IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONALD MILTON WALLER, Appellant.	No. 38008-1-II (Consolidated with 37831-1-II, 38021-8-II, 38102-8-II) UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. DAWN MARIE COOPER, Appellant.	
STATE OF WASHINGTON, Respondent, v. DAVID WILLIAM READING, Appellant.	

Quinn-Brintnall, J. — A jury entered verdicts finding co-defendants Donald Waller and David Reading guilty of conspiracy to commit first degree robbery and/or first degree burglary and finding Dawn Cooper guilty of conspiracy to commit first degree robbery. Waller, Reading, and Cooper appeal their convictions, asserting that the State did not present sufficient evidence of an agreement among the participants to commit either of the charged offenses. Additionally, Cooper asserts that the trial court erred by (1) joining the defendants for trial, (2) violating her timely trial right, and (3) violating her right to present a defense by refusing her request to call a witness on her behalf. Cooper also argues that cumulative error requires reversal of her convictions based on the trial court violating the appearance of fairness doctrine and based on prosecutorial misconduct. In her statement of additional grounds for review (SAG),[1] Cooper repeats her counsel's arguments that the trial court improperly joined the defendants for trial and that the cumulative error doctrine requires reversal of her convictions. In her SAG, Cooper also argues that the trial court erred by limiting the scope of her defense counsel's opening statements. Because sufficient evidence supports the agreement element of the conspiracy convictions and because Cooper's remaining contentions lack merit, we affirm.

FACTS

Background Facts

On the morning of November 27, 2007, Waller, Reading, Cooper, and Janus Afo traveled in a green Ford Explorer to Kristinna Whitt's house on Steamboat Island in Thurston County. Afo told Whitt that he needed her help to find someone. Afo got into the Explorer and rode to the Steamboat Island Store; Whitt followed in her own car. At the store, Afo got into Whitt's

[1] RAP 10.10.

vehicle and told her that he needed her help to find Nate Hoffman because Hoffman "ripped some people off for $1,500." 2 Report of Proceedings (RP) at 258. Whitt and Afo drove to a nearby driving range followed by Waller, Reading, and Cooper in the Explorer. Cooper got out of the Explorer, walked to Whitt's car, and told her "she was sorry about the situation, that it sucked, but at that point, [Whitt] was their only link to finding [Hoffman]." 2 RP at 260. This was the first time that Whitt had met Cooper.

Cooper entered Whitt's car, and Whitt drove to a trailer park in Olympia, Washington, followed by the Explorer. Everyone went into a trailer, and Whitt made a number of telephone calls in an attempt to locate Hoffman. After approximately 10 phone calls, Whitt obtained directions to a residence in Tumwater, Washington. She wrote the directions on a piece of a phonebook page and gave it to Afo. Afo, Reading, and Waller left in the Explorer; Cooper stayed at the trailer with Whitt.

That same morning, Kristi Jones looked out the window of her Tumwater duplex and saw three men, later identified as Waller, Reading, and Afo, walking up the driveway toward her neighbor's house. Because Jones knew her neighbor very well and thought that he was not at home that morning, she became concerned about the men's presence. Jones did not notice whether any of the men were holding any objects in their hands. Waller, Reading, and Afo left Jones's view for approximately five minutes and then she saw them as they were returning to the Explorer. On the way back to the Explorer, Waller knocked on Jones's door, Jones answered through her window, and Waller asked her if "Nate [Hoffman]" was at home. 1 RP at 48. After Jones told him she did not know who Nate was, Waller left with Reading and Afo.

Also, that same morning, Narissa Kelley saw a green Ford Explorer drive past her

Tumwater home approximately five times in a 40- to 45-minute period. The Explorer eventually parked by a duplex across the street from Kelley. Kelley saw the three men walk toward the duplex; all three men were wearing hooded sweatshirts with their hoods up and one was wearing a camouflage jacket. Kelley saw one of the men open the screen door and try to push open the door with his upper right shoulder. Kelley saw another man possibly attempting to open a window. Kelley did not see any of the men enter the residence. She saw them leave after approximately five minutes. Kelley called 911 to report the activity.

At 9:35 am that day, Officer Christopher Tressler of the Tumwater Police Department responded to a call about a suspicious green Ford Explorer. While traveling southbound on Capital Boulevard in Tumwater, Tressler saw a green Ford Explorer traveling northbound. Tressler passed the vehicle and saw that there were three men in the vehicle. Tressler turned his vehicle around and stopped behind the Explorer while it was at a red light. When the light turned green, the Explorer turned left, and Tressler activated his overhead lights in an attempt to perform a traffic stop.

The driver of the vehicle, later identified as Reading, entered Interstate 5 and drove as "[f]ast as the vehicle would go," 85 m.p.h. 3 RP at 546. While driving on the Interstate, Reading "made numerous lane changes between the right outside lane and the center lane to pass other vehicles." 1 RP at 97. When Reading exited the Interstate, he went "[p]art way down the [off-]ramp, . . . braked and then made a hard right-hand turn onto the on-ramp to Highway 101 to Deschutes Way, driving the wrong way onto the on-ramp." 1 RP at 97. Reading then turned left on Deschutes Way and traveled at 80 m.p.h. in a posted 35-m.p.h. zone. The Explorer eventually turned into a private drive and stopped; the three men ran from the vehicle.

