

NO. 36950-8

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LERISSA IATA, APPELLANT

and

FARAJI BLAKENEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson

No. 06-1-04270-2

and

No. 06-1-04268-1

BY _____
STATE OF WASHINGTON
COUNTY OF PIERCE

STATE OF WASHINGTON
COUNTY OF PIERCE

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court err by giving an accomplice liability instruction after the state began closing, but before the state completed closing?
2. Is the accomplice liability statute overbroad?
3. Did the accomplice liability instruction alleviate the State of its burden as to Iata?
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B. STATEMENT OF THE CASE.

1. Procedure

Lerissa Iata and Faraji Blakeney were charged as co-defendants with unlawful manufacture of a controlled substance, cocaine, and unlawful possession of a controlled substance with intent to deliver, cocaine, as well as other counts. A third co-defendant, plead guilty prior to trial.

Iata and Blakeney proceeded to trial and were convicted by a jury of manufacture of a controlled substance, and possession of a controlled substance with intent to deliver. Both of those counts were firearm

sentence enhanced with two firearm enhancements and with a school bus route stop enhancement. CPLI 1-2, 101-105; CPF 5-8, 80-89. Blakeney was also convicted of unlawful possession of a firearm in the first degree; possessing stolen property in the second degree; and unlawful possession of forty grams or less of marijuana. CP FB 5-8, 80-89.

2. Facts

On December 8, 2006 at about 6:45 a.m. Pierce County Sheriff's Deputies served a warrant in the Fife area at 2540 62nd Ave. East. RPLI vol. 2, p. 60/RPF 2, p. 203.¹ Upon entry the officers found a fifteen or sixteen year old male within five feet of the front door in a sort of entry hall. RPLI vol. 2, p. 118/RPF 2, p. 261. The entry team found defendant Blakeney in bed in a back bedroom that also contained three children in the southwest corner of the apartment. RPLI vol. 2, p. 79-80, 119/RPF 2, p. 222-23, 262.

Lerissa Iata was found in a small living room area connected to a dining room. RPLI vol. 3, p. 150/RPF 3, p. 293.

¹ Defendants Lerissa Iata and Faraji Blakeney have designated different reports of proceedings, and the two sets of reports were numbered differently. They have also designated separate sets of clerk's papers. Accordingly, each citation to the record will be identified as to both records. Report of Proceedings for Lerissa Iata will be identified as RPLI, while those of Faraji Blakeney will be RPF. Similarly, clerk's papers will be CPLI and CPF. Thus, a citation to the report of proceedings will appear as RPLI vol. X, p. y/RPF vol. m, p. n, while a citation to the clerk's papers will appear as CPLI x/CPF n.

In a shoe box in the corner of the bedroom officers found a blue glass dish with a metal measuring spoon (Ex 5), both of which had a white residue that was cocaine with bicarbonate of soda. RPLI vol. 3, p. 154-55, vol. 4, p. 394, 408/RPFB vol. 3, p. 297-298, vol. 4, p. 537, 551. Both were consistent with items used to measure out narcotics. RPLI vol. 3, p. 154-55/RPFB vol. 3, p. 297-98.

Officers also found several bundles or packages of currency in the bedroom. Three \$20 bills (Ex 1), for a total of \$60, were found in a tennis shoe. RPLI vol. 3, p. 155/RPFB vol. 3, p. 298. Another \$54 (Ex 3) consisting of \$1 and \$5 bills was found in another shoe on the floor of the bedroom. RPLI vol. 3, p. 156/RPFB vol. 3, p. 299. Another \$30 (Ex 4) consisting of \$1 and \$5 bills was found on a shelf in the bedroom. RPLI vol. 3, p. 156-57/RPFB vol. 3, p. 299-300. In a wooden box on a TV stand officers found \$515 (Ex 6). RPLI vol. 3, p. 157/RPFB vol. 3, p. 300.

In a shoe box on the top shelf of the closet officer found \$6,250 in cash (Ex 7), marijuana (Ex 8), a tin with white powder cocaine residue (Ex 9). RPLI vol. 3, p. 157-60, 202, 298-99, vol. 4, p. 395/RPFB vol. 3, p.300-03, 345, 441-42, vol. 4, p. 538. Inside the closet officers also found a cloth bag that contained a shoulder holster (Ex 13), a plastic measuring cup caked with white freebase cocaine residue (Ex 14), a retractable razor blade with white freebase cocaine residue (Ex 15), a brass letter opener with white freebase cocaine residue (Ex 16). RPLI vol. 3, p. 161-63, vol. 4, p. 395-97/RPFB vol. 3, p.304-06, vol. 4, p. 538-40. On a shelf in the

closet, hidden under a pile of men's clothing in a manner that was easily accessible was a Colt .357 revolver that was loaded with six rounds of ammunition (Ex 21-A, 21-C). RPLI vol. 3, p. 165-66, 168, 178/RPFB vol. 3, p. 308-09, 311, 321.

