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SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
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No. 96584-6
COA 32919-4

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LUIS GOMEZ-MONGES,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the unpublished opinion filed on October 18, 2018 in Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

1. Should review be denied because the court's decision does not meet the criteria for review under RAP 13.4(b)?

D. STATEMENT OF THE CASE

The facts are as set forth in the Court of Appeal's unpublished opinion, which was filed as an appendix to the petition for review. The State will supplement those facts as needed below.

E. ARGUMENT

- 1. Review should be denied because the court's decision does not meet the criteria for review under RAP 13.4(b).**

Under RAP 13.4(b), Gomez-Monges must show that the decision below conflicts with a decision of this court or another division of the Court of Appeals, that it presents a significant question of constitutional interest, or that it presents an issue of substantial public interest that should be decided by this Court. RAP 13.4(b). Here, the decision below does not meet any of this criteria.

a. The Court of Appeals correctly held that there was sufficient evidence to support a first degree murder conviction.

Gomez-Monges claims that there is insufficient evidence to support his conviction for first degree murder either as a principal or an accomplice. He argues that although he had knowledge and was present during the killing, there was no evidence he committed an overt act in furtherance of killing Mr. Holbrook or was ready to assist.

In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 599, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. *Id.*

The appellant was charged with first degree murder. Here, there was more than sufficient evidence to convict Gomez-Monges under either a principal or accomplice liability theory. WPIC 26.02 sets forth the only elements that the State must prove beyond a reasonable doubt. The court's Jury Instruction Number 14 contained this pattern instruction. CP 1852. Considering the evidence in the light most favorable to the State, a rational jury could have found all these essential elements.

First, there was overwhelming evidence that Gomez-Monges acted with intent to cause the death of the victim. Ms. Mendez testified that her boyfriend agreed to kill Mr. Holbrook for money. She testified that she saw Gomez-Monges attack Mr. Holbrook by hitting him on the head repeatedly while the victim was on his back. She walked out of the house when she saw blood and left Gomez-Monges alone with the victim. Mr. Holbrook was later found in critical condition, near death, with multiple fractures to both sides of his skull, and severe face trauma. RP 1373, 1375, 1392, 1479, 2328. Dr. Reynolds, the forensic pathologist, concluded that the proximate cause of death was severe blunt force trauma to his head. RP 2336. Specifically, there were three head injuries caused by three separate impacts or hits. *Id.* at 2335, 2338. The trauma resulted in brain damage. *Id.* at 2336. Dr. Wigren, the defense expert, concluded that the blunt injuries occurred first, and that the victim's neck was cut

when the victim was likely unconscious or near unconscious. *Id.* at 2366. Dr. Padilla opined that the skull fractures could have been caused by a number of blunt, hard objects, and perhaps a very hard blow with a fist, elbow, or knee. *Id.* at 1457-8. He testified that because of the deep bruising, there was a considerable amount of force used. *Id.* at 1478. Dr. Pauldine concluded that the head injury could be the result of several mechanisms, including punching, kicking, hitting the head against any type of object, or being hit with any type of a blunt object. *Id.* at 1469-70. Furthermore, both forensic pathologists indicated stomping on the head could cause fractures. *Id.* at 2338, 2380.

There was also a thin five- to six-inch incision on the victim's neck. *Id.* at 2333, 2343. No major arteries were hit. *Id.* at 2343-5, 2363-4. Dr. Reynolds testified that the cut could have been caused by any sharp blade, a knife, razor blade, or something with an edge. *Id.* at 2334, 2444. Dr. Padilla testified that it could have been caused by "a knife, utility knife, scalpel, something sharp." RP 1457.

With the severe injuries Gomez-Monges inflicted and his agreement to kill the victim for \$10,000 cash, there can only be one intent, an intent to kill. From the evidence presented, a rational trier of fact could have concluded that Gomez-Monges intentionally struck the victim multiple times on both sides of the head with the goal of killing him.

