

No. 42268-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jacob Hubble,

Appellant.

Lewis County Superior Court Cause No. 10-1-00516-6
The Honorable Judge Nelson Hunt

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant
BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 6

I. The trial court violated both Mr. Hubble’s and the public’s right to an open and public trial by conducting proceedings behind closed doors. 6

A. Standard of Review..... 6

B. Both the public and the accused person have a constitutional right to open and public criminal trials. 6

C. The trial court violated the public trial requirement by holding hearings in chambers. 8

D. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court. 9

II. The prosecutor committed misconduct that violated Mr. Hubble’s right to due process and his privilege against self-incrimination. 10

A. Standard of Review..... 10

B.	The prosecutor committed reversible misconduct by commenting on Mr. Hubble’s exercise of his right to remain silent.....	10
III.	The accomplice liability statute is overbroad because it criminalizes constitutionally protected speech in violation of the First and Fourteenth Amendments.....	12
A.	Standard of Review.....	12
B.	Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds.....	13
C.	The accomplice liability statute is overbroad because it criminalizes pure speech that is not directed at inciting imminent lawless action.....	14
D.	<i>Coleman</i> and was incorrectly decided, and should be reconsidered.	17
CONCLUSION	19

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Brandenburg v. Ohio</i> , 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).....	15, 16, 17, 18
<i>Conchatta Inc. v. Miller</i> , 458 F.3d 258 (3rd Cir. 2006).....	14
<i>Doyle v. Ohio</i> , 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).....	11
<i>Griffin v. California</i> , 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)	11
<i>Malloy v. Hogan</i> , 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)...	10
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	10
<i>Presley v. Georgia</i> , ___ U.S. ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010)6	
<i>United States v. Platte</i> , 401 F.3d 1176 (10th Cir. 2005).....	14
<i>Virginia v. Hicks</i> , 539 U.S. 113, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003)	14, 17

WASHINGTON STATE CASES

<i>Adams v. Hinkle</i> , 51 Wash.2d 763, 322 P.2d 844 (1958)	13
<i>Bellevue School Dist. v. E.S.</i> , 171 Wash.2d 695, 257 P.3d 570 (2011)6, 10, 12	
<i>City of Bellevue v. Lorang</i> , 140 Wash.2d 19, 992 P.2d 496 (2000)	10
<i>City of Seattle v. Webster</i> , 115 Wash.2d 635, 802 P.2d 1333 (1990), <i>cert. denied</i> , 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991) 14, 17, 19	
<i>State v. Bone-Club</i> , 128 Wash.2d 254, 906 P.2d 325 (1995)	1, 6, 8, 9

<i>State v. Brightman</i> , 155 Wash.2d 506, 122 P.3d 150 (2005)	7
<i>State v. Burke</i> , 163 Wash.2d 204, 181 P.3d 1 (2008)	10
<i>State v. Carnahan</i> , 130 Wash.App. 159, 122 P.3d 187 (2005).....	11
<i>State v. Coleman</i> , 155 Wash.App. 951, 231 P.3d 212 (2010), <i>review denied</i> , 170 Wash.2d 1016, 245 P.3d 772 (2011).....	17, 18
<i>State v. Duckett</i> , 141 Wash.App. 797, 173 P.3d 948 (2007)	7
<i>State v. Easterling</i> , 157 Wash.2d 167, 137 P.3d 825 (2006)	7, 9
<i>State v. Ferguson</i> , 164 Wash.App. 370, 264 P.3d 575 (2011).....	17, 19
<i>State v. Gonzales</i> , 111 Wash.App. 276, 45 P.3d 205 (2002).....	11
<i>State v. Immelt</i> , ___ Wash.2d ___, ___ P.3d ___ (2011).....	12, 13
<i>State v. Kirwin</i> , 165 Wash.2d 818, 203 P.3d 1044 (2009).....	12
<i>State v. Momah</i> , 167 Wash.2d 140, 217 P.3d 321 (2009)	7, 9
<i>State v. Nguyen</i> , 165 Wash.2d 428, 197 P.3d 673 (2008)	12
<i>State v. Njonge</i> , 161 Wash.App. 568, 255 P.3d 753 (2011)	6
<i>State v. Strobe</i> , 167 Wash.2d 222, 217 P.3d 310 (2009)	7, 9
<i>State v. Sublett</i> , 156 Wash.App. 160, 231 P.3d 231, <i>review granted</i> , 170 Wash.2d 1016, 245 P.3d 775 (2010)	9
<i>State v. Toth</i> , 152 Wash.App. 610, 217 P.3d 377 (2009).....	10, 11
<i>State v. Walsh</i> , 143 Wash.2d 1, 17 P.3d 591 (2001).....	12
<i>State v. WWJ Corp.</i> , 138 Wash.2d 595, 980 P.2d 1257 (1999).....	12

