IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of JEREMY JAMES BONO, Petitioner.	No. 41912-2-II UNPUBLISHED OPINION

Van Deren, J. — Jeremy James Bono argues in a personal restraint petition (PRP) that his conviction of first degree assault should be reversed. He argues that (1) the trial court's accomplice liability instruction relieved the State of its burden to prove each element of first degree assault beyond a reasonable doubt and that its "to convict" instruction omitted elements of the crime charged, (2) the State failed to present sufficient evidence to convict him of first degree assault and to support the deadly weapon sentencing enhancement, and (3) the prosecutor committed misconduct by minimizing the State's burden of proof in closing arguments. Bono also raises a number of other errors. Because Bono's allegations of constitutional error are without merit and because he fails to allege that the nonconstitutional errors merit review under the PRP standard, we deny his petition.

FACTS[1]

In October 2005, Garrett Wilson was staying at Tracy Vasquez's home. Vasquez saw Bono drive by his house on October 12, 2005. Twenty minutes later, Bono and Jared Metcalf came to the open door and Metcalf asked for Wilson. Wilson knew Jeremy Bono because he had dated Bono's sister. They had not experienced significant conflict in the past but Bono recently told Wilson that he would kill him if he slept with his sister. Wilson did not expect Bono and Metcalf as visitors that day.

Bono and Metcalf said that they were going for a ride and Wilson left with them. Wilson testified later that he left with the two men because he thought they were angry and because he did not want anything to happen in Vasquez's home. Vasquez saw the three men drive away in a pickup truck. He saw Bono driving, Wilson sitting in the middle, and Metcalf sitting on the passenger side.

In the truck, Metcalf restrained Wilson and hit him. Metcalf punched Wilson with his fist and hit him with an empty liquor bottle. Metcalf uttered obscenities, some of which may have been of a sexual nature involving what might happen to Wilson. When Wilson asked Bono "'why [he] was getting beat up,'" Bono said something about his sister being arrested. *State v. Bono*, noted at 150 Wn. App. 1057, 2009 WL 1863894, at *1 (quoting *Bono* Report of Proceedings (RP) at 327), *review denied*, 168 Wn.2d 1012 (2010). When Metcalf told Wilson to empty his pockets, Wilson complied. Wilson defecated in his pants. He testified that he did this to be funny but he also suggested before trial that he did it to make himself repugnant to his assailants.

After driving 20 minutes, Bono parked the truck on an isolated logging road. Metcalf told

[1] The facts here are substantially those recited in Bono's direct appeal. *State v. Bono*, noted at 150 Wn. App. 1057, 2009 WL 1863894, at *1-2, *review denied*, 168 Wn.2d 1012 (2010).

Wilson to remove his clothes, and Wilson complied. Metcalf tried to grab Wilson and they both fell to the ground. Wilson ran to some bushes and two rocks hit him as he ran away. He hid in the bushes until Bono and Metcalf left. After Bono dressed himself, a man driving by picked him up, called 911, and drove him to a fire station.

Paramedics transported Wilson to the hospital. Daniel Brocksmith, a physician's assistant, took photographs to document Wilson's condition when he arrived at the hospital. Brocksmith testified that Wilson had suffered nasal and skull fractures, he was covered in feces, and he had numerous lacerations to his head and face. Wilson told Brocksmith that "'he had been assaulted with bottles and fists.'" *Bono*, 2009 WL 1863894, at *1 (quoting *Bono* RP at 293).

A week or so later, after he had been released from the hospital, Wilson spoke with a police officer concerning the assault on October 12. As a result of the interview, the police arrested Bono and Metcalf and the State charged them with first degree assault of Wilson with a deadly weapon enhancement.

After his arrest, Metcalf repeatedly contacted Wilson and Vasquez and offered them money to make the case go away or "'help him out.'" *Bono*, 2009 WL 1863894, at *2 (quoting *Bono* RP at 188). The State eventually arrested Wilson as a material witness, and he testified that he thought the case should not be prosecuted. Vasquez eventually authored two statements—one for Metcalf and one for Bono—that indicated that they had not assaulted Wilson.

The trial court consolidated the two cases for trial. A jury found both Bono and Metcalf guilty as charged. The trial court sentenced Bono to 136 months plus 24 months for the deadly weapon enhancement.

