IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 29555-9-III
Respondent,	)	
v.	)	
LACEY KAE HIRST-PAVEK,	)	UNPUBLISHED OPINION
Appellant.	)	

Brown, J. • Lacey Hirst-Pavek appeals her accomplice-liability aggravated first degree murder and first degree manslaughter convictions. She contends the trial court erred in concluding she had no reasonable privacy expectation in her employment and vehicle rental records. But the evidence came in from multiple other sources, including her, so any error is harmless. Additionally, we reject Ms. Hirst-Pavek's evidence-insufficiency and prosecution-misconduct contentions, and find no merit in her pro se statement of additional grounds mainly concerning instructional errors. We affirm.

FACTS

The record viewed for evidence sufficiency with inferences drawn most favorably

for the State show in December 2008, Ms. Hirst-Pavek, an Okanogan County resident, was consumed by her husband's (Danny Pavek's) affair with Michelle Kitterman and Ms. Kitterman's resultant pregnancy. Ms. Hirst-Pavek wanted Ms. Kitterman to terminate the pregnancy. Her animosity toward Ms. Kitterman is amply shown by her frequent disparaging comments to others, her deteriorating work performance at Sunrise Chevrolet, and her attempts to have Ms. Kitterman arrested for drug dealing and driving Ms. Hirst-Pavek's truck without a license. She constantly contacted others regarding her husband and Ms. Kitterman's whereabouts. Ultimately, Ms. Hirst-Pavek contacted and facilitated others to confront Ms. Kitterman, resulting in Ms. Kitterman's homicide and the death of her unborn child. A summary of the trial record follows.

In January 2009, Ms. Hirst-Pavek told Detective Don Redfield she did not want Ms. Kitterman around her kids or using her truck. On February 2, 2009, an Oroville police officer arrested Ms. Kitterman in Ms. Hirst-Pavek's truck for driving without a license leading to the discovery of controlled substances in the truck. Ms. Hirst-Pavek later told Jasmine Walts that Ms. Kitterman, who was released, had made a deal with police, but the officer later testified to the contrary. Police later discovered Ms. Hirst-Pavek kept a folder at her office with Ms. Kitterman's name written on it containing documents related to Ms. Kitterman's criminal charge. Eventually, Ms. Hirst-Pavek took leave from work because her personal problems interfered with her job performance. Her

comments about Ms. Kitterman became "threatening" and "abusive." Report of Proceedings (RP) at 333.

Kelly McClure related Ms. Hirst-Pavek commented she wanted Ms. Kitterman "to just disappear, go away," and that she "wished that she would die or something like that." RP at 679. Andrea Orlando related Ms. Hirst-Pavek called her about three weeks before Ms. Kitterman's death wanting to find someone to "beat up" Ms. Kitterman. RP at 661. Ms. Hirst-Pavek wanted to "take care of her, get rid of her." RP at 661. Ms. Hirst-Pavek told Ms. Orlando she would be willing to pay money or drugs to have Ms. Kitterman "blanketed," meaning "throwing a blanket over [Ms. Kitterman] and having a bunch of people beat her up so she would lose her baby." RP at 662. Robert Ramin related Ms. Hirst-Pavek commented about having Ms. Kitterman "taken care of, having some friends in Spokane that were gonna come fix this problem for her, making her disappear." RP at 333. Marcella Raymer related Ms. Hirst-Pavek told her she hated Ms. Kitterman and that she "was gonna hire four people to take care of" Ms. Kitterman and the baby. RP at 575-77, 579, 590-91.

In late January or early February, Ms. Hirst-Pavek met in Spokane with Tansy Mathis, a methamphetamine dealer acquainted with Mr. Pavek and Ms. Kitterman, and talked about how Ms. Hirst-Pavek could "get her [Ms. Kitterman] to go away." RP at 1478. Ms. Mathis told her it would take about $10,000, and is something she would have

to live with for the rest of her life. Ms. Hirst-Pavek understood this to mean killing Ms. Kitterman. Ms. Hirst-Pavek later told co-worker David Price she had gone to Spokane to hire someone to "take care of" Ms. Kitterman, but "couldn't go through with it" and returned home. RP at 493-94, 502.

