

No. 42268-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**JACOB HUBBLE,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Did the trial court violate Hubble's public trial right by conducting proceedings behind closed doors?
- B. Did the deputy prosecutor comment on Hubble's right to remain silent thereby committing reversible error?
- C. Is the accomplice liability statute unconstitutional on its face due to it being overbroad and criminalizing constitutionally protected speech in violation of the First and Fourteenth Amendments of the United States Constitution?

## II. STATEMENT OF THE CASE

On August 9, 2010 Jeremy Allison was living in a 26 foot long Coachman trailer on his grandfather's property in Winlock, Washington. 1RP 20-21.<sup>1</sup> In the early morning hours of August 9, 2010, Mr. Allison received a text message from a girl he knew as Punky. 1RP 22. Punky's real name is Emerald Culberg. 1RP 22, 86-87. Ms. Culberg indicated in the text message that she wanted to hang out with Mr. Allison and asked Mr. Allison if he could pick her up. 1RP 22. Mr. Allison agreed to pick up Ms. Culberg. 1RP 22. Mr. Allison, who was unaware at the time that Ms. Culberg had a boyfriend, was hoping to have some sort of sexual encounter with Ms. Culberg. 1RP 23, 25.

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<sup>1</sup> There are two verbatim report of proceedings in this case. The State will refer to the November 18, 2010 jury trial (day one) as 1RP and the November 19, 2010 and March 9, 2011 proceedings (jury trial day two and the sentencing hearing) as 2RP.

Mr. Allison left his residence and drove to go pick up Ms. Culberg. 1RP 23. Mr. Allison was unable to locate Ms. Culberg, although they had been exchanging text messages back and forth with each other. 1RP 23-24. Ms. Culberg told Mr. Allison, via a text message, that she had a ride and she would be at his place shortly. 1RP 24. Mr. Allison arrived back at his residence but Ms. Culberg had not arrived yet. 1RP 24. Ms. Culberg eventually made it to Mr. Allison's trailer, bringing her friend Sandra with her. 1RP 24-25. Mr. Allison and Ms. Culberg continued to text back and forth about sex and the need to take Sandra home. 1RP 26-27. Ms. Culberg told Mr. Allison she needed to call a friend in regards to getting Sandra a ride and a place to go. 1RP 27. Ms. Culberg wanted to smoke some methamphetamine but Mr. Allison told Ms. Culberg he did not have enough to share with both her and Sandra, so they would have to wait until Sandra left to get high. 1RP 27.

Mr. Allison was lying on his bed when Hubble and friend of Hubble's showed up and barged into Mr. Allison's trailer. 1RP 37-38. Hubble pulled out a three sell magnum style flashlight, walked up to the foot of Mr. Allison's bed and started questioning Mr. Allison about some text messages Mr. Allison had sent to Hubble's girlfriend. 1RP 38. Mr. Allison asked Hubble who he was and who

Hubble's girlfriend was. 1RP 38. Hubble stated that, "my name is Twisted and she [Emerald] is my girlfriend." 1RP 38. Mr. Allison admitted to Hubble that he had been sending text messages to Ms. Culberg. 1RP 39. Mr. Allison reached back to grab his phone to show Hubble the texts and Hubble tried to grab the phone out of Mr. Allison's hand. 1RP 39. Sandra and Ms. Culberg left while Hubble and Mr. Allison struggled over the phone. 1RP 40. Hubble told his friend to grab the safe that was sitting on Mr. Allison's bed. 1RP 40. Mr. Allison let go of the phone and grabbed Hubble's friend by the wrists. 1RP 41. Hubble then struck Mr. Allison in the head with the flashlight. 1RP 41. A struggle ensued and at the end of the struggle Hubble and his friend left Mr. Allison's trailer and got in a car and drove away. 1RP 41-44.

After Hubble, his friend, Sandra and Ms. Culberg left Mr. Allison noticed his safe, phone and keys were missing. 1RP 42. Mr. Allison went to his grandfather's house and called the police. 1RP 44. Mr. Allison provided the police a statement and the flashlight that he had been struck with. 1RP 44-45. The batteries that were located inside of the flashlight had Hubble's fingerprints on them. 1RP 83-84.

