

COURT OF APPEALS
STATE OF WASHINGTON
BY: *DM*

No. 38902-9-II Consolidated

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Brian Winter,

Appellant.

Thurston County Superior Court Cause No. 08-1-02088-0

The Honorable Judge Richard D. Hicks

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove that Mr. Winter or an accomplice was armed with a firearm.
2. The trial court erred by imposing a firearm enhancement based on insufficient evidence.
3. The accomplice liability statute is unconstitutionally overbroad.
4. Mr. Winter was convicted through operation of a statute that is unconstitutionally overbroad.
5. The trial judge erred by giving Instruction No. 9, which reads as follows:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he or 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, he or 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. 9, Court's Instructions to the Jury, Supp. CP.

6. Instruction No. 9 permitted conviction as an accomplice without proof of an overt act.
7. Mr. Winter was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

8. Defense counsel was ineffective for failing to object to the admission of irrelevant and prejudicial evidence.
9. The trial court erred by sentencing Mr. Winter with an offender score of six.
10. The 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the state to prove a sentencing enhancement beyond a reasonable doubt. In this case, the state failed to prove that Mr. Winter or an accomplice was armed with a firearm. Must Mr. Winter's firearm enhancement be stricken and the case remanded for resentencing?
2. 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?
3. Accomplice liability requires proof of an overt act. The court's instructions permitted the jury to convict Mr. Winter 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?
4. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel failed to object to the admission of irrelevant and prejudicial evidence. Was Mr. Winter denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

5. Under the Fifth and Fourteenth Amendments, an offender has a constitutional right to remain silent pending sentencing, and the state is constitutionally required to prove criminal history by a preponderance of the evidence. The 2008 amendments to the SRA permit the court to use a prosecutor's bare assertions as prima facie evidence of criminal history, and allow the court to draw adverse inferences from the offender's silence pending sentencing. Do the 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In the morning of November 18, 2008, both Russell Molnar and Cary Swofford saw ten men in her yard. RP (2/3/09) 219; RP (2/4/09) 359. All but one of the men were running around. RP (2/3/09) 219, 239-40. One came to the door and said that he wanted to talk about his mother. RP (2/3/09) 223; RP (2/4/09) 346, 361. Molnar wouldn't open the door, and three of the men went to a neighbor's Ford Explorer and removed the vehicle's stereo. RP (2/3/09) 224-26.

Molnar decided to go outside. As he unfastened the locks on the door to open it, the man on the outside tried to open the door. RP (2/3/09) 226, 249-51. Swofford relocked the door and told Molnar not to go outside. RP (2/2/09) 245-46; RP (2/4/09) 349.

At this point, the man at the door went to another vehicle and then returned to the door. Molnar watched this through the monitor of a security system, and saw a gun. RP (2/3/09) 228, 235, 241. Molnar said the gun was a rifle, roughly two and a half feet long, and described the cocking action as "slam[ming] it down." Swofford did not see a gun. RP (2/3/09) 275-78; RP (2/4/09) 351-52, 374, 379, 385.

After the men left, Molnar called 911 and reported the incident. He told dispatch that all of the ten men looked Mexican, that they all wore

beanie caps, and that they all piled into a 1966 or 1967 Impala. RP (2/3/08) 246, 248, 252-53.

Responding to the call, Deputy Simper saw a light blue compact car heading in the opposite direction. RP (2/3/09) 90-93. He stopped the car, which was driven by Rigoberto Contreras. RP (2/3/09) 94, 98. Jason Woods was in the front passenger seat, and Timothy Baxter, Toby Anderson, and Brian Winter were in the back seat. RP (2/3/09) 99-101.

Simper found a CD player on the floorboard where Woods had been, but did not find a weapon. RP (2/3/09) 101, 105. There were two hats in the car, one red and one black. RP (2/3/09) 155. Simper later searched along the road for a gun, and found a black 12-gauge sawed-off shotgun. RP (2/3/09) 108. The gun was unloaded and lacked a firing pin, and its trigger housing had been tampered with. RP (2/4/09) 313-14. Simper did not find a firing pin or ammunition, either in the car or along the road. RP (2/4/09) 314-16. Nor did Simper find any additional hats along the road. RP (2/3/09) 156, 164.

