

No. 43290-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RONALD MCNEAL,

Respondent.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court violate McNeal's public trial right by discussing jury instructions during an in-chambers conference?
- B. Can McNeal raise an objection to the admission of prior bad acts when he failed to object below?
- C. Did McNeal receive effective assistance from his trial counsel?
- D. Is the accomplice liability statute overbroad because it criminalizes protected speech?

II. STATEMENT OF THE CASE

On November 16, 2011 Hayden Morgan stopped by Ronald McNeal's residence on the way home from the Lucky Eagle Casino. 2RP 72-73.¹ Mr. Morgan stopped by McNeal's residence to purchase methamphetamine from McNeal. 2RP 77. McNeal told Mr. Morgan he did not have any and that Mr. Morgan should come back in a half an hour. 2RP 77. After leaving McNeal's residence Mr. Morgan was pulled over by Centralia Police Officer Haggerty. 2RP 105-06. Officer Haggerty stopped Mr. Morgan for a traffic violation which led to an investigation for driving under the influence. 2RP 106. Methamphetamine was discovered in Mr. Morgan's vehicle. 2RP 53, 78.

¹ The verbatim report of proceedings for the jury trial contains three volumes: Volume I (March 12, 2012) will be cited as 1RP; Volume II (March 13, 2012) will be cited as 2RP; Volume III (March 14, 2012) will be cited as 3RP.

Officer Smerer arrived on the scene of the traffic stop and spoke with Mr. Morgan. 2RP 20-21, 78. Mr. Morgan agreed to be a confidential informant in exchange for his possession of methamphetamine charge to be dropped. 2RP 20-21. Mr. Morgan told Officer Smerer that he could buy methamphetamine from McNeal. 2RP 25, 79. Mr. Morgan did the controlled buy that night. 2RP 22, 86-92. Prior to returning to McNeal's residence Mr. Morgan was strip searched and his car was searched. 2RP 22-23, 27, 84. Mr. Morgan went over to McNeal's residence, which was a trailer owned by Donald Pender. 2RP 26, 34, 38-39. Mr. Morgan went inside the trailer and was directed to the back bedroom which was occupied by McNeal and Roxanne Chipman. 2RP 86-90. McNeal sold Mr. Morgan methamphetamine. 2RP 90-92. Mr. Morgan drove to a location where he and his car were searched. 2RP 41-42. Mr. Morgan gave Officer Smerer a baggie of methamphetamine. 2RP 41. Mr. Morgan also provided Officer Smerer with a taped statement. 2RP 42.

Officers obtained a search warrant for McNeal's residence and executed it on November 17, 2011. 2RP 109-11. In the back bedroom officers found court documents belonging to McNeal and Ms. Chipman. 2RP 125-26, 130. In the bedroom officers found a

green backpack that contained a men's hygiene kit, clothes and two prescription bottles bearing McNeal's name. 2RP 127, 134. Inside one of the pill bottles was a small orange baggie containing methamphetamine. 2RP 127. Officers also located a tan canvas bag containing two digital scales, numerous Ziploc baggies that had a pit bull logo on them. 2RP 128. A larger Ziploc baggie containing methamphetamine was removed from the tan bag. 2RP 140-41.

Officers arrested McNeal and Ms. Chipman. 2RP 45, 48. Donald Pender was also arrested for possession of methamphetamine after he attempted to hide his methamphetamine outside. 3RP 12.

The State charged McNeal with Count I, Possession of Methamphetamine, and Count II, Delivery of Methamphetamine. CP 1-2. The State alleged the delivery was within 1,000 feet of a school. CP 2. McNeal elected to have his case tried to a jury. 1RP, 2RP, 3RP. Ms. Chipman testified on McNeal's behalf. 3RP 58-106. Ms. Chipman claimed that McNeal did not live or stay at the trailer. 3RP 92. Ms. Chipman also testified that she was the one who sold Mr. Morgan the methamphetamine on November 16, 2011. 3RP 72. McNeal was found guilty as charged. 3RP 178-79. McNeal was sentenced to 24 months on Count I and 120 months on Count II

plus a 24 month sentencing enhancement for a total confinement of 144 months. CP 7. McNeal timely appeals his conviction. CP 14-24.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE MCNEAL'S PUBLIC TRIAL RIGHT BY DISCUSSING JURY INSTRUCTIONS IN CHAMBERS.

The right to a public trial was not violated when the deputy prosecutor, the judge and McNeal's trial counsel discussed and reviewed jury instructions in chambers.

1. Standard Of Review.

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).

2. Preliminarily Discussing Proposed Jury Instructions In Chambers Does Not Violate Any Of The Values Served By The Public Trial Right.