Ms. Culberg sent her friend Brian, who was incarcerated at Stafford Creek Correction Center, a letter, written on August 17, 2010. 1RP 113. The letter stated:

Basically me and Twisted and my girlfriend Sandra and my other friend Mike set up this pervo dick that wouldn't stop hitting on me. And us girls started hanging out with him for a minute and the guys ran in and cracked his head open with a mag light and grabbed his safe, keys, phone, and then took off. Apparently, dude blacked out in his car trying to follow us and cops came. Dude gave a statement, and from what I hear Lewis County law enforcement crew has been searching.

1RP 114. Ms. Culberg pleaded guilty to second degree robbery in regards to the incident with Mr. Allison. 1RP 86. Ms. Culberg did testify at that trial she was the one who brought the flashlight and she was the one who took Mr. Allison's belongings. 1RP 96, 99-102.

Hubble was charged with Robbery in the First Degree on September 13, 2010. CP 1-3. Hubble exercised his right to have his case tried to a jury. See 1RP. On the first day of trial the trial court indicated that there had been a pretrial conference. 1RP 3. The trial court stated there would be one alternate juror selected, witnesses would be excluded and the jury would not be sequestered. 1RP 3. The trial court also heard the State's and Hubble's motions in limine. 1RP 10-17. The trial court went

through each motion on the record and made its determination and gave its ruling to the parties. 1RP 10-17. The trial court did note that there had been some discussion in chambers about one of the motions, but further information was provided to the trial court through Hubble's trial counsel and the State argued its point and the trial court made a ruling at that time, on the record. 1RP 14-16.

There were two witnesses called by the State, Jeremy Allison and Detective Jamie McGinty. 1RP 20, 76. Mr. Allison admitted during his testimony that he had not been forthcoming with the police or the deputy prosecutor and Hubble's trial counsel about his drug use the day of the incident. 1RP 28, 70. Hubble called one witness, Emerald Culberg. 1RP 86. The jury found Hubble guilty of Robbery in the First Degree. 2RP 33. Hubble was sentenced on March 9, 2011 to a standard range sentence of 168 months. CP 4-13. Hubble timely appeals his conviction. CP 14-24.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT DID NOT VIOLATE HUBBLE'S PUBLIC TRIAL RIGHT BY DISCUSSING LEGAL AND MINISTERIAL MATTERS IN CHAMBERS.**

The United States Constitution and the Washington State Constitution guarantees that a criminal defendant has the right to a public trial. U.S. Const. amend. IV; Const. art. I, § 22. The

Washington State Constitution also requires that “[j]ustice in all cases shall be administered openly and without undue delay.”

Const. art. I, § 10. A court must weigh the five *Bone-Club* factors prior to closing a courtroom in a criminal hearing or trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); *State v. Paumier*, 155 Wn. App. 673, 678, 230 P.2d 212 (2010), *review granted*, 169 Wn.2d 1017 (2010). The five *Bone-Club* factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused’s right to a fair trial, the proponent must show a “serious imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

*State v. Bone-Club*, 128 Wn.2d at 258-59. A criminal defendant’s public trial rights are violated if there is a proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.2d

150 (2005). Whether a trial court has violated the public trial right is a question of law and reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

The public trial requirement is primarily for the benefit of the accused. *State v. Momah*, 167 Wn.2d at 148. The public trial right ensures “that the public may see he [the accused] is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to the sense of the responsibility of their functions.” *Id.* The right to a public trial is closely linked to the defendant’s right to be present during critical phases of the trial. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations omitted).

