IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KIRK RICARDO SAINTCALLE, Appellant.	)))))))))	No. 64467-0-I DIVISION ONE UNPUBLISHED OPINION FILED: June 27, 2011

Grosse, J. — Where the State offers a race-neutral explanation for challenging a member of the venire, the issue of whether the defendant established a prima facie case of purposeful discrimination need not be determined in order to uphold the trial court's refusal to find a Batson violation. Here, the State offered a race-neutral explanation for challenging the sole African-American member of the venire and, accordingly, we need not decide whether her dismissal established a prima facie case. The trial court's rejection of Kirk Saintcalle's Batson challenge was not clearly erroneous and is not grounds for reversal of his conviction. Saintcalle raises additional issues, none of which have merit. Accordingly, we affirm his conviction.

FACTS

In the early morning hours of February 9, 2007, Kirk Saintcalle and his friend Narada Roberts, Roberts' brother Roderick, and two other males drove to Tamara Brown's apartment located in Auburn to find out who had assaulted

Narada Roberts on New Year's Eve.

While she was upstairs in her apartment, Brown heard a knock on the front door and heard her boyfriend Anthony Johnson walk toward the door. Brown decided it was unusually quiet downstairs and went to see what was going on. At the door, Brown saw Johnson and other people, including Saintcalle. Brown testified that Saintcalle held a gun to her face, rushed her up the stairs, and forced her, along with her roommate Latasha Ellis and Ellis' boyfriend, Ronald Robinson, into a bedroom closet and told them to get on their knees and stay there. Robinson and Ellis testified to similar versions of the events. Robinson testified that he started to go downstairs because he heard commotion; downstairs, he saw three males wrestling Johnson to the ground. One of these males was holding an assault rifle. Robinson wanted to help Johnson, but Saintcalle pushed him back up the stairs, holding a semiautomatic pistol. Ellis also testified that Saintcalle chased Brown and Robinson up the stairs while holding a handgun and that he pointed the gun at all three of them when they were in the closet.

While Brown, Ellis, and Robinson were in the closet, Narada Roberts and Roderick Roberts entered the bedroom. Narada Roberts was holding an assault rifle and put the gun up against each of the three people's heads. Narada Roberts took a suitcase from the closet in the bedroom. The Roberts brothers then left the bedroom and Saintcalle returned. He told Brown there was just "something we got to take care of." Saintcalle then left the bedroom and went

back downstairs. The next thing Brown heard were gunshots. Robinson testified that at the time the shots were fired, Narada Roberts was in the bedroom with his gun pointed at Brown's head. Ellis testified that at the time she heard the gunshots, Saintcalle was downstairs.

Officer Daniel O'Neil of the Auburn Police Department was dispatched to a call of shots fired at an apartment. Officer O'Neil and other officers located the apartment, opened the front door, and saw a body, later identified as Anthony Johnson, lying on the ground in a bathroom that was just inside the door. The officers also saw a shell casing and a bullet fragment on the ground near Johnson's feet. Johnson was dead. He sustained three gunshot wounds. The murder weapon was determined to be a .45 caliber handgun.

The State charged Saintcalle with one count of first degree felony murder and three counts of second degree assault. Each count included a deadly weapon-firearm allegation. The jury convicted Saintcalle on all counts, and he was sentenced to 579 months.

Additional facts are discussed below in connection with the issue to which they are relevant.

ANALYSIS

Peremptory Challenge

The State used a peremptory challenge to exclude Juror 34, the only African-American member of the venire. Saintcalle claims that by allowing the State to strike this juror, the trial court deprived him of his right to equal protection. We disagree.

The equal protection clause requires defendants to be "tried by a jury whose members are selected pursuant to nondiscriminatory criteria."[1] A prosecutor's use of a peremptory challenge based on race violates a defendant's right to equal protection.[2] The United States Supreme Court in Batson v. Kentucky[3] set forth a three-part analysis to determine whether a member of the venire was peremptorily challenged pursuant to discriminatory criteria. Under this analysis, a defendant must first establish a prima facie case of purposeful discrimination. To do this, the defendant must provide evidence of any relevant circumstances that raise an inference that the challenge was used to exclude a venire member on account of his or her race. Second, if the defendant establishes a prima facie case, the burden shifts to the prosecutor to come forward with a race-neutral explanation for challenging the venire member. Third, the trial court must determine whether the defendant has established purposeful discrimination.[4] In reviewing a trial court's ruling on a Batson challenge, we give the determination of the trial judge great deference, and we will not disturb it unless it is clearly erroneous.[5]

