NO. 30485-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BILLY DAVIS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The prosecution's failure to prove that Billy Davis is liable for committing robbery, as defined by the instructions presented to the jury, violates the requirements of due process and the guarantees of a fair trial by jury**

Robbery requires a taking of property from the person or in the presence of another. See State v. Tvedt, 153 Wn.2d 705, 715-16, 107 P.3d 728 (2005). As the prosecution agrees, Davis did not take property while he was inside the store, in front of the store clerk. Response Brief at 13; 1RP 40-41. Accordingly, Davis cannot be convicted of robbery based on his actions alone.

When legal culpability is imposed for the actions of another, the State must prove and the jury must find the evidence showed beyond a reasonable doubt that the person is guilty as an accomplice. RCW 9A.08.020. The court may not impose punishment based on accomplice liability when the jury never considered that possibility or weighed its legal requirements. See State v. Williams-Walker, 167 Wn.2d 889, 899-900, 225 P.3d 913 (2010); U.S. Const. amends. 6, 14; Const. art. I, §§ 21, 22.

In Williams-Walker, the Court explained that when the law sets forth an essential element of a crime, "due process requires that the

issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty." Id. at 896 (internal quotation omitted).

The trial court in the Williams-Walker had not explicitly asked the jury to find that the defendants were armed with firearms, and instead used the term deadly weapon, although the evidence at trial involve crimes committed by firearm. The Supreme Court held that the, "[t]he failure to submit a sentencing factor to a jury for a finding thus violates a defendant's right to a jury trial under both the federal and state constitutions." Id. at 897.

The same reasoning controls Davis's case: the failure to submit the law of accomplice liability violates his right to a jury trial on that issue and deprives the court of authority to impose punishment based on accomplice liability.

The prosecution cites two irrelevant cases that offer no support for the notion that the jury may convict a person as an accomplice without being told the essential elements of accomplice liability. In Taplin, the trial court gave an accomplice liability instruction to the jury. State v. Taplin, 9 Wn.App. 545, 547, 513 P.2d 549 (1973). Under that instruction, the jury was permitted to decide whether there was

sufficient evidence to convict the driver of a car of liability for burglary as an accomplice. Id. The Taplin opinion is of no consequence to the case at bar.

The prosecution also cites an obscure, three paragraph memorandum decision from Maine, State v. Fenderson, 443 A.2d 76, 77 (Me. 1982).[1] But in Fenderson, the court ruled that the failure to give an instruction explaining the legal requirements of accomplice liability was not error "since the evidence did not generate the issue of accomplice liability." Id. at 77. The police arrested the accused person as he drove away from a house that had been recently damaged and, moments earlier, they saw his unoccupied car parked at this house, permitting the rational inference that he had participated in causing damage to the house. Id. Unlike Fenderson, in Davis's case it is undisputed that he did not personally commit all the essential elements robbery and thus his conviction cannot be affirmed based on his liability as a principal.

The State has not located any cases that excuse the court from accurately defining the elements of accomplice liability when the accused person did not commit each element of the offense, even

though its reliance on Taplin and Fenderson show it made far-reaching efforts to locate such cases. Similarly irrelevant is the State's reliance on McDonald and Carothers. Response Brief at 7-8. In both of those cases, the jury was instructed on the elements of liability as a principal and accomplice. State v. McDonald, 138 Wn.2d 680, 686-87, 981 P.2d 443 (1993); State v. Carothers, 84 Wn.2d 256, 262-63, 525 P.2d 731 (1974). In Davis's trial, the jury was not instructed that it could base its verdict on accomplice liability.

The State's burden of proof is not alleviated, altered, or even influenced by the theory of defense. The prosecution must prove each element beyond a reasonable doubt without regard to the vigor with which the defense contests an element. See State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); see also City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989) ("Slack has not raised this issue [of sufficiency of the evidence] at any other stage of the proceedings. However, this will not bar him from raising the issue for the first time on appeal.").

"The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." Jackson

[1] Fenderson has not been cited as authority by any court, even in Maine.

v. Virginia, 443 U.S. 307, 309, 99 S. Ct. 2781, 2783, 61 L. Ed. 2d 560 (1979) (citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). "[N]o person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson, 443 U.S. at 316. Furthermore, "[u]nder our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." Id. at 323-24.