In a blue denim purse in the bedroom closet officers found off-white colored rocks that were freebase cocaine (Ex 17), a loaded Smith and Wesson .38 revolver (Ex 21-B, 21-B1), a small, compact digital gram scale (Ex 20) and \$130 in currency (Ex 19), as well as a wallet that contained the Washington ID card for Lerissa Iata (Ex 18). RPLI vol. 3, p. 164-65, 166, 169, vol. 4, p. 398/RPFB vol. 3, p.307-09, 310, 303, vol. 4, p. 541.

The bedroom also contained several paperwork documents addressed to Lerissa Iata and/or Faraji Blaekeny at the address of the apartment that was the subject of the search (Ex. 22). RPLI vol. 3, p. 170-71. /RPFB vol. 3, p. 313-14. Additionally, there was a social security card, U.S. Military I.D. card, Macy's credit card, and Washington I.D. card, all of which belonged to one Stacy Loepp and had been stolen from her (Ex 37A). RPLI vol. 3, p. 179, 285-89/RPFB vol. 3, p. 322, 428-32.

In the kitchen, officers found three boxes of baking soda on top of the refrigerator (Ex 23). RPLI vol. 3, p. 171/RPFB vol. 3, p. 314. Directly next to the baking soda was a glass Pyrex measuring cup with white freebase cocaine residue caked to the inside (Ex 24). RPLI vol. 3, p. 171-72, vol. 4, p. 399/RPFB vol. 3, p. 314-15, vol. 4, p. 542. There were

three microwaves in the kitchen and a glass rotating plate from inside one of the microwaves also had white powder freebase cocaine residue on top of it (Ex. 25). RPLI vol. 3, p. 172/RPFB vol. 3, p. 315. Officers also found a blue glass plate with white powder cocaine residue (Ex. 28) and a zip-loc baggie with white powder residue containing possible cocaine and bicarbonate of soda (Ex. 27). RPLI vol. 3, p. 173-74, vol 4, p. 400-01/RPFB vol. 3, p. 316-17, vol. 4, p. 543-44. There was green vegetable matter in the kitchen that was marijuana (Ex 26). RPLI vol. 3, p. 172-73, 315-16. Officers also found a police scanner in the kitchen that was on and scanning frequencies (Ex. 29). RPLI vol. 3, p. 174, /RPFB vol. 3, p. 317.

On a couch in the living room officers found a cell phone on the couch in the living room (Ex 31). RPLI vol. 3, p. 175/RPFB vol. 3, p. 318.

Officers found \$50 in a pair of jeans on the floor in the hallway of the apartment (Ex 32). RPLI vol. 3, p. 175/RPFB vol. 3, p.318.

In a backpack in the hallway closet officers found a martini shaker, the bottom of which was caked with a white powder cocaine hydrochloride residue (Ex. 33) as if it had been used as a crushing device to get cocaine into a powder form. RPLI vol. 3, p. 176-77/RPFB vol. 3, p. 319-20. Alongside the martini shaker officers also found digital gram scale that appeared to be non-operable because it was charred and broken

and had the batteries removed (Ex. 34). RPLI vol. 3, p. 177/RPFB vol. 3, p. 320.

In the hallway closet officers also found a glass pie plate with kitchen knives and razors, all of which were caked with white powder residue (Ex. 35). RPLI vol. 3, p. 177-79/RPFB vol. 3, p. 320-22. Officers also found boxes of ammunition for both guns in the hallway closet (Ex. 36). RPLI vol. 3, p. 178-79/RPFB vol. 3, p. 321.

A representative of the Fife School district testified that there was an officially designated school bus stop route located 260 feet from the apartment. RPLI vol. 2, p. 128-132 /RPFB vol. 3, p. 271-274.

C. ARGUMENT.

1. THE COURT DID NOT ERR IN GIVING THE ACCOMPLICE LIABILITY INSTRUCTION AFTER THE COMMENCEMENT OF THE STATE'S CLOSING, BUT PRIOR TO THE COMPLETION OF THE STATE'S CLOSING.

In order to be convicted of a crime as an accomplice, the defendant need not be charged as an accomplice in the information. *State v. Bobenhouse*, 143 Wn. App. 315, 324, 177 P. 3d 209 (2008)(citing *State v. McDonald*, 138 Wn.2d 680, 688, 981 P.2d 443 (1999)). “It is constitutionally permissible to charge a person as a principal and convict him as an accomplice as long as the court instructs the jury on accomplice

liability.” *Bobenhouse*, 143 Wn. App. at 324 (citing *State v. Davenport*, 100 Wn.2d 757, 765-65, 675 P.2d 1213 (1984)).

