

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A. INTRODUCTION

Someone fired a single shot that hit Silvano Ruiz-Perez in the forearm. He died shortly thereafter. No witnesses or forensic evidence showed who fired this shot, why, or what weapon was used to do it.

At least two other people were potentially present: Abbas Zghair and an unidentified Black man wearing red. There was no evidence any these people knew each other before this incident. There was no evidence of any plan, agreement, encouragement, or solicitation of this shooting. At most, jurors could infer Mr. Zgahir was there. But no reasonable inferences showed he knowingly participated in the shooting or was the shooter.

The Court of Appeals correctly ruled Mr. Zghair's potential presence is not a valid basis to convict him of the shooting.

B. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED

The prosecution charged Mr. Zghair with second degree murder based on an intentional shooting, but the evidence established only that he was potentially present at the time the decedent was shot. No evidence showed any connection between the possible people present or any plan or agreement to shoot anyone. The prosecution claimed Mr. Zghair's post-incident behavior was suspicious, yet this sheds no light on Mr. Zghair's actual knowledge or conduct during the incident. Is speculation premised on suspicion insufficient to establish Mr. Zghair knowingly participated in an intentional shooting?

C. STATEMENT OF THE CASE

On March 24, 2019, a homeless man living near a field found a person lying dead. RP 1115, 1131-32, 1135-06. Silvano Ruiz-Perez had a single shotgun wound to his forearm. RP 1729, 1913, 1919, 1928.

Police believed Mr. Ruiz-Perez was shot the day before and walked around the field before dying. RP 1121, 1301, 1306. They thought his footprints started at tire tracks along the road. RP 1297, 2061-61.

Numerous homeless people lived in camps or vehicles nearby. RP 1123, 1189, 1249. There were also businesses and an apartment. RP 1461, 1463.

Several weeks later, Maryanne Denton told officers that she and her husband Mark were parked outside a friend's auto shop in the area. RP 2140. At about 3:30 am, she was watching a movie on her phone, using headphones, when she thought she heard two gunshots. RP 1437, 1439-42. Mark was asleep, snoring, and did not hear a shot. RP 1443. After Maryanne woke Mark, they heard two people argue in Spanish. RP 1455-56, 1467. They did not understand what was said. *Id*.

The Dentons' car had curtains blocking them from seeing outside. RP 1453. They briefly peered out but another

car's headlights blinded their view. RP 1439-40, 1445, 1452-53, 1464.

The evening before he was shot, Mr. Ruiz-Perez spent about four hours at a bar in Kent. RP 1355-58. Video surveillance showed he left this bar at 10:47 pm, closing time. RP 1355-56. Cell phone records showed he went to another nearby bar. RP 1362, 1369, 2286-87.

Police officers tracked Mr. Ruiz-Perez's cell phone location and searched for surveillance video. They found an ATM camera showing Mr. Ruiz-Perez withdrawing money at about 1:25 am. RP 2118-19. The image included a white car in the background. RP 2119.

Mr. Ruiz-Perez made several calls at about 2:30 am, some to taxi companies and to his fiancée, indicating he was looking for a ride. RP 2087-88.

Although cell phone data does not give precise location information, Mr. Ruiz-Perez's cell phone was in the area of D St. NE and 277th St. in Auburn at about 4 am. RP 2092.

Surveillance cameras showed a similar white car in the area. RP 2119.

Police located this white car parked on the street by some apartments several weeks later. RP 1394, 2114. The apartment's surveillance cameras showed an unidentified person parking the car on March 31, eight days after the shooting. RP 1409-10.

The white car was registered to Abbas Zghair. RP 1429. A 10-person FBI team searched the car and found only a small spot on the car's frame where the door shuts and a "little tear" on the back of the driver's seat cushion that possibly contained blood. RP 1614-15, 1664, 1669-70. DNA testing confirmed Mr. Ruiz-Perez as a contributor. RP 2006-08, 2014-19. The little tear also contained a small number of birdshot pellets. RP 1664, 2182.

The FBI examiners found food stains and other markings in the car, undercutting the prosecution's theory it had been thoroughly cleaned before their search. RP 1662, 1669. They

also found a toothbrush, soda can, clothing, and documents with Mr. Zghair's name on them in the car, including the car registration. RP 1651-54, 1657-58, 1662.