Officer Tressler caught the backseat passenger, Afo. A police dog located the front passenger, Waller, who was in a nearby wooded area. When officers found Waller, he was wearing a camouflage jacket, had a ski mask around his neck, and had two pairs of gloves in his pocket. Police caught Reading behind a convenience store near Highway 101. Inside the Explorer, police found a hatchet, a two-way radio, cell phones, a roll of duct tape, a police scanner, a wooden club, a pair of gloves, zip ties, a sleeping bag, and a .45 caliber handgun. When officers turned on the scanner, they found it tuned to the frequency used by the Tumwater and Lacey Police Department. Officers also found a page from a telephone book with directions written on it stating, "Right at the Dairy Queen, take the first right, follow to the end and take a left." 2 RP at 231.

Tumwater Police Detective Charles Liska found a cell phone ringing in the front passenger seat of the Explorer. Liska answered the phone and a female, later identified as Cooper, repeatedly asked him who he was. Liska said he was "Janus," and Cooper responded, "Quit fucking with me," and asked him where she could pick them up. 1 RP at 174. Liska told her that she could pick them up at the Tumwater Dairy Queen. Cooper called again, and Liska saw that the caller identification read "Don C." 1 RP at 176. Liska answered, "Dawn, where are you at," and he told her to pick him up at the Dairy Queen. 1 RP at 177. Cooper called again and Liska handed the phone to Detective Jennifer Kolb, who told Liska that Cooper wanted to talk to the male to whom she had just spoken. Cooper told Liska to meet her at the Chevron gas station. Liska contacted Police Chief John Stines and asked him to patrol the Dairy Queen for any suspicious females. Cooper called again and demanded to know the location of the person to whom she was talking; Cooper's voice became "increasingly panicky." 1 RP at 179. Officers did

not locate Cooper that day.

On November 30, 2007, Cooper gave a tape-recorded statement to the Tumwater Police Department. In her statement, Cooper told Detective Kolb that she was friends with Afo and that she rode with Afo, Reading, and Waller in a Ford Explorer to Whitt's residence. During the interview, Kolb confronted Cooper about the lack of details in her statement, and Cooper responded, "This is ridiculous. I don't want the tape on." 3 RP at 404. After Kolb turned off the tape recorder, Cooper stated that they were looking for Hoffman because he had stolen $1,500 from Reading. Cooper also stated that she had contacted Afo because she believed he could help them contact Whitt and that Whitt could help them locate Hoffman. Cooper further stated that she wanted to help find Hoffman because she had introduced him to Reading. Cooper also told Kolb that she did not believe that Reading intended to kill Hoffman, "[j]ust beat him up pretty bad." 3 RP at 405.

Procedural Facts

The State charged Waller with first degree unlawful possession of a firearm and conspiracy to commit first degree robbery and/or first degree burglary. The State charged Reading with first degree unlawful possession of a firearm, attempting to elude a pursuing police vehicle, and conspiracy to commit first degree robbery and/or first degree burglary.

On December 5, 2007, the State charged Cooper with conspiracy to commit first degree robbery. The State's charging document lists Waller, Reading, and Afo as Cooper's "Co-Defendant[s]" and provides separate cause numbers for each co-defendant. Clerk's Papers (CP) (Cooper) at 8. Cooper was arraigned on December 11, 2007. The trial court entered an order setting Cooper's trial to begin the week of February 4, 2008; the order lists Waller, Reading, and

Afo as Cooper's co-defendants.

On January 7, 2008, the State filed a motion to join defendants for trial. The trial court heard the State's motion on January 17, 2008. At the hearing, Cooper's defense counsel requested a one-week continuance to review the State's motion to join, which the trial court granted. At a January 30, 2008 status hearing, Reading's defense counsel indicated that Reading objected to the State's motion to join defendants for trial, to which the trial court responded, "The motion to join isn't before the Court today. The Court has already granted the motion to join, as I recall." RP (Jan. 30, 2008) at 12. The trial court noted that, although it had continued the hearing on the State's motion to join to January 24, it signed an order joining the defendants on January 17. The State appeared to concede that the order was erroneously signed, but it argued that the co-defendants were nonetheless properly joined for trial by operation of CrR 4.3(b). The trial court agreed with the State, finding that the State charged all the co-defendants in the same set of underlying facts or allegations. Cooper objected to the trial court's finding that the State properly joined the defendants for trial and objected to a continuance of the trial date, asserting her timely trial right. The trial court continued the trial to the week of March 17, 2008, over Cooper's objection.