On February 25, Ms. Hirst-Pavek met Ms. Mathis for dinner in Omak. After dinner, the two went shopping and Ms. Hirst-Pavek paid toward a pre-paid cell phone for Ms. Mathis. On February 26, Ms. Hirst-Pavek rented a 2008 Chevy Trailblazer from her employer. The standard paperwork required by Sunrise was prepared by its rental department, and then signed by the customer. When she picked up the rental vehicle, Ms. Hirst-Pavek appeared distant and anxious. She was accompanied by a Hispanic male and a "dishwater blonde" female, later identified as Adolfo Palomares and Ms. Mathis. After they left Sunrise, Ms. Hirst-Pavek provided the rental vehicle to Ms. Mathis. Between February 25 and February 28, many telephone calls (and/or text messages) were made between Ms. Hirst-Pavek and Ms. Mathis.

On Saturday, February 28, Ms. Hirst-Pavek called Ms. Walts and Michael McClure to ask if they would inform her of the whereabouts of her husband and Ms. Kitterman. She wanted them to check if they were at Jana Mason's house, where Ms. Kitterman was living. Ms. Hirst-Pavek told Ms. Walts that "it would all be handled by Monday[•]she would be able to go back to work and everything would be back to

normal." RP at 605. Ms. Kitterman was murdered that night.

Brent Phillips confessed to his role in Ms. Kitterman's murder. He testified about the sequence of events and the persons involved. Mr. Phillips lived in Spokane with David Richards, a methamphetamine seller, who approached him in February 2009 about accompanying him and Ms. Mathis to get drugs and assist in taxing a snitch who later turned out to be Ms. Kitterman. Mr. Phillips at times acted as Mr. Richards' "tax man," meaning he collected debts from people who failed to pay for drugs. Mr. Phillips knew Ms. Mathis through Mr. Richards and their drug dealings. Mr. Phillips knew Steve Pina, and a Hispanic male, later identified as Mr. Palomares, through Mr. Richards.

On the February 28 murder date, Mr. Richards unsuccessfully tried to obtain a gun. Ms. Mathis then acquired Mr. Richards' favorite weapon, a homemade ice pick. Ms. Mathis picked Mr. Phillips up from Mr. Richards' house in the rented Trailblazer, leaving without Mr. Richards because he was not then present. Ms. Mathis stated her friend had rented it for her. Ms. Mathis drove Mr. Phillips to her house in Spokane, where she picked up her child and Mr. Palomares before driving the Trailblazer to the Okanogan area. Ms. Mathis dropped Mr. Palomares off before leaving her child with Connie Gallas and picking up drugs.

Ms. Mathis then drove to a house near Ms. Kitterman's house where Ms. Mathis told Mr. Phillips: "We're gonna tax a snitch." RP at 740. Ms. Mathis told Mr. Phillips

there could be money involved, "$1,000.00 dollars just to kind of rough somebody up, $500.00 dollars if anybody else got in the way and there could be over $10,000.00 dollars if things got messy on us." RP at 740. Mr. Phillips testified Mr. Richards had previously told him similar payment information.

The pair persuaded Ms. Kitterman to leave with them partly by promising drugs. Ms. Mathis then drove to a location on Stalder Road in Republic, Washington and stopped to smoke outside the car. Ms. Mathis returned to the car to make a phone call. When Mr. Phillips went to Ms. Mathis to see if they were leaving for the casino, Ms. Mathis told Mr. Phillips, "That's the snitch." RP at 746. The attack on Ms. Kitterman then began with Mr. Phillips beating and choking her. Ms. Mathis then began stabbing Ms. Kitterman in the abdomen with the ice pick. Ms. Mathis told Mr. Phillips to "finish it" and she tossed Mr. Phillips the ice pick. RP at 748. Mr. Phillips then stabbed Ms. Kitterman multiple times. The pair left Ms. Kitterman off the side of the road and drove off. Mr. Phillips believed Ms. Kitterman would die from her injuries. As they drove, Ms. Mathis was using her phone to make calls. The phone calls were later connected to Ms. Hirst-Pavek. Ms. Mathis then drove to a house near Republic where Ms. Mathis and Mr. Pina vacuumed and cleaned the Trailblazer's interior. Ms. Mathis and Mr. Pina then left the house in the Trailblazer, and returned driving Ms. Mathis' personal vehicle after returning the Trailblazer to Ms. Hirst-Pavek. Ms. Kitterman's body was discovered the

next morning, on March 1, 2009. She had died of the stab wounds and had been pregnant.

