

FILED
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No. 38793-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Alnissia Moore,

Appellant.

Lewis County Superior Court

Cause No. 08-1-00590-3

The Honorable Judges James Lawler and Richard Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erroneously admitted evidence of uncharged misconduct in violation of ER 404(b).
2. The trial court erroneously failed to analyze the 404(b) evidence on the record.
3. The trial court erred by admitting evidence under ER 404(b) without giving the jury a limiting instruction.
4. The evidence was insufficient to prove Ms. Moore stole property that exceeded \$1500 in value.
5. The trial court erred by refusing Ms. Moore's proposed missing witness instruction, which reads as follows:

If a party does not produce the testimony of a witness who is within the control of or peculiarly available to that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

Defendant's Proposed Instructions, Supp. CP

6. The trial court erred by sustaining the prosecutor's objection to defense counsel's missing witness argument.
7. The accomplice liability statute is unconstitutionally overbroad.
8. Ms. Moore was convicted through operation of a statute that is unconstitutionally overbroad.
9. The trial judge erred by giving Instruction No. 12, which reads as follows:

A person is guilty of a crime if it is committed by the conduct of another person for which she is legally accountable. A person is legally accountable for the conduct of another when she

is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

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

Instruction No. 12, Court's Instructions to the Jury, Supp. CP.

10. Instruction No. 12 permitted conviction without proof of an overt act.

11. The trial court erred by providing an erroneous definition of knowledge, which read as follows:

A person knows or acts knowingly or with knowledge when she is aware of a fact, facts, or circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Instruction No. 6, Court's Instructions to the Jury, Supp. CP.

12. The court's knowledge instruction contained an improper mandatory presumption.

13. The court's knowledge instruction impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of prior misconduct is inadmissible if offered to establish propensity to commit the charged crime. The trial court admitted allegations of uncharged misconduct that was used as propensity evidence. Did the trial court's admission of propensity evidence violate ER 404(b)?
2. The state bears a "substantial burden" of proving that uncharged misconduct fits within an exception to ER 404(b). In this case, the prosecutor did not mention an exception to ER 404(b), and did not prove that the evidence fit within an exception. Did the trial court's admission of evidence of uncharged misconduct violate ER 404(b)?
3. Before admitting evidence of uncharged misconduct, a trial court must analyze the evidence on the record. Here, the trial court failed to analyze the uncharged misconduct evidence on the record, and did not articulate a basis for the admission of the evidence. Did the trial court's decision admitting evidence of uncharged misconduct violate ER 404(b)?
4. Due process requires the state to prove every element of a criminal offense beyond a reasonable doubt. Ms. Moore was convicted despite the state's failure to prove an element of Theft in the First Degree. Must Ms. Moore's conviction be reversed and the case remanded for entry of a conviction for Theft in the Third Degree?
5. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite "imminent lawless action." The accomplice liability statute criminalizes support and encouragement of criminal activity, even where such support and encouragement is not directed at and likely to incite "imminent lawless action." Is the accomplice liability statute unconstitutionally overbroad?

6. Accomplice liability requires proof of an overt act. The court's instructions permitted the jury to convict Ms. Moore even absent proof of an overt act. Did the court's instructions relieve the state of its obligation to prove the elements of accomplice liability?
7. To prove that Ms. Moore was an accomplice to Theft in the First Degree, the state was required to produce evidence that she intentionally distracted the salesclerk, knowing that her action would facilitate theft. The court's definition of knowledge permitted the jury to presume she acted with knowledge that her action would facilitate theft if she intentionally spoke with the clerk. Did the court's knowledge instruction conflate two mental states and permit conviction without proof that Ms. Moore acted with the requisite knowledge?
8. A jury instruction creates a conclusive presumption whenever a reasonable juror might interpret the presumption as mandatory. The trial judge instructed the jury that "[a]cting knowingly or with knowledge... is established if a person acts intentionally." Did the court's instruction defining knowledge create an unconstitutional mandatory presumption?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Alnissia Moore went to school in Seattle and didn't have a car. RP (12/2/08) 132-133. When her acquaintance Patricia Noble offered to take her school shopping in Portland and at outlet malls along the way, she agreed because she had shopping and returns to make at various stores. RP (12/2/08) 133. On August 27, 2008, they took Noble's van, and one of their stops was at the Ralph Lauren Polo outlet store in Centralia. RP (12/2/08) 133-134; RP (12/1/08) 59-60. They went into the shop together. RP (12/2/08) 130. Ms. Moore had some items to return and exchange. RP (12/1/08) 51; RP (12/2/08) 133. While she looked for items and asked questions of the staff, Ms. Noble went in and out of the store repeatedly, stealing sweaters. RP (12/1/08) 59-60; RP (12/2/08) 133-134, 138-141.

