No. 44726-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeffrey Weller,

Appellant.

Clark County Superior Court Cause No. 11-1-01678-1

The Honorable Judge Barbara Johnson

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Weller's unlawful imprisonment conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.

2. Mr. Weller's unlawful imprisonment conviction violated his state constitutional right to notice of the charges against him, under Wash. Const. art. I, §§ 3 and 22.

3. The Information was deficient because it failed to allege the essential elements of unlawful imprisonment.

   ISSUE 1: A criminal Information must set forth all of the essential elements of an offense. The Information charged Mr. Weller with unlawful imprisonment, alleging only that he knowingly restrained another person. Did the Information omit essential elements of the offense in violation of Mr. Weller's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. art. I, § 22?

4. The trial court erred by denying Mr. Weller's motion to suppress.

5. The convictions were based in part on evidence illegally obtained in violation of Mr. Weller's right to be free from unreasonable searches and seizures under the Fourth Amendment and his right to privacy under Wash. Const. art. I, § 7.

6. The trial court erred by finding that "community caretaking" justified the warrantless search.

7. The trial court applied the wrong legal standard in rejecting Mr. Weller's motion to suppress.

   ISSUE 2: The state and federal constitutions prohibit searches under the "community caretaking" exception to the warrant requirement unless six criteria are met. Here the state failed to establish that officers had a reasonable belief that the children were at imminent risk of substantial injury, or that officers had a reasonable basis to associate any need for assistance with Mr. Weller's garage. Should the trial judge have excluded evidence seized in violation of Mr. Weller's rights under the Fourth Amendment and Wash. Const. art. I, § 7?

8. Mr. Weller was convicted through the operation of a statute that is unconstitutionally overbroad.

9. The accomplice liability statute impermissibly permits conviction based on "words" or "encouragement" spoken with knowledge but without intent to promote or facilitate a crime.

10. The accomplice liability statute impermissibly permits conviction based on "words" or "encouragement" even absent proof that the speech is likely to incite imminent lawless action.

11. The trial judge erred by giving Instruction No. 7, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.

> **ISSUE 3:** A statute is unconstitutional if it criminalizes speech without proof that the speaker intended to incite crime. The accomplice liability statute criminalizes speech made with knowledge that it will facilitate or promote commission of a crime, even if the speaker lacked the intent to incite imminent lawless action, and even if the speech was unlikely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

12. Mr. Weller's exceptional sentence infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove essential elements of each aggravating factor.

13. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.

14. The trial court erred by failing to instruct jurors regarding the state's obligation to prove that Mr. Weller acted as a principal, for purposes of the special verdict forms.

15. The special verdict form did not reflect a jury finding that Mr. Weller acted as a principal as to each offense.

> **ISSUE 3:** A court may only impose an exceptional sentence if jurors find all essential elements of the aggravating factor upon which the sentence is based. Here, the court's instructions relieved the state of its burden to prove that Mr. Weller acted

as a principal with regard to each offense, and the special verdict did not reflect a jury finding on that issue. Must Mr. Weller's sentence be vacated and the case remanded for sentencing within the standard range?

16. The trial court infringed Mr. Weller's Sixth and Fourteenth Amendment right to a jury trial by imposing an exceptional sentence based on judicial factfinding.

17. The trial court infringed Mr. Weller's Fourteenth Amendment right to proof beyond a reasonable doubt by imposing an exceptional sentence based on judicial factfinding.

18. The trial court erred by adopting Finding of Fact No. 2.4. CP 40.

19. The trial court erred by adopting Finding of Fact No. 3. CP 40.

20. The trial court erred by adopting Finding of Fact No. 4. CP 41.

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> **ISSUE 5:** A sentencing court may not rely on judicial factfinding to impose an exceptional sentence. Here, the trial court imposed an exceptional sentence based in part on judicial factfinding. Did the trial court infringe Mr. Weller's Sixth and Fourteenth Amendment right to a jury trial and to proof beyond a reasonable doubt by imposing an exceptional sentence based in part on judicial factfinding?

36. Pursuant to RAP 10.1, Mr. Weller adopts and incorporates the assignments of error set forth in Ms. Weller's Opening Brief.