The right to a public trial extends to evidentiary hearings, voir dire and other adversary proceedings. *State v. Sadler*, 147 Wn. App.at 114. A criminal defendant does not however have a public trial right to trial on purely legal or ministerial matters. *State v. Sublett*, 156 Wn. App. 160, 181, 231 P.3d 231 (2010), *citing State v. Sadler*, 147 Wn. App.at 114.<sup>2</sup> The Supreme Court has previously

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<sup>2</sup> The Court in *Sadler* gives a variety of examples of purely legal and/or ministerial matters from the Supreme Court cases *In re Pirtle and In re Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). “(1) a deferred ruling on a ER 609 motion, (2) a defense motion for funds to get Lord’s hair cut and to provide him with clothing for trial, (3) questions regarding the wording of the jury questionnaires and pretrial instructions, (4) a time limit for testing certain evidence, (5) the trial court’s announcement of its ruling on

held that in-chamber conference between the judge and counsel for legal matters does not trigger a criminal defendant's right to be present. *In re Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998).

The wording of jury instructions is a legal matter. *Id.*

Hubble argues his public trial rights were violated in three ways: (1) an in chambers conference held by the trial where it was decided an alternative juror would be seated, (2) an apparent discussion in chambers regarding one of the motions in limine and (3) a jury instruction conference that was held in chambers. Brief of Appellant 8. Hubble argues that in accordance with *Momah*, the public trial right applies to all judicial proceedings and the Washington State Supreme Court has not recognized any exceptions to this rule. Brief of Appellant 9. Hubble urges the court to reconsider its holding from *Sublett* in light of the Supreme Court's decision in *Momah*. Brief of Appellant 9.

On the first day of trial the trial court stated:

All right. 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 with the exception of

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previously argued matters, (6) a decision allowing the jurors to take notes during trial, and (7) an order directing the State to provide the defense with summaries of the witness testimony...(1) the wording of jury instructions; (2) ministerial matters; and (3) whether the jury should be sequestered." *State v. Sadler*, 147 Wn. App. at 116-17.

obviously the defendant and the state's chief  
investigating officer who is - -

1RP 3. Voir dire was conducted, a jury was seated and given preliminary instructions before being released for lunch. 1RP 5-10. The trial court, outside of the presence of the jury, heard the Hubble and the State's motions in limine. 1RP 10-16. After ruling on Hubble's four motions in limine, the trial court asked the State about its motion in limine. 1RP 10-14. The trial court stated:

This is to preclude any inquiry into whether the state's witness, Jeremy Allison, has ever ingested, possessed, or sold any type of controlled substance. 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, Emerald Culberg.

So that's what you're talking about, is that right, Mr. - - the two of you, is that correct, is that what this motion is aimed at or is there some other use at some other time you were going to be attempting to introduce, Mr. Baum?

1RP 14-15. Hubble's trial counsel explains to the court what he intended to illicit and the other information he had regarding Mr. Allison's drug use. 1RP 15. Hubble's trial counsel further clarified, "[m]y intent was not to get into just generalized collateral drug use." 1RP 15. The trial court then gave the State an opportunity to

respond. 1RP 15-16. After hearing from Hubble's trial counsel and the State the trial court made its ruling. 1RP 16.

Hubble's argument that the court's conduct in regards to the pretrial conference in chambers violates his public trial rights is an incorrect interpretation of the law and facts of this case. Yes, the court did state there was a pretrial conference in chambers and it would appear from the trial court's statement that it was decided that an alternate juror would be seated. See 1RP 3. The decision regarding whether to seat an alternate juror is completely in the trial court's discretion and is a legal matter. CrR 6.5. Further, while there was a pretrial conference, the trial court did not state that the attorneys, Hubble's or the State's, had any input in regards to seating an alternate juror. See 1RP 3. Finally, there was no objection to an alternate being seated. 1RP 3.

Second, while Hubble's trial counsel may have given some type of outline to the trial court in regards to Ms. Culberg's anticipated testimony about Mr. Allison's drug use, it is clear from the record that whatever cursory information was given during the in chambers conference was not the determining factor in the trial court's decision of the State's motion in limine. 1RP 14-16. The trial court heard arguments from Hubble and the State regarding

the motion in limine, gathered information about what exactly the State was seeking to exclude and then made a decision, in open court, on the record. 1RP 14-16. The pretrial in chambers conference did not violate Hubble's public trial right because at most any discussion was ministerial and/or legal in nature.