While checking on a size for Ms. Moore, employee Reid Zucati noticed Noble's thefts and alerted the managers who were in the back area. RP (12/1/08) 59-60, 69. When Zucati came back out, Noble had left the store. RP (12/1/08) 60. Merchandise manager Alison Townsend came out, answered Ms. Moore's questions, and completed her return.¹ RP (12/1/08) 73-78, 90. Zucati described the interaction with Ms. Moore as

¹ Part of the return process included reviewing and recording Ms. Moore's driver's license information, which Ms. Moore provided. RP (12/1/08) 76-78, 89.

“normal,” but stated that he later decided it was suspicious since Ms. Moore seemed to know Noble. RP (12/1/08) 64-65, 67-68.

The next week (September 4th), Noble again offered to take Ms. Moore shopping in Portland, and Ms. Moore accepted. RP (12/2/08) 134, 143. They were accompanied by another friend of Noble’s named Sang Nguyen. When they stopped at the Centralia outlet stores, Ms. Moore didn’t have any shopping to do and stayed in the van. RP (12/2/08) 144. Nguyen went into the store and attempted to return a sweater, which was the same type of sweater that Noble had stolen the week before. RP (12/2/08) 108, 144. Staff made note of the van description and contacted police. RP (12/1/08) 106, 109.

Police stopped the van, and arrested Ms. Moore, Noble, and Nguyen.² RP (12/2/08). Officers searched the van pursuant to a search warrant and found sweaters, gift cards, and bags of items in the van. RP (12/2/08) 121. They also found a foil-lined shopping bag (a “booster bag”), which could be used to interfere with anti-theft security systems. RP (12/1/08) 82-83, 112.

² It’s unclear from the record whether the fourth person in the van, Brian Dorsey, was arrested. RP (12/2/08) 122.

Ms. Moore was charged with Theft in the First Degree. CP 24-25. Noble and Nguyen were also charged, and they entered into plea agreements with the prosecutor on the morning Ms. Moore's trial began. Each agreement included a promise to testify against Ms. Moore at her trial.³ RP (11/26/08) 3; RP (12/1/08) 19-20, 24-25.

At trial, staff from the Polo store testified that the sweaters stolen on August 27th were marked \$69.99. RP (12/1/08) 82, 84. On cross-examination, Townsend (the merchandise manager) acknowledged that although the sweaters were marked \$69.99, they rang up at \$49.99 on the register. RP (12/1/08) 87-89. Townsend also testified that after the theft was discovered, she counted the remaining sweaters on the sales floor. She testified that counts were generally performed every two weeks, but did not testify when the last count before August 27th had been done.⁴ According to Townsend, 41 sweaters were missing as of August 27th. RP (12/1/08) 80-93. In closing, the state argued that the value of the sweaters stolen on August 27th was equal to 41 times \$69.99. RP (12/1/08) 48-49.

³ The record in this case doesn't specify their charges, but they were both charged with Theft in the First Degree.

⁴ Store manager Mistee Hurley told the jury that in general, 20% of store losses are paperwork errors, and 40% are from employee thefts. RP (12/1/08) 51.