> **ISSUE 7:** Pursuant to RAP 10.1, Mr. Weller adopts and incorporates the issues set forth in Ms. Weller's Opening Brief.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS[1]

Jeffrey and Sandra Weller lived with their blended family in Clark County. As of the summer of 2011, this included six children. Their oldest children, twins C.W. and C.G.[2], were 16. They had been adopted by Sandra Weller and Timothy Graf. They resided with Ms. Weller after she and Graf separated. RP 806-809, 811.

Mr. Weller brought two biological sons to the relationship. I.W. was fifteen, and E.W. was twelve. RP 719-720; RP 1224. Ms. Weller's biological son N.G. was ten. RP 1156-1157. E.W. was four years old, and he was the biological child of both Mr. and Ms. Weller. RP1488.

There were ongoing issues regarding legal custody of the children. A court had recently awarded custody of I.W. and E.W. to Mr. Weller.[3] RP 1283-1288. Neither I.W. nor E.W. wanted to reside with their father. They made this known, but nothing came of their complaints. RP 1243-1244. Social workers and guardians *ad litem* made multiple home visits

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[1] Pursuant to RAP 10.1, Mr. Weller also adopts and incorporates the Statement of the Case set forth in Ms. Weller's Opening Brief.

[2] This brief refers to the children by the initials of the last names they used for themselves during trial. For the twins, this means that C.W. is the son, and C.G. is the daughter. RP 806, 1101.

[3] When Ms. Weller and Mr. Graf separated, it was likewise acrimonious. RP 1586-1595.

leading up to the court decision awarding Mr. Weller custody in the summer of 2011. RP 1284-1288.

The twins, C.W. and C.G., attended counseling for years. RP 851-852. In October of 2011, they left their counselor a note. In the note, they alleged for the first time that Mr. and Ms. Weller had subjected them to horrific abuse. Ex. 51. The counselor called child protective services. A social worker made a home visit. Later that same day, police and social workers went to the Weller home for a "welfare check." RP 580-581.

Officers Aldridge and Jensen arrived at the Weller house in response to the request from CPS. RP 65-66, 144. They knocked and spoke briefly to Ms. Weller. When the officers arrived, they twins stood inside, just behind Ms. Weller. Ms. Weller stepped aside and gestured toward the twins. She did not expressly invite the officers inside. The officers entered the house. RO 70-71, 151.

Once inside, the officers took the twins into the garage, to talk to them away from the rest of the family. RP 91, 165-67. They did not obtain permission from either parent to enter the garage. RP 157-159. Once inside the garage, Chris and Christa did not focus on the conversation. Instead, they looked around for a "stick." RP 169-70. They claimed their parents used this stick to abuse them. RP 159-162, 166.

Aldridge helped the twins look for the stick. She saw a piece of light-colored "debris wood" leaning against the wall next to a filing cabinet. RP 170. She asked the twins whether it was the stick they were looking for. RP 170-71. They said that it was. RP 170-71. Until the children identified the stick, the officers did not know whether or not it was significant. RP 174. Officer Jensen then grabbed the stick. When he moved it, he and Aldridge were able to see that it appeared to have blood on it. Jensen wrapped the stick in paper and placed it into evidence. RP 94, 172, 175.

The police removed the children from the home, CPS placed them with their respective other parents. The children visited each other. RP 720-722, 774. After talking with the children, the state filed multiple charges against the Wellers. Specifically, Mr. Weller was charged with: three counts of second-degree assault against C.G., two counts of second-degree assault against C.W., two counts of third-degree assault (with an alleged victim of C.G.), two counts of third-degree assault (alleged victim C.W.), one count of third-degree assault (alleged victim I.W.), two counts of assault of a child in the third degree (one each: N.W. and E.W.), and two counts of simple assault (one each: E.W. and N.W.). The state also charged two counts of unlawful imprisonment (one for C.G. and one for C.W.). The Information alleged that both codefendants "knowingly

restrained [C.G], a human being." Each count also carried two aggravators: deliberate cruelty and domestic violence with a pattern of ongoing abuse. CP 1-9.

Mr. Weller moved to suppress the stick based on the warrantless search of his garage. CP 79-86; RP 134-35. The court denied his motion, ruling that the seizure of the stick was justified under the "community caretaking" exception to the warrant requirement. The court also relied on the "plain view" doctrine. RP 289-90.

