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

STATE OF WASHINGTON, Respondent, v. RONALD WAYNE MILLER, JR., aka L'IL WAYNE, Appellant.	))))))))))	No. 63367-8-I UNPUBLISHED OPINION FILED: August 30, 2010

Ellington, J. — Ronald Miller was convicted of attempted murder in the first degree with a firearm enhancement and tampering with a witness. At trial, a detective testified that he had ruled out the only other suspect. Miller contends this testimony constituted an impermissible opinion on guilt. He also argues reversal is required because of prosecutorial misconduct, ineffective assistance of counsel, and the court's refusal to give a cautionary instruction regarding accomplice testimony. We find no reversible error and affirm.

BACKGROUND

On October 3, 2007, at about 5:30 p.m. as Arthur Shaw Jr. was washing his car at the National Pride Car Wash in Seattle, he was shot eight times in the chest. A security camera captured video images of a Chrysler 300 driving into the car wash and

of the shooting, but the video quality was not adequate to identify the perpetrator.

Shaw sustained severe injuries, but survived. On November 13, 2007, while recovering in the hospital, Shaw told Detective Thomas Mooney that the shooter was either Jamell or Jamal Webb and that the driver of the Chrysler was Marcus Watkins. When presented with photographs, Shaw identified Jamell Webb as the shooter.

The day after the shooting, Louis Barrow was arrested for unlawful possession of a firearm. Barrow told police he had been released from jail the day before. He said he obtained the gun, a .380 caliber semiautomatic pistol, from a man he knew as "Wayne" or "Wheezy," who told him the gun had been used in a shooting. The gun was found to match shell casings and bullets recovered from the scene.

On February 7, 2008, Shaw told Detective Mooney his identification of Jamell Webb was a mistake. Instead, he said his attacker was actually a man he knew as "Lil Wayne." Shaw explained that he had been confused because Lil Wayne and Jamell Webb look alike. Shaw identified Miller as Lil Wayne from a photomontage.

On April 8, 2008, a police detective went to see Miller in jail and showed him photos from the surveillance video and played excerpts of Barrow's interview.

On April 10, 2008, the State charged Miller and Watkins with assault in the first degree.

In a subsequent phone call from jail, Miller told his wife Shauna that he recognized Barrow's voice. He called Barrow a "snitch-ass" and asked Shauna to post Barrow's photograph on his MySpace page with the word "snitch" and a copy of the certification for determination of probable cause. Miller and Shauna also discussed

wiping fingerprints off shell casings and a gun. Shauna later testified she was talking about a different gun belonging to her former boyfriend. Miller also said "the boy is talkin'" about "some shit that happened at the car wash" and "he's 100% sure that . . . I shot him."[1] In another call, Miller told his brother to "[t]ell that bitch-ass nigga . . . not to come . . . I'm just trying . . . to make sure that bitch-ass nigga don't come. . . . 'Cause if they don't got him, they ain't got nothin'."[2]

A joint trial of Miller and Watkins began on February 2, 2009. On that date, the court granted the State's motion to amend the information to charge Miller with attempted first degree murder with a firearm enhancement and witness tampering and to charge Watkins with rendering criminal assistance in the first degree.

Several days later, Watkins offered to cooperate in exchange for a reduced charge. After an agreement was reached, Watkins pleaded guilty to misdemeanor attempt to render criminal assistance and agreed to testify against Miller.

At trial, some of the witnesses changed their stories. Barrow acknowledged that he previously told police that "Wayne" gave him the gun but testified that he had been talking about a different Wayne, not Miller. Barrow could not explain having chosen Miller's photo from a montage. Barrow acknowledged that he knew he had been labeled as a snitch on Miller's MySpace page. Shaw testified he had known all along that his attacker was Lil Wayne, not Jamell Webb. He explained he intentionally lied to police to throw them off course so he could exact his own revenge. Shaw had not mentioned this revenge motive during pretrial interviews.

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[1] Ex. 70 at 3–4.

[2] Id. at 13.

