No. 43720-1-II-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Daniel Holcomb,

Appellant.

Grays Harbor County Superior Court Cause No. 11-1-00402-6

The Honorable Judge F. Mark McCauley

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATE STATUTES

OTHER AUTHORITIES

ASSIGNMENTS OF ERROR

1. Mr. Holcomb's conviction was entered in violation of his state constitutional right to a unanimous jury.

2. The trial court erred by giving Instruction No. 8.

3. The trial court erred by failing to give the jury an instruction requiring unanimity as to the mode of participation in the charged crime.

4. Mr. Holcomb was convicted through the operation of a statute that is unconstitutionally overbroad.

5. The trial judge erred by giving Instruction No. 6, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state constitution requires juror unanimity as to the accused person's mode of participation in a felony. Here, the prosecution introduced evidence that Mr. Holcomb acted as a principal or an accomplice. Did the trial court's failure to give a unanimity instruction violate Mr. Holcomb's state constitutional right to a unanimous verdict as to the mode of participation?

2. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite imminent lawless action. The accomplice liability statute criminalizes speech made with knowledge that it will facilitate or promote commission of a crime, even if the speech is not directed at inciting imminent lawless action or likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Daniel Holcomb and Anthony Sumait walked past Charles Burnett's home and noticed he had a truck for sale. RP (4/3/12) 4-5, 15, 27-29, 71. Burnett was outside, and Mr. Holcomb asked Burnett about the truck. RP (4/3/12) 87, 91.

Sumait hit Burnett on the head. RP (4/3/12) 91, 103. Burnett had blurred vision and started falling, but stopped and regained awareness. He saw Mr. Holcomb in front of him, pulled out his handgun, and shot Mr. Holcomb five times. RP (4/3/12) 57, 92-93, 104. Burnett may have thought Mr. Holcomb had something in his hand, but if so, he didn't know what.[1] RP (4/3/12) 92. Mr. Holcomb fell to the ground. RP (4/3/12) 93.

Sumait fled, and was later found a mile and a half from the scene; he had dirt and recent scrapes on his hands. RP (4/3/12) 27-29.

A neighbor who heard the shots ran over to help; this person saw no weapons near Mr. Holcomb as he lay there bleeding. RP (4/3/12) 16. Another neighbor saw a stick with a metal end on the ground, two to five feet from Mr. Holcomb. RP (4/3/12) 19-20. When the police arrived, one

[1] When Burnett gave a statement to police soon after the incident, he did not say that he saw anything in Mr. Holcomb's hands. RP (4/3/12) 99. Burnett also told a defense investigator that he saw nothing in Mr. Holcomb's hand. RP (4/4/12) 144.

officer saw the stick about three feet from Mr. Holcomb's feet. RP (4/3/12) 24, 32. A paramedic kicked the stick away before the police were able to document its exact location relative to Mr. Holcomb. RP (4/3/12) 10-11.

The stick was seized and sent for testing.[2] Burnett's DNA was on the metal end of the stick. The other end had a mixture, with Mr. Holcomb comprising the main contributor. RP (4/3/12) 40-43.

After the state received the lab results, Mr. Holcomb was charged with Assault in the Second Degree, RP (4/4/12) 149, CP 1.

At trial, Burnett described being hit one time by a person who was not Mr. Holcomb. RP (4/3/12) 91-109. His former girlfriend testified that she watched the assault and that both men assaulted Burnett with stick weapons. RP (4/3/12) 71, 74, 76.

Mr. Holcomb asked the court to require the prosecution to elect one theory of liability. Alternatively, Mr. Holcomb asked the court to instruct the jury that they must be unanimous as to Mr. Holcomb's mode of participation in the offense: either Mr. Holcomb acted as an accomplice to Sumait's attack, or Mr. Holcomb was a principal and assaulted Burnett himself. RP (4/3/12) 111-118. The court ruled that such an instruction

[2] At that point, Mr. Holcomb had not been charged. Ex. 45, Supp. CP; RP (4/3/12) 36, 60-61.

would be a comment on the evidence and declined the defense request.[3] RP (4/3/12) 119. The state did not elect which theory it was pursuing, and the jury was not instructed that it had to be unanimous as to Mr. Holcomb's mode of participation in the crime. RP (4/4/12) 160-172. The state argued to the jury that it did not have to be unanimous as to whether Mr. Holcomb was an accomplice or a principal. RP (4/4/12) 160-161.