At trial, five of the children testified. RP 718-910, 1011-1100, 1156-1212, 1223-1260. The stick was admitted, along with expert testimony that C.W.'s blood and Mr. Weller's DNA were found on it. RP 1123-1149. Mr. and Ms. Weller also testified, and denied the allegations. RP 1273-1368, 1374-1444.

The court instructed the jury regarding accomplice liability:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he or she in an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote of facilitate the commission of the crime, he or she either:
> (1) solicits, commands, encourages, or requests another person to commit the crime, or
> (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. CP 113.

The aggravating factor instructions read as follows:

If you find the defendant guilty of any of the crimes charged in Counts 1 through 14, then you must determine if any of the following aggravating circumstances exists:

- Whether the defendant's conduct during the commission of the crime manifested deliberate cruelty to the victim
- Whether the current offense involved domestic violence and was part of an ongoing pattern of psychological or physical abuse of the victim manifested by multiple incidents over a prolonged period of time

"Deliberate cruelty" means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime.

An "ongoing pattern of psychological or physical abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.
CP 149.

The special verdict forms regarding each aggravating factor included the following language:

(1) QUESTION: Did the defendant's conduct during the commission of the crime manifest deliberate cruelty to the victim?

ANSWER: Yes

(2) QUESTION: Were JEFFREY WAYNE WELLER and [C.G. or C.W] members of the same household or family?

ANSWER: Yes

(3) Was the crime part of an ongoing pattern of psychological or physical abuse of the victim manifested by multiple incidents over a prolonged period of time?

ANSWER: Yes
CP 151, 153, 155, 157, 159, 161, 165, 167, 169, 171, 173.

The jury convicted Mr. Weller of two counts of simple assault, five counts of second-degree assault, one count of unlawful imprisonment and one count of third-degree assault of a child. The jury endorsed both aggravating factors on each conviction. CP 150-177.

Mr. Weller had no criminal history. He had a standard range of 63-84 months for his most serious convictions. CP 20-39. The court imposed an exceptional sentence totaling 240 months. RP 1614. The court made lengthy factual findings in support of the exceptional sentence. CP 10-19.

Mr. Weller timely appealed. CP 44.

ARGUMENT

I. MR. WELLER'S CONVICTION FOR UNLAWFUL IMPRISONMENT VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, § 22.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt v. Harbor View Med. Ctr.*, 85367-3, 2013 WL 6022156 (Wash. Nov. 14, 2013). A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id,* at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id,* at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wn. App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

B. The Information failed to allege the essential elements of unlawful imprisonment.

The Sixth Amendment to the Federal Constitution guarantees an accused person the right "to be informed of the nature and cause of the

accusation." U.S. Const. Amend. VI.[4] A similar right is secured by the Washington State Constitution. Wash. Const. art. I, § 22. All essential elements must be included in the charging document. *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

Here, Mr. Weller was charged with unlawful imprisonment under RCW 9A.40.040. The statute provides that "[a] person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040.[5] By itself, this language does not describe a crime. *State v. Johnson*, 172 Wn. App. 112, 138, 297 P.3d 710 (2012), as modified on denial of reconsideration (Feb. 13, 2013), *review granted in part,* 178 Wn.2d 1001, 308 P.3d 642 (2013) (Johnson II). A person may lawfully restrain another under many circumstances: a parent may restrain a child, a police officer may restrain an arrestee, a store owner may restrain a shoplifter.

Accordingly, the Information must do more than allege 'knowing restraint' of another. *Id.* A charging document which alleges only

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[4] This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

[5] "'Restrain' means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him or her has not acquiesced." RCW 9A.40.010(6).

'knowing restraint' does not provide adequate notice of the essential elements, and does not charge a crime. *Id.*

The Information in this case charged only that Mr. Weller "knowingly restrain[ed]" another. CP 3-5. It suffered the same defect outlined in *Johnson.*[6] Accordingly, Mr. Weller's conviction for unlawful imprisonment must be reversed. *Id.* The charge must be dismissed without prejudice. *Id.*

II. THE WARRANTLESS SEARCH OF MR. WELLER'S GARAGE VIOLATED HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS AND ART. I, § 7.