The jury heard additional testimony supporting Ms. Hirst-Pavek's complicity. Mr. Phillips established Ms. Mathis' payment to Mr. Richards and Mr. Richards' desire to get his ice pick back. Jeffrey Boughter testified a blonde woman approached Mr. Richards and Mr. Phillips to tax a woman who was having an affair. Ms. Mathis asked Brian Hohman to visit Ms. Hirst-Pavek and tell her to "keep her mouth shut." RP at 998, 1007. Ms. Mathis asked Mr. Hohman to kill Mr. Phillips. On March 2, Ms. Hirst-Pavek proclaimed to Mr. McClure, "[I]t wasn't supposed to happen like that." RP at 643.

Ms. Hirst-Pavek was arrested and charged as a principal or accomplice with aggravated murder, or alternatively felony murder, and first degree manslaughter of an unborn quick child. On March 31, after her arrest, she was interviewed again by detectives, contradicting her March 5 statement in which she partly denied asking anyone to take care of Ms. Kitterman. At one point, Ms. Hirst-Pavek asked the detectives if they could stop the tape recording for a moment. The detective testified Ms. Hirst-Pavek then asked what would happen if she "changed her story" and said "the truth was that she wanted [Ms. Kitterman] gone and the baby dead . . . that [Ms.] Mathis had asked her if this is what she wanted, and she said it was." RP at 1483. Ms. Hirst-Pavek gave additional recorded incriminating statements about telling Ms. Mathis she and her

husband both wanted her to "take care of the baby situation." RP at 1519. Ms. Hirst-Pavek admitted that she knew Ms. Mathis needed the rental vehicle to go to Spokane to pick up people "to help her do whatever she was going to do." RP at 1490. When she received a text in the early morning hours indicating that Ms. Mathis was with Ms. Kitterman, she told detectives that she "assumed" that Ms. Mathis was going to go through with "her thing." RP at 1489.

Before trial, Ms. Hirst-Pavek unsuccessfully moved to suppress evidence, partly arguing the warrantless seizure of her employment and car rental records violated her right to be free from warrantless searches. The court reasoned Ms. Hirst-Pavek had no expectation of privacy in either type of record. During trial, multiple witnesses, including evidence from Ms. Hirst-Pavek, established her work hours and the vehicle rental.

After the State rested, defense counsel unsuccessfully moved for dismissal, after arguing no evidence showed Ms. Hirst-Pavek intended Ms. Kitterman's death.

During rebuttal closing argument, the State explained several of the instructions to the jury. In part, the prosecutor explained:

> [T]he instructions go on to tell you that on or about a particular date Ms. Hirst-Pavek or an accomplice with Ms. Hirst-Pavek's knowledge acted with the intent.
> So in this case, did Ms. Hirst-Pavek have intent? Yeah. Is it necessary? No.
> DEFENSE COUNSEL: Objection, your Honor misstatement of the law.
> PROSECUTOR: Your Honor, it's arguing from the instruction.
> DEFENSE COUNSEL: He said Ms. Hirst-Pavek did not have to have any intent.

> THE COURT: What instruction are you arguing from?
> PROSECUTOR: Your Honor for example number "12" Ms. Hirst-Pavek or an accomplice with Ms. Hirst-Pavek's knowledge acted . . . .
> THE COURT: Correct.
> PROSECUTOR: . . . with intent. So I guess we know what Ms. Hirst-Pavek wanted to do, but that's not required in the elements. She had knowledge that this other person was gonna act and had intent to carry that out. It's enough and it's in the instructions.

RP at 1737-38. The court denied the objection without a curative instruction.

The court gave special verdict instructions concerning the deadly weapon aggravating factor in instruction 29. It partly provided:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If, after due consideration, you cannot unanimously agree that the aggravating circumstances exist, you must fill in the blank with the answer "no."

Clerk's Papers (CP) at 79. The court gave the jury special verdict questions concerning two aggravating circumstances: whether Ms. Hirst-Pavek solicited another person to commit the murder and paid or agreed to pay money for committing the murder and whether Ms. Hirst-Pavek knew Ms. Kitterman was pregnant. Instruction 31 stated:

> If you find Ms. Hirst-Pavek guilty of premeditated murder in the first degree as defined in Instruction 11, you must then determine whether the following aggravating circumstance exists:
>
> Ms. Hirst-Pavek solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder.
>
> The State has the burden of proving the existence of an aggravating

> circumstance beyond a reasonable doubt. In order for you to find that the aggravating circumstance has been proved beyond a reasonable doubt, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.
>
> If you unanimously agree that the specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance.
>
> For any of the aggravating circumstance [sic] to apply, the defendant must have been a major participant in acts causing the death of Michelle Kitterman and the aggravating factor must specifically apply to the defendant's actions. The State has the burden of proving this beyond a reasonable doubt. If, after due consideration, you cannot unanimously agree that the aggravating circumstance exists, you must fill in the blank with the answer "no."

