NO. 89754-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BILLY WAYNE DAVIS

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

State of Washington asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals issued an opinion on October 22, 2013, reversing the conviction of Billy Wayne Davis for Robbery in the First Degree and ordering the trial court to vacate the judgment and sentence and dismiss the charge with prejudice. A copy of the decision is in the Appendix at pages A-1 through A-8. A copy of the order denying petitioner's motion for reconsideration, entered on December 12, 2013, is in the Appendix at Page A-9.

C. ISSUES PRESENTED FOR REVIEW

1. **Is the evidence sufficient to convict a defendant as a principal where it shows that person jointly participated with another person in the actus reus of the crime?**

2. **Does any issue of accomplice liability arise in Washington where the defendant on trial does not meet the definition of an accomplice set forth in RCW 9A.08.020(3)?**

3. **Is any failure to instruct on accomplice liability harmless where the uncontroverted evidence shows the defendant committed sufficient physical acts to constitute the crime charged and the only defense is one of insanity?**

D. STATEMENT OF THE CASE

On August 20, 2010, Michael Acton was working at the Family Mart convenience store at 508 North Fourth Avenue, Pasco, Washington. (1RP at 30-32). During the course of the evening, a regular by the name of Moses Sanders came in several times. (1 RP at 33). During one of the visits, Acton noted that Sanders was accompanied by another man. (1RP at 34). Sanders and the same companion drove by in a large Lincoln type vehicle several times throughout the night. (1RP at 36).

Later that night, Sanders returned with Billy Wayne Davis and told Acton that they would be holding him up and that he needed to cooperate. (1RP at 38). Davis then approached Acton holding what appeared to be a firearm inside his coat. (1 RP at 38). Acton did not know Davis and took him and the firearm as a serious threat. (1RP at 39). Acton was then escorted to the cash register by Sanders while Davis kept the weapon pointed at him. (1RP at 40). Acton unlocked the register and Sanders began removing

money from the cash drawer. (1 RP at 40). As Sanders took the money out of the drawer, Davis directed him by saying, "Hurry up. Let's go. Hurry up. Let's go." (1RP at 41). Once they had the money, Sanders ran out first and Davis second, still pointing the gun at Action and telling him to "give us five minutes." (1 RP at 42). Acton then immediately called the police. (1RP at 42-43).

Pasco Police responded to the scene and contacted Acton. (1RP at 50). They observed that Acton was upset, scared and crying. (1RP at 50). Other officers responding drove north of the location, attempting to locate the fleeing suspects. (1RP at 78). Officer Jose Becho observed two subjects matching the description given by Acton running northeast through Volunteer Park. (1RP at 78). One of the subjects, indentified as Davis, was immediately taken into custody. (1RP at 79-80). Sanders attempted to hide but was eventually arrested at the same location. (1RP at 79-80).

Once Davis was under arrest, Officer Becho searched him and found $289 in cash on his person. (1RP at 82-83). Acton did not know the exact amount that had been taken from the register, but estimated it was something over $200. (1RP at 44).

Davis and Sanders were taken back to the store and Acton identified them as the individuals who had robbed him at gunpoint.

(1RP at 51-52). He immediately recognized them as the perpetrators. (1RP at 45).

A canine was used to trace the path of the robbers across the park. (1RP at 100). The canine alerted on what appeared to be a rifle and it was secured by the officers. (1RP at 101). Evidence Technician David Renzelman identified it as a BB gun that had been modified to make it appear like a regular rifle. (1RP at 59). Near the rifle police located a Lincoln Mark IV vehicle, consistent with the one Davis and Sanders had been seen occupying earlier in the night. (1RP at 101).

During trial, defense counsel moved "in accordance with" State v. Jeppesen, 55 Wn. App. 231, 776 P.2d 1372 (1989), to bifurcate the case into separate phases to determine (1) whether Davis was guilty, not guilty, or not guilty by reason of insanity, and (2) if the latter, whether he presented a future danger. (2RP at 142-43). The trial court noted that Jeppesen referenced a proffer of evidence being made that would constitute a bona fide defense on the merits (See Jeppesen, 55 Wn. App. at 237) and gave defense counsel an opportunity to make such a proffer. (2RP 146). None was offered. (2RP at 146-49). The court did not bifurcate the trial,

but limited testimony of criminal history to that relied on by the expert witnesses in reaching their conclusions. (2RP at 150).