It is well-established that in addition to the essential elements of a crime, "criminal liability must be proved beyond a reasonable doubt." State v. Teaford, 31 Wn.App. 496, 500, 644 P.2d 136 (1982). Davis's criminal liability was not proven when the jury was never asked to consider whether Davis could be held liable as an accomplice and there was no record evidence that Davis himself took the money from the store in presence of the store clerk.

The prosecution's harmless error analysis is similarly inapposite. If the State does not prove criminal liability, the court does not sit in judgment as a 13th juror and weigh how it would have voted. State v. Williams, 96 Wn.2d 215, 221-22, 634 P.2d 868 (1981) (judge "is not

deemed a 'thirteenth juror'" but rather "[i]t is the province of the jury to weigh the evidence, under proper instructions, and determine the facts). The State did not prove that Davis committed robbery as a principal, and therefore it did not prove the crime as charged and instructed, thus due process requires reversal.

2. **Presenting the jury with uncharged alternative means of robbery denied Davis his right to notice and is presumed harmful**

Davis was charged with robbery by taking property "in the presence of Michael Acton" by force. CP 65. The "to convict" instruction directed the jury that it could convict Davis if he "unlawfully took personal property from the person or in the presence of another . . . ." CP 29 (Instruction 9; emphasis added). "From the person" and "in the presence" are alternative means of committing robbery; this language would be superfluous if the two terms meant the same thing or if one encompassed the other. State v. Nam, 136 Wn.App. 698, 705-06, 150 P.3d 617 (2007).

On appeal the State claims that "in the presence" necessarily includes "from the person," but this assertion is contrary to the established rule of statutory construction that different statutory

language must be given different meaning or it would be superfluous. Id. at 706.

Because the prosecution elected to limit its charging document to "in the presence" it was not free to add the alternative means of "from the person" in the "to convict" instruction without violating the rule against prosecuting someone for an uncharged alternative means. State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942).

The prosecution misrepresents the holding of State v. Grant, 77 Wn.2d 47, 459 P.2d 639 (1969) by claiming it addressed the "exact issue" as raised in Davis's case. Response Brief at 18. In Grant, the charging document included only the "in the presence" language and the defendant argued the evidence was insufficient to prove that a robbery occurred in this fashion. Id. at 49-50. But the opinion does not even mention the jury instructions; Grant involves a sufficiency challenge. Id. The court affirmed the robbery conviction because there was sufficient evidence that the accused did exactly what was charged, committing a robbery in the presence of the owner of the property, and there was no challenge to or discussion of the jury instructions. Id. No uncharged alternative means issue arose in Grant.

The presumptively harmful error may only be treated as harmless in the narrow circumstance where other instructions "clearly and specifically defined the charged crime." State v. Chino, 117 Wn.App. 538, 540, 72 P.2d 256, 261 (2003). The jurors were not instructed to focus on the "in the presence" means of committing robbery and did not deliver a verdict that clearly indicates they unanimously relied on only the charged allegation, thus requiring reversal.

3. The State misreads and misrepresents its authority to demand multiple psychological evaluations based on the prosecution's disagreement with the end result of an evaluation by a State psychologist

The prosecution characterizes RCW 10.77.060 as a mere discovery statute and misrepresents the court's reliance on that statute in the context of this case.[2] RCW 10.77.060(1) sets forth "mandatory"

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[2] The text of RCW 10.77.060(1)(a) in effect at the time, in pertinent part, provided:

> Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant. ... Upon agreement of the parties, the court may designate one expert or professional person to conduct the examination and report on the mental condition of the defendant.

procedures for the court when there is reason to believe a person might not be competent to stand trial or he has pleaded not guilty by reason of insanity. State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009).

The court ordered that Davis submit to a single evaluation by a State-employed psychologist – which RCW 10.77.060(1) permits when the parties agree. The provision permitting the court to order a single evaluation upon the parties' agreement was enacted to rectify substantial backlog in conducting such evaluations at Eastern State Hospital. See Opening Brief at 18-19.

On appeal, the prosecution claims that its right to request additional evaluations is triggered after it has seen the first evaluation and is based on whether it agrees with the first evaluation's results. Response Brief at 27-28. The prosecution overstates its authority under RCW 10.77.060 and is contrary to a plain reading of the statute.

