No. 45056-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JUSTIN DEWAYNE MCPHERSON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Court of Appeals Cases

Federal Cases

Washington Statutes

Other Rules or Authorities

I. FACTS

The Appellant (Mr. McPherson) broke into a building where Mr. Salewsky lived. The Respondent accepts Appellant's description of the building Mr. Salewsky resided in with the following additions:

Jerry Salewsky, the resident of the building, described the door to his apartment at the top of the stairs as a thin, 1960's plywood door. RP 23. The door was just a "door to close if you didn't want someone to come through." RP 23. There was no lock on it. RP 23. The door did not shut very well. RP 45. It had slight damage to it. RP 45. It could have been shut, but it did not function correctly. RP 45. This door normally stayed open. RP 45.

The door at the bottom of the stairs was a door that only "swings." RP 23.

These doors were the only entrance to the apartment. RP 23. The only way to get to the apartment was through the front door of the jewelry store, walk through the store, then up the stairs. RP 26-27. There was no outside, separate entrance to the apartment. If Salewsky wanted to leave in the middle of the night, he would walk down the stairs and through the front door. RP 27.

The alarm switch for the entire building is right next to the front door that leaves the building. RP 46.

II. ARGUMENT

A. APPELLANT MISAPPLIED *STATE V. NEAL*. UNDER *STATE V. NEAL*, THE ENTIRE BUILDING IS CONSIDERED A DWELLING IF A PORTION OF IT WAS USED AS A DWELLING.

Appellant quotes *State v. Neal*[1] but gives no analysis as to why it is applicable to Mr. McPherson's case. *Neal* actually supports the Respondent's position that the entire building in this case was a "dwelling" as defined in RCW 9A.04.110(7).

In *Neal*, the defendant broke into a tool room of an apartment building. *State v. Neal,* 161 at 112. Neal argued that the part of the building broken into must be used for lodging in order to be a "dwelling". *State v. Neal,* 161 at 113. But the Court of Appeals, Division I, used the plain meaning of the language and the traditional rules of grammar to interpret RCW 9A.04.110(7). *State v. Neal,* 161 at 113. In so doing, the court explained why the entire building is a dwelling even if only a portion of it is used for lodging. The following is the court's explanation:

> "Neal asks that we decline to follow *Murbach*.[2] He contends it is inconsistent with the "last antecedent rule." Under that rule, "qualifying or modifying words and phrases refer to the last antecedent." *Bunker*, 169 Wn.2d at 578.[3] Thus, Neal argues the lodging requirement must be applied only to the "portion thereof" language, and accordingly, it is the "portion" of the building (in this case, the tool [114] room) that must be used for lodging. But under the corollary to the last antecedent rule, the presence of a comma

[1] *State v. Neal*, 161 Wn. App. 111, 114, 249 P.3d 211 (2011).
[2] The complete cite to *Murbach* is: *State v. Murbach*, 68 Wn. App. 509, 513, 843 P.2d 551 (1993).
[3] The complete cite to *Bunker* is: *State v. Bunker*, 169 Wn.2d 571, 577-578, 238 P.3d 487 (2010)

> before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. *Bunker*, 169 Wn.2d at 578. The application of the corollary rule leads to the conclusion that a "dwelling" may be a building or structure used for lodging, or it **may be any portion of a building where the portion is used for lodging.**" *State v. Neal*, 161 at 113-114 (emphasis added).

In *Murbach*, the burglary was of a garage attached to a house. *Murbach*, 68 Wn. App. at 510-511. The house was used for lodging, the garage was not. But the garage was a portion of a building used for lodging, so the court in *Murbach* found that burglary of the garage was a residential burglary. *Murbach*, 68 Wn. App. at 510-513.

Likewise, in *Neal*, the tool room of the apartment complex was not used for people to lodge in. *State v. Neal,* 161 at 112-113. The apartment building was used for lodging, the tool room was not. But the tool room was a portion of a building used for lodging, so the court in *Neal* found the burglary of the tool room was a residential burglary. *State v. Neal,* 161 at 115.