The prosecutor sought to admit evidence of all of the items found in the van on September 4th. According to the prosecutor, the items in the van and Nguyen's return were all a part of a scheme in which Ms. Moore participated. RP (12/1/08) 13-16, 25. Defense counsel objected, since there was no proof that the sweaters in the van were stolen, or that they were the same sweaters taken by Noble the week before. RP (12/1/08) 11-16, 23-29. Furthermore, Ms. Moore's charge stemmed from the August 27 incident and not from any actions or items found on September 4th. RP (11/26/08) 2-3; RP (12/1/08) 27. Defense counsel also argued that the gift cards and other items in the van were not tied to Ms. Moore. RP (12/1/08) 11-16, 23-29; RP (12/2/08) 122-123. The court overruled Ms. Moore's objection and admitted testimony about the September 4th seizures. RP (12/1/08) 13-16, 29.

After the state rested, defense counsel moved to dismiss for insufficient evidence. The court denied the motion. According to the trial judge, the case could be submitted to the jury because Noble and Ms. Moore entered the store together and Zucati had a feeling that something was going on. RP (12/2/08) 127-129.

The state didn't call either Noble or Nguyen as witnesses, despite their plea agreements requiring their testimony. RP (12/1/08) 19-21, 23-24. Ms. Moore sought a missing witness instruction, since the state had

entered plea agreements requiring Noble and Nguyen to testify, had subpoenaed them, and had failed to call them at trial. RP (12/2/08) 150-153; Defendant's Proposed Instructions, Supp. CP. Defense counsel argued that because of the plea deal, both Noble and Nguyen were both uniquely available to the state. RP (12/2/08) 150-153. The court refused the requested instruction. RP (12/2/08) 153-154. The state requested, and the court gave, the following additional instructions, without defense objection:

A person knows or acts knowingly or with knowledge when she is aware of a fact, facts, or circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.
Instruction No. 6.

A person commits the crime of Theft in the First Degree when he or she commits theft of property exceeding \$1500 in value.
Instruction No. 7.

To convict the defendant of the crime of Theft in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 27, 2008, the defendant wrongfully obtained or exerted unauthorized control over property of another;

- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 11.

A person is guilty of a crime if it is committed by the conduct of another person for which she is legally accountable. A person is legally accountable for the conduct of another when she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

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

Instruction No. 12.

Court's Instructions to the Jury, Supp. CP.

The jury convicted Ms. Moore as charged. She was sentenced, and this timely appeal followed. CP 14-23, 3-13.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF UNCHARGED MISCONDUCT IN VIOLATION OF ER 401, ER 403 AND ER 404(B) AND THEREBY DEPRIVED MS. MOORE OF HER RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” A trial court’s decision under ER 403 is reviewed for an abuse of discretion. *Subia v. Riveland*, 104 Wn. App. 105, 113-114, 15 P.3d 658 (2001).

Under ER 404(b), “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” A trial court “must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). Where the state seeks to introduce evidence of prior bad acts, it bears a “substantial

burden” of showing admission is appropriate for a purpose other than propensity, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); *DeVincentis*, at 18-19.

Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). The trial court must conduct the analysis on the record.⁵ *State v. Asaeli*, ___ Wn. App. ___, ___, 208 P.3d 1136 (2009) (citing *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007)). If the evidence is admitted, a limiting instruction must be given. *Asaeli*, ___, n. 35.

In this case, the prosecutor argued that the September 4th evidence showed that there was a larger scheme to Ms. Moore’s involvement in the August 27th theft. RP (12/1/08) 27, 29. The trial judge admitted the evidence, but did not explain the purpose for which it was admitted, did

⁵ But if the record shows that the court adopted a party’s express arguments as to the purpose of the evidence and that party’s weighing of probative and prejudicial value, then the failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at ___, n. 35 (citing *State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995)).

not determine the relevance of the evidence to prove an element of theft, and did not balance the probative value against the prejudicial effect. Nor did the court adopt the prosecutor's reasoning. RP (12/1/08) 11-30. In fact, the prosecutor did not reference any exception under ER 404(b), did not explain how the evidence was relevant to an element of theft, and did not argue that the probative value outweighed the prejudicial effect. RP (12/1/08) 11-30. The failure to analyze the evidence on the record was error. *Asaeli*, at ____.