The third issue raised, that the hearing conducted in chambers regarding jury instructions violates Hubble's right to an open and public trial is simply untrue. The trial court did state that there had been a jury instructions conference the night before. 2RP 3. Hubble's trial counsel was able to request an instruction he had not previously requested the night before and over the State's objection, the trial court gave the instruction. 2RP 2-4. The trial court also gave the State and Hubble an opportunity to raise any objection or exceptions to the jury instructions given by the trial court. 2RP 4-5. Hubble's trial counsel also addressed the court in regards to Hubble's election not to request a lesser included instruction. 2RP 5. As stated above, the selection of what instructions to give the jury is a purely legal matter. Hubble's right to be present is not triggered by an in chambers conference about legal matters. *See In re Pirtle*, 136 Wn.2d at 484.

Under Hubble's interpretation of the right to an open and public trial, nothing in regards to a trial could ever be done outside the presence of an open courtroom with a recorder present. There could be no scheduling conference, no discussion about what time breaks need to be taken, strategic issues regarding transportation of the defendant or witnesses, or even the order of the witnesses could not be discussed outside of an official proceeding.

The State respectfully requests this court to be consistent with its prior holdings in *Sadler* and *Sublett*, and find that an in-chambers conference regarding if an alternate juror would be seated, a brief discussion regarding Hubble's trial counsel's plan to introduce evidence regarding the victim's drug use which was brought to light due to the State's motion in limine and which jury instructions will be given are legal proceedings and the right to an open and public trial is not violated by such activity. Hubble's right to an open and public trial was not violated and his conviction should be affirmed.

**B. THE DEPUTY PROSECUTOR’S COMMENT REGARDING HUBBLE’S FAILURE TO GIVE INFORMATION REGARDING A POTENTIAL WITNESS, IF ERROR, IS HARMLESS BEYOND A REASONABLE DOUBT.**

A person cannot be compelled in criminal case to provide evidence against him or herself. U.S. Const. amend. X; Const. art. I, § 9.

A person who invokes his or her right to silence may not have that silence used as substantive evidence of guilt in a criminal trial. *State v. Sloan*, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006), citing *State v. Easter*, 130 Wn.2d 228, 238, 992 P.2d 1285 (1996) (additional citations omitted). It is a violation of a defendant’s due process rights for the State to exploit or comment on the defendant’s choice to exercise his or her right to remain silent. *State v. Romero*, 114 Wn. App. 779, 786-87, 54 P.3d 1255 (2002), citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), *State v. Fricks*, 91 Wn.2d 391, 395–96, 588 P.2d 1328 (1979). The State, therefore, “cannot elicit comments from a witness that are related to a defendant’s silence or make such comments during closing arguments in order to infer guilt. *State v. Sloan*, 133 Wn. App. at 127 (citations omitted).

A comment on a defendant’s right to remain silent can be harmless error. *State v. Pottorff*, 138 Wn. App. 343, 346-48, 156

P.3d 955 (2007). In *Pottorff* the court differentiated the review standards of the harmless error analysis based upon what type of comment was made by the State. *State v. Pottorff*, 138 Wn. App. at 347. The court explained that the prejudice incurred as the result of a direct comment about a person's right to remain silent would require the State to show the error was harmless beyond a reasonable doubt. *Id.* "A direct comment occurs when a witness or state agent makes a reference to the defendant's invocation of his or her right to remain silent. *Id.* at 346.<sup>3</sup> A constitutional error is deemed harmless if the reviewing court is certain beyond a reasonable doubt that the verdict is unattributable to the error. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). The Supreme Court has held, "[t]his court employs the overwhelming untainted evidence test and looks to the untainted evidence to determine if it so overwhelming that it necessarily leads to a finding of guilt." *State v. Anderson*, 171 Wn. 2d at 770.