On February 1, 2008, Cooper filed a motion to vacate the order joining defendants for trial. On February 12, 2008, Cooper filed a brief in support of a motion for separate trials. The trial court heard arguments on Cooper's motion on March 17, 2008. At the March 17 hearing, the trial court stated,

> As far as the Court is concerned, we are here for two matters today. One is to address dates for all the remaining court hearings in all three cases, including trial, and the other matter is regarding the motion by Ms. Cooper to vacate the Court's order joining the matters for trial. Frankly, one of the reasons I made the

> comments I made last time is because it appears to the Court that that earlier order was not properly entered. It was entered by some kind of inadvertence or accident because the Court had earlier indicated that it was going to have a hearing on [defense counsel's] request that the matters be severed or his opposition to joinder, depending on how you want to phrase it.
>
> I have reviewed each of the files. I reviewed them last week, I reviewed them again today, and I am pretty comfortable that this court never intended to sign that order. Having said that, that does not mean that the cases are not and should not have been proceeding together. They are all charged co-defendants arising out of a common set of alleged facts.

RP (Mar. 17, 2008) at 3-4.

When Cooper raised the issue of her timely trial right, the trial court noted that she did not file a motion for the timely trial issues. In denying Cooper's request to sever her trial from the co-defendants, the trial court found that Cooper had adequate notice that she would be tried as a co-defendant with Reading and Waller.[2]

The trial court entered an order continuing the trial date to May 19, 2008, to allow Waller's new counsel adequate time to prepare. On May 6, 2008, the State filed a motion requesting the trial court to continue the trial to May 27, 2008, because Detective Liska was scheduled for training in Spokane. Cooper filed a motion to dismiss for the State's failure to properly join co-defendants, which the trial court denied on May 29, 2008. Cooper appealed the trial court's denial of her motion to dismiss in a motion for discretionary review, which we later consolidated with her direct appeal.

A jury trial began on June 18, 2008. Before opening statements, the trial court heard the parties' motions in limine. The trial court granted Waller's motion to exclude any reference to a bag of marijuana found in the Explorer. Cooper requested that there be no mention of Reading's

[2] Afo entered a guilty plea prior to trial.

nickname, "Bogeyman or Boogeyman," that there be no mention of uncharged crimes, and that there be no mention of a drug debt unless the State presented evidence of a drug debt. 1 RP at 9. The State agreed that it would not discuss a drug debt unless there was evidence presented on the subject and that it would not mention Reading's nickname in its opening statement but that the nickname might go to identification. The trial court granted Cooper's motions to the extent that they related to opening statements, but it stated that it would address the issues at sidebar if they arose during the evidentiary phase of the trial. Waller later requested that there be no mention of an alleged incident involving Afo and Whitt where Afo allegedly threatened Whitt into helping them locate Hoffman. The State responded that it was "not going to go there." 1 RP at 26.

In its opening instructions to the jury, the trial court instructed the jury on reasonable doubt, stating,

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we can know with absolute certainty, and in criminal cases, the law not [sic] require proof that overcomes every possible doubt.
>
> A reasonable doubt is one for which a reason exists and may have arise [sic] from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

1 RP at 30-31.

On the third day of trial, June 23, 2008, Cooper moved to sever her trial from the co-defendants and for a mistrial based on the trial court's apparent chambers conference ruling that she could not call Hoffman as a witness. The trial court reserved its ruling on Cooper's motion until the conclusion of the State's case.

During the State's direct examination of Whitt, it asked her if she knew Reading, to which

Whitt replied, "I knew of him as the Boogeyman. I had heard of him as the Boogeyman." 2 RP at 245. The trial court sustained defense counsel's objection and instructed the jury to disregard Whitt's statement. Later the State asked Whitt if she had heard Afo say anything to the other men, to which she answered, "He said, 'Should I take my hostage with us?'" 2 RP at 266. The trial court ruled that it would instruct the jury to disregard the statement based on the parties' agreement not to mention uncharged crimes.

At the conclusion of the State's case, Cooper's defense counsel informed the trial court that he intended to call Hoffman as a witness. The State objected to Cooper calling Hoffman as a witness, arguing that his testimony was not relevant. In an offer of proof, Cooper's defense counsel stated that Hoffman would testify that he was friends with Cooper; that he had asked Cooper for a loan to bail a friend out of jail; that Cooper had replied that she did not have money to loan him; and that Cooper had introduced him to Reading, who agreed to loan Hoffman money if he would pay it back with interest.

Cooper's defense counsel also anticipated that Hoffman would testify that he had no reason to believe anyone was angry with him, that he did not receive any threats, and that nobody had tried to contact him or request that he repay his debt. Reading's defense counsel informed the trial court that he had previously represented Hoffman and that if Cooper called Hoffman as a witness, he would move to sever Reading's trial based on a conflict of interest impairing his ability to cross-examine the witness. The trial court ruled that Cooper could not call Hoffman as a witness, finding that Hoffman's proposed testimony was not relevant.

The jury entered verdicts finding all the co-defendants guilty of criminal conspiracy. The jury entered special verdicts finding that Waller and Reading conspired to commit first degree

robbery and first degree burglary but that Cooper only conspired to commit first degree robbery. The jury also entered a verdict finding Reading guilty of attempting to elude a pursuing police vehicle.[3] The jury found Waller and Reading not guilty of first degree unlawful possession of a firearm. The trial court sentenced each defendant within the standard range based on his or her respective offender score. Waller, Reading, and Cooper timely appeal.