The jury instructions made no reference to accomplice liability. (3RP at 92-103). Neither party made any objection or took any exception to the instructions given by the court. (3RP 82-83).

The prosecutor began his closing argument by briefly discussing of the elements of the crime and the merits of the charge, making no mention of accomplice liability. (3RP 104-06). The prosecutor then noted that "there is not really any dispute with those elements" and "[t]he defendant is focused mostly on the fact that although he committed the robbery, it wasn't his fault because he was insane at the time." (3RP 106). The balance of the State's argument focused on the insanity question. (3RP 106-20; 130-35). Defense counsel's closing argument related entirely to the issue of insanity and did not suggest any defense on the merits. (3RP 120-30).

Davis was convicted and appealed. (A 1-2). The Court of Appeals concluded that the evidence showed Davis was only an accomplice to the first degree robbery: "Mr. Acton's testimony was clear: it was Mr. Sanders, acting as the principal, who took the money in the presence of Mr. Acton, while Mr. Davis aided him by

holding a gun." (A 7-8). The Court of Appeals further found that since the jury was not instructed on accomplice liability, this evidence was insufficient to support the conviction. (A 7-8).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4 lists among considerations governing acceptance of review whether the decision of the Court of Appeals is in conflict with a decision of this court or presents an issue of substantial public interest that should be determined by this court. This instant case is ripe for review under these criteria.

1. There is sufficient evidence to convict a defendant as a principal where he or she jointly participates with another person in the actus reus of a crime. No issue of accomplice liability arises in Washington where the defendant on trial does not meet the definition of an accomplice under RCW 9A.08.020(3).

The Court of Appeals found Davis was only an accomplice to the first degree robbery since Sanders was the one who lifted the money from the cash drawer. (A 7-8). The State had argued that the instant case did not generate an issue of accomplice liability, as "pointing the gun at the clerk was part of the process of taking personal property from the presence of the clerk by the threatened use of force, every bit as much as physically removing the money from the cash drawer." Brief of Respondent, at 14. In other words,

two or more persons may be copincipals where they jointly participate in the actus reus of the crime (even if their physical acts are not identical).

History is replete with notorious robbers who jointly committed their crimes with partners; Jesse and Frank James, Butch Cassidy and the Sundance Kid, and Bonnie and Clyde are examples that come to mind. No one would ever describe any of these historical figures as mere accomplices, even if there was some division of labor in the commission of their crimes. On a more mundane level, crimes occur every day where two or more persons work in concert to jointly participate in the actus reus of the crime. Whether evidence of such participation is sufficient to convict a defendant as a principal is thus a matter of substantial public interest that should be determined by this court. See RAP 13.4(b)(4).

In Baker v. State, 905 P.2d 479 (Alaska Ct. App. 1995), the court began its analysis by reviewing the common law defining the parties to a crime:

> At common law, a person who personally committed the actus reus of a crime was a "principal in the first degree." Any person who was present at the commission of the crime and who aided and abetted the commission of the crime was a "principal in the

> second degree." Anyone who aided or abetted the crime before it was committed and who was not present at the commission of the crime was an "accessory before the fact."

Id. at 484.

"Accomplice liability" in Washington clearly covers only persons who at common law would have been labeled "principals in the second degree" or "accessories before the fact." RCW 9A.08.020(3)(a)(i)&(ii) provides that "[a] person is an accomplice of another person in the commission of a crime if . . . with knowledge that it will promote or facilitate the commission of the crime, he . . . solicits, commands, encourages, or requests such other person in to commit it; or . . . aids or agrees to aid such other person in planning or committing it[.]" This statutory definition is obviously identical to the common law definitions, as stated in Baker, of principals in the second degree and accessories before the fact. On the other hand, if the defendant would have been considered a "principal in the first degree" under the common law, no issue of accomplice liability arises in Washington.