Watkins testified that the Chrysler 300 was his car. He said that on the day of the shooting, he and his friend Chris Wilson went to a corner store. Wilson was driving

because Watkins did not have a valid license. At the store, they encountered Miller, who asked for a ride to the car wash, where Watkins went daily.[3] Watkins agreed, and they all went to the car wash. Watkins was arranging to get his car washed when he heard shots. He looked up and saw Miller shooting Shaw. He, Wilson and Miller jumped back into the car and Wilson drove away with Watkins in the back and Miller in the front passenger seat, reloading his gun and telling Wilson to "drive, drive."[4] They dropped Miller off near the Rainier playfield. Watkins testified that he did not call the police or seek help for Shaw because he was afraid of being charged in the crime. Wilson did not testify.

The defense theory was that Miller was not involved and that Shaw's initial identification of Jamell Webb as the shooter established reasonable doubt. Miller's wife Shauna testified that between October 2007 and January 2008, Miller typically picked her up from work after 5 p.m. and arrived home at around 6 p.m. Miller would then go to Roman's Casino in the evenings.[5] Shauna testified that this routine must have occurred on the day Shaw was shot at the car wash at 5:30 p.m. Shauna's housemate Rita Curry also testified that Miller drove Shauna to and from work and then went to the casino in the evening, although she was uncertain as to whether Miller was living with them on the day of the shooting. Shauna's supervisor testified that Shauna was at work on the day of the shooting, that Miller sometimes picked her up, and other times she drove herself or got rides from her mother or father.

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[3] The car wash was described by Detective Mooney as a social gathering place.

[4] Report of Proceedings (RP) (Feb. 12, 2009) at 146.

[5] Ronald and Shauna Miller were not married at the time of the shooting.

The jury found Miller guilty as charged.

DISCUSSION

Opinion On Guilt

At trial, defense counsel questioned Detective Mooney extensively regarding Shaw's identification of Webb and his later identification of Miller. Defense counsel asked the detective whether he was concerned about the changed identification, and the detective said he was. Defense counsel then asked whether the detective was concerned about "intimidation out there on the streets," and Mooney said "[t]hat was one of my concerns."[6] On redirect examination, the prosecutor asked:

> Q: Counsel asked you a question then limited your answer to your concerns regarding intimidation out there on the streets. And you said it was one of your concerns, intimidation on the street. What were other concerns that you had when this identification changed?
>
> A: No matter what the circumstances, my job as a detective is to identify the correct suspect. And that's what I do, that's what I work for. So when I learned that there . . . was a misidentification of the shooting suspect, it became my highest priority to identify the correct suspect.
>
> Q: Were you able, in your work, to eliminate Jamell Webb as a suspect in this case?
>
> A: Yes.[7]

On recross, defense counsel asked Mooney:

> Q: And it's fair to say you interviewed Mr. Webb in '08 because he remained a person of interest in this case? Possible suspect, yes or no?
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> A: Um, no.

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[6] RP (Feb. 17, 2009) at 97–98.

[7] Id. at 103.

Q: And that's because of what Mr. Shaw had told you, correct?

A: Based on his identification, yes.

Q: Right. Or change of identification?

A: True.[8]

Miller argues these portions of Detective Mooney's trial testimony constitute an opinion on guilt and manifest constitutional error that requires reversal. "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference."[9] Such testimony violates the defendant's constitutional right to a jury trial and infringes upon the jury's fact-finding role.[10]

Miller did not make this argument below. He may therefore raise it on appeal only if it constitutes manifest error. "RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal, but only certain questions of 'manifest' constitutional magnitude."[11] Constitutional error is manifest only when it causes actual prejudice or practical and identifiable consequences.[12] Improper opinion testimony may amount to manifest error affecting a constitutional right,[13] but can be raised for the first time on appeal only where it involves "an explicit or almost explicit witness statement on an ultimate issue of fact."[14]

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[8] Id. at 110.

[9] State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

[10] State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

[11] State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007) (emphasis omitted).

[12] State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

[13] State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 1194 (2004).

Miller argues that where it is clear a crime occurred and there are only two suspects, testimony that one suspect was ruled out is a nearly explicit statement that the other must be guilty. Miller further contends that the testimony was manifest constitutional error because it had the practical and identifiable consequence of eliminating the only other suspect from the jury's consideration. The State responds the testimony did not cause actual prejudice because it was not a direct statement on guilt, there was no other evidence to implicate Webb, there is no evidence that the jury was unfairly influenced, and the jury was properly instructed.

