NO. 44847-5-II CONSOL WITH 44877-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHARI A. BRENTIN and
ANTHONY D. BRENTIN,

Appellants.

RESPONDENT'S BRIEF

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A. ANSWERS TO ASSIGNMENTS OF ERROR

1. The trial court did not improperly exclude evidence nor deny appellants their right to present a defense.

2. The trial court did not admit highly prejudicial hearsay testimony.

3. The trial court did not admit improper opinion testimony.

4. Mr. Brentin's conviction did not violate his right to due process

5. The State introduced sufficient evidence to prove Theft in the First Degree.

6. The State presented sufficient evidence that Mr. Brentin obtained money by color or aid of deception.

7. The State presented sufficient evidence that the $500 Ms. Faveluke gave to Mr. Brentin was not intended to be a gift to be used for whatever purpose he had in mind.

8. The State presented sufficient evidence that the $500 Ms. Faveluke gave to Mr. Brentin was obtained by color or aid of deception.

9. The State presented sufficient evidence that Mr. Brentin was an accomplice of Ms. Brentin.

10. The trial court did not allow the State to introduce inadmissible hearsay.

11. The trial court did not err by admitting Ms. Faveluke's statement to Detective Plaza.

12. The trial court properly applied ER 803(a)(5).

13. The trial court properly admitted Ms. Faveluke's statement as substantive evidence.

14. The Brentins were not denied their right to a speedy trial.

15. The trial court did not err by granting continuances in this case.

16. The accomplice liability statute is not unconstitutionally overbroad.

17. The accomplice liability statute does not impermissibly permit convictions based on words without intent.

18. The accomplice liability statute does not impermissibly permit convictions based on words.

19. The trial court did not err by giving the accomplice liability instruction.

B. STATEMENT OF THE CASE

1) Procedural History

Shari Brentin and Anthony Brentin were charged by information with one count of Theft in the First Degree by color or aid of deception contrary to RCW 9A.56.030(1)(a) and RCW 9A.56.010(18)(c) for a series of transactions in Cowlitz County, State of Washington on or about and between October 12, 2011 and December 23, 2011, wherein the Brentins obtained control of United States Currency belonging to Suzanne Faveluke in an amount greater than $5,000. S.B. CP 3-4; A.B CP 1-2.[1] In

[1] S.B. CP refers to Ms. Brentin's Clerk's Papers while A.B. CP refers to Mr. Brentin's Clerk's Papers. I will be utilizing Mr. Brentin's Report of Proceedings and, for clarity, citing them as A.B. RP.

addition, the State gave notice that it was seeking exceptional sentences on the basis of two aggravating factors: 1) the defendants knew or should have known that the victim of the offense was particularly vulnerable and 2) the current offense was a major economic offense. S.B. CP 3-4; A.B. CP 1-2; RCW 9.94A.535(3)(b).

On August 23, 2012, October 4, 2012, and on October 25, 2012 the State sought, and the Brentins did not object, to continue the trial date. On November 29, 2012, January 3, 2013, and on January 28, 2013 the State sought additional continuances because a material witness, Teresa Loucks, had a serious medical condition that prevented her from being available for trial. A.B. RP 8-20, A.B. RP (1/3/13) 1-3. The State ended up filing a sealed document explaining Ms. Loucks's medical condition that the court and the Brentins had an opportunity to review A.B. CP 36, A.B RP 35-38. The Brentins objected to the latter three continuances but did not file a written motion making an objection to the trial date nor did they note a hearing for the same. A.B. RP 8-35; A.B. RP (1/3/13) 1-3. The Brentins moved for a continuance on March 14, 2013 and on the actual trial date of March 19, 2013, but those continuances were denied. A.B. RP 21-35. Consequently, the cases proceeded to trial on March 19, 2013 before the

Honorable Michael Evans and testimony began on March 20, 2013. A.B. RP 33-117. The jury returned guilty verdicts and found both aggravating factors. S.B. CP 66-68; A.B. CP 3-4. The Brentins each received an exceptional sentence. S.B. CP 75, 79-80; A.B. CP 3-16. Ms. Brentin was sentenced to 12 months and one day and Mr. Brentin was sentenced to 6 months. S.B. CP 75, 79-80; A.B. CP 3-16. Each filed a timely notice of appeal. S.B. CP 84; A.B. CP 20-34.