Accomplice liability is neither an element of the crime, nor an alternative means of committing the crime. *State v. Teal*, 152 Wn.2d 333, 338-339, 96 P.3d 974 (2004). Thus, the rule that all elements of a crime be listed in a single instruction is not violated when accomplice liability is described in a separate instruction. *Teal*, 152 Wn.2d at 339.

It is error for either party to argue a legal theory of the case upon which the jury was not instructed, even where the argument regarding the theory is legally correct. *State v. Davenport*, 100 Wn.2d 757, 760ff, 675 P.2d 1213 (1984). Statements by the prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions given by the court. *Davenport*, 100 Wn.2d at 760 (citing *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972)). However, the court has discretion to provide further instruction to the jury after deliberation has begun where both parties either have or properly could have argued the theory to the jury. *State v. Becklin*, 163 Wn.2d 519, 529-30, 182 P.3d 944 (2008). *See also Becklin*, 163 Wn.2d at 531 (Alexander dissenting).

Even where the prosecutor makes an improper argument during closing, the defendant must object at the first opportunity or the objection

is waived. *State v. Classen*, 143 Wn. App. 45, 64-65, 176 P.3d 582 (2008).

In *State v. Becklin* the court held that the trial court did not error when it answered a jury question on accomplice liability in a stalking case.

The jury asked:

Is [a] third party included in stalking? Pursuant to our instructions of charges brought against the defendant? Can you stalk a party thru [sic] a third person. [Becklin, 163 Wn.2d at 524.]

The court answered the question “Yes.” The Supreme Court affirmed the trial court’s conduct even though no jury instruction had been given on accomplice liability. The court affirmed the trial court because in closing both parties argued whether Becklin should be held accountable for the conduct of his friends. The analysis in *Becklin* was based in part CrR 6.15(f).

CrR 6.15 addresses jury instructions and argument. CrR 6.15(a) provides that proposed jury instructions shall be served and filed when a case is called for trial. Additional instructions that could not be reasonably anticipated can be served and filed any time before the court has instructed the jury. CrR 6.15(a). No cases directly interpret CrR 6.15(a) with regard to when jury instructions must be presented, however the cases previously cited address the issue without citing to CrR 6.15(a).

Here, shortly after the start of the prosecutor's closing, defense counsel objected to the prosecutor's inclusion of an accomplice liability language in her PowerPoint closing because no accomplice liability instruction had been included with the proposed instructions. The closing was halted while the parties and the court considered how to proceed.

The original packet of jury instructions did refer to the defendant or an accomplice in two of the jury verdict forms. So defense counsel was not without notice on the issue of accomplice liability. The court ultimately decided to add an accomplice liability instruction to the packet, and to add accomplice language to the "to convict" instructions. Once that was done, the prosecutor recommenced with closing, followed later by counsel for the defendants.

Thus, the jury was correctly instructed on accomplice liability before the closings were complete, and before deliberation. All parties had an opportunity to argue accomplice liability to the jury. Therefore, this case can be distinguished from *State v. Davenport* and *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990), the cases upon which the appellants rely. In both *Davenport* and *Ransom*, the court added instructions on accomplice liability after they had begun to deliberate, so that the defense had no opportunity to argue the theory.

In *State v. Davenport*, the defendant was accused of burglary. The defense argued that the defendant was not guilty of burglary if the driver

of the car was the person who entered the house and handed the property to the defendant who remained outside because under those facts the defendant never entered or remained unlawfully in a building. In rebuttal the prosecutor argued that it didn't matter actually who entered the house... they were accomplices. No jury instruction on accomplice liability had been proposed or given. Nonetheless the trial court denied the defense objection to the prosecutor's rebuttal statement. After 2 ½ hours of deliberation the jury requested a definition of "accomplice" in terms of participation in the crime of burglary. The court sent the jury home overnight and the next day answered the question by referring them to their instructions.

The court in *Davenport* held the prosecutor's statement was error because accomplice liability had never been charged in the information and more importantly because the jury had never been instructed on it. *Davenport*, 100 Wn.2d at 765, so that the comment was an improper statement of the law (of the case).

In *State v. Ransom*, no accomplice liability instruction was proposed or included in the jury instructions. After deliberations began, the jury submitted the following question to the court:

If someone is an accessory to the actual or constructive or attempted transfer of a controlled substance from one person to another are they both guilty of the same?