[3] Reading appeals only his conspiracy conviction.

ANALYSIS

Sufficiency of the Evidence

Waller, Reading, and Cooper all assert that the State did not present sufficient evidence to support their conspiracy convictions. Specifically, they assert that the State did not present sufficient evidence that they had agreed to engage in conduct amounting to first degree robbery and/or first degree burglary. The State counters that it presented sufficient evidence from which the jury could reasonably infer that the co-defendants agreed to commit the charged offenses. We agree with the State.

Sufficiency of the evidence is a question of constitutional magnitude that a defendant may raise for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). In determining whether sufficient evidence supports a conviction, "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable for purposes of drawing inferences. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997) (citing *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992)). In other words, credibility determinations are for the trier of fact and are not subject to review. *State*

v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, the jury found by special verdict that Waller and Reading conspired to commit first degree robbery and first degree burglary but that Cooper conspired to commit only first degree robbery.

The criminal conspiracy statute, RCW 9A.28.040(1), provides:

> A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.52.020(1) provides:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.56.200(1) provides in pertinent part:

> A person is guilty of robbery in the first degree if:
> (a) In the commission of robbery or of immediate flight therefrom, he or she:
> (i) Is armed with a deadly weapon; or
> (ii) Displays what appears to be a firearm or other deadly weapon; or
> (iii) Inflicts bodily injury.

The criminal conspiracy statute makes an agreement between one or more persons a necessary element that the State must prove beyond a reasonable doubt to convict a defendant of conspiracy. RCW 9A.28.040; *State v. Miller*, 131 Wn.2d 78, 87, 929 P.2d 372 (1997). But the State is not required to show a formal agreement. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669, *review denied*, 133 Wn.2d 1021 (1997). Rather, the State may prove a conspiracy "'by showing the declarations, acts and conduct of the conspirators.'" *Barnes*, 85 Wn. App. at 664

(quoting *State v. McGonigle*, 144 Wash. 252, 260, 258 P. 16 (1927)). And the agreement may be proved circumstantially by the defendant's overt acts alone. *State v. Gallagher*, 15 Wn. App. 267, 277, 549 P.2d 499 (1976). Further, "once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict the defendant of knowing participation in the conspiracy." *State v. Brown*, 45 Wn. App. 571, 579, 726 P.2d 60 (1986) (citing *United States v. Traylor*, 656 F.2d 1326, 1337 (9th Cir. 1981); *United States v. Bailey*, 607 F.2d 237, 243 (9th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980)).

Here, the State presented sufficient evidence of Waller's, Reading's, and Cooper's overt acts, from which any reasonable juror could infer that each had agreed to engage in or cause the performance of conduct amounting to first degree robbery and that Waller and Reading had agreed to engage in conduct amounting to first degree burglary. At trial, the State presented evidence that Hoffman, the intended victim, owed $1,500 to Reading and that Cooper wanted to help Reading recover the money because she had introduced the two men. The State also presented evidence that Cooper contacted Afo to assist her in locating Hoffman.

Afo testified at trial that he expected that the group might have beaten up Hoffman if they located him and if he did not pay them the debt he owed to Reading. Afo also testified that, although Cooper did not formally discuss a plan to commit robbery or burglary, she knew that there was a possibility that the group would beat Hoffman up if necessary. In her statement to Tumwater Police Detective Kolb, Cooper stated that the group was looking for Hoffman so they could retrieve money owed to Reading. Cooper further stated, "They were going to beat him up," and, "They were going to beat him pretty bad." 2 RP at 391.

The evidence at trial also showed that Waller, Reading, Cooper, and Afo rode together in a green Ford Explorer to obtain directions to Hoffman's residence. And after receiving the directions, Waller, Reading, and Afo drove to the location on the directions while Cooper stayed behind. Additionally, the State presented testimony from two witnesses who had seen Waller, Reading, and Afo approach a residence, with one witness testifying that she saw one of the men trying to force open the front door. The evidence also showed that after the men left the residence, a police officer quickly spotted their vehicle and, when the officer attempted to pull the Explorer over, a high-speed chase ensued.

A search of the Explorer revealed numerous items that the men could have used to further a robbery or burglary including a hatchet, a two-way radio, cell phones, a roll of duct tape, a police scanner, a wooden club, a pair of gloves, zip ties, and a .45 caliber handgun. The State also presented evidence that Cooper had made numerous "increasingly panicky" phone calls to one of the men's cell phones requesting to know their location so she could meet up with them. 1 RP at 179. Last, the State presented testimony that showed Cooper attempted to meet up with the group but left after seeing police vehicles in the area because she became concerned that it was a set-up.

Any reasonable juror could infer from the defendants' conduct and from the items found in the Explorer that the defendants agreed to recover Hoffman's debt to Reading with force if necessary. The State thus presented sufficient evidence that each defendant had conspired to commit first degree robbery and that Waller and Reading had conspired to commit first degree burglary. The fact that the defendants did not complete a robbery or burglary is irrelevant to their criminal conspiracy convictions because their conspiracy was completed when they agreed to act

in concert and when they took a substantial step in their agreement when, prepared to recover Hoffman's debt with force, they drove to a residence they believed belonged to the intended victim.

