No.45155-7

COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

HAROLD E. LANG, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE JAMES ORLANDO

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERRORS

A. The trial court erred in excluding evidence as self-serving hearsay where the evidence was necessary to satisfy the rule of completeness under ER 106.

B. The court violated ER 801 and 612 in allowing inadmissible hearsay.

C. The evidence was insufficient to sustain a conviction for robbery in the first degree.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

A. Did the trial court err in excluding evidence as self-serving hearsay where the evidence was necessary to satisfy the rule of completeness under ER 105?

B. Did the court violate ER 801 and 612 where the court allowed inadmissible hearsay to be presented to the jury, unfairly prejudicing Mr. Lang?

C. Was the evidence insufficient to sustain a conviction for robbery in the first degree?

II. STATEMENT OF FACTS

Harold Lang was charged by amended information with two counts of robbery in the first degree, the State alleging that either he or an accomplice displayed what appeared to be a firearm or other deadly

weapon. (CP 53-54). The second count was later dismissed with prejudice. (Vol. 2 RP 162). The matter proceeded to a jury trial.

On October 15, 2012, Mr. Lang arranged to meet Ian Kristiansen to purchase an Iphone 5 listed for sale on Craigslist. (Vol. 2RP 127;180-81). He intended to steal the phone. (Vol. 2RP 127). At the meeting, Mr. Lang wanted to see the telephone out of its case. (Vol. 2RP 183). Mr. Kristiansen refused, testifying, "I didn't want to take the phone out of the case because it's been in the case, it's brand new. And so as I was taking it out of the case to show him, I didn't want to hand it to him because I didn't want him to drop it." (Vol. 2RP 183-84). He reported when he eventually did take the phone out of its case Mr. Lang grabbed the phone out of his hand and ran. (Vol. 2RP 184; 198-99).

Mr. Kristiansen chased after Mr. Lang. (Vol. 2RP 184). He reported, "I chased after him, and he ran down half a block when I gave up. He outran me easily." (Vol. 2RP 186). After Mr. Lang was gone and Mr. Kristiansen knew he was not going to catch him, according to Mr. Kristiansen, a third party came up behind him and said, "Do you want to get shot? Keep running." (Vol. 2RP 186). Mr. Kristiansen turned around. (Vol. 2RP 187). He did not get a good look at the speaker and never saw a bulge or a gun. He stated it was dark, but he observed the speaker had his hand in his sweater pocket, "like if there was something there" but did not

say the speaker gestured or even moved his hand. (Vol. 2RP 187;195-197). Mr. Lang was arrested on October 19 and questioned about the robbery. (Vol. 2RP 115).

In pretrial motions, the court granted a defense motion to exclude any reference to a warning the complaining witness put on Craigslist the day after the alleged robbery. (Vol. 1RP 14-15).

During a CrR 3.5 hearing, officers testified they advised Mr. Lang of his Miranda rights and he agreed to talk to them. (Vol. 2RP 121;124-25). He told officers two other individuals accompanied him to the meeting place where he was going to steal the Iphone, the driver of the vehicle and an unexpected passenger named "Arsenio". (Vol. 2RP 126).

He told them Mr. Kristiansen would not hand the Iphone to him outside of its case: "But he said, 'I'll set it on the table and you can use it, you can try to see if it works.' So basically to see if I wanted it. While it was on the table with us and he set it on the table, I snatched it and ran…As soon as he set the phone on the table, just like the one right here, I just took it and runned." (Vol. 2RP 137). They also testified that Mr. Lang was unaware, until he read the Craigslist warning ad, that Arsenio had threatened to shoot the alleged victim if he continued to chase Mr. Lang. (Vol. 2RP 129-130). He said he learned Arsenio told him he had

only threatened to beat them up if they continued to follow him. (Vol. 2RP 130).

The State sought to exclude portions of Mr. Lang's interview on the basis of "self serving hearsay." (Vol. 2RP 157). The State particularly wanted exclusion of Mr. Lang's statement to police that once the cell phone was on the table, he took it and ran with it. (Vol. 2RP 157). Over defense objection, the court granted the motion, stating,

> "Well, it's self-serving hearsay, so I would sustain that objection. If Mr. Lang wishes to testify in what he intended or how the phone got taken from there, he can certainly do that, but I don't think he can do that by way of interview without taking the stand. So I would exclude that statement. The other statements I view as statements against interest. They're not self-serving hearsay." (Vol.2 RP 159).

The State also sought admission of Mr. Lang's previously excluded statements regarding the Craigslist ad. The State argued the statements showed Mr. Lang had knowledge that a third party, associated with him, threatened to shoot Mr. Kristiansen. (Vol. 2RP 155). Over defense objection, the court ruled Mr. Lang's statement about the warning ad admissible. (Vol. 2RP 156). The court found his statements were made with a knowing and voluntary waiver of his Miranda rights. (CP 90-92).

Over defense objection, the State questioned Mr. Kristiansen about the Craigslist ad as follows:

Q. Did you – after this happened, did you post an ad on Craigslist?

A. I posted a warning ad.
Q. In that warning ad, did you talk about what happened to you?
A. Yes.
Q. Did you mention about being threatened to be shot?
A. No.
Q. Have you seen that ad?
A. I've seen it, I recognize it, but I don't even remember the ad as to detail.
(Vol. 2RP 188).

Q. Did he [Tacoma Police Officer Jared Williams] talk to you about the Craigslist ad?
A. Yes.
Q. I'm handing you what's been marked for identification purposes as Plaintiff's Exhibit No. 4. I want you to read a passage here. I want you to tell me if this is what you remember posting right there?
Mr. Underwood: Objection to this procedure. It's not proper refreshing recollection.
The Court: Overruled.
A. Do you want me to read it?
Q. Read it to yourself.
Q. Is that what you posted?
A. Yeah.
Q. Is that verbatim what you posted? Is that exactly what you posted?
A. Yes.
Q. Can you read the first line?
Mr. Underwood: Objection, hearsay.
The Court: Well, the question is, if it refreshes his recollection. He needs to testify from memory rather than the document.
Q. Does it remind you what you said?
A. Yes.
Q. What did you state?
A. That I had my phone stolen.
Q. Did you specify where it was taken from?
A. No.
Q. I'm going to show you again what you wrote. Why don't you—
Mr. Underwood: Your Honor, this –

Mr. Curtis: I'm just refreshing his recollection, Your Honor, if it's true.
Q. Does looking at that refresh your recollection as to where you indicated your phone was taken from?
A. No.
Q. On where the phone was when it was taken from you?
A. I know where the phone was taken.
Q. Where was it taken from?
A. My job.
Q. On you personally, where did you have the phone?
A. In my hand.
Q. Did you state that in your ad?
A. No.
Q. Did you put it in the ad that the phone was taken from your hands?
Mr. Underwood: Asked and answered.
The Court: Hold on. Ask the question again.
Mr. Curtis: Ok.
Q. The reason I'm showing you is to refresh your recollection about what you specifically wrote, because that's important and the jurors need to hear that. Did you write in your ad your phone was snatched from your hand?
A. Yes.
Mr. Underwood: Objection, leading.
The Court: Overruled.
Q. Did you indicate, while you were chasing him, someone came from behind and threatened to shoot you?
A. Yes.
Q. Did you put that in your warning ad?
A. Yes.
Q. Do you recall when you put that warning ad out?
A. The next day. (Vol. 2RP 188-192).

The court gave the following jury instructions:

Jury Instruction No. 6:

> "A person commits the crime of robbery in the first degree when in the commission of a robbery he or an accomplice displays what appears to be a firearm or other deadly weapon." (CP 74).

Jury Instruction No. 7:

> "To display what appears to be a firearm means to exhibit or show what appears to be a firearm to the view of the victim or to otherwise manifest by words and actions the apparent presence of a firearm even though it isn't actually seen by the victim." (CP 75).

Jury Instruction No. 8:

> "To convict the defendant of robbery in the first degree, the State is not required to prove that the defendant knew that an accomplice displayed what appeared to be a firearm." (CP 76).

Jury Instruction No. 12:

> "To convict the defendant of the crime of robbery in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about October 15, 2012, 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 or an accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property.
>
> (4) That force or fear was used by the defendant or an accomplice 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 the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon;

(6) That any of these acts occurred in the State of Washington.

During closing arguments the State emphasized that Mr. Lang "overpowered" Mr. Kristiansen and took the phone from his hand. (Vol. 2RP 244, 247, 251, 252, 253, 254). The State also emphasized that the third party (Arsenio) "gestured" there was a firearm inside of his pocket. (Vol. 2 RP 251;252). Mr. Lang was found guilty of robbery first- degree. (CP 55). He makes this timely appeal. (CP 110-125).

III. ARGUMENT

A. The Trial Court Erred In Excluding Evidence As "Self-Serving" Hearsay Evidence Necessary To Satisfy The Rule Of Completeness Under ER 106.

A court's interpretation of an evidentiary rule is a question of law, which is reviewed *de novo. State v. Foxhoven,* 161 Wn.2d 168, 174, 163 P.3d 786 (2007). If the trial court has correctly interpreted the rule, the trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Finch,* 137 Wn.2d 792, 810, 975 P.2d 967 (1999). Abuse of discretion occurs when the ruling is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson,* 132 Wn.2d 668, 702, 940

P.2d 1239 (1997). Mr. Lang challenges the trial court's interpretation of ER 106 and its subsequent ruling that statements he gave in a police interview were inadmissible because they were "self serving" hearsay.

A defendant's out of court exculpatory statements offered for the truth of the matter asserted are usually inadmissible. *State v. Huff,* 3 Wn.App. 632, 636, 477 P.2d 22 (1970). However, where one party has introduced part of a conversation, the opposing party is entitled to introduce the balance thereof in order to explain, clarify, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved. This is true though the evidence might have been inadmissible in the first place. *State v. West,* 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967).

Evidence Rule 106, often referred to as the "rule of completeness" provides :

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

Here, at trial the State introduced portions of the statement Mr. Lang gave in his police interview: that Mr. Lang intended to steal the Iphone; he normally works alone but this time, told Arsenio to get out of

the car and then get back in the car; and that Mr. Lang knew that Arsenio had threatened to shoot Mr. Kristiansen. On the basis of the court's order, Mr. Lang's statement that he grabbed the cell phone off the table and ran was not elicited at trial. (Vol. 2RP 157-159).

Washington case law interpreting ER 106 requires that the evidence sought to be admitted must be relevant to the issues in the case. *State v. Larry,* 108 Wn.App. 894, 910 P.3d 241 (2001). If relevant, the trial court should inquire whether the offered evidence (1) explains the admitted evidence, (2) places it in context, (3) avoids misleading the trier of fact, and (4) insures a fair and impartial understanding of the evidence. *Id.* If the statement is part and parcel of the very statement a portion of which the State was properly bringing before the jury, then it may be admissible. *Id.* (quoting *United States v. Haddad,* 10 F.3d 1252, 1258 (7th Cir. 1993).

The difference between a robbery and a theft is the use of force. RCW 9A.56.020; RCW 9A.56.190. Mr. Lang's statement about taking the phone from the table passes the threshold of relevancy as defined in ER 401. Mr. Lang told officers his intent was to commit a theft because he knew threatening or acting like one had a weapon could result in a robbery charge; He told officers he deliberately "… did not verbally

threaten, physically threaten 'em, physically touch them." (State's Exh. 35 p. 12-13).

The admission of only the inculpatory statements without more, unfairly suggests that Mr. Lang admitted the charged crime of robbery in the first degree. This takes on a special significance when during closing argument the State declared no less than eleven times that Mr. Lang "overpowered" Mr. Kristiansen. Mr. Lang's complete statement about taking the phone from the table should have been admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure an impartial and fair understanding of the evidence. *United States v. Haddad,* 10 F.3d at 1258-59.

The right of a criminal defendant to present all relevant evidence in support of his defense is of constitutional magnitude. *Washington v. Texas,* 388 U.S. 14, 16, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). This right is balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact finding process. *Id.* Here, the exclusion of the relevant evidence, admissible under ER 106, offered by Mr. Lang was material to his defense that he intended and committed a theft, not a robbery. The trial court erred in suppressing his statements as self-serving and violated his right to present admissible and material

evidence under the Sixth Amendment. This requires reversal of the conviction and remand for a new trial.

B. Evidentiary Errors Require Reversal

A court's rulings on admissibility of evidence are reviewed for an abuse of discretion. *State v. Kinard,* 109 Wn.App. 428, 435, 36 P.3d 573 (2001). Here, the State elicited testimony from Mr. Kristiansen that his phone had been taken from his hand, he chased Mr. Lang, and that he was threatened by Arsenio. Despite its earlier assurances that in questioning Mr. Kristiansen, "I'm not going to go off basis and ask him who did you tell about this incident." (Vol. 1RP 15), the State then proceeded to ask Mr. Kristiansen if he had posted a warning ad on Craigslist after his phone had been stolen. (Vol. 2RP 188). Following that were a series of questions where Mr. Kristiansen was asked if he remembered writing in the ad that he was threatened and that the phone was taken from his hand. Mr. Kristiansen answered "No" to each question. State's counsel directed him to read the ad and answer again. Mr. Kristiansen then changed his answers. This was improper admission of evidence on two bases: use of inadmissible hearsay to bolster testimony and improper refreshing of recollection to bolster testimony.

a. The State Improperly Bolstered Witness Credibility With The Use Of Inadmissible Hearsay.

Hearsay is a statement, oral or written, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). A prior statement by a witness may not be hearsay if the declarant testifies, is subject to cross examination and that prior statement is inconsistent with the declarant's testimony and was given under oath, or is consistent but is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. ER 801(d)(1)(i,ii). Neither circumstance applies in this case.

Mr. Kristiansen had just testified under oath as to the events in question. The Craigslist ad was hearsay by definition and did not meet any hearsay exceptions. It was offered to bolster Mr. Kristiansen's testimony, showing a prior consistent statement. Prior out of court statements consistent with the declarant's testimony are not admissible simply to reinforce or bolster the testimony: repetition is not a valid test for veracity. *State v. Osborn,* 59 Wn.App. 1, 4, 795 P.2d 1174 (1990). (Internal citations omitted).

b. The Court Violated ER 612 Governing The Use Of A Writing To Refresh Memory For The Purpose Of Testifying.

Evidence rule 612 governs the procedure for using a writing to refresh a witness's memory. A witness may use a writing to refresh his

memory for the purpose of testifying if: (1) the witness's memory needs refreshing, (2) opposing counsel has the right to examine the writing, and (3) the trial court is satisfied the witnesses is not being coached- that the witness is using the notes to aid, and not to supplant, his own memory. *State v. Little,* 57 Wn.2d 516, 521, 358 P.2d 120 (1961). A witness may not be urged to create testimony, under the guise of refreshing the witness's recollection under ER 612. *State v. McCreven,* 170 Wn.App. 444, 474, 284 P.3d 793 (2012) *rev. denied,* 297 P.3d 708 (2013).

Under ER 612, the writing must cause the witness to actually recall the event in question. Here, the witness had already testified about the events without any indication that his memory was exhausted. The "refreshing" of recollection was not focused on the substance of the events, but rather on what Mr. Kristiansen had posted in the ad. The State specifically stated, "The reason I'm showing you is to fresh your recollection about what you specifically wrote, because that's important and the jurors need to hear that…." (Vol. 2RP 191). As argued above, the ad was inadmissible hearsay and eliciting the contents of the ad under the guise of refreshing recollection was improper.

This was the second time the jury heard Mr. Kristiansen's statements about the alleged crime; it was cumulative evidence that tended to corroborate his earlier testimony, and was highly prejudicial in that it

impermissibly bolstered Mr. Kristiansen's version of events. This was an abuse of the court's discretion.

Under the doctrine of cumulative error, a defendant is entitled to a new trial when it is reasonably probable that errors, even though not individually reversible error cumulatively produce an unfair trial. *State v. Grieff,* 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (*State v. Alexander,* 64 Wn.App. 147, 822 P.2d 1250 (1992)(reversal required because witness impermissibly suggested the victim's account was consistent and truthful, the prosecutor impermissibly elicited defendant's identity from the victim's mother and the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing)); *State v. Badda,* 63 Wn.2d 176, 385 P.2d 859 (1963)(three instructional errors and prosecutor's remarks during voir dire required reversal)).

Here, Mr. Lang was prevented from having his statements to officers be presented in contradiction to ER 106, limiting the proof to partial truths. The court made further evidentiary errors in allowing the State to elicit inadmissible hearsay that bolstered the credibility of a witness, and improperly "refresh" the recollection of a witness about that inadmissible hearsay. The cumulative effect of these errors is not insignificant and effectively deprived Mr. Lang of a fair trial.

C. The Evidence Was Insufficient To Sustain A Conviction For Robbery First Degree.

A reviewing court does not weigh evidence or sift through competing testimony. Rather, the question presented is whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979). The reviewing court will consider the evidence in a light most favorable to the prosecution. *State v. Green,* 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). Sufficiency of the evidence is a question of constitutional magnitude and may be raised for the first on appeal. *State v. Baeza,* 100 Wn.2d 487, 488, 670 P.2d 646 (1983). Due process rights, guaranteed under the State and Federal Constitution, require every element of a crime proved beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1968, 25 L.Ed.2d 368 (1970). Insufficiency of the evidence to prove all elements requires the conviction to be reversed and dismissed. *State v. Teal,* 117 Wn.App. 831, 837, 73 P.3d 402 (2003).

Here, to convict Mr. Lang of robbery first degree, the State was require to prove beyond a reasonable doubt that (1) he unlawfully took personal property from the person or in the presence of another; that he intended to commit theft of the property (3) That the taking was against

the person's will by the defendant or an accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property (4) That force or fear was used by the defendant or an accomplice 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 the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon. RCW 9A.56.200.

Mr. Lang argues (1) the evidence is insufficient evidence to find beyond a reasonable doubt that his accomplice displayed a firearm and (2) that the State failed to show that he had knowledge of the crime of his alleged accomplice until after the incident.

(1) The Evidence Was Insufficient As A Matter of Law To Find A Firearm Was Displayed.

An element of robbery in the first degree is that the defendant displays what appears to be a firearm or other deadly weapon in the commission of the crime. Case law holds that the witness does not actually need to see the weapon, but there must be some manifestation, by words *and* action that the perpetrator has a weapon. *State v. Kennard,* 101 Wn.App. 533, 538, 6 P.3d 38 (2000). In *Henderson*, the evidence showed the first victim saw the defendant's right hand was concealed in his right front pocket, *which had a bulge*; the second robbery victim said, "Are you

kidding?" and the defendant there replied, "No. I have this" and put his hand in his pocket. *State v. Henderson,* 34 Wn.App. 865, 866-67, 6 P.3d 38 (1983). The court held that where the accused indicates verbally or otherwise the presence of a weapon, the effect is the same, whether it is seen by the victim or whether it is directed at the victim from inside a pocket. *Id.* at 868-69.

In *Kennard,* the witness testified the defendant directed him to give him the money from the till. "He said I have a gun and he patted his hip and said he knew where I lived after he told me he had a gun." *Kennard,* 101 Wn.App. at 540. The court found the words and action sufficient to meet the requirement of display of a weapon. Similarly, in *Barker,* the defendant told the clerk he had a gun, threatened to shoot her, and pressed something hard into her back. The court there gave an instruction on both first and second-degree robbery. Although Barker met the display element necessary for first degree robbery, the jury convicted of second degree. *State v. Barker,* 103 Wn.App. 893, 897, 14 P.3d 683 (2000).

By contrast, *Bratz* and *Scherz* show that the mere threatened use of a deadly weapon in the commission of a robbery unaccompanied by any physical manifestation indicating a weapon does not satisfy the display element of first-degree robbery. A mere verbal statement that one is armed with a weapon does not constitute display of a deadly weapon.

There must be some physical manifestation beyond a mere verbal threat. *In re Personal Restraint of Bratz,* 101 Wn.App. 662, 674-76, 5 P.3d 759 (2000); *State v. Scherz,* 107 Wn.App. 427, 435, 27 P.3d 252 (2001)(internal citations omitted).

Similarly here, Mr. Kristiansen testified he heard Arsenio say "You want to get shot, keep running." Even though it was dark and he could not see well enough to identify the speaker, he believed he saw Arsenio had his hand in a sweater pocket. There was no testimony he saw a bulge in the pocket or any physical gesture indicating a weapon. In fact, according to Mr. Kristiansen, Arsenio never even said he had a weapon.

Notwithstanding the State's closing argument, for which there was absolutely no evidence that Arsenio "gestured", *Bratz and Scherz* are controlling here. Mere threatening words do not satisfy the display element of first degree robbery. The threatened use of a deadly weapon in the commission of a robbery unaccompanied by a menacing physical manifestation indicating a weapon cannot be more than second-degree robbery. *Scherz,* 107 Wn.App. at 436. The evidence was insufficient, as a matter of law, to sustain a conviction for robbery in the first degree. The remedy is dismissal with prejudice. *State v. DeVries,* 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

(2) The State Failed To Show That Mr. Lang Had Knowledge Of Arsenio's Conduct.

The action that forms the basis of theft is the exertion of unauthorized control over the property of another; the conduct that forms the basis of robbery is the taking of property by the use of force or threatened use of force. RCW 9A.56.020; RCW 9A.56. 190. A person who acts with the purpose of facilitating a theft is not liable for robbery. *State v. Grendahl,* 110 Wn.App. 905, 911, 43 P.3d 76 (2002).

The elements of a crime are the same for both a principal and an accomplice. *State v. Carothers,* 84 Wn.2d 256, 264, 525 P.2d 731 (1974), *overruled on other grounds in State v. Harris,* 102 Wn.2d 148, 685 P.2d 584 (1984). For accomplice liability to attach, "a defendant must not merely aid in *any* crime, but must knowingly aid in the commission of the specific crime charged." *State v. Teal,* 117 Wn.App. 831, 73 P.3d 402 (2003)(internal citations omitted). The culpability of an accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge. *In re Wilson,* 169 Wn.App. 379, 279 P.3d 990 (2012); *State v. Trout,* 125 Wn.App. 403, 410, 105 P.3d 69 (2005)(*internal citations omitted).*

Washington case law is fairly clear that where criminal liability for a first-degree robbery is premised upon accomplice liability, there is not

strict liability for any and all crimes. *State v. Roberts,* 142 Wn.2d 471, 14 P.3d 713 (2000). The State must prove an accomplice's general knowledge of his co-participant's substantive crime. *State v. Rice,* 102 Wn.2d 120, 125, 683 P.2d 199 (1984). Conversely, because the elements are the same, a principal's general knowledge of an alleged accomplice's substantive crime must also be proved.

Here, drawing all inferences in favor of the State, the evidence was sufficient for a jury to infer that by going to UPS to take the Iphone, Mr. Lang intended to perpetrate a theft at least and second-degree robbery at most. However, the evidence was not sufficient for a jury to infer that Mr. Lang even had knowledge of Arsenio's involvement until after the fact. Testimony from officers was that Mr. Lang told them he told Arsenio to stay close and then told him to get back in the car. When Mr. Lang returned to the car he had no idea where Arsenio had been or what he had done, if anything. As such, Mr. Lang cannot be held liable for the actions of another which he did not solicit and about which he had no knowledge.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Lang respectfully asks this Court to dismiss the conviction for first-degree burglary based on insufficiency of the evidence. In the alternative, he requests this Court to remand for a new trial.

Submitted this 31st day of January 2014.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Harold E. Lang., do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Brief was mailed by USPS, postage prepaid, first class, on January 31, 2014 to

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