A sheriff's deputy drove Swofford and Molnar by the area where the car was stopped; they identified Woods, who was standing by the police car in handcuffs.¹ RP (2/3/09) 110, 162, 192; RP (2/4/09) 355, 363.

¹ There was contradictory testimony as to whether they made any additional identifications. RP (2/3/09) 110, 156, 192-94, 203, 235; RP (2/4/09) 355

All five occupants of the car were arrested and charged. RP (2/3/09) 140. The state charged Mr. Winter with Robbery in the First Degree with a Firearm Enhancement, Attempted Burglary in the First Degree with a Firearm Enhancement, Unlawful Possession of a Firearm in the First Degree, and Vehicle Prowl in the Second Degree. CP 2-3. All five codefendants' cases were joined and tried together.

At trial, the state introduced into evidence the gun found at the side of the road. RP (2/3/09) 115. Molnar testified that the gun—Exhibit 25—was not the gun he had seen. RP (2/3/09) 283, 287, 294. Swofford testified that she never saw a gun during the incident and thus couldn't identify a gun. Even so, Mr. Winter's attorney did not object to the gun's admission, or ask that it and testimony pertaining to it be stricken from the record. No prints were found on the gun. RP (2/4/09) 310.

The gun could not be test fired, because it lacked a firing pin and because the trigger housing had been tampered with. RP (2/4/09) 313-14. The state's firearms expert testified that it would take an hour to put in a new firing pin, that the manufacturer likely no longer made firing pins for this gun, and that it would take weeks or months to obtain a used one. RP (2/4/09) 325, 335. He also said that the trigger was not in place, and that if a bullet was chambered, it would simply fall out. RP (2/4/09) 326-30.

Since he didn't attempt to repair the gun, he didn't know if it had additional problems that would prevent it from firing. RP 92/4/09) 335.

Deputy Simper testified about a statement made by Woods. RP (2/3/09) 129-39. Woods told the officer that his mother had been at a party at that home the night before and had been slapped around, so he went to the house to talk with the occupants about it. RP (2/3/09) 136-37. According to Simper, Woods said that the gun was passed to him from the back seat of the car, and that he threw the gun out the window. RP (2/3/09) 130. The jury was instructed that it could not consider Woods' statement against Mr. Winter or the other codefendants. Instruction No. 4, Supp. CP.

The court instructed the jury on accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another when he or 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, he or 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. 9, Court's Instructions to the Jury, Supp. CP.

Mr. Winter did not object to this instruction.

The jury returned guilty verdicts on the robbery and vehicle prowling charges, and acquitted Mr. Winter of attempted burglary and UPF. The jury found that Mr. Winter or an accomplice was armed with a firearm at the time of the robbery. Verdict Forms, Supp. CP.

At sentencing, the state submitted a Prosecutor's Statement of Criminal History, alleging three prior felony convictions. Prosecutor's Statement of Criminal History, Supp. CP. Relying on this statement, the court found that Mr. Winter had six points, and sentenced him to 89.5 months in prison with a 60-month firearm enhancement. CP 7-16. This timely appeal followed. CP 4.

ARGUMENT

I. THE TRIAL COURT'S IMPOSITION OF A FIREARM ENHANCEMENT VIOLATED MR. WINTER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT HE OR AN ACCOMPLICE WAS ARMED WITH A FIREARM.

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). The same is true for sentencing enhancements. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

Evidence is insufficient 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.² *DeVries*, at 849. The remedy for a 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*.

² 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*.

- A. The state failed to prove beyond a reasonable doubt that Exhibit 25 was a firearm.

A firearm enhancement may be imposed if the defendant or an accomplice was armed with a firearm. RCW 9.94A.533. Before a firearm enhancement may be imposed, the state must prove “beyond a reasonable doubt [that] the weapon in question falls under the definition of a ‘firearm:’ ‘a weapon or device from which a projectile may be fired by an explosive such as gunpowder.’” *State v. Recuenco*, at 437 (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (Supp.2005) (WPIC)).³ The Supreme Court has held that the firearm enhancement applies only to working firearms:

We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.

Recuenco, at 437 (citing *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)).⁴

³ This is in contrast to the substantive crime (Robbery in the First Error! **Bookmark not defined.** Degree), which requires only that the “defendant or accomplice displayed what appeared to be a firearm...” Instruction No. 19, Court’s Instructions to the Jury, Supp. CP.

