

No. 43290-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Ronald McNeal,

Appellant.

Lewis County Superior Court Cause No. 11-1-00816-3

The Honorable Judge James Lawler

Appellant's Opening Brief

(Corrected Copy)

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ASSIGNMENTS OF ERROR

1. The trial court violated Mr. McNeal's First, Sixth, and Fourteenth Amendment right to an open and public trial.
2. The trial court violated Mr. McNeal'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 a hearing in chambers to respond to a jury question.
4. The trial court violated the constitutional requirement of an open and public trial by holding a hearing in chambers to discuss the instructions that would guide the jury's decision.
5. Mr. McNeal's conviction was based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process.
6. Mr. McNeal was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
7. Defense counsel unreasonably failed to object and seek redaction of inadmissible propensity evidence that was highly prejudicial.
8. Defense counsel erroneously failed to propose a proper instruction limiting the jury's consideration of his prior convictions (contained in documents admitted to show dominion and control).
9. The accomplice liability statute is unconstitutionally overbroad.
10. Mr. McNeal was convicted through operation of a statute that is unconstitutionally overbroad.
11. The trial judge erred by giving Instruction No. 13, 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 met with counsel in chambers to discuss the instructions that would guide the jury's consideration and to answer a jury question during deliberations. Did the trial judge violate the constitutional requirement that criminal trials be open and public by meeting with counsel in chambers, without first conducting any portion of a Bone-Club analysis?
2. A criminal conviction may not be based on propensity evidence. In this case, the prosecution introduced unredacted documents outlining Mr. McNeal's criminal history, which included convictions for drug possession, and the jury was instructed to consider the evidence as proof of guilt. Did Mr. McNeal's convictions violate his Fourteenth Amendment right to due process because they were based in part on propensity evidence?
3. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. In this case, defense counsel unreasonably failed to object to inadmissible and prejudicial evidence of Mr. McNeal's prior conviction(s), failed to seek redaction of documents containing the information, and failed to seek an instruction limiting the jury's consideration of the evidence. Was Mr. McNeal deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. 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 words that facilitate or promote commission of a crime, even if 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

Roxanne Chipman resided at her friend Donald Pender's while serving an electronic home monitoring sentence. The home was a single-wide trailer with a shed in a trailer park. RP (3/13/12) 99, 113, 156-158, 160; RP (3/14/12) 59-61. Chipman sold drugs from the trailer. RP (3/14/12) 73-76.

On November 16, 2011, police pulled over Hayden Morgan as he drove away from the trailer. The officer arrested Morgan, and saw methamphetamine in the pocket of the driver's side door. RP (3/13/12) 18, 53. Additional officers came to talk with Morgan about working as an informant and conducting a buy from Ronald McNeal. RP (3/13/12) 105. One of the officers believed that Mr. McNeal lived with Chipman and Pender in the trailer, and that he distributed drugs. RP (3/13/12) 18, 26. Morgan agreed to act as an informant. RP (3/13/12) 21, 73.

Morgan was to do the buy that night. RP (3/13/12) 22. Morgan made a call, left a message, and received a call. RP (3/13/12) 24-25. He drove to the trailer, went inside for a minute or two, and then came out. RP (3/13/12) 26, 32, 39. He left the trailer, and later gave police methamphetamine he had obtained. RP (3/13/12) 40-41.

Police obtained a search warrant for the trailer, and searched it the next day. RP (3/13/12) 44, 61. They didn't find any of the marked bills

Morgan had used for the purchase. RP (3/13/12) 48. They did find scales, cash, and additional methamphetamine, as well as court documents that belonged to Pender, Chipman, and Mr. McNeal. RP (3/13/12) 118-133, 153; Exhibit 37, Supp. CP.

Police arrested Chipman and Mr. McNeal. RP (3/13/12) 45, 48. They also arrested Pender when he tried to hide some methamphetamine outside. RP (3/14/12) 12.

The state charged Mr. McNeal with Possession of a Controlled Substance and Delivery of Methamphetamine with a school zone enhancement. CP 1-2.

While the charges were pending, Morgan violated his agreement with the state. RP (3/13/12) 49-51. He was arrested and charged with a controlled substance violation. RP (3/13/12) 49-51, 96.

