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No. 54276-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KYLE PAGEL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Lanese
Cause No. No. 19-1-00945-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether defense counsel rendered ineffective assistance of counsel, where a witness who counsel had previously been unable to locate spoke to the defense investigator the day before trial, was subpoenaed during trial, did not appear to testify, and the record reveals that the testimony sought by the defense would have incriminated the witness, given that nothing in the record suggests that he would not have asserted his Fifth Amendment privilege against self-incrimination.

2. Whether the accomplice liability statute and the associated jury instruction given are an unconstitutionally overbroad restriction on free speech where the statute only criminalizes conduct rendering aid with knowledge that it will further the specific crime alleged.

3. Whether Pagel can demonstrate an impermissible restriction on free speech where the facts alleged and presented at trial focused on Pagel's conduct, not speech.

4. Whether any error that may have occurred in the trial court's instructions on accomplice liability were harmless given the overwhelming evidence that Pagel acted as both principal and accomplice in the crimes charged.

B. STATEMENT OF THE CASE.

The appellant, Kyle Pagel, went to an apartment with Brad Connors and Jason Bennet to collect metal and then sell it. RP (10/24/19) 307-308, 310.¹ The building was a rental unit that had suffered a major fire. RP (10/22/19) 172-174. After the fire, a fence had been put up and there had been some deconstruction at the property. RP (10/23/19) 11-12. Evan Krill, a neighbor to the property, observed three individuals around a transformer at the property. RP (10/23/19) 14.

Krill watched the three males. *Id.* 15. He observed that one of the males was wearing a red shirt that was stained. *Id.* 