2) Statement of Facts

In 2009, Mr. Brentin and Ms. 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[2]. 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 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

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

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[3], 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 cop 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-

[3] 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.

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 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 Sheri 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[4].

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.

[4] 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[5], admitted her family's financial distress, said that "Suzanne probably believed the money was 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-

[5] $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.

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

C. ARGUMENT

1) THE TRIAL COURT'S RULINGS AND THE EVIDENCE ADMITTED AT TRIAL CONCERNING THE VICTIM'S GENEROSITY, TO INCLUDE REPUTATION AND SPECIFIC INSTANCES OF CONDUCT, ALLOWED THE APPELLANTS TO FULLY PRESENT THEIR DEFENSE.

"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). 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).

Pursuant ER 404(a), character evidence is generally inadmissible. *Martin*, 169 Wn.App at 628 ("A victim's character . . . in general [is]

excluded from evidence."). ER 404(a)(2), however, is an exception to the general rule and allows "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused." While ER 404 "controls the admissibility of character evidence," ER 405 "controls the method of proving character when evidence of character is admissible." *State v. Donald*, 178 Wn.App 250, 256, 316 P.3d 1081 (2013).

Consequently, under ER 405, when evidence of the character of the victim is admissible, and not an essential element of a "charge, claim, or defense," it may only be proven "by testimony as to reputation." On the other hand, when the "character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." ER 405(b). In criminal cases, "character is rarely an essential element of the charge, claim, or defense." *State v. Kelly*, 102 Wn.2d 188, 196-87, 685 P.2d 564 (184). This is not surprising because for "character to be an essential element, character must itself determine the rights and liabilities of the parties." *Id.* In other words, if "[p]roof, or failure of proof of the character trait, standing alone, would not satisfy any element of the charge, claim, or defense" the character trait is not an essential element and evidence of the

character trait must be limited to reputation. *State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998); *See e.g. State v. Alexander*, 52 Wn.App 897, 901, 765 P.2d 321 (1988) (holding that specific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense).

Ms. Brentin appears to argue, however, that specific instances of conduct are an acceptable method of proof even when character is not an essential element of the charge or defense. Br. of App. S. Brentin at 16. Noting that the second sentence of ER 405(a) states that "[o]n cross examination, inquiry is allowable into relevant specific instances of conduct," she contends subsection (a) allows proof by specific instances of conduct. *Id.* Appellate courts have rejected that reading of the rule, however, and held that reputation testimony is the exclusive way to prove character under ER 405(a) when the character of the victim is not an essential element of a "charge, claim, or defense." *State v. Mercer-Drummer*, 128 Wn.App. 625, 630-32, 116 P.3d 454 (2005); *State v. O'Neill*, 58 Wn.App. 367, 370, 793 P.2d 977 (1990). Rather, the second sentence of ER 405(a) pertains to allowing the impeachment of an opposing party's character witness by asking said witness whether they

have personal knowledge of specific incidents of (mis)conduct regarding the person for whom they appeared as a character witness. *State v. Lord*, 117 Wn.2d 829, 891, 822 P.2d 177 (1991).