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). 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).

The public trial requirement is primarily for the benefit of the accused. *Momah*, 167 Wn.2d at 148. "[T]he right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of

their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *State v. Sublett*, Supreme Court No. 8456-4, slip at 14 (November 21, 2012). 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 Supreme Court recently adopted the use of the experience and logic test to determine if a public trial right violation occurred. *Sublett*, slip at 14-21. The Supreme Court adopted this rule, formulated by the United States Supreme Court, “to determine whether the core values of the public trial rights are implicated.” *Id.* at 15.

The first part of the test, the experience prong, asks whether the place and process have historically been open to the press and general public. The logic prong asks ‘whether public access plays a significant role in the functioning of the particular process in question. If the answer to both is yes, the public trial attaches and the *Waller* or *Bone-Club* factors must be considered before the proceeding may be closed to the public.

Id. at 15 (internal quotations omitted), citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-8, 106 S. Ct. 2735, 92 L. Ed.2d 1

(1986).² The reviewing court is also required to “consider whether openness will enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* at 17 (citations and internal quotations omitted).

In *Sublett* the Supreme Court had to decide whether the right to a public trial was violated when the trial court answered a jury question in chambers with only the judge, deputy prosecutor and defense counsel present. *Id.* at 11. The Court employed the experience and logic test to determine if a violation had occurred. *Id.* at 18-21. The Court examined if jury questions regarding jury instructions had historically been open to the general public. *Id.* at 18-19.³ The Court analyzed this question by looking at proceedings for jury instructions in general. *Id.* at 18. The Court discussed that jury instruction proceedings have not historically been required to be conducted in an open courtroom. *Id.* at 18. The Court considered the Criminal Rules and how the jury instructions must be submitted in writing and objections and exceptions must be placed on the record. *Id.* At 18-19. The Court concluded that

² *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

³ The Court also noted that *Sublett* and *Olsen* had not identified any case that a reviewing court has held that answering a jury question regarding the jury instructions in chambers violates the public trial right. Similarly in this case, *McNeal* has not identified a case that holds a jury instructions conference held in chambers violates the public trial right.

historically, it could not find a challenge to the criminal rules regarding jury instructions or any case that required jury instruction discussions to be held in open court. *Id.* at 19. The Court held that the public trial right was not implicated by the answering of the jury question in chambers. *Id.* at 20-21. The Court further explained:

None of the values served by public trial right is violated under the facts of this case. No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists. The appearance of fairness is satisfied by having the questions, answer, and any objections placed on the record pursuant to CrR 6.15. Similarly, the requirement that the answer be in writing serves to remind the prosecutor and judge of their responsibility because the writing will become part of the public record and subject to public scrutiny and appellate review. This is not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.

Id. at 21.

In the present case the trial court told counsel it wanted to do some advance work on the jury instructions in chambers. 3RP 101. Then, at the conclusion of the presentation of evidence, the trial court told the parties that when the State finished fixing the instructions the parties would meet back in chambers to go through them. 3RP 120-21. After the recess to prepare the sets of jury instructions and prior to reading the court's instructions to the jury,

the trial court asked if either party had exceptions or objections to the instructions given or not given. 3RP 121. Neither the State nor McNeal took issue with any of the instructions. 3RP 121.

The Supreme Court's reasoning in *Sublett* is directly on point for this case. The Supreme Court discussed jury instructions conferences and how historically they were not necessarily done on the record in open court. *Sublett* at 18. When evaluating the experience portion of the test, a discussion regarding jury instructions that happens in the judge's chambers, is not a process that has historically been open to the general public or the press. The State could only find one Washington State case regarding in-chambers conferences for jury instructions and public trial right, a Division II case from earlier this year, which held there is not a per se rule that issues discussed during an in-chambers conference is not subject to the public trial right. *State v. Bennett*, 168 Wn. App. 197, 205, 275 P.3d 1224 (2012). In that opinion the court stated that some in-chambers conferences for jury instructions may be purely administrative or ministerial and others could be adversarial and in order to have an effective review on such issues the parties should make an adequate record regarding what occurred during the in-chambers conference. *Bennett*, 168 Wn. App. at 206. The

holding in *Bennett* does not require that a jury instructions conference be held in open court. In a historical context, a jury instructions conference is not a proceeding that implicates the public trial right.

In regards to logic, a discussion regarding possible and proposed jury instructions in-chambers does not violate the core values served by the public trial right. *Sublett* at 21. There are no witnesses to be called to testify, no testimony given and therefore no possible perjury. *Id.* The objections and exceptions that are put on the record hold the prosecutor and the judge responsible for their actions. *See Id.* Finally, “[t]his is not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.” *Id.* The in-chambers conference in this case regarding jury instructions did not violate McNeal’s public trial right.