At Mr. McNeal's trial, one of the officers who watched the vehicles at the trailer park during the transaction was asked if she wrote a report. She testified, without objection, that "there was so many cases with Mr. MrNeal, I wasn't sure which case that was going to go to." RP (3/13/12) 67.

Morgan told the jury he purchased methamphetamine from Mr. McNeal. RP (3/13/12) 90. Chipman, who was transported from prison to

testify, stated that she dealt drugs from the trailer, and that she had given the methamphetamine to Morgan. RP (3/14/12) 58, 72.

The court admitted the documents regarding Mr. McNeal without redaction or limitation. These included Judgment and Sentence orders, as well as court setting documents. Ex. 37, Supp. CP; RP (3/13/12) 146-147.

The trial judge invited the attorneys into chambers to discuss the jury instructions. RP (3/14/12) 101. No further record was made regarding their meeting. RP (3/14/12) 101, 120-122. The court gave a standard instruction defining accomplice liability. No. 13, Court's Instructions, Supp. CP. During jury deliberations, the court answered a jury question without any comment on the record. Response by Court to Jury Inquiry, Supp. CP.

The jury convicted Mr. McNeal. He was sentenced and timely appealed. CP 4-24.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC.

A. Standard of Review

Alleged 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 576.

B. The trial court violated both Mr. McNeal's and the public's right to an open and public trial by meeting with counsel in chambers.

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*, 558 U.S. 209, ___, 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 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.

¹ See also *State v. Storde*, 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).

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.^{2,3}

In this case, the court met with counsel in chambers without the required analysis and findings. During one in camera hearing, the court and counsel decided on the instructions that would guide the jury’s consideration of the evidence. RP (3/14/12) 101. During a second in

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)).

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; *Strode*, at 230.

camera hearing, the court consulted with counsel and responded to a jury question. Response by Court, Supp. CP.

These in camera hearings violated Mr. McNeal'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 the public's right to an open trial. Id. Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

II. MR. MCNEAL'S CONVICTIONS WERE BASED IN PART ON PROPENSITY EVIDENCE, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

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.⁴ RAP 2.5(a)(3); State v. Kirwin, 165 Wash.2d 818, 203 P.3d 1044 (2009)). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is

⁴ In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see State v. Russell, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. Id.

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).

B. A conviction may not rest on propensity evidence.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.⁶ U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), reversed on other grounds at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); see also *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau*, at 776, 777-778; see also *Old Chief v. United States*, 519 U.S. 172, 182, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (“There is, accordingly, no question that propensity would be an ‘improper basis’ for conviction...” (citation omitted)).

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).

⁶ The U.S. Supreme Court has expressly reserved ruling on a very similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

For example, courts, reasoning that jurors may convict an accused because the accused is a “bad person,” have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior “bad acts,” may overlook weaknesses in the prosecution’s case in order to punish the accused for the prior offense. Moreover, as scholars have suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves. Researchers have shown that character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait. Furthermore, courts have excluded propensity evidence because such evidence blurs the issues in the case, redirecting the jury’s attention away from the determination of guilt for the crime charged.

Natali & Stigall, *“Are You Going to Arraign His Whole Life?”: How Sexual Propensity Evidence Violates the Due Process Clause*, 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

In the absence of a limiting instruction, the jury is likely to use evidence of prior misconduct as propensity evidence; this is especially true when jurors are required to consider “all of the evidence” relating to a proposition, “in order to decide whether [that] proposition has been proved...” Instruction No. 1, Supp. CP.

C. Mr. McNeal's convictions were based in part on propensity evidence.

Here, the prosecution introduced documents showing Mr. McNeal's prior criminal involvement. The evidence indicated that he'd been sentenced in superior court one day prior to the delivery charged in this case. See RP (3/13/12) 131-132, 147; Exhibits 18 and 37, Supp. CP.

The evidence was admitted without limitation, and the jury was not instructed to consider it solely for its intended purpose. See Court's Instructions, generally, Supp. CP.⁷ The court's instructions permitted the jury to consider the evidence for any purpose, including as substantive evidence of guilt. *State v. Myers*, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997). In fact, the court instructed the jury that it "must consider all of the evidence" admitted by the court, in considering whether or not a particular proposition had been proved. Instruction No. 1, Supp. CP. In light of this instruction, it is highly likely that the jury erroneously used evidence of prior misconduct as propensity evidence.

