IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SETH WILLIAMS, Appellant.	No. 40447-8-II ORDER AMENDING OPINION

The unpublished opinion in this matter was filed on February 7, 2012. After review, the court amends the filed opinion as follows:

> Page 10, line 1: In the citation for *State v. Smith*, 162 Wn. App. 833, 849, 262 P.3d 72, the year this case was filed is amended to reflect the correct date: (2011).

DATED this _____ day of _____, 2012.

Armstrong, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SETH THOMAS WILLIAMS, Appellant.	No. 40447-8-II UNPUBLISHED OPINION

Armstrong, P.J. — Seth Thomas Williams appeals his convictions of two counts of first degree robbery as an accomplice with two firearm enhancements. Williams argues that (1) the State failed to prove the robbery; (2) the trial court erroneously instructed the jury such that the jury could have convicted him of robbery even if it believed he intended to participate in only theft; (3) the prosecutor improperly vouched for the truthfulness of a witness by inquiring about the witness's promise to testify truthfully in a plea agreement; and (4) his counsel ineffectively represented him by failing to object to the vouching and failing to properly prepare him as a witness. Finding no reversible error, we affirm.

FACTS

The State charged Williams with first degree robbery as an accomplice, including two firearm enhancements. Co-defendants James Briggs, Marces Sanders, and Larell Hartlett pleaded guilty to the robbery. Neither party called Briggs, Sanders, or Hartlett to testify at Williams's trial.

One evening in April 2009, Efrem Peoples agreed to smoke marijuana with Briggs and

possibly sell him some. Briggs and Peoples arranged to meet at a 76 gas station. When Peoples arrived, Briggs and Hartlett entered his Bronco and said they wanted to complete the transaction at the Sandman I apartments across the street.[1] When Peoples drove into the Sandman I parking lot, Briggs suggested that he park next to a dumpster, which had very little lighting. Peoples refused and parked in an area with better lighting. Briggs exited the Bronco, claiming he needed to use a restroom.

Shortly thereafter, Sanders opened the Bronco's side door and pointed a gun at Peoples. Hartlett, seated on the passenger side of the Bronco, was also pointing a gun at Peoples. Sanders and Hartlett took Peoples's gold chain necklace, cell phone, and some of his cash, and then demanded that Peoples exit the Bronco. Sanders told Peoples to lie on the ground while Sanders and Briggs searched the rest of the Bronco. As he exited, Peoples saw a van behind his Bronco. Instead of lying on the ground, Peoples slowly backed away from Sanders, eventually turning and running toward the 76 station across the street. As he did so, he glanced back and saw the van again.

A clerk at the 76 station called the police. An officer who heard the report from dispatch recognized Sanders's name and knew his mother lived nearby. Officers staked out the home and, approximately 20 - 30 minutes after the initial report, the van arrived. The officers arrested all five occupants. At a crime scene line-up, Peoples identified Briggs, Sanders, and Hartlett as the robbers. He could not identify Williams as being at the scene of the robbery.

The police were given a surveillance video from the neighborhood where Peoples's

[1] There are several Sandman apartment complexes and, for these purposes, Sandman I describes the complex across from the 76 station.

Bronco was later recovered. The video shows the van pulling up near the Bronco and, as it is pulling up, two persons running toward the van. Then the video shows a person moving between the van and the Bronco.

During a search of the van, the police recovered property from the Bronco, including speakers, subwoofers, digital video disks (DVDs), a video player, and other electronic gadgets. The police found a speaker from the Bronco in the van's front passenger seat. Most of the other items were on the floor behind the van's front seats or on the back bench seat. The officers also found four firearms in the van: a .32 caliber revolver and a .40 caliber Glock on the floor board between the two middle row captain's seats; a Ruger P85 protruding from the passenger side, middle row seat; and another .40 caliber Glock in a drawer under the back bench seat.

