Supreme Court No. 102787-7
(COA No. 83489-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ABBAS ZGHAIR,
Respondent,

v.

STATE OF WASHINGTON,
Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

ANSWER TO PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Statutes

Court Rules

Other Authorities

A. IDENTITY OF RESPONDENT AND DECISION BELOW

Abbas Zghair asks this Court to deny the prosecution's petition for review of the unpublished Court of Appeals decision issued November 3, 2023, for which the prosecution's request for reconsideration was denied on January 22, 2024, pursuant to RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

The prosecution requests this Court "correct" how the Court of Appeals applied settled law to the facts in its unpublished decision. Petition at 3. Yet the petition for review misrepresents both the facts of the case and settled law.

The Court of Appeals applied longstanding precedent governing the sufficiency of evidence, including the standards of accomplice liability and circumstantial evidence, after thoroughly reviewing the case. The Court of Appeals decision is fact-specific, thorough, and well-reasoned. There is no reason for this Court to grant review.

C. STATEMENT OF THE CASE

On March 23, 2019, a homeless man called 911 to report a person lying dead in an abandoned field. RP 1115, 1131-32, 1135-06.[1] Responding officers found Silvano Ruiz-Perez with a single shotgun wound to his forearm. RP 1729, 1912, 1919.

From a blood trail at the scene, it appeared Mr. Ruiz-Perez had walked around the field before dying. RP 1121, 1301, 1306. Trackers believed his trail started near some tire tracks at the side of the road. RP 1297, 2061-61.

Several weeks after the incident, Maryanne Denton told a police officer that she had heard two gunshots on March 22, 2019, near the field where Mr. Ruiz-Perez was found. RP 1436, 1440, 1443, 1459. Her husband Mark was asleep and did not hear any shots. RP 1464. After Ms. Denton woke her husband, both heard an argument in another language they believed was

[1] The verbatim report of proceedings is consecutively paginated and referred to herein as "RP."

Spanish. RP 1455, 1463, 1472. They did not understand what was being said. RP 1455, 1472.

The Dentons did not see anything that was occurring; they only heard noises. RP 1439-40, 1445, 1452-53, 1465-66. Mr. Denton was sound asleep for much of it, they were inside a car that had curtains blocking all of its windows, and when Ms. Denton briefly peered outside, the other car's headlights were pointed in their direction, blinding their view. RP 1439-40, 1445, 1452-53, 1464. They said other people often stayed in the area and some people were living in an apartment nearby, but no one else testified to hearing or seeing anything. RP 1461, 1463.

During the evening before he was shot, Mr. Ruiz-Perez spent four hours at a bar in Kent, where he was a regular customer. RP 1355-58. He stayed at this bar from about 7 pm until he left at 10:47 pm, which was closing time. RP 1355-56. Surveillance video did not indicate if he was with anyone else when he left. RP 1360, 2075-77. According to cell phone

records, Mr. Ruiz-Perez next went to another nearby bar but the police did not obtain surveillance video from that establishment. RP 1362, 1369, 2286-87.

Police officers tracked Mr. Ruiz-Perez's cell phone location and searched for businesses and traffic cameras that retained surveillance video. They found an ATM video showing Mr. Ruiz-Perez withdrawing money at about 1:25 am. RP 2118-19. The ATM camera showed a white car in the background. RP 2119.

Mr. Ruiz-Perez made several calls at about 2:30 am, some to taxi companies and to his fiancée, indicating he was looking for a ride. RP 2087-88.

Although cell phone data does not give precise location information, it indicated Mr. Ruiz-Perez's cell phone was in the area of D St. NE and 277th St. in Auburn at about 4 am. RP 2092. Surveillance cameras showed a similar white car in the area. RP 2119.

The detectives sent out a bulletin looking for this white car and an officer found it parked by some apartments several weeks later. RP 1394, 2114. The apartment's surveillance cameras showed an unidentified person parking the car on March 31, 2019. RP 1409-10.

The white car was registered to Abbas Zghair. RP 1429. After an extensive search for trace evidence inside the car by a 10-person FBI team, they found a small spot on the frame where the door shuts and a very small tear to a seat cushion that possibly contained blood. RP 1614-15. 1664, 1670. DNA testing confirmed Mr. Ruiz-Perez as a contributor. RP 2006-08, 2014-19.

