

FILED
Court of Appeals
Division II
State of Washington
6/26/2020 12:40 PM

No. 54276-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kyle Pagel,

Appellant.

Thurston County Superior Court Cause No. 19-1-00945-8

The Honorable Judge Chris Lanese

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2

ARGUMENT..... 6

I. Mr. Pagel was denied the effective assistance of counsel because he was prejudiced by his attorney’s failure to secure the attendance of a critical defense witness at trial. 6

A. Mr. Pagel was entitled to the effective assistance of counsel. 6

B. Defense counsel unreasonably failed to undertake a timely investigation, to request a continuance when a critical witness failed to appear, and to seek a material witness warrant. 7

II. The accomplice liability statute and associated jury instruction are overbroad because they criminalize constitutionally protected speech..... 14

A. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds. 15

B. Washington’s accomplice liability statute punishes protected speech, including mere advocacy..... 16

C. The Court of Appeals applied the wrong legal standard in *Coleman*, *Ferguson*, and *Holcomb*, upholding RCW 9A.08.020 against a First Amendment challenge. 20

D. The Court of Appeals should review this manifest constitutional error *de novo*. 23

CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Ashcroft v. Free Speech Coal.</i> , 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).....	15, 16, 17, 22
<i>Brandenburg v. Ohio</i> , 395 U.S. 444, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969)	16, 17, 18, 19, 20, 21, 22
<i>Dakota Rural Action v. Noem</i> , 416 F. Supp. 3d 874 (D.S.D. 2019).....	18
<i>Hawkman v. Parratt</i> , 661 F.2d 1161(8th Cir. 1981).....	7
<i>Hess v. Indiana</i> , 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973)	18, 21
<i>United States v. Freeman</i> , 761 F.2d 549 (9th Cir. 1985).....	17, 19, 21, 22
<i>United States v. Platte</i> , 401 F.3d 1176 (10th Cir. 2005).....	16
<i>Virginia v. Hicks</i> , 539 U.S. 113, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003)	15, 16

WASHINGTON STATE CASES

<i>Adams v. Hinkle</i> , 51 Wn.2d 763, 322 P.2d 844 (1958).....	14
<i>City of Bremerton v. Widell</i> , 146 Wn.2d 561, 51 P.3d 733 (2002).....	13
<i>City of Seattle v. Webster</i> , 115 Wn.2d 635, 802 P.2d 1333 (1990), <i>cert. denied</i> , 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991)	15, 16
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010)	6, 7, 8, 10, 14
<i>State v. Classen</i> , 4 Wn.App.2d 520, 422 P.3d 489 (2018)	6
<i>State v. Coleman</i> , 155 Wn.App. 951, 231 P.3d 212 (2010) <i>review denied</i> , 170 Wn.2d 1016, 245 P.3d 772 (2011) (<i>Coleman</i>).....	19, 20, 21, 22
<i>State v. Crow</i> , 8 Wn.App.2d 480, 438 P.3d 541 (2019)	7

<i>State v. Drath</i> , 7 Wn.App.2d 255, 431 P.3d 1098 (2018).....	7
<i>State v. Estes</i> , 188 Wn.2d 450, 395 P.3d 1045 (2017).....	10
<i>State v. Ferguson</i> , 164 Wn.App. 370, 264 P.3d 575 (2011).....	19, 20
<i>State v. Holcomb</i> , 180 Wn.App. 583, 321 P.3d 1288 <i>review denied</i> , 180 Wn.2d 1029, 331 P.3d 1172 (2014).....	19, 20, 21
<i>State v. Immelt</i> , 173 Wn.2d 1, 267 P.3d 305 (2011).....	15, 23
<i>State v. J.P.</i> , 130 Wn.App. 887, 125 P.3d 215 (2005).....	13
<i>State v. Jensen</i> , 149 Wn.App. 393, 203 P.3d 393 (2009).....	13
<i>State v. Jones</i> , 183 Wn.2d 327, 352 P.3d 776 (2015).....	7, 8, 10, 14
<i>State v. Lopez</i> , 190 Wn.2d 104, 410 P.3d 1117 (2018).....	7
<i>State v. Schaler</i> , 169 Wn.2d 274, 236 P.3d 858 (2010).....	23
<i>State v. Visitacion</i> , 55 Wn.App. 166, 776 P.2d 986 (1989).....	7, 8, 14
<i>Washington Off-Highway Vehicle Alliance v. State</i> , 163 Wn.App. 722, 260 P.3d 956 (2011), <i>aff'd</i> 176 Wn.2d 225, 290 P.3d 954 (2012).....	23