Cell phone records showed Mr. Zghair's phone in the same area as Mr. Ruiz-Perez's phone at various times that evening. RP 2103, 2271. One shared location of the phone was a Chevron gas station in Kent. RP 1852, 1856, 2275-77. The Chevron's video surveillance showed Mr. Zghair near a Black man in a red jacket. RP 1856, 1871-73; Ex. 57. Traffic cameras showed a person in red inside Mr. Zghair's car close in time to when the police believed the shooting occurred. RP 2538-39, 2542. The police never identified this other person. RP 2317.

More than three weeks after the shooting, Abdoul Tevore and Mansur Ponnaught ran into Mr. Zghair at McDonalds. RP 2340-42. They were going to Canada to visit Mansur's girlfriend. RP 2203, 2342. Mr. Zghair joined them. RP 2342, 2344. Mr. Zghair did not have identification with him and his friends gave him another friend's identification card. RP 2203.

At the border, none of the men had their U.S. residency documents and the Canadian border official told them to turn around. RP 1553, 2345-46.

A United States border guard told the three men to wait while they verified their state-issued identification. RP 1556, 2348. Mr. Zghair left the waiting area and bought a drink at a gas station farther down the road. RP 1571-72, 2348. He ran when a border guard found him but was quickly detained. RP 1572.

There was no warrant for Mr. Zghair at this time but detectives had marked him as a person of interest and they learned of his arrest at the border. RP 1576. In response to the detectives' questions about the incident, Mr. Zghair said he gave a ride to a Mexican guy. RP 2211-12, 2222. The Mexican man repeatedly asked for help to buy cocaine. RP 2227-28.

Mr. Zghair's native language is Arabic, not English, but the police interviewed him without an interpreter. RP 1823, 2294. He used an interpreter throughout trial. RP 662. Spanish

was Mr. Ruiz-Perez's first language. RP 1343. There was no evidence Mr. Zghair speaks Spanish.

The prosecution charged Mr. Zghair with felony murder in the second degree based on the second degree assault with a firearm enhancement. CP 1. It argued that cell phone evidence showed Mr. Zghair was present when Mr. Ruiz-Perez was shot along with the person in red, and either he shot Mr. Ruiz-Perez or he was an accomplice to the person in red. RP 2535, 2542, 2573-74.

The jury asked the court if accomplice liability includes "the withholding of information to detectives" as "constitut[ing] aiding another person in planning or committing a crime." CP 135. The court told the jury to re-read their instructions. CP 136. He was convicted as charged.

The Court of Appeals determined there was insufficient evidence to convict Mr. Zghair as the principle or accomplice, because no reasonable inferences from the evidence satisfied the essential elements of the crime charged. Slip op. at 9-23.

D. ARGUMENT

As the Court of Appeals correctly ruled, the prosecution's speculative theory of culpability did not prove Mr. Zghair knowingly aided another person in committing the crime charged.

1. *Speculation about possible scenarios connecting a person to a crime does not constitute sufficient evidence to sustain a criminal conviction*.

Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold that the prosecution must establish to garner a conviction. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. "[T]he Due Process Clause 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." *Id*.

An appellate court may not assume a jury reached the correct result merely because some evidence in the record supports a conviction. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94

Wn.2d 216, 221-22, 616 P.2d 628 (1980). The reviewing court must "assess the historical facts" and "determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 318.

The reasonable doubt standard of proof requires the factfinder "to reach a subjective state of near certitude of the guilt of the accused." *Id*. at 315. Reviewing courts must "take seriously the admonition that while '[a] jury is entitled to draw a vast range of reasonable inferences from evidence, [it] may not base a verdict on mere speculation.'" *Harrison v. United States*, 60 A.3d 1155, 1162-63 (D.C. 2012) (quoting *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001)).

A reasonable inference is one that "flows more likely than not from the basic proven fact." *State v. Jameison*, 4 Wn. App. 2d 184, 200, 421 P.3d 463 (2018) (citing *State v Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994)).

A jury may not infer the existence of facts from mere possibilities. *Gardner v. Seymour*, 27 Wn.2d 802, 810-11, 180

P.2d 564 (1947). A belief that something "might have happened" is not a legitimate inference the fact-finder may make absent additional proof "that it could not reasonably have happened any other way." *Id*. at 810.