At common law, both principals in the first degree and principals in the second degree are generally present at the scene of the crime. The distinction between them is that the former participate in the actus reus of the crime while the latter merely aid

in its commission. Baker, 905 P.2d at 484. By the same token, aiding or agreeing to aid may be the key factor making someone an accomplice under RCW 9A.08.020(3). The only other way the definition of accomplice in RCW 9A.08.020(3) could be met is by soliciting, commanding, encouraging, or requesting another person to commit the crime (which would make someone an accessory before the fact at common law). Conversely, there is nothing in the definition of accomplice set forth in RCW 9A.08.020(3) that would cover a person who participates in the actus reus of the crime. If a crime is committed exclusively by persons who would be principals in the first degree at common law, the definition of accomplice in RCW 9A.08.020(3) does not come into play.

In Baker, three men devised a plot to order pizza for home delivery and then rob the pizza delivery person. Upon the delivery person's arrival, one of the robbers punched him while the other two grabbed the property and ran away. The court stated:

> Applying the common law definitions to Baker's case, if Baker was one of the three men who waited in ambush for the pizza delivery person, then he was a principal in the robbery. If Baker either struck the delivery person or helped to carry away the pizzas, he was a principal in the first degree – since the actus reus of the robbery requires both an assault and the taking (or attempted taking) of property. If Baker was present but only provided aid or encouragement to

> the enterprise, then he was a principal in the second degree.

Baker, 905 P.2d at 485 (citation omitted; emphasis added).

In the instant case, the actus reus of the robbery required the unlawful taking of personal property from the presence of another with intent to commit theft of the property, against the person's will by the use or threatened use of immediate force, violence, or fear of injury to that person, with such force or fear being used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, and that in the commission of these acts or in immediate flight therefrom, displaying what appeared to be a firearm or other deadly weapon. (CP 29). The Court of Appeals opinion stated that "it was Mr. Sanders, acting as the principal, who took the money in the presence of Mr. Acton, while Mr. Davis aided him by holding a gun." (A 7-8). This statement ignores the point that in holding the gun in a threatening manner, Davis did more than merely provide aid; he participated in the actus reus of the robbery, just as the defendant in Baker who struck the pizza delivery person while his companions grabbed the pizzas. Since Davis and Sanders were both principals in the first degree, there was no issue of accomplice liability.

A leading treatise, 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.1 (2d ed. updated 2013) (hereafter LAFAVE) further explains as follows:

> There can be more than one principal in the first degree. This occurs when more than one actor participates in the actual commission of the offense. Thus, when one man beats a victim and another shoots him, both may be principals in the first degree to murder. And when two persons forge separate parts of the same instrument, they are both principals in the first degree to the forgery.

(Footnotes omitted). In United States v. Bell, 812 F.2d 188 (5th Cir. 1987), the court relied heavily on an earlier edition of the LAFAVE treatise. Bell in turn is now cited and discussed in the current edition of LAFAVE § 13.1 n. 26. In Bell, Ronald Bell and his brother Allen Bell were coprincipals in an attempted bank extortion where Ronald took the bank officer's wife hostage and compelled her to call her husband, while Allen made contact with the husband regarding the payment of bank funds for her release. The jury was instructed that to convict Ronald Bell, it must find he committed each element of the crime. No instruction was given on accomplice liability. The court noted:

> Appellant's remaining contention is that in any event the evidence was insufficient to support his conviction unless he is regarded as responsible for the acts of his brother, Allen Bell, and that, because no aiding

and abetting instruction was given, he cannot he held responsible for the acts of a coperpetrator.

Appellant's argument centers on the district court's charge to the jury describing the essential elements of the government's proof. The jury was told that the government must prove beyond a reasonable doubt "that the defendant Ronald Bell induced or attempted to induce the Charles Schreiner Bank and Mark Haufler to part with money." Appellant claims his brother Allen made the critical calls instructing Mr. Haufler to remove the money from the bank and carry it to a scenic overlook, and appellant cannot be held criminally liable for his brother's acts because the jury was not instructed on accomplice liability. We observe that the government carried a heavier burden in this case by being required to prove to the jury's satisfaction that Ronald was a coprincipal in the extortion attempt rather than a mere aider and abettor, and we determine the government met its burden of proof under that standard.