As to a prima facie case of purposeful discrimination—the first part of the Batson analysis—the Washington Supreme Court held in State v. Hicks[6] that the

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[1] Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).
[2] Batson, 476 U.S. at 86.
[3] 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).
[4] State v. Rhone, 168 Wn.2d 645, 651, 229 P.3d 752 (2010) (citing Batson, 476 U.S. at 85-86, 96), cert. denied, Rhone v. Washington, 131 S. Ct. 522 (2010).
[5] Rhone, 168 Wn.2d at 651 (internal quotation marks omitted) (citation omitted).
[6] 163 Wn.2d 477, 490, 181 P.3d 831, cert. denied, Babbs v. Washington, 129 S. Ct. 278 (2008).

trial court is not required to find a prima facie case based on the dismissal of the only venire person from a constitutionally cognizable group, but the court may, in its discretion, find a prima facie case in such instances. In a later case, State v. Rhone,[7] a four-justice plurality of the court declined to adopt a bright-line rule that a prima facie case of discrimination is always established whenever a prosecutor peremptorily challenges a venire member who is a member of a racially cognizable group.[8] Four justices dissented in Rhone and stated that the court should adopt such a bright-line rule. Justice Madsen's concurring opinion in Rhone states in its entirety: "I agree with the lead opinion in this case. However, going forward, I agree with the rule advocated by the dissent."[9]

The parties dispute whether the bright-line rule discussed in Rhone is now the law in Washington. We need not resolve that dispute, however, if the prosecutor had offered a race-neutral explanation for the challenge to Juror 34:

> Even "where [a] trial court [finds] a prima facie case 'out of an abundance of caution,'" if the prosecutor has offered a race-neutral explanation, the ultimate issue of whether or not a "prima facie case was established does not need to be determined" to uphold the trial court's refusal to find a Batson violation.[10]

In this case, Juror 34 was the only African-American juror in the venire. When asked whether she had any impressions about the criminal justice system, Juror 34 responded:

> A. Gosh, I feel like I am on the spot here.
> But being a person of color, I have a lot of thoughts about

[7] 168 Wn.2d 645, __ P.3d __ (2010).
[8] Rhone, 168 Wn.2d at 661 (Alexander, J., dissenting).
[9] Rhone, 168 Wn.2d at 658 (Madsen, C.J., concurring).
[10] State v. Thomas, 166 Wn.2d 380, 397, 208 P.3d 1107 (2009) (quoting Hicks, 163 Wn.2d at 492-93).

the criminal system. I see – I have seen firsthand – and a couple people have already mentioned that if you have money, you tend to seem to work the system and get over. And regardless if you are innocent or guilty, if you want to be innocent, your money says you are innocent.

And a person of color, even if you do have an affluent lawyer who has the background, the finance to get you off, because you are a person of color, a lot of times you are not going to get that same kind of opportunities.

And especially with this person being a person of color and being a male, I am concerned about, you know, the different stereotypes. Even if we haven't heard anything about this case, we watch the news every night. We see how people of color, especially young men, are portrayed in the news. We never hardly ever see anyone of color doing something positive, doing something good in their community.

So kind of like what the person behind me is saying, since most of the people in this room are white, I am wondering what's running through their mind as they see this young man sitting up here.

Q. Right. How about for you, do you think – I mean, you've got a whole lot that you are feeling as you sit here and that you are going to be asked to sit in judgment of somebody. How do you think you are going to be able to handle that?

A. I think number one, because I am a Christian, I know I can listen to the facts and, you know, follow the judge's instruction. But also it's kind of hard, and I haven't mentioned this before because none of those questions have come up for me to answer, but I lost a friend two weeks ago to a murder, so it's kind of difficult sitting here. Even though I don't know the facts of this particular case, and I would like to think that I can be fair because I am a Christian, I did lose someone two weeks ago.