Inferences of a person's mental state "may be drawn only from conduct that plainly indicates such intent as a matter of logical probability." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). A person's intent may not be inferred from conduct that is "patently equivocal." *Id*. at 8.

In *Vasquez*, a Spanish-speaking man was arrested for shoplifting and had fraudulent Social Security and permanent resident cards in his wallet. *Id*. at 4-5. There was no direct proof he used these documents to gain a benefit, but there was no other apparent purpose for having them. *Id*. at 7. This Court ruled that speculating about an immigrant's suspicious possession of false documents to find intent to defraud "whisks away" the prosecution's burden of proof. *Id*. at 13; *see also State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999)

("[a]n inference should not arise where there are other reasonable conclusions that would follow from the circumstances").

2. *Lacking evidence Mr. Zghair was the shooter, the prosecution had to prove Mr. Zghair knowingly aided another person in the charged shooting.*

The prosecution charged Mr. Zghair with felony murder in the second degree, alleging he caused Mr. Ruiz-Perez's death in the course of committing assault in the second degree. CP 1. The court instructed the jury that to convict Mr. Zghair, the prosecution had to prove he or an accomplice committed an intentional shooting. CP 121, 123.[1]

In its closing argument, the prosecution contended the jurors could infer an unknown person shot Mr. Ruiz-Perez

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[1] The court instructed the jury that second degree assault means an assault "with a deadly weapon" and "assault" means "an intentional shooting of another person." CP 122-23. These instructions are the law of the case governing what the prosecution was required to prove. *State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1998).

while Mr. Zghair was present, and insisted this made Mr. Zghair an accomplice. RP 2538-39, 2542, 2545. Although it alternatively posited that Mr. Zghair could have been the shooter, it had no evidence supporting either version of events. RP 2545, 2547, 2573-74. At most, jurors could infer Mr. Zghair's presence. But his involvement is unknown and speculative. The prosecution lacked the necessary evidence permitting a reasonable inference of Mr. Zghair's liability for the intentional shooting.

a. A person is not culpable as an accomplice because they are present when a crime occurs.

To be liable as an accomplice to another person, the accused must have knowingly "aided, solicited, commanded, encouraged, or requested the commission of *the* crime." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.51 (5th ed. 2021) (emphasis added); RCW 9A.08.020(3)(a). "[A] person must associate with the undertaking, participate in it as something he desires to bring

about, and seek by his actions to make it succeed." *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

Aiding *any* crime does not suffice. *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). The person must have acted with knowledge that their conduct would promote or facilitate the crime charged. *Id*. In its closing argument the prosecution speculated that perhaps Mr. Zghair went to this field to commit a robbery. RP 2567-68. But if Mr. Zghair knowingly participated in some other crime, jurors could not convict him as charged. *Cronin*, 142 Wn.2d at 578-79.

The prosecution must prove the accomplice "*actually* knew that he was promoting or facilitating" the charged crime. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (emphasis in original). A person may not be convicted because they "should have known" they were aiding another person in the crime charged. *Id*. The inference that Mr. Zghair should have known another person would commit some crime when he went to the field does not establish accomplice liability. *See*

State v. Asaeli, 150 Wn. App. 543, 568-69, 208 P.3d 1136 (2009).

Mere presence is insufficient for accomplice liability, even if the person's presence "bolsters" or "gives support" to the perpetrator. *Wilson*, 91 Wn.2d at 491-92. In *Wilson*, several people strung a rope across a highway in a dangerous manner and were charged with reckless endangerment. *Id*. at 489. Mr. Wilson was present but his role was unclear. *Id*. at 490. This Court ruled his presence was insufficient to sustain a conviction, even if his presence encouraged the crime and he knew what the others were doing. *Id*. at 492 ("We hold that something more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite to finding Wilson to be an accomplice in this instance.").

"An accomplice is liable because he or she knowingly aids the criminal enterprise of another before the fact." *State v. Anderson*, 63 Wn. App. 257, 261, 818 P.2d 40 (1991); *see*

RCW 9A.08.020(3)(a) (defining accomplice liability as conduct that it aids in "the commission of the crime").

Helping someone after the crime constitutes rendering criminal assistance, which is a distinct offense premised on helping someone avoid apprehension or prosecution while knowing they committed a crime. *Anderson*, 63 Wn. App. at 261 (citing RCW 9A.76.050(5)).