The court responded by giving WPIC 10.51 over the objection of defense. The defense objected that they had not been afforded the opportunity to argue this theory. The court in *Ransom* reversed the conviction, holding that accomplice liability is a distinct theory of criminal culpability and that defense counsel had no chance to argue it. *Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).

Here, unlike in *Davenport* and *Ransom*, the accomplice instruction was added before jury deliberation began. The prosecutor and defense counsel had an opportunity to argue accomplice liability. Moreover, defense counsel was on notice as to accomplice liability because some of the verdict forms initially submitted specifically referred to accomplice liability.

2. THE ACCOMPLICE LIABILITY STATUTE IS NOT OVERBROAD WHERE THE PROHIBITION ON AIDING ANOTHER IN PLANNING OR COMMITTING A CRIME DOES NOT MAKE UNLAWFUL A SUBSTANTIAL AMOUNT OF CONSTITUTIONALLY PROTECTED CONDUCT.

a. The Accomplice Liability Statute Is Not Overbroad On Its Face.

The appellant seeks to impose on the accomplice liability statute an unreasonably broad definition of the words “aid” and “encourage” in the hope that the court will overturn the statute based upon that unreasonable interpretation.

The appellant claims the statute is unconstitutionally overbroad under both the federal and Washington constitutions. Br. App. p. 3-4. The standard of review under both constitutions is identical. *State v. Pauling*, 108 Wn. App. 445, 448, 31 P.3d 47 (2001), *rev'd. on other grounds*, *State v. Pauling*, 149 Wn.2d 381, 69 P.3d 331 (2003)(citing *City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989)). Because the appellant does not claim the statute is overbroad as applied to her conduct, she is challenging it as facially overbroad. Br. App. p. 4.

A statute is unconstitutionally overbroad if it infringes on constitutionally protected speech or conduct. *Huff*, 111 Wn.2d at 925 (citing *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 84 L. Ed. 1093 (1940)). While a defendant may not normally challenge a statute unless the defendant's conduct falls within the range of constitutionally protected conduct (invalid as applied), a defendant may challenge a statute as overbroad even where the defendant's own conduct is not prohibited (facially invalid) because prior restraints on speech receive greater protection. *Pauling*, 108 Wn. App. 445 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)).

Criminal laws are overbroad if they prohibit a substantial amount of protected conduct even if they also have legitimate applications. *Pauling*, 108 Wn. App. at 448. Nonetheless, statutes that regulate behavior rather than pure speech are lawful "unless the overbreadth is real and substantial in relation to the ordinance's plainly legitimate sweep."

Pauling, 108 Wn. App. at 448 (citing *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990)(citing *Broadrick*, 413 U.S. at 615)).

Here, appellant Iata challenges the accomplice liability statute. It provides in pertinent part:

§ 9A.08.020. Liability for conduct of another -- Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

[...]

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

[...] [RCW 9A.08.020]

The appellant particularly challenges the word “aid,” especially as defined by WPIC 10.51, the jury instruction used in this case.

“Aid” is defined as follows:

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. [WPIC 10.51]

The appellant takes issue with what she describes as the broad definition of “aid.” However, the appellant’s objection to the definition of “aid” is misplaced because the statutory language limits the scope of “aid” so that it is not overbroad.

The statute indicates that a person is an accomplice if with the knowledge that it will promote or facilitate the crime, the person aids in planning or committing the crime. While aid can include encouragement, mere encouragement alone is not enough. The person giving encouragement must: 1) give the encouragement with the knowledge that it will promote and facilitate the crime; and 2) the encouragement must aid in planning or committing the crime.

Thus, contrary to appellant’s argument, the statute does not prohibit acts from which the perpetrator derives encouragement. The encouragement must be intended to promote or facilitate the crime, and it must aid in planning or committing the crime.

These restrictions mean that the accomplice liability statute does not violate the standards established in *Brandenburg v. Ohio*.

Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). In *Brandenburg*, the court held that State’s could not “proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenbrg* 395 U.S. at 447. The statute at issue in *Brandenburg* was the Ohio Criminal Syndicalism Statute “which punished persons who ‘advocate or teach the duty, necessity, or propriety’ of violence ‘as a means of accomplishing industrial or political reform;’ or who publish or circulate or display any book or paper containing such advocacy [...]” *Brandenburg*, 395 U.S. at 448.

The accomplice liability statute does not penalize persons who generally advocate for the duty, necessity, or propriety of legal violation. Rather, Washington’s accomplice liability statute prohibits aid, including encouragement, which knowingly promotes or facilitates the crime and which aids in planning or committing the crime. Because of these requirements, Washington’s accomplice liability statute is narrowly tailored.