Further, there was sufficient evidence that the defendant's intent to cause the victim's death was premeditated. Premeditation has been defined as "the deliberate formation of and reflection upon the intent to take a human life" and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Gentry*, 125 Wn.2d 570, 598-99, 888 P.2d 1105, *cert. denied*, 116 S. Ct. 131 (1995).

Here, there was direct evidence of premeditation in that Gomez-Monges agreed in February of 2013 to kill Mr. Holbrook for \$10,000 cash. This was about three months before the attack. There was thinking and planning beforehand. The testimony showed that Ms. Mendez approached Mr. Blizzard about the offer to kill the victim in exchange for \$10,000. RP 2055. Gomez-Monges was present during the conversation and an agreement was reached. *Id.* at 2056-7. Ms. Taylor witnessed this agreement. *Id.* at 2314. Gomez-Monges told Ms. Mendez to tell Mr. Blizzard that he was going to do it. *Id.* at 2058. A few weeks later, he told Ms. Taylor that he was going to get the job done. *Id.* at 2288.

Gomez-Monges claimed on appeal that there was no evidence that he killed Mr. Holbrook. However, this argument is based on viewing the evidence in the light most favorable to the defendant, and completely ignores Ms. Mendez's testimony. He also claimed that he was clearly not

the principal as reflected in the jury's special verdicts. The special verdicts rendered no answers as to whether the appellant was a principal or accomplice and are entirely irrelevant to that issue. The jury answered no to the special verdicts which means either that the jury unanimously agreed that the answer was "no" or could not unanimously agree that "yes" was the correct answer.

Gomez-Monges seems to imply that the jury verdict and the special verdict on the deadly weapon are inconsistent. As explained in *State v. Goins*, 151 Wn.2d 728, 733, 92 P.3d 181 (2004), "Juries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity." Gomez-Monges claims that because the deadly weapon allegation was not proven and because no one saw him with a deadly weapon, there was no evidence that he caused the cut to Mr. Holbrook's neck.

First of all, the jury did not need to find that Gomez-Monges cut Mr. Holbrook's neck in order to find him guilty. The blunt force trauma to the head was the cause of death. RP 2336-7, 2381. The jury only needed to find that he acted with intent to cause the death of the victim. WPIC 26.02. Second of all, the jury did not need to find that he used a deadly weapon when cutting the victim's neck or fracturing the victim's head. The jury only needed to find the elements of the crime, none of

which require the use of a deadly weapon. *See* WPIC 29.02. The deadly weapon allegation required that the jury find he was armed with a deadly weapon at the time of the crime, a weapon specifically defined by statute. *See* CP 1856. This was not an element of first degree murder.

As to the cut on the victim's neck, Dr. Wigren testified it was likely caused by a sharp force, like a kitchen or steak knife. RP 2368. Dr. Reynolds testified that any sharp blade could have caused the cut, including a package cutting knife. RP 2335. Based on the evidence and testimony, it is possible the jury believed Gomez-Monges used a boxcutter or something else with a sharp blade in the attack, but that they did not find it was a deadly weapon as defined by RCW 9.94A.825.

As to the victim's head injuries, Dr. Reynolds testified the injuries were caused by something firm, which could be a piece of wood or something with an edge to it. RP 2334-5, 2338. Dr. Wigren testified that the injuries were consistent with an edge of a piece of wood, a two-by-four or even the edge of a brick, or maybe even a rock. RP 2358. At trial, Gomez-Monges claimed that his girlfriend used a rock to hit the victim in the head. It is quite possible that the jury believed that Gomez-Monges was actually the one who used a rock to hit the victim in the head but did not find a rock was a deadly weapon under the statute. Or it is possible they believed he used an unknown item with an edge, but could not find it

was a deadly weapon as defined by law. It's also possible the jury did not believe that Gomez-Monges used any object when he attacked Mr. Holbrook. Dr. Robert Padilla opined that the skull fractures could have been caused by a number of blunt, hard objects, and *perhaps a very hard blow with a fist, elbow, or knee*. *Id.* at 1457-8 (emphasis added). Dr. Pauldine concluded that the head injury could be the result of any of a number of mechanisms, including *punching, kicking, hitting the head against any type of object* or being hit with any type of a blunt object. *Id.* at 1469-70 (emphasis added). Both forensic pathologists indicated stomping on the head could also cause fractures. *Id.* at 2338, 2380.