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I.....	1, 2, 6, 12, 13, 14, 15, 16, 17, 18
U.S. Const. Amend. V	1, 2, 10

U.S. Const. Amend. VI.....	1, 6, 8
U.S. Const. Amend. XIV	1, 2, 6, 9, 10, 12, 13
Wash. Const. Article I, Section 10.....	1, 6, 9
Wash. Const. Article I, Section 22.....	1, 6, 9
Wash. Const. Article I, Section 5.....	13

WASHINGTON STATUTES

RCW 9A.08.020.....	15, 17
--------------------	--------

OTHER AUTHORITIES

RAP 2.5.....	12
WPIC 10.51.....	15, 16, 17, 18

ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Hubble's First, Sixth, and Fourteenth Amendment right to an open and public trial.
2. The trial court violated Mr. Hubble's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22.
3. The trial court violated the constitutional requirement of an open and public trial by holding hearings in chambers.
4. The prosecutor committed misconduct requiring reversal.
5. The prosecutor improperly commented on Mr. Hubble's exercise of his right to remain silent, in violation of his Fifth and Fourteenth Amendment privilege against self-incrimination.
6. The accomplice liability statute is unconstitutionally overbroad.
7. Mr. Hubble was convicted through operation of a statute that is unconstitutionally overbroad.
8. The trial judge erred by giving Instruction No. 6, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge held closed hearings in chambers. Did the trial judge violate the constitutional requirement that criminal trials be open and public by holding closed hearings in chambers without first conducting any portion of a *Bone-Club* analysis?
2. A prosecutor may not comment on an accused person's exercise of his right to remain silent. Here, the prosecutor argued that the police were unable to find a witness because Mr. Hubble was unwilling to "cough him up." Did the

prosecutor unconstitutionally comment on Mr. Hubble's Fifth and Fourteenth Amendment privilege against self-incrimination?

3. 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 Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jacob Hubble got a message from his girlfriend, Emerald Culberg, that she was at Jeremy Allison's trailer. RP (11/18/10) 27, 87-89. Allison expected to have sex with Culberg in exchange for sharing his methamphetamine with her. RP (11/18/10) 22-23, 27, 53, 87-90. Culberg did not want to have sex, so she asked Hubble to come and get her and her reason for wanting to leave. RP (11/18/10) 38, 91. Mr. Hubble and a friend went to Allison's trailer and went inside. RP (11/18/10) 38, 92. The men scuffled. RP (11/18/10) 59, 75, 92-95.

Allison called police and alleged that Mr. Hubble had assaulted him with a large flashlight, and that he had also taken his safe, keys, and phone. RP (11/18/10) 40-42.

The state charged Mr. Hubble with Robbery in the First Degree. CP 1.

At the start of trial, the judge stated, "The record should reflect that we've had a pretrial conference, there will be one alternate, looks like we're set up for that. No need to sequester the jury. Witnesses will be excluded..." RP (11/18/10) 3. In later reviewing the state's motion in limine to prevent inquiry into Allison's drug use, Judge Hunt indicated, "We had a discussion about this in chambers, and apparently there is some

evidence to be presented by the defense that on the night in question, that during the relevant time period on this particular day, that Mr. Allison was involved in methamphetamine use with one of the defense witnesses...”
RP (11/18/10) 14-15.

During trial, Allison testified that he was attacked by Mr. Hubble and injured. RP (11/18/10) 27-75. Culberg testified that Allison made the first physical contact by pushing Mr. Hubble, and later punching him, and that Mr. Hubble used her flashlight to protect himself. RP (11/18/10) 94-97. She also said she was the person who took the keys and phone. RP (11/18/10) 99.

The person with Mr. Hubble who Allison claimed came in and participated in the scuffle, though Culberg stated that he remained in the car, was only referred to as “Mike”. “Mike” was not called to testify by either party. RP (11/18/10) 38-40, 93.

After the jury heard all the evidence, the judge indicated that the attorneys would join him in chambers to discuss jury instructions. RP (11/18/10) 120.

Without objection, the court gave a definition of accomplice liability that included the following:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he 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....
Court’s Instruction No. 6, Supp. CP.

