Supreme Court No. 89754-9
(COA No. 30485-0-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

BILLY DAVIS,

Respondent.

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

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# ANSWER TO PETITION FOR REVIEW

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## A. IDENTITY OF RESPONDENT

Billy Davis, respondent here and appellant below, asks this Court to deny the request to review the Court of Appeals decision terminating review pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

## B. COURT OF APPEALS DECISION

The unpublished Court of Appeals decision was issued on October 22, 2013. The Court of Appeals denied the State's request for reconsideration on December 12, 2013.

## C. ISSUE PRESENTED FOR REVIEW

The unpublished Court of Appeals decision relies on well-settled law that the State bears the burden of proving the essential elements of a charged offense. Robbery requires proof a person unlawfully took property from another person or in the other person's presence by force. Billy Davis was present inside a store and held a weapon while another person took property. The jury was not asked to find Davis legally accountable for the conduct of another person. Did the Court of Appeals apply established law to conclude that under the law of the case, there was insufficient evidence that Davis's own acts constituted the essential elements of robbery?

D. STATEMENT OF THE CASE

One evening, Moses Sanders entered a gas station's convenience store where he was friendly with the clerk, Michael Acton. 1RP 32-34.[1] Sanders told Acton "they were going to hold [him] up" and Acton noticed another person had what looked like a gun in his jacket. 1RP 38. Acton thought Sanders was kidding until he saw the person with what looked like a gun. 1RP 39. Acton opened the cash register for Sanders. 1RP 40. Sanders went behind the counter and slowly took bills and coins from the cash drawer, then took cigarettes. 1RP 40-42. The other man told Sanders to "hurry up." 1RP 41. As the men left the store, the man with the gun asked Acton to "give us five minutes." 1RP 42.

Acton did not know Billy Davis, but later identified Davis as the person with the gun. 1RP 45, 51. Davis did not hold a firearm, but a BB gun; Acton knew little about guns. 1RP 40, 59. Police arrested Davis in a nearby park shortly after the incident. 1RP 79. He had about $289 in his pocket and Acton testified that about $200 was taken from the store.

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[1] The transcripts from pretrial and trial proceedings are referred to by date of the proceeding. The three volumes of trial transcripts are referred to as:
1RP October 20, 2011;
2RP October 21, 2011;

1RP 44, 83. Sanders was hiding in a tree near where Davis was arrested. 1RP 79, 98. The two men were not charged or tried together. CP 65.

Davis was 65 years old and suffered medical and mental health problems. 1RP 125, 127. These issues led to a psychologist from Eastern State Hospital determining Davis did not understand the difference between right and wrong at the time of the incident due to acute psychosis. 2RP 218, 221, 225-26. Davis presented a not guilty by reason of insanity defense, and several issues raised on appeal involved this defense. *See* Appellant's Opening Brief at19-34. Because the Court of Appeals decision dismissed the charge due to insufficient evidence, it did not address or resolve the remaining issues. Slip op. at 8. The State seeks review of the insufficiency of the evidence.

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3RP October 24, 2011.

E. ARGUMENT.

**In an unpublished decision, the Court of Appeals relied on settled law and established principles to find that the State presented insufficient evidence that Davis committed the charged offense**

1. *It is well-settled that the State bears the burden of proving the essential elements of a charged offense*

The State must prove the essential elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence that the State must establish to garner a conviction. *Winship*, 397 U.S. at 364.

The prosecution charged Davis with committing first degree robbery. CP 65. To commit a robbery, there must be a forcible taking of property, from a person, against the owner's will. *State v. Nam*, 136 Wn.App. 698, 705, 150 P.3d 617 (2007); RCW 9A.56.190. The taking of property, or the forced used to keep it, must occur in the presence of the person who owns or controls the property. *State v. Tvedt*, 153 Wn.2d 705, 715-16, 107 P.3d 728 (2005).

The court instructed the jury that to convict Davis of first degree robbery, the prosecution needed to prove beyond a reasonable doubt

that Davis intentionally and "unlawfully took personal property from the person or in the presence of another," by using or threatening force and displaying what appeared to be a firearm. CP 29.