⁴ Published cases decided by the Court of Appeals after *Pam* but prior to *Recuenco* took the position that *Pam* allowed the enhancement even in the case of an inoperable gun, as long as it was a “real” gun. *See, e.g., State v. Faust*, 93 Wn.App. 373, 967 P.2d 1284

In this case, the gun introduced at trial as Exhibit 25 was not operable, and thus did not qualify as a firearm for purpose of the enhancement.⁵ First, it lacked a firing pin. The gun was more than 40 years old, and the state's expert opined that the firing pin for this gun was no longer being manufactured. RP (2/4/09) 314, 324-25. Finding a used firing pin could take weeks or months. RP (2/4/09) 334-35. Even if a firing pin were available, it would take an hour to install it. RP (2/4/09) 325.

Second, the trigger housing had been tampered with, in such a way as to make the gun inoperable. RP (2/4/09) 314. No opinion was offered on how long it would take to repair the damage, or if repairs were even possible. RP (2/4/09) 334-35.

Third, the state's expert opined that the gun might have additional problems. RP (2/4/09) 335. No effort was made to restore it to working condition and test fire it; thus, any other problems were not known at the time of trial.

(1998); *State v. Berrier*, 110 Wn.App. 639, 41 P.3d 1198 (2002). But *Recuenco* made clear that *Pam* prohibited the enhancement unless the state established that the gun was operable. *Recuenco*, at 437.

⁵ The gun may not have been the weapon allegedly used during the crime, as argued elsewhere in this brief.

Under these circumstances, the state failed to prove that the gun qualified as a firearm. The firearm enhancement must be stricken, and the case remanded to the trial court for resentencing without the enhancement.

Pam, supra.

B. The state failed to prove beyond a reasonable doubt that Exhibit 25 was readily available for use.

The firearm enhancement applies whenever a person is “armed” with a deadly weapon during the commission of a crime. RCW 9.94A.533(3). A person is “armed” if the firearm is “easily accessible and readily available for use, either for offensive or defensive purposes.” *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Proximity and/or possession are insufficient to establish that a person is “armed” under the statute. For example, evidence that an unloaded gun was found under the defendant’s bed is insufficient to prove that he was “armed” for purpose of an enhancement. *Valdobinos*, at 282. Whether a gun is loaded or unloaded is not determinative, but is one factor to be considered in determining whether or not a person is “armed” within the meaning of the statute. *State v. Simonson*, 91 Wn.App. 874, 960 P.2d 955 (1998). Under the same reasoning, a gun’s operability must be considered in determining whether or not a person is armed.

Here, even if the state proved that the gun was easily accessible, the record does not establish that it was “readily available for use, either for offensive or defensive purposes.” *Valdobinos*, at 282. First, the gun was unloaded, and no ammunition was found. RP (2/3/09) 156, 164. Second, the gun was missing its firing pin. If a replacement firing pin was on hand—and there is no indication that one was—the defendants would have needed an hour to restore the gun to working condition. RP (2/4/09) 325. If a replacement firing pin was not on hand, finding a used part could take weeks or months. RP (2/4/09) 334-35. Third, the trigger housing had been tampered with. RP (2/4/09) 314-35. The state did not provide any evidence that the trigger housing could be repaired or how long it could take. RP (2/4/09) 314-335. Fourth, the gun may have had additional problems that prevented it from functioning. RP (2/4/09) 335. Whether or not these additional problems could have been fixed is an open question.

Under these circumstances, the gun was not readily available for offensive or defensive use. Accordingly, the defendants were not “armed” with a firearm for purposes of the enhancement. The enhancement must be stricken, and the case remanded for resentencing. *Valdobinos, supra*.

II. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

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).⁶ 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*, 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

⁶ Washington’s Constitution affords a similar protection: “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.

‘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*, 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, Mr. Winter'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*, 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. 9, 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.⁷ 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 protestors *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

⁷ 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).

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 Mr. Winter as a principal or as an accomplice. Verdict Forms A and F, Special Verdict Form A, Supp. CP. Accordingly, his 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.