In determining whether testimony amounts to an improper opinion on guilt, we evaluate the circumstances of the case, including (1) the type of witness, (2) the nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier or fact.[15] We conclude that even if Detective Mooney's testimony constituted an indirect comment on guilt, it was not an explicit or nearly explicit statement on an ultimate issue of fact.

Certainly some aspects of the detective's testimony were problematic. The only two named suspects were Jamell Webb and Miller.[16] The detective did not state the basis for his decision to rule out Webb as a suspect.[17] This suggests he was relying on

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[14] Kirkman, 159 Wn.2d at 936.

[15] State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (quoting City of Seattle v. Heatley, 70 Wn. App. 753, 579, 854 P.2d 658 (1993)).

[16] See Dolan, 118 Wn. App. at 328–29 (improper opinion testimony constituted an opinion on guilt, where only two people had access to the abused child and the witnesses testified that they did not think the mother could have done it).

[17] The State cites several out-of-state cases holding that the elimination of one suspect is not equivalent to a conclusion that the defendant was guilty. However, in each of these cases, the officer explained the reasons for eliminating the other suspect.

evidence that was not before the jury.

Nevertheless, the detective did not expressly state that he accepted Shaw's identification of Miller as true. To some extent, the detective's testimony was invited by defense counsel's questions on cross-examination. And the prosecutor's subsequent questions on redirect examination put the statements in context. The detective's comments were not a sufficiently explicit comment on guilt to warrant review.

Moreover, the alleged error was not manifest. An important consideration in determining whether opinion testimony prejudices the defendant is whether the jury was properly instructed.[18] In State v. Kirkman[19] and State v. Montgomery,[20] the court determined that despite allegedly improper witness testimony on credibility, the defendant was not prejudiced because "the jury was properly instructed that jurors 'are the sole judges of the credibility of witnesses' and 'are not bound' by expert witness opinions."[21] The Montgomery court also noted that "[t]here was no written jury inquiry or other evidence that the jury was unfairly influenced."[22] Here, there was no inquiry, and the jury was properly instructed that "[y]ou are the sole judges of the credibility of each witness."[23]

Ineffective Assistance Of Counsel

See State v. Link, 25 S.W.3d 136, 145 (Mo. 2000); State v. Baker, 338 N.C. 526, 555, 451 S.E.2d 574 (1994); Taylor v. State, 689 N.E.2d 699, 706 (Ind. 1997).

[18] Montgomery, 163 Wn.2d at 595.

[19] 159 Wn.2d 918, 155 P.3d 125 (2007).

[20] 163 Wn.2d 577, 183 P.3d 267 (2008).

[21] Id. at 595 (quoting Kirkman, 159 Wn.2d at 937).

[22] Id. at 596.

[23] Clerk's Papers at 55.

Miller argues that his attorney's failure to object to the detective's testimony constituted ineffective assistance of counsel. "To prevail on a claim of ineffective

assistance of counsel, a defendant must show that '(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.'"[24] "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"[25] Courts begin with a strong presumption that the representation was effective.[26] The defendant "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel."[27]

The State argues any error was not prejudicial because there is no reasonable probability that the outcome of the trial would have been different if defense counsel had objected. We agree. As discussed above, Miller cannot demonstrate prejudice because the jury was properly instructed that it was the sole arbiter of credibility. Moreover, the evidence against Miller was substantial.

Prosecutorial Misconduct

Miller argues that multiple incidents of prosecutorial misconduct deprived him of a fair trial. "To establish a claim of prosecutorial misconduct, an appellant must show that the prosecutor's comments were both improper and prejudicial.[28] A defendant who

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[24] In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (quoting State v. McFarland, 127 Wn.2d 322, 344–35, 899 P.2d 1251 (1995)).

[25] State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155 (1996) (emphasis omitted) (quoting State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)).

[26] State v. Grier, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009).

[27] McFarland, 127 Wn.2d at 336.

[28] State v. Dixon, 150 Wn. App. 46, 59–60, 207 P.3d 459 (2009).

does not timely object at trial waives any claim on appeal unless the argument is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury."[29]

Miller first argues that the prosecutor's question to the detective about whether he had eliminated Webb as a suspect improperly elicited the detective's improper opinion on Shaw's truthfulness and Miller's guilt. "A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth."[30] Even if the detective gave an improper opinion on guilt, we conclude that any prejudice could have been cured by an instruction.