In his closing argument, the defense attorney argued that the state’s case had missing pieces, noting that the police took no action to identify and locate the person who was with Mr. Hubble (“Mike”). RP (11/19/10)

19. During the rebuttal, the prosecutor attempted to appeal to the jury:

Ladies and gentlemen, the implication that the state did not take this case seriously or that we did not do our job in trying to prosecute this matter effectively is frankly offensive because we did all we could with what we had. Who is Mike? Maybe we don’t know who Mike is. Maybe the defendant didn’t want to cough him up.
RP (11/19/10) 27.

This last sentence was repeated when the court overruled the defense objection. RP (11/19/10) 27.

Mr. Hubble was convicted as charged, and he timely appealed. CP 4, 14-24.

ARGUMENT

I. THE TRIAL COURT VIOLATED BOTH MR. HUBBLE’S AND THE PUBLIC’S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, 161 Wash.App. 568, 573, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Id.* at 574-575.

B. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club*, at 261-

262, 257.¹ In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct., at 724-725.

The public trial right ensures that an accused person “is fairly dealt with and not unjustly condemned.” *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, “the presence of interested spectators may keep [the accused person’s] triers keenly alive to a sense of the responsibility and to the importance of their functions.” *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007). The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.” *See, e.g., Strode*, at 230.²

¹ *See also State v. Strode*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

² (“This court, however, ‘has never found a public trial right violation to be [trivial or] *de minimis*’”) (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

- C. The trial court violated the public trial requirement by holding hearings in chambers.

In this case, the court held at least two hearings in chambers, without analyzing the *Bone-Club* factors. First, the court held a hearing in chambers to discuss pretrial matters. During this initial closed hearing, the parties and the court agreed that one alternate juror would be selected. RP (11/18/10) 3-4. Defense counsel outlined his plan to introduce evidence that Mr. Allison had used drugs on the night of the incident. RP (11/18/10) 14-16. The court did not analyze the need for closure, and no record of the in-chambers hearing was produced. RP (11/18/10) 3-18.

Second, the court met with counsel in chambers at the conclusion of the evidence, to discuss the jury instructions. RP (11/18/10) 120. During this closed instructions conference, defense counsel either withdrew some of the instructions initially proposed or failed to persuade the court that they were applicable. *Compare* Defendant's Proposed Instructions, Supp. CP, with Court's Instructions, Supp. CP. No record was made of the closed hearing, and the court did not analyze the need for closure. RP (11/18/10) 120; RP (11/19/10) 3-6.

These proceedings, conducted outside the public's eye without the required analysis and findings, violated Mr. Hubble's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend.

XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra*. They also violated public's right to an open trial. *Id.* Accordingly, Mr. Hubble's convictions must be reversed and the case remanded for a new trial. *Id.*

D. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

The public trial right "applies to all judicial proceedings." *Momah, at 148*. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely "ministerial." *See, e.g., Strobe, at 230.*³

The Court of Appeals has held that the public trial right only extends to evidentiary hearings. *See, e.g., State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered. *Momah, at 148; Strobe, at 230.*

³ ("This court, however, 'has never found a public trial right violation to be [trivial or] *de minimis*'") (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. HUBBLE’S RIGHT TO DUE PROCESS AND HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *E.S. at* 702. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. The prosecutor committed reversible misconduct by commenting on Mr. Hubble’s exercise of his right to remain silent.

An accused person has a constitutional privilege against self-incrimination.⁴ U.S. Const. Amend. V; *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). It is “well settled” that the

⁴ The Fifth Amendment is applicable to the states through the Fourteenth Amendment’s due process clause. U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

prosecution may not comment on or otherwise exploit an accused person's exercise of the privilege. *State v. Carnahan*, 130 Wash.App. 159, 168, 122 P.3d 187 (2005) (citing *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); *Griffin v. California*, 380 U.S. 609, 613-615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

In this case, the prosecutor violated Mr. Hubble's privilege against self-incrimination by arguing that a potential witness or accomplice was unavailable because "[m]aybe the defendant didn't want to cough him up." RP (11/18/10) 27. The prosecutor's remarks were manifestly intended to highlight Mr. Hubble's exercise of his right to remain silent, and thus infringed his constitutional privilege against self incrimination. *United States v. Tanner*, 628 F.3d 890, 899 (9th Cir. 2010).

Furthermore, the court compounded the problem by overruling defense counsel's objection to the most egregious misconduct. *State v. Gonzales*, 111 Wash.App. 276, 283-284, 45 P.3d 205 (2002). This had the effect of "giving additional credence to the argument." *Id.* This misconduct is presumed prejudicial. *Toth, supra.* Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

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

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *E.S.*, at 702.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).⁵ An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Free speech challenges are different from most constitutional challenges to statutes; under the First Amendment, the state bears the burden of justifying a restriction on speech. *State v. Immelt*, ___ Wash.2d ___, ___, ___ P.3d ___ (2011).