Here, Ms. Faveluke's generosity cannot be said to be an essential element of the appellants' defense and Ms. Brentin does not argue otherwise. Consequently, the only allowable method of proof of Ms. Faveluke's generosity was through reputation testimony. Not only did appellants introduce substantial evidence of Ms. Faveluke's reputation for being generous, but the trial court allowed testimony through multiple witnesses about a specific instance of Ms. Faveluke's generosity, i.e., her $20,000 gift to the owners of the Eager Beaver restaurant for the purposes of paying off their debt. Moreover, there were additional specific instances of Ms. Faveluke's generosity that ended up being testified to by Ms. Faveluke herself, to include donations to the Woodland Fire Department and Woodland Police Department and $100 bills she gave out around Christmas time. A.B. RP 206

Thus, contrary to appellants' argument that they should have been able to admit into evidence even more instances of Ms. Faveluke's generosity, here, the trial court allowed testimony about a specific instance

of generosity that ER 404(a) and ER 405 do not allow. As a result, the trial court did not err to the appellants' detriment in its application of the evidence rules concerning Ms. Faveluke's character. Instead, appellants had many more specific instances of Ms. Faveluke's generosity admitted into evidence than which they were entitled under the evidence rules.

Under the Constitution, States' have "broad latitude . . . to establish rules excluding evidence from criminal trials." *Donald*, 178 Wn.App at 263. That said, a criminal defendant's "constitutional right to a meaningful opportunity to present a complete defense limits this latitude." *Id.* (citation and internal quotations omitted). "An evidence rule abridges this right when it infringes upon a weighty interest of the defendant and is arbitrary or disproportionate to the purpose it was designed to serve." *Id.* Similarly, a defendant's right to present a defense is limited. *Id.* For instance, a defendant's right to present a defense is "subject to reasonable restrictions and must yield to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id* at 263-64 (quoting *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999)). A violation of a defendant's right to present a complete defense is subject to harmless error

analysis. *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *Id.*

Here, the appellants were allowed to and did present complete defenses. As mentioned above, not only did appellants introduce substantial evidence of Ms. Faveluke's reputation for being generous, but the trial court allowed testimony through multiple witnesses about a specific instance of Ms. Faveluke's generosity, i.e., her $20,000 gift to the owners of the Eager Beaver restaurant for the purposes of paying off their debt. Moreover, there were additional specific instances of Ms. Faveluke's generosity that ended up being testified to by Ms. Faveluke herself, to include donations to the Woodland Fire Department and Woodland Police Department and $100 bills she gave out around Christmas time.

Importantly, Ms. Brentin spent extensive time in her closing argument talking about the evidence of Ms. Faveluke's generosity and arguing that such generosity helped to create a reasonable doubt that she was guilty. A.B. RP 894-897, 900. Meanwhile, for Mr. Brentin the

evidence of Ms. Faveluke's generosity was not important enough to his defense to even be considered on the periphery during his closing argument. A.B. RP 903-929. Consequently, it is difficult to believe that Mr. Brentin was prevented from presenting his complete defense on the basis that additional evidence of Ms. Faveluke's generosity was not introduced during trial.

Additionally, the Brentins failed to make sufficient offers of proof regarding the other alleged specific instances of Ms. Faveluke's generosity. A.B. RP 126, 132-33, 138-139, 157-158. The offers of proof that were made were vague as to the time, place, and/or purpose of the gifts. A.B. RP 126, 132-33, 138-139, 157-158. Notably, not a single offer of proof included a cash gift to a person with no strings attached. Instead, each purported gift was made either to an organization or to a specific person for a specific purpose. A.B. RP 126, 132-33, 138-139, 157-158. Thus, even if there were admissible evidence out there that was central to ability of the Brentins to present a complete defense such an offer of proof was not made to the trial court.

Finally, even if the trial court erred in preventing the Brentins from cross examining Ms. Faveluke concerning specific instances of her

generosity the error was harmless. Any reasonable jury would have reached the same result as additional evidence of her generosity would not have realistically changed the core facts of the case or the reasonable inferences from the evidence presented.

2) THE TRIAL COURT DID NOT IMPROPERLY ADMIT HEARSAY EVIDENCE AS THE STATEMENTS WERE NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED AND/OR PROPERLY ADMITTED UNDER ER 803(A)(3).