Williams testified that Briggs called and asked him for a ride around 9:30 p.m. Williams attempted to pick up Briggs at Sandman II, but Briggs was not there. After attempting to reach Briggs by phone, Williams left Sandman II and headed for Sandman I in case Briggs was there. On the way, he encountered his friend James Bradford,[2] who asked for a ride to the store. At about the same time, Briggs called and gave Williams a new pick-up location. When he arrived at the new location, Briggs was there with Hartlett and Sanders. Williams did not know that the three had stolen goods or firearms. Williams agreed to drop off the three at Sanders's mother's house. When they arrived, the police arrested them. Williams testified that he did not know there were firearms or stolen goods in his van, and he never discussed a robbery with the others because the music was loud and he was alone in the front of the van. Although he was the only

[2] Bradford was still in the van when the police arrested the occupants. The State charged him with, and the jury convicted him of, unlawfully possessing two firearms. In a separate opinion, we reversed Bradford's convictions for insufficient evidence.

person who drove the van that night, he denied ever going to Sandman I.

Peoples agreed to testify pursuant to a plea agreement with the State. In the agreement, the State reduced Peoples's pending unrelated robbery charge to attempted second degree robbery and gave him immunity from any marijuana or firearm charges arising from the April 8, 2009 incident. During direct examination, the prosecutor questioned Peoples about the "testify truthfully" provision in his plea agreement:

> Q: (By Mr. Howe [Prosecutor]) . . . The agreement, the plea agreement covering this case and your pending case, do you have to do anything besides appear?
> A: [Peoples] No. No, sir.
> Q: Well, what if you came up – let me just give you a hypothetical for a second, okay. What if you came up here, just for example, and said I don't know nothing about any of these cases. As far as I know some martian came down and did all this stuff. Would that be in accordance with the plea agreement?
> A: No. The plea agreement is to tell the truth.
> Q: Who decides if you told the truth or not. If it came down to it, would we litigate or would I have to take your word for it or do you not understand that part?
> A: I don't understand that part.

Report of Proceedings (RP) at 308-09.

The jury convicted Williams and answered "yes" to both firearm enhancements.

ANALYSIS

I. Sufficiency of the Evidence

Williams challenges the sufficiency of the evidence supporting his robbery conviction.

We test the sufficiency of the evidence by asking whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). When a defendant challenges the sufficiency of evidence in a criminal case, we draw all reasonable inferences from

the evidence in the State's favor. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Raleigh*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011).

A person is an accomplice if he aids or agrees to aid another in planning or committing a crime with knowledge that his aid will promote or facilitate the crime. RCW 9A.08.020(3)(a)(ii). Mere presence during a crime is insufficient to show accomplice liability. *State v. McDaniel*, 155 Wn. App. 829, 863, 230 P.3d 245, *review denied*, 169 Wn.2d 1027 (2010). Instead, the defendant must have associated himself with the criminal conduct, participated in the criminal conduct, and sought to make the crime successful by his actions. *State v. Robinson*, 73 Wn. App. 851, 855, 872 P.2d 43 (1994) (citing *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979)). An accomplice does not have to participate in every element of the crime so long as the accomplice has general knowledge of the specific crime committed. *State v. Roberts*, 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000).

The driver of a car is not guilty as an accomplice where there is no evidence he knew a passenger would suddenly jump out and rob a person on the street. *Robinson*, 73 Wn. App. at 857. Nor is a passenger liable as an accomplice where the driver stops the car, gets out, walks away, and then steals a truck, absent evidence the passenger knew the driver intended to commit the crime. *State v. Luna*, 71 Wn. App. 755, 756, 759, 862 P.2d 620 (1993). Williams cites both cases in support of his insufficiency claim. But both are factually distinguishable.