III. THE COURT’S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. WINTER 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 Wn. 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. 9 was fatally flawed because it allowed conviction without proof of an overt act. Under the instruction, the jury was permitted to convict if Mr. Winter was present and assented to his codefendants’ crimes, even if he committed no overt act. 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. 9 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. 9, 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. 9, 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.*

IV. MR. WINTER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is

applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)

(citing *Strickland*); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

In this case, Swofford did not see a gun during the incident (although she believed one of the men was armed). RP (2/4/09) 352, 379, 381. Molnar saw a gun; however, the gun he saw was not Exhibit 25. RP (2/3/09) 294-95. Accordingly, Exhibit 25 (and the associated testimony) was irrelevant to Mr. Winter’s case.⁸ Despite this, defense counsel did not object to Exhibit 25, or to any of the testimony about Exhibit 25. This

⁸ Although Mr. Woods’ statement to the police arguably provided some evidence linking Exhibit 25 to the alleged incident, this statement was not admissible against Mr. Winter, and the jury was instructed not to consider it against Mr. Winter. Instruction No. 4, Court’s Instructions to the Jury, Supp. CP.

failure fell below an objective standard of reasonableness, and prejudiced Mr. Winter.

There was no conceivable strategic reason to allow the prosecutor to introduce Exhibit 25 as *the* gun used during the incident. Without Exhibit 25, the prosecutor would have been forced to rely solely on Molnar's testimony to establish that there really was a gun. But Molnar did not have a clear view, and could not definitively confirm that anyone had a real working firearm. There is a reasonable possibility that the outcome of the proceeding would have been different if defense counsel had objected to the admission of Exhibit 25. Accordingly, Mr. Winter's conviction must be reversed and the case remanded for a new trial.

Reichenbach.

V. THE SRA, AS AMENDED IN 2008, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCING.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *In re Detention of Post*, 145 Wn.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68

L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from an offender's silence pending sentencing. *Mitchell*, at 328-329.

Thus, for example, it is improper to imply lack of remorse from an accused person's presentencing silence. *Post*, at 758.

The state has the burden of proving an offender's criminal history, and does not meet its burden through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." *Ford* at 482. This rule is constitutionally based, and thus cannot be altered by statute. As the Supreme Court pointed out in *Ford*, requiring the offender to object when the state presents no evidence "would result in an unconstitutional shifting of the burden of proof to the defendant." *Ford*, at 482.

In 2008, the legislature amended RCW 9.94A500 and RCW 9.94A.530. *See* Laws of 2008, Chapter 231, Section 2. Under RCW 9.94A.500(1), "[a] criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500(1). Furthermore, the sentencing court may rely on information that is "acknowledged in a trial or at the time of sentencing," and

“[a]cknowledgment includes... not objecting to criminal history presented at the time of sentencing.” RCW 9.94A.530(2).⁹

These provisions result in the “unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482. By requiring an offender to object to a prosecutor’s allegations, RCW 9.94A.500(1) and RCW 9.94A.530(2) violate the Fifth and Fourteenth Amendments to the U.S. Constitution. *Ford, supra*.

Mr. Winter should have been sentenced with an offender score of (at most) one, because he stipulated (at trial) that he had a prior felony conviction. RP (2/4/09) 396-97. Instead of sentencing him with an offender score of one, the trial judge adopted the prosecutor’s statement of criminal history and sentenced Mr. Winter with an offender score of six. CP 8. By accepting the prosecutor’s statement, the court relied on “bare assertions” of criminal history in violation of *Ford, supra*. Because the prosecutor failed to prove Mr. Winter’s criminal history, the judgment and sentence must be vacated and the case remanded to the trial court for resentencing. *Ford, supra*.

⁹ Under the prior version of the statute, a Statement of Prosecuting Attorney was insufficient to establish an offender’s criminal history. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009).

CONCLUSION

For the foregoing reasons, the firearm enhancement must be vacated and the firearm allegation dismissed with prejudice. Mr. Winter's convictions must be reversed and the case remanded for a new trial, at which he may not be retried under an accomplice liability theory.

In the alternative, if the convictions are not reversed, Mr. Winter's case must be remanded for sentencing without the firearm enhancement and with a new determination of his offender score.

Respectfully submitted on July 30, 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 that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 30, 2009.

Further, I delivered an electronic copy of the brief to:

Patricia Pethick, counsel for codefendant Rigoberto Contreras
Lisa Tabbut, counsel for codefendant Timothy Baxter
Anne Crusier, counsel for codefendant Toby Anderson
Thomas Doyle, counsel for codefendant Jason Woods

on July 30, 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 30, 2009.



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