At oral argument, Cooper asserted that sufficient evidence did not support her conspiracy to commit first degree robbery conviction because the State did not present any evidence showing she had knowledge that one of her co-conspirators was armed with a deadly weapon. Cooper's assertion fails because the State premised her criminal liability for conspiracy to commit first degree robbery based on her role as an accomplice. And the State is not required to prove an accomplice had knowledge that the principal was armed with a deadly weapon. *State v. Davis*, 101 Wn.2d 654, 658, 682 P.2d 883 (1984). "[T]he law has long recognized that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." *Davis*, 101 Wn.2d at 658. Sufficient evidence supports Cooper's conspiracy to commit first degree robbery conviction.

Improper Joinder/Timely trial

Next, Cooper asserts that the trial court improperly joined the defendants for trial, which resulted in a violation of her timely trial right. We disagree.

Cooper asserts that the trial court improperly joined the defendants for trial by granting the State's motion to join without an opportunity to be heard and, thus, in violation of her right to due process. Although it appears that the trial court inadvertently signed an order joining the defendants for trial, any error resulting from the signed order was harmless because the State properly joined Cooper as a co-defendant through her charging document.

CrR 4.3(b) provides in relevant part:

> **Joinder of Defendants.** Two or more defendants may be joined in the same charging document:
>
> . . . .
>
> (2) When each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
>
> (3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:
>
> (i) were part of a common scheme or plan; or
>
> (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

Here, Cooper's original information charges her with conspiracy to commit first degree robbery and lists Waller, Reading, and Afo as her co-defendants. Cooper argues that this charging document was insufficient to join her as a co-defendant because the State charged each co-defendant by separate information, and CrR 4.3(b) requires joinder "in the same charging document." But Cooper's narrow reading of this technical provision does not comport with our State's policies favoring notice pleading[4] and joint trials. *See State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991) ("Separate trials are not favored in Washington and defendants seeking severance have the burden of demonstrating that a joint trial would be so manifestly prejudicial as to outweigh the concern for judicial economy.").

Although CrR 4.3(b) allows the State to charge multiple defendants in the same charging document, nothing in CrR 4.3(b) requires the State to charge co-defendants in this manner. Division One of this court has determined that CrR 4.3's joinder of offenses provision should be construed expansively to promote the policy of conserving judicial and prosecution resources. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017

[4] Washington is notice pleading state. CR 8(a); *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006).

(1999). We agree and hold that similar concerns dictate an expansive interpretation of CrR 4.3's joinder of defendants provision such that its technical language does not prohibit the State from charging co-defendants in separate charging documents.

Because the State properly joined the defendants for trial, Cooper's assertion that the trial court violated her timely trial right fails. CrR 3.3(f)(2) provides:

> On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance.

Here, the trial court properly continued the trial date based on Waller's change of appointed counsel. Our Supreme Court has held that a trial court may continue a joint trial at one defendant's request past the timely trial period of an objecting co-defendant, where such continuance does not substantially prejudice the objecting co-defendant's presentation of his defense. *State v. Guloy*, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986); *see also State v. McKinzy*, 72 Wn. App. 85, 863 P.2d 594 (1993) (where on the last day of timely trial period, trial court granted continuance based on defendant's recent change of counsel, it was not required to grant co-defendant's motion for severance). Here, Cooper has not alleged that continuing her trial past her timely trial period based on her co-defendant's change of counsel substantially prejudiced the presentation of her defense and, thus, the trial court did not violate her right to a timely trial.

Due Process Right to Present a Defense

Next, Cooper asserts that the trial court denied her due process right to present a defense by precluding her from calling Hoffman as a witness. The State counters that the trial court

properly excluded Hoffman as a witness because his testimony would not have been relevant. Because the trial court acted within its discretion when it excluded Hoffman from testifying, we agree with the State.

A criminal defendant has a constitutional right to present relevant, admissible evidence in her defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). The United States Supreme Court has stated, "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). But the right of a criminal defendant to present evidence is not unfettered and the refusal to admit evidence lies largely within the sound exercise of the trial court's discretion. *Rehak*, 67 Wn. App. at 162. We review a trial court's decision to admit or refuse evidence under an abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Powell*, 126 Wn.2d at 258.

Here, the State objected to Cooper's defense counsel calling Hoffman as a witness, asserting that Hoffman's testimony would not be relevant. In his offer of proof, Cooper's defense counsel stated that Hoffman would testify that he was friends with Cooper, that he asked her to loan him money to bail a friend out of jail, and that she introduced him to Reading, who loaned him the money on the condition that he pay it back with interest. Cooper's defense counsel also anticipated that Hoffman would testify that he believed nobody was angry with him, that nobody made any threats against him, that nobody asked for the money back, and that Whitt had a

reputation for not telling the truth. The trial court sustained the State's objection stating,

> I agree with the State that were the jury to believe everything that has been set forth in the offer of proof, it would not assist them in determining the verdict in this case. His testimony goes to none of the elements of the charged offenses, and for that reason, it is irrelevant.