Williams testified that he was the only driver of the van on the day of the robbery. Peoples

testified the van was not present at the scene when he first pulled into the parking lot. But Peoples saw the van briefly as he exited his vehicle and again as he ran for help. The van was parked behind Peoples's Bronco. The jury could have inferred that one of the robbers (Sanders) arrived in the van. Williams was driving the van filled with items stolen in the robbery when the police arrested the van's occupants. A large speaker stolen in the robbery was on the front passenger seat of the van. A jury could infer that Williams participated in planning the robbery because he drove one of the principals, Sanders, to the robbery location; he parked the van so that the robbery principals had access to Peoples and his vehicle; and then drove the robbery principals away with the stolen property.

Accordingly, we hold that the record contains sufficient evidence to sustain Williams's conviction.

II. Jury Instructions

Williams argues that the trial court erroneously instructed the jury as to accomplice liability such that they could have convicted him as an accomplice to robbery, even if he intended to commit only theft.

In considering a challenge to jury instructions, we read the instructions as a whole. *State v. Pirtle*, 127 Wn.2d 628, 656-57, 904 P.2d 245 (1995). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case and, when read as a whole, they properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 908 n.1, 909, 976 P.2d 624 (1999). We review the adequacy of jury instructions de novo as a question of law. *Pirtle*, 127 Wn.2d at 656-57.

Under the robbery statute, "[a] person commits robbery when he . . . *unlawfully* takes personal property from the person of another . . . by the use or threatened use of immediate force . . . ." RCW 9A.56.190 (emphasis added). The elements of robbery include the underlying crime of theft. 11 Washington Practice: Washington Pattern Jury Insructions: Criminal § 37.50, at 69 (cmt.-Intent) (3d ed. Suppl. 2010); *see also State v. Faucett*, 22 Wn. App. 869, 871, 593 P.2d 559 (1979) (Robbery includes elements of larceny plus elements of (1) taking the property from the person or in their presence and (2) using force or the threat of force to complete the taking.). Therefore, inserting "intent to commit theft" or other similar language in the "to convict" instruction for robbery is not erroneous. *See Faucett*, 22 Wn. App. at 871-72.

The accomplice liability statute imposes liability on persons who aid or encourage the principal's crime. RCW 9A.08.020(3). To be liable as an accomplice, the defendant must have "general knowledge of [the] specific crime" the principal intends to commit. *Roberts*, 142 Wn.2d at 512.

Here, the jury instructions, considered as a whole, did not permit the jury to convict Williams as an accomplice to robbery if it found he intended to aid only theft. The accomplice liability instruction correctly stated the law under *Roberts* by explaining that the alleged accomplice must act with knowledge that his actions will promote commission of *the* crime and must aid or agree to aid in committing *the* crime. Williams is correct that the "to convict" instruction[3] refers to theft, but the instruction also stated that to convict Williams of robbery, the

[3] The "to-convict" instruction states:

> To convict the defendant, Seth Thomas Williams, of the crime of robbery in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 8th day of April, 2009 the defendant, Seth Thomas

jury had to find that *each* element was proved beyond a reasonable doubt. The instruction then listed the elements, including (1) taking property from the person of the victim (2) with force. Thus, considered as a whole, the "to convict" instruction did not allow the jury to convict Williams of being an accomplice to robbery if he intended to aid only theft.

Williams relies on *State v. Grendahl*, 110 Wn. App. 905, 911, 43 P.3d 76 (2002), where Division Three of this court held that similar robbery and "to convict" instructions together "permitted the jury to convict [the defendant] of robbery as an accomplice . . . even if he or [his co-defendant] merely intended to commit theft." The prosecutor in *Grendahl*, however, argued in closing that the jury could convict Grendahl even if it found he intended to commit theft. *Grendahl*, 110 Wn. App. at 909-10. Here, the prosecutor did not argue that finding intent to commit theft was sufficient to convict Williams as an accomplice to robbery.[4] In fact, the

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> Williams, or an accomplice unlawfully took personal property, not belonging to the defendant, from the person or in the presence of another;
> (2) That the defendant, Seth Thomas Williams, or an accomplice *intended to commit theft* of the property;
> (3) That the taking was against the person's will by the defendant, Seth Thomas Williams, or an accomplice's *use or threatened use of immediate force*, violence or fear of injury to that person;
> (4) That the force or fear was used by the defendant, Seth Thomas Williams, or an accomplice, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
> (5) That in the commission of these acts the defendant, Seth Thomas Williams, or an accomplice, was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and
> (6) That any of these acts occurred in the State of Washington.
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

Clerk's Papers at 130 (emphasis added).