Cell phone records showed Mr. Zghair's phone in the same area as Mr. Ruiz-Perez's phone in the morning March 23, 2019. RP 2103, 2271. One shared location of the phone was a Chevron gas station near where the police found Mr. Ruiz-Perez's body. RP 2276-77. The Chevron's video surveillance showed Mr. Abbas near a person in a red sweatshirt. RP 1871-

72. The police never identified him. RP 2317. Traffic cameras showed the person in red inside Mr. Zghair's car close in time to when the police believed the shooting occurred. RP 2538-39, 2542.

Three weeks later, on April 14, 2019, Mr. Zghair accompanied two friends to visit one friend's girlfriend in Canada. RP 1553, 2340-41. However, the men had not brought their federal identification documents and the Canadian border officers told them to turn around. RP 1553. Mr. Zghair had Yayha Wahidi's driver's license while his friends had their own licenses. RP 1556. A United States border guard told the three men to wait while they verified their identification. *Id*. Mr. Zghair left the waiting area and bought a drink at a gas station down the road. RP 1571-72, 2348. He ran when a border guard found him but was quickly detained. RP 1572.

When the two lead detectives, Buie Arneson and Mark Walker, learned Mr. Zghair had been stopped at the border, they drove to Whatcom County and interviewed him at the jail.

RP 2185. Mr. Zghair denied any involvement in causing Mr. Ruiz-Perez's death. RP 2211-12. He agreed he interacted with a Mexican guy but he said he was not involved in any type of misconduct. RP 2222. He described the Mexican man repeatedly asking for help to buy cocaine. RP 2227-28.

As Mr. Zghair told the police, he was born in Iraq and English is not his first language. RP 2294. The police interviewed him without an interpreter. *Id*.

The prosecution charged Mr. Zghair with felony murder in the second degree based on the predicate offense of second degree assault with a firearm enhancement. CP 1. It argued to the jury that cell phone evidence showed Mr. Zghair was present at the scene where Mr. Ruiz-Perez was shot along with the person in red, and he either shot Mr. Ruiz-Perez or was an accomplice to the person in red. RP 2535, 2542, 2573-74.

The deliberating jury asked the court if accomplice liability includes "the withholding of information to detectives" as "constitute[ing] aiding another person in planning or

committing a crime." CP 135. The court told the jury to re-read its instructions. CP 136.

The Court of Appeals reviewed the record and determined there was insufficient evidence to convict Mr. Zghair as the principle or accomplice, because there was no reasonable inference based on the evidence that satisfied the essential elements of the crime charged. Slip op. at 9-23. Its decision is unpublished and did not address other issues raised in the appeal.

D. ARGUMENT

The Court of Appeals accurately applied the law to the facts of the case, and there is no reason for this Court to "correct" the Court of Appeals' view of the facts.

1. *The law governing review of sufficiency of the evidence is well-settled and was accurately applied by the Court of Appeals*.

It is undisputed that proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence that the prosecution must establish to garner a

conviction. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id*.

An appellate court is prohibited from simply assuming that a properly instructed jury reached the correct result as long as there is some evidence in the record that supports a conviction. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The reviewing court's role is to "assess the historical facts" and "determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 318.

The reasonable doubt standard of proof requires the factfinder "to reach a subjective state of near certitude of the guilt of the accused." *Jackson,* 443 U.S. at 315. Courts "have an obligation to take seriously the requirement that the

evidence in a criminal prosecution must be strong enough that a jury behaving rationally could find it persuasive beyond a reasonable doubt." *Harrison v. United States*, 60 A.3d 1155, 1162 (D.C. 2012) (quoting *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001)). Reviewing courts "must also take seriously the admonition that while '[a] jury is entitled to draw a vast range of reasonable inferences from evidence, [it] may not base a verdict on mere speculation.'" *Id.* at 1162-63 (quoting *Rivas*, 783 A.2d at 134).