A. Standard of Review.

The validity of a warrantless search is reviewed *de novo*. *State v. Westvang*, 174 Wn. App. 913, 918, 301 P.3d 64 (2013). A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed de novo. *Id.* In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn. App. 541, 562, 222 P.3d 1217 (2009).

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[6] In a split decision, another panel of Division I has since repudiated *Johnson*. *State v. Phuong*, 174 Wn. App. 494, 545, 299 P.3d 37 (2013) (citing *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013), as amended (Feb. 8, 2013)). The Supreme Court has accepted review of the issue. *Johnson II,* 178 Wn.2d 1001. The outcome in this case will turn on the Supreme Court's decision in *Johnson.*

B. No exception to the warrant requirement justifies the warrantless search of Mr. Weller's garage.

Both the Fourth Amendment and art. I, § 7 prohibit searches and seizures without a search warrant. *Westvang,* 301 P.3d at 68; U.S. Const Amends. IV; XIV; art. I, § 7. This "blanket prohibition against warrantless searches is subject to a few well guarded exceptions…" *Id.* When police have ample opportunity to obtain a warrant, courts do not look kindly on their failure to do so. *State v. White*, 141 Wn. App. 128, 135, 168 P.3d 459 (2007) (internal citation omitted).

The state bears the heavy burden of showing that a search falls within one of the narrowly drawn exceptions to the warrant requirement. *Westvang,* 301 P.3d at 68. Before evidence seized without a warrant can be admitted at trial, the state must establish an exception to the warrant requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Unlike the Fourth Amendment, art. I, § 7 focuses on individual rights and the expectation of privacy, not the reasonableness of police conduct. *State v. Monaghan*, 165 Wn. App. 782, 787, 266 P.3d 222 (2012). Thus, under the state constitution, a warrantless search presumptively violates the state constitution whether reasonable or not.

Id. Good faith on the part of the officers is not enough to satisfy art. I, § 7. *State v. Schultz*, 170 Wn.2d 746, 760, 248 P.3d 484 (2011).

The state constitution grants special protection to the home. *Schultz*, 170 Wn.2d at 753. "[T]he closer officers come to intrusion into a dwelling, the greater the constitutional protection." *Id.* (*quoting State v. Ferrier,* 136 Wn.2d 103, 112, 960 P.2d 927 (1998)).

1. The search of Mr. Weller's garage was not justified under the community caretaking or emergency exception to the warrant requirement.

The emergency aid or community caretaking exception to the warrant requirement permits "limited invasion" of a person's privacy when required in order for law enforcement to render aid or assistance. *Schultz*, 170 Wn.2d at 754.

In order to justify a search under the emergency aid exception, the government must show that the situation meets six criteria. *Id.* First, the officers must subjectively believe that someone likely needs assistance. *Id.* Second, the officer's belief must be reasonable. *Id.* Third, the officer must possess a reasonable basis to associate the need for assistance with the place to be searched. *Id.* Fourth, there must be an imminent threat of substantial injury to persons or property. *Id.* Fifth, the officers must believe that a specific person or piece of property is in need of immediate

aid. *Id.* Finally, the claimed emergency must not be a pretext for a general evidentiary search. *Id.*

The search of Mr. Weller's garage cannot be justified under the emergency aid exception to the warrant requirement. The officers did not have a reasonable basis to believe that the children's safety was compromised by something in the garage. Nor was there an imminent threat of substantial injury if police did not immediately search the garage.

In fact, Aldridge acknowledged that she started looking for the stick in order to get the children to calm down and to focus on the conversation. RP 169-170. She testified that the children would not have been in danger if she had left the stick where it was. RP 190. In other words, her decision to explore the garage was not based on the "need for assistance" in connection with some "imminent threat of substantial injury."