The jury convicted Mr. Holcomb as charged. RP (4/4/12) 196.

Mr. Holcomb moved for a new trial, arguing that his attorney denied him his right to testify. The court appointed a new attorney, held a factual hearing, and denied the motion. RP (4/16/12) 3-4; RP (5/16/12) 3-62. Mr. Holcomb also contested his criminal history. RP (7/12/12) 1-28. The court ruled that his offender score had been correctly calculated by the prosecutor, and sentenced Mr. Holcomb to 74 months in prison. RP (7/12/12) 11; CP 4-11. Mr. Holcomb timely appealed. CP 15.

[3] The next morning, defense counsel acknowledged that he'd been unable to find any cases supporting his request. RP (4/4/12) 127-8.

ARGUMENT

I. MR. HOLCOMB'S CONVICTION VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT UNDER ART. I, § 21.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, ___ Wn.2d ___, ___, 291 P.3d 876 (2012). A manifest error affecting a constitutional right may be raised for the first time on review.[4] RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh,* 143 Wn.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

[4] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

B. The state constitution guarantees the right to a unanimous jury determination as to the mode of participation in a felony.

The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon,* 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). However, in Washington, an accused person has a state constitutional right to a unanimous verdict. Wn. Const. art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman,* 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) ("*Coleman* I"). Because the federal right does not attach to criminal defendants in Washington, it is necessary to determine the scope of the state right. The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

No Washington court has examined art. I, § 21 under *Gunwall* to determine whether or not an accused person has a constitutional right to jury unanimity as to the mode of participation in a felony. Historically, the common law drew sharp distinctions between accessories before the fact, accessories after the fact, principals in the first degree, and principals in the second degree, and jury unanimity was required as to the mode of

participation. *Gunwall* analysis shows that art. I, § 21 incorporated this unaminity requirement.

1. Wash. Const. art. I, § 21 preserves the common law right to a unanimous jury determination of an accused person's mode of participation in a felony.

The first *Gunwall* factor requires examination of the text of the state constitutional provision at issue. Wn. Const. Article I, Section 21 provides that "[t]he right of trial by jury shall remain inviolate..." The strong, simple, direct, and mandatory language ("shall remain inviolate") implies a high level of protection, and, in fact, the court has noted that the language of the provision requires strict attention to the rights of individuals. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Art. I, § 21 has no federal counterpart. The Washington Supreme Court has found the difference between the two constitutions significant, and determined that the state constitution provides broader protection.[5] *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982)

[5] The court held that under the state constitution "no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime." This is in contrast to the more limited protections available under the federal constitution. *Mace*, at 99-100.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21 "preserves the right as it existed at common law in the territory at the time of its adoption." *Mace*, at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003). Historically, the common law distinguished between four types of participants in crime:

> (1) principals in the first degree who actually perpetrated the offense; (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission; (3) accessories before the fact who aided or abetted the crime, but were not present at its commission; and (4) accessories after the fact who rendered assistance after the crime was complete.

Standefer v. U. S., 447 U.S. 10, 15, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980). Determining the proper category was crucial to a successful prosecution:

> the category determined venue (the principal had to be prosecuted where the crime took place, while the aider and abettor had to be prosecuted where his or her act of abetting took place); the phrasing of the indictment (variance was fatal); and, at times, whether the prosecution could even be initiated altogether (accessories could be tried only after the conviction of the principal). Consequently, "considerable effort was expended in defining the categories."

Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Fordham L. Rev. 1341,

1357-58 (2002) (footnotes and citations omitted) (quoting *Standefer, at* 16).