In sum, the fact that the jury did not answer “yes” to the deadly weapon allegation tells us nothing about the jury verdict and we can infer nothing from that fact. The State did not have to prove the existence of a deadly weapon in order to prove that the defendant acted with intent to kill the victim.

Similarly, the fact that no one saw him with a deadly weapon does not mean there was insufficient evidence of the elements of murder in the first degree. Ms. Mendez testified that she saw Gomez-Monges hitting the victim in the head repeatedly while he laid on his back. RP 2081. She walked out and he later came out and told her to tell Mr. Blizzard “it was done.” *Id.* at 2082. There was a period of time (up to about 5 minutes

according to Ms.Mendez) when he was with the victim and she was not in the room. RP 2129. Later that same day he was found with multiple fractures to his head and a cut across his throat. And a boxcutter was subsequently found in the car he borrowed from his mother to drive to the scene of the crime.

Viewing the evidence in the light most favorable to the State, a reasonable inference from the evidence is that he caused the injuries to the victim, some of which his girlfriend witnessed and some of which she did not witness.

Gomez-Monges also argues that the State had no murder weapon. In some murder cases, the weapon is never found. That does not mean the State has not proven the elements of the crime. The jury could have believed that the defendant used his own body, including his hands, fists, elbows, fists, or feet to injure Mr. Holbrook. The jury was entitled to weigh the testimony and believe Ms. Mendez when she testified about Gomez-Monges attacking Mr. Holbrook. They were entitled to reject the testimony of Dr. Wigren, the defense expert. On the other hand, they were also entitled to believe that based on the significant injuries, the defendant used some type of weapon, but concealed or disposed of it after the attack.

Gomez-Monges also claimed on appeal that there was no evidence

he was ready to assist Ms. Mendez. However, the only evidence he considers is his *own* testimony at trial. *Id.* at 18. This is clearly not the standard of review. Looking at *all* the evidence in the light most favorable to the State, even if the jury did not believe he was the principal, there was more than enough evidence to find that he was an accomplice.

To prove that one present is an aider, it must be established that one is “ready to assist” in the commission of the crime. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981) (citing *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979)). The law holds an accomplice equally culpable as the principal, regardless of which one actually performed the harmful act. *State v. Silva-Baltazar*, 125 Wn.2d 472, 886 P.2d 138 (1994); *State v. McDonald*, 90 Wn. App. 604, 611, 953 P.2d 470 (1998), *aff’d*, 138 Wn.2d 680, 981 P.2d 443 (1999). All that is required is that the accomplice encouraged, rendered assistance, or aided in the planning or commission of the crime. *State v. McDonald*, 90 Wn. App. at 611 (1998). For sake of argument, if Ms. Mendez was the principal, there was substantial evidence that Gomez-Monges rendered assistance and aided in the planning and commission of the crime. He agreed with her to plan and kill the victim in exchange for \$10,000. He agreed that she should give the victim false names when setting up an appointment with him. He went

with her and Mr. Blizzard to scope out the location of the planned attack. On the day of the appointment, he borrowed his mom's car and drove his girlfriend to the appointment. He then joined Ms. Mendez in meeting with the victim and following him to the location of a second house where the attack took place. After the attack, he took the victim's phone and came up with the idea of breaking it. Finally, he drove Ms. Mendez away from the scene and accepted the cash that Ms. Mendez received from Mr. Blizzard for completing the job. Gomez-Monges then lied to detectives about ever going in the house, evidence of his guilty knowledge. Therefore, even if Gomez-Monges was not the principal, he engaged in sufficient acts to make him liable under an accomplice theory.