2. *The prosecution concedes its case was tenuous and "difficult" to prove but incorrectly ignores law prohibiting speculation to prove essential elements*.

The prosecution concedes, as it should, that its case "was a difficult circumstantial case" involving an unknown "second perpetrator." Petition at 20. But its petition for review rests on the straw man claim that the Court of Appeals refused to use inferences from circumstantial evidence to support the conviction. Petition at 12-14. The Court of Appeals made no such ruling.

As the Court of Appeals acknowledged and the petition for review wholly ignores, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013); *see* Slip op. at 11-12. A "modicum" of evidence does not meet the standard of proof required by the Due Process Clause. *Jackson*, 443 U.S. at 320.

The prosecution's case must rest on reasonable inferences, not impermissible inferences or speculation. Slip op. at 8, 11. This proposition is solidly grounded in the due process requirements for a conviction. *Vasquez*, 178 Wn.2d at 16; *Harrison*, 60 A.3d at 1162 ("evidence is insufficient if, in order to convict, the jury is required to cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation"); *see also Salt Lake City v. Carrera*, 358 P.3d 1067, 1070 (Utah 2015) ("In short, the difference between an inference and speculation depends on whether the underlying facts support the conclusion. A jury

draws a reasonable inference if there is an evidentiary foundation to draw and support the conclusion. In the case of speculation, however, there is no underlying evidence to support the conclusion.").

The prosecution insists inferences can be "pyramided" to support a conviction, and this pyramiding is what sustains this conviction, citing *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). But this claim misrepresents the controlling legal principles. A "pyramiding of inferences" is only permitted when the inferences are reasonable and not based on speculation. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) ("[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.").

In *Bencivenga*, this Court said, "It is true that we have stated that the essential proofs of guilt cannot be supplied by a pyramiding of inferences." 137 Wn.2d at 711. *Bencivenga* further explained, "[a]n inference should not arise where there

are other reasonable conclusions that would follow from the circumstances." *Id*.

Bencivenga does not endorse the prosecution's insistence that speculative possibilities may be the basis for a conviction. If it did endorse such an approach, it would run afoul of the principle announced in *Jackson*: "[T]he record evidence" must "reasonably support a finding of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 318.

3. The prosecution misrepresents the law governing accomplice liability.

The prosecution charged Mr. Zghair with felony murder predicated on second degree assault, and defined second degree assault as "an intentional shooting." CP 121-24. It had no evidence Mr. Zghair was the person who shot Mr. Ruiz-Perez and it relies on accomplice liability to defend its conviction on appeal. But its petition misrepresents what it had to prove and what the evidence showed, even when viewed in the light most favorable to the prosecution.

a. It is well-settled that accomplice liability requires a person actually know they are facilitating the charged crime .

Accomplice liability attaches only for a person who "aided, solicited, commanded, encouraged, or requested the commission of *the* crime." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.51 (5th ed. 2021) (WPIC) (emphasis added); RCW 9A.08.030.

A person is not an accomplice by aiding *any* crime. *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). The person must have acted with knowledge that his conduct would promote or facilitate the crime charged. *Id*.

The State must prove the accomplice "*actually* knew that he was promoting or facilitating" the charged crime. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (emphasis in original). Accomplice liability requires actual knowledge, not speculation about what someone should have known. *Id*.

Mere presence is insufficient for accomplice liability, even if the person's presence "bolsters" or "gives support" to

the perpetrator. *In re Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979).”[S]omething more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite to finding Wilson” is an accomplice. *Id*.

The prosecution tries to dilute this legal standard.

b. The prosecution misunderstands the legal requirement that an accomplice must knowingly aid the crime charged.

Contrary to the prosecution’s contention, a “getaway driver” does not become an accomplice in the charged crime by witnessing a crime and then driving the perpetrator away. Petition at 19-20. A driver is an accomplice in the crime only when the driver “actually knew” the other person “was going to” commit the crime before it occurred. *See Allen*, 182 Wn.2d at 374.

In *Allen*, the defendant’s only role was driving the perpetrator to and from the scene of a shooting. *Id*. at 370. This Court explained, “the jury must find that Allen *actually knew* Clemmons was going to murder the four police officers” for his

role as a driver to constitute accomplice liability. *Id*. at 374 (emphasis in original).