Had the trial court conducted a proper analysis on the record, it would have excluded the evidence. The evidence was not admissible for any legitimate purpose, was not relevant to prove any element of theft, and was so lacking in probative value that its prejudicial effect predominated. The state charged Ms. Moore with only one incident, occurring August 27th. Nothing in the record established that the sweaters discovered on September 4th were stolen, or that the gift cards in Ms. Moore's purse were improperly obtained. Ms. Moore did not deny that she knew Ms. Noble or that she had accompanied Noble to the store. At the time the evidence was admitted, Ms. Moore had not yet testified, and thus had not denied participation in the August 27th theft. Under these circumstances, admission of the evidence was improper. *See, e.g., Fisher* (improper for

state to introduce misconduct evidence before defendant had the opportunity to raise an issue that might have made the evidence relevant.)

The trial court's errors were prejudicial and require reversal of Ms. Moore's conviction. An erroneous ruling under ER 404(b) requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Wilson*, 144 Wn.App. 166, 177-178, 181 P.3d 887 (2008).

Here, the trial judge failed to provide the required limiting instruction. Court's Instructions to the Jury, Supp. CP. The jury could have decided that additional theft(s) occurred on September 4th, and used Ms. Moore's alleged involvement as propensity evidence to convict her of the August 27 crime. Without the ability to use the September 4th evidence as propensity evidence, Ms. Moore would likely have been acquitted.⁶ The admission of misconduct evidence without proper analysis and in violation of ER 404(b) prejudiced Ms. Moore because it materially affected the outcome of the trial. *Wilson, supra*.

⁶ Indeed, jurors told defense counsel that the September 4th evidence contributed to their guilty verdict. Defendant's Motion and Memorandum for Arrest of Judgment, p. 2, Supp. CP; RP (1/21/09)4.

II. MS. MOORE’S CONVICTION VIOLATED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT SHE STOLE MERCHANDISE WORTH AT LEAST \$1500.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.⁷ *DeVries*, at 849. The remedy for a

⁷ Although a claim of insufficiency admits the truth of the state’s evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589, 592, 123 P.3d 891 (2005). The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” *In re A.V.D.*, 62 Wn.App. 562, 568, 815 P.2d 277 (1991), *citation omitted*.

conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

Theft in the First Degree requires proof that a person stole property that exceeded \$1500 in value. Instructions Nos. 7 and 11, Court's Instructions to the Jury, Supp. CP. In this case, the state presented evidence that the sweaters stolen on August 27th were each worth either \$49.99 or \$69.99. RP (12/1/08) 82-93. The prosecution was unable to prove how many were stolen on that day, but established that 41 such sweaters were likely missing over a two-week period. RP (12/1/08) 80-82.

This evidence was insufficient to prove that Ms. Moore stole merchandise that exceeded \$1500 in value⁸ on or about August 27th. To reach that amount, the prosecution would have to produce evidence that Ms. Moore or an accomplice took 22 or more sweaters during their visit to the store on September 27th. The state did not produce evidence that Ms. Moore was involved in a single theft of that magnitude on that date.

⁸ Ordinarily, the state may aggregate the value of property from multiple low-value thefts that form part of a single criminal episode. RCW 9A.56.010(18)(c). However, this rule of aggregation does not apply to Ms. Moore's case, since the state alleged and introduced evidence of only one incident, and the jury was not instructed on aggregation.

Because the evidence was insufficient to convict Ms. Moore of Theft in the First Degree, her conviction must be reversed. *Colquitt*. The case must be remanded to the trial court for a new trial on the inferior degree offense of Theft in the Third Degree (if a new trial is warranted by Ms. Moore's other arguments) or for entry of a conviction of Theft in the Third Degree (if a new trial is not otherwise warranted). *See, e.g., State v. Garcia*, 146 Wn.App. 821, 193 P.3d 181 (2008) (“[W]hen an appellate court finds the evidence insufficient to support a conviction for the charged offense, it will direct a trial court to enter judgment on a lesser degree of the offense charged when the lesser degree was necessarily proven at trial.”)

III. THE TRIAL COURT SHOULD HAVE GIVEN MS. MOORE'S MISSING WITNESS INSTRUCTION AND PERMITTED DEFENSE COUNSEL TO ARGUE THE MISSING WITNESS DOCTRINE TO THE JURY.

