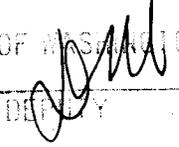


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DIVISION II

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STATE OF WASHINGTON
BY 
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No. 41320-5-II

(Consolidated with 41319-1-II)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

David Eden,

Appellant.

Lewis County Superior Court Cause No. 10-1-00152-7

The Honorable Judge James Lawler

Appellant's Reply Brief

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ARGUMENT

I. THE PROSECUTION FAILED TO PROVE THE EXISTENCE OF AN INSURANCE CONTRACT, OR MR. EDEN'S KNOWLEDGE OF ANY SUCH CONTRACT.

Jennifer Mau sought reimbursement from U-Haul for damage caused by defective equipment. RP (9/22/10) 26-27, 38; RP (9/23/10) 284. Although she'd purchased U-Haul's "Safe Move" coverage, the contract did not cover water damage; any water damage claim would be paid (or litigated) under a negligence theory. RP (9/22/10) 39, 84. Furthermore, the prosecutor did not prove that Mr. Eden knew Mau had purchased any coverage. For these reasons, the prosecution failed to prove that Mr. Eden knowingly submitted a false claim under a contract of insurance, as required to establish a violation of RCW 48.30.230(1).

Respondent erroneously suggests that U-Haul's "contract" with Republic Western Insurance brings Mau's general negligence claim within reach of the statute.¹ Brief of Respondent, p. 13. This is incorrect for two reasons.

¹ Respondent specifically disavows any argument that the "Safe Move" contract provided a basis for the charge. Brief of Respondent, p. 14.

First, U-Haul is self-insured.² RP (9/22/10) 36, 39, 84. It does not pay claims pursuant to a “contract of insurance.” Accordingly, the facts do not support Respondent’s argument.

Second, Respondent cites no authority in support of its argument that the “contract” between U-Haul and Republic Western “would qualify as a contract of insurance” under the statute. Brief of Respondent, p. 13. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

Proof of Mr. Eden’s knowledge is equally lacking. Respondent is unable to point to anything in the record establishing that Mr. Eden knew of the existence of any insurance contract—whether between Mau and U-Haul, or between U-Haul and its subsidiary.³ Brief of Respondent, pp. 10-15.

² Republic Western Insurance is a wholly owned subsidiary of the company, charged with processing claims against the company. RP (9/22/10) 36, 49.

³ Indeed, although Respondent repeatedly claims that Mr. Eden knew he was submitting a claim to Republic Western Insurance, the record does not even support this assertion. See Brief of Respondent, p. 13 (citing RP (9/22/10) 75-82), p. 14 (no citation to the record).

II. THE COURT’S INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF ACCOMPLICE LIABILITY, AND CREATED A MANIFEST ERROR AFFECTING MR. EDEN’S RIGHT TO DUE PROCESS.

Respondent suggests that any problem with the court’s instructions may not be raised for the first time on review because the instructions were not erroneous. Brief of Respondent, pp. 16-17. This necessarily requires consideration of the issue on its merits, which Respondent implicitly admits—by addressing the merits. Brief of Respondent, pp. 17-20.

Respondent acknowledges that accomplice liability requires proof of an overt act. Brief of Respondent, p. 19. The primary question on review, then, is whether the accomplice instruction permitted conviction even if the jury failed to find an overt act.

Respondent does not point to any language in the instruction that requires the jury to find an overt act. Brief of Respondent, p. 19. Instead, Respondent points out that the instruction requires “more than mere presence or knowledge.” Brief of Respondent, p. 19.

This is not sufficient. Even if the state presents proof of more than presence and knowledge, this does not mean it has presented proof of an overt act. Instead, under the instruction, proof of presence and silent assent is sufficient—because proof of assent requires more than proof of knowledge—even in the absence of an overt act. CP 21.

An instruction that relieves the prosecution of its burden to prove every element of a crime requires automatic reversal. *State v. Sibert*, 168 Wash.2d 306, 312, 230 P.3d 142 (2010) (plurality) (citing *State v. Brown*, 147 Wash.2d 330, 339, 58 P.3d 889 (2002)). Not every omission relieves the prosecution of its burden; however, the “total omission” of essential elements can do so. *Sibert*, at 312.

Here, the instructions completely failed to require proof of an overt act. Accordingly, they relieved the prosecution of its burden to prove an essential element of accomplice liability, requiring automatic reversal. *Id.*

III. AS CURRENTLY INTERPRETED, THE ACCOMPLICE LIABILITY STATUTE IS UNCONSTITUTIONALLY OVERBROAD, IN VIOLATION OF THE FIRST AMENDMENT.

RCW 9A.08.020 permits conviction as an accomplice if a person, 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.” Respondent claims that this language limits accomplice liability to aid “that is likely to produce or incite imminent lawless acts,” in keeping with the standard set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

This is incorrect. First, nothing in the statute requires examination of the likely effect of the aid. A person who gives some slight encouragement may act with knowledge that her/his speech will promote

the commission of a crime, even if criminal activity is highly unlikely.

Such a person could be convicted under the statute.

Second, nothing in the statute requires examination of the imminence of criminal activity. The *Brandenburg* standard requires some degree of imminence, but the accomplice statute permits conviction for advocacy that could theoretically result in the commission of a crime at some point far in the future. A person who engages in such advocacy—knowing that it promotes the commission of some theoretical crime in the distant future—is guilty under the statute.

Because of this, the statute—as currently construed—violates the First Amendment. Accordingly, Mr. Eden’s conviction must be reversed and the case dismissed. *Brandenburg*. In the alternative, the Court may impose a limiting construction on the accomplice liability statute, and remand for a new trial.

IV. MR. EDEN ADOPTS THE ARGUMENTS SET FORTH IN MS. MAU’S BRIEFING.

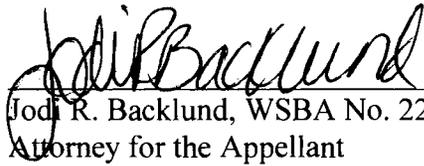
Pursuant to RAP 10.1(g), Mr. Eden adopts and incorporates the arguments made on behalf of Ms. Mau.

CONCLUSION

Mr. Eden's conviction must be reversed. The case must either be dismissed with prejudice or remanded for a new trial.

Respectfully submitted on July 13, 2011.

BACKLUND AND MISTRY



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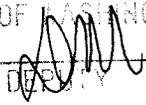


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CERTIFICATE OF MAILING

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

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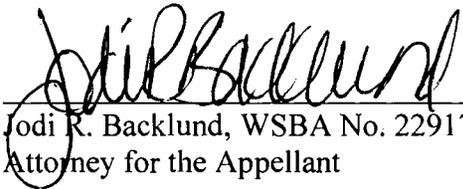
And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 13, 2011.

I further sent an electronic copy of the Reply Brief to counsel for Codefendant, John Hays on today's date.

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 13, 2011.



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