The state did not establish the third and fourth *Schultz* criteria.[7] *Schultz*, 170 Wn.2d at 754. The search of Mr. Weller's garage cannot be justified under the emergency aid exception to the warrant requirement because the search of the garage was not necessary to protect the children

[7] From the record, it does not appear that the court considered the six criteria set forth in *Schultz*. RP 284-290.

or assess their safety. *Id.* The court erred by denying Mr. Weller's motion to suppress. *Id.*

2. The seizure of the stick cannot be justified under the plain view doctrine.

Under the plain view exception to the warrant requirement, an officer may lawful seize an item when (1) s/he is lawfully standing in the place where s/he sees the item and (2) s/he immediately knows that the item is incriminating evidence. *State v. Link*, 136 Wn. App. 685, 696-97, 150 P.3d 610 (2007) (*citing State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005)).

In the vast majority of cases, evidence seized by the police is in plain view when found. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The fact that an item is in plain view is only legally significant when the officers immediately recognize it as evidence of a crime. *Id.* Officers are not permitted to move an item in order to determine its significance. *Arizona v. Hicks*, 480 U.S. 321, 328, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) (Hicks I).

The trial court held that the officers validly seized the stick in Mr. Weller's garage because it was in plain view. RP 289-90. This was error. It was not immediately apparent that the stick was evidence of a crime as

required for seizure under the plain view doctrine. *Link*, 136 Wn. App. at 696-97.

Aldridge testified that she saw a piece of wood leaning against a wall in the garage. RP 170. The stick looked like "debris wood." RP 171. The officers did not know whether the piece of wood was significant until the twins told them that it was. RP 170-71. Jensen did not see that the stick had unique markings and brown stains until after he had removed it from his resting place. RP 95. At that point, Jensen placed the stick into evidence. RP 172.

The seizure of the stick was not justifiable under the plain view doctrine because it was not immediately recognizable as evidence of a crime. *Id.; Coolidge,* 403 U.S. at 465. The court erred by denying Mr. Weller's motion to suppress based on the plain view doctrine. *Id.*

The search of Mr. Weller's garage and the seizure of the stick violated his rights under the Fourth and Fourteenth Amendments and art. I, § 7. *Link*, 136 Wn. App. at 696-97; *Coolidge*, 403 U.S. at 465. Mr. Weller's convictions must be reversed. *Link*, 136 Wn. App. at 696-97; *Coolidge,* 403 U.S. at 465.

III. 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*. *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). 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.[8] *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

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.*

[8] 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*, 163 Wn. App. 722, 733, 260 P.3d 956 (2011) *review granted,* 173 Wn.2d 1013, 272 P.3d 247 (2012) (Off-Highway Vehicle Alliance I) and *aff'd sub nom. Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 290 P.3d 954 (2012) (Off Highway Vehicle Alliance II).

Hinkle, 51 Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).[9] A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. *Immelt,* 173 Wn.2d at 6-7. 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. *Id* at 33.

An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Id.* 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, 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) (Hicks II). 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

[9] 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." Wash. Const. art. I, § 5.

the overbroad statute imposes criminal sanctions.'" *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005) (quoting *Hicks II,* 539 U.S. at 119); *see also Conchatta Inc. v. Miller,* 458 F.3d 258, 263 (3rd Cir. 2006).

Mr. Weller's jury was instructed on accomplice liability. CP 113. Accordingly, Mr. Weller is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks,* 539 U.S. at 118-119; *Webster,* 115 Wn.2d at 640.

C. A person may not be convicted for speech absent proof of intent to promote or facilitate a crime.

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). This standard requires proof of intent; knowledge is insufficient. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

In *Freeman,* the defendant was convicted of counseling others to violate the tax laws. Some of his convictions were reversed because the trial court failed to instruct the jury on the *Brandenburg* standard:

> [A]n instruction based upon the First Amendment should have been given to the jury. As the crime is one proscribed only if done willfully, the jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur.

Freeman, 761 F.2d at 552 (citing *Brandenburg*).[10]

Accomplice liability in Washington does not require proof of intent. The accomplice statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech protected by the First Amendment.

Under RCW 9A.08.020, a person may be convicted as an accomplice for speaking "[w]ith knowledge" that the speech "will promote or facilitate the commission of the crime." RCW 9A.08.020; WPIC 10.51.[11] The statute does not require proof of intent, nor does it require any evidence regarding the likelihood that the words will produce imminent lawless action. RCW 9A.08.020. This interpretation

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[10] The court affirmed two of the convictions, finding that the "intent of the [defendant] and the objective meaning of the words used [were] so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." *Freeman,*761 F.2d at 552.