CP at 87. Similarly, instruction 32 stated:

> If you find Ms. Hirst-Pavek guilty of Murder in the First Degree . . . then you must determine if the following aggravating circumstance exists:
>
> Whether Ms. Hirst-Pavek knew that the victim of the crime of Murder in the First Degree – Premeditation or Murder in the Second Degree – Intentional Murder, or Murder in the Second Degree – Felony Murder was pregnant.
>
> The State has the burden of proving the existence of the aggravating circumstance beyond a reasonable doubt. In order for you to find the existence of an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt. If, after due consideration, you cannot unanimously agree that the aggravating circumstance exists, you must fill in the blank with the answer "no."

CP at 89.

The jury found Ms. Hirst-Pavek guilty as charged and found she or an accomplice

was armed with a deadly weapon at the time of the crimes. The jury answered "yes" regarding the aggravating circumstances. The court sentenced Ms. Hirst-Pavek to life imprisonment without the possibility of parole. She appealed.

ANALYSIS

A. Evidence Suppression

Ms. Hirst-Pavek asserts the trial court erred by failing to suppress evidence of her employment and rental car records obtained from her employer. She contends the evidence was obtained in violation of her privacy rights under article I, section 7 of the Washington State Constitution.

We review a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). When the appellant does not challenge any of the trial court's findings of fact, they are verities on appeal. *Id*. We review de novo the trial court's legal conclusions resulting from a suppression hearing. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

Article I, section 7 of the Washington State Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A warrantless search is per se unreasonable unless it falls under one of Washington's

recognized exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). Here, the State does not argue the search falls into one of the exceptions, but argues the employer's records are not private affairs. Thus, our inquiry would be "whether the state unreasonably intruded into the defendant's 'private affairs,'" triggering article I, section 7 protection. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984).

Private affairs are those "interests which citizens of this state have held, and should be entitled to hold, safe from government trespass." *Id*. at 511. In determining whether a certain interest is a private affair, we first consider whether historical protections are afforded to the perceived interest. *See State v. Jorden*, 160 Wn.2d 121, 127, 156 P.3d 893 (2007); *State v. McKinney*, 148 Wn.2d 20, 27, 60 P.3d 46 (2002). Next, we consider "the nature of the information sought• that is, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person's life." *Jorden*, 160 Wn.2d at 126-27; *see McKinney*, 148 Wn.2d at 29. Additionally, we examine "the purpose for which the information sought is kept, and by whom it is kept." *Jorden*, 160 Wn.2d at 127 (citing *McKinney*, 148 Wn.2d at 32).

Neither party has pointed out any historical protections for these types of records. The parties do debate the nature of the information sought. This is our "most important inquiry." *Id.* at 129. We look at whether the type of information sought reveals intimate

or discrete details of a person's life. *See id.*; *State v. Jackson*, 150 Wn.2d 251, 262, 76 P.3d 217 (2003); *In re Pers. Restraint of Maxfield*, 133 Wn.2d 341, 354, 945 P.2d 196 (1997); *State v. Young*, 123 Wn.2d 173, 183-84, 867 P.2d 593 (1994).

The "reasonable expectation of privacy" test is partly our focus under our state constitution. *Jorden*, 160 Wn.2d 121; *McKinney*, 148 Wn.2d 20; *City of Seattle v. McCready*, 123 Wn.2d 260, 868 P.2d 134 (1994); *Myrick*, 102 Wn.2d 506. "This determination is not 'merely an inquiry into a person's subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold.'" *McKinney*, 148 Wn.2d at 27 (quoting *McCready*, 123 Wn.2d at 270). In *Jorden*, our state Supreme Court found that a motel registry constitutes a private affair because it reveals sensitive, discrete and private information about the guest. *Jorden*, 160 Wn.2d at 126-27. The *Jorden* court reasoned the information contained in a motel registry could provide "intimate details about a person's activities and associations," thus, it decided the registry was "a private affair under our state constitution, and a government trespass into such information is a search." *Id*. at 129-30.

In *In re Nichols*, 171 Wn.2d 370, 256 P.3d 1131 (2011), the court explained what it meant in *Jorden* was that certain affairs can be private "to a limited extent." *Id*. at 377-78. It explained affairs are not private if police officers have an individualized and particularized suspicion regarding the person engaging in the affairs. *Id.* The dissent in

Nichols criticized the majority holding as an exception threatening to "swallow the rule." *Nichols*, 171 Wn.2d at 381 (Fairhurst, J., dissenting). The State relies on the *Nichols* majority holding to argue solely random, suspicionless viewings of records violates a person's article I, section 7 right to be free from being disturbed in their private affairs; contrarily, Ms. Hirst-Pavek argues the minority view.

Finally, regarding the purpose that records are kept and by whom, the employment and car rental records were kept by Ms. Hirst-Pavek's employer for business purposes. The employment records do not show how much she was paid and reflect the hours she was present for employment without testimonial elaboration revealing any private information. Similarly, the car rental records do not appear by themselves to reveal intimate details of Ms. Hirst-Pavek's life.

We decline to resolve this constitutional debate, because even if the records were private affairs, any error is harmless. Violations of a person's right to be free from an illegal search and seizure are a constitutional error and are presumed to be prejudicial. *State v. McReynolds*, 117 Wn. App. 309, 326, 71 P.3d 663 (2003); *see also State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). When the error is constitutional, the State must show that the error was harmless beyond a reasonable doubt. *McReynolds*, 117 Wn. App. at 326. An error is harmless beyond a reasonable doubt if untainted evidence admitted at trial is so overwhelming that the jury would have reached the same

result despite the error. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004).

Numerous Sunrise employees testified about Ms. Hirst-Pavek's attendance at work and her rental of the vehicle, based on their own recollection, independent of the records. Lay witnesses, co-defendant statements, and Ms. Hirst-Pavek's own statements to law enforcement established her time off from work and the rental car use. This evidence was untainted by any use of the records. Accordingly, we conclude any error in admitting the records was harmless.

B. Evidence Sufficiency

Ms. Hirst-Pavek asserts the evidence is insufficient to support her first degree murder conviction and the aggravating factor of soliciting another person to commit murder.

First, Ms. Hirst-Pavek contends her due process rights were violated because the State failed to prove every element of first degree murder beyond a reasonable doubt, in violation of her constitutional due process rights. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it would permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068

(1992). An insufficiency claim admits the truth of the State's evidence and requires that all reasonable inferences be drawn in the State's favor and interpreted most strongly against the defendant. *Id.* In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Circumstantial evidence is equally as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To prove the charge of first degree murder, the State had to show, beyond a reasonable doubt, Ms. Hirst-Pavek, as a principal or accomplice, "[w]ith a premeditated intent to cause the death of another person . . . cause[d] the death of such person or of a third person." RCW 9A.32.030(1). A person is an accomplice to a crime if, "[w]ith knowledge that it will promote or facilitate the commission of the crime, . . . she . . . [s]olicits, commands, encourages, or requests such other person to commit it." RCW 9A.08.020(3).

Ms. Hirst-Pavek argues the State needed to prove that she intended to have Ms. Kitterman killed. But the State correctly responds, since Ms. Hirst-Pavek was charged as an accomplice, it need not show that she had the intent that the victim would be killed. *State v. Thomas*, 166 Wn.2d 380, 387-88, 208 P.3d 1107 (2009) (citing *State v. Guloy*, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985)). The State needed solely to prove she knew

her actions would facilitate the crime of murder. *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). The to-convict and the accomplice liability instructions correspond with the law and are not challenged.

As shown in the exhaustive facts, numerous witnesses testified Ms. Hirst-Pavek wanted Ms. Kitterman frightened, beat up, or made to leave town and that she wished Ms. Kitterman and her unborn child were dead. Although Ms. Hirst-Pavek argues she did not actually want Ms. Kitterman killed, we must accept the truth of the State's evidence with all reasonable inferences drawn in the State's favor and interpreted most strongly against her. Ms. Hirst-Pavek met with Ms. Mathis, who explained she could kill Ms. Kitterman. Ms. Hirst-Pavek facilitated the murder and manslaughter in several ways, including promising payment and providing a phone and rental car. She remained in phone contact with Ms. Mathis during the critical events. Considering the evidence as we must, we conclude the evidence sufficiently permitted the jury to find beyond a reasonable doubt that Ms. Hirst-Pavek knew her actions were facilitating Ms. Kitterman's murder and the death of her unborn child.