"An accomplice is liable because he or she knowingly aids the criminal enterprise of another before the fact." *State v. Anderson*, 63 Wn. App. 257, 261, 818 P.2d 40 (1991). As *Anderson* explained, the crime of rendering criminal assistance applies to a person's conduct after the crime, when they intentionally help to prevent, hinder, or delay the apprehension or prosecution of a person they know has committed a crime. *Id*. (citing RCW 9A.76.050(5)).

Driving someone to the scene of a fight is insufficient to establish accomplice liability without further evidence showing the person's intent, even if the driver might have reason to suspect something nefarious could occur. *State v. Asaeli*, 150 Wn. App. 543, 568-69, 208 P.3d 1136 (2009) (insufficient evidence of the driver's accomplice liability, because "the record contains no evidence, direct or indirect, establishing that

[the defendant] was aware of any plan, by Asaeli, Williams, or anyone else, to assault or shoot Fola.").

Likewise, a person who drives someone to a location where the other person steals a car is not liable as an accomplice without evidence the driver knew he was aiding the car theft. *State v. Luna*, 71 Wn. App. 755, 759-60, 862 P.2d 620 (1993). In *Luna*, the driver realized his friends stole a truck but at the time he drove one friend to the place where the theft occurred, he did not know they were stealing the truck. *Id*. The Court of Appeals reversed Luna's conviction as an accomplice, because "there is no evidence that Mr. Luna knew of Mr. Lauriton's intentions before he took the truck, nor that he knew of Mr. Brown's intention to drive it when they stopped on the freeway." *Id*. at 757.

The prosecution claims a getaway driver is an accomplice to the crime based on their presence and after-the-fact assistance with the escape -- but the cases they cite for this assertion rested on clear evidence of the driver's knew they

were participating in the crime before it occurred. Petition at 19-20 (citing *State v. McDaniel*, 155 Wn. App. 829, 864, 230 P.3d 245 (2010); *State v. Rainwater*, 75 Wn. App. 256, 257 n.1, 876 P.2d 979 (1994); *State v. Elza*, 87 Wn. App. 336, 344-45, 941 P.2d 728 (1997)).

In *McDaniel*, two people in a car arranged a drug sale with a third person, intending to rob the buyer. 155 Wn. App. at 836-37. The passenger shot the victim after taking his money. *Id*. at 837. The Court of Appeals affirmed the driver's conviction for robbery because the evidence showed the driver was present as the drug sale was being arranged, he carefully positioned the car for a quick getaway, and he allowed time for the passenger to draw his gun on the victim. *Id*. at 864. The victim's testimony explained the driver's active efforts to aid the robbery, not just the getaway. *Id*. at 837, 864. The case also did not rest on speculation about what the driver may have done to aid the robbery as it occurred, as in Mr. Zghair's case.

In *Rainwater*, a security guard witnessed the defendant inside a store with friends who were stealing clothing. 75 Wn. App. at 258-59. The guard saw the defendant drive her car to the store's entrance while a friend yelled "let's go," and a group of girls ran out of the store carrying "armloads of merchandise." *Id*. The defendant claimed she was an unknowing driver, but the guard's eyewitness testimony described her active participation in the theft as it was occurring inside the store and her efforts to position the car by the store's front door to help the escape. *Id*.

Similarly, in *Elza*, the defendant arranged for others to steal from a bar where he had worked for several years. 87 Wn. App. at 341. He stayed outside in the car while his cohorts stole the money and he drove them away, where they split the proceeds. *Id*. at 338-39. Testimony from a participant in the robbery and the bar owner showed the defendant was the mastermind who set up the robbery, not a mere getaway driver.

These cases illustrate the Court of Appeals' accurate assessment of the law. A person may be an accomplice when helping cohorts escape, but accomplice liability for the underlying crime does not attach merely by witnessing a crime occur and then drive away with the perpetrator in their car. The accomplice must know they are there to help the perpetrator commit the crime and must participate in the crime as "something he desires to bring about, and seeks by his action to make it succeed." *Wilson,* 91 Wn.2d at 491.