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend I.....	1, 14, 15, 19, 21, 23
U.S. Const. Amend. VI.....	1, 6, 14
U.S. Const. Amend. XIV.....	1, 6, 14
Wash. Const. art. I, §22.....	6
Wash. Const. art. I, §5.....	15

WASHINGTON STATE STATUTES

RCW 9A.08.020.....	17, 18, 19, 20, 21
--------------------	--------------------

RCW 9A.52.090..... 13

RCW 9A.82.050..... 13

OTHER AUTHORITIES

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (4th Ed) ... 18, 19, 21

CrR 4.10..... 12

Ohio Rev. Code Ann. §2923.13..... 19

ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Pagel was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. Pagel's attorney provided ineffective assistance by failing to investigate the case in a timely fashion.

ISSUE 1: Defense counsel provides ineffective assistance by failing to conduct a reasonable investigation. Was Mr. Pagel denied effective assistance by his attorney's failure to investigate the facts of the case?

3. Mr. Pagel was convicted through the operation of a statute that is overbroad in violation of the First and Fourteenth Amendments.
4. The trial judge erred by giving Instruction No. 12, which defined accomplice liability in a manner that violates the First and Fourteenth Amendments.
5. The trial judge erred by giving Instruction No. 13, which incorporated the unconstitutional accomplice liability standard.

ISSUE 2: A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite imminent lawless action. Are the accomplice liability statute and its associated jury instruction unconstitutionally overbroad, in violation of the First and Fourteenth Amendments?

INTRODUCTION AND SUMMARY OF ARGUMENT

Brad Conners told Kyle Pagel that he had permission to enter a fire-damaged apartment building to recover scrap metal and sell it. Mr. Pagel relied on this information, and it later formed the basis for his defense to charges of burglary and trafficking in stolen property. His attorney failed to take necessary steps to ensure that Conners testified at Mr. Pagel's trial. This deprived Mr. Pagel of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. His convictions must be reversed, and the case remanded for a new trial.

The court's accomplice instruction permitted conviction based on words alone, even if they were not directed to inciting or producing imminent lawless action and likely to incite or produce such action. The accomplice liability statute and the court's instructions violated the First Amendment. Mr. Pagel's convictions must be reversed, and the case remanded for a new trial with proper instructions.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In May of 2019, Kyle Pagel found himself in Olympia and needed to get home to Gig Harbor. RP (10/24/19) 268. He didn't have a car, or money, for the trip. RP (10/24/19) 268-270, 293. He had asked friends for rides without luck, but one friend said he could drive him there if Mr.

Pagel could pay for gas. RP (10/24/19) 269, 315. Mr. Pagel spoke with Brad Conners, who owed him money, and asked to be paid. RP (10/24/19) 268.

Conners told Mr. Pagel that he had permission to go into an empty apartment and remove the copper pipe because the apartment was to be demolished. RP (10/22/19) 10-11, 176; RP (10/24/19) 274, 281, 297. Conners also said that he had permission to sell that pipe and keep the money. RP (10/22/19) 10-11; RP (10/24/19) 273-274. They went to the apartment, Connor and another went in and got the pipe and they all left the area. RP (10/23/19) 22, 27; RP (10/24/19) 277-280, 297-301, 309.

The group then went to Sutter Metals. RP (10/24/19) 282. Mr. Pagel got \$30 cash and a check for \$55 for the copper. RP (10/23/19) 119-120, 183-188; RP (10/24/19) 284.

But Conners did not have permission, and a neighbor watched the men and called the police. RP (10/22/19) 187; RP (10/23/19) 28, 32-45. Mr. Pagel was arrested and charged with burglary in the second degree and trafficking in stolen property in the first degree. CP 1. He told police he was told they had permission to take and sell the copper. RP (10/23/19) 189.