It is also worth noting that the statutory language specifies “the crime.” Courts have emphasized that language in a slightly different context. The courts have held that accomplice liability attaches only when

the accomplice acts with knowledge of the specific crime that is charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity. See *State v. Carter*, 154 Wn.2d 71, 109 P.3d 823 (2005); *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 512, 14 P.3d 713 (2000). Thus the instruction must frame the language in terms of knowledge of “the crime” rather than “a crime.” *Cronin*, 142 Wn.2d at 578-79; *Roberts*, 142 Wn.2d at 510-13. By emphasizing “the crime” the accomplice liability statute further limits encouragement as aid in such a way the statute avoids overbreadth because generalized encouragement of criminal conduct does not fall within the statute.

Under the statute, a person is guilty as an accomplice if that person “aids” the accomplice in planning or committing the crime, and with the knowledge that doing so will promote or facilitate the commission of the crime. “Aid” includes encouragement.

So notwithstanding the definition of “aid” which the appellant argues is broad, it is in fact not broad because the definition only applies to aid that promotes the crime with the knowledge that it promotes the crime. Where the other statutory language greatly limits the scope of the aid subject to prohibition, the definition of “aid” does not reach as broadly as the appellant argues.

As to the two examples given by appellant in her brief, both of them misstate the effect of the accomplice liability instruction. The college professor who praises ongoing acts of trespass as an expression of protest is not an accomplice unless his encouragement is made with the knowledge that it will promote or facilitate a specific crime and it aids the perpetrators in planning or committing the crime. Similarly, a journalist sent to cover the protest isn't encouraging the activity, even if the protestors choose to be encouraged by the media coverage. Nor does it aid the perpetrators in planning or committing the crime, even if the crime is committed for the purpose of media attention. Because motive is not an element of the crime, the media coverage does not aid in the commission of the crime.

The appellant's argument that the accomplice liability statute is without merit where it attempts to interpret "aid" and "encourage" outside the context of the other statutory requirements which limit the statute.

b. The Accomplice Liability Statute Is Susceptible To A Limiting Construction.

The court should invalidate a statute "*only if* the court is unable to limit sufficiently its standardless sweep by a limiting construction."

Pauling, 149 Wn.2d at 389 (citing *City of Tacoma v. Luvone*, 118 Wn.2d 826, 840, 827 P.2d 1374 (1992)). [Emphasis in original.] In *Pauling*, the

Supreme Court reversed the Court of Appeals precisely because the Court of Appeals did not impose a limiting construction on Washington's extortion statute. *Pauling*, 149 Wn.2d at 391

Thus, even if this court were otherwise inclined to hold the statute overbroad, the court is nonetheless obligated to interpret the definition according to a more limited construction, if possible, so that the statute is not overbroad.

Moreover, the appellant suffers no prejudice under a limiting construction because at trial the State did not argue the broad interpretation of "aid" to which appellant objects. There was no argument that the court should find Iata even where she merely encouraged Blakeney to commit the crime.

c. The Appellant's Argument is Moot Because Trial Counsel Failed to Object To the Language of the Jury Instruction, which becomes the Law of the Case.

Trial counsel for defendant Iata made no objections to the language of the accomplice liability instruction given by the court. The only objections were to the giving of the instruction after the state had begun closing. 6 RPLI vol. 6, p. 546-566/RPFB vol. 6, p. 689-709. *See* especially RPLI vol. 6, p. 559, ln. 16ff; p. 561-62/RPFB vol. 6, p. 702, ln. 16ff; p. 704-05.

Because trial counsel made no objection to the language of the accomplice liability instruction, that instruction becomes the law of the case. *State v. Guzman*, 98 Wn. App. 638, 643, 990 P.2d 464 (1999). (This assumes that it was not improper for the court to give the accomplice liability instruction in the first place, as argued in section 1. above.) Accordingly, counsel's challenge to the accomplice liability statute is moot because the accomplice liability instruction given by the court became the law of the case.

3. THE ACCOMPLICE LIABILITY INSTRUCTION
CORRECTLY STATED THE LAW AND THE
STATE'S BURDEN.

In 1981, the Washington Supreme Court held that mere presence is insufficient to support accomplice liability and that the omission from the jury instruction of the sentence that sets forth the "ready to assist" standard is reversible error. *State v. Rotunno*, 95 Wn.2d 931, 631 P.2d 951 (1981). *See also In Re Welfare of Wilson*, 91 Wn.2d 485, 588 P.2d 1161 (1971). In *State v. Robinson*, the court noted the problem with an earlier version of the WPIC and proposed resolutions. In 1986 the WPIC committee incorporated the suggestions made by the court in *Robinson* with slight modifications. *State v. Robinson*, 35 Wn. App. 898, 671 P.2d 256 (1983).

WPIC 10.51, Washington Practice, vol. 11, p. 158, West Publishing, c. 1994.

Mere presence is insufficient to establish accomplice liability, even if it is combined with either assent or knowledge. *In Re Wilson*, 91 Wn.2d at 491; *State v. Ferreira*, 69 Wn. App. 465, 850 P.2d 541 (1993); *State v. Galisia*, 63 Wn. App. 833, 840 P.2d 303 (1992). However, presence at the scene may be sufficient if it is combined with readiness to assist. *In Re Wilson*, 91 Wn.2d at 491.

Here the jury instruction included the following language that appropriately explained these aspects of accomplice liability:

[...]

The word “aid” means all assistance whether given by words, acts, encouragement, support, or pretense. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. [CPLI 98/CPFB 77]

The instruction given correctly states the law and the State’s burden. The accomplice liability instruction did not relieve the State of its burden to prove Iata committed an overt act, because the State has no such burden under the case law.

The appellant’s reliance on the cited authority is misplaced. *State v. Matthews* does not hold or imply that accomplice liability requires an

overt act. Br. App. p. 8 citing *State v. Mathews*, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). In *Mathews*, the court held that the jury instruction on given in that case (which was on knowledge, not accomplice liability) was susceptible to three interpretations, two of which involved an unconstitutional mandatory presumption of culpability, rather than a permissive presumption. *Mathews*, 28 Wn. App. at 203-04.

Accordingly, *Mathews* does not stand for the proposition that the State has the burden to prove the appellant committed an overt act. Where the State had no such burden, the instruction given could not relieve the State of that (nonexistent) burden. Where *Mathews* is inapposite the appellant has failed to cite to relevant authority as required by RAP 10.3(a)(6) and therefore should not be considered by the court. In any case, the appellant's statement of the law is erroneous and without merit.

Appellant's reliance on *State v. Peasley* is also misplaced where *Peasley* is a 1914 case, and the accomplice liability statute was adopted in 1975. See *State v. Peasley*, 80 Wash 99, 141 P. 316 (1914). Whether or not *Peasley* may by happenstance accurately reflect the current state of the law, it is not valid authority on this issue where it predates the current statute.

Because the jury instruction was a correct statement of the law, the State was not relieved of its burden and the appellant's argument is without merit.

4. THE KNOWLEDGE INSTRUCTION DID NOT RELIEVE THE STATE OF ITS BURDEN AS TO IATA.

In *State v. Goble*, the court reversed a conviction, holding that the knowledge instruction relieved the State of the burden of proving in a third degree assault that the defendant knew the victim of the assault was a law enforcement officer performing his or her official duties. *State v. Goble*, 131 Wn. App. 194, 200, 126 P.3d 821 (2005). While the State is not normally required to prove that the defendant knew the victim was a law enforcement officer, in *Goble* the State had failed to object to a jury instruction that included that requirement, so that it became the law of the case even though it was an erroneous statement of the law. *Goble*, 131 Wn. App. at 201. The court held that language from the knowledge instruction relieved the State of the burden of proving that the defendant knew the victim's status as a law enforcement officer at the time of the assault. The court held the instruction had this effect because it conflated the requirement that the State prove the assault was intentional with the requirement that the defendant knew the victim was an officer. *Goble*,

131 Wn. App. at 203-04. *See also State v. Gerdts*, 136 Wn. App. 720, 727-28, 150 P.3d 627 (2007).

The particular language the court found error with was:

Acting knowingly or with knowledge also is established if a person acts intentionally. [*Goble*, 131 Wn. App. at 202-204.]

The court limited the scope of *Goble* in two subsequent opinions. First, in *State v. Gerdts* the court held that *Goble* only applied to cases involving a second *mens rea* that could result in two separate *mentes*[3rd declension nominative plural feminine] *reae* being conflated. *State v. Gerdts*, 136 Wn. App. 720, 728, 150 P.3d 627. Second, in *State v. Keend*, the court held that *Goble* was also limited to those cases where a jury could have been confused. *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007).

Here the appellant acknowledges that *Gerdts* and *Keend* are controlling, but invites the court not to follow them. Br. App. p. 13. The appellants argue that WPIC 10.02 including the addition of the bracketed language at issue here always creates problems when a crime involves two *mentes reae* [Latin plural].

The appellant's argument then depends upon a second argument that is without merit. The appellant goes on to argue that the unlawful manufacture of a controlled substance involves two *mentes reae* [Latin plural] by implication because the defendant must intend to manufacture a

controlled substance (an express element), and because the defendant must intend the act of manufacturing. This second argument is contrary to the plain meaning of the controlled substance statutes, which do not impose a *mens rea* on manufacture. The reason it does not is because manufacture cannot be accidental. Because manufacturing cannot be accomplished by accident, there is no point in engrafting an intent *mens rea* onto it by implication.