B. MCNEAL CANNOT RAISE FOR THE FIRST TIME ON APPEAL THE TRIAL COURT’S ADMISSION OF TWO EXHIBITS ALLEGING THEY CONSTITUTE IMPERMISSIBLE PROPENSITY EVIDENCE BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.

McNeal argues, for the first time on appeal, that the trial court impermissibly admitted, without limitation, two documents that

show McNeal's prior criminal involvement. Brief of Appellant 18. McNeal alleges the two documents suggest that McNeal has a propensity to commit crimes and this had identifiable and practical consequences at McNeal's trial. Brief of Appellant 18-19. McNeal did not object to the trial court's admission of Exhibits 18 and 37. 2RP 126, 147-48; Ex. 18, 37. McNeal is now attempting to assert that the admission of these two exhibits is a manifest constitutional error that he can now raise for the first time on appeal. Brief of Appellant 15-19. The alleged error is not a manifest constitutional error. The error is not constitutional. Even if this Court were to find the error encompassed a constitutional right, McNeal does not demonstrate to this Court how the error is manifest. Therefore, McNeal cannot raise this issue for the first time on appeal.

1. Standard Of Review

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. McNeal Did Not Object To The Admission Of The Exhibits And Fails To Show This Court That The Alleged Error Is A Manifest Constitutional Error.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v.*

O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is a manifest error affecting a constitutional right.” *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*).

No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

a. The alleged error, admission of impermissible propensity evidence, is not of constitutional magnitude.

Evidence of other crimes or misconduct is not admissible to demonstrate a defendant's propensity to commit the crime they are currently charged with. ER 404(b); *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). The evidence is admissible for other purposes if the probative value of the evidence outweighs the prejudicial effect. ER 404(b); *Powell*, 166 Wn.2d at 81. The reviewing court defers to the trial court regarding the admission of evidence and reviews alleged error in admitting evidence using an abuse of discretion standard. *Powell*, 166 Wn.2d at 81. This deference acknowledges that the trial court is best suited to determine a piece of evidence's prejudicial effect. *Id.* "An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of a constitutional magnitude." *Id.* at 84.

In *Powell* the trial court allowed testimony regarding Powell's drug use on the day he attempted to commit the burglary. *Id.* at 82. Powell's defense counsel objected solely on the grounds that the

person giving the testimony regarding the drug use was not credible. *Id.* The evidence was introduced to show Powell's state of mind at the time of the incident. *Id.* The trial court did limit the admission of the evidence for the limited purpose of demonstrating Powell's state of mind. *Id.* Regardless, the Supreme Court found that Powell could not raise, for the first time on appeal, an objection under the theory of impermissible 404(b) propensity evidence. *Id.* at 84-85.

In the present case before this Court, no objection was made to the admission of McNeal's docket notice, dated November 15, 2011. 2RP 126, 148; Ex. 18, 37. McNeal now attempts to raise, for the first time on appeal, that this evidence was impermissible propensity evidence. The State acknowledges that McNeal couches the issue as it is impermissible propensity evidence absent a limitation instruction. However, the State's position is that this is not an issue of constitutional magnitude, pursuant to *Powell*, and this issue cannot be raised for the first time on appeal. The State will discuss below, the separate issue regarding the lack of a limiting instruction.

b. If this Court finds the alleged error is of constitutional magnitude the error is not manifest.

While the State maintains throughout its argument that the admission of the exhibits without a limiting instruction is not an error of constitutional magnitude, *arguendo*, if this Court finds the error alleged by McNeal is an error of constitutional magnitude, the error is not manifest.

An error is manifest if a defendant can show actual prejudice. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Actual prejudice requires a defendant to make a “plausible showing... that the asserted error had practical and identifiable consequences in the trial of the case.” *O’Hara*, 167 Wn.2d at 99 (internal citations and quotations omitted). McNeal has not satisfied this requirement. McNeal speculates that because the jury was allowed to consider “McNeal’s prior criminal involvement as substantive evidence of guilt, the court tipped the balance in favor of conviction.” Brief of Appellant at 18-19. This statement exaggerates the impact of the documents admission and ignores the overwhelming evidence presented by the State in favor of convicting McNeal of the crimes of Delivery of Methamphetamine and Unlawful Possession of Methamphetamine.