The day before trial was set to start, Mr. Pagel's attorney John Hansen asked for a continuance. He told the court that he just received

information about some possible defense witnesses and he needed time to contact them. RP (10/21/19) 39-40. The court denied the motion, and trial began the next day. RP (10/21/19) 40.

As trial started, Mr. Pagel asked for a new attorney and told the court multiple tasks had been requested and not completed by his attorney. RP (10/22/19) 4-5. Hansen told the court that his investigator had spoken with Connors the day before, that the information was material and exculpatory, and that he had only just obtained contact information for Connors. RP (10/22/19) 5-6, 10. Mr. Pagel tried to further explain his concerns to the court when his attorney interrupted and “cut him off”. RP (10/22/19) 7. Attorney Hansen further explained: “Your Honor, I think my client wishes to go into material that could be a claim for ineffective assistance of counsel.” RP (10/22/19) 7.

Then Hansen made an offer of proof regarding what Connors was expected to testify to:

Brad Connors would have testified that he told Mr. Pagel that he had permission, that they had permission to go into the apartment building, that they had permission to take scrap metal out and that there was no problem as to selling it at Sutter Metals. Mr. Conner will testify that he told these things directly to Pagel and Mr. Pagel acted in reliance upon those statements that the transactions, both getting the metal, entering the building and selling the metal, were not in fact illegal, in fact that Mr. Connors had permission and that Mr. Pagel was assisting him. RP (10/22/19) 11.

The court denied the defense motion to continue the trial, noting that the information was not specific and could have been addressed earlier. RP (10/22/19) 10-11, 14. When asked to list who the defense witnesses would be, counsel Hansen told the court he may call Conners:

MR. HANSEN: I would represent that I have the obligation to make my own call as far as which other witnesses to call, which other witnesses may be allowed to testify under the rules of evidence and local court rules. My client has a disagreement as to that, but having reviewed their potential testimony and having consulted with other counsel I'd state for the record that those are the only witnesses that I will be attempting to call.
RP (10/22/19) 18.

During trial, the defense investigator served Conners with a subpoena. But when Conners failed to appear, Hansen did not ask the court for a material witness warrant. Nor did he request an order to continue or recess the trial to secure his attendance. RP (10/22/19) 105-107.

After calling Mr. Pagel to testify, the court asked the defense if they had any additional witnesses. RP (10/24/19) 325. Hansen responded: “Unfortunately, I have not been able to get an additional witness here in the courtroom, and I have to rest.” RP (10/24/19) 325.

The court gave a jury instruction that defined accomplice as one who aids in the commission of a crime by aiding another person by “words, acts, encouragement, support or presence.” CP 64.

The jury convicted Mr. Pagel as charged. CP 87. He was sentenced to 63 months, and he timely appealed. CP 144-156.

ARGUMENT

I. MR. PAGEL WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE WAS PREJUDICED BY HIS ATTORNEY’S FAILURE TO SECURE THE ATTENDANCE OF A CRITICAL DEFENSE WITNESS AT TRIAL.

Mr. Pagel’s attorney failed to perform a timely investigation and did not properly explain his need for a continuance so he could secure the attendance of a critical witness at trial. When the witness failed to appear at trial (despite an 11th hour subpoena), counsel did not renew his request for a continuance and did not seek a material witness warrant.

Counsel’s actions deprived Mr. Pagel of his right to the effective assistance of counsel. Mr. Pagel’s convictions must be reversed and the case remanded for a new trial.

A. Mr. Pagel was entitled to the effective assistance of counsel.

An accused person is guaranteed the effective assistance of counsel. U.S. Const. Amend. VI and XIV; Wash. Const. art. I, §22; *State v. Classen*, 4 Wn.App.2d 520, 422 P.3d 489 (2018). A person claiming ineffective assistance must show deficient performance resulting in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. A.N.J.*, 168 Wn.2d 91, 109, 225

P.3d 956 (2010). An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *State v. Drath*, 7 Wn.App.2d 255, 266, 431 P.3d 1098 (2018).