Q. Was that in Seattle?

A. Yes.

Q. Was that the Tyrone case?

A. Yes.

After a side-bar, the prosecutor asked Juror 34 more questions:

> Q Juror number 34, I am going to move on to the group, but I wanted to close the loop with you. You have a lot that is going through your mind currently both that would give you a lot of empathy for someone who is charged with a crime and also empathy for someone who may be a victim of a crime. In that way, you may be representative of the perfect juror.
>
> At the same time, we don't put people in a position where it's going to cause them a lot of emotional pain. At this point do you think you could sit in this case and listen to the facts and make a decision based solely on the evidence presented in trial here and be fair to both sides?
>
> A. I'd like to think that I could be, but kind of what you just mentioned just with the freshness and the rawness of the death of a friend, I am wondering if that would kind of go through my mind. I like to think that I am fair and can listen, be impartial, but I don't know. I have never been on a murder trial and have just lost a friend two weeks prior to a murder.

The following day, the prosecutor asked Juror 34 whether she had done any more thinking on her serving on the jury. She responded:

> Yes. I thought about it last night as well as this morning. And, you know, my thought is I don't want to be a part of this jury because of the situations, and the circumstances that I just went through. But I'm thinking if ever I was put in a situation where I needed twelve people who could be honest and look through all the facts or I guess I'm saying who could be like me I would want me. So sometimes you have to do things that you don't want to do.

The trial court denied the State's challenge for cause to Juror 34, and the State indicated that it intended to use a peremptory challenge. Saintcalle objected under Batson. The trial court denied the Batson challenge, stating the following reasons:

> [Juror 34] stated that her friend recently was murdered, as a well known case to all counsel here at the table. Further stated that she was upset about that. That she – it was the death of a friend, and that yesterday she was not certain whether she should be a juror on that case because of the fact that looking at homicide scene photos would have on her. Today she did, in fact, say that

> she felt that perhaps, words to the effect of, that she had a duty to be on the jury. She stated still today that she didn't know how she would react to those photographs. But I think those are reasons that she herself articulated that are sufficient, are race neutral to allow peremptory challenge to go forward in this case.

Saintcalle argues that the fact that Jurors 10, 23, 24, 33, and 49 were allowed to serve shows that the State's reasons for challenging Juror 34 were not race-neutral. We disagree.

Juror 10 was the sole Hispanic member of the venire. The State used a peremptory challenge to Juror 10, but the court granted Saintcalle's Batson challenge. The State stated that it flagged Juror 10 early in the jury selection process, before she informed the court that she was a Mexican-American. The State challenged her because she initially indicated that it would be a hardship for her to serve on the jury, but later changed her mind, and because she gave "gobbledygook" answers to questions, chewed gum in court and appeared to have no respect for the process, and her youth. The court disagreed with the State and found no reason for the State to challenge Juror 10. The court determined that Juror 10 shared many of the same characteristics of other members of the jury panel and that on a number of occasions, other members of the jury panel seemed to agree with what Juror 10 was saying and that her answers did not raise any surprise with the other members of the panel. The State obviously believed it had valid, race-neutral reasons for challenging Juror 10. The fact that it challenged both Juror 10 and Juror 34 does not mean that the State was trying for an all-white jury. The State offered race-neutral grounds

for challenging both jurors, even though the trial court disagreed with the State's reasons as to Juror 10.

Jurors 23 and 24 expressed a stricter understanding of the "beyond a reasonable doubt" standard than other members of the venire. Saintcalle argues that the fact that the State allowed Jurors 23 and 24 to serve despite their "defense-friendly" view of the standard of proof shows that the State's reasons for challenging Juror 34 were not race-neutral. The fact that the State did not challenge Jurors 23 and 24 does not negate the race-neutral reasons for which it challenged Juror 34, namely that she was upset about having had a friend murdered two weeks prior and was unsure how she would react to seeing photographs of the crime scene and how it would affect her ability to serve as a juror.

Juror 33, who is white, stated that he knew people who had been shot. While, like Juror 34, Juror 33 knew people who had been shot, unlike Juror 34, the people to whom Juror 33 referred were mere acquaintances of his, not friends. Further, Juror 33 unequivocally stated that this fact would not impact his ability to be fair and impartial. This is a very different sort of *knowledge of people who have been shot* than Juror 34's knowledge.