3 RP at 449.

ER 401 defines relevant evidence:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Here, the trial court properly acted within its discretion by not allowing Hoffman to testify. The essential elements of a criminal conspiracy are (1) an agreement to commit a crime and (2) taking a substantial step toward the completion of that agreement. RCW 9A.28.040; *State v. Varnell*, 162 Wn.2d 165, 169, 170 P.3d 24 (2007). Hoffman's belief as to the nature of his debt and his belated claim of an ability to repay it would not make it any less probable that Cooper agreed to commit first degree robbery or any less probable that a co-conspirator took a substantial step toward committing first degree robbery. Further, because Cooper's offer of proof did not indicate that Hoffman was present during any of the events leading up to the criminal conspiracy, apart from making the initial debt, his testimony would not have undercut any of the State's evidence against Cooper. And Hoffman's proposed testimony as to Whitt's reputation for not telling the truth would not have undercut the State's case because all of her testimony was cumulative of Miller's testimony and portions of her testimony were also cumulative of Afo's and Reading's testimony. *See* ER 403.[5]

[5] ER 403 states,

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues,

More important, whether Hoffman actually owed Reading money was not relevant evidence to the crime of conspiracy to commit first degree robbery or first degree burglary because the defense of self-help is not available to a defendant claiming to have acted in order to recover a debt owed by the victim. *State v. Self*, 42 Wn. App. 654, 657, 713 P.2d 142, *review denied*, 105 Wn.2d 1017 (1986); *State v. Larsen*, 23 Wn. App. 218, 219, 596 P.2d 1089 (1979). Accordingly, the trial court did not deny Cooper's due process right to present a defense when it properly refused to admit Hoffman's irrelevant and cumulative testimony.

Appearance of Fairness Doctrine

Next, Cooper asserts that the trial court violated the appearance of fairness doctrine.[6] Specifically, Cooper asserts that the trial court demonstrated bias by making comments that "were not overly courteous to [her defense] counsel." Br. of Appellant (Cooper) at 33. Because a reasonably prudent and disinterested person would not perceive the trial court's comments as demonstrating bias or prejudice, we disagree.

The appearance of fairness doctrine, Canon 3(D) of the Washington Code of Judicial Conduct (CJC), and due process require a judge to disqualify himself if he is biased against a party or if his impartiality "may reasonably be questioned." *State v. Dominguez*, 81 Wn. App. 325, 328,

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> or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[6] Cooper also asserts that the judges presiding over pretrial hearings violated the appearance of fairness doctrine. But Cooper does not state any facts supporting this claim, does not direct the court to where in the record such facts may be found, and does not provide any argument in support of this claim. Instead, Cooper merely states, "The pretrial motion demeanor of the judges is set forth in the transcripts and the motions, including the motion to disqualify Judge Hirsch and the motion for discretionary review." Br. of Appellant (Cooper) at 33. And an assignment of error unsupported by legal argument will not be considered on appeal. RAP 10.3(a)(6); *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

914 P.2d 141 (1996) (citing *In re Matter of Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). The appearance of fairness doctrine protects not only against actual bias or prejudice but also against perceived bias and prejudice. *State v. Mandry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972) ("The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial."). We determine whether a judge appears to be impartial by how "'it would appear to a reasonably prudent and disinterested person.'" *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999) (quoting *Brister v. Tacoma City Council*, 27 Wn. App. 474, 486-87, 619 P.2d 982 (1980), *review denied*, 95 Wn.2d 1006 (1981)). But we presume that a judge acts without bias or prejudice. *See State v. Chamberlin*, 161 Wn.2d 30, 38, 162 P.3d 389 (2007). Therefore, a party challenging impartiality, here Cooper, bears the burden of presenting evidence of actual or potential bias. *Dugan*, 96 Wn. App. at 354 (citing *State v. Post*, 118 Wn.2d 596, 619 n.9, 826 P.2d 172, 837 P.2d 599 (1992)).

Here, Cooper asserts that two incidents demonstrate the trial court's bias against her defense counsel. First, after the trial court sustained the State's objection to the defense calling Hoffman as a witness, the following exchange took place:

> THE COURT: . . . His testimony goes to none of the elements of the charged offenses, and for that reason, it is irrelevant.
>
> [Defense Counsel]: Your Honor, you didn't give me a chance to respond. There is a little more I would like to have on the record.
>
> THE COURT: Counsel, I think we have talked about this several times already. I have given you ample opportunity to deal with it. It is 20 after 9:00, and we need to move on.
>
> [Defense Counsel]: Your Honor, I don't mean to belabor . . . the point, but we talked about it in chambers. That part is not on the record. My client has the right to have that on the record, and I have to ask the Court to allow me to do that.
>
> THE COURT: I will give you one minute, counsel, and I would point out you were 15 minutes late this morning. So you have already had 15 minutes that you used up.