This error was manifest, because it had practical and identifiable consequences at trial. By permitting the jury to consider Mr. McNeal's prior criminal involvement as substantive evidence of guilt, the court

⁷ Instruction No. 16 addressed prior convictions for witnesses. Since Mr. McNeal did not testify, the instruction did not apply to him. Instruction No. 16, Supp. CP.

tipped the balance in favor of conviction. Accordingly, the error can be reviewed for the first time on appeal. RAP 2.5(a)(3); Nguyen, at 433.

The evidence suggested that Mr. McNeal had a propensity to commit crimes. The court's instructions encouraged jurors to convict based (in part) on propensity evidence, in violation of Mr. McNeal's Fourteenth Amendment right to due process. Garceau, supra. Accordingly, his convictions must be reversed and the case remanded for a new trial. Id.

III. MR. MCNEAL WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *State v. A.N.J.*, 168 Wash. 2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

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

Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must satisfy “the familiar two-part Strickland... test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant.” *State v. Sandoval*, 171 Wash. 2d 163, 169, 249 P.3d 1015 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy.⁸

⁸ See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”).

These are guidelines only, not “mechanical rules.” Strickland , at 696. Instead, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” Id. In every case, the court must consider whether the result is unreliable because of a breakdown in the adversarial process. Id.

C. Defense counsel unreasonably failed to object and seek redaction of inadmissible propensity evidence that was highly prejudicial.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, Exhibits 18 and 37 contained material that should not have been admitted, including documentation showing that Mr. McNeal had been sentenced in superior court just one day before the delivery charged in this case. See RP (3/13/12) 131-132, 147; Exhibits 18 and 37, Supp. CP. Although the prosecution sought to use the evidence as indicia of occupancy (RP (3/14/12) 138, 146), the specific evidence of Mr. McNeal’s criminal involvement was not necessary for that purpose. Defense counsel should have objected under ER 402, ER 403, and ER

404(b), and, at a minimum, sought redaction of any prejudicial information.

The evidence of Mr. McNeal's prior criminal involvement was damaging and prejudicial. It painted Mr. McNeal in an extremely poor light, suggested that he had a propensity to commit crimes, and bolstered the state's case against him.

No strategic purpose supported defense counsel's failure to object or seek redaction. Proper objections would likely have been sustained. ER 402, ER 403, and ER 404(b). Had counsel objected the result of the trial would have been different. Mr. McNeal argued to the jury that he was not involved in the drug delivery, even as an accomplice. RP (3/14/12) 153-166. Evidence of his prior criminal involvement undermined this contention. By allowing the jury to receive this evidence and to consider it for any purpose, including as propensity evidence, defense counsel deprived Mr. McNeal of the effective assistance of counsel. Reichenbach, *supra*.

The convictions must be overturned and the case remanded for a new trial, with instructions to exclude or redact Exhibits 18 and 37. *Id.*

- D. Defense counsel provided ineffective assistance by failing to propose a proper instruction limiting the jury’s consideration of unredacted documents showing Mr. McNeal’s prior criminal involvement.

The reasonable competence standard requires defense counsel to be familiar with the instructions applicable to the representation. See, e.g., *State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). A failure to propose proper instructions constitutes ineffective assistance of counsel. *State v. Woods*, 138 Wash. App. 191, 156 P.3d 309 (2007); see also *State v. Rodriguez*, 121 Wash. App. 180, 87 P.3d 1201 (2004).

Here, defense counsel failed to propose a proper instruction based on WPIC 5.30 (“Evidence Limited as to Purpose”).^{9 10} Counsel’s error infringed Mr. McNeal’s right to effective assistance under the Sixth and Fourteenth Amendments. By failing to propose a proper instruction, counsel’s performance fell below an objective standard of reasonableness. *Woods*, supra. There was no strategic reason justifying the decision to allow the evidence of prior criminal involvement to be admitted as substantive evidence of guilt.

⁹ WPIC 5.30 reads as follows: “Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of and] may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.”

¹⁰ Review of the trial court docket reflects that the defense attorney did not propose any jury instructions.