The document McNeal objects to does not state that McNeal was sentenced on November 15, 2011. Ex. 18, 37. The document is a criminal docket notice from Lewis County Superior Court. Ex. 37. The docket notice contains McNeal's name, a case number and a description of the hearing that was being set. Ex. 37. The hearing is listed as "SENTENCING HEARING: / FORMAL ENTRY OF J&S: NOV. 23, 2011 @ 1PM (D2)." Ex. 18, 37. The document bears McNeal's signature and the date, November 15, 2011. Ex. 18, 37. The State introduced this document, which was found in the back bedroom of the trailer, as evidence that McNeal was residing in that bedroom, that McNeal had personal items of significance in the bedroom and at the very least this document shows he put items in his bedroom the day before he sold methamphetamine to Mr. Morgan. 2RP 72-73, 86-92, 124-25, 146-48; Ex. 18, 37. This evidence was also used to show dominion and control over the bedroom and therefore, possession of methamphetamine on November 17, 2011. 2RP 111, 125-28, 136, 141; 3RP 144, 146, 170; Ex. 18, 37.

Mr. Morgan acted as a confidential informant and did a controlled buy for methamphetamine from McNeal. 2RP 21, 86-92. Mr. Morgan was strip searched, his car was searched, he was

provided pre-recorded money, surveilled from the police facility to McNeal's residence, surveilled visually and by telephone until reaching a designated location, was strip-searched, his vehicle searched, he handed over the methamphetamine and gave a taped statement to Officer Smerer. 2RP 22-23, 26-28, 38-42, 84, 86-93. The police obtained and executed a search warrant on the trailer McNeal was residing in. 2RP 44, 111. Mr. Morgan testified that McNeal was in the back bedroom when he bought the methamphetamine from McNeal. 2RP 89-92. Donald Pender testified that McNeal was living in the back bedroom. 2RP 162-63, 170-71; 3RP 13-14. Anthony Pender also testified that McNeal and Ms. Chipman were living in the back bedroom. 3RP 114-15. The methamphetamine found during the execution of the search warrant was in the back bedroom. 2RP 127-141. The overwhelming evidence in this case proved beyond a reasonable doubt that McNeal had delivered methamphetamine to Mr. Morgan and was in possession of methamphetamine at the time the search warrant was executed.

The admission of a document captioned as a criminal docket notice bearing McNeal's name did not tip the balance in favor of conviction based upon propensity that McNeal committed crimes.

The document evidenced that McNeal was living in the back bedroom. The docket notice does not list the crime McNeal was being sentenced for. Ex. 18, 37. Further, Ms. Chipman's testimony, elicited by McNeal's trial counsel, spoke of the court dates both Ms. Chipman and McNeal had regarding on-going cases. 3RP 61. Even if the evidence was considered for the purpose that McNeal is a criminal and therefore likely to commit crimes, the other evidence submitted by the State was more than sufficient to prove the crimes charged. McNeal cannot show that the admission of the docket notice had practical and identifiable consequences in the trial in this case. Therefore, McNeal has not satisfied the requirements to show this Court that the error is manifest and the alleged error is not properly before this Court.

C. MCNEAL RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL THROUGHOUT HIS CASE, PRETRIAL AND TRIAL PROCEEDINGS.

McNeal's trial counsel provided competent and effective legal counsel throughout the course of the trial. McNeal asserts that his trial counsel was ineffective for failing to object to and at a minimum request a limiting instruction regarding the docket notice admitted into evidence. Brief of Appellant at 21-22. McNeal's assertion that his counsel was ineffective is false. If, this Court were

to find McNeal's trial counsel's performance was deficient, McNeal has not shown that he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *McFarland*, 127 Wn.2d at 335 (citations omitted).

2. McNeal's Trial Counsel Was Not Ineffective For Failing To Object To The Admission Of The Docket Notice.

To prevail on an ineffective assistance of counsel claim McNeal must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the

assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

McNeal argues in this direct appeal that he was prejudiced by his trial counsel's deficient performance when he failed to object to or seek redaction of the docket notice exhibits. Brief of Appellant 21-22. McNeal asserts that this evidence was inadmissible under ER 402, ER 403 and ER 404(b). Brief of Appellant 21-22. This is not the case. The evidence, that McNeal had an important personal document that was dated the day before the controlled buy in what the State was asserting was McNeal's room, was relevant evidence and therefore admissible under ER 402. The probative value of the docket notice was not substantially outweighed by the danger of

unfair prejudice. ER 403. The notice did not list a crime or explicitly state that McNeal had been sentenced on November 15, 2011. Ex. 18, 37. It is doubtful the average lay person would completely understand what “formal entry of J&S” actually means. See Ex. 18, 37. Further, the probative value of the evidence was significant because it was strong evidence that McNeal resided in the back bedroom, beyond Mr. Morgan’s testimony that the controlled buy took place there. Finally under ER 404(b), the State was not attempting to admit the docket notice for evidence of a propensity to commit crime. The relevance of the evidence and the State’s intent was to show dominion and control over the back bedroom to prove the possession of methamphetamine charge. 2RP 111, 125-28, 136, 141; 3RP 144, 146, 170; Ex. 18, 37. Objections to the documents on these grounds would have been overruled. McNeal’s trial counsel obviously understood that objections to the admission of the docket notice were without merit and therefore did not object. This is not deficient or ineffective assistance.