Performance is deficient if it falls below an objective standard of reasonableness. *State v. Crow*, 8 Wn.App.2d 480, 438 P.3d 541 (2019). Prejudice is established when there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 511. This standard is less than a preponderance; it requires only a probability sufficient to undermine confidence in the outcome. *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018).

Here, Mr. Pagel was deprived of the effective assistance of counsel.

B. Defense counsel unreasonably failed to undertake a timely investigation, to request a continuance when a critical witness failed to appear, and to seek a material witness warrant.

To be effective, defense counsel must conduct an adequate investigation.¹ *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Investigating the facts is “an essential duty.” *State v. Visitacion*, 55

¹ Even a client’s admission of guilt will not excuse a failure to adequately investigate. *A.N.J.*, 168 Wn.2d at 110.

Wn.App. 166, 174, 776 P.2d 986 (1989) (citing *Hawkman v. Parratt*, 661 F.2d 1161, 1168 (8th Cir. 1981)).

In *Jones*, defense counsel failed to interview three eyewitnesses who were clearly identified in discovery provided by the State. *Jones*, 183 Wn.2d at 332, 337. The Supreme Court reversed for ineffective assistance.² *Id.*, at 347; *see also Visitacion*, 55 Wn.App. at 174-175.

This case is controlled by *Jones*.

Conners was an eyewitness and he participated in the behavior that resulted in Mr. Pagel's charges. RP (10/23/19) 104-107, 160-162, 190-192; RP (10/24/19) 274-285, 294-310, 318-322. He was clearly identified in the discovery. RP (10/22/19) 5-6. According to Mr. Pagel, Conners told him they had permission to enter the building and take the copper pipe.³ RP (10/24/19) 274, 297, 319.

Despite this, when requesting a continuance the day before trial, defense counsel did not tell the judge that he hadn't located or spoken with Conners.⁴ RP (10/21/19) 39-40. Nor did Hansen explain to the judge why Conners was important to the defense. RP (10/21/19) 39-40.

² Likewise, in *A.N.J.*, the Supreme Court determined that defense counsel was ineffective for failing to conduct a "meaningful investigation." *A.N.J.*, 168 Wn.2d at 109.

³ Conners later confirmed this to a defense investigator. RP (10/22/19) 11.

⁴ Nor did he raise the issue at an earlier hearing when he obtained a one-week continuance to review new discovery with his client. RP (10/14/19) 25-31; Motion and Declaration for Continuance filed 10/10/19, Supp. CP.

Instead, counsel told the court that his client had just provided a new list of witnesses to contact. RP (10/21/19) 39-40. The court denied the request, unaware that counsel had failed to contact an eyewitness who had participated in the conduct leading to Mr. Pagel's prosecution. RP (10/21/19) 39-40.

Defense counsel's investigator did not speak with Conners until the evening before trial started. RP (10/22/19) 5. At that time, Conners confirmed that he'd told Mr. Pagel they had permission to enter the apartment building and take the scrap metal, and that "there was no problem as to selling it." RP (10/22/19) 11. The investigator did not record Conners' statement.⁵ RP (10/22/19) 5-6.

When defense counsel finally sought a continuance based on Conners' anticipated testimony, the court denied the motion because the issue "could have been raised far in advance." RP (10/22/19) 14. The judge went on to say that "[a]bsent a recorded statement or something far stronger indicating this is what actually occurred...I'm exercising my discretion [to deny] the continuance." RP (10/22/19) 14.

Although a subpoena was served sometime before opening statements, counsel did not renew his request for a continuance when Conners failed to appear. RP (10/19/22) 105-107, 155; RP (10/24/19) 325.

⁵ Nor did he serve him with a subpoena at that time. RP (10/22/19) 5-6.

Nor did counsel seek a material witness warrant, despite the critical nature of Conners' testimony.

Counsel's inadequate efforts to secure Conners' attendance at trial amounted to deficient performance.

First, Counsel should have vigorously pursued an interview with Conner well before trial started.⁶ Conners was an eyewitness who had participated in the behavior that ultimately resulted in Mr. Pagel's charged. *See Jones*, 183 Wn.2d at 332. He provided the basis for Mr. Pagel's defense—that they had permission to enter the building and take scrap metal. Conners was not in hiding: he had a home address and a place he worked. RP (10/22/19) 6, 14.