⁵ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

- B. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds.

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).⁶ A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. *Immelt*, at ____.

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. *Immelt*, at _____. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Immelt*, at _____. In other words, “[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds.” *City*

⁶ Washington’s Constitution gives 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.

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. 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 *Hicks*, at 119); *see also Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3rd Cir. 2006).

In this case, the jury was instructed on accomplice liability. Court’s Instruction No. 6, Supp. CP. Accordingly, Mr. Hubble is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks*, at 118-119; *Webster*, at 640.

C. The accomplice liability statute is overbroad because it criminalizes pure speech that is not directed at inciting imminent lawless action.

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, one may be convicted as an accomplice if 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.” No Washington court has 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 also Court’s Instruction No. 6, Supp. CP. By defining “aid” to include “assistance... given by words... [or] encouragement...”, 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, anyone who praises ongoing acts of criminal trespass by Occupy Wall Street protestors is guilty as an accomplice if she or he utters praise knowing that it provides 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 a 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 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. 6—is overbroad;

⁷ Indeed, under WPIC 10.51 and Instruction No. 6, 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).

therefore, RCW 9A.08.020 is unconstitutional. *Brandenburg, supra; see* Court's Instruction No. 6, Supp. CP.

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

D. *Coleman* and was incorrectly decided, and should be reconsidered.

Division I has upheld the accomplice liability statute (and WPIC 10.51) against a similar First Amendment challenge. *State v. Coleman*, 155 Wash.App. 951, 961, 231 P.3d 212 (2010), *review denied*, 170 Wash.2d 1016, 245 P.3d 772 (2011). Division II has adopted the *Coleman* analysis. *State v. Ferguson*, 164 Wash.App. 370, 264 P.3d 575 (2011).

In *Coleman*, Division I erroneously relied on cases involving conduct: "A statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute's plainly legitimate sweep." *Coleman, at* (citing *Hicks, supra* and *Webster, supra*). Relying on *Webster*, the Court reasoned that the statute survived constitutional scrutiny because of its *mens rea* element:

We find *Coleman*'s case similar to *Webster*. *Webster* was charged under a Seattle ordinance banning intentional obstruction of vehicle or pedestrian traffic. The Washington Supreme Court explained the ordinance was not overbroad because the requirement of criminal intent prevented it from criminalizing

protected speech activity that only consequentially obstructed vehicle or pedestrian traffic... In the same way, the accomplice liability statute Coleman challenges here requires the criminal *mens rea* to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime. Therefore, by the statute's text, its sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime.

Coleman, at 960-961 (citations omitted).

This analysis is incorrect, because the accomplice liability reaches pure speech. The word "aid" has been defined to include "words... encouragement, [or] support." WPIC 10.51. As a result, the *mens rea* element cannot save the statute from First Amendment problems. The *mens rea* element (acting "[w]ith knowledge that [words, encouragement or support] will promote or facilitate the commission of the crime) is not equivalent to the mandatory standard imposed by *Brandenburg*.

The *mens rea* element does not require the jury to find that any words, encouragement, or support were "*directed to* inciting or producing imminent lawless action..." *Brandenburg*, at 447. Nor does it require the jury to evaluate the imminence of any lawless action. *Id.* Finally, it does not require jurors to evaluate the likelihood that a person's words, encouragement, or support will "incite or produce such action." *Id.*

The *mens rea* element does not resolve the problems created by the accomplice liability statute. Accordingly, the *Coleman* Court's reliance

on *Webster* was misplaced. Division II should revisit the issue, reevaluate its decision in *Ferguson*, and reject the *Coleman* Court's reasoning.

CONCLUSION

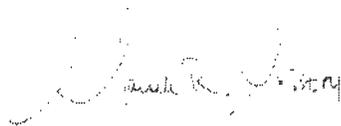
For the foregoing reasons, Mr. Hubble's conviction must be reversed and the case remanded for a new trial. Upon retrial, he may not be tried under a theory of accomplice liability.

Respectfully submitted,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jacob Hubble, DOC #793312
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 25, 2012.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

January 25, 2012 - 9:07 AM

Transmittal Letter

Document Uploaded: 422689-Appellant's Brief.pdf

Case Name: State v. Jacob Hubble

Court of Appeals Case Number: 42268-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Manek R Mistry - Email: **backlundmistry@gmail.com**

A copy of this document has been emailed to the following addresses:

appeals@lewiscountywa.gov