> [Defense Counsel]: [discusses issue of conflict of interest between Hoffman and Reading's defense counsel]. I believe that the law is that [Reading's defense counsel] had to withdraw as soon as he knew about that conflict. Now both he and [the State] - -
>
> [The trial court continues to discuss the conflict of interest issue with Cooper's defense counsel.]
>
> THE COURT: Counsel, we need to move on. I have a jury waiting. Are there other matters we need to take up before the jury comes in?
>
> [Defense Counsel]: Your Honor, I wasn't quite finished. I would like to put all of this on the record.
>
> THE COURT: All of what on the record? You have made your motion. You have made your comments about what you knew. What else do you need to put on the record?
>
> [Defense Counsel]: I need to state that this conflict of interest cannot, which was not of my making or Ms. Cooper's making, cannot overcome Ms. Cooper's right to present a defense. I did not know that Mr. - -
>
> THE COURT: I'm not finding that [Reading's defense counsel] has a conflict, because I'm not permitting Mr. Hoffman to be called as a witness. End of story.
>
> . . . .
>
> THE COURT: Your objection is noted, counsel. I have made my ruling. What other matters do we need to take up before the jury comes in?
>
> [Defense Counsel]: I would just like to take up one more, your Honor. The Court has exhibited anger towards me on several occasions. All I'm doing is trying to represent my client, and if I have done anything to anger the Court, it has been completely unintentional. I don't personally think that I have done anything to anger the Court, but I'm just trying to represent my client, and I don't think that I deserve the Court's anger for doing that.
>
> THE COURT: Counsel, I'm not frustrated by your representation of your client. Your client has every right to aggressive advocacy. What frustrates me is being late for appearances, not being adequately prepared, not having a witness list, and then bringing up issues at the 11th hour when it's a difficult time for the counsel and the Court to deal with them and I have a jury waiting.

3 RP at 449-53.

At most, the trial court's remarks to Cooper's defense counsel demonstrate that it became impatient with defense counsel because he had appeared late and because he continued to argue a motion that the trial court had already ruled on. Further, despite the trial court's remarks to counsel, it continued to allow him to argue his motion. The trial court's remarks to defense

counsel are insufficient to overcome the presumption that he performed his functions without bias or prejudice.

Cooper also asserts that the trial court demonstrated bias in favor of the prosecuting attorney during her defense counsel's motion to dismiss the case. Cooper claims that the trial court showed bias by stating, "I know [the prosecuting attorney] by reputation." 5 RP at 837. But Cooper takes the trial court's comment out of context. Here, the trial court's comment came in response to Cooper's defense counsel's assertion that the prosecutor intentionally violated the Rules of Evidence when a police officer witness turned a photo of a defendant, later admitted into evidence, in such a way as to allow the jury to view it. In response to defense counsel's assertion, the trial court stated,

> First of all, I don't believe there has been any arbitrary action or governmental misconduct in this case. I'm aware that you have objected along the way to certain lines of questioning or forms of questioning. This court has considered all of those objections, and like any other trial, sometimes they are upheld and sometimes they are overruled. I have attempted to listen closely to each objection and apply the Rules of Evidence, but at no time during this trial have I observed [the prosecuting attorney] intentionally violating the Rules of Evidence in order to get a certain result, *and I know him by reputation*, and I also know him by what I have seen in this courtroom, and I have never seen that happen.

5 RP at 836-37 (emphasis added).

Here, the trial court clearly indicated that it did not observe the prosecuting attorney intentionally violating the Rules of Evidence during trial. And the trial court's remark that it knew the prosecuting attorney by reputation does not indicate that it was biased in favor of him. Cooper has not overcome the presumption that the trial court acted without bias.

Improper *Castle*[7] Instruction

[7] *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, *review denied*, 133 Wn.2d 1014 (1997).

Next, Cooper asserts that the trial court violated the appearance of fairness doctrine by giving a portion of the disapproved *Castle* instruction on the reasonable doubt standard in its opening instructions to the jury. In its opening instructions to the jury, the trial court stated,

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we can know with absolute certainty, and in criminal cases, the law [sic] not require proof that overcomes every possible doubt.

1 RP at 30-31.

In *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), our Supreme Court found a similar, but not identical, instruction constitutionally sufficient but problematic and, thus, instructed trial courts to use only the approved pattern instruction, 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01, at 79 (2d ed. Supp. 2005) (WPIC), to instruct juries on the reasonable doubt standard.

As an initial matter, it does not appear that Cooper objected to the trial court's opening instruction. CrR 6.15. And, generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Our Supreme Court has indicated that the disapproved *Castle* instruction satisfies the minimum requirements of due process. Thus, Cooper has not raised a manifest error affecting a constitutional right and we decline to address her contention further.

Moreover, any error in giving a portion of the disapproved *Castle* instruction in opening instructions was harmless because the trial court informed the jury that it would give them the applicable law at the conclusion of the case and it gave the jury the approved instruction for its deliberations using language from WPIC 4.01 as *Bennett* suggested.