A reasonable attorney would have interviewed a critical eyewitness prior to trial.⁷ *Id.* Counsel's failure to interview Conners prior to trial amounted to deficient performance. *Id.*

Second, counsel should have sought a continuance based on his need to locate and interview Conners prior to trial. Although counsel obtained a one-week continuance before trial and sought a second continuance the day before trial started, he never mentioned Conners. RP

⁶ Ultimately, it was Conners himself who came to defense counsel's office to give a statement. RP (10/22/19) 5, 9.

⁷ Indeed, counsel could not properly advise Mr. Pagel to accept or reject a plea offer without having spoken to Conners. *See State v. Estes*, 188 Wn.2d 450, 464, 395 P.3d 1045 (2017); *A.N.J.*, 168 Wn.2d at 110-112.

(10/14/19) 25-26; RP (10/21/19) 39; Motion and Declaration for Continuance filed 10/10/19, **Supp. CP**.

He never told the court prior to trial that he still needed to locate and interview a critical witness identified in the discovery. In fact, the second continuance request was denied because the court believed it was based on information that Mr. Pagel had just provided his attorney. RP (10/21/19) 39-40.

A reasonable attorney would have sought a continuance based on the need to interview a critical witness such as Conners. Counsel's failure to seek a continuance related to Conners amounted to deficient performance.

Third, counsel should have obtained a recorded statement from Conners (and served him with a subpoena) prior to the start of trial.⁸ The evening before trial started, Conners confirmed that he'd told Mr. Pagel that "they had permission to go into the apartment building, that they had permission to take scrap metal out and that there was no problem as to selling it." RP (10/22/19) 11.

Armed with a recorded statement (and having subpoenaed Conners), counsel would have been in a better position to seek a

⁸ Alternatively, counsel could have produced a report from his investigator or asked the investigator to testify to an offer of proof.

continuance when Conners failed to appear at trial. Indeed, the court denied counsel's continuance request in part because Conners had not provided a recorded statement. RP (10/22/19) 14. Counsel's performance was deficient because a reasonable attorney would have obtained a recorded statement (and served Conners with a subpoena).

Fourth, counsel should have renewed his request for a continuance when Conners failed to appear for trial. Counsel had managed to serve a subpoena on the first day of trial, but Conners did not come to court on that day. Counsel should have requested additional time to ensure Conners would be present to testify. In addition, counsel should have renewed his request for more time after the State rested its case: at that point, counsel knew that he'd be going forward with only his client's testimony.

Given the critical nature of Conners' testimony, a reasonable attorney would have requested a continuance to ensure Conners attended trial. Counsel's performance was deficient.

Fifth, counsel should have sought a material witness warrant to secure Conner's attendance at trial. CrR 4.10(a)(2). Under the rule, a warrant may issue for a material witness who refuses to obey a lawfully issued subpoena. CrR 4.10(a)(2). A reasonable attorney would have requested a material witness warrant to ensure that jurors heard Conners'

testimony. Defense counsel's performance fell below an objective standard of reasonableness.

Counsel's deficient performance prejudiced Mr. Pagel. The entire defense rested on Mr. Pagel's belief that Conners had permission to enter the apartment and take scrap metal. *See* RCW 9A.52.090(3); *State v. J.P.*, 130 Wn.App. 887, 895, 125 P.3d 215 (2005) (citing *City of Bremerton v. Widell*, 146 Wn.2d 561, 51 P.3d 733 (2002)).⁹ This would also have provided a complete defense to the trafficking charge, which required proof that he knowingly trafficked in stolen property, knowing it to be stolen. CP 69, 75; RCW 9A.82.050.

Had he been called to testify, Conners would have confirmed Mr. Pagel's account. He would have explained to the jury that he told Mr. Pagel "that they had permission to go into the apartment building, that they had permission to take scrap metal out and that there was no problem as to selling it." According to Conners, "he told these things directly to Pagel and Mr. Pagel acted in reliance upon those statements that the transactions, both getting the metal, entering the building and selling the metal, were not in fact illegal, in fact that Mr. Conners had permission and that Mr. Pagel was assisting him." RP (10/22/19) 11.