A driver may be an accomplice in the crime only when the driver "actually knew" the other person "was going to" commit the crime before it occurred. *See Allen*, 182 Wn.2d at 374. In *Allen*, the defendant's only role was driving the perpetrator to and from the scene of a shooting. *Id*. at 370. This Court explained, "the jury must find that Allen *actually knew*" the other person "was going to murder the four police officers" for Allen's driving to make him an accomplice to this crime. *Id*. at 374 (emphasis in original).

Similarly, in *Asaeli*, there was insufficient evidence the driver was an accomplice to an assault. 150 Wn. App. at 568-

70. The defendant drove people to a park in the early morning and watched as they assaulted a rival, but "the record contains no evidence, direct or indirect, establishing that [the defendant] was aware of any plan . . . to assault or shoot" before it occurred. *Id*. at 569. Despite driving a participant to the shooting, "the evidence failed to show that [the driver] was present at the scene with more than mere knowledge of some potential interaction with" the victim. *Id*. at 568.

Likewise, a person driving a car is not an accomplice to a robbery where he did not know his passenger would leave the car, forcefully take a bystander's purse, and jump back into the car to get away. *State v. Robinson*, 73 Wn. App. 851, 857-58, 872 P.2d 43 (1994). The driver admitted he drove away to help his friend escape. *Id*. His post-incident assistance could constitute rendering criminal assistance, but did not make him liable for the robbery. *Id*. at 858.

The State lacked necessary evidence showing Mr. Zghair's actual knowledge and purposeful aid in the commission of the charged intentional shooting.

b. Mr. Zghair's presence does not establish his liability.

Mr. Ruiz-Perez died from a single shotgun wound to his arm. RP 1913. There is no evidence who shot him or whether it was intentional rather than reckless or accidental. No weapon was ever found. Its size, shape, and owner were unknown.

The prosecution had no evidence about why someone fired a gunshot. There was no evidence showing who the person in red was. No one knew if he was Mr. Ruiz-Perez's acquaintance. There was no evidence Mr. Zghair had ever met either man before this evening. There was no evidence Mr. Zghair and the person in red were the only other people there.

In its closing argument, the prosecution speculated about why Mr. Zghair went to the field. RP 2567-68. It told the jury that people commit other crimes in far less remote locations, so

that going to a secluded area must mean some intent to commit some type of crime. *Id*. It contended that his post-incident conduct showed his consciousness of guilt. RP 2520, 2546-47, 2572-73.

Jurors plainly focused on this suspicion when they asked the court if he was an accomplice by withholding information from the police. CP 135-36. Contrary to the prosecution's closing argument, a lack of candor with the police does not show Mr. Zghair knowingly aided the intentional shooting at issue.

3. Suspicion about someone does not permit a juror to infer they knowingly aided in the charged shooting.

The prosecution asked jurors to surmise Mr. Zghair's culpability because it claimed he acted suspiciously after the incident. This type of speculation encourages jurors to draw on implicit or unconscious biases against a person like Mr. Zghair, a young man who spoke Arabic and was plainly born outside the United States.

A person's behavior after a crime occurs has been "consistently" treated as having dubious probative value. *Wong Sun v. United States*, 371 U.S. 471, 484 n.10, 83 S. Ct. 407, 415, 9 L. Ed. 2d 441 (1963). "[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses." *Id*. at 484 n.10 (quoting *Alberty v. United States*, 162 U.S. 499, 511, 16 S. Ct. 864, 40 L. Ed. 1051 (1896)).

Evidence of flight may be as consistent with innocence as with guilt. *State v. Slater*, 197 Wn.2d 660, 668, 486 P.3d 873 (2021). *Slater* explained that "not all flight evidence" permits an inference of consciousness of guilt. *Id*. at 674. "Even when flight evidence is admissible, it "tends to be only marginally probative as to the ultimate issue of guilt or innocence." *Slater*, 197 Wn.2d at 668 (internal citation omitted).

The probative value of flight evidence rests on "the degree of confidence with which four inferences can be drawn:" *Id*. These inferences are:

> (1) from the defendant's behavior to flight**;**
> (2) from flight to consciousness of guilt;
> (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and
> (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Id. at 669.