A jury may draw inferences unfavorable to a party who fails to produce otherwise proper evidence within that party's control. *State v. Russell*, 125 Wn.2d 24, 90, 882 P.2d 747 (1994). If requested by the accused person and warranted by the facts, a court must instruct the jury on the missing witness doctrine. *State v. Davis*, 73 Wn.2d 271, 438 P.2d 185 (1968). There are three exceptions to this rule. First, the instruction should not be given if the witness possesses evidence that is unimportant or merely cumulative. *State v. Blair*, 117 Wn.2d 479, 489, 816 P.2d 718

(1991). Second, the instruction should not be given if there is a satisfactory explanation for the witness' absence. *Blair*, at 489. Third, the instruction should not be given if the witness is incompetent or the testimony is privileged. *Blair*, at 489.

The witness must be “within the control of or peculiarly available” to the party against whom the instruction is offered. WPIC 5.20; *Blair*, *supra*. However, this question of availability does not mean that the witness is present in court or subject to the subpoena power. Instead,

[f]or a witness to be “available” to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging... The rationale for this requirement is that a party will likely call as a witness one who is bound to him by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be.

State v. Blair, at 490.

In this case, the trial court should have granted Ms. Moore's request for a missing witness instruction. First, the prosecution made plea agreements with Noble and Nguyen that required them to testify, and the two pled guilty pursuant to those agreements. RP (11/26/08) 3; RP (12/1/08) 19-20, 24-25. Second, because Noble and Nguyen were charged

with crimes and represented by counsel, Ms. Moore's attorney did not have the same access to them that the prosecutor did. Third, having entered into plea agreements with the two witnesses, the prosecution would not have failed to call them unless their testimony was adverse to the state's case.

Under these circumstances, the trial court should have given Ms. Moore a missing witness instruction, and permitted defense counsel to argue the missing witness doctrine to the jury. The court's refusal to give the requested instruction or to allow defense counsel to argue the doctrine violated Ms. Moore's right to a fair trial. Her conviction must be reversed and the case remanded for a new trial. *Davis, supra*.

IV. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH AND CONDUCT.

The First Amendment to the U.S. Constitution provides that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51

Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases). Washington's Constitution affords a similar protection in Article I, Section 5:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.
Wash. Const. Article I, Section 5.

A statute is unconstitutionally overbroad if it criminalizes constitutionally protected speech or conduct. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000). Any person accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Lorang, supra*, at 26. The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003). Instead of applying the general rule for facial challenges, “[t]he Supreme Court has ‘provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or “chill” constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.’” *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005), quoting *Virginia v. Hicks* at 119; see also *Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3d Cir. 2006). Accordingly, an overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Lorang, supra*, at 26.

A statute that reaches a “substantial” amount of protected conduct is unconstitutionally overbroad:

The showing that a law punishes a “substantial” amount of protected free speech, “judged in relation to the statute’s plainly legitimate sweep,” *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973), suffices to invalidate all enforcement of that law, “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression,” *id.*, at 613...
Virginia v. Hicks, at 118-119.

The First Amendment protects speech that supports or encourages criminal activity unless the speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes a substantial amount of speech (and conduct) protected by the First Amendment. Because of this, Ms. Moore’s conviction must be reversed and the case remanded for a new trial. Upon retrial, the state may not proceed on a theory of accomplice liability.

Under RCW 9A.08.020, a person may be convicted as an accomplice if she or he, acting “[w]ith knowledge that it will promote or facilitate the commission of the crime... aids or agrees to aid [another]

person in planning or committing it.” The statute does not define “aid.” Nor has any Washington court limited the definition of aid to bring it in compliance with the U.S. Supreme Court’s admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) “imminent lawless action.” *Brandenburg v. Ohio, supra, at 447-449.*

Instead, Washington courts—and the trial judge in this case—have adopted a broad definition of “aid,” found in WPIC 10.51:

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.