Finally, Juror 49 served on the jury despite expressing the opinion that the law of accomplice liability was unfair. Juror 49 also stated, however, that if the law instructed a juror that an accomplice is as guilty as the principal, he or she would follow the law, notwithstanding any personal beliefs: "[i]f that's what

the law stated specifically that that's the way the rules are, and they're aware of the rules the same as the rest of us, if they commit the crime, then they are guilty of it." Juror 49 stated further: "In my gut I would say I don't believe that's fair, but that doesn't mean I wouldn't follow the law." Juror 49's statements showed that his or her personal opinion about the fairness of the law of accomplice liability would not interfere with his or her ability to apply the law as instructed. By contrast, Juror 34 expressed doubt a number of times as to her ability to fulfill her duty as a juror in this case.

In sum, the fact that Jurors 10, 23, 24, 33, and 49 served on the jury does not show that the State's reasons for challenging Juror 34 were not race-neutral. We find that the State's reasons for challenging Juror 34 were race-neutral. Accordingly, under Hicks and Thomas, we need not determine whether the bright-line rule discussed in Rhone applies or whether Saintcalle established a prima facie case of purposeful discrimination. The trial court's ruling on Saintcalle's Batson challenge was not clearly erroneous and it is, therefore, affirmed.

Admission of Recordings of Jail Telephone Conversations

Over Saintcalle's objection, the trial court allowed the State to play recordings of telephone conversations between Saintcalle and his friend during a call Saintcalle placed from the county jail. He argues that the admission of these recordings violated his right to privacy under article I, section 7 of the Washington Constitution.[11]

[11] The State argues that this issue is not properly before us. But, an appellant

Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Whether undisputed facts constitute a violation of that provision is a question of law that we review de novo.[12]

We have previously rejected the argument Saintcalle raises and find no reason to depart from our previous holding. In State v. Archie,[13] we held that the defendant had no reasonable expectation of privacy in jail telephone records and that the communications were therefore not private affairs deserving protection under article I, section 7. As here, the telephone calls at issue in Archie were placed from the King County jail. The record in Archie showed that signs were posted near jail telephones warning that telephone calls were subject to recording and monitoring and, when a call was answered, a recorded message was played informing the caller and the recipient that the call would be recorded and subject to monitoring, and the call could not continue until the recipient dialed or pressed three.

As we noted in Archie, the Washington Supreme Court recognized the need for monitoring inmate communications and found no violation of the right to privacy when other forms of inmate communications are inspected so long as inmates have been informed of the likelihood of inspection.[14] As we also noted,

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may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3).

[12] State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

[13] 148 Wn. App. 198, 199 P.2d 1005, review denied, 166 Wn.2d 1016 (2009).

[14] Archie, 148 Wn. App. at 204 (citing State v. Hawkins, 70 Wn.2d 697, 704, 425 P.2d 390 (1967)).

the Supreme Court in State v. Modica[15] held that the recording of a local jail inmate's calls to his grandmother did not violate the privacy act, chapter 9.73 RCW, where signs were posted near the telephones, a message informed the caller and the recipient that the call would be recorded, and the recipient had to press or dial three in order to accept the call. The court in Modica held that any subjective expectation of privacy in the calls was not objectively reasonable. In Archie, after balancing the circumstances of the case against the privacy protection usually applied to telephone conversations, we held that the defendant's calls from jail were not private affairs deserving of protection under article I, section 7.

Saintcalle does not argue that the same notices and warnings about calls being recorded as discussed in Archie were not in place at the time he made his calls from the jail such that Archie is distinguishable and not dispositive of his argument. Rather, he appears to argue that either we should overrule Archie or we are not bound by it because the Supreme Court has not addressed the issue under article I, section 7. Saintcalle's arguments for not following Archie are not persuasive. We apply Archie and conclude that the admission of recordings of Saintcalle's jail telephone calls did not constitute a violation of his right to privacy.

Sufficiency of the To-Convict Instructions on the Assault Counts

The to-convict instructions for the second degree assault counts provided:

> To convict the defendant of the crime of Assault in the Second degree, as charged in count II, each of the following elements of

[15] 164 Wn.2d 83, 186 P.3d 1062 (2008).

> the crime must be proved beyond a reasonable doubt:
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> (1) That on or about February 9, 2007, the defendant – as principal or an accomplice – assaulted Tammy Brown with a deadly weapon; and
>
> (2) That the acts occurred in the State of Washington.

The jury was given a separate instruction setting forth the defense of others, which included the instruction that the State had the burden of proving beyond a reasonable doubt that the force used or offered to be used by the defendant was not lawful. That instruction also informed the jury that if the State failed to prove the absence of the defense beyond a reasonable doubt, it was the jury's duty to return a verdict of not guilty on the assault charges.