Second, Ms. Hirst-Pavek contends the State insufficiently proved the solicitation aggravating factor. The facts supporting an aggravating factor must be proved to a jury beyond a reasonable doubt. Our standard of review is the same. *State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). Although not required by law, the solicitation

jury instruction included the requirement that, in order for the aggravating circumstance to apply, the defendant must have been a major participant in the acts causing Ms. Kitterman's death. Ms. Hirst-Pavek argues the State was then required to prove it under law of the case principles. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

Without supporting authority Ms. Hirst-Pavek argues, because she was not present at the time and place of the murder, she could not have been a major participant. Likewise, Ms. Hirst-Pavek argues the acts that caused Ms. Kitterman's death were solely "taking Ms. Kitterman, . . . starting to beat her up, grabbing an ice-pick, and stabbing her several times." Br. of Appellant at 22. As the State responds, absent Ms. Hirst-Pavek's acts, Ms. Kitterman would not have been murdered. Considering the record of Ms. Hirst-Pavek's considerable role in the events leading to Ms. Kitterman's death in the light most favorable to the State, the question of major participation was properly left for the jury to decide.

C. Prosecutorial Misconduct

Ms. Hirst-Pavek asserts the prosecutor committed misconduct in closing argument by misstating the law in arguing her intent was unnecessary to convict her as an accomplice of murder.

A defendant claiming prosecutorial misconduct must establish both an improper

comment and the resulting prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We consider the alleged comment in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *Id.* A prosecutor may not mislead the jury through misstatement of the law or the evidence. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

Here, the prosecutor explained the accomplice liability instruction to the jury, pointing out Ms. Hirst-Pavek's intent was not necessary. As discussed above, in order to convict Ms. Hirst-Pavek as an accomplice, the State did not need to show that she intended the victim would be killed, but solely that she knew her actions would facilitate the crime of murder. The prosecutor's argument was an accurate representation of the law, not improper, and did not constitute misconduct.

D. Statement of Additional Grounds for Review (SAG)

Ms. Hirst-Pavek's SAG concerns are (1) whether the jury instructions were confusing and misleading, (2) whether the evidence was sufficient to support the element of intent in first degree murder, (3) whether the court erred in denying a mistrial, (4) whether sufficient evidence supports the aggravating factor that she solicited the murder, and (5) whether the definition of "unborn quick child" is vague. Concerns 2 and 4 for the most part duplicate the evidence sufficiency issues raised by her appellate counsel and thus, will not be further addressed. RAP 10.10(a).

Turning to the first of her remaining concerns, Ms. Hirst-Pavek argues the instructions describing what to do with the verdict forms are confusing, misleading, and contain typos. She claims the special verdict form instruction improperly required unanimous agreement to answer "no," to the aggravating factors. We review challenged jury instructions de novo. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). But she did not object to the jury instructions at trial as generally required. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). And, CrR 6.15(c) requires timely and well stated objections be made to instructions given or refused.

To overcome RAP 2.5(a) and raise an error for the first time on appeal, an appellant must first demonstrate that the error is "truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). We will not assume an error is of constitutional magnitude; rather, the appellant must identify the constitutional error. *Id*. (citing *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). Ms. Hirst-Pavek fails to identify a constitutional provision violated by the court's instructions.

Even if a claimed error is of constitutional magnitude, we must then determine whether the error was manifest. *Id*. at 99. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." *Id.* (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). "To demonstrate actual prejudice there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in

the trial of the case." *Id.* (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). Ms. Hirst-Pavek fails this test because she does not show the instructions had practical and identifiable consequences here.

Second, Ms. Hirst-Pavek argues the court should have granted her a mistrial after the detective testified that she confessed and so he arrested her. But Ms. Hirst-Pavek fails to support her contention with legal argument and the court ordered the testimony stricken and not considered. We presume the jury followed the court's instructions.

Finally, Ms. Hirst-Pavek appears to argue she should not have been convicted of manslaughter because the definition of "unborn quick child" is unconstitutionally vague, the supporting evidence is hearsay, and the evidence is insufficient. Again, however, she fails to provide any legal authority for her arguments.

In sum, Ms. Hirst-Pavek's SAG lacks merit.

Affirmed.

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

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Brown, J.

WE CONCUR:

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Korsmo, C.J.

_____
Kulik, J.