Importantly, it is not necessary that jurors be unanimous as to the manner of an accomplice's and a principal's participation as long as all agree that they did participate in the crime. *State v. Hoffman*, 116 Wn.2d 51, 104-105, 804 P.2d 577 (1991). In summary, any rational trier of fact could have found all of the essential elements of first degree murder beyond a reasonable doubt.

b. The Court of Appeals correctly affirmed the trial court's denial of a CrR 8.3 motion to dismiss.

On Appeal, Gomez-Monges raised an issue regarding prosecutorial misconduct that had already been decided in the codefendant's case. Mr. Blizzard previously raised the same exact issue and the Court of Appeals found that the trial court correctly denied the CrR 8.3 motion. *State v. Blizzard*, 195 Wn. App. 717, 381 P.3d 1241 (2016). This Court previously denied review of the claims in Blizzard's case. *State v. Blizzard*, 187 Wn.2d 1012, 388 P.3d 485 (2017).

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Brett*, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995). Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Appeals courts will find a decision manifestly unreasonable "if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Id.* A trial court's decision on prosecutorial misconduct is given deference on appeal. *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). This is because the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced the defendant's right to a fair trial. *Id.*

To support dismissal under Criminal Rule (CrR) 8.3(b), the defendant must show by a preponderance of the evidence both (1) arbitrary action or governmental misconduct, and (2) actual prejudice affecting the defendant's right to a fair trial. *Rohrich*, 149 Wn.2d at 654, 658; *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). Dismissal under CrR 8.3(b) is an extraordinary remedy that is improper except in truly egregious cases of mismanagement or misconduct that materially prejudice the rights of the accused. *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003); *Wilson*, 149 Wn.2d at 9. The level of governmental misconduct needed to prove a violation of due process must shock the conscience of the court and the universal sense of fairness. *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996).

In this case, numerous pretrial motions were heard. The petitioner's pretrial motions were consolidated with the codefendants' pretrial motions, including Mr. Blizzard's. On May 21, 2014, while court dates were pending on the motions, the elected prosecutor sent a letter to Presiding Judge Elofson, stating that Judge Reukauf should recuse herself from the pending cases involving the Vern Holbrook matter. CP 338-41. The presiding judge shared the contents of the letter with the trial judge. RP 566. On May 28, Judge Reukauf sent the letter to the trial prosecutor and defense attorney in this case, and then filed the letter with the clerk.

CP 336-41. A hearing was set on that same date in court on pretrial matters. During that hearing the trial judge was very clear that she felt she could be fair and impartial on the case. RP 496. She then explained that if a motion for recusal was being made by any of the parties, that it needed to be done in writing. *Id.* at 501. The State filed a notice of abandonment of the motion for recusal of judge. CP 353-4. No motions to recuse were filed by any defendants, including Gomez-Monges. Rather, the defense filed a motion to dismiss under CrR 8.3(b). *Id.* at 363-73.

At the CrR 8.3 hearing, the trial judge went on to make an independent decision that she was not going to voluntarily recuse and made a thorough record as to her decision. RP 569. The court then ruled on the CrR 8.3 motion. The trial court found that the letter was an ex parte communication with the trial judge and constituted misconduct. RP 566. The manner of the communication, not the content, was the basis for the misconduct finding. However, the trial court denied a motion to dismiss. *Id.* at 570, 575. The court also found that the conduct did not rise to a structural error. *Id.* at 576.

In *State v. Blizzard*, this Court held that once a basis for recusal is discovered, prompt action is required and that delaying a request for recusal until after a judge has issued an adverse ruling is considered tactical and constitutes waiver. 195 Wn. App. 717, 381 P.3d 1241 (2016).