[4] Williams asserts that the prosecutor "argued that in order to convict Mr. Williams of the crime of robbery, he only had to show that Mr. Williams agreed to commit the crime of theft." Br. of Appellant at 6. This assertion misconstrues the State's closing argument. Taken in context, the

prosecutor discussed each element of robbery and pointed to the evidence supporting each element. The trial court did not err in instructing the jury on accomplice liability. Because the trial court did not erroneously instruct the jury on accomplice liability, we need not discuss Williams's claim that his counsel ineffectively represented him by not challenging the instructions.

III. Vouching

Williams argues that the prosecutor improperly vouched for Peoples's veracity by questioning him about the plea agreement's provision that he testify truthfully. Further, Williams urges us to find prejudice because Peoples's testimony is the "sole testimony identifying [Williams] as involved." Reply Br. of Appellant at 4.

To prove prosecutorial misconduct, Williams must show that the prosecutor's conduct was improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Williams can establish prejudice if "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *State v. Dixon*, 150 Wn. App. 46, 53, 207 P.3d 459 (2009) (quoting *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). But because he failed to object to the prosecutor's remarks at trial, he must demonstrate on appeal that the remarks were so "'flagrant and ill intentioned that it cause[d] an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" *Thorgerson*, 172 Wn.2d at 443 (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). Otherwise, we will consider the issue waived. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

A prosecutor may not vouch for a witness's credibility. *State v. Coleman*, 155 Wn. App.

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prosecutor was discussing the "to convict" instruction, and mentioned that theft was an element that the State had to prove. The prosecutor stated that the State had proved this element and then explained that the State had also proved the other robbery elements.

951, 957, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016 (2011). The trier of fact has sole authority to assess the credibility of witnesses. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Vouching occurs when the State "places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." *State v. Smith*, 162 Wn. App. 833, 849, 262 P.3d 72 (2001) (citing *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980)).

In *Ish*, 170 Wn.2d at 193, the defendant's cell mate agreed to "testify truthfully" for the State. At trial, the prosecutor asked the cell mate on direct examination about the "testify truthfully" provision. *See Ish*, 170 Wn.2d 194. Four justices in the lead opinion and one dissenting justice agreed the prosecutor vouched for the witness by inquiring about the "testify truthfully" provision on direct examination. But because other evidence supported the conviction, the prosecutor did not dwell on the provision in direct examination, and defense counsel attacked the witness's credibility on cross-examination, the four lead justices found the error harmless.[5] *Ish*, 170 Wn.2d at 200-01. The *Ish* court did not have to address the "flagrant and ill intentioned" standard because Ish's defense counsel objected to the admission of the plea agreement and its "testify truthfully" provision. *Ish*, 170 Wn.2d at 193-94.

Here, Williams's counsel did not object to the prosecutor's "testify truthfully" questioning. Thus, we will review the issue only if Williams can demonstrate that the prosecutor's questions were "'so flagrant and ill intentioned'" as to evince "'enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" *Thorgerson*, 172 Wn.2d at 443

[5] The lead opinion also speculated that the prosecutor could ask about a "testify truthfully" provision on redirect if the defense challenged the witness's veracity on cross. *Ish*, 170 Wn.2d at 201.

(quoting *Russell*, 125 Wn.2d at 86).