Appellant's theory depends on an essential premise – that each accomplice in a single offense is responsible only for the specific criminal acts he personally commits – which we view as patently inapplicable to an offense jointly committed by more than one coperpetrator. It is hornbook law that

> "[t]here can be more than one principal in the first degree. This occurs when more than one actor participates in the actual commission of the offense. Thus, when one man beats a victim and another shoots him, both may be principals in the first degree to murder. And when two persons forge separate parts of the same instrument, they are both principals in the first degree to the forgery.
>
> "Although it has been said that a principal in the first degree must be present at the

> commission of the offense, this not literally so. He may be 'constructively' present when some instrument which he left or guided caused the criminal result." W. LaFave & A. Scott, *Criminal Law* § 63, at 497 (West 1972) (footnotes omitted).
>
> *See also* 21 Am.Jur.2d Criminal Law, §§ 168-169, at 362-28 (1981) (describing principals).
>
> . . .
>
> Although the extortion offense involved all events from the moment Mrs. Haufler was taken hostage until Mr. Haufler deposited the extorted funds in the location described by the extortionists, we decline to carve the defendants' extortion scheme into discrete subparts and to absolve any malefactor who was not physically present at every misdeed. Just as, in the crime of armed bank robbery, the getaway driver and robber holding only a canvas sack are generally joint principals along with the robber carrying the firearm, the hostage-holder and his colleague in contact with the bank officer were jointly principals in the extortion attempt.

Bell, 812 F.2d at 193-95.

Applying the Bell court's bank robbery hypothetical to the instant case, Davis was comparable to the "robber carrying the firearm" while Sanders corresponds to the "robber holding only a canvas sack." They were joint principals in the robbery. Neither was an accomplice or aider and abettor.

Bell is directly on point with the instant case. Since the jury was not instructed on accomplice liability, the State carried a

heavier burden by being required to prove to the jury's satisfaction that Davis was a coprincipal in the first degree robbery rather a mere aider and abettor. However, the State met this burden by showing Davis participated in the actus reus of the crime. It is immaterial that the physical acts of the coprincipals were not identical. Like inducing a bank or banker to part with money, taking personal property from the presence of a store clerk against that person's will by the threatened use of force is an ultimate result. The jury properly found that Davis took personal property from the presence of the store clerk against that person's will by the threatened use of force, as pointing the gun at the clerk was part of the immediate process of achieving that criminal result; just as the jury in Bell properly found that Ronald Bell induced the bank and the banker to part with money, even though his coprincipal was the one who made the critical calls to the banker instructing him to remove the money from the bank and carry it to the scenic overlook.

Along the same lines is State v. Fenderson, 443 A.2d 76 (Me. 1982), where the Supreme Judicial Court of Maine found a criminal conviction was supported by sufficient evidence despite the absence of an accomplice liability instruction. While the Court of

Appeals read Fenderson as only addressing instructional error and not sufficiency of the evidence (A-5), the Fenderson court actually held: "We find the evidence was sufficient to sustain the jury's verdict." Fenderson, 443 A.2d at 76. The Court of Appeals opinion further stated: "Unlike Fenderson, it is undisputed that Mr. Davis did not commit all the elements of the robbery" (apparently meaning Sanders lifted the money out of the cash drawer while Davis pointed the gun at the clerk). (A-6). However, the entire discussion of the evidence in the Fenderson opinion was as follows:

> The evidence established that the defendant and three companions were arrested by two police officers as they were driving away in a pickup truck from a private residence in York County less than fifteen minutes after the same officers had seen the same individuals in another location. The officers had found the house secure only twenty minutes before the arrest. When they returned to the house, one of the officers observed the pickup truck parked next to the house and unoccupied. The front door of the house was open and two adults were seen running past a window. One of the co-defendants testified that the group had gone to the house but had merely sat in the truck drinking beer and relieved themselves on the property, and had not heard or seen anything unusual. A piano, one of the few pieces of furnishings in the house, had sustained extensive damage of $2,500.00.