The "flight" at issue in *Slater* was the defendant's failure to appear for a court hearing on a criminal charge. *Id*. at 670-71. This Court explained this behavior did not meet the first inference required for admissibility -- it did not show flight. *Id*. at 672-73. "There are many innocent reasons people fail to appear for court, and courts must consider these circumstances." *Id*. at 674. A single failure to appear for court is so speculative that it "cannot be used for the purpose of inferring guilt" in any capacity. *Id*. at 673.

As another example, in *Cooper v. United States*, 218 F.2d 39, 41 (D.C. Cir. 1954), the defendant created a false alibi after his car was used in a robbery. But this suspicious alibi and facts connecting the defendant to the robbery did not prove his actual involvement. *Id*. The court explained that "innocent people caught in a web of circumstances frequently become terror-stricken." *Id*. It ruled the defendant's desire to distance himself from the robbery was too speculative to infer guilt, even if he could have been present for it. *Id*.

Mr. Zghair's behavior after the incident does not constitute "flight," does not indicate he was acting due to consciousness of guilt, and does not allow an inference that he was actually guilty of the crime charged. *See Slater*, 197 Wn.2d at 669.

The prosecution contended Mr. Zghair tried to distance himself from his white car. RP 2546. But the inference of guilt from this tenuous evidence is wholly speculative.

Eight days after Mr. Ruiz-Perez was shot, Mr. Zghair parked his car on the street by an apartment building where his friend lived. RP 2205. Just over one week later, the police found the parked car and had it towed. RP 1397. Mr. Zghair told police he realized the car was towed but assumed this happened because he left it on the street for too long. RP 2205-06.

The prosecution claimed the car's appearance was "slightly, not significantly" altered by removing part of a sticker on the windshield and parking it in a place he did not live. RP 2520. But the car contained a number of Mr. Zghair's personal effects. RP 1636. It smelled of cologne, not cleaning fluid. *Id*. It had clothes, food stains, a soda can, and a toothbrush inside, among other items. RP 1636, 1651-52, 1662. It had Mr. Zghair's paperwork including the car's registration in his name. RP 1653-54.

One "change" was that the front license plate was now properly attached to the car, as required by RCW

46.16A.200(5)(a)(i), where a photograph from incident showed the front license plate propped against the windshield. Ex. 73. Parking a car by a friend's home, with the car registration inside and license plates attached, along with personal belongings and identifying information, does not show Mr. Zghair was hiding from authorities.

The prosecution also alleged Mr. Zghair's impromptu decision to join friends Abdoul Tevore and Mansur Ponnaught on a trip to Canada permitted the jury to infer guilt. It is undisputed Mr. Zghair learned of the trip by happenstance. He did not bring personal belongings to indicate an intent to stay there.

Mr. Zghair did not have identification with him. RP 2203. His friends gave him an identification card in another friend's name. *Id*. When they got to the border, the guard asked for their green cards, which they did not have. RP 2345. They only had Washington identification with them. RP 2345-46. Without the federal identification documents needed to enter

Canada, they were told to wait so officers could verify their identification. RP 1554-56.

The three men got in line as directed but Mr. Zghair left and told his friends he was going to a shop. RP 1571-72, 2348. He bought a drink from a gas station further down the road. RP 1572, 2348. When border guards saw him he briefly fled but was caught quickly and arrested. RP 1571-73. Although the police viewed him as a person of interest, there was no warrant for his arrest. RP 1576.

No evidence connected this activity to the shooting that occurred more than three weeks earlier. There are multiple potential reasons Mr. Zghair would not want to cooperate with border authorities when he was tagging with friends to cross the border. It was reasonable to fear being in trouble for using a friend's identification at the border, particularly as a young Arab man who immigrated to the United States. RP 2214. None of the men appeared aware of what identification papers were required to travel to Canada. RP 2345. A non-citizen would

seek to avoid contact with border authorities when realizing there could be a problem.

As a person of Arab descent who does not speak English as his first language, Mr. Zghair likely had negative experiences with the authorities. *State v. Sum*, 199 Wn.2d 627, 642-43, 511 P.3d 92 (2022) (recognizing people of color "are disproportionate victims" of police scrutiny "without reasonable suspicion") (internal citation omitted). Mr. Zghair's behavior at the border is subject to various possible interpretations, most logically related to his ethnicity, immigration status, and the unplanned nature of this trip. Even if it indicated he felt guilty about something, it does not reasonably follow that it shows consciousness of guilt of the shooting.