The appellant's two examples defy credulity and are in fact in themselves a *reductio ad absurdum* that disproves appellant's own argument. A person who accidentally knocks over someone else's crack cocaine thereby breaking it into smaller pieces is not manufacturing a controlled substance under the definition of manufacture. Such a person would not be producing, preparing, propagating, compounding, converting, or processing a controlled substance, either directly or indirectly. Rather, such a person has only bumped into something, and bumping into something is not manufacturing.

Similarly, a person who has accidentally dropped a marijuana seed has only dropped something (which happens to be a marijuana seed) but has not thereby cultivated marijuana, even if by some strange chance the seed were to later sprout. Accidentally dropping something, even a seed, is not the same as propagating a seed.

Because manufacturing cannot occur by accident, it would be improper and unnecessary to engraft an additional intent element into the elements of manufacture.

The appellant's argument fails for two reasons. First, the courts *Gerds* and *Keend* correctly held that in the disputed language from the knowledge instruction can only be a problem on cases where there are two separate *mentes reae* elements and the instructions permitted the jury to become confused about them. Additionally, the unlawful manufacture of a controlled substance, only has one *mens rea*. By asking the court to engraft an additional *mens rea* into the manufacturing elements, the appellant is asking the court to create a problem which in fact does not exist so that the appellant can then challenge the contrived problem. For all these reasons, the appellant's argument is without merit.

5. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT BLAKENEY'S CONVICTIONS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...]great deference [...] is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity. [*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).]

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

a. There Was Sufficient Evidence That Blakeney Had Dominion And Control Of The Premises

Possession of property may be actual or constructive. Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual physical possession, but that the person charged with possession has dominion and control over the goods. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)(citing *State v. Walcott*, 72 Wn.2d 959, 435 P.2d 994 (1957)).

While a showing of something more than mere proximity must be shown to establish dominion and control, it is not necessary to show exclusive control. *State v. Hystad*, 36 Wn. App. 42, 671 P.2d 793 (1983). When reviewing a challenge to constructive possession, courts must consider the totality of the situation and determine whether there is substantial evidence that tends to establish circumstances from which the jury could reasonably infer that the defendant had dominion and control of the goods and was in constructive possession of them. *State v. Paine*, 69

Wn. App. 873, 878, 850 P.2d 1369 (1993). Dominion and control over the premises on which a controlled substance is found is sufficient to establish dominion and control over the controlled substance. *See State v. Ponce*, 79 Wn. App. 651, 653, 904 P.2d 322 (1995)(holding that a jury instruction defining construction possession as dominion and control over the substance or the premises upon which the substance is found was not error).

Here, when the officers entered they found Blakeney in bed in the bedroom. RPLI vol. 2, p. 79, 119, /RPFB vol. 2, p. 222, 162. In that bedroom officers also found documents addressed to Blakeney individually and to Blakeney and Iata jointly. Those documents were addressed to them at the address that was the subject of the search warrant and in which Blakeney, Iata and the evidence were found. From this evidence alone the jury could reasonably find that Blakeney and Iata resided at the apartment. The jury could also find from that evidence that not only did Blakeney have dominion and control over the apartment, but that the fact that he was in bed in the bedroom established more specifically that he also had dominion and control over the bedroom.

Additionally, officers found one of the guns high up on the shelf in the closet, under men's clothing. That further reinforces Blakeney's dominion and control over both the weapon and the drugs and drug

operation that the jury held it was readily available to protect, especially where a separate gun was found in Iata's purse. Both the fact that it was a second gun, and its location on a high shelf would further reinforce a jury inference that the gun belonged to Blakeney and that it was there to protect the drug operation.

There was an open cocaine manufacturing operation in the kitchen. The kitchen is a common area of the house and therefore an area that the jury could reasonably infer was under Blakeney's dominion and control.

Given these facts, it was not unreasonable for the jury to infer that both Blakeney and Iata had joint dominion and control over the premises and were in fact working in concert as accomplices. As accomplices in the crimes of manufacture of cocaine and possession of cocaine with intent to deliver, they were both equally guilty.

b. There Was Sufficient Evidence That Iata Also Had Dominion And Control Of The Premises.