Miller next argues that the prosecutor improperly vouched that Webb was not a suspect. In rebuttal closing, the prosecutor stated, "What possible incentive could the State have for not charging Jamell Webb with the attempted murder of JR Shaw if the evidence pointed to Jamell Webb as the shooter? The evidence points to Ronald Wayne Miller, not to Jamell Webb."[31]

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury.[32] The remarks are viewed "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."[33] Otherwise improper remarks are not grounds for reversal when they are a fair reply to the defendant's arguments, unless they go

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[29] State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

[30] State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996).

[31] RP (Feb. 25, 2009) at 72.

[32] State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

[33] Brown, 132 Wn.2d at 561.

beyond the scope of an appropriate response or are incurably prejudicial.[34]

A prosecutor's expression of a personal belief as to the credibility of a witness or the guilt of the accused is improper.[35] To be prejudicial error, it must be "'clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.'"[36]

Miller relies primarily on State v. Susan.[37] There, the prosecutor argued, "never in the history of the five or six years that I have been prosecuting attorney of this county have I ever accused any man or woman of any crime or filed an information against them until I was satisfied they had committed the crime."[38] The court held the statement improper, noting that the basis for the prosecutor's opinion was outside the evidence at trial and that the statement placed the weight and influence of the prosecutor on the scales of justice.

Miller argues that, as in Susan, the prosecutor's statement that the State had no incentive to charge Webb was not drawn from evidence at trial and injected the prosecutor's personal opinion into the proceedings.

The remarks in this case do not rise to the level of reversible misconduct. The prosecutor responded to the defense argument that Webb might have been the shooter by stating that Webb was not charged because the evidence pointed to Miller. The

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[34] State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (quoting State v. LaPorte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)).

[35] State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983).

[36] State v. McKenzie, 157 Wn.2d 44, 53–54, 134 P.3d 221 (2006) (emphasis omitted) (quoting id.).

[37] State v. Susan, 152 Wash. 365, 278 P. 149 (1929).

[38] Id. at 378.

prosecutor did not suggest that she personally believed Miller was guilty; rather, she argued that the evidence pointed to Miller, not Webb. Further, even if the argument was improper, any prejudice could have been cured by an instruction.

Miller next argues that the prosecutor committed reversible misconduct during rebuttal closing by arguing:

> If you believe Shauna and Rita, then you would have to conclude that Mr. Miller was home having a quiet little family dinner at the time of this shooting. That would mean that Marcus Watkins had to just pull him out of in this area [sic] and decide to blame him for the shooting, just decide to make it up about Ronald Wayne Miller.[39]

A prosecutor undermines the presumption of innocence and shifts the burden of proof by arguing that the jury must find the State's witnesses are lying in order to acquit the defendant.[40] Such arguments mislead the jury by presenting a false choice, because "[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved."[41] Prosecutors are, however, permitted to argue that conflicting versions of events cannot both be correct.[42] It is also permissible to argue that in order to believe the defendant, the jury would have to conclude that the State's witness was mistaken, not lying.[43]

Miller argues that the prosecutor presented the jury with a false choice by arguing that to believe Miller's alibi, the jury would have to find that Watkins "just

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[39] RP (Feb.25, 2000) at 72–73.

[40] State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

[41] State v. Castaneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991).

[42] State v. Wright, 76 Wn. App. 811, 825–26, 888 P.2d 1214 (1995).

[43] Id. at 826.

decid[ed] to make it up" about Miller being the shooter. Miller contends that this argument went too far because the prosecutor did not merely point out that Miller's alibi and Watkins' testimony could not both be correct, but conditioned an acquittal on a finding that Watkins lied.

The State acknowledges that it is generally misleading to state that if an alibi is believed, the State's witness must be lying. But it contends that the argument was not improper here because the evidence shows that Watkins could not have been simply mistaken. Watkins testified that he knew Miller before the shooting, they drove together to the site of the shooting, Watkins saw Miller shoot Shaw, and they drove away together as Miller reloaded his gun and shouted "drive, drive." According to the State, if the jury were to believe Miller's alibi, the only possible explanation would be that Watkins was lying. The State's argument on this point is persuasive, and we agree that there is a legitimate exception to the "false choice" rule under these facts. Moreover, any misconduct would have been curable by instruction.