Among the other procedural requirements that flowed from these common law distinctions was the requirement of unanimity. In felony cases, the prosecution was required to plead and prove the mode of participation, and conviction required a unanimous finding on that issue:

> the common law absolutely prohibited abrogation of verdict specificity, or otherwise eliminating the requirement of unanimity of theory as between an aider and abettor and a principal…

Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. Rev. 85, 112-113 (2005).

These "'intricate' distinctions"[6] endured in Washington until they were partially abolished by the territorial legislature in 1881:

> No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals.

Code of 1881, §956. This statute continued in effect following the 1889 adoption of the state constitution, pursuant to Wn. Const. art. XXVII, § 2.[7]

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[6] Id.

Notwithstanding this provision, Washington courts continued to distinguish between the modes of participation where required. *See, e.g., State v. Gifford*, 19 Wn. 464, 53 P. 709 (1898); *State v. Nikolich*, 137 Wn. 62, 241 P. 664 (1925). In *Gifford,* the state charged the defendant with rape as a principal (in accordance with the "no distinction" statute). After conviction, the defendant appealed, and the Supreme Court reversed because the evidence showed he'd aided and abetted the rapist by procuring the victim. In reversing the conviction, the Supreme Court made the following remarks regarding the "no distinction" statute:

> [T]he object of this statute was to do away with some of the technical hindrances which before existed in relation to the trials of accessories, and that it was the intention, under this statute, that the defendant might be indicted and tried even though the principal had been acquitted, and to make an accessory before the fact the same as a principal so far as the punishment was concerned, and so far as the mode, manner, and time of trial were concerned. But we do not think it was the intention of the legislature, in the passage of this law, to set a trap for the feet of defendants. The defendant enters upon the trial with the presumption of innocence in his favor, and if he were called upon to blindly defend against a crime of which he had no notice, and which, we think, would be the result of the strict construction of this law contended for, the law itself would be unconstitutional

Gifford, at 468.

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[7] That provision reads: "All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature…"

In *Nikolich,* several defendants were accused of aiding or abetting an unknown person ("John Doe") in the commission of an arson; however, the evidence at trial established that the fire was set by one of the codefendants (a person named Howard Carter).[8] Despite this, the jury was instructed to determine whether or not the defendants were guilty of aiding and abetting John Doe. Codefendant Howard Carter (and his wife) were acquitted of the charge, but the remaining defendants were convicted. Under these circumstances, the Supreme Court reversed, reasoning as follows:

> Even though the accessory may be tried and convicted as principal either before or after the principal actor, he may not be convicted in the absence of proof that the one to whom he is charged as accessory actually committed the crime… The result [here] is that there is no proof that the principal actor [John Doe] to which the jury were required to find the appellants aiders and abettors had anything to do with the setting of the fire.

Nikolich, at 66-67. In reaching this decision, the Supreme Court quoted from a Mississippi case interpreting a similar statute:

> "[I]f the evidence shows that one or more [codefendants] were accessories before the fact, though charged in the indictment as principals, it is absolutely necessary to prove the party guilty who actually committed the felony before you can secure proof of the guilt of the accessories before the fact, though charged in the indictment as principals…"

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[8] Prior to trial, the prosecutor announced that John Doe was Howard Carter; however, no amendment was made to the charging document. *Nikolich, at* 63-64.

Nikolich, at 66-67 (quoting *Osborne v. State*, 99 Miss. 410, 55 So. 52, 54 (1911)).[9]

As these early cases demonstrate, the "no distinction" statute did not purport to dispense with such constitutional requirements as the right to adequate notice of the mode of participation, or the right to proof beyond a reasonable doubt of the principal's guilt (even if the principal escaped criminal liability). Similarly, nothing in the statute suggests that the legislature sought to eliminate the requirement that jurors be unanimous as to the mode of participation.[10] Code of 1881, §956. Instead, the object of the statute was to remove certain obstacles to prosecution that had evolved under the common law scheme.[11]

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[9] The court also cited a Texas case outlining similar reasoning. *Nikolich, at* 67 (citing *Gibson v. State*, 53 Tex. Crim. 349, 364, 110 S.W. 41 (1908) ("Where a party is being tried as an accessory before the fact, or as an accomplice, it is essential as a predicate for, or condition precedent to, his guilt, that the state should establish the guilt of the principal, for his guilt is dependent on that of the principal, whether the latter is on trial or not."))

[10] One commentator has suggested that the corresponding federal statute was not meant to eliminate the requirement of unanimity as to mode of participation in federal crimes. Kurlan, *at* 101-116. Despite this, "For almost a century, federal courts, without adequate legal and historical analysis, have simply viewed the elimination of the distinctions between a principal and an aider and abettor as also dispensing the need for jury unanimity…" *Id, at* 98.

[11] Had the legislature intended to remove the unanimity requirement, it would have done so explicitly. Any attempt to do so, however, would have been found unconstitutional. *See Gifford, at* 468 (noting that the statute would be unconstitutional if it dispensed with the requirement that the accused person be given adequate notice of the charged mode of participation).

(Continued)

The fourth *Gunwall* factor "directs examination of preexisting state law, which 'may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.'" *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62). There do not appear to be any cases addressing nonconstitutional claims on this issue. Nor has there been legislative or executive attempts to address the issue.

The fifth *Gunwall* factor (structural differences in the two constitutions) always points toward pursuing an independent analysis, "because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State's power." *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. An accused person's right to juror unanimity is an issue of particular state interest or local concern. *See State v. Silva*, 107 Wn. App. 605, 621, 27 P.3d 663 (2001) (outlining other similar areas of state interest). There is no need for national uniformity on the issue.

Five of the six *Gunwall* factors establish that art. I, § 21 preserved the common law right of unanimity as to mode of participation in a crime; the remaining factor (pre-existing state law) does not favor either side of the analysis. Thus *Gunwall* analysis suggests that the "inviolate" right to a jury trial includes the right to jury unanimity as to the mode of participation. Const. art. I, § 21.

2. The Supreme Court's *Hoffman* decision does not control in this case.

The Washington Supreme Court has previously held that "the right to jury unanimity" does not include unanimity as to the mode of an accused person's participation in a crime. *See State v. Hoffman*, 116 Wn. 2d 51, 104-05, 804 P.2d 577 (1991) (citing *State v. Carothers,* 84 Wn.2d 256, 525 P.2d 731 (1974)). Although the *Hoffman* case referred to the "right to jury unanimity," the court made no mention of art. I, § 21 and did not analyze the scope of that provision. Instead, the court relied on the reasoning outlined in *Carothers*.[12]

[12] Curiously the *Hoffman* court also claimed that "[t]his court reaffirmed [*Carothers*] in *State v. Davis,* 101 Wn.2d 654, 658, 682 P.2d 883 (1984)." But *Davis* had nothing to do with unanimity. Instead, the *Davis* court held that an accomplice to robbery could be found guilty of first degree robbery even absent proof of knowledge that the principal was armed.

Carothers does not provide an adequate foundation for dispensing with a constitutional right derived from centuries of common law. First, the *Carothers* court made only one passing reference to art. I, § 21. *Carothers, at* 262 (noting that the unanimity issue was constitutional and thus could be raised for the first time on review). The court did not analyze the provision to determine whether or not it protected a right to unanimity as to the mode of an accused person's participation.

Second, even if *Carothers* had examined art. I, § 21, it would not have had the benefit of *Gunwall* (which was not decided until 1986, 12 years after *Carothers*). *Gunwall* provides the appropriate framework for answering questions such as that posed by this issue. In the absence of proper *Gunwall* analysis, the *Carothers* court's reasoning amounted to little more than "pure intuition," rather than the "articulable, reasonable and reasoned" process that now governs the analysis. *Gunwall, at* 63.

Third, the *Carothers* court focused on whether the mode of participation comprised an alternative means[13] of committing an offense. *Id, at* 262-264. The court determined that it was *not* an alternative means, and thus the unanimity issue was not controlled by *State v. Golladay*, 78 Wn. 2d 121, 470 P.2d 191 (1970) *overruled in part by State v. Arndt*, 87

[13] The court used the phrase "method or mode of committing a crime" instead of the phrase "alternative means."

Wn. 2d 374, 553 P.2d 1328 (1976).[14] This holding—that the mode of participation is not an alternative means—is not a determination of the protections afforded by art. I, § 21.[15] Whether or not the mode of participation is an alternative means of committing a crime, art I, § 21 protects the right to a unanimous jury determination as to the mode of participation.

Because the *Hoffman* court did not specifically address the art. I, § 21 right to unanimity, it should not control here. Furthermore, because the *Hoffman* decision rested on the limited and imperfect reasoning of *Carothers,* this court should urge the Supreme Court to revisit *Hoffman*.

C. The trial court's failure to require juror unanimity as to the mode of participation requires reversal of the conviction because the prosecution relied on proof that Mr. Holcomb acted as a principal and as an accomplice.

In multiple acts cases, the failure to provide a unanimity instruction is presumed to be prejudicial.[16] *Coleman, at* 512; *see also*

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[14] In *Golladay,* the court overturned a conviction after the trial court submitted three alternative means to the jury, one of which was not supported by sufficient evidence.

[15] If the *Carothers* holding described the scope of art. I, § 21, then multiple acts cases would also not require juror unanimity, since multiple acts are not alternative means of committing a crime. But a unanimity instruction is always required in a multiple acts case, unless the prosecution elects a particular act to support a charge.

[16] Unless the prosecution elects a particular act upon which to proceed.

State v. Vander Houwen, 163 Wn.2d 25, 38, 177 P.3d 93 (2008). Without the election or instruction, each juror's guilty vote might be based on facts that her or his fellow jurors believe were not established. *Coleman, at* 512. Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman, at* 512. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id, at* 512.

The same rule should apply as to the mode of participation. If the court instructs on accomplice liability but there is evidence that the accused person acted as a principal, either the prosecution must elect a particular theory of liability or the court must instruct jurors that unanimity is required as to the mode of participation. *See Coleman, at* 512. Failure to do so is constitutional error that is presumed prejudicial and requires reversal unless harmless beyond a reasonable doubt. *Id.*

In this case, the court's instructions allowed conviction by a split jury. Under the court's instructions, the jury was entitled to convict even if they did not unanimously agree as to Mr. Holcomb's mode of participation in the assault. *See* Instruction No. 8, Supp. CP. Some jurors may have believed he hit Burnett, while others believed he stood by while another man hit Burnett. This created a manifest error affecting Mr.

Holcomb's right to a unanimous jury under art. I, § 21, and thus may be reviewed for the first time on appeal. *See* RAP 2.5(a)(3).

The court's failure to instruct on the unanimity requirement violated Mr. Holcomb's state constitutional right to a unanimous jury under art. I, § 21. His conviction must be reversed and the case remanded for a new trial. If the prosecutor does not elect a theory of liability, the jury must be instructed on the unanimity requirement. *See Coleman, at* 512.

II. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *McDevitt, at* ___. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *Kirwin*, *at* 823. Free speech challenges are different from most constitutional challenges to statutes; under the First Amendment, the state bears the burden of justifying a restriction on speech.[17] *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

[17] Ordinarily, the burden is on the party challenging the statute to show beyond a reasonable doubt that it is unconstitutional. *Washington Off Highway Vehicle Alliance v. State*, ___ Wn.2d ___, ___, ___ P.3d ___ (2012).

(Continued)

B. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds.

The First Amendment to the U.S. Constitution provides that "Congress shall make no law… abridging the freedom of speech." U.S. Const. Amend. I. This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).[18] A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. *Immelt, at* ___. Anyone accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Immelt, at* ___.

An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Immelt, at* ___. In other words, "[f]acts are not essential for consideration of a facial challenge…on First Amendment grounds." *City of Seattle v. Webster,* 115 Wn.2d 635, 640,

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[18] Washington's constitution gives similar protection: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Wn. Const. art. I, § 5.