[11] The statute uses the word "aid," which Washington courts have interpreted to include "words" or "encouragement." RCW 9A.08.020; *see* WPIC 10.51.

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 U.S. Supreme Court found this speech—which would be criminal under 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 in *Brandenburg*. 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. 7—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Id.*

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

D. The *Coleman* court 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); *see also State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011). In *Coleman,* 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*, 155 Wn. App. at 960-961 (citations omitted).[12]

This is incorrect for three reasons.

First, in Washington, accomplice liability can be premised on speech made with *knowledge* that it will facilitate the crime, even if the speaker lacks the *intent* to facilitate the crime. RCW 9A.08.020; *see*

[12] In *Ferguson,* Division II court adopted the reasoning set forth in *Coleman.*

WPIC 10.51. *Coleman's* use of the phrase "in aid of" implies an intent requirement that is lacking from the statute and the pattern instruction. Under *Brandenburg,* the First Amendment protects speech made with knowledge but without intent to facilitate crime. Washington accomplice law directly contravenes this requirement.

Second, the First Amendment protects much more than speech "that only consequentially further[s] the crime." *Coleman*, 155 Wn. App. at 960-961 (citations omitted). The state cannot criminalize mere advocacy[13]—even if the words are spoken "in aid of a crime." *Coleman*, 155 Wn. App. at 960-961. Words spoken "in aid of a crime" are protected unless "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." *Brandenburg,* 395 U.S. at 447; *cf. Coleman,* 155 Wn. App. at 960-961. Even if the statute required proof of intent, it would remain unconstitutional unless it also required proof that the speech was likely to produce imminent lawless action.

Speech that "encourage[s] unlawful acts" is protected, unless it falls within the narrow category outlined by *Brandenburg. Ashcroft,* 535 U.S. at 253. The state cannot ban speech made with knowledge that it will promote a crime. Nor can it ban speech made with intent to promote the commission of a crime, unless the speech is (1) made with intent to incite

or produce "imminent lawless action" and (2) "likely to incite or produce such action." *Brandenburg,* 395 U.S. at 447.

Third, the *Coleman* 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,* 535 U.S. at 253. The accomplice liability statute reaches pure speech: "words" and "encouragement" are sufficient for conviction, if spoken with the appropriate knowledge. *See* WPIC 10.51; CP 113. Because the statute reaches pure speech, it *cannot* be analyzed under the more lenient First Amendment tests for statutes regulating conduct.

But the *Coleman* court ignored this distinction. Specifically, the *Coleman* 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,* 155 Wn. App. at 960 (citing *Hicks,* 539 U.S. at 122 and *Webster,* 115 Wn.2d at 641.) The court then imported the Supreme Court's rationale from *Webster* and applied it to the accomplice liability statute. *Coleman,* 155 Wn. App. at 960-61 (citation omitted).

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[13] *Hess,* 414 U.S. at 108.

But *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,* 115 Wn.2d 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; CP 113. 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* 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.

IV. THE EXCEPTIONAL SENTENCE INFRINGED MR. WELLER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY DETERMINATION OF ALL FACTS USED TO INCREASE THE PENALTY FOR AN OFFENSE.

A. Standard of Review

The adequacy of jury instructions is reviewed *de novo*. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Failure to instruct on all elements necessary to find an aggravating factor infringes the right to a jury trial. S*tate v. Williams-Walker*, 167 Wn.2d 889, 897, 225 P.3d 913 (2010). Such a failure creates a manifest error affecting a constitutional right and thus can be raised for the first time on appeal. *State v. Smith*, 174 Wn. App. 359, 365, 298 P.3d 785 (2013) *review denied,* 178 Wn.2d 1008, 308 P.3d 643 (2013); RAP 2.5(a)(3). Error of this type is never harmless. *Id.*

B. The trial court lacked authority to impose an exceptional sentence absent a jury finding that Mr. Weller acted as principal rather than accomplice.

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. U.S. Const. Amends. VI, XIV; Wash. Const.

art. I, §§ 21, 22.; *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Imposition of an enhanced sentence without a proper jury finding on the underlying facts violates an accused person's right to due process and to a jury trial. *Blakely,* 542 U.S. at 303; *Alleyne v. United States*, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (citing art. I, § 21).