⁹ *But see State v. Jensen*, 149 Wn.App. 393, 401, 203 P.3d 393 (2009) (disagreeing with *J.P.*)

Without Conners' testimony, jurors had nothing to consider but Mr. Pagel's own self-serving denials. There is a reasonable probability that counsel's errors affected the outcome of the case.¹⁰ *Crow*, 8 Wn.App.2d at 511.

Defense counsel failed in his "essential duty" to conduct a proper investigation and to secure the attendance of a critical witness at Mr. Pagel's trial. *Visitacion*, 55 Wn.App. at 174; *see also Jones*, 183 Wn.2d at 339; *A.N.J.*, 168 Wn.2d at 109-110. Because the error prejudiced Mr. Pagel, he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Strickland*, 466 U.S. at 687.

II. THE ACCOMPLICE LIABILITY STATUTE AND ASSOCIATED JURY INSTRUCTION ARE OVERBROAD BECAUSE THEY CRIMINALIZE CONSTITUTIONALLY PROTECTED SPEECH.

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. Washington's accomplice liability statute and the associated pattern instruction allow conviction for protected speech that is not directed to or likely to produce imminent lawless action. The statute and instruction are facially overbroad.

¹⁰ Any notion that this was any kind of strategic decision on counsel's part is belied by his statement upon resting his case: "Unfortunately, I have not been able to get an additional witness here in the courtroom, and I have to rest." RP (10/24/19) 325.

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

The First Amendment protects free speech.¹¹ U.S. Const. Amend.

I. A statute is overbroad under the First Amendment if it sweeps within its prohibitions a substantial amount of constitutionally protected speech.

State v. Immelt, 173 Wn.2d 1, 6-7, 267 P.3d 305 (2011); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

Anyone accused of violating such a statute may bring an overbreadth challenge; the accused person need not have engaged in constitutionally protected activity or speech. *Immelt*, 173 Wn.2d at 33. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Id.*

In other words, “[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds.” *City of Seattle v. Webster*, 115 Wn.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

¹¹ This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases). 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. art. I, §5.

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*, 539 U.S. at 119).

Mr. Pagel’s jury was instructed on accomplice liability. CP 64-65. Accordingly, he is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks*, 539 U.S. at 118-119; *Webster*, 115 Wn.2d at 640.

B. Washington’s accomplice liability statute punishes protected speech, including mere advocacy.¹²

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*, 535 U.S. at 253. Because of

¹² The U.S. Supreme Court recently reviewed a 9th Circuit decision invalidating a similar federal statute on First Amendment grounds. *United States v. Sineneng-Smith*, No. 19-67, Slip. Op. (U.S. May 7, 2020). Although the Supreme Court vacated and remanded the 9th Circuit decision, it did not address the merits. Instead, it based its decision on the lower court’s departure from the principle of party presentation: the 9th Circuit’s overbreadth analysis stemmed from the court’s invitation to amici to address an issue not briefed by the parties. *Id.*

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).

This requires courts to instruct juries in a manner ensuring that mere advocacy is not criminalized; instead, the defendant must *intend* to incite imminent criminal activity. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). In *Freeman*, the defendant was charged with counseling others to violate the tax laws. The court reversed some of his convictions¹³ because the trial court failed to instruct on the *Brandenburg* standard: “[T]he jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur.” *Freeman*, 761 F.2d at 552.

Accomplice liability in Washington does not meet the *Brandenburg* standard. The accomplice statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes a substantial amount of constitutionally-protected expression. *Immelt*, 173 Wn.2d at 6-7; *Ashcroft*, 535 U.S. at 255.

¹³ In the remaining counts, the defendant actually assisted in the preparation of false tax returns. *Freeman*, 761 F.2d at 552.

In Washington, a person may be convicted as an accomplice for “encourage[ment]” provided “[w]ith knowledge that it will promote or facilitate the commission of the crime.”¹⁴ RCW 9A.08.020 (3)(a); *see also* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (4th Ed).

