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## ASSIGNMENTS OF ERROR

1. The accomplice liability statute is unconstitutionally overbroad.
2. Mr. Beltran was convicted through operation of a statute that is unconstitutionally overbroad.
3. The trial judge erred by giving Instruction No. 16, 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 of Assault in the Second Degree, if with knowledge that it will promote or facilitate the commission of that 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.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. Instruction No. 16, Court's Instructions to the Jury, Supp. CP.

4. Instruction No. 16 permitted conviction as an accomplice without proof of an overt act.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. 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 in violation of the First and Fourteenth Amendment?
2. Accomplice liability requires proof of an overt act. The court’s instructions permitted the jury to convict Mr. Beltran 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?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

After playing golf with friends, drinking beer at Mac's Bar and the Blue Beacon, Leslie Smith ended up at The Northwest Passage in Aberdeen, where he played pool, and, by his own admission, drank "[p]robably too much."<sup>1</sup> RP (5/5/10) 35. He left the bar with Juan Beltran and another person, visited an apartment building, and then went to buy more beer at a 7-11. RP (5/5/10) 36. A surveillance camera at the 7-11 recorded video of Smith and Mr. Beltran. RP (5/5/10) 106-107. In the video, Mr. Beltran is seen to be wearing pants, not shorts. RP (5/5/10) 121.

Early the following morning, Smith was assaulted in the parking lot of an apartment building. RP (5/5/10) 56-64. Robert Nylander witnessed the assault through his apartment window, but was too far away to see the assailant's face, or that of his companion. RP (5/5/10) 65. He described a short man ("about five six") attacking Smith, while a taller man ("closer to six foot") stood nearby holding a half rack of beer.<sup>2</sup> RP (5/5/10) 63-64, 67. The taller man, who did not participate in the assault, was wearing running shorts. RP (5/5/10) 67. Nylander speculated that the

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<sup>1</sup> His BAC was later determined to be .24. RP (5/5/10) 84.

<sup>2</sup> Mr. Beltran is 6'2". RP (5/5/10) 121.

taller man “might have stopped the guy from running off.” RP (5/5/10) 64. He also testified that “[o]ne of the gentleman was telling the other gentleman after he hit him to get him... Get him now.” RP (5/5/10) 62. He did not clarify which person said this. RP (5/5/10) 62. Within ten minutes of the incident he gave a statement to police, in which he said “I don’t believe either of these two guys was Hispanic.” RP (5/5/10) 69.<sup>3</sup>

Before Smith was taken to the hospital, he told police that he was assaulted by several Hispanic males. RP (5/5/10) 24. He later said there were four assailants. RP (5/5/10) 24, 29. Eight days after the assault, he was shown a photo montage that included Mr. Beltran. RP (5/5/10) 122, 125. He did not select Mr. Beltran as a suspect; instead, he identified someone else as his assailant, and marked the montage to indicate his choice.<sup>4</sup> RP (5/5/10) 46-50; 123-124.

While Mr. Beltran was in custody on another matter, police seized his shoes, one of which had a blood smear on it. RP (5/5/10) 110, 112-113. Mr. Beltran said the blood was from when he had filleted a salmon on the Fourth of July (ten days prior to the incident). RP (5/5/10) 114.

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<sup>3</sup> At trial, he testified that he now thought the two *were* Hispanic. RP (5/5/10) 70.

<sup>4</sup> Nearly seven months after the incident, Smith wrote out a statement accusing Mr. Beltran, who had at that point been arrested and charged with the crime. RP (5/5/10) 50-53.

Lab testing established that a swabbed sample taken from Mr. Beltran's shoe included DNA contributed by Smith. RP (5/6/10) 137.

Mr. Beltran was interviewed about the incident. He acknowledged spending part of the evening with Smith, although he did not remember visiting the 7-11 to buy beer (and said he must have blacked out during that part of the evening). RP (5/5/10) 116-117, 127. He denied participating in an assault. RP (5/5/10) 117. He said that he last saw Smith drive away with two white men. RP (5/5/10) 126.

The state charged Mr. Beltran with Assault in the Second Degree. CP 1. At trial, the court instructed the jury on accomplice liability. Instructions Nos. 4 and 16, Court's Instructions to the Jury, Supp. CP. Mr. Beltran was convicted, and he timely appealed. CP 3, 11, 15.

## ARGUMENT

### **I. 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 Wash.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).<sup>5</sup> A statute is unconstitutionally overbroad if it criminalizes constitutionally protected speech or conduct. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 26, 992 P.2d 496 (2000).

Anyone 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. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Lorang*, at 26. In other words, “[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds.” *City of Seattle v. Webster*, 115 Wash.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

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.

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<sup>5</sup> 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.

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).

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 speech (and conduct) protected by the First Amendment. 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 into 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*, 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. 16, 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, 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.<sup>6</sup> Anyone who supports the

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<sup>6</sup> Indeed, under WPIC 10.51 and Instruction No. 16, 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).

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 constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. *Brandenburg, 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. 16—is overbroad. Therefore, RCW 9A.08.020 is unconstitutional.

Mr. Beltran’s conviction must be reversed and the case remanded for a new trial. *Brandenburg, supra*. Upon retrial, the state may not proceed on a theory of accomplice liability. *Id.*

**II. THE COURT’S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. BELTRAN COMMITTED AN OVERT ACT.**

Accomplice liability requires an overt act. *See, e.g., State v. Matthews*, 28 Wash. 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 Wash.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 Wash.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 Wash.2d 147, 150, 426 P.2d 854 (1967).