Fenderson, 443 A.2d at 76. There was clearly no evidence of which person or persons committed the physical acts of breaking

into the house and damaging the piano. The only reasonable reading of Fenderson is that the evidence showed all four defendants left the vehicle, went to the house, and jointly participated in the actus reus of the aggravated criminal mischief, even if their physical acts were not identical. To use the common law term, a jury could find that all four defendants were principals in the first degree; thus, the evidence was sufficient to convict even without an accomplice liability instruction. Fenderson is indistinguishable from the instant case.

"While there may be more than one principal in the first degree, there must always be at least one for a crime to have taken place." LAFAVE § 13.1. "This is for the obvious reason that without one there can be no criminal act." LAFAVE § 13.1 n. 29. Under the Court of Appeals opinion, there was no principal in the first degree in this case. If it was necessary for someone to perform every physical act of each element in order to be a principal, Davis and Sanders would both be accomplices. The elements included the taking being accomplished by the threatened use of force and that a firearm or other deadly weapon be displayed. (A-7). Sanders did not display a firearm and did nothing to place the victim in apprehension and fear; these acts were

performed exclusively by Davis. Under the Court of Appeals opinion, the crime was committed by two accomplices – a legal impossibility. In actuality, Davis and Sanders were both principals since they jointly participated in the actus reus of the crime.

Finally, principal liability and accomplice liability are not mutually exclusive. State v. Bradshaw, 26 S.W.3d 461, 466-70 (Mo. App. 2000). Even if a theory could be constructed for imposing accomplice liability on Davis, it would not preclude there being sufficient evidence to find him guilty as a principal.

2. If the instant case does involve accomplice liability, then the Court of Appeals opinion conflicts with this court's decision in State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) in failing to consider the harmless nature of omitting that issue.

It is well established that while an omission that relieves the prosecution of its burden to prove every element of the crime is error, that does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Thomas, 150 Wn.2d 821, 844-45, 83 P.3d 970 (2004). Such constitutional error is harmless where it appears beyond a reasonable doubt that the error complained of did not

contribute to the verdict obtained. Neder, 527 U.S. at 15; Thomas, 150 Wn.2d at 845. As applied to the omission of an essential element, the error is harmless if that element is supported by uncontroverted evidence. Neder, 527 U.S. at 18; Thomas, 150 Wn.2d at 845. In State v. Brown, 147 Wn.2d 330, 58 P.2d 889 (2002), this court extended these principles to accomplice liability instructions.

The Court of Appeals decision in the instant case cannot be reconciled with this court's opinion in Brown; thus, review by this court is merited. See RAP 13.4(b)(1). As previously noted, Davis did not assert any defense on the merits; his sole defense was one of insanity. (2RP 145-46). Accordingly, the uncontradicted evidence showed Davis committed sufficient physical acts to constitute the crime of first degree robbery; the only issue was one of his sanity at the time. Any omissions from the instructions on the merits did not contribute to the verdict obtained and were harmless beyond a reasonable doubt.

F. CONCLUSION

On the basis of the foregoing arguments, it is respectfully requested that this court grant review of the Court of Appeals

decision which reversed and dismissed the conviction of Billy Wayne Davis for Robbery in the First Degree.

Dated this 2nd day of January, 2014.

Respectfully submitted,
SHAWN P. SANT
Prosecuting Attorney

By: Frank W. Jenny
Frank W. Jenny,
WSBA #11591
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says: That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 2nd day of January, 2014, a copy of the foregoing was delivered to Billy Wayne Davis #622780, Appellant, Callam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326 and to Nancy P. Collins, opposing counsel, 701 Melbourne Tower, 1511 Third Ave, Seattle WA 98101 by

depositing in the mail of the United States of America a properly stamped and addressed envelope.

Signed and sworn to before me this 2nd day of January, 2014.

Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2014

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APPENDIX

FILED
OCTOBER 22, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 30485-0-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
BILLY WAYNE DAVIS,	)	
	)	
Appellant.	)	

KULIK, J. — Billy Wayne Davis appeals his conviction and sentence for first degree robbery, arguing the State's evidence was insufficient to support the conviction in the absence of a jury instruction on accomplice liability. We agree and reverse the robbery conviction.

FACTS

During the early morning of August 20, 2010, Moses Sanders and Billy Davis entered a Family Mart store in Pasco, Washington. Mr. Sanders told the night cashier, Michael Acton, that "they were going to hold [Mr. Acton] up and [he] needed to cooperate." Report of Proceedings (RP) (Oct. 20, 2011) at 38. Mr. Acton then saw the barrel of what appeared to be a gun in Mr. Davis's jacket. Mr. Sanders followed Mr.

Acton to the cash register and took money from the till, while Mr. Davis urged Mr. Sanders to hurry. After Mr. Sanders and Mr. Davis left, Mr. Acton called the police, who arrested Mr. Davis and Mr. Sanders in a nearby park. During a search incident to arrest, police found $289 in Mr. Davis's pocket. Police officers also found a modified BB gun close to the car driven by Mr. Davis and Mr. Sanders.

At the close of the testimony, both parties submitted instructions. The prosecution did not submit or request an instruction on accomplice liability. In closing argument, the State argued that the evidence proved beyond a reasonable doubt that Mr. Davis took property from Mr. Acton against his will by threatened use of immediate force and, therefore, was guilty of robbery. The State did not argue accomplice liability in closing.

Mr. Davis was convicted as charged.

At sentencing, the State asked the court to impose a sentence under the Persistent Offender Accountability Act of the Sentencing Reform Act of 1981, ch. 9.94A RCW. Defense counsel indicated that she had nothing to argue that would "change the sentencing from mandatory to a not-mandatory term or to an alternative placement." RP (Dec. 13, 2011) at 9. The court sentenced him to life without the possibility of parole.

ANALYSIS

Mr. Davis contends that his right to due process was violated when the trial court accepted the jury's guilty verdict because there was insufficient evidence to convict him of first degree robbery. He maintains that because the jury was not instructed on accomplice liability, the State was required to prove principal liability, and there was no evidence that Mr. Davis himself took property from Mr. Acton. He contends, "[i]t violates the right to trial by jury for the court to impose punishment based on accomplice liability when the jury never considered that possibility or weighed its legal requirements." Appellant's Br. at 12.

The State responds that the law makes no distinction between principal and accomplice liability, and that "[t]he State need not ask a jury to decide who exactly participated in which specific elements of a crime, it is enough that the crime occurred and the defendant participated." Resp't's Br. at 8.

Due process requires the State to prove its case beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). Evidence is sufficient to support a conviction, if, viewed in a light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of

the State's evidence and all reasonable inferences drawn therefrom. *Id.* Reviewing courts defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

For the jury to find Mr. Davis guilty of first degree robbery, the State had to prove beyond a reasonable doubt that he (1) unlawfully took personal property from the person of another; (2) by the use or threatened use of immediate force; and (3) during the commission of the robbery, was (i) armed with a deadly weapon; (ii) displayed what appeared to be a deadly weapon; or (iii) inflicted bodily injury. RCW 9A.56.190, .200(1)(a).

The State is correct that criminal liability is the same whether one acts as a principal or as an accomplice. RCW 9A.08.020(1), (2)(c). Accomplice liability is not an element or alternative means of a crime. *State v. Teal*, 152 Wn.2d 333, 338, 96 P.3d 974 (2004). Principal and accomplice are, however, alternative theories of liability requiring different considerations, and although the State need not charge the defendant as an accomplice in order to pursue liability on that basis, 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).

Citing *State v. Fenderson*, 443 A.2d 76 (Me. 1982), a brief decision from Maine that has not been cited as authority in any court, the State argues that an accomplice instruction was not needed in this case because the evidence did not generate the issue of accomplice liability, given that Mr. Davis and Mr. Sanders both entered the store and jointly committed the robbery. It argues, "[Mr. Davis], while not physically pulling the money out of the register, still obviously committed the robbery." Resp't's Br. at 8-9. It also argues that in the absence of showing manifest constitutional error, Mr. Davis is precluded from raising the issue of instructional error under RAP 2.5.

The State misstates the issue before us. Mr. Davis is not alleging instructional error; rather, he is arguing that the State failed to prove that he committed robbery in the absence of an accomplice liability instruction. Thus, the State's harmless error analysis is inapposite.

Moreover, *Fenderson* is inapplicable here. In that case, police arrested the defendant as he drove away from a house that had been recently damaged and, moments earlier, police had seen the defendant's unoccupied car parked at the house, which

permitted the rational inference that the defendant had participated in damaging the house. *Fenderson*, 443 A.2d at 77. The court held that the failure to give an instruction explaining the legal requirements of accomplice liability was not error because the evidence did not generate the issue of accomplice liability. *Id.* Unlike *Fenderson*, it is undisputed that Mr. Davis did not personally commit all the elements of robbery. Accordingly, an accomplice liability instruction was required.

Whether the evidence is sufficient to sustain a verdict under the jury instructions issued by the court is determined by the law as set forth in the instructions. *State v. Nam*, 136 Wn. App. 698, 705-06, 150 P.3d 617 (2007); *State v. Hickman*, 135 Wn.2d 97, 102-03, 954 P.2d 900 (1998).

> It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions[.] In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge.

Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948). Because the trial court's "to convict" instructions were provided without objection, they become the law of the case. *State v. Hames*, 74 Wn.2d 721, 724-25, 446 P.2d 344 (1968).

Here, the court, without objection from either party, instructed the jury that to convict Mr. Davis, it must find he actually took the property. The "to convict" instruction, instruction 9, stated:

> To convict the defendant of the crime of robbery in the first degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about August 20, 2010, the defendant unlawfully took personal property from the person or in the presence of another;
>
> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person;
>
> (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (5) That in the commission of these acts or in the immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon; and
>
> (6) That any of these acts occurred in the State of Washington.

Clerk's Papers at 29.

By failing to include "or an accomplice" language in instruction 9 or otherwise instruct the jury on accomplice liability, the State was required to prove that Mr. Davis himself took property from Mr. Acton. *Willis*, 153 Wn.2d at 375.

Viewing the evidence in the light most favorable to the State, it fails to carry its burden. An essential element of robbery is the unlawful taking of property from a person. *Nam*, 136 Wn. App. at 704-05. This taking must occur in the presence of the person who has the ownership interest in the property. *State v. Tvedt*, 153 Wn.2d 705, 714-15, 107 P.3d 728 (2005). But Mr. Acton's testimony was clear: it was Mr. Sanders, acting as the principal, who took the money in the presence of Mr. Acton, while Mr. Davis aided him

by holding a gun. During closing, the only evidence cited by the court to establish the first element of robbery was that Mr. Davis was "caught right down the road here in the park with that property." RP (Oct. 24, 2012) at 104.

In the absence of evidence that Mr. Davis took property from or in the presence of Mr. Acton, the State failed to carry its burden of proving beyond a reasonable doubt an essential element of robbery. Where the State assumes the burden of proof on an element and we find that there is insufficient evidence on that element, we must reverse the conviction and dismiss with prejudice. *Hickman*, 135 Wn.2d at 103. Accordingly, we reverse. Given the disposition of this issue, we need not address Mr. Davis's remaining issues on appeal.

We reverse the robbery conviction, order the trial court to dismiss with prejudice, and vacate the judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

WE CONCUR:

Brown, J.

Siddoway, A.C.J.

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DECEMBER 12, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 30485-0-III**
	)	
Respondent,	)	
	)	**ORDER DENYING**
v.	)	**MOTION FOR**
	)	**RECONSIDERATION**
BILLY WAYNE DAVIS,	)	
	)	
Appellant.	)	

The court has considered the State's motion for reconsideration and is of the opinion the motion should be denied.

IT IS ORDERED the motion for reconsideration of this court's decision of October 22, 2013, is hereby denied.

DATED: December 12, 2013

PANEL: Judges Kulik, Brown, and Siddoway

FOR THE COURT:

KEVIN M. KORSMO
CHIEF JUDGE

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