Saintcalle argues that the to-convict instructions on the assault counts were constitutionally deficient because they omitted the element that the State must disprove lawful use of force.

We review the adequacy of a challenged to-convict instruction de novo.[16] In State v. Hoffman,[17] the court rejected the same argument Saintcalle raises in connection with the defense of self-defense. In Hoffman, the court noted that the jury was instructed to consider the instructions as a whole, and stated that no prejudicial error occurs when the instructions taken as a whole properly instruct the jury on the applicable law. The court noted further that the self-defense instructions properly informed the jury that the State bore the burden of proving the absence of self-defense beyond a reasonable doubt. The court concluded:

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[16] State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).
[17] 116 Wn.2d 51, 804 P.2d 577 (1991).

"We perceive no error in this instructional mode."[18]

Saintcalle argues that Hoffman has been abrogated by later cases. We disagree. None of the cases cited call into question the clear rule stated in Hoffman that giving a separate instruction on self-defense or, as here, defense of others, which includes the State's burden of proof, is the better approach. The to-convict instructions on the assault counts were not deficient.[19]

Prosecutorial Misconduct

To establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial to the defendant's right to a fair trial.[20] "Prejudice is established only if there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict."[21] Where defense counsel fails to object to the prosecutor's comments during trial, reversal is required only if the misconduct was so flagrant and ill-intentioned that no instruction to the jury could have cured the resulting prejudice.[22]

Saintcalle cites to four comments by the prosecutor which he alleges constitute misconduct warranting reversal. He objected to only two of the alleged improper comments:

> 1. Vouching for, or personal opinion of, credibility of the witnesses; commenting on the exercise of a constitutional right.

[18] Hoffman, 116 Wn.2d at 109.
[19] The State argues that this issue is not properly before us because Saintcalle did not object below to the instruction. Regardless of whether Saintcalle properly preserved this issue for review, his argument as to the deficiency of the to-convict instructions is without merit.
[20] State v. Jackson, 150 Wn. App. 877, 882, 209 P.3d 553, review denied, 167 Wn.2d 1007 (2009).
[21] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).
[22] Jackson, 150 Wn. App. at 883.

> Saintcalle argues the following comments constitute misconduct:
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> And I want to talk to you about the testimony of these two co-defendants at this time that came in and testified to you. . . . what we know is they took responsibility. They indicated a willingness to take the responsibility.

Saintcalle objected to these comments below and argues on appeal that the comments amount to the prosecutor's improperly implying that a person who pleads guilty is more credible than a person who does not plead guilty but rather goes to trial. We disagree.

"[During] closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences about credibility based on evidence in the record."[23] A prosecutor may not, however, express a personal belief as to the credibility of a witness.[24] Nor may a prosecutor personally vouch for the credibility of a witness.[25] To constitute prejudicial error, however, it must be clear and unmistakable that the prosecutor is expressing a personal opinion.[26] Further, a prosecutor may not urge the jury to draw an adverse inference from the defendant's exercise of a constitutional right.[27]

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[23] State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).
[24] Millante, 80 Wn. App. at 250.
[25] Jackson, 150 Wn. App. at 883.
[26] Jackson, 150 Wn. App. at 883.
[27] State v. Moreno, 132 Wn. App. 663, 672-73, 132 P.3d 1137 (2006) (involving a comment about the defendant's exercise of his right to represent himself); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (involving a comment on the defendant's right to remain silent).

Importantly, for purposes of addressing Saintcalle's argument, when addressing allegations of prosecutorial misconduct during closing argument, we look at the entire argument instead of viewing highlighted snippets of argument out of context.[28] We view the allegedly improper remarks "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."[29] Saintcalle's quotation contains mere highlighted snippets of the lengthy passage in which the prosecutor made the comments to which Saintcalle objects. Contrary to what his quotation suggests, the comments were not made nearly one after the other, but rather, the first sentence he quotes is separated by a number of lines of argument from the other two sentences. The part of the passage Saintcalle fails to quote shows that the prosecutor did not vouch for the witnesses' credibility or comment on Saintcalle's right to trial. For example, the prosecutor told the jury to heed the court's instruction to carefully assess the witnesses' testimony and not to wholeheartedly believe their testimony "hook, line, and sinker." She also told the jury that she in no way absolved the witnesses of any responsibility and reminded the jury that the witnesses pleaded guilty to murder.