Whereas, the prejudice incurred when the State makes an indirect comment on a person's right to remain silent is reviewed

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<sup>3</sup> The court gave the following as examples of direct comment on the evidence: An officer testifying that he read a defendant his *Miranda* warnings and the defendant chose not to waive his right to remain silent and would not speak to the officer. An officer testifies that a defendant would not speak to the officer and requested an attorney. See *State v. Pottorff*, 138 Wn. App. at 347. (referring to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

under the lower standard, which determines whether no reasonable probability exists that error affected the outcome. *Id.* at 347. The State makes an indirect comment on the a person’s right to remain silent when it, through a witness or the deputy prosecutor, references an action or comment made by the defendant which could be inferred as an attempt by the defendant to exercise his or her right to remain silent. *Id.*, citing *State v. Lewis*, 130 Wn.2d 700, 706, 927, P.2d 235 (1996).<sup>4</sup>

“[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence.” *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), citing *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant’s attorney in closing argument. *Id.* (citation omitted).

In the present case, Hubble argues that the deputy prosecutor’s comments, in his rebuttal closing, stating, “Who is Mike? Maybe we don’t know who Mike is. Maybe the defendant

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<sup>4</sup> “[O]fficer did not testify the defendant refused to talk, but rather that the defendant claimed he was innocent ...[O]fficer’s testimony that the defendant would take polygraph test after discussing the matter with his attorney was an indirect reference to silence.”

didn't want to cough him up.”, was an impermissible comment on Hubble's right to remain silent. Brief of Appellant 11; See RP 27. Hubble further argues that the court compounded the problem when it overruled Hubble's trial counsel's objection to the comment. Brief of Appellant 11. While the deputy prosecutor may have indirectly commented on Hubble's right to remain silent, any prejudice suffered by Hubble was harmless.

It is important to view the deputy prosecutor's comment in context. The deputy prosecutor was responding to an argument made by Hubble's trial counsel during his closing argument.

Hubble's trial counsel stated:

Ladies and gentlemen, I would hope that based on hearing this evidence you would have serious questions about what happened here. And I would hope that based on what has not been presented to you and the lack of credibility of the witnesses is cause to give you pause that would make you think there just is not evidence here to prove a person guilty beyond a reasonable doubt of a very, very serious crime. I would hope you would say that, I think the state should have more. They should have produced Sandra, they should have produced Mike... So I'm asking that based on lack of credibility of witnesses, lack of evidence, evidence that wasn't provided to you, seeming lack of concern all the way around, you find him [Hubble] not guilty based on what hasn't been provided to you.

2RP 26-27. The deputy prosecutor responded in his rebuttal closing with:

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.

2RP 27. Hubble's trial counsel objected and the trial court overruled the objection. 2RP 27. The deputy prosecutor continued:

Maybe the defendant didn't want to cough him up. Maybe Emerald Culberg didn't want to implicate her friend, her associate, and tell law enforcement who he really was. Maybe Sandra is in Mexico. Maybe we can't find these people. Maybe we have no idea where they are...

2RP 27-28. The deputy prosecutor was answering the allegations made by Hubble's trial counsel during his closing argument.

The deputy prosecutor's comment about Hubble possibly not wanting to give up Mike is, at best, an indirect comment on Hubble's right to remain silent. Further, the argument was not made in order to infer guilt on Hubble. The argument was made in an attempt to explain why the State had not produced this witness. See RP 27. If there were any prejudice to Hubble, it was harmless under either standard set forth in *Pottorff*.

The evidence presented in Hubble's case, all which would be considered untainted with the exception of questioning where "Mike" was, is so overwhelming that it would naturally lead a jury to find Hubble guilty of Robbery in the First Degree. The testimony of Mr. Allison, coupled with the letter Ms. Culberg sent to her friend in prison prior to her arrest, overwhelmingly prove that Hubble is guilty of Robbery in the First Degree. This court, if it should find the deputy prosecutor's remark improper, should find the resulting prejudice from the remark was harmless beyond a reasonable doubt and affirm Hubble's conviction.