The prosecution had evidence showing such knowledge in *McDaniel*, *Rainwater* and *Elza*. It lacked such evidence in *Wilson*, *Asaeli*, and *Luna*. Likewise, in *State v. Robinson*, 73 Wn. App. 851, 857-58, 872 P.2d 43 (1994), the court reversed a robbery conviction, finding insufficient evidence the driver knew his passenger was going to jump out of the car, steal a girl's purse, and then get back into the car. The driver had not

"associated himself with Baker's undertaking, participated in it with the desire to bring it about, nor sought to make the crime succeed by any actions of his own." *Id*. at 857.

After-the-fact assistance is a different crime, rendering criminal assistance. *Id*. at 858. This principle is well-settled and not subject to dispute. The prosecution does not claim these cases were wrongly decided.

The petition for review offers another speculative theory of liability in its petition for review that it did not raise in the trial court or in its response brief filed in the Court of Appeals − that as the driver of the car, Mr. Zghair would be presumed to have dominion and control over any weapon therein and therefore his knowledge of the shotgun and the shooting can be inferred. Petition at 26.

But this analogy is fundamentally wrong. In the constructive possession cases the prosecution cites, the State had to prove "dominion and control" over contraband, not actual knowledge of it. *See State v. Ibarra-Erives*, 23 Wn. App.

2d 596, 602, 516 P.3d 1246 (2022); *State v. Bowen*, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010). *Bowen* relied on the defendant's "sole occupancy" of the vehicle, not his ownership of it, to infer he had dominion and control over its contents as required to prove constructive possession. 157 Wn. App. at 828. In *Ibarra-Erives*, the defendant was the only person who slept and kept his personal belongings in a bedroom where drugs were found and had drugs in his pocket. 23 Wn. App. 2d at 603-04. The court ruled there was sufficient evidence to infer he had the ability to exercise control over the drugs found in his bedroom. *Id*.

The presumptions permitted in a constructive possession case do not suffice to establish accomplice liability. Tellingly, the prosecution cites no case law where such a presumption was the basis for inferring a person's actual knowledge of the crime and knowing participation in it. On the contrary, courts have repeatedly held that mere presence is insufficient to prove accomplice liability and actual knowledge of the charged crime

is required. *See, e.g., Wilson*, 91 Wn.2d at 491-92; *Asaeli*, 150 Wn. App. at 568-69; *Luna*, 71 Wn. App. at 757.

Mr. Zghair's after-the-fact behavior, such as his decision to go to Canada three weeks after the incident and his denial of involvement in this incident to the police, do not permit a reasonable inference he knowingly participated in an intentional shooting as it occurred. It is not possible to reasonably infer he knew there would be a shooting until after it was complete. There was no evidence he ever owned or possessed a gun, no evidence he knew there was a gun in the car, and no evidence he fired a gun. There was no evidence he ever met the other people in the car, or Mr. Ruiz-Perez, before the incident.

The unpublished Court of Appeals decision accurately recites the law governing accomplice liability and the due process requirements to sustain a conviction. It applies the law to the facts of this case based on a detailed review of those facts. Slip op. at 9-23. The prosecution misrepresents the

controlling legal principles and tries to discredit the Court of Appeals by relying on inapposite cases. The petition for review should be denied.

E. CONCLUSION

Abbas Zghair respectfully requests that review be denied pursuant to RAP 13.4(b).

Counsel certifies this document contains 3806 words and complies with RAP 18.17(b).

DATED this 11th day of March 2024.

Respectfully submitted,

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Respondent
nancy@washapp.org
wapofficemail@washapp.org

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 102787-7**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ petitioner Ian Ith, DPA
[ian.ith@kingcounty.gov]
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ respondent

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: March 11, 2024
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

March 11, 2024 - 4:26 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,787-7
Appellate Court Case Title:	State of Washington v. Abbas Salah Zghair

The following documents have been uploaded:

- 1027877_Answer_Reply_20240311162535SC565524_2958.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was washapp.031124-17.pdf

A copy of the uploaded files will be sent to:

- ian.ith@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Nancy P Collins - Email: nancy@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20240311162535SC565524