802 P.2d 1333 (1990), *cert. denied,* 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003). Instead of applying the general rule for facial challenges, "[t]he Supreme Court has 'provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.'" *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005) (quoting *Hicks, at* 119); *see also Conchatta Inc. v. Miller,* 458 F.3d 258, 263 (3rd Cir. 2006).

Mr. Holcomb's jury was instructed on accomplice liability. Instruction No. 6, Supp. CP. Accordingly, Mr. Holcomb is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks , at* 118-119; *Webster , at* 640.

C. The accomplice liability statute is overbroad because it criminalizes pure speech that is not directed at and likely to incite imminent lawless action.

The First Amendment protects speech advocating criminal activity: "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coal.*, 535 U.S.

234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Because of this, speech advocating criminal activity may only be punished if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech protected by the First Amendment. Under RCW 9A.08.020, one may be convicted as an accomplice if she, acting "[w]ith knowledge that it will promote or facilitate the commission of the crime… aids or agrees to aid [another] person in planning or committing it." The statute does not define "aid." No Washington court has limited the definition of aid to bring it into compliance with the U.S. Supreme Court's admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) "imminent lawless action." *Brandenburg , at* 447-449.

Washington courts, including the trial judge here, have adopted a broad definition of aid: "The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence." *See* WPIC 10.51; Instruction No. 6, Supp. CP. By defining "aid" to include assistance… given by words… [or] encouragement…", the instruction criminalizes a vast amount of pure speech protected by the First

Amendment, and runs afoul of the U.S. Supreme Court's decision in *Brandenburg*.

Thus, for example, Washington's accomplice liability statute would criminalize the speech protected by the U.S. Supreme Court in *Hess v. Indiana*, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) ("We'll take the fucking street later [or 'again']"), in *Ashcroft* (virtual child pornography found to encourage actual child pornography), and *Brandenburg* itself (speech "'advocat(ing) * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform'") (quoting Ohio Rev. Code Ann. s 2923.13). Each of these cases involved words or encouragement made with knowledge that the words or encouragement would promote or facilitate the commission of the crime, yet the Supreme Court found this speech—criminalized by RCW 9A.08.020—to be protected by the First Amendment.

It is possible to construe the accomplice statute in such a way that it does not reach constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. *Brandenburg, supra.* However, such a construction has yet to be imposed. The prevailing construction—as expressed in WPIC 10.51

and adopted by the trial court in Instruction No. 6—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Brandenburg, supra.*

Mr. Holcomb's convictions must be reversed and the case remanded for a new trial. *Brandenburg, supra.* Upon retrial, the state may not proceed on any theory of accomplice liability. *Id.*

D. The *Coleman* II and *Ferguson* courts applied the wrong legal standard in upholding RCW 9A.08.020, and should be reconsidered in light of established U.S. Supreme Court precedent.

The Court of Appeals has upheld Washington's accomplice liability statute. *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011) ("*Coleman* II"); *State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011). In *Coleman* II, Division I concluded that the statute's *mens rea* requirement resulted in a statute that "avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime." *Coleman* II, *at* 960-961 (citations omitted). In *Ferguson,* Division II court adopted the reasoning set forth in *Coleman* II. The court's decisions in *Coleman* II and *Ferguson* are incorrect for two reasons.

First, Division I's analysis in *Coleman* II—that the statute is constitutional because it does not cover "protected speech activities that are not performed in aid of a crime and that only consequentially further

the crime"—is severely flawed, because the First Amendment protects much more crime-related speech than the "speech activities" described by the court. *Coleman* II, *at* 960-961. For example, the state cannot criminalize speech that is "nothing more than advocacy of illegal action at some indefinite future time." *Hess, at* 108.

Contrary to Division I's reasoning, speech encouraging criminal activity is protected even if it *is* performed in aid of a crime and even if it *directly* furthers the crime, unless it is also "directed to inciting or producing *imminent lawless action* and *is likely to incite or produce such action*." *Brandenburg at,* 447; *cf. Coleman* II, *at* 960-961. Merely examining the *mens rea* required for conviction is insufficient to save the statute, because a person can engage in criminal advocacy with the intent to further a particular crime and still be protected by the constitution.