The court's instructions did not permit the jury to hold Davis liable based on actions of another person. None of the jury instructions mentioned accomplice liability. CP 17-40. The prosecution "assumes the burden of proving the elements as instructed or charged." *Nam*, 136 Wn.App. at 706 (citing *State v. Hickman,* 135 Wn.2d 97, 103, 954 P.2d 900 (1998) and *Tonkovich v. Dep't of Labor & Indus.,* 31 Wn.2d 220, 225, 195 P.2d 638 (1948)); *cf. State v. Willis*, 153 Wn.2d 366, 375, 103 P.3d 1213 (2005) ("By failing to include the phrase 'or an accomplice,' [in the firearm enhancement instruction,] instruction 29 required the State to prove that Willis himself was armed").

The State's burden of proof is not alleviated or 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 Court of Appeals reversed Davis's conviction for first degree robbery because there was no dispute about who did what during the incident and it was clear that Davis did not commit all essential elements of first degree robbery. Slip op. at 6-8. Acton testified without contradiction that Sanders took the property in his presence and the men left the store. 1RP 40-42. Acton did not see Davis possess any of the store's property or take anything from his person. *Id.* Without evidence that Davis took property from the person or in the presence of Michael Acton, the State failed to prove all essential elements of robbery as listed in the jury instructions. Slip op. at 7-8.

2. *The State places undue importance on the label of acting as a principal or accomplice, which is irrelevant to the case at bar*

The prosecution's petition for review is based on the theory that Davis should be held culpable for Sanders's actions, even though it did not ask the jury to consider whether it proved accomplice liability. It makes this argument by urging this Court to disregard the controlling statute and case law applying it.

To be legally culpable for actions taken by another person, the prosecution must prove the person is accountable under RCW 9A.08.020, unless another statute expressly controls. RCW 9A.08.020 says that "[a] person is guilty of a crime . . . committed by the conduct of another person [if] he or she is legally accountable" for that person's conduct. A person is legally accountable for conduct of another person if "he or she is an accomplice of such other person." RCW 9A.08.020(2)(c).

As the Court of Appeals accurately stated, when a conviction involves holding a person accountable for another person's actions, and not only his own conduct, "different considerations" are required. Slip op. at 4. To convict a person based on actions taken by another person,

> the State need not charge the defendant as an accomplice in order to pursue liability on that basis, [but] the court must instruct the jury on accomplice liability. *State* v. *Davenport,* 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984); *State* v. *Jackson,* 137 Wn.2d 712, 726-27, 976 P.2d 1229 (1999); RCW 9A.08.020(3). Significantly, here, if the jury is not properly instructed on accomplice liability, the State assumes the burden of proving principal liability. *State* v. *Willis,* 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005).

Slip op. at 4-5.

In its petition for review, the State gives an exposition on the origins and meaning of the words accomplice and principal liability culled from a few obscure cases from other jurisdictions. But the label given to the actor is unimportant. The only theory of complicity at issue is that which the prosecution elected when it charged the jury with deciding whether Davis committed the essential elements of first degree robbery. CP 29. This issue is not the subject of conflicting decisions or contrary to constitutional law. The State's belabored effort to concoct a legal doctrine that hinges on whether a person fits a certain label is a straw man.

A distinguishing feature between Davis's case and those cited by the State is that in the case at bar, there is no dispute about who did what. Slip op. at 7-8. When there is a dispute about what happened, the reviewing court views the evidence in the light most favorable to the prosecution, which is what the courts did in cases the State relies on, *State v. Fenderson*, 443 A.2d 76, 77 (Me. 1982)[2]; *Baker v. State*, 905

[2] In *Fenderson*, evidence of the defendant's presence at the scene at the time a house was damaged provided sufficient proof to infer he participated in the criminal mischief without needing to consider liability for another person's conduct. 443 A.2d at 77.

P.2d 479 (Alaska Ct. App. 1995)[3]; and *United States v. Bell*, 812 F.2d 188 (5th Cir. 1987).[4]

The State's petition does not cite pertinent cases from Washington, such as *Willis*, even though the Court of Appeals relied on it. Slip op. at 5, 7. In *Willis*, the defendant was charged with a firearm enhancement and the instructions used in his case did not mention accomplice liability. 153 Wn.2d at 374. He argued that the prosecution needed to prove "that Willis himself was armed." *Id.* This Court agreed. "By failing to include the phrase "or an accomplice," instruction 29 required the State to prove that Willis himself was armed." *Id.* at 375. This same theory governs in Davis's case.