Accomplice liability in Washington does not require proof of criminal intent. Under the statute and the pattern instruction, knowledge is sufficient for conviction. Thus a person may be convicted for speaking, even if the speech is not “directed to inciting or producing imminent lawless action.” *Brandenburg*, 395 U.S. at 447. Nor does accomplice liability in Washington require any proof that the speaker’s “encourage[ment]” will likely produce imminent lawless action. *Id.*; RCW 9A.08.020(3)(a).

Washington’s accomplice liability statute criminalizes a vast amount of pure speech protected by the First Amendment, and thus it runs afoul of *Brandenburg*. Because the law governing accomplice liability is susceptible to regular application to constitutionally protected speech it is unconstitutional. *See Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 883 (D.S.D. 2019).

Indeed, Washington’s accomplice liability statute and WPIC 10.51

¹⁴ Accomplice liability may also be premised on “aid,” which has been interpreted to include “all assistance whether given by words [or] encouragement.” WPIC 10.51; RCW 9A.08.020**Error! Bookmark not defined.**(3)(a)(ii).

would criminalize speech protected by the U.S. Supreme Court. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (reversing a disorderly conduct conviction stemming from a protester’s statement that “We’ll take the f*cking street later”); *Brandenburg*, 395 U.S. at 445 (reversing a Klan leader’s conviction for ““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. §2923.13).

Each of these examples involve encouragement made with knowledge that the encouragement would promote or facilitate a violation of law. Each would lead to conviction in Washington, despite being protected by the First Amendment.

It is possible to construe Washington’s accomplice statute in such a way that it does not reach constitutionally protected speech. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction in *Brandenburg*. Thus, in *Freeman*, the 9th Circuit reversed based on the lower court’s failure to instruct the jury in a manner consistent with *Brandenburg*. *Freeman*, 761 F.2d at 552.

However, neither the statute nor the pattern instruction includes the limitations required by *Brandenburg*. Washington’s law of accomplice liability, as expressed in the statute, WPIC 10.51, and the court’s

instructions in this case, is overbroad. *Id.* Mr. Pagel’s conviction must be reversed, and the case remanded for a new trial. *Id.*

C. The Court of Appeals applied the wrong legal standard in *Coleman*, *Ferguson*, and *Holcomb*, upholding RCW 9A.08.020 against a First Amendment challenge.

The Court of Appeals has upheld Washington’s accomplice liability statute. *State v. Coleman*, 155 Wn.App. 951, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011) (*Coleman*); *see also State v. Ferguson*, 164 Wn.App. 370, 264 P.3d 575 (2011); *State v. Holcomb*, 180 Wn.App. 583, 590, 321 P.3d 1288 *review denied*, 180 Wn.2d 1029, 331 P.3d 1172 (2014).

According to the *Coleman* court,¹⁵ the statute “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.” *Coleman*, 155 Wn.App. at 960-961. The *Coleman* court opined that the statute “avoids protected speech activities that are not performed *in aid of* a crime and that only consequentially further the crime.” *Id.* (emphasis added).

This reference to “aid” ignores subsection (a)(i), which permits conviction when a person “encourages” criminal activity without aiding or agreeing to aid the other person. RCW 9A.08.020 (3)(a)(i).

¹⁵ Divisions II and III essentially adopted the *Coleman* court’s reasoning. *Ferguson*, 164 Wn.App. 370; *Holcomb*, 180 Wn.App. at 590.

Encouragement, even when coupled with knowledge, is insufficient to meet the *Brandenburg* standard.

The *Coleman* court’s phrase “the criminal *mens rea* to aid or agree to aid” implies that accomplice liability requires proof of intent. *Coleman*, 155 Wn.App. at 960-961. But accomplice liability in Washington can be premised on speech made with *knowledge* that it will facilitate the crime, even if the speaker lacks the *intent* to facilitate the crime. RCW 9A.08.020(3)(a); *see* WPIC 10.51. Under *Brandenburg*, the First Amendment protects speech made with knowledge but without intent to incite imminent lawless action. *Freeman*, 761 F.2d at 552. Washington accomplice law directly contravenes this requirement.