A statute must be construed based on its plain meaning, so that no part is rendered superfluous. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003). The framework of the statute demonstrates the nature of the court's authority and the parties' individual roles.

RCW 10.77.060(1)(a) dictates when and how a court shall order a competency or sanity evaluation:

Subsection (1)(b), speaks to the court's authority to set bail before the evaluation and following the evaluation.

Subsection (2) addresses the defense's right to have another expert witness the initial evaluation. This defense expert may be either retained by the defense or appointed by the court if the accused is indigent.

Subsection (3) specifies the content of the evaluation, and subsection (4) authorities the secretary to implement the statute.

The prosecution insists on appeal that it had a right to demand a certain expert be the person who initially evaluated Davis, under subsection (1)(a). Response Brief at 26. It never made any such request at the time the court ordered the evaluation. On the contrary, it agreed by "stipulation" to one evaluator. CP 52; see also 10/19/10RP 2 (prosecution notes it has no objection to the court's order for a competency evaluation); CP 63 (prosecutor's signature as presenting order to court).

The statute directs the court to either "appoint or ask the secretary to designate" the qualified experts. RCW 10.77.060(1)(a). "Upon agreement of the parties, the court may designate one expert or professional person to conduct the examination and report on the mental condition of the defendant." Id. Here, without objection from any party, the court directed the secretary to designate a qualified expert which is exactly what the statute contemplates.

The prosecution requested a second evaluation after it received the results of the first evaluation prepared by a state-employed psychologist because it disliked the results of the first evaluation. CP 51-52; CP 54. It did not complain about the first evaluator's expertise, but rather asserted its right to Davis "re-evaluated by a second expert, the same way as a defense counsel could have a second evaluation done if Eastern State Hospital had found him competent and sane." CP 52. The prosecution wanted a second opinion because it disagreed with the results of the first opinion. The statute does not award the State such authority.

Finally, the State contends that there is no remedy for this improperly obtained evaluation. On the contrary, the remedy is a new trial without the use of tainted information. It would be permissible for another psychologist, untainted by improperly gathered private information, could predicate an expert opinion on a review of Davis's records. See State v. Miles, 159 Wn.App. 282, 291, 244 P.3d 1030, rev. denied, 171 Wn.2d 1022 (2011). But Davis cannot be court-ordered to submit to an evaluation under the authority of RCW 10.77.060 and the fruits of that evaluation should be suppressed.

Without a remedy for such a violation, the State claims free reign to obtain highly private information to which it was not entitled. But a mental evaluation ordered by the court without authority of law is an invasion of a person's private affairs, violating Article I, section 7, and a violation of Article I, section 7 must be remedied by barring the State from use of illegally obtained information. See State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009) ("whenever the right [to be free from intrusion into one's private affairs] is unreasonably violated, the remedy must follow.").

4. **Davis's prior criminal history was used for propensity purposes, not for the limited purpose of explaining the expert's conclusion about his mental state at the time of the offense.**

Contrary to the argument presented by the prosecution on appeal, at trial the prosecution claimed Davis's prior convictions from years past were relevant to a secondary issue presented -- if the jury found Davis was not guilty by reason of insanity, it would need to decide whether he was a substantial danger to others unless kept under control by the court or an institution. 2RP 141.[3] The prosecution did

[3] Under RCW 10.77.010(5), a person is "criminally insane" if he:

not claim the information was material to the psychologist's opinion of Davis's mental state. 2RP 146; 3RP 47-50.

In fact, Dr. William Grant conceded at trial that Davis's prior convictions were not relevant to whether he thought Davis was a substantial danger. Grant said, "[h]e's not dangerous as he sits here now." 3RP 52. Grant believed that Davis' potential for future violence rested on whether he used drugs or alcohol, which had triggered the instant offense.

Grant repeated Davis's criminal history for the jury and impressed upon them its similarity to the charged crimes. 3RP 50. He said Davis had committed a "substantial number of thefts, burglaries, robberies and assaults. He has spent 12 to 13 years of his adult life in prison, and some of the robberies where people got hurt." 3RP 51. According to Grant, Davis had "pistol whipped a drug dealer" and "charged" at a cab driver who had overcharged him. 3RP 51. Grant said Davis had a "predisposition to theft, robberies, violence." 3RP 51. He said the instant offense was "a coming together of this predisposition"

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has been acquitted of a crime charged by reason of insanity, and thereupon found to be a substantial danger to other persons or to present a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other

with "a very frustrating day. . . . and the combination of the cocaine and the alcohol, which just came together, you know, the background predisposition and the bad day and the drugs and alcohol, which led to the offense at this time." 3RP 51.