On direct appeal, Bono argued that the prosecutor committed misconduct during closing

argument by relying on facts not in evidence. *Bono*, 2009 WL 1863894, at *2. He also filed a statement of additional grounds for review,[2] in which he challenged the deadly weapon enhancement, argued that the State failed to present sufficient evidence of essential elements of the crime charged, raised other instances of alleged prosecutorial misconduct, claimed that his trial should have been severed from Metcalf's, and raised a number of evidentiary issues. *Bono*, 2009 WL 1863894, at *5-9. We affirmed his conviction. *Bono*, 2009 WL 1863894, at *10.

ANALYSIS

I. Personal Restraint Petition Standard of Review

A petitioner may request relief through a PRP when he is under an unlawful restraint.[3] RAP 16.4(a)-(c). Our Supreme Court has limited collateral relief available through a PRP "'because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992)). "A personal restraint petitioner must prove either a (1) constitutional error that results in actual and substantial prejudice or (2) nonconstitutional error that 'constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010) (internal quotation marks omitted) (quoting *Davis*, 152 Wn.2d at 672). Additionally, "to prevail on a PRP alleging constitutional error [the petitioner] must show by a preponderance of the

[2] RAP 10.10.

[3] Bono is under a "restraint" as he is confined under a judgment and sentence resulting from a decision in a criminal proceeding. RAP 16.4(b).

evidence that the error has caused him actual prejudice." *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

A personal restraint petition is a collateral attack on a judgment. RCW 10.73.090(2). A collateral attack "may not renew an issue raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." *In re Pers. Restraint of Spencer*, 152 Wn. App. 698, 706, 218 P.3d 924 (2009). Reexamination of an issue serves the interests of justice "if there was an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." *State v. Wade*, 133 Wn. App. 855, 872, 138 P.3d 168 (2006).

When reviewing a PRP, we have three options:

> 1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;[4]
> 2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12; [or]
> 3. If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the P[RP] without remanding the cause for further hearing.

In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

II. Constitutional Errors

Bono argues that the trial court made several constitutional errors that require reversal of his conviction. First, Bono argues that the trial court's accomplice liability instruction relieved the State of its burden to prove that he had knowledge that his activity would promote or facilitate the particular crime charged. Second, he alleges that the "to convict" instruction relieved the

[4] RAP 16.11(b) states that the chief judge can dismiss a PRP or a panel of judges may make a determination on the merits of the PRP.

State of its burden to prove that he had the requisite intent for first degree assault. Third, Bono contends that sufficient evidence did not support the deadly weapon enhancement or his first degree assault conviction. Finally, he argues that the State deprived him of the right to a fair trial when it minimized its burden of proof in closing arguments. We disagree.

A. Accomplice Liability Instruction

Bono argues that two portions of the accomplice liability instruction were ambiguous and, thus, relieved the State of its burden to prove essential elements of the crime charged. "'It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden' to prove 'every essential element of a criminal offense beyond a reasonable doubt.'" *State v. Hayward*, 152 Wn. App. 632, 641-42, 217 P.3d 354 (2009) (alteration in original) (quoting *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). And "[d]ue process requires the State to bear the 'burden of persuasion beyond a reasonable doubt of every essential element of a crime.'" *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996) (internal quotation marks omitted) (quoting *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994)). Accordingly, Bono alleges a constitutional error and, thus, he "must show by a preponderance of the evidence that the error has caused him actual prejudice." *Lord*, 152 Wn.2d at 188.

Relying on our Supreme Court's decision in *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000), Bono first argues that the trial court's accomplice liability instruction could have led the jury to convict him by finding that he had knowledge that his activities would promote or facilitate *any* crime and, thus, relieved the State of its burden to prove that Bono was an accomplice to the particular crime charged. The State contends that the instruction was a correct statement of the law and that the error highlighted in *Cronin* does not appear in the instruction here. Br. of Resp't

at 11. We agree with the State.

Jury "[i]nstructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case." *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). "We analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context." *Hayward*, 152 Wn. App. at 642.

Under RCW 9A.08.020(3):[5]

> A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it.

The trial court's jury instruction 7 read in relevant part:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
> (2) aids or agrees to aid another person in planning or committing the crime.

Br. of Resp't App. D at 11.