See Instruction No. 12, Court’s Instructions the Jury, Supp. CP. By defining “aid” to include anything more than mere presence and knowledge of criminal activity, the instruction criminalizes a vast amount of speech and conduct protected by the First Amendment, and runs afoul of the U.S. Supreme Court’s decision in *Brandenburg v. Ohio, supra.*

For example, a college professor who praises ongoing acts of criminal trespass by antiwar protestors is guilty as an accomplice if he utters his praise knowing that it will provide support and encouragement for the protestors. A journalist sent to cover the protest, who knows that

media presence encourages the illegal activity, would be guilty as an accomplice simply for reporting on the protest.⁹ Anyone who supports the protest from a legal vantage point (for example by carrying an antiwar sign on the sidewalk across the street) is guilty as an accomplice. An attorney who agrees to represent the protesters *pro bono* provides support and encouragement, and is thus guilty of trespass as an accomplice.

It is possible to construe the accomplice statute in such a way that it does not reach substantial amounts of constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. *Brandenburg v. Ohio, supra*. However, such a construction has yet to be imposed. The prevailing construction—as expressed in WPIC 10.51 and adopted by the trial court in Instruction No. 12—is overbroad. Therefore, RCW 9A.08.020 is unconstitutional.

The verdict form in this case does not indicate whether the jury convicted Ms. Moore as a principal or as an accomplice. Verdict Form A, Supp. CP. Accordingly, her convictions must be reversed and the case remanded to the trial court for a new trial. Upon retrial, the state may not pursue a theory of accomplice liability.

⁹ Indeed, under WPIC 10.51 and Instruction No. 27, every news program commits a crime when it covers terrorism, knowing that terrorism depends on publicity to fulfill its general purpose (intimidating and coercing persons beyond its immediate victims).

V. THE COURT'S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE MS. MOORE COMMITTED AN OVERT ACT.

Accomplice liability requires an overt act. *See, e.g., State v.*

Matthews, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, she must say or do something that carries the crime forward. *State v. Peasley*, 80 Wash. 99, 100, 141 P. 316 (1914). In *Peasley*, the Supreme Court distinguished between silent assent and an overt act:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.
Peasley, at 100.

See also State v. Everybodytalksabout, 145 Wn.2d 456, 472, 39 P.3d 294 (2002) (“Physical presence and assent alone are insufficient” for conviction as an accomplice.)

Similarly, in *State v. Renneberg*, the Supreme Court approved the following language: “to aid and abet may consist of *words spoken, or acts done...*” *State v. Renneberg*, 83 Wn.2d 735, 739, 522 P.2d 835 (1974), *emphasis added*. The Court noted that an instruction is proper if it requires ““*some form of overt act in the doing or saying of something that either directly or indirectly contributes to the criminal offense.*””

Renneberg, at 739-740, *emphasis added*, quoting *State v. Redden*, 71 Wn.2d 147, 150, 426 P.2d 854 (1967).

Instruction No. 12 was fatally flawed because it allowed conviction without proof of an overt act. Under the instruction, the jury was permitted to convict if Ms. Moore was present and assented to her codefendant's crimes, even if she did not aid or agree to aid Noble. Court's Instructions to the Jury, Supp. CP. Because of this, the instruction violates the "overt act" requirement of *Peasley*, *supra* and *Renneberg*, *supra*.

The last two sentences of Instruction No. 12 do not correct this problem. The penultimate sentence ("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") does not exclude other situations. Instruction No. 12, Court's Instructions to the Jury, Supp. CP. Thus a person who is present and *unwilling* to assist, but who approves of the crime, may still be convicted if she or he knows his presence will promote or facilitate the crime.

Similarly, the final sentence fails to save the instruction as a whole. Although the final sentence ("more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice") excludes presence coupled with mere knowledge, the instruction does not exclude presence coupled with silent

assent or silent approval. Instruction No. 12, Court's Instructions to the Jury, Supp. CP. Even with this final sentence, a person who is present and unwilling to assist, but who silently approves of the crime could be convicted.

Because the instructions allowed conviction as an accomplice in the absence of an overt act, the convictions must be reversed and the case remanded to the trial court for a new trial. *Peasley, supra; Renneberg, supra.*

VI. THE COURT'S INSTRUCTIONS CONFLATED TWO MENTAL STATES, CREATED A MANDATORY PRESUMPTION, AND RELIEVED THE STATE OF ITS BURDEN TO PROVE KNOWLEDGE (ARGUMENT INCLUDED FOR PRESERVATION OF ERROR).