The *Holcomb* court attempted to remedy this error in *Coleman* by noting that the accomplice liability statute has been construed to require knowledge of the specific crime charged, rather than any other crime. *Holcomb*, 180 Wn.App. at 590. But proving specific knowledge does not establish that “both the intent of the speaker and the tendency of [their] words was to produce or incite an imminent lawless act, one likely to occur.” *Freeman*, 761 F.2d at 552. Requiring proof of knowledge—even specific knowledge of the crime to be committed – is insufficient to meet the *Brandenburg* standard. *Id.*; *Brandenburg*, 395 U.S. at 447.

Furthermore, the First Amendment protects much more than

speech “that only consequentially further[s] the crime.” *Coleman*, 155 Wn.App. at 960-961. The state cannot criminalize mere advocacy of criminal activity. *Hess*, 414 U.S. at 108. Even words spoken “in aid of a crime”¹⁶ may be protected.

Such words may only be punished if “directed to inciting or producing imminent lawless action” and “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447; *cf. Coleman*, 155 Wn.App. at 960-961. Even if accomplice liability required proof of intent (as *Coleman* implies), it would remain unconstitutional unless it also required proof that the speech was likely to produce imminent lawless action.

Speech that “encourage[s] unlawful acts” is protected, unless it falls within the narrow category outlined by *Brandenburg*. *Ashcroft*, 535 U.S. at 253. The state cannot ban speech made with knowledge that it will promote a crime. Nor can it ban speech made with intent to promote the commission of a crime, unless the speech is (1) made with intent to incite or produce “imminent lawless action” and (2) “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447.

Washington’s accomplice liability statute and associated pattern jury instruction are unconstitutionally overbroad. They permit conviction for pure speech encouraging criminal activity, even if the speech is not

¹⁶ *Coleman*, 155 Wn.App. at 960-961.

“directed to inciting or producing imminent lawless action” and “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447; *Freeman*, 761 F.2d at 552. Accordingly, Mr. Pagel’s convictions must be reversed, and the case remanded for a new trial. *Freeman*, 761 F.2d at 552.

D. The Court of Appeals should review this manifest constitutional error *de novo*.

Constitutional violations are reviewed *de novo*. *Blomstrom*, 189 Wn.2d at 389. A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Mr. Pagel’s First Amendment challenge raises a manifest error affecting a constitutional right. *See, e.g., State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010). Given what the trial judge knew at the time of the trial, “the court could have corrected the error.” *O’Hara*, 167 Wn.2d at 100. The problem posed by the statute and the court’s accomplice instruction are evident in the record. The issue may be reviewed for the first time on appeal. *Id.*

Free speech challenges are different from most constitutional challenges to statutes.¹⁷ Under the First Amendment, the State bears the burden of justifying a restriction on speech. *Immelt*, 173 Wn.2d at 6. Because the accomplice liability statute and the associated jury instruction reach pure

¹⁷ Ordinarily, the burden is on the party challenging the statute to show beyond a reasonable doubt that it is unconstitutional. *Washington Off-Highway Vehicle Alliance v. State*, 163 Wn.App. 722, 733, 260 P.3d 956 (2011), *aff’d* 176 Wn.2d 225, 290 P.3d 954 (2012).

expression, the State bears the burden of establishing their constitutionality.

Id.

CONCLUSION

Mr. Pagel was deprived of his constitutional right to the effective assistance of counsel. His attorney failed to take necessary steps to secure the attendance of a critical witness at trial. The error prejudiced Mr. Pagel, requiring reversal of his convictions.

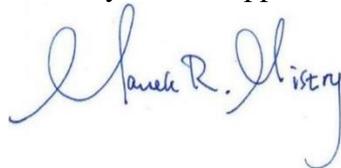
In addition, the accomplice liability statute and the accomplice jury instruction allow conviction based on protected speech. The accomplice statute (as currently interpreted) and the associated pattern instruction violate the First Amendment. Mr. Pagel's convictions must be reversed, and the case remanded for a new trial with proper instructions.

Respectfully submitted on June 26, 2020,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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Forks, WA 98331

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

Thurston County Prosecuting Attorney's Office
jackson@co.thurston.wa.us; paoappeals@co.thurston.wa.us

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 June 26, 2020.



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June 26, 2020 - 12:40 PM

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Appellate Court Case Title: State of Washington, Respondent v. Kyle Pagel, Appellant
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