"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." *Aguirre*, 168 Wn.2d at 361; *Martin*, 169 Wn.App. at 628 ("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). 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 *Fankhouser*, 133 Wn.App. at 695. 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)).

"Whether a statement is hearsay depends upon the purpose for which the statement is offered. Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay." *State v. Garcia*, 179 Wn.2d 828, 318 P.3d 266, 276 (2014) (citation omitted). Thus, statements offered to prove a declarant's intent can be offered for that purpose rather than for the truth of the matter asserted. *Id.* Similarly, "[a] statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement." *State v. Edwards*, 131 Wn.App. 611, 614, 128 P.3d 631 (citing *State v. Roberts*, 80 Wn.App. 342, 352–53, 908 P.2d 892 (1996).

In addition, ER 803(a)(3), provides an exception to the hearsay rule for statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health." Under that exception, hearsay statements may be offered "to prove that the declarant acted in accordance with statements of future intent." *State v. Powell*, 126 Wn.2d 244, 266,

893 P.2d 615 (1995) (citing *State v. Terrovona*, 105 Wn.2d 632, 642, 716 P.2d 295 (1986)).

State v. Crowder is instructive. 103 Wn.App. 20, 11 P.3d 828 (2000). There, the defendant was convicted of one count of Theft in the First Degree for the embezzlement of funds from the estate of an elderly man. *Id.* at 22. On appeal, the defendant challenged the trial court's admission of the victim's out-of-court statements through other individuals, which related primarily to her management of his financial affairs. *Id. Crowder* held that five of the six statements were admissible under ER 803(a)(3). *Id.* at 26-28. For example, the victim's attorney testified that the victim told her "I want Holofa to be my guardian, she's my daughter, I want Holofa to be my Power of Attorney." *Id.* at 27. The reviewing court found that this statement "was a statement of intent and motive, and thus excepted from the hearsay rule." *Id.* (citing ER 803(a)(5)). Similarly, the victim told a legal assistant in regard to the defendant's spending that he was going to "pull in the purse strings." *Id.* at 26. Likewise, *Crowder* held that "[t]his statement also was admissible as evidence of the existing mental or emotional condition, showing the intent of the declarant at the time spoken. ER 803(a)(3). The statement

was not offered to prove that [the victim] "pull(ed) in the purse strings," which he did not do, but rather to serve as circumstantial evidence of [the defendant's] influence." *Id.*

Here, the trial court correctly admitted statements by Ms. Faveluke through the various bank employees. Each testified to what Ms. Faveluke's said she intended to do with the money, i.e., her plan, and thus, such testimony was admissible pursuant ER 803(a)(3). Additionally, the statements were not offered to prove that all of the money that Ms. Faveluke gave to Ms. Brentin was used to take care of Ms. Brentin's cat because it was undisputed that Ms. Brentin spent thousands of those dollars on other things, but rather to serve as circumstantial evidence of Ms. Faveluke's state of mind at the time these withdrawals were taking place and of Ms. Brentin's influence over her. *Garcia*, 318 P.3d at 276 ("Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay."). Applying *Crowder* and ER 803(a)(5) to this case is straightforward; the statements were admissible.

Even if the statements were admitted in error, however, there is not a reasonable possibility that the testimony would have changed the

outcome of trial because Ms. Faveluke testified as to why she gave Ms. Brentin the money and that testimony was corroborated by her written statement.

3) NO WITNESS TESTFIED TO HIS OR HER OPINION OF MS. BRENTIN'S GUILT.

The general rule is that no witness may "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Our Supreme Court has, however, "expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (quoting *City of Seattle v. Heatley*, 70 Wn.App. 573, 579, 854 P.2d 658 (1993)). "Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *State v. Notaro*, 161 Wn.App 654, 662, 255 P.3d 774 (2011) (quoting *Heatley*, 70 Wn.App at 578). In other words, lay witnesses may offer opinion testimony. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) ("Lay witnesses also may [] give opinions or inferences based upon rational perceptions. . . ."). To

help determine whether statements are impermissible opinion testimony, a court will consider (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Id.* at 590.