The prosecution also urged the jury to infer guilt from Mr. Zghair's reticence with police. But a person's lack of candor with the police has limited probative value. *State v. Burke*, 163 Wn.2d 204, 218, 181 P.3d 1 (2008). People may

"mistrust law enforcement officials and refuse to speak to them not because they are guilty of some crime, but rather because 'they are simply fearful of coming into contact with those whom they regard as antagonists.'" *Id*. at 219 (internal citation omitted)).

The prosecution claimed Mr. Zghair changed his appearance by shaving, yet it had no evidence of when he shaved or whether he was clean-shaven at the time of the incident. RP 2306. The sole evidence for this change of appearance was a driver's license issued on January 4, 2019, which showed him with a neatly trimmed goatee and mustache. Ex. 28.

Mr. Zghair's lack of facial hair on April 13, 2019 offers no insight into his consciousness of guilt. Mr. Zghair told the police that he often grows facial hair then shaves it. RP 2236. He did not drastically cut his hair or color it as someone would to actually disguise themselves. A shadowy video from the Chevron shows a possible image of Mr. Zghair with hair that

looks substantially similar to the police interview and without apparent facial hair. Exs. 57, 72, 75. It is purely speculative, and seemingly erroneous, to conclude he changed his appearance due to this incident.

The prosecution noted Mr. Zghair sold his phone on April 12, 2019, shortly before his arrest. But the phone had belonged to a former employer who cut off service when Mr. Zghair stopped working for him. RP 1782, 1786. Mr. Zghair told the police he sold the phone because he needed money. RP 2220. This explanation is perfectly reasonable when it is undisputed the phone no longer had service. Any evidentiary value in the phone's data existed independent of the physical object.

Tenuous instances casting Mr. Zghair's behavior as suspicious do not permit an inference of his guilt.

4. The Court of Appeals properly reviewed the record and correctly determined the State lacked critical evidence for a conviction

As the Court of Appeals ruled after carefully reviewing the evidence in this case, the prosecution had a burden of proving a specific connection between Mr. Zghair and the intentional single gunshot wound to Mr. Ruiz-Perez's arm. It failed to prove he knowingly aided this shooting when it occurred.

A conviction may not rest on inferring his presence when it happened. *Wilson*, 91 Wn.2d at 491-92. Driving the shooter away from the scene does not establish the necessary knowing participation in the shooting when it occurred. *Robinson*, 73 Wn. App. at 857-58; *Anderson*, 63 Wn. App. at 261.

It does not suffice to guess why he shaved facial hair at some time in 2019. Failing to be honest with border guards or the detectives may be suspicious of something, but it does not provide insight into what happened during the incident.

There was no evidence Mr. Zghair spoke Spanish, unlike the person the Dentons heard arguing after the shots. RP 1463. There was no evidence he knew the person in red before this evening, that he ever had a gun or shotgun pellets, or that he ever anticipated a shooting might occur.

Jurors may not speculate Mr. Zghair knew there was a gun in the car simply because he was the driver. The prosecution bore the burden of proving Mr. Zghair's actual knowledge of the assault to be criminally liable. There was no evidence the gun was visible rather than hidden on the person carrying it. No evidence connected Mr. Zghair to any weapon.

One reason courts preclude convictions resting on speculation about the accused is to minimize the risk that racial or ethnic prejudices substitute for evidence and reasonable inferences. *See Vasquez*, 178 Wn.2d at 13 (rejecting inference that immigrant's possession of forged immigration documents shows intent to defraud even if no other reason to have such documents). Authorizing jurors to use suspicions to convict

someone invites them to resort to stereotypes and biases. To the extent the prosecution took advantage of such biases, it cannot be condoned.

The prosecution did not prove Mr. Zghair knowingly aided or intentionally committed this shooting of a person he did not know, with an unidentified weapon no one claimed he ever touched or knew about, with a person to whom he has no connection, for a wholly unexplained reason. The record is devoid of the necessary threshold of evidence to sustain a conviction.

E. CONCLUSION

This Court should affirm the Court of Appeals.

Counsel certifies this brief complies with RAP 18.17 and contains approximately 4961 words.

DATED this 26th day of July 2024.

Respectfully submitted,

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 102787-7**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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