Miller next argues that at the end of rebuttal closing, the prosecutor improperly minimized the State's burden of proof and violated the presumption of innocence by arguing, "The word verdict means to speak the truth. And your job as jurors is the search for the truth, not to search for reasonable doubt but to search for the truth, and I ask you to do that.[44]

The State characterizes the propriety of this argument as a close question. We disagree. The statement was improper.

[44] RP (Feb. 25, 2009) at 79.

"[I]t is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise."[45] The State may not undermine the presumption of innocence by telling the jury that the reasonable doubt standard "doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt."[46] Telling the jury, as the prosecutor did here, that it should not search for reasonable doubt is improper and implies that "the truth" and "reasonable doubt" are contrary to each other. The question is whether the error requires reversal under the circumstances here.

The State points to State v. Anderson,[47] a recent case holding that the prosecutor's repeated requests that the jury "declare the truth" were improper but did not warrant a new trial where defense counsel timely objected, the court gave proper jury instructions, and the evidence was thoroughly discussed by both counsel.[48] The State contends any error here could have been cured by a prompt instruction, noting that the jury was properly instructed that the State had the burden of proof.

We agree. There is no indication the comments were so flagrant and ill-intentioned that a curative instruction would not have cured any prejudice. The evidence was discussed at length, and the jury was properly instructed on the presumption of innocence. Absent evidence to the contrary we presume the jury

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[45] State v. Warren, 165 Wn.2d 17, 26–27, 195 P.3d 940 (2008).

[46] Id. at 27.

[47] 153 Wn. App. 417, 220 P.3d 1273 (2009).

[48] Id. at 429.

follows its instructions.[49] Finally, the evidence against Miller was very strong, and he has not demonstrated that the outcome of trial would have been different had an objection been lodged and a curative instruction given.

Cautionary Accomplice Instruction

Miller argues the trial court erred in refusing to give an instruction cautioning the jury about the reliability of Watkins' testimony.[50] A trial court's refusal to give a jury instruction, if based on a factual dispute, is reviewed for abuse of discretion.[51]

In State v. Harris,[52] the Washington Supreme Court established the following standards for determining whether a cautionary accomplice jury instruction is required:

> (1) [I]t is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies *solely* on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.[53]

Although Watkins was not charged as an accomplice, Miller argues that the cautionary instruction was required because a reasonable trier of fact, viewing the evidence in the light most favorable to Miller, could have found that Watkins was an

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[49] State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

[50] The proposed instruction read: "Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone, unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth." Clerk's Papers at 47.

[51] State v. Walker, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998).

[52] 102 Wn.2d 148, 685 P.2d 584 (1984).

[53] Id. at 155.

accomplice in the first degree attempted murder charge. Miller further argues that Watkins should be treated as an accomplice for the purposes of the cautionary instruction because that rule is grounded in the witness's culpability and motivation to lie.

We disagree. Whether a witness is an accomplice depends on "whether he could be indicted for the same crime for which the defendant is being tried."[54] Accomplice liability is based upon the participant's general knowledge of the crime committed.[55] Miller proposed a standard accomplice instruction defining an accomplice as one who, with knowledge it will promote or facilitate commission of the crime, aids another in committing it. Watkins testified he did not know Miller had a gun and did not know Miller would shoot Shaw, and there was no evidence to the contrary. Watkins was a daily customer at the car wash, so there is no inference to the contrary. There was thus insufficient evidence that Watkins knew the shooting would occur or intended to assist in the crime. The instruction has no application when the witness is not an accomplice.

Even considering Watkins as an accomplice, however, the court did not err in declining to give the instruction. It is mandatory only when the State relies solely on uncorroborated accomplice testimony.[56] Here, the corroborating evidence included the video, Shaw's testimony, Barrow's testimony identifying Miller as the one who gave him the gun and told him it had been used in a shooting, and Miller's telephone

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[54] City of Seattle v. Edwards, 50 Wn.2d 735, 738, 314 P.2d 436 (1957).

[55] State v. Sweet, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999).

[56] Harris, 102 Wn.2d at 152.

conversations and MySpace page.

Affirmed.

WE CONCUR: