SUPREME COURT NO. 91613-6
C.O.A. No. 44877-7-II CONSOL W/44847-5-II
(CONSOLIDATED UNDER 44877-7-II)
Cowlitz Co. Cause NO. 12-1-00005-8

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY DAVID BRENTIN,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTIFY OF RESPONDENT

The respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Ryan P. Jurakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly decided this matter, holding that the accomplice liability statute is not unconstitutionally overbroad and that the trial court did not abuse its discretion when it admitted the victim's written statement as a recorded recollection under ER 803(a)(5). The respondent respectfully requests this Court deny review of the March 31, 2015, Court of Appeals' opinion in *State v. Anthony Brentin*, No. 44847-5-II, affirming Anthony Brentin's conviction.

III. STATEMENT OF THE CASE

In 2009, Mr. Brentin and his wife, Shari Brentin, opened and managed a Primerica office in Woodland, Washington. A.B. RP 447-78. Primerica is a financial-services company, the business of which includes investments, mortgage refinances, and life, auto, and home insurance. A.B. RP 447. By 2011, the Brentins financial status was dire. A.B. RP 739-40, 742-43, 787-88. Their home had been foreclosed upon, they had been evicted from an apartment while owing $4,680.24 for unpaid rent and a

security deposit check that bounced, and for a while they were living in a trailer on a couples' property with whom they were friends but were only able to make partial utility payments despite promising to pay rent. A.B. RP 416-44, 450-55, 740, 742-43, 772-73, 777, 780-81. In July of 2011, the Brentins moved into a home with that same couple and where the rent was $1,700 a month. A.B. RP 785. In 2011, the rent for the Primerica office space was $1,000 a month with about an additional $200 a month in utilities. A.B. RP 764-65. All told, the Brentins had about $4,000 in expenses each month and were still not making ends meet. A.B. RP 785-88. Things had to change. And they did. The Brentins became very close to Suzanne Faveluke an elderly woman in her 70s who was well known locally for being generous and a woman they knew to have lots of money. A.B. RP 748, 805-06[1]. They ended up separating her from about $20,000 of her money, which she thought was going to save Ms. Brentin's cat Mr. Socks's life and to support Mr. Brentin's campaign for city council. A.B. RP 171-260, 591-593.

Instead, Ms. Brentin bought a jewelry armoire for herself, remarking that she had wanted one for a long time, paid $1,700 in December for rent for herself and Mr. Brentin as well as her housemates, $1,200 in back rent

[1] Testimony indicated that Ms. Faveluke had multiple bank accounts at US Bank each in the "mid six figures." A.B. RP 313.

on the house, $500 towards a car payment, $2,000 to towards the lease on the Brentins' business office as they owed $1,500 in back payments and $500 for the month of December, $350 in owed deposit fees on the house for November and December, $300 on Christmas gifts, $150 in gas for her vehicle, $45 for gas in a different vehicle, $620 in back-due utility bills on the Brentins' home and business, and $350 on her cellphone bill. A.B. RP 464, 468-72, 615-17, 782. Meanwhile, Mr. Brentin spent $4,680.24 paying off the judgment entered for the unpaid rent and security deposit on the apartment. A.B. RP 440-43, 750-51. It was undisputed at trial that Ms. Faveluke was the source of this money, what was disputed was whether the Brentins deceived her by leading her to believe all the money she gave to them was to save the life of Ms. Brentin's cat and to fund Mr. Brentin's campaign for city council.

At trial multiple witnesses testified about Ms. Faveluke. She was well known in Woodland as she would regularly visit local businesses and in particular her local bank and a local restaurant by the name of Eager Beaver. A.B. RP 266-67, 320-21, 350-51, 385-86, 481-84. Ms. Faveluke was well-liked by the bank employees and she had developed a reputation in the community for being kind, generous with her money, and full of stories. A.B. RP 268, 320, 386, 494-96, 682, 748, 805-06. Ms. Faveluke admitted to being generous and testified that she gave $20,000 to the owners

of Eager Beaver to keep it open[2], donated to the Woodland police and fire departments, and that every Christmas that she would give the garbage man, the street sweeper, and different people that worked for the city a $100 bill. A.B. RP 206, 225-28, 247-48, 252, 258, 591.

Bank employees testified about Ms. Faveluke's normal banking practices and demeanor over the years, noting that she would always come to the bank very happy, get a cup of coffee, chat with the tellers, and check the balances of her accounts. A.B. RP 268, 321, 386. Ms. Faveluke always presented as very clean and well dressed, in a word—classy. A.B. RP 322. She also always appeared with a dog named Mindy Peep perched on her shoulder. A.B. RP 268-69, 322-23, 387. When it came to her money, she never withdrew large sums of cash. A.B. RP 275-6, 282, 321-22, 327. Instead, she would make deposits, maybe withdraw ten to twenty dollars, or get change for a bigger bill because she did not like to have large bills. A.B. RP 275-76, 321-22.

Ms. Faveluke's personality changed in the fall of 2011 as Mindy Peep died and the loss was very upsetting to her. A.B. RP 270-71, 322-23, 387. She became very forgetful, she appeared in the bank in the same dirty clothes with very messy hair, and she was no longer happy-go-lucky, rather

[2] Contrary to Mr. Brentin's contention she never accused the owners of the Eager Beaver of fraud. A.B. RP 109; Br. of App. A. Brentin at 5.

she showed up and conducted business without visiting or having coffee; she was not herself. A.B. RP 270-282, 323-24, 387, 392. Soon after Mindy Peep died, Ms. Faveluke fell down her stairs and injured herself, which resulted in a stay at a care facility for a few weeks. A.B. RP 184, 221-23, 274-78. During those weeks, Ms. Faveluke did not go to the bank. A.B. RP 274-78, 332.

When she reappeared she was still not herself and Ms. Brentin was with her. A.B. RP 274-82, 291, 392. Ms. Brentin had not previously accompanied Ms. Faveluke to the bank, but now she was regularly with her. A.B. RP 274-82, 287-297, 331, 354 390-94. Once Ms. Brentin was no longer showing up with Ms. Faveluke at the bank, however, Ms. Faveluke returned to her normal self. A.B. RP 303-04, 399-401. On the occasions in which Ms. Brentin accompanied Ms. Faveluke to US Bank, November 16, 2011, a couple days after November 16, November 29, 2011, and December 7, 2011, respectively, Ms. Faveluke withdrew $1,000 in cash, cashed a $5,000 check, withdrew $3,400 in cash, and asked for $5,000 in cash but the bank would only give her a cashier's check for that amount. A.B. RP 278-285, 288-296, 325-331, 350-52, 357, 391-97. According the US Bank employees, Ms. Faveluke indicated that she needed all that money to save Ms. Brentin's cat. A.B. RP 278-285, 288-296, 325-331, 350-52, 357, 391-97.

During the December 7, 2011 transaction, Ms. Faveluke was originally in the bank without Ms. Brentin, but when Ms. Faveluke left the bank with only a cashier's check in hand, she reappeared moments later with Ms. Brentin by her side each requesting that the check be cashed. A.B. RP 296-97, 397. Ms. Loucks declined to cash the check explaining that the bank did not have that much cash on hand even though it in fact did, so Ms. Faveluke and Ms. Brentin departed the bank without cash. A.B. 299-301. Following this transaction Ms. Loucks called the police. The pair did not give up, however, as they headed to a US Bank in Vancouver to attempt to have the cashier's check cashed. A.B. RP 727-28. The bank did cash the check. A.B. RP 713. In addition, there, a bank employee saw Ms. Faveluke and Ms. Brentin together and overheard Ms. Brentin say to Ms. Faveluke, "Are you almost ready, Mom?" A.B. RP 730-31.

Additional financial information was provided by the manager of the Woodland Banking Center for the Bank of America, which was the Brentins' bank, and an investigator for US Bank. A.B. RP 499, 517, 524, 542-43. The manager identified a check payable to Shari Brentin written by Ms. Faveluke for $4,000, dated November 23, 2011, and negotiated on November 25, 2011; the memo line read Mr. So--. A.B. RP 536-37. She also explained that the Brentins had two separate accounts at the bank, but that both were joint accounts with both their names on them. A.B. RP 541-

42. The investigator identified a check payable to Anthony Brentin written by Ms. Faveluke for $5,000, dated October 12, 2011 and negotiated on October 13, 2011; the memo line read $100 cash. A.B. RP 505-06. The investigator also provided stills from the Woodland US Bank's surveillance system for the dates of November 16, 2011, November 29, 2011, and December 7, 2011 and from the Vancouver US Bank's surveillance system on December 7, 2011 that showed, in all but one, Ms. Brentin standing right next to Ms. Faveluke during the bank transactions. A.B. RP 510-11, 610-12; Ex. 25-31.

Deanna Waggoner, one-time co-owner of the Eager Beaver provided testimony similar to that of the bank employees regarding Ms. Faveluke's personality. A.B. RP 481-83. She also detailed how Ms. Faveluke came to give her and her mother (the other co-owner) $20,000 so that they could pay off what was owned on the loan for the Eager Beaver. A.B. RP 483-84, 494-96. In order to make the gift official, Ms. Faveluke's husband, a former judge, met with Ms. Waggoner, her mother, and Ms. Faveluke and the group filled out paperwork to include a slip of donation and Ms. Faveluke wrote out a check. A.B. RP 484-86.

At some point, Ms. Faveluke brought Mr. Brentin to the Eager Beaver and introduced him to Ms. Waggoner. A.B. RP 486. Ms. Waggoner testified that Ms. Faveluke began coming to the restaurant with Mr. Brentin

two to three times a week and that at the beginning she was herself but that she became very distant. A.B. RP 487. More specifically, that she wasn't colorful with her stories, very quiet, and sometimes didn't recognize Ms. Waggoner or her mother. A.B. RP 487. Ms. Brentin also showed up a couple times. A.B. RP 488. One of these times, Ms. Brentin informed Ms. Waggoner that she and Mr. Brentin were going to take over Ms. Faveluke's finances and that they were very concerned about her well-being. A.B. RP 489. Ms. Brentin stated to Ms. Waggoner that they were trying to get power of attorney in order to get control of Ms. Faveluke's finances. A.B. RP 490. Ms. Waggoner also noticed that once the police became involved and the Brentins were no longer in Ms. Faveluke's life she was back to the normal Suzanne. A.B. RP 491.

Mr. Socks, Ms. Brentin's cat, was actually quite sick. A.B. RP 342-46. He was taken to the Woodland Veterinary Hospital and examined by a veterinarian on November 17, 2011 and referred to Columbia River Veterinary. A.B. RP 340. The total cost of the visit was $127.00, which was paid in cash by Ms. Brentin. A.B. RP 341. Woodland Veterinary accepts checks, cash, Visa, MasterCard, Discover, and CareCredit as forms of payment. A.B. RP 337.

Columbia River Veterinary, which accepts all the same types of payment as Woodland Veterinary save personal checks, provides

emergency and specialty services for cats and dogs. A.B. RP 364-65. Ms. Brentin took Mr. Socks to Columbia River on November 18, 2011. A.B. RP 371. Ms. Brentin's total bill for Mr. Socks's care at Columbia River, which spanned from November 18, 2011 to December 8, 2011, was $1,772.29 including tax. A.B. RP 370-73[3].

The Woodland Police became involved following Ms. Loucks's call on December 7, 2011. A.B. RP 549. Officers contacted US Bank employees and the relevant veterinary offices to collect records. A.B. RP 549-559. On December 14, 2011, Detective David Plaza proceeded to Ms. Faveluke's residence and when he knocked on the door Mr. Brentin answered. A.B. RP 559-561. Detective Plaza testified that when Ms. Faveluke came to the door she was not looking her usual self, rather she was extremely disheveled, her clothes were messy and her hair was not done. A.B. RP 563. Mr. Brentin asked Det. Plaza if he needed to step out and Det. Plaza told him it would be a good idea. A.B. RP 563. Det. Plaza spoke with Ms. Faveluke about what was going on for about an hour and a half maybe two hours and when he left he noticed that Mr. Brentin was still outside and that he went back into Ms. Faveluke's house. A.B. RP 564-65.

[3] Ms. Brentin did also pick up medications a couple times after December 8, 2011 and Mr. Socks was euthanized by Columbia River in what appears to be May of 2012. A.B. RP 379, 382. The estimated cost for the medications and euthanization was around $200. A.B. RP 382.

After some further investigation, Det. Plaza returned to Ms. Faveluke's home on December 22, 2011. A.B. RP 567. Ms. Faveluke made a formal statement to Det. Plaza by dictating it to him and then signed it under penalty of perjury. A.B. RP 568-570. That statement was read into evidence and is as follows:

"I have known Tony and Shari Brentin for about five years. I met Tony when he was the fire chief for the Woodland Fire Department and I donated money to the department after I was hurt. After falling down my stairs, Tony and Shari stated coming over about three months ago. Shari and Tony would help around the house and help me shower, make sure I ate, et cetera. The Brentins did not help me pay bills, nor did they do any financial transactions on my behalf.

On October 12, 2011, Tony was at my house and made a comment about how nice my Jamie Herrera election signs were. He was running for Woodland City Council at the time. We talked about how nice signs would help his campaign. Tony said that campaign sings cost money. Shari then said if we had money, they would buy nice signs, too. After we talked for a while, I decided to help Tony by donating to his campaign. I wrote Tony a check, Check Number 1389 for $5,000 but kept $100.00 for myself, so I gave Tony $4,900.00. This money was to be used solely for his campaign

and nothing else. He was supposed to buy signs, flyers, posters, et cetera. I later found out he did not use my money for any of that.

On November 16, 2011, Shari stopped by my house and she was crying. She told me her cat had cancer and it was dying. She said the vet could save the cat, but it would cost $1,000. She told me the vet would only take cash. Since my dog recently died of cancer, and knowing the pain I went through, I gave Shari the money. I was told the entire amount was for the vet bill.

On November 29, 2011, Shari came by my house again. She said her cat needed more surgery or her cat would die. She told me again that her vet only took cash. She drove me to the bank and I withdrew $4,352.00 in cash. I gave her the money, believing that the entire amount was to be used to pay the vet.

On December 7, 2011, Shari came to my house again. She said the cat needed more work done. At one point, she was on the telephone with who she said was the vet office. After she hung up, she told me the vet said either she paid them $5,000.00 in cash or they would put her cat to sleep. Not wanting her cat to be killed, I agreed to give her the money. She took me to the bank and I tried to withdraw the cash but was told the bank did not have it. I got a cashier's check instead. The bank lady asked me to wait one day before I cashed it, and I said okay. When we got to my car, Shari

said we should look for a bank to cash the check at. We went to a bunch of banks before we found one that would cash it. After I gave her the money she told me not to tell Tony about it. She said Tony would not agree with her spending $5,000.00 on a cat. I promised not to tell. I gave her the money thinking it would all be used on an operation for Shari's cat. The day the police came by, Tony and Shari stopped coming over." A.B. RP 591-93.

While Ms. Faveluke's trial testimony was generally consistent with her statement to Det. Plaza some details were different and she appeared confused at times. A.B. RP 171-260. That said, she was clear that she gave a substantial amount of money to the Brentins for only two purposes: 1) to save the life of Ms. Brentin's cat and 2) Mr. Brentin's campaign. A.B. RP 182, 187-88, 198-200, 202-03, 207-08, 236-37, 249-50. Ms. Faveluke also provided information about an additional $500 in cash she gave to Mr. Brentin for his campaign and more specifically for signs. A.B. RP 187, 197, 199-200, 249-50, 259. Though part of this testimony could be fairly characterized as jumbled, Ms. Faveluke was able to distinguish between the $5,000 check she wrote to Mr. Brentin in which she kept $100 and the $500 cash, in five one-hundred dollar bills, that she gave to him while in the nursing home. A.B. RP 187, 197, 199-200, 249-50, 259. She also acknowledged that it was possible that she read a newspaper article about

Mr. Brentin's campaign and that if she had read an article that portrayed him badly she probably would have talked to him about it. A.B RP 251, 253-54. Ms. Faveluke likewise agreed that it was possible that she talked to her neighbor Scott Perry about Mr. Brentin's campaign and that she probably told him she wanted to help out Mr. Brentin by giving him money. A.B. RP 256-57.

The day after getting Ms. Faveluke's formal statement, Det. Plaza spoke with Ms. Brentin. A.B. RP 594. Mr. Brentin explained to Det. Plaza that after Ms. Faveluke got hurt and returned from the nursing home she (Ms. Brentin) would be at Ms. Faveluke's house every day to help out. A.B. RP 598. When asked about going to the bank with Ms. Faveluke, Ms. Brentin initially stated that she would wait at the door or stand by the side of it while Ms. Faveluke conducted her business because Ms. Faveluke's banking business was not her business. A.B. RP 601. Det. Plaza asked Ms. Brentin whether she had received any money from Ms. Faveluke and she replied that she had as Ms. Faveluke had offered to pay for three of her vet bills which she estimated to be $3,000.00. A.B. RP 601-03.

Ms. Brentin ended up writing a statement for Det. Plaza and in it she now estimated that she received $4,000 from Ms. Faveluke to pay her vet bills. A.B. RP 609. Det. Plaza then confronted Ms. Brentin with things he found confusing about her statement including the fact that she had told him

that they (the Brentins) were doing just fine financially. A.B. RP 609-10. Next, Det. Plaza and a fellow officer revealed that they were aware of how much the vets' bills really were and how much money was really involved overall. A.B. RP 614-15. Det. Plaza then asked Ms. Brentin if she always intended to take Ms. Faveluke's money, or if it had gotten away from her. A.B. RP 615. Ms. Brentin responded that "it just had gotten way from her." A.B. RP 615.

Ms. Brentin then admitted that when she found out the vet bill was substantially less than she had told Ms. Faveluke it would be that she decided to keep the money for herself and to pay off personal bills. A.B. RP 616. She also claimed at some time during interview, however, that when she tried to give Ms. Faveluke the extra money back that Ms. Faveluke told her that she did not want the money back and for Ms. Brentin to use it. A.B. RP 633. Nonetheless, after admitting to using Ms. Faveluke's money to pay for things other than vet bills, Ms. Brentin gave a detailed list of the things for which used Ms. Faveluke's money[4], admitted her family's financial distress, said that "Suzanne probably believed the money was

[4] $1,200 in back rent on the house, $500 towards a car payment, $2,000 to towards the lease on the Brentins' business office as they owed $1,500 in back payments and $500 for the month of December, $350 in owed deposit fees on the house for November and December, $300 on Christmas gifts, $150 in gas for her vehicle, $45 for gas in a different vehicle, $620 in back-due utility bills on the Brentins' home and business, and $350 on her cellphone bill. A.B. RP 464, 468-72, 615-17, 782.

going towards the vet bills," and said that what she did was wrong. A.B. RP 617-18.

The defendant(s) called two witnesses, Scott Perry and Anthony Brentin. Mr. Perry's testimony was equivocal. He testified that Ms. Faveluke was upset about a newspaper article written about Mr. Brentin that referenced a debt he owed and that she dropped by his office to tell him she had given Mr. Brentin $5,000 for his campaign. A.B. RP 679-680. He also testified that in their conversation about the article Ms. Faveluke seemed to be saying that she didn't want that (the article) to be a negative to his campaign, but couldn't say that she said the money was specifically for the debt. A.B. 686, 698. Mr. Perry noted that since situation with the Brentins, Ms. Faveluke had become somewhat paranoid calling him at least once a day for several weeks. A.B. RP 692-94.

Mr. Brentin testified that in June 2011 he filed to run for Woodland City, but did not intend to campaign. RP 743-45, 750, 793. After he filed to run, his former landlord wrote a letter to the Columbian that mentioned Mr. Brentin's debt of $4,680.24. RP 251, 745. Mr. Brentin testified that as a result of this article Ms. Faveluke offered to pay his debt and that despite his declining her offer, her persistence paid off and he accepted the money. A.B. RP 747-78, 751, 796-97. During this time period and contemporaneous to it, Mr. Brentin and his wife visited Ms. Faveluke daily

at her nursing home following her fall. RP 753. After Ms. Faveluke was back home, Mr. Brentin continued his almost daily visits and helped her around the house to include repairs and running errands. A.B. RP 755-58. He denied conning or scamming Ms. Faveluke. A.B. RP 759.

Both Mr. and Mrs. Brentin were convicted at trial. These convictions were affirmed on appeal. Mr. Brentin now seeks review of the Court of Appeals' decision by claiming that the WPIC jury instruction given at trial defining accomplice liability, that is derived from RCW 9A.08.020, was unconstitutional and that the trial court abused its discretion by admitting a recorded recollection pursuant to ER 803(a)(5).

IV. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Mr. Brentin's petition fails to demonstrate that any of the grounds listed under RAP 13.4(b) apply, his petition should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

In his petition, Mr. Brentin does not claim that the holding in his case conflicts with a decision of the Supreme Court or the Court of Appeals, thus RAP 13.4(1), (2) do not apply. Mr. Brentin maintains that his case raises significant constitutional issues and substantial issues of public interest. His sole argument that the decision raises a significant question of constitutional law is based on an issue that has already been decided. He never explains how the decision in his case raises a substantial issue of public interest. Because Mr. Brentin's petition fails to provide grounds for review under RAP 13.4(b), it should be denied.

A. Mr. Brentin fails to demonstrate how the Court of Appeals' holding that the accomplice liability statute is constitutional raises a significant question of constitutional law or a substantial issue of public interest.

Because the sweep of RCW 9A.08.020 avoids protected speech activities that are not performed in aid of a crime and that only consequentially further a crime, it is not overbroad; therefore, the trial court did not err when it instructed the jury on the definition of an accomplice. In 2011, Division Two of the Court of Appeals held: "Agreeing with and

adopting Division One's rationale in *Coleman*, we also hold that the accomplice liability statute is not unconstitutionally overbroad." *State v. Ferguson*, 164 Wn.App. 370, 376, 264 P.3d 575 (2011) (referencing *State v. Coleman*, 115 Wn.App. 951, 960-61, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011)). Mr. Brentin argues that in *Coleman* the Court of Appeals erred by failing to apply the legal standard set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), requiring the statute not forbid advocacy of a law violation "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action." However, Mr. Brentin appears to ignore entirely that in *Ferguson* the Court of Appeals directly addressed this language from *Brandenburg*.

Just as Mr. Brentin does here, in *Ferguson*, the defendant challenged the accomplice liability statute as being overbroad, claiming it criminalized constitutionally protected speech under the First and Fourteenth Amendments of the U.S. Constitution. 164 Wn.App. at 375. The Court of Appeals explained that under RCW 9A.08.020 (3)(a) a person can be found guilty as an accomplice if "with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests another person to commit the crime or aids or agrees to aid such person in the planning or committing the crime." *Id.* The court acknowledged that a

statute is overbroad when it prohibits protected speech, then provided the rule for evaluating whether such a statute is overbroad: "A statute that regulates behavior, not pure speech, will not be overturned 'unless the overbreadth is both real and substantial in relation to the ordinance's plainly legitimate sweep.'" *Id.* (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 31, 759 P.2d 572 (1989)).

The court then quoted *Brandenburg*: "The constitutional guarantee of free speech does not allow a State to forbid the advocacy of a law violation 'except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *Id.* (quoting *Brandenburg*, 395 U.S. at 447). After doing so, the *Ferguson* Court agreed with the *Coleman* Court's holding that the statute was not overbroad because it requires a criminal mens rea to aid in the commission of the crime with knowledge that the aid will further the crime. *Id.* at 376 (quoting *Coleman*, 155 Wn.App. at 960-61). Finally, the Court then stated: "Because the statute's language forbids advocacy directed at and likely to incite or produce imminent lawless action, it does not forbid the mere advocacy of law violation that is protected under the holding of *Brandenburg*." *Id.* Thus, not only did the *Ferguson* Court hold that the accomplice liability statute was constitutional, but it explained how the statute directly addressed the concerns raised in *Brandenburg*.

Accordingly, Mr. Brentin's claim that the statute is overbroad based on the holding in *Brandenburg* fails.

In addition to Division One, the other two divisions of the Court of Appeals have evaluated and upheld the constitutionality of the accomplice liability statute. In *Coleman*, Division Two of the Court of Appeals also rejected the defendant's argument and found that the accomplice liability statute "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." 155 Wn.App. at 961. This requirement, therefore, avoids activities that are not performed in aid of a crime and that only consequentially further the crime. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 448, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). Division Two again rejected this argument in *State v. McCreven*, 170 Wn.App. 444, 484-85, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013). Most recently, in *State v. Holcomb*, 180 Wn.App. 583, 590, 321 P.3d 1288, 1292 (2014), *review denied*, 180 Wn.2d 1029 (2014) Division Three of the Court of Appeals also upheld the constitutionality of the accomplice liability statute. In applying this holding to Mr. Brentin's case, the court cited *Holcomb* to explain that "the accomplice liability statute cannot punish pure speech because it 'has been construed to apply solely when the accomplice acts with knowledge of the specific crime that is eventually charged, rather than with knowledge of a

different crime or generalized knowledge of criminal activity. And the required aid or agreement to aid must be 'in planning or committing the crime.'"" Court of Appeals' Opinion in *State v. Anthony Brentin*, No. 44847-5-II at 24 (quoting 180 Wn.App. at 590; RCW 9A.08.020 (3)(a)(ii)).

Thus, all three divisions of the Court of Appeals have found the accomplice liability constitutional when confronted with arguments that cannot be distinguished from those of Mr. Brentin. As explained by *Ferguson*, the accomplice liability statute is consistent with the holding in *Bradenburg* and is therefore constitutional. Because this issue has been reviewed and decided on numerous occasions, all with the same result, Mr. Brentin fails to raise a significant issue of constitutional law under RAP 13.4(3) and review should be denied.

B. Mr. Brentin does not provide any basis to show that the trial court's exercise of its discretion in admitting evidence pursuant to ER 803(a)(5) created a significant question of substantial public interest.

Because the Court of Appeals' affirmation that the trial court did not abuse it's discretion in admitting the evidence pursuant to ER 803(a)(5) does not raise a substantial issue of public interest review should be denied. "Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion." *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669

(2010); *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) ("The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view.") (citations omitted). "An abuse of discretion occurs only 'when no reasonable judge would have reached the same conclusion.'" *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). Mr. Brentin maintains that the trial court's decision to admit a recorded recollection under ER 803(a)(5) was in error and claims that the Court of Appeal's affirmation of the trial court's decision should be reviewed because it raises an issue of substantial public interest. However, a review of the evidence reveals that the trial court did not abuse its discretion in admitting this evidence, and the Court of Appeals' decision, affirming the trial court's evidentiary decision, does not raise a substantial issue of public interest.

When a trial court's ruling on such matters of evidence is in error, reversal will only be required "if there is a reasonable possibility that the testimony would have changed the outcome of trial." *Aguirre*, 168 Wn.2d at 361 (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006) Moreover, appellate courts "may affirm the trial court's ruling on any grounds the record supports, including those the trial court did not

explicitly articulate." *State v. Moore*, 178 Wn.App. 489, 498, 314 P.3d 1137 (2013) (citing *State v. Ginn*, 128 Wn.App. 872, 884 n. 9, 117 P.3d 1155 (2005)). The party offering evidence "must establish the elements of a required foundation by a preponderance of the evidence." *State v. Nava*, 177 Wn.App 272, 289-90, 311 P.3d 83 (2013) (citing *State v. Benn*, 120 Wn.2d 631, 653, 845 P.2d 289 (1993)).

A recorded recollection can be admitted as substantive evidence "when the proponent of the evidence demonstrates that (1) the record pertains to a matter about which the witness once had knowledge, (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony, (3) the record was made or adopted by the witness when the matter was fresh in the witness's memory, and (4) the record reflects the witness's prior knowledge accurately." *Id.* at 290; ER 803(a)(5). The foundation for the admission of a recorded recollection "may be satisfied without the witness' direct averment of accuracy at trial" and even in the face of a witness' disavowal of the record. *State v. Alvarado*, 89 Wn.App. 543, 551, 949 P.2d 831 (1998); *Nava*, 177 Wn.App. at 291-95.[5] This is unsurprising since "other evidence establishing the accuracy of [a

[5] "[T]he language of ER 803(a)(5) providing the basis for the fourth element of the foundation—its requirement that the memorandum or record "reflect [the witness's former] knowledge correctly"—provides no textual basis for requiring that the witness personally vouch for the accuracy of the recorded statement." *Nava*, 177 Wn.App. at 293.

recorded recollection] could be just as credible as, if not more so, than the declarant's testimony at trial that the statement was accurate when made." *Nava*, 177 Wn.App at 294 (quoting *State v. Derouin*, 116 Wn.App. 38, 46, 64 P.3d 35 (2003)).

In his appeal, Mr. Brentin challenged the second foundational element for a recorded recollection, that the witness had an insufficient recollection of the matter to provide truthful and accurate testimony.[6] However, the trial court, properly admitted the record after finding the State established the elements of the required foundation by a preponderance of the evidence. The trial court was obviously in the best position to assess Ms. Faveluke's testimony and her memory issues. As to whether Ms. Faveluke had an insufficient recollection of the matter to provide truthful and accurate trial testimony, the trial court stated: "You know, she . . . would read this [(her written statement)] and then it [(her memory)] would just go. It was not – not there. That was my impression and she testified that If I – you know, even though she says she has total recall, even if she read it three times, I'm not sure if she – she would actually remember it. . . . [S]he wrote this at one time, she reads it again; does that refresh her memory? She can't even do that." A.B. 585-86.

[6] The Court of Appeals' opinion indicates that Mr. Brentin also challenged the third foundational element, however his brief in support of his appeal does not appear to contain an express argument in support of this.

The trial court's ruling was not a manifest abuse of discretion. Ms. Faveluke's testimony is replete with evidence of a poor memory to include forgetting the name of her cat and Ms. Brentin's cat, repeating the same story about her cat multiple times, not remembering whether she or an officer wrote her statement, and at one point indicating that she had no idea if her memory of the events was better in December 2011 or the day of the trial before stating that her memory of the events was a lot better the day of the trial and yet she claimed her written statement would help her remember.[7] A.B. RP 179, 193, 196-97, 209, 171-260. Moreover, on cross examination Ms. Brentin's trial counsel worked hard to point out that Ms. Faveluke had an insufficient, independent recollection of the matter to provide truthful and accurate trial testimony by attempting to show through use of her written statement that she couldn't remember, for example, how long she knew the Brentins and if the Brentins would help her shower and prepare food for her. A.B. RP 219-221, 223.

[7] Ms. Faveluke's memory issues were apparent to Mr. Brentin's trial counsel as well. During part of Ms. Faveluke's testimony she was asked to refresh her recollection using her written statement. Mr. Brentin's trial counsel eventually objected and put on the record the reason for his objection: "it was very clear that Counsel was holding the statement to the witness that she was looking at in order to answer those questions." A.B. RP 213. The trial court responded: "A big part of what I said is that memory is – is at issue and that basically that's – that's an issue and it's an ongoing issue, and that, as she testified even before the sidebar, that was obviously an issue, and then afterwards, it became readily apparent." A.B. RP 214-15.

Meanwhile, Mr. Brentin's trial counsel's cross examination made clear that Ms. Faveluke had no memory of the newspaper article that led to her giving Mr. Brentin money for his campaign and no real memory of a conversation with her neighbor about the article. A.B. RP 251-54, 256-58. Consequently, by the time Det. Plaza testified and read Ms. Faveluke's statement into the record there was ample evidence for the trial court to rely on when it determined that the Ms. Faveluke had an insufficient recollection of the matter to provide truthful and accurate trial testimony and that her written statement was admissible under ER 803(a)(5).

The Court of Appeals affirmed the trial court's decision. The court agreed with the trial court that Ms. Faveluke's testimony demonstrated that she had insufficient recollection of the details of her interactions with the Brentins to provide truthful and accurate trial testimony about them. The court also agreed that the foundational element of providing the statement while it was fresh in her memory was sufficient when the statement was made in December of 2011 about events occurring in the fall of 2011. From this evidence, the trial court, which was best positioned to judge the circumstances of the statement at trial, did not did not abuse its discretion when it found these foundational elements were satisfied.

Mr. Brentin argues for review of the Court of Appeals' affirmation of the trial court's decision by claiming it involves an issue of substantial

public interest that should be determined by the Supreme Court. However, he provides no explanation of why this involves a substantial issue of public interest. His only support for this assertion appears to be that he disagrees with the Court of Appeals' and trial court's decisions. The ruling itself was on an evidentiary issue involving an evaluation of facts and circumstances that were most readily assessed through direct testimony in the courtroom. This is the kind of evidentiary ruling that trial courts are routinely required to make. The Court of Appeal's affirmation of the trial court confirms that the trial court did not violate ER 803(a)(5). Mr. Brentin's disagreement with the Court of Appeals' affirmation of this decision, without more, does not create a substantial issue of public interest.

V. CONCLUSION

Because Mr. Brentin's petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 28th day of May, 2015.

Ryan P. Jurvakainen
Prosecuting Attorney
Cowlitz County, Washington

By: _____
Eric H. Bentson, WSBA #38471
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

Supreme Court
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and,

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

Signed at Kelso, Washington on May 28th, 2015.

Michelle Sasser
Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle; backlundmistry@gmail.com
Subject: RE: PAs Office Scanned Anthony David Brentin, 91613-6, Response to Petition for Review

Received 5-28-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Sasser, Michelle [mailto:SasserM@co.cowlitz.wa.us]
Sent: Thursday, May 28, 2015 12:39 PM
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Subject: FW: PAs Office Scanned Anthony David Brentin, 91613-6, Response to Petition for Review

Attached, please find the Response to Petition for Review regarding the above-referenced Case.

If you have any questions, please contact this office.

Thanks, Michelle Sasser

From: pacopier_donotreply@co.cowlitz.wa.us [mailto:pacopier_donotreply@co.cowlitz.wa.us]
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