As indicated above, Iata received mail addressed to her at the apartment and was found in the living room. Additionally, in a blue denim purse in the bedroom closet officers found off-white colored rocks that were freebase cocaine (Ex. 17), a loaded Smith and Wesson .38 revolver (Ex. 21-B, 21-B1), a small, compact digital gram scale (Ex. 20) and \$130 in currency (Ex. 19), as well as a wallet that contained the

Washington ID card for Lerissa Iata (Ex. 18). RPLI vol.3, p. 164-65, 166, 169, vol. 4, p. 398/RPFB vol. 3, p. 307-08, 309, 312.

These items when taken together are sufficient to establish Iata's dominion and control over the premises generally, the bedroom specifically, and the purse and its contents particularly. That is sufficient to implicate her in the entire cocaine operation. It was therefore reasonable for the jury to also infer that she was an accomplice of Blakeney.

c. There Was Sufficient Evidence Of Blakeney's Guilt.

In a shoe box in the corner of the bedroom officers found a blue glass dish with a metal measuring spoon (Ex 5), both of which had a white residue that was cocaine with bicarbonate of soda. RPLI vol. 3, p. 154-55, vol. 4, p. 394, 408/RPFB vol. 3, p. 297-98 vol. 4, p. 537, 551. Both were consistent with items used to measure out narcotics. RPLI vol. 3, p. 154-55/RPFB vol. 3, p. 297-98.

Officers also found several bundles or packages of currency in the bedroom. Three \$20 bills (Ex. 1), for a total of \$60, were found in a tennis shoe. RPLI vol. 3, p. 155/RPFB vol. 3, p. 298. Another \$54 (Ex. 3) consisting of \$1 and \$5 bills was found in another shoe on the floor of the bedroom. Another \$30 (Ex. 4) consisting of \$1 and \$5 bills was found on

a shelf in the bedroom. In a wooden box on a TV stand officers found \$515 (Ex. 6).

In a shoe box on the top shelf of the closet officer found \$6,250 in cash (Ex. 7), marijuana (Ex. 8), and a tin with white powder cocaine residue (Ex. 9). RPLI vol. 3, p. 157-60, 202, 298-99, vol. 4, p. 395/RPFB vol. 3, p.300-03, 345, 441-42, vol. 4, p. 538. Inside the closet officers also found a cloth bag that contained a shoulder holster (Ex 13), a plastic measuring cup caked with white freebase cocaine residue (Ex 14), a retractable razor blade with white freebase cocaine residue (Ex 15), and a brass letter opener with white freebase cocaine residue (Ex 16). RPLI vol. 3, p. 161-163, vol. 4, p. 395-397/RPFB vol. 3, p. 304-06, vol. 4, p. 538-40. On a shelf in the closet, hidden under a pile of men's clothing in a manner that was easily accessible was a Colt .357 revolver that was loaded with six rounds of ammunition. (Ex. 21-A, 21-C). RPLI vol. 3, p. 165-66, 168, 178/RPFB vol. 3, p. 308-09, 311, 321.

All this was found in the bedroom with Blakeney. There was additionally the evidence of crack cocaine manufacture in the kitchen, as well as the evidence of cocaine manufacture and distribution from the hall closet. Blakeney had dominion and control over all of these places. He had specific control over the bedroom where his mail was found and where he was present. And he had dominion and control over the common areas of the apartment.

Because the jury could reasonably find that Blakeney had dominion and control over the bedroom, they could also find that he had dominion and control over the bedroom closet, and thus over the gun that was hidden up high under the men's clothes in it.

Accordingly, the jury could infer that he manufactured cocaine, that he possessed cocaine with intent to deliver, that he possessed the firearm, and that he did so to use it to protect his drug operation, including his nearly \$7,000 in profits. RPLI vol. 3, p. 155-60, 202, 298-99/RPFB vol. 3, p. 298-99, 345, 441-42.

The jury could also find that he possessed the IDs stolen from Stacy Loepp where they were found in the bedroom with him. RPLI vol. 3, p. 179, 285-289/RPFB vol. 3, p. 322, 428-432.

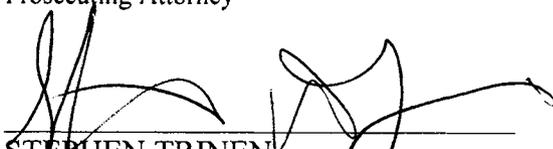
D. CONCLUSION

The court did not err by adding the accomplice liability instruction before the parties completed closing. The accomplice liability statute is not overbroad, nor does the accomplice instruction relieve the state of its burden. The knowledge instruction did not create an impermissible presumption. Finally, there was sufficient evidence to convict both defendants.

Because all of the appellants' claims are without merit, the appeal should be denied and the judgment should be affirmed.

DATED: NOVEMBER 10, 2008

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Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/08/08 Johnson
Date/ Signature

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STATE OF WASHINGTON
BY [Signature]
COUNTY OF PIERCE
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