**C. THE ACCOMPLICE LIABILITY STATUTE, RCW 9A.08.020, IS NOT OVERBROAD WHERE THE PROHIBITION ON AIDING ANOTHER IN PLANNING OR COMMITTING A CRIME DOES NOT MAKE UNLAWFUL A SUBSTANTIAL AMOUNT OF CONSTITUTIONALLY PROTECTED CONDUCT.**

Hubble seeks to impose on the accomplice liability statute an unreasonably broad definition of the words "aid" and "encourage" in the hope that the court will overturn the statute based upon that unreasonable interpretation. Hubble argues that because RCW 9A.08.020 criminalizes a substantial amount of speech and conduct protected by the First Amendment of the United States Constitution it is overbroad and unconstitutional. Brief of Appellant 14-15. This argument is without merit.

A statute is unconstitutionally overbroad if it infringes on constitutionally protected speech or conduct. *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.3d 572 (1989), *citing Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). While a defendant may not normally challenge a statute unless the defendant's conduct falls within the range of constitutionally protected conduct (invalid as applied), a defendant may challenge a statute as overbroad even where the defendant's own conduct is not prohibited (facially invalid) because prior restraints on speech receive greater protection. *State v. Pauling*, 108 Wn. App. 445, 448, 31 P.3d 47 (2001), *reversed on other grounds*, 149 Wn.2d 381, 69 P.3d 331 (2003), *citing Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

Hubble relies on *Brandenburg v. Ohio*, and its holding that pursuant to constitutional guarantee of free speech the State may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy 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, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969). Hubble finds fault with section (3)(ii) of RCW 9A.08.020. Brief of Appellant 15-17. Hubble argues that

the language “[w]ith knowledge that it will promote or facilitate the commission of a crime. . . aids or agrees to aid [another] person in planning or committing it” criminalizes speech protected by the First Amendment. Brief of Appellant 15.

Hubble particularly challenges the word “aid,” especially as defined by WPIC 10.51, the jury instruction used in this case. “Aid” is defined as follows:

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.

WPIC 10.51. RCW 9A.08.020 indicates that a person is an accomplice if with the knowledge that it will promote or facilitate the crime, the person aids in planning or committing the crime. While aid can include encouragement, mere encouragement alone is not enough. The person giving encouragement must: 1) give the encouragement with the knowledge that it will promote and facilitate the crime; and 2) the encouragement must aid in planning or committing the crime. RCW 9A.08.020. These restrictions mean that the accomplice liability statute does not violate the standards established in *Brandenburg*. The language of RCW 9A.08.020

qualifies aid as advocacy that is likely to produce or incite imminent lawless acts; this is not the kind of advocacy that is protected in *Brandenburg*.

The accomplice liability statute has been previously attacked as being unconstitutionally overbroad. See *State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011); *State v. Coleman* 155 Wn. App. 951, 231 P.3d 212 (2010). Coleman argued the exact same argument Hubble is putting forward to this court, that the failure to limit or define the term aid makes the statute, RCW 9A.08.020, unconstitutionally overbroad because it criminalizes constitutionally protected speech, press or assembly activities that a person knows will encourage lawless behavior but with no intent to further or promote a crime. *State v. Coleman*, 155 Wn. App. at 960. The court held that the statute, RCW 9A.08.020,

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.

*Id.* at 960-61. Similarly, the court in *Ferguson* adopted the reasoning of the court in *Coleman*, holding that the accomplice liability statute was not overbroad. *State v. Ferguson*, 164 Wn. App. at 376. The *Ferguson* court held, “[b]ecause the statute’s

language forbids advocacy direct at and likely to incite or produce imminent lawless action it[, RCW 9A.08.020(3)(a),] does not forbid the mere advocacy of law violation that is protected under the holding of *Brandenburg*." *Id.*

Therefore, RCW 9A.08.020 is not unconstitutionally overbroad and jury instruction 6, as given to the jury, was proper. See CP 42. Hubble's conviction should be affirmed

#### IV. CONCLUSION

For the foregoing reasons, this court should affirm Hubble's conviction for Robbery in the first Degree.

RESPECTFULLY submitted this 26<sup>th</sup> day of March, 2012.

JONATHAN L. MEYER  
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by: \_\_\_\_\_  
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# LEWIS COUNTY PROSECUTOR

**March 26, 2012 - 11:22 AM**

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