Generally, an enhanced sentence must be based on the defedant's own conduct. *State v. Hayes*, --Wn.2d --, 312 P.3d 784 (Wash. Ct. App. 2013). An aggravated sentence cannot be based on accomplice liability, absent "explicit evidence of the legislature's intent to create strict liability." *Id* (citing *State v. McKim,* 98 Wn.2d 111, 117, 653 P.2d 1040 (1982)). Thus, for example, a firearm enhancement applies whenever "the offender or an accomplice" was armed with a firearm. RCW 9.94A.533(3). By contrast, a school zone enhancement cannot be applied to an accomplice who was not personally within the school zone. *State v. Pineda-Pineda*, 154 Wn. App. 653, 661-665, 226 P.3d 164 (2010).

Here the court instructed jurors on accomplice liability. CP 113 The court also outlined two aggravating factors: that Mr. Weller

manifested deliberate cruelty and that the offenses were part of an ongoing pattern of domestic violence. The instructions did not indicate that these aggravating factors only applied to acts personally committed by Mr. Weller. CP 149. The special verdict forms did not reflect a jury finding that Mr. Weller personally committed each offense and that each aggravator applied to him personally. CP 151, 153, 155, 157, 159, 161, 165, 167, 169, 171, 173.

The jury's verdicts did not authorize an exceptional sentence. *Hayes*, 312 P.3d 784 (Wash. Ct. App. 2013); *Alleyne* --- U.S. at ___. Absent an express jury finding that Mr. Weller personally committed each offense and personally engaged in the conduct required for each aggravator, the sentencing court lacked the power to impose an exceptional sentence. *Hayes*, 312 P.3d 784 (Wash. Ct. App. 2013); *Alleyne* --- U.S. at ___.

Mr. Weller's exceptional sentence must be vacated. *Hayes,* 312 P.3d 784 (Wash. Ct. App. 2013). The case must be remanded for sentencing within the standard range.

C. The exceptional sentence was based in part on judicial factfinding.

The trial court adopted numerous factual findings in support of the exceptional sentence. The factual findings related to testimony introduced at trial. They were not necessary to the jury's verdicts. CP 10-19. One

finding recited that "the above summarized trial testimony of [certain listed witnesses] supports the sentence imposed by the court as an exceptional sentence." CP 10-19.

A court may not impose an exceptional sentence based on judicial factfinding. *Blakely,* 542 U.S. at 303. The sentence here violated Mr. Weller's right to a jury determination beyond a reasonable doubt of the facts listed in the trial court's findings. *Id.* The findings must be vacated, the sentence reversed, and the case remanded for sentencing within the standard range. *Id.*

V. MR. WELLER ADOPTS AND INCORPORATES THE ARGUMENTS MADE BY MS. WELLER.

Pursuant to RAP 10.1, Mr. Weller adopts and incorporates the arguments set forth in Ms. Weller's Opening Brief.

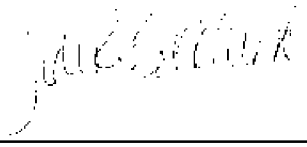
CONCLUSION

Mr. Weller's convictions must be reversed. The Information failed to properly charge unlawful imprisonment. That charge must be dismissed without prejudice. In addition, the trial court should have suppressed evidence seized pursuant to an unlawful warrantless search. Furthermore, the accomplice liability statute is overbroad.

In the alternative, if his convictions are not reversed, Mr. Weller's exceptional sentence must be vacated. The jury's verdict does not authorize a sentence above the standard range.

Respectfully submitted on December 9, 2013,

BACKLUND AND MISTRY



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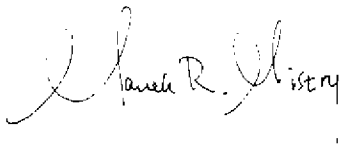

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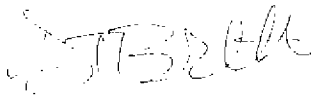

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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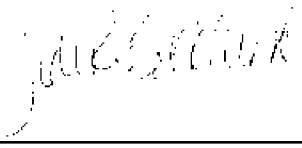
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 December 9, 2013.



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