Furthermore, the error prejudiced Mr. McNeal: the court's instructions encouraged jurors to consider the exhibits as propensity evidence, thereby increasing the evidence available to establish guilt and the likelihood that jurors would vote to convict.

Accordingly, Mr. McNeal was deprived of the effective assistance of counsel. Woods, *supra*. His convictions must be reversed and the case remanded for a new trial. *Id.*

IV. 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); Kirwin, at 823. A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” Walsh, at 8.¹¹ 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. Nguyen, at 433.

¹¹ 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., at 603.

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*, 173 Wash. 2d 1, 6, 267 P.3d 305 (2011).

- B. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds; facts are not essential.

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).¹² 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

¹² 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.

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 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).

Mr. McNeal’s jury was instructed on accomplice liability. Instruction No. 13, Supp. CP. Accordingly, Mr. McNeal 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 advocating criminal activity:

“[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S. Ct. 1389, 1403, 152 L. Ed. 2d 403 (2002). Because of this, speech advocating criminal activity may only be punished if it “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 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.

Washington courts, including the trial judge here, have adopted a broad definition of aid: “The word ‘aid’ means all assistance whether given by words, acts, encouragement, support, or presence.” See WPIC 10.51; Instruction No. 13, Supp. CP. By defining “aid” to include assistance... given by words... [or] encouragement...”, the instruction criminalizes a vast amount of pure speech protected by the First Amendment, and runs afoul of the U.S. Supreme Court’s decision in *Brandenburg*.

Thus, for example, Washington’s accomplice liability statute would criminalize the speech protected by the U.S. Supreme Court in *Hess v. Indiana*, 414 U.S. 105, 107, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973) (“We’ll take the fucking street later [or ‘again’]”), *Ashcroft, supra* (virtual child pornography found to encourage actual child pornography), and *Brandenburg* itself (speech “‘advocat(ing) * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform’”) (quoting Ohio Rev. Code Ann. s 2923.13).

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. 13—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Brandenburg*, *supra*.

Mr. McNeal’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. The *Coleman* and *Ferguson* courts applied the wrong legal standard in upholding RCW 9A.08.020, and should be reconsidered in light of established U.S. Supreme Court precedent.

The U.S. Supreme Court has drawn “vital distinctions between words and deeds, between ideas and conduct.” *Ashcroft*, at 253. Because the accomplice liability statute reaches pure speech—“words” and “encouragement”—it cannot be analyzed under First Amendment tests for statutes regulating conduct. See WPIC 10.51; Instruction No. 13, Supp. CP.

Despite this, the Court of Appeals has upheld Washington’s accomplice liability statute by applying the standards for conduct rather than pure speech. *State v. Coleman*, 155 Wash.App. 951, 960-961, 231 P.3d 212 (2010), review denied, 170 Wash.2d 1016, 245 P.3d 772 (2011); *State v. Ferguson*, 164 Wash.App. 370, 264 P.3d 575 (2011). In *Coleman*, the court concluded that the statute’s mens rea requirement resulted in a statute that “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). The Ferguson court adopted the reasoning set forth in Coleman.

The court’s conclusion in Coleman and Ferguson is incorrect; the statute’s mens rea element cannot save the statute from First Amendment problems. Speech that “encourage[s] unlawful acts” is protected, unless it falls within the narrow category outlined by Brandenburg. Ashcroft, at 253. The state cannot ban speech made with knowledge that it will promote or facilitate the commission of crime. Such speech can only be criminalized if it also meets the Brandenburg test. A conviction can only be sustained if the jury is instructed that it must find that the speech was (1) “directed to inciting or producing imminent lawless action...” and (2) “likely to incite or produce such action.” Brandenburg at 447. The jury was not so instructed in this case.

The Coleman and Ferguson courts applied the wrong legal standard in upholding the accomplice liability statute. These decisions should be revisited.

CONCLUSION

For the foregoing reasons, Mr. McNeal's convictions must be reversed and the case remanded to the trial court for a new trial.

Respectfully submitted on September 12, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief (Corrected Copy), postage prepaid, to:

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Coyote Ridge Corrections Center
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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
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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 September 12, 2012.



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September 27, 2012 - 4:30 PM

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