An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). A jury instruction that misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the

presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569, 573, 618 P.2d 82 (1980), citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58, 63, 768 P.2d 470 (1989). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

The Court has previously reversed a conviction because of problems with an instruction defining “knowledge” in the same language as Instruction No. 6. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.¹⁰ The trial court’s “knowledge”

¹⁰ Although not a statutory element of Assault in the Third Degree, knowledge that the victim was a law enforcement officer performing official duties was included in the “to convict” instruction and thus became an element under the law of the case in *Goble*. *Goble* at 201.

instruction included the contested language at issue here: “Acting knowingly or with knowledge also is established if a person acts intentionally.” *Goble*, at 202. This Court noted that this language could be read to mean that an intentional assault established Mr. Goble’s knowledge, regardless of whether or not he actually knew the victim’s status as a police officer:

We agree that the instruction is confusing and... allowed the jury to presume Goble knew Riordan's status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.

Goble, at 203. The problem in this case is similar to the problem in *Goble*.

A. The instructions in this case violated the rule in *Goble*.

In this case, Ms. Moore was accused of intentionally distracting the salesclerks so that her friends could steal sweaters by stuffing them in the booster bag. Thus, as in *Goble*, the state was required to prove that Ms. Moore took some intentional act, and had knowledge that her act would promote or facilitate the crime. Instruction No. 12, Court’s Instructions to the Jury, Supp. CP. As in *Goble*, the court also instructed the jury that “[a]cting knowingly or with knowledge... is established if a person acts intentionally.” Instruction 6, Court’s Instructions to the Jury, Supp. CP.

This combination of instructions permitted the jury to conclude that Ms. Moore acted with knowledge if it found that she took *any* intentional act. The court did not offer any guidance limiting which intentional acts the jury could consider in order to establish knowledge. The jury could have used the instruction properly (i.e. if Ms. Moore *intentionally* facilitated the theft by distracting the clerk, she also *knowingly* facilitated the theft), but it could also have used the instruction improperly (i.e. if Ms. Moore *intentionally* returned her items, she must have *knowingly* facilitated the theft, even if she actually was ignorant of her friends' plans).

Accordingly, under *Goble*, Ms. Moore's conviction for theft must be reversed and the case remanded for a new trial. *Goble, supra*.

B. The decisions in *Gerds* and *Keend* should be reconsidered.

This Court limited *Goble* to crimes that *explicitly* include more than one *mens rea* as an element in the "to convict" instruction. *State v. Gerds*, 136 Wn. App. 720, 150 P.3d 627 (2007).¹¹ *Goble* was further limited when this Court held that the problem created by the erroneous

¹¹ Under *Gerds*, Mr. Goble's conviction would not have been reversed, since he was charged with assaulting another whom he knew to be a police officer; he was not charged with "intentionally" assaulting another whom he knew to be a police officer. See *Goble*, at 200-201.

instruction could be solved by instructions that were “were clear, accurate, and separately listed [sic].” *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007).¹²

Gerds and *Keend* should be re-evaluated. The language contained in the erroneous “knowledge” instruction creates problems whenever a crime includes two *mens rea*, regardless of whether the mental states are implicit or explicit and regardless of how artfully the other instructions are worded. The difficulty is that the instruction places no limits on which intentional acts can support a finding that a person possessed the requisite knowledge.

CONCLUSION

For the foregoing reasons, Ms. Moore’s conviction must be reversed. The case must be remanded to the trial court for a new trial on the inferior degree offense of Theft in the Third Degree. In the alternative, the case must be remanded for entry of a conviction for Theft in the Third Degree, or for a new trial on the original charge.

¹² The instructions in *Keend*, which were upheld by this Court, did not differ significantly from those in *Goble*, which led this Court to reverse. *Compare Goble*, at 200-202 with *Keend*, at 863-864, 867.

Respectfully submitted on July 6, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to:

Lewis County Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 6, 2009.

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

Signed at Olympia, Washington on July 6, 2009.



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