The court did not admit Grant's opinion related to Davis's prior convictions on ER 703. ER 703 permits an expert to explain the basis of his or her opinion, but those facts are not admissible as substantive evidence. When otherwise inadmissible facts or data underlying an expert's opinion is admitted "for the limited purpose of explaining the basis for an expert's opinion, [it] is not substantive evidence." Allen v. Asbestos Corp., Ltd., 138 Wn.App. 564, 579, 157 P.3d 406 (2007), rev. denied, 162 Wn.2d 1022 (2008).

The prosecution cannot properly rely on ER 703 as the basis for admitting details of Davis's criminal history. The jury was not directed to treat this testimony merely to evaluate the basis of Grant's opinion; it was admitted without limitation and therefore whether it would have been properly admitted under ER 703 does not rectify the error. Furthermore, this information was not offered for the limited purpose of explaining the expert's opinion, which is all that ER 703 permits.

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persons or institutions.

Davis's prior offenses were offered because "they are the best prediction of future behavior," and he has "a predisposition to theft, robberies, and violence," according to Grant. 3RP 51. In the case cited by the prosecution, State v. Medrano, 80 Wn.App. 108, 112-14, 906 P.2d 9821 (1995), the State's expert relied on prior burglary convictions to show the defendant's ability to form the intent to commit the charged crime. Unlike Medrano, Grant did not use the details of Davis's prior assault and robbery convictions to explain Davis's ability to form the intent to commit the charged crime. Instead, he used those convictions as evidence that he was predisposed to committing crimes like the crime charged. This inference of propensity is forbidden under ER 404(b), as the Medrano Court acknowledged. Id. at 113. It is also forbidden under ER 703 at a criminal trial when it is not part of the expert's opinion of the accused's ability to appreciate right from wrong and understand the nature of his conduct at the time of the offense.

The civil commitment cases such as In re Detention of Young, 122 Wn.2d 1, 53, 857 P.2d 989 (1993), on which the State also relies in its response brief, offer no guidance. To be committed as a sexually violent predator, the State must prove the existence of past qualifying convictions coupled with the likelihood of committing similar offenses

in the future. Id. Propensity is an essential element of such civil commitment but the same is not true to determine whether a person appreciated the nature of his conduct at the time of the offense.

Davis's convictions were used to show his predisposition and not to explain his mental state as pertinent to his legal sanity. Their prejudicial impact denied Davis a fair trial.

5. The prosecution concedes it did not meet its burden of proving Davis's qualifying prior convictions at the sentencing hearing.

The prosecution implicitly concedes it did not meet its burden of proving that Davis had two prior, valid, qualifying convictions that required a sentence of life without the possibility of parole. Response Brief at 42, 44.

It agrees, as it must, that the State bears the burden of proving Davis's criminal history. It also bears the burden of proving that Davis's prior convictions qualify as predicate offenses, including that they have not washed out from the offender score calculation.

The State tries to blame Davis for failing to expressly object, but as the Supreme Court recently explained in State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012), the failure to object does not constitute an affirmative agreement to the sentence and the State's

burden of proof at sentencing is mandated by the requirements of due process of law.

The State's failure to meet its burden of proof requires a new sentencing hearing. Because the aggravating factors of prior convictions substantially increase Davis's punishment, the jury trial and due process rights of the Sixth and Fourteenth Amendments, and article I, sections 21, and 22, should govern and a jury should be empaneled.

B. CONCLUSION.

For the foregoing reasons as well as those contained in his Opening Brief, Billy Davis respectfully requests reversal of his conviction due to insufficient evidence, or alternatively remand for a new trial and sentencing proceeding with restrictions on the type of evidence the State may use.

DATED this 21st day of March 2013.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30485-0-III
	)	
BILLY DAVIS,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	BRIAN HULTGRENN, DPA FRANKLIN COUNTY PROSECUTOR'S OFFICE 1016 N 4TH AVE PASCO, WA 99301	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF MARCH, 2013.

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