Courts often find "flagrant and ill-intentioned" comments where the law is clearly established and the prosecutor's comments implicate a core criminal trial right (i.e., presumption of innocence). *See State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010), (addressing improper comments on the defendant's right to a presumption of innocence), *review denied*, 171 Wn.2d 1013 (2011); *see also, State v. Venegas*, 155 Wn. App. 507, 523-24, 228 P.3d 813 (addressing improper comments on the reasonable doubt standard), *review denied*, 170 Wn.2d 1003 (2010).

We considered the vouching argument in *Ish*, 150 Wn. App. at 786-87. We held that the prosecutor did not vouch for the witness by questioning him about his promise to testify truthfully, relying on the Supreme Court's reasoning in *State v. Kirkman*, 159 Wn.2d 918, 925, 155 P.3d 125 (2007), where a detective testified that he elicited a child victim's promise to tell the truth. *Ish*, 150 Wn. App. at 786-87 (citing *Kirkman*, 159 Wn.2d at 925). The *Kirkman* court had characterized this as "'simply an account of the interview protocol,'" which "'merely provided the necessary context that enabled the jury to assess the reasonableness of the . . . responses.'" *Ish*, 150 Wn. App. at 787 (quoting *Kirkman*, 159 Wn.2d at 931). Thus, we held that similar testimony in *Ish* was not vouching. *Ish*, 150 Wn. App. at 787.

Our *Ish* opinion *preceded* the trial here, and the Supreme Court overruled our *Ish* opinion *after* this case was tried. Thus, under our *Ish* opinion, the prosecutor could inquire about the "testify truthfully" provision of Peoples's plea agreement. Under these circumstances, the prosecutor did not commit flagrant and ill-intentioned error by relying on then current law in

questioning Peoples on direct examination about the plea agreement. Thus, we need not discuss any possible prejudice.

Nor do we need to discuss Williams's argument that his trial counsel ineffectively represented him by failing to object to the prosecutor's claimed vouching. To establish that counsel ineffectively represented him, Williams must show that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Again, because the prosecutor did not err in eliciting the "testify truthfully" provision under our *Ish* opinion, counsel was not ineffective in failing to object. *See State v. Slighte*, 157 Wn. App. 618, 625, 238 P.3d 83 (2010) (explaining that attorneys are not expected to predict changes in the law, and assessment of effective representation is based on the law at the time of the representation), *remanded*, No. 38624-1-II, 2011 WL 5373982 (Wash. Ct. App. Nov. 8, 2011).

IV. Ineffective Assistance of Counsel

Williams also faults his trial counsel for failing to prepare him for testifying by not showing him pictures obtained during discovery.[6] Specifically, Williams argues that had he been shown the evidence before trial, he might not have testified or, when testifying, would have addressed the evidence more competently.

[6] Williams also claims that before trial, his counsel failed to show him the surveillance video recovered from a neighbor in the neighborhood where the police found Peoples's Bronco. In the video, which is poor quality, three people get into a van that looks similar to, or is, Williams's van. However, the record does not clearly support the proposition that Williams's counsel did not show him the video before trial. It only indicates that it is hard to see what happens in the video because of the poor quality.

On direct appeal, we can consider only issues the trial record supports. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Thus, the trial record must support a claim of ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 335. Williams did testify. During cross-examination, Williams testified that he never saw the photographs of stolen items recovered from his van until trial. Assuming without deciding that counsel was ineffective in failing to prepare Williams for questioning about the photos, Williams has not shown prejudice. *Thomas*, 109 Wn.2d at 225-26. Nothing in the record suggests that the trial result would have been different if counsel had shown Williams the photographs before trial. The photos showed the location of the stolen items in the van, but the officers also testified about where the items were in the van. Moreover, on re-direct, Williams's trial counsel elicited that most of the stolen items were behind the driver's seat, thereby offering some support for Williams's defense. And even without Williams's testimony, the photos were admissible through other witnesses; thus, Williams has not demonstrated prejudice.

We affirm.

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

Armstrong, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.