Also in the portion of the argument omitted from Saintcalle's quote, the prosecutor told the jury to heed the following instruction from the court:

> Testimony of an accomplice, given on behalf of the State should be subjected to careful examination in the 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

[28] Jackson, 150 Wn. App. at 884.
[29] State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010).

> unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

We presume that the jury follows the trial court's instructions.[30]

Viewed in context of the argument as a whole, we conclude that the prosecutor's comments were not improper comments on the defendant's exercise of a constitutional right or the improper vouching for or personal opinion on the credibility of the witnesses. The comments do not constitute prosecutorial misconduct.

2. Vouching for credibility of a witness.

Saintcalle argues that the following comments constitute the prosecutor's improper vouching for the credibility of a witness:

> And here's my impression. That Mr. Roderick Roberts has a tendency to minimize . . . his own involvement. He has a tendency [to] minimize his understanding of what was going on. And Narada Roberts doesn't do that.

Saintcalle did not object to these comments at trial.

While the prosecutor should not have said, "here's my impression," the comments, properly viewed in the context of the argument as a whole, are part of the prosecutor's discussion of the Roberts brothers' testimony and the reasonable inferences that could be drawn therefrom. Because Saintcalle did not object to these comments, in order to warrant reversal, the comments must amount to misconduct that was so flagrant and ill-intentioned that no instruction to the jury could have cured the resulting prejudice. Saintcalle fails to show that the comments amount of such misconduct and, accordingly, the comments are

[30] Anderson, 153 Wn. App. at 428.

not grounds for reversal.

3. Personal opinion as to credibility.

Saintcalle next argues that the prosecutor improperly stated her personal opinion of the credibility of Tammy Brown by stating:

> We have never tried to hide the fact that Tammy Brown was confused, and that's my impression. She is genuinely confused about where Mr. Saintcalle was at the time the shots were fired. Her belief currently, and I think she's honestly trying to tell you the truth.

Saintcalle objected to these comments, but the trial court overruled the objection stating that "[t]his is argument" and the "jury weighs the evidence independently." After the court's comments, the prosecutor told the jury that her opinion "doesn't mean anything. It's you as a group who will make decisions about what the evidence was. What someone said. What someone's credibility is. It's not enough my belief doesn't carry the day in this courtroom."

Again, although the prosecutor should not have used the terms "my impression" and "I think," given the comments she made after the court overruled the objection, we find no substantial likelihood that the comments affected the jury's verdict.

4. Mischaracterization of the jury's role.

Saintcalle argues that the following comment is reversible misconduct because it constitutes a mischaracterization of the jury's role: "[O]ur mission here in this trial and throughout this trial has been to present you with evidence that will let you tell the truth of what happened." Saintcalle did not object to this

comment.

A prosecutor's repeated requests that the jury "declare the truth" are improper.[31] Taken in context, as they must be, the prosecutor's comments here did not amount to repeated requests that the jury declare the truth. After making this statement, the prosecutor explained what she meant by that statement: "[W]e didn't pick and choose the witnesses, and we didn't pick and choose what evidence you got. The bottom line is if there was evidence good, bad, or ugly we provided it to you."

Here, the jury instructions clearly laid out the jury's actual duties, and both counsel thoroughly discussed the evidence during closing argument. In State v. Anderson,[32] these facts led the court to hold that, while the repeated requests that the jury declare the truth were improper, they were not grounds for reversal even where the defendant objected below. Here too, the prosecutor's statements to which Saintcalle did not object, are not grounds for reversal.

Statement of Additional Grounds

Additional Ground 1 — Saintcalle appears to argue that the State was required to present evidence of each of the underlying alternative means of felony murder and was required to elect a particular means and provide a unanimity instruction. He provides no support for this argument, except a cite to the Court of Appeals opinion in State v. Brown[33] which was reversed in part by

[31] Anderson, 153 Wn. App. at 429 (finding, however, that the comments did not require reversal).
[32] 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010).
[33] 100 Wn. App. 104, 995 P.2d 1278 (2000).

the Supreme Court[34] and which does not support his argument.