Prosecutorial Misconduct

Next, Cooper raises several claims of prosecutorial misconduct. A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

We review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). In determining whether prosecutorial misconduct occurred, we first evaluate whether the prosecuting attorney's comments were improper. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the prosecuting attorney's statements were improper and the defendant made a proper objection to the statements, then we consider whether there was a substantial likelihood that the statements affected the jury. *Reed*, 102 Wn.2d at 145. Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

The State is generally afforded wide latitude in making arguments to the jury. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). But a prosecuting attorney's expressions of personal opinion about the defendant's guilt or the witnesses' credibility are improper. *State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). In determining whether the prosecuting attorney expressed a personal opinion about a witness's credibility, we view the challenged comments in context. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

Cooper first asserts that the State committed prosecutorial misconduct by expressing a personal opinion about a witness's credibility. Specifically, Cooper points to the prosecutor's statements at closing argument, "I would not stand here and say believe everything that Mr. Afo says," and, "I don't believe Afo. It doesn't matter what I believe." 4 RP at 797-98. Cooper did not object to the prosecutor's comments and, thus, if improper, they must be so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *Charlton*, 90 Wn.2d at 661.

Taken in context, the prosecutor's statement, "I would not stand here and say believe everything that Mr. Afo says," does not express a personal opinion about a witness's credibility. Here, in rebutting the defense's closing argument that Afo had credibility issues, the State argued,

> He is a witness, and as a witness, you are to consider any factors that bear on believability and weight, and you have those in your instructions. You are to consider his memory and manner while testifying, any bias or interest he may have, and the reasonableness of his testimony in light of all the other evidence in the case. *I would not stand here and say believe everything Mr. Afo says.*

4 RP at 797 (emphasis added).

Our Supreme Court has stated,

> "It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*"

McKenzie, 157 Wn.2d at 53-54 (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983)). It is clear from viewing the prosecutor's statement in context that he was not expressing a personal opinion but rather was directing the jury to the

court's instructions on how it should evaluate Afo's credibility. Accordingly, the statement did not constitute prosecutorial misconduct.

The prosecutor's second challenged comment, "I don't believe Afo. It doesn't matter what I believe," is more problematic. 4 RP at 798. Although, when read in context, it appears that the comment was directed toward the jury's instructions on what weight it may give to a witness's testimony, the statement, "I don't believe Afo," taken alone, indicates the prosecutor's personal opinion as to a witness's credibility. 4 RP at 798. Although the statement was improper, in light of its context, it does not appear to be the focus of the argument and the comment was not so flagrant or ill-intentioned that an instruction could not have cured any resulting prejudice. Accordingly, the statement does not rise to the level of prosecutorial misconduct.

Cooper also claims that the State committed prosecutorial misconduct by asking a defense witness whether she was convicted of crimes that she did not commit. After Cooper objected to the State's questioning and outside the presence of the jury, the State explained that it had misread the witness's criminal history and that it had mistakenly asked her whether she was convicted of offenses for which she was only arrested. The trial court gave a curative instruction:

> In the cross-examination of Ms. Miller, the State asked some questions regarding her possible convictions of criminal offenses.
>
> You are not to draw any inference from the fact that the State asked those questions other than the one she admitted to, and there is no record that she ever was convicted of forgery or theft.

3 RP at 514.

Here, the trial court's curative instruction prevented any prejudice to Cooper as a result of the State's improper questioning. Because she did not suffer any prejudice from the improper

questioning, her prosecutorial misconduct claim fails. *See State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000) ("To prevail on an allegation of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect.").

While Cooper argues that the above instances most clearly demonstrate prosecutorial misconduct, she also devotes nearly nine pages of her brief to her assertions that nearly every instance where her defense counsel objected to the State's questioning over the course of the six-day trial was misconduct. But not every objectionable form of a prosecutor's questioning rises to the level of prosecutorial misconduct and, more important, Cooper does not identify any prejudice resulting from the several alleged instances of prosecutorial misconduct. Having reviewed the record, it is clear to us that even where the State's questions were arguably improper, Cooper did not suffer any prejudice as a result.

Cumulative Error

Last, Cooper asserts that the trial court's violations of the appearance of fairness doctrine, together with the prosecuting attorney's misconduct, require reversal of her conviction under the cumulative error doctrine. We disagree. The cumulative error doctrine applies when several errors occurred at the trial court level, none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Here, Cooper has not demonstrated that the combined errors alleged denied her a fair trial. Accordingly, we affirm.

SAG Arguments

Cooper has filed a SAG in which she repeats her counsel's arguments that the trial court improperly joined the defendants for trial and that the trial court gave the disapproved *Castle* instruction in its opening instructions to the jury. We have addressed these arguments above. Additionally, Cooper asserts that the trial court erred by limiting the scope of her counsel's opening statement. We disagree.

A trial court has broad discretion to control the content of the parties' opening statements. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). The purpose of an opening statement is to outline the material the party intends to introduce. *Kroll*, 87 Wn.2d at 834. An opening statement should not be argumentative. *Kroll*, 87 Wn.2d at 835.

Here, the trial court twice sustained the State's objection to Cooper's opening statement on the basis that it was argumentative. The trial court did not abuse its discretion when it did. Additionally, because Cooper only provides a portion of her defense counsel's opening statement, it is difficult to determine on the record before the court what prejudice she would have suffered as a result of the trial court's ruling on the State's objection. Finding no error below, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

HUNT, J.