Bono argues that our Supreme Court in *Cronin* "struck down an instruction almost identical to the instruction given in [his] case." PRP at 6. The jury instruction in *Cronin* read:

> "A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of *a crime*, he or she either:
> (1) solicits, commands, encourages, or requests another person to

[5] The legislature amended RCW 9A.08.020 in 2011. Laws of 2011, ch. 336, § 351. The amendments did not alter the statute in any way relevant to this case; accordingly, we cite the current version of the statute.

> commit the crime; or
> (2) aids or agrees to aid another person in planning or committing a crime."

142 Wn.2d at 572 (emphasis added) (quoting *Cronin* Clerk's Papers at 87). The *Cronin* court held that "[b]ecause the jury instruction permitted the fact finder to find accomplice liability if the defendant knew he was promoting or facilitating 'a crime' rather than the specific crime charged, the instruction was deficient." *State v. O'Neal*, 126 Wn. App. 395, 419, 109 P.3d 429 (2005) (citing *Cronin*, 142 Wn.2d at 578-79), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007).

But jury instruction 7 does not contain the reference to "a crime" that the *Cronin* court held inadequate. Rather, jury instruction 7 read, "A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of *the crime*." Br. of Resp't App. D at 11 (emphasis added). The ambiguity in the *Cronin* instruction does not appear in the trial court's accomplice liability instruction here.

Bono appears to argue that the offending language is actually the first reference to "'a crime,'" not the second. PRP at 9 (underline omitted) (quoting Br. of Resp't App. D at 11). That is, he argues that the phrase in jury instruction 7 providing that "'[a] person is an accomplice in the commission of *a crime* if'" is inappropriate under *Cronin*. PRP at 9 (emphasis added) (quoting Br. of Resp't App. D at 11). But Bono misreads *Cronin*. The language at issue in that case was the second phrase, "with knowledge that it will promote or facilitate the commission of *a crime*." *Cronin*, 142 Wn.2d at 572, 579 (internal quotation marks omitted). Here, jury instruction 7 properly read "with knowledge that it will promote or facilitate the commission of *the crime*." Br. of Resp't App. D at 11 (emphasis added). Accordingly, we reject Bono's argument.

Bono also appears to apply *Cronin*'s reasoning to a portion of the accomplice liability instruction that *Cronin* did not address. Relying on the difference between the accomplice liability statute's reference to "such other person" and jury instruction 7's reference to "another person," Bono argues that the instruction relieved the State of its burden to prove that he was an accomplice to the alleged principal, Metcalf, as opposed to "any other person." PRP at 10-11 (underline omitted) (internal quotation marks omitted).

The accomplice liability statute provides in relevant part:

> A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) Solicits, commands, encourages, or requests *such other person* to commit it; or
> (ii) Aids or agrees to aid *such other person* in planning or committing it.

RCW 9A.08.020(3) (emphasis added). Jury instruction 7 read as follows:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
> (1) solicits, commands, encourages, or requests *another person* to commit the crime; or
> (2) aids or agrees to aid *another person* in planning or committing the crime.

Br. of Resp't App. D at 11 (emphasis added).

Bono contends that the reference to "another person" in instruction 7 is misleading because that person "could be anyone and not solely the principal actor for whom the [d]efendant is an alleged accomplice." PRP at 10. But we examine "a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context." *Hayward*, 152 Wn. App. at 642.

Read as a whole, jury instruction 7 does not contain the ambiguity Bono alleges. The accomplice liability statute contains the phrase "such other person" because section (3)(a) of the statute references "another person;" thus, the reference to "such other person" clarifies the first reference. RCW 9A.08.020. Instruction 7 does not make reference to "another person," and, thus, its later reference to "another person" in the challenged portion of the instruction does not require the qualification found in the statute. Br. of Resp't App. D at 11. Thus, Bono fails to prove any constitutional error in the accomplice liability instruction and fails to assert that the alleged error resulted in "actual and substantial prejudice." *Monschke,* 160 Wn. App. at 488. Accordingly, his claim fails.

B. "To Convict" Instruction

Bono next argues that the trial court's "to convict" instruction was improper because "[t]he jury could have, and probably did, convict Jeremy Bono even though it did not find that he had either the requisite intent or that he acted with a deadly weapon or force or means likely to produce great bodily harm." PRP at 14. A "to convict" instruction that omits an element of a crime presents an error of constitutional magnitude. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Thus, to the extent that Bono argues that the trial court omitted an element of the charged crime in the "to convict" instruction, he has alleged a constitutional error and, thus, he "must show by a preponderance of the evidence that the error has caused him actual prejudice." *Lord*, 152 Wn.2d at 188.