Based on the same facts presented in this case, this Court held that appellate review was waived because Blizzard never made a motion for recusal.

The Court of Appeals denied Blizzard's separation of powers argument, reasoning that the letter could only implicate separation of powers if it was so powerful and divisive that it had the capacity to threaten the judge's independence. *Blizzard*, 195 Wn. App. at 725 (citing *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)).

Furthermore, there was no actual prejudice caused by the letter. Actual prejudice is the second requirement under CrR 8.3. On appeal, Gomez-Monges claimed that there was misconduct but did not argue that there was any actual prejudice. Similarly, during the pretrial hearing, Gomez-Monges did not argue that there was actual prejudice. His attorney stated, "It's potentially going to have effect on the proceedings as we go forward." RP 495. He also chose not to file a motion for recusal and made a thorough record that he agreed with the other three defense attorneys who stated they could have a fair trial. RP 495. As such, the trial court properly denied the dismissal motion because Gomez-Monges did not show actual prejudice.

As to structural error, there is a strong presumption that errors are not structural. *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144

L. Ed. 2d 35 (1999), *cert. denied*, 131 S. Ct. 160 (2010). A structural error is rare and courts are hesitant to classify errors as structural. *See, e.g., In re Pers. Restraint of Benn*, 134 Wn.2d 868, 921, 952 P.2d 116 (1998) (rejecting argument that violation of the right to be present is a structural error). It is an error that “affect[s] the framework within which the trial proceeds” and renders a criminal trial an improper ““vehicle for determining] guilt or innocence.”” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). In other words, the court must ask if the error necessarily rendered the trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009) (internal quotation marks omitted) (quoting *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)), *cert.denied*, 131 S. Ct. 160 (2010)).

In *State v. Warren*, the Supreme Court declined to reach the issue of whether a constitutional error analysis might be appropriate if the prosecutorial misconduct directly violated a constitutional right. 165 Wn.2d 17, 195 P.3d 940 (2008). The Court noted that like most errors, even constitutional ones, it is subject to some sort of harmless error analysis. Structural errors encompass only the most egregious

constitutional violations. *See, e.g., State v. Vreen*, 143 Wn.2d 923, 930, 26 P.3d 236 (2001) (denial of peremptory challenge is structural error).

In this case, Gomez-Monges has not shown that the prosecutor's letter rises to the level of a structural error. Here, the communication was made known to all the parties. RP 501, CP 336-341. Upon learning of the letter or at any point thereafter, Gomez-Monges did not seek recusal of the trial judge. There was simply no "miscarriage of justice" warranting reversal. It cannot be said that the conduct rendered the trial fundamentally unfair.

In *State v. Blizzard*, the Court of Appeals agreed there was no structural error. 195 Wn. App. 717, 381 P.3d 1241 (2016). The court correctly held that that the circumstances presented by Mr. Blizzard did not fall into any of the three established categories of unconstitutional judicial bias. *Id.* at 728. Furthermore, the criticisms were professional, not personal, and did not fall into a potential fourth category. *Id.* As such, there was no due process violation. *Id.* at 727-8. Furthermore, Gomez-Monges has not identified any difference in the letter's impact on his trial. Accordingly, the Court of Appeals was correct in standing by its reasoning in *Blizzard*.

F. CONCLUSION

This case does not meet any of the criteria in RAP 13.4(b). First of all, the decision is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. Second, a significant question of law under the Constitution of the State of Washington or of the United States is not involved. Lastly, the petition does not involve an issue of substantial public interest that should be determined by the Supreme Court. As such, his petition for review should be denied.

Respectfully submitted this 13th day of December, 2018,

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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on December 13, 2018, via the portal, I emailed a copy of STATE'S ANSWER TO PETITION FOR REVIEW to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13th day of December, 2018 at Yakima, Washington.

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