Applying this analysis to McPherson's case, McPherson broke into the part of the jewelry store that was not normally used for lodging. However, the store was a portion of a building used for lodging. Jeremy Salewsky lived in the upstairs portion of the building. He actually had to use the front door of the store as the front door of his apartment. RP 26. Once he entered the store, Salewsky had to walk through it to get to the stairs leading to his apartment. RP 23. There was no other entrance, and no separate entrance to his apartment. RP 27. He had access to the store

24 hours a day, whether the store was open for business or not, because the store was the entrance to his apartment. While there were doors between the lodging portion and the store portion of the building, they were not able to be locked and therefore the store could not be sealed off from the lodging portion. The store was a part of a building used for lodging. Therefore, when McPherson broke into the store, which was part of a building used for lodging, he was committing residential burglary.

B. THE ACCOMPLICE LIABILITY STATUTE IS NOT OVERBROAD BECAUSE IT DOES NOT CRIMINALIZE SPEECH PROTECTED BY THE FIRST AMENDMENT.

A statute is unconstitutionally overbroad if it infringes on constitutionally protected speech or conduct. *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.3d 572 (1989), *citing Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). While a defendant may not normally challenge a statute unless the defendant's conduct falls within the range of constitutionally protected conduct (invalid as applied), a defendant may challenge a statute as overbroad even where the defendant's own conduct is not prohibited (facially invalid) because prior restraints on speech receive greater protection. *State v. Pauling*, 108 Wn. App. 445, 448, 31 P.3d 47 (2001), *reversed on other grounds*, 149 Wn.2d 381, 69 P.3d 331 (2003), *citing Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

McPherson relies on *Brandenburg v. Ohio*, and it's holding that pursuant to constitutional guarantee of free speech the State may not

"forbid or proscribe advocacy of the use of force or of law violation except where such advocacy 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, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969). McPherson argues that the language "'[w]ith knowledge that it will promote or facilitate the commission of a crime. . .aids or agrees to aid [another] person in planning or committing it'" criminalizes speech protected by the First Amendment. Brief of Appellant 9-10.

McPherson particularly challenges the word "aid," especially as defined by WPIC 10.51, the jury instruction used in this case. "Aid" is defined as follows:

> 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.

WPIC 10.51. RCW 9A.08.020 indicates that a person is an accomplice if with the knowledge that it will promote or facilitate the crime, the person aids in planning or committing the crime. While aid can include encouragement, mere encouragement alone is not enough. The person giving encouragement must: 1) give the encouragement with the knowledge that it will promote and facilitate the crime; and 2) the encouragement must aid in planning our committing the crime. RCW 9A.08.020. These restrictions mean that the accomplice liability statute

does not violate the standards established in *Brandenburg.* The language of RCW 9A.08.020 qualifies aid as advocacy that is likely to produce or incite imminent lawless acts; this is not the kind of advocacy that is protected in *Brandenburg.*

The accomplice liability statue has been previously attacked as being unconstitutionally overbroad. *See State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011); *State v. Coleman* 155 Wn. App. 951, 231 P.3d 212 (2010). Coleman argued the exact same argument McPherson is putting forward to this court, that the failure to limit or define the term aid makes the statute, RCW 9A.08.020, unconstitutionally overbroad because it criminalizes constitutionally protected speech, press or assembly activities that a person knows will encourage lawless behavior but with no intent to further or promote a crime. *Coleman*, 155 Wn. App. at 960. The court held that the statute, RCW 9A.08.020,

> 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. Therefore by the statute's text, its sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime.

Id. at 960-61. Similarly, the court in *Ferguson* adopted the reasoning of the court in *Coleman*, holding that the accomplice liability statute was not overbroad. *Ferguson*, 164 Wn. App. at 376. The *Ferguson* court held, "[b]ecause the statute's language forbids advocacy direct at and likely to incite or produce imminent lawless action it[, RCW 9A.08.020(3)(a),] does

not forbid the mere advocacy of law violation that is protected under the holding of *Brandenburg*." *Id.*

III. CONCLUSION

Therefore, RCW 9A.08.020 is not unconstitutionally overbroad and jury instruction 13, as given to the jury, was proper. McPherson's conviction should be affirmed.

RESPECTFULLY submitted this 16 day of April, 2014.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. JUSTIN DEWAYNE MCPHERSON, Appellant.	No. 45056-9-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On April 16, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jodi R. Backlund, attorney for appellant, at the following email addresses: backlundmistry@gmail.com.

DATED this 16th day of April, 2014, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

April 16, 2014 - 1:40 PM

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