Where, as here, a defendant is charged with committing a crime by more than one alternative means, the State is required to present substantial evidence to support each of the means charged.[35] A defendant does not, however, have the right to a unanimous jury determination as to which of the alleged means was used to commit the charged crime. Rather, the "jury must unanimously agree as to guilt for the crime charged, but unanimity is not required as to the alternative means for committing the crime as long as substantial evidence supports each alternative means."[36] Saintcalle does not provide any support for his argument that the State did not present substantial evidence as to each of the means charged. We are not required to search the record for evidence to support this claim.[37]

Additional Ground 2 — Saintcalle claims he was entitled to a jury instruction on second degree murder. But, second degree murder is not a lesser included offense of first degree felony murder because second degree murder requires the specific intent to murder that is not required for first degree murder.[38]

Saintcalle also claims he was entitled to a jury instruction on the necessity defense to the assault charges. An instruction on necessity is available when

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[34] 147 Wn.2d 330, 58 P.3d 889 (2002).
[35] State v. Scott, 145 Wn. App. 884, 894, 189 P.3d 209 (2008), review denied, 165 Wn.2d 1032 (2009).
[36] Scott, 145 Wn. App. at 894.
[37] RAP 10.10(c).
[38] State v. Dennison, 115 Wn.2d 609, 627, 801 P.2d 193 (1990).

the circumstances cause the defendant to take unlawful action in order to avoid a greater injury.[39] The instruction is available only where the defendant did not cause the threatened harm and where there was no reasonable legal alternative to breaking the law.[40] Although Saintcalle provides no indication of what evidence in the record supports his argument, the evidence would not support the argument that Saintcalle was not the cause of the threatened harm (either alone or in combination with his accomplices) or that no reasonable legal alternative existed to assaulting the three victims with a deadly weapon.

Additional Ground 3 — Saintcalle argues the evidence was insufficient to convict him of felony murder because there was insufficient evidence of intent or knowledge. As stated above, however, specific intent to murder is not required for first degree murder.[41] The mens rea for felony murder is based solely on the mens rea for the predicate offense: here, first degree burglary or first degree robbery.[42]

Saintcalle also claims he was entitled to an instruction on the definition of knowledge for purposes of accomplice liability. But the Supreme Court has held that because the statutory definition of knowledge is the same as the word's plain meaning, the technical term rule does not require that the jury be instructed on the meaning of "knowledge" when that term is used to define a criminal offense.[43] Also, this court has held that because the word "knowledge" has an

[39] State v. White, 137 Wn. App. 227, 231, 152 P.3d 364 (2007).
[40] White, 137 Wn. App. at 231.
[41] Dennison, 115 Wn.2d at 627.
[42] State v. Bolar, 118 Wn. App. 490, 502, 78 P.3d 1012 (2003).
[43] State v. Scott, 110 Wn.2d 682, 691-92, 757 P.2d 492 (1988).

ordinary and accepted meaning, the trial court is not required to define it.[44] Accordingly, the use of the term "knowledge" in the context of an accomplice liability instruction is not misleading and the jury needs no further explanation.[45]

Saintcalle argues further that the evidence was insufficient to prove he had the requisite knowledge for purposes of accomplice liability. He appears, however, to have an incorrect view of the relevant "knowledge." An accomplice need not have specific knowledge of every element of the crime committed by the principal; rather, the accomplice's general knowledge of his coparticipant's substantive crime suffices for accomplice liability.[46] Here, assuming the jury convicted Saintcalle as an accomplice and not a principal, the evidence shows that he had knowledge of his coparticipants' substantive crimes of first degree burglary or first degree robbery and second degree assault.

Additional Ground 4 — Saintcalle identifies his fourth additional ground as "[b]eing charged a seperate [sic] crime then [sic] the principle/co-defendant [sic]." The record does not reflect the crimes with which Saintcalle's codefendants were charged. He seems to argue that he should not be charged with any crime as an accomplice because he did not intend for his codefendants to commit any crime. Regardless of the merits of this argument, the evidence fully supports the jury's conviction of Saintcalle as a principal, not an accomplice.

Affirmed.

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[44] State v. Castro, 32 Wn. App. 559, 564-65, 648 P.2d 485 (1982).
[45] Castro, 32 Wn. App. at 565.
[46] State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 713 (2000).

Grosse, J.

WE CONCUR:

Ellington, J.

Becker, J.