Instruction No. 16 was fatally flawed because it allowed conviction without proof of an overt act. Under the instruction, the jury was permitted to convict if Mr. Beltran was present and assented to the assault, even if he committed no overt act. Instruction No. 16, 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. 16 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. 16, 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. 16, 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. Such a construction gives criminals the power to transform approving bystanders into accomplices, simply by announcing the intent to commit a crime and telling the bystanders that their presence is helpful.

But the law does not impose a duty on bystanders to reject another person's criminal activity; instead, it requires proof of an overt act.

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.*

### **III. THIS COURT SHOULD NOT FOLLOW DIVISION I'S DECISION IN COLEMAN.**

A. The *Coleman* decision misapplies First Amendment precedent.

Division I recently upheld the accomplice statute and WPIC 10.51 against an overbreadth challenge. *State v. Coleman*, 155 Wash.App. 951, 960-961, 231 P.3d 212 (2010). The Court held that the statute was constitutional because it did not cover speech "that only consequentially further[s] the crime." *Id.* In reaching this decision, the Court relied on *Webster, supra.*

But *Webster* does not support Division I's reasoning. First, in *Webster* the Supreme Court upheld an ordinance regulating behavior, not pure speech.<sup>7</sup> The accomplice statute, by contrast, explicitly applies to "aid," which has been defined to include support or encouragement. RCW

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<sup>7</sup>The "pedestrian interference ordinance" made it unlawful to intentionally obstruct pedestrian or vehicular traffic. *Webster*, at 640.

9A.08.020; *see also* WPIC 10.51 *and* Instruction No. 16, Supp. CP.

Second, in *Webster* the Supreme Court found that the inclusion of specific intent (the intent to obstruct pedestrian or vehicle traffic) as an element of the offense saved the statute from being found overbroad. But the *mens rea* for accomplice liability is knowledge, not intent. RCW 9A.08.020.

Verbal encouragement coupled with knowledge is sufficient for accomplice liability. Thus guilt can attach to pure speech, even if provided without specific intent (as in *Webster*), and even if the encouragement is not directed at inciting imminent lawless action (as in *Brandenburg*). Thus *Webster* does not support the result reached by Division I.

The *Coleman* decision suffers from an additional flaw. The Court denied appellant's challenge in part because he failed to show "any actual criminalization of protected speech." *Coleman*, at 961. It is unclear what this ambiguous pronouncement means. The Court may have rejected appellant's challenge because he did not personally suffer "actual criminalization of protected speech" under the facts of his case. *Id.* If so, the statement reflects a misunderstanding of the standards for facial challenges brought under the First Amendment (as set forth in *Lorang*, *Hicks*, and *Webster*). On the other hand, the Court may have meant that the accomplice statute does not actually criminalize protected speech. If

so, then the court failed to recognize that pure speech falls within the statute's reach when it takes the form of support or encouragement for criminal activity (as specifically provided in RCW 9A.08.020). Such speech is protected unless it is directed at and likely to incite imminent lawless action, as set forth in *Brandenburg*.

Division I's decision in *Coleman* was wrongly decided, and should not be followed by Division II. The statute violates the First and Fourteenth Amendments. Accordingly, Mr. Beltran's conviction must be reversed.

B. The *Coleman* applied the wrong standard in evaluating the accomplice instruction.

In *Coleman*, Division I analyzed an instruction equivalent to the one at issue here, and found it "adequate." *Coleman*, at 961. But jury instructions must be more than adequate; instead, they must make the relevant legal standard manifestly clear to the average juror. *State v. Killo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

The *Coleman* Court's finding of adequacy rested on its belief that the instruction in that case "required the jury to find that Coleman knowingly, with specific criminal *mens rea*, stood ready to aid or aided [his codefendant]." *Coleman*, at 961. This is incorrect. The instruction does not require proof of a mental state other than knowledge. *Id.*, at 961;

*see also* WPIC 10.51; Instruction No. 16, Court's Instructions to the Jury, Supp. CP. This is in contrast to the instruction used in *Renneberg*, which required proof of

words spoken, or acts done, for the purpose of assisting in the commission of a crime or of counseling, encouraging, commanding or inducing its commission. To constitute an aider or abettor, it is essential that the aider or abettor should share the criminal intent of the person or party who committed the offense.

*Renneberg*, at 739.

The instruction used in this case permitted conviction if Mr. Beltran stood by and silently assented to the assault on Smith, with knowledge that his silent assent supported or encouraged the assailant. Instruction No. 16, Court's Instructions to the Jury, Supp. CP. The instruction dispensed with the "overt act" requirement, and thus violated Mr. Beltran's right to due process. Division I's holding to the contrary is incorrect, and should not be followed by Division II.

### **CONCLUSION**

For the foregoing reasons, Mr. Beltran's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on January 7, 2011.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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

Juan Beltran  
Grays Harbor County Jail  
P.O. Box 630  
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and to:

Grays Harbor Prosecuting Attorney  
102 West Broadway, #102  
Montesano, WA 98563

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

All postage prepaid, on January 7, 2011.

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 January 7, 2011.

  
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