Here, Teresa Loucks did not testify as to her opinion of Ms. Brentin's guilt. Ms. Loucks had been working in the banking industry for 38 years and was acting manager at the Woodland US Bank during the incidents in question and testified at length. A.B. RP 261-314. She explained that as part of her duties she tries to keep an eye out for problematic and fraudulent transactions by getting to know her customers' banking habits, that she paid special attention to her elderly customers and how they were doing, and that at the time of the incidents she had known Ms. Faveluke for at least six years. A.B. RP 264-66. Near the end of her testimony she was asked if she had been trying to get in touch with the police and she responded "Yes." A.B. RP 301-02. She was also asked if she tried to get in touch with Adult Protective Services and she responded "Yes. And our fraud department." A.B. RP 302. Ms. Loucks was asked if she ended up speaking with the police and whether she provided them information and other materials, she responded "Yes, I did" and "Yes"

respectively. A.B. RP 303. Ms. Loucks offered no additional testimony concerning her contact with the police, Adult Protective Services, or her fraud department. A.B. RP 264-314.

Ms. Loucks's testimony contained no direct opinion on Ms. Brentin's guilt or on her credibility. Rather, she testified to objective facts and by acknowledging that she contacted to police, her testimony only informed the jury as to how the police came to be involved in the matter. Importantly, to the extent that Ms. Loucks's testimony included her opinion, that opinion was based solely on her experience in the banking industry and her observations of the change in Ms. Faveluke's banking habits, personality, and physical appearance, all of which coincided with when Ms. Brentin began appearing in the bank with her.

Thus, this evidentiary foundation directly and logically supported Ms. Loucks's concern, if it can be said that acknowledging she called a couple agencies in response to what was happening informed the jury of her opinion. At most, Ms. Louck's simple acknowledgment that she called the police and Adult Protective Services allowed the jury to infer she was concerned about what was going on. But her concern or suspicion about what was going on, which would have been evident by all the other

objective facts to which she testified, does not rise to the level of an opinion that Ms. Brentin was guilty of the crime charged.

Moreover, the jury was in a position to independently assess the opinion, if one was proffered, in light of the foundation evidence. Ms. Loucks was available for cross examination and the jury was instructed that it was the sole judge of credibility and the weight to be accorded the testimony of each witness. In sum, Ms. Loucks did not improperly offer her opinion as to Ms. Brentin's guilt, if part of her testimony included her opinion it was proper, and even if it was improper the error was harmless as it is beyond a reasonable doubt that the jury would have reached the same result in the absence of Ms. Loucks answering in the affirmative that she contacted the police and Adult Protective Services.

4) THE STATE PRESENTED SUFFICIENT EVIDENCE.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In order to determine whether the necessary quantum of proof exists, the reviewing court "need not be convinced of the defendant's guilt beyond a reasonable doubt but only that substantial evidence supports the State's case." *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citations omitted).

Ms. Faveluke's testimony combined with her written statement that was read into the record provided sufficient evidence of Mr. Brentin's guilt. Ms. Faveluke testified to $500 in cash that she gave to Mr. Brentin in the nursing home for the purpose of his campaign and that she wrote a check to him for $4,900 was undisputed. Ms. Faveluke testified that the only reason she was giving Mr. Brentin money was for his campaign and for signs and not for any other purpose, which is corroborated by her written statement. Mr. Brentin, on the other hand, testified the money was given to him specifically for the debt he owed, that he never intended to campaign for the city council, and that he did not in fact campaign. The

jury was in the best place to weigh the credibility of these two stories and choose which one to believe, and it's not far-fetched that they would not believe the story that a person who signs up to run for office actually has no plan to do so. Mr. Brentin let Ms. Faveluke give him money thinking she was helping his campaign for city council and he turned around and put it towards his financial troubles thinking she would be none the wiser.

Moreover, all of the circumstantial evidence in the case militates against the likelihood that Ms. Faveluke was being untruthful. When she was at her lowest, confused, and not herself, the Brentins, in full financial distress, swoop in to help and in less than two months the pair has managed to get close to $20,000 from her. Ms. Brentin is telling Ms. Waggoner that *they* are working on getting control of Ms. Faveluke's finances. Additionally, all of the money Ms. Brentin is successfully getting from Ms. Faveluke is getting put into the Brentins joint account, is being spent on their home's rent and deposit fees, their business's lease, and their home's and business's back-due utility bills. Unsurprisingly, given this information, the fact that the Brentins together run a financial services business, and that they were together with Ms. Faveluke at the nursing home and her home all of the time during this period, the jury

likely believed the Brentins were defrauding Ms. Faveluke together rather than independently bilking her without each other's knowledge and assistance. Here, there was sufficient evidence to convict Mr. Brentin as a principle or accomplice.

5) THE TRIAL COURT PROPERLY ADMITTED MS. FAVELUKE'S WRITTEN STATEMENT UNDER ER 803(A)(5) BECAUSE THE STATE ESTABLISHED A SUFFICIENT FOUNDATION FOR THE STATEMENT.

As mentioned above, "[q]uestions 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." *Aguirre*, 168 Wn.2d at 361; *Martin*, 169 Wn.App. at 628 ("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). 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 *Fankhouser*, 133 Wn.App. at 695. 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." *Moore*, 178 Wn.App. at 498 (citing *Ginn*, 128 Wn.App. at 884 n. 9).

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 fourth element of 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.[6] This is unsurprising since "other evidence establishing the accuracy of [a 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)). Instead, to determine whether the record reflects the witness's prior knowledge accurately "[t]he court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement." *Alvarado*, 89 Wn.App. at 551–52; *Nava*, 177 Wn.App at 291-93.

Here, Appellants only challenge the admission of recorded recollection on the basis that the State did not prove the second foundational element, that the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony. Br. of App. A.

[6] "[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.

Brentin at 16. The court, however, properly admitted the record after finding the State established the elements of the required foundation by a preponderance of the evidence. First, the trial court was 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.

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.

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

[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.

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).

6) THE BRENTINS RECEIVED A TIMELY TRIAL AND BECAUSE THEY FAILED TO FILE A MOTION OBJECTING TO THE TRIAL DATE AND NOTING IT FOR A HEARING AS REQUIRED BY CRR 3.3(D)(3) THEY LOST THE RIGHT TO OBJECT TO THE TRIAL DATE ON APPEAL.

The application of the time for trial rule to a specific set of facts is subject to de novo review. *State v. Carney*, 129 Wn.App. 742, 748, 119 P.3d 922 (2005). Compliance with CrR 3.3(d)(3) requires a defendant to do two things to avoid losing the right to object that a trial commenced on a date not within the time limits prescribed by CrR 3.3: 1) He or she must object to the trial date set; and 2) file a motion for a timely trial making sure that "[s]uch motion shall be promptly noted for hearing by the moving party in accordance with local procedures." CrR 3.3(d)(3); *State v. Wilson*, 113 Wn.App 122, 130, 52 P.2d 545 (2002). Importantly, "[t]he 2003 revised version of CrR 3.3 has not altered the burden on defendants to file a *written* objection within 10 days of the notice of the trial date.

State v. Chavez-Romero, 170 Wn.App 568, 581, 285 P.3d 195 (2012) (citing *State v. Farnsworth*, 133 Wn.App. 1, 13 n. 5, 130 P.3d 389 (2006)); CrR 3.3 (d)(3) ("A party who fails, for any reason, to make such a motion shall lose the right to object.").

Here, the Brentins did not object to the new trial dates by filing written motions to set their trial within the time limits of CrR 3.3 or by noting the matter for such a hearing. By failing to file a motion the Brentins have lost their right to object to the trial date that was ultimately set.[8]

Even if the Brentins did not lose their right to object to the trial date, the trial still occurred within the time limits prescribed by CrR 3.3 because the trial court properly found good cause when it granted the State's continuances. The grant or denial of a continuance will not be disturbed on appeal absent a showing of manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). "The unavailability of a material state witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the

[8] On March 14, the Brentins requested to continue the trial date from March 18 to sometime in April based on witness unavailability. A.B. RP 21-29. And on the trial date of March 19, the Brentins again moved to continue the trial. A.B. RP 34-35.

witness will become available within a reasonable time, and there is no substantial prejudice to the defendant." *State v. Hale*, 146 Wn.App. 299, 189 P.3d 829 (2008) (quoting *State v. Nguyen*, 68 Wn.App. 906, 914, 847 P.2d 936 (1993)); CrR 3.3(f)(2) ("the court may continue the trial . . . when such continuance is required in the administration of justice and the defendant will not be *prejudiced in the presentation* of his or her defense.) (emphasis added)

Here, Ms. Loucks[9] was unavailable because of a serious medical condition, she became available within a reasonable time and neither defendant raised the idea that the presentation of his or her defense was prejudiced by the continuances. A.B. RP 5-20, 37-38; RP (1/3/13) 1-5. Thus, the trial court did not manifestly abuse its discretion in granting the continuances in this case.

7) THE ACCOMPLICE LIABILITY STATUTE IS CONSTITUIONAL.

A statute is unconstitutional on its face if "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875

(2004). Such statutes are rendered inoperative. *Id.* A statute that is unconstitutional as applied prohibits the future application of the statute in a similar context, but the statute is not totally invalidated. *Id.* at 669. Specifically, a statute is overbroad if it prohibits a substantial amount of protected speech and conduct. *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989); *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990) ("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.") (internal quotations omitted).

The Court of Appeals in *State v. Coleman*, 155 Wn.App. 951, 231 P.3d 212 (2010) considered the same attack on the accomplice liability statute, RCW 9A.08.020, that Mr. Clark makes. In *Coleman*, the defendant argued the statute was unconstitutionally overbroad because it criminalizes a substantial amount of speech protected by the First Amendment. *Id.* at 960. *Coleman* rejected the defendant's argument and found that the accomplice liability statute "requires the criminal mens rea

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[9] Contrary to Mr. Brentin's contention the State never sought a continuance on the basis of Ms. Faveluke's medical problems. Br. of App. A. Brentin at 19-20.

to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime." *Id.* 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).

The Court of Appeals in *State v. Ferguson*, 164 Wn.App. 370, 264 P.3d 575 (2011) also considered the same attack on the accomplice liability statute that Mr. Clark presents. *Ferguson* held that the accomplice liability statute "forbids advocacy directed at and likely to incite or produce imminent lawless action," and does not forbid the "mere advocacy of law violation that is protected under the holding in *Brandenburg*." *Ferguson*, 164 Wn. App. At 376. Most recently, *State v. Holcomb*, __ Wn.App. ___, 321 P.3d 1288, 1292 (2014) addressed the constitutionality of the accomplice liability statute and stated "[g]iven all, like Divisions One and Two, we hold RCW 9A.08.020, the accomplice liability statute, is constitutional.

This court should decline Mr. Clark's invitation to reconsider *Coleman* and *Ferguson* given that, in that last four years, between those two cases and *Holcomb* all three divisions of the Court of Appeals have

found the accomplice liability constitutional when confronted by arguments that cannot be distinguished from those of Mr. Brentin.

D. CONCLUSION

For the reasons argued above, the Brentins' convictions should be affirmed.

Respectfully submitted this 7 day of May, 2014.

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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 12th, 2014.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

May 08, 2014 - 10:35 AM

Transmittal Letter

Document Uploaded: 448475-Respondent's Brief.pdf

Case Name: State of Washington v. Shari A. Brentin and Anthony D. Brentin

Court of Appeals Case Number: 44847-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:

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