Speech that "encourage[s] unlawful acts" is protected, unless it falls within the narrow category outlined by *Brandenburg. Ashcroft, at* 253. The state cannot ban all speech made with intent to promote or facilitate the commission of a crime; such speech can only be criminalized if it also meets the *Brandenburg* test. A conviction can only be sustained if the jury is instructed that it must find that the speech was (1) "*directed to* inciting or producing imminent lawless action…" and (2) "likely to incite or produce such action." *Brandenburg at* 447. The jury was not so

instructed in this case. Thus, assuming (as the *Coleman* II court claims) that the accomplice liability statute avoids the "protected speech activities" described, such avoidance is not enough to render the statute constitutional, if it also reaches other protected speech.

Second, the *Coleman* II court applied the wrong legal standard in evaluating the statute. The U.S. Supreme Court has drawn "vital distinctions between words and deeds, between ideas and conduct." *Ashcroft, at* 253. The accomplice liability statute reaches pure speech: "words" and "encouragement" are sufficient for conviction, if accompanied by the proper *mens rea. See* WPIC 10.51; Instruction No. 6, Supp. CP. Because the statute reaches pure speech, it *cannot* be analyzed under the more lenient First Amendment tests for statutes regulating conduct.

But the *Coleman* II court ignored this distinction. Specifically, the *Coleman* II court relied on cases dealing with laws regulating behavior. The court began its analysis by noting that "[a] statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute's plainly legitimate sweep." *Coleman* II, *at* 960 (citing *Hicks, at* 122 and *Webster, at* 641.) The court then imported the

Supreme Court's rationale from *Webster* and applied it to the accomplice liability statute:

> We find Coleman's case similar to *Webster*. Webster was charged under a Seattle ordinance banning intentional obstruction of vehicle or pedestrian traffic. The Washington Supreme Court explained the ordinance was not overbroad because the requirement of criminal intent prevented it from criminalizing protected speech activity that only consequentially obstructed vehicle or pedestrian traffic…In the same way, the accomplice liability statute Coleman challenges here requires the criminal *mens rea* to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime.

Coleman II, *at* 960-61 (citation omitted). But (as noted) *Webster* involved the regulation of *conduct*—obstruction of vehicle or pedestrian traffic—and therefore, the statute could be upheld based on the distinction between "innocent intentional acts which merely consequentially block traffic…" and acts performed with the requisite *mens rea*. *Webster, at* 641-642.

No such distinction is available here, because the accomplice liability statute reaches pure speech, unaccompanied by any conduct—i.e. speech that knowingly encourages criminal activity, including speech (words or encouragement) that is not directed at and likely to incite imminent lawless action. *See* WPIC 10.51; Instruction No. 6, Supp. CP. The First Amendment does not only protect "innocent" speech; it protects free speech, including criminal advocacy directly aimed at encouraging

criminal activity, so long as the speech does not fall within the rule set forth in *Brandenburg.*

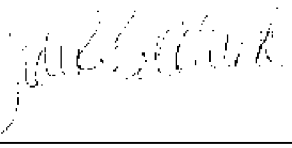
The *Coleman* II court applied the wrong legal standard in upholding the accomplice liability statute. It should have analyzed the statute under *Brandenburg* instead of the test for conduct set forth in *Webster.* Accordingly, *Coleman* and *Ferguson* should be reconsidered.

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on April 7, 2013,

BACKLUND AND MISTRY



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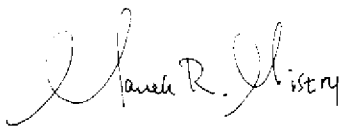

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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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and to:

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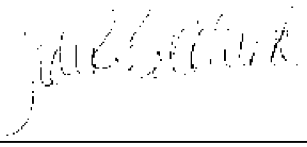
Montesano, WA 98563

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 7, 2013.



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April 07, 2013 - 7:18 PM

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