It is undisputed that Davis did not personally commit all the essential elements robbery. Acton testified about what Saunders and Davis did inside the store. 1RP 40, 42. Saunders went behind the counter, took the money, held the money, and left the store with the money. *Id.* Davis stood on the other side of the counter, near the door.

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[3] In *Baker*, the court gave an accomplice liability instruction without objection. 905 P.2d at 482. The issue on appeal was whether the court erred by giving this instruction when the prosecution claimed that Baker was the principal in a robbery he committed jointly with others. *Id.* at 487.

[4] In *Bell*, the defendant was charged with attempting to extort money from a bank and his own efforts sufficiently proved his culpability. 812 F.2d at 191-92 & 193 n.6.

*Id*. He took nothing from inside the store. *Id*. His presence while holding a BB gun would constitute part of the elements of robbery, but his must be held accountable for the actions of another in order to be convicted of robbery.

The State opted to proceed on the theory that Davis should be judged by his acts alone. CP 29. It did not ask the court to instruct the jury on accomplice liability and did not ask the jury to convict Davis as an accomplice. 3RP 104-06. The State failed to prove that he took property from the person or in the presence of another, and consequently, it did not prove the essential elements of first degree robbery.

3. *The State's effort to do away with the need to ask the jury whether the State has proven accomplice liability is contrary to the jury trial rights guaranteed by our constitution.*

The heart of the State's argument is the notion that the jury does not need to decide whether a person is legally accountable for another person's acts when he also acts in furtherance of the crime. Its argument would do away with the complicity statute when a person commits some of the acts required for the offense.

This argument nullifies the application of RCW 9A.08.020, defining when a person may be legally accountable for the conduct of

another. It also undermines the right to have a jury determine whether a person should be liable for another person's acts. It is not the role of the reviewing court to 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). It is contrary to the inviolate right to trial by jury expressly guaranteed in Washington for the court to 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); Const. art. I, §§ 21, 22. This Court should reject the State's efforts to dilute the requirements of accomplice liability.

4. *Because this is not a case of instructional error, the State's manufactured conflict with Brown does not provide a basis to grant review.*

It is well-settled that the remedy for the prosecution's failure to present sufficient evidence of the charged crime is reversal of the conviction. *See State v. Vasquez*, 178 Wn.2d 1, 18, 309 P.3d 318 (2013); *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

The State manufactures a conflict with *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002), to gain review. In *Brown*, the trial court misstated the law by defining the essential elements of accomplice liability too broadly. *Id.* at 338. The instructions permitted the jury to hold the defendants liable for "any crime" not just "the crime" charged. *Id.* This Court agreed that "an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." *Id.* at 339. However, overstating the basis of accomplice liability as occurred in *Brown* did not automatically relieve the State of its burden of proof and could be analyzed under the constitutional harmless error test. *Id.* at 339-40.

Unlike *Brown*, the legal issue is not an instructional error. The sufficiency of evidence to sustain the verdict is determined with reference to the instructions but it is not an error in the instructions that occurred. *Hickman*, 135 Wn.2d at 103 (quoting *Tonkovich,* 31 Wn.2d at 225); *see Williams-Walker*, 167 Wn.2d at 901. The State bore the burden of proving Davis committed each element of first degree robbery, it failed to sustain this burden of proof, and the Court of Appeals opinion reversing his conviction is based on settled law and consistent with precedent. Further review is not warranted.

The decision below carries no precedential weight. GR 14.1(a). There is no substantial public interest in granting review, as demonstrated by the few obscure, factually distinguishable cases from other jurisdictions that the State relies upon. *See* RAP 13.4(b)(iv). Finally, there are remaining unresolved issues that also require reversal of Mr. Davis's conviction that the Court of Appeals did not reach. These issues remain part of the appeal and would require remand for further consideration.

F. CONCLUSION.

Based on the foregoing, Respondent Billy Davis respectfully requests that the Court deny review.

DATED this 5th day of February 2014.

Respectfully submitted,

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## 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 (Answer to Petition for Review), was filed in the **Supreme Court** under **Case No. 89754-9**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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