McNeal further argues that at a minimum his trial counsel should have requested the document be redacted. Brief of Appellant 21-22. It is likely that McNeal’s trial counsel looked at the docket notice and saw what the State asserted above, that to the

average lay person the document does not give all the information McNeal now asserts it conveys. The docket notice does not state that McNeal was sentenced on November 15, 2011. Ex. 18, 37. “Formal entry of J&S” is commonly understood by criminal law practitioners but is not common knowledge among the public at large. By seeking redaction it is possible that the jury would wonder just what McNeal was attempting to hide and therefore speculate about what the notice actually said. It was a legitimate trial tactic to not seek redaction as it would call attention to the document that in reality said very little to the jury beyond that it belonged to McNeal, set a court date and was signed on November 15, 2011. Ex. 18, 38.

Arguendo, if this Court was to find McNeal’s trial counsel’s performance deficient for failing to object or request redaction; McNeal has not shown this Court that the deficiency prejudiced him. As argued above, the limited information contained on the docket notice was not prejudicial to McNeal’s case. Further, there was overwhelming evidence presented by the State to support McNeal’s convictions. McNeal was not prejudiced by his trial counsel’s alleged deficient performance and his claim of ineffective assistance of counsel fails.

3. McNeal's Trial Counsel Was Not Ineffective For Failing To Request A Limiting Instruction.

McNeal's trial counsel may have chosen to not request a limiting instruction because it would draw the jury's attention that the docket notice may contain more information or be evidence of more than indicia that McNeal lived in the back bedroom. When the State elicited testimony from Officer Haggerty as to why he collected the documents, Haggerty stated, "To show ownership and who's been in the room recently." 2RP 147. The State only argued that the documents showed that McNeal resided in the room and therefore had dominion and control over the methamphetamine found in the bedroom. 3RP 144, 146, 170.

Conduct by an attorney that can be characterized as legitimate tactics or trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *citing State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Courts have long acknowledged that any defendant can claim, after being convicted, that he or she received ineffective assistance from counsel who actually employed a legitimate trial strategy or tactics.

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make

mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate. Such a finding of ineffective representation should reverse a defendant's conviction if counsel's conduct created a reasonable possibility of contributing to that conviction.

Adams, 91 Wn.2d at 91. It is a legitimate trial tactic to not draw more attention to a piece of evidence.

If this Court were to find that McNeal's trial counsel was deficient for failing to request a limiting instruction, this deficiency, as argued above, did not prejudice McNeal. This Court should find that McNeal's counsel was not ineffective and his convictions should be affirmed.

D. 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.

McNeal 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. McNeal 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 27. This argument is without merit.

1. Standard Of Review.

Constitutional violations are reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). The party challenging a statute bears the burden of proving that the statute is unconstitutional. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011). “However, in the free speech context, the State usually ‘bears the burden of justifying a restriction on speech.’” *Immelt*, 173 Wn.2d at 6.

2. The Accomplice Liability Statute Is Not Overbroad Because It Does Not Criminalize Speech Protected By The First Amendment.

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).

McNeal relies on *Brandenburg v. Ohio*, and it's 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). McNeal finds fault with section (3)(ii) of RCW 9A.08.020. Brief of Appellant 27-29. McNeal 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 27.

McNeal 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 P.3d 575 (2011); *State v. Coleman* 155 Wn. App. 951, 231 P.3d 212 (2010). Coleman argued the exact same argument McNeal 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. *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. *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. McNeal’s conviction should be affirmed.

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V. CONCLUSION

McNeal received a fair trial and was properly convicted by the jury of both Possession of Methamphetamine and Delivery of Methamphetamine within 1,000 feet of a school. McNeal's right to a public trial was not violated, he was not convicted by impermissible propensity evidence, he received effective assistance from his trial counsel and the accomplice liability statute is not overbroad. For the foregoing reasons, this should court affirm McNeal's convictions.

RESPECTFULLY submitted this 14th day of December, 2012.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

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