Jury instruction 16 read:

> To convict the defendant Jeremy James Bono of the crime of assault in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about [the] 12th day of October, 2005, the defendant or an

> accomplice assaulted Garrett Wilson;
>
> (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
>
> (3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and
>
> (4) That the 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.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of those elements, then it will be your duty to return a verdict of not guilty.

Br. of Resp't App. D at 20.

First, Bono argues that jury instruction 16 omitted an element of the offense because it did not require the jury to find that Bono acted "'with intent to inflict great bodily harm'" before convicting him of first degree assault. PRP at 15 (internal quotation marks omitted). But it is well-settled that a defendant charged as an accomplice "need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal." *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003).

Second, Bono argues that under our Supreme Court's decision in *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), the instruction omitted an element of the offense because it did not require the jury to find that Bono "personally participated in the assault with a deadly weapon or by force or means likely to produce great bodily harm or death." PRP at 15. We disagree.

In *Roberts*, our Supreme Court held:

> [W]hen jury instructions . . . allow for the possibility that the defendant was convicted solely as an accomplice to premeditated first degree murder, the defendant may not be executed unless the jury expressly finds (1) the defendant was a major participant in the acts that caused the death of the victim, and (2) the

aggravating factors under the statute specifically apply to the defendant.

142 Wn.2d at 508-09. But the *Roberts* rule applies only in cases where the State seeks the death penalty. *State v. Whitaker*, 133 Wn. App. 199, 231, 135 P.3d 923 (2006).

Finally, relying on *State v. Amezola*, 49 Wn. App. 78, 741 P.2d 1024 (1987), Bono argues that it was improper for the trial court to submit an instruction to the jury that allowed it to convict him as either a principal or an accomplice to first degree assault when there was insufficient evidence to convict him as a principal.[6] Bono is correct that "where the trial court instructs the jury that there are alternative means of committing the charged criminal act, and does not require a unanimous determination of which alternative is used, [Washington courts] have required substantial evidence of each alternative." *State v. McDonald*, 138 Wn.2d 680, 687, 981 P.2d 443 (1999). Thus, relying on this principle, the *Amezola* court held that it was improper to submit an instruction to the jury allowing it to find the defendant guilty under either principal or accomplice liability theories where there was insufficient evidence to support a conviction as an accomplice. 49 Wn. App. at 90.

But *Amezola* "was a misreading of our [Supreme Court's] alternative means cases" and

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[6] Bono argues that sufficient evidence did not support his conviction as a principal because "the [p]rosecuting [a]ttorney, in his closing argument, so advised the jury." PRP at 19. In support of this contention, Bono relies on the prosecutor's statement in closing argument that "'[i]t's a case of [Bono], who did not commit any physical assault himself against [Wilson].'" PRP at 19 (underline omitted) (quoting *Bono* RP at 589). But in jury instruction 1, the trial court properly instructed the jury that the attorneys' arguments are not evidence:

> It is important . . . for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

Br. of Resp't App. D at 4. Accordingly, we disregard Bono's contention that the prosecutor's statement constitutes "evidence."

inappropriately applied the alternative means rule to principal and accomplice charges. *McDonald*, 138 Wn.2d at 689. In *McDonald*, our Supreme Court expressly rejected the *Amezola* court's reasoning, noting that our Supreme Court "ha[s] made clear the emptiness of any distinction between principal and accomplice liability." 138 Wn.2d at 688. The *McDonald* court stated:

> "The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. *The elements of the crime remain the same.*"

138 Wn.2d at 688 (emphasis in original) (quoting *State v. Carothers*, 84 Wn.2d 256, 264, 525 P.2d 731 (1974)). Thus, it held that because "principal and accomplice liability are not alternative means of committing a single offense," substantial evidence need not support a finding that the defendant is guilty as both a principal and an accomplice—substantial evidence of accomplice liability will suffice. *McDonald*, 138 Wn.2d at 687.

Because Instruction 16 allowed the jury to convict Bono based on accomplice or principal liability, under *McDonald*, it does not present "alternative means" of committing the crime. 138 Wn.2d at 687. Thus, Bono has failed to prove any constitutional error in the "to convict" instruction and fails to assert that the alleged error resulted in "actual and substantial prejudice."[7] *Monschke*, 160 Wn. App. at 488. Accordingly, his claim fails.

C. Sufficiency of the Evidence

[7] Bono also argues that the "to convict" instruction is a misstatement of the law because it allows the jury to conclude that "a person can be guilty of any crime if it is committed by a person for whom he is legally accountable." PRP at 9. But Bono's assertion directly conflicts with the plain language of the accomplice liability statute, which provides that "[a] person is legally accountable for the conduct of another person when. . . [h]e or she is an accomplice of such other person in the commission of the crime." RCW 9A.08.020(2).

Next, Bono suggests, but does not explicitly argue, that his due process rights were violated because the State failed to present sufficient evidence to support his deadly weapon enhancement or his conviction for first degree assault. "In a criminal prosecution, due process requires the State to prove every element of the charged crime beyond a reasonable doubt." *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). This, too, is an alleged constitutional error that we may review in a PRP. *Monschke*, 160 Wn. App. at 488. But we previously rejected Bono's sufficiency argument in his direct appeal as to both the deadly weapon enhancement[8, 9] and the first degree assault conviction.[10] *Bono*, 2009 WL 1863894, at *6-7. Bono has provided no reason why the interests of justice require relitigation of the issue. *Spencer*, 152 Wn. App. at 706. Accordingly, these claims are barred.

[8] On direct appeal, we held that "Wilson testified that he was hit with rocks, thrown with sufficient force to cause him serious injury. These circumstances support the jury's finding that rocks were used as deadly weapons." *Bono*, 2009 WL 1863894, at *5. We also held that "although Wilson testified that he was hit with a plastic bottle, the State argued that the jury need not believe that the bottle was plastic in light of the extensive injuries to Wilson's face." *Bono*, 2009 WL 1863894, at *5. Citing case law in which "a glass . . . bottle was considered a deadly weapon," we held that "[s]ufficient evidence of use of a deadly weapon exists in this case." *Bono*, 2009 WL 1863894, at *5-6.

[9] Bono also challenges the deadly weapon enhancement because "a deadly weapon enhancement cannot be applied to a conviction of [f]irst [d]egree [a]ssault." PRP at 21. Bono fails to support this assertion with further argument or citations to authority. "[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made." *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); RAP 10.3(a)(6). Accordingly, we decline to address Bono's assertion further.

[10] On direct appeal, we held that "sufficient evidence shows that Bono acted, at the very least, as an accomplice to the assault against Wilson and, in fact, may have also directly assaulted him when Wilson was hit by two rocks as he ran from the truck." *Bono*, 2009 WL 1863894, at *7.

D. Prosecutorial Misconduct

Bono next suggests, but does not explicitly argue, that the prosecuting attorney committed misconduct in closing arguments by minimizing the State's burden to prove all elements of the crime beyond a reasonable doubt. It is clear that "[d]ue process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt [and i]t is error for the State to suggest otherwise." *State v. Warren*, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008). Thus, to the extent that Bono alleges a constitutional error, he "must show by a preponderance of the evidence that the error has caused him actual prejudice." *Lord*, 152 Wn.2d at 188.

In closing argument at trial, the prosecuting attorney stated:

> I want to point out a few instructions that are very important for you to understand in making your decision in this case. First thing I want to do, I guess, the instruction is [n]umber 15 that I want to go to first, but I want to say something regarding the elements in [n]umber 15. When I first spoke to the first juror in this case in jury selection I said, if you recall, how important [it would] be if chosen to be on this jury to render a verdict that represents the truth about what happened, and everybody agreed that's what you're here for.
>
> Well, there's a little twist now that the case is over and the [c]ourt's instructed you. You do not have to decide the truth of everything that happened. That is not your job. Maybe some jurors feel like they have to decide beyond a reasonable doubt what really happened in the case, and that is not the law. The law is you have to determine, if you render a guilty verdict, the truth about the elements, the truth of the charge. Is the State's charge, is the State's contention that these two men committed an assault in the first degree true or not. That's the truth that you're here to decide.
>
> And with that in mind, if you look at [i]nstruction [n]umber 15, it gives you the elements that you need to focus on, the things that you need to determine are these—has the State proved to you beyond a reasonable doubt that these are true[?]

Bono, 2009 WL 1863894, RP at 537-38.

Bono argues that the phrases "'You do not have to decide the truth'" and "'Maybe some jurors feel like they have to decide beyond a reasonable doubt what really happened in the case,

and that is not the law'" constituted prosecutorial misconduct. PRP at 12 (underline omitted) (quoting *Bono*, 2009 WL 1863894, RP at 538). But allegedly improper statements made by the prosecuting attorney "should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Viewed as a whole, the prosecuting attorney's statements do not misstate the State's burden to prove each element of the crime beyond a reasonable doubt. In fact, the prosecuting attorney explicitly stated in closing argument, "[I]f you look at [i]nstruction [n]umber 15, it gives you the elements that you need to focus on, the things that you need to determine are these—has the State proved to you beyond a reasonable doubt that these are true[?]" *Bono*, 2009 WL 1863894, RP at 538. Thus, Bono has failed to prove any constitutional error resulting from the prosecutor's closing arguments and fails to assert that the alleged error resulted in "actual and substantial prejudice."[11] *Lord*, 152 Wn.2d at 188.

III. Nonconstitutional Errors

Bono also argues that the trial court erred when it (1) failed to include a definition of "'knowledge'" in its instruction on accomplice liability; (2) denied his motion to sever[12] because testimony indicating that Metcalf was in prison unfairly prejudiced him;[13] and (3) admitted

[11] Bono also cites multiple other instances of prosecutorial misconduct, but fails to allege that those instances constituted "either a (1) constitutional error that result[ed] in actual and substantial prejudice or (2) nonconstitutional error that 'constitute[d] a fundamental defect which inherently results in a complete miscarriage of justice.'" *Monschke*, 160 Wn. App. at 488 (internal quotation marks omitted) (quoting *Davis*, 152 Wn.2d at 672). Accordingly, we decline to address these arguments.

[12] On Bono's direct appeal, this court noted, "[Bono] asserts that in 2005 or early 2006, he unsuccessfully filed a motion to sever against the advice of his attorney." *Bono*, 2009 WL 1863894, at *8.

[13] Bono also argues that the trial court should not have denied his severance motion because he was prejudiced by testimony that Metcalf evaded police at the time of his arrest and testimony

testimony suggesting that Bono had some connection to illegal drugs, contrary to its decision on a motion in limine. These allegations do not rise to the level of constitutional error,[14] and Bono fails to assert that the alleged errors "'constitute[d] a fundamental defect which inherently result[ed] in a complete miscarriage of justice.'" *Monschke,* 160 Wn. App. at 488 (internal quotation marks omitted) (quoting *Davis*, 152 Wn.2d at 672). Thus, these claims fail.

IV. Cumulative Error

Bono argues that "[t]here were several errors occurring during trial which would have had a substantial impact upon the jury and, any one of which would have prevented Jeremy Bono from receiving a fair trial." PRP at 28. "The cumulative error doctrine applies . . . when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial." *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003). Bono has failed to identify "either a (1) constitutional error that result[ed] in actual and substantial prejudice or (2) nonconstitutional error that "constitute[d] a fundamental defect which inherently result[ed] in a complete miscarriage of justice.'" *Monschke,* 160 Wn.

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that Metcalf attempted to pay witnesses not to testify at trial. Bono previously raised these arguments on direct appeal, and we rejected his claims because "trial testimony ma[de] clear that it was Metcalf, not Bono, who evaded police and contacted witnesses." *Bono*, 2009 WL 1863894, at *9. Bono fails to demonstrate why the interests of justice require relitigation of these arguments; thus, his claims fail. *Spencer*, 152 Wn. App. at 706.

[14] With respect to Bono's assertion that the trial court erred in failing to define "knowledge," although in the case of accomplice liability "definitional instructions of 'knowledge' are recommended," the Constitution does not "requir[e] that the meanings of particular terms used in an instruction be specifically defined." *State v. Scott*, 110 Wn.2d 682, 691-92, 757 P.2d 492 (1988). With respect to his severance argument, Bono fails to allege that any constitutional right was implicated by the trial court's denial of his motion. Finally, with respect to the drug-related testimony, ER 403 and 404(b) violations are not errors of constitutional magnitude that can be raised for the first time on appeal. *State v. Chase*, 59 Wn. App. 501, 508, 799 P.2d 272 (1990).

App. at 488 (quoting *Davis*, 152 Wn.2d at 672). Thus, we hold that the cumulative error doctrine does not apply.

We deny Bono's petition.

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.

Van Deren, J.

We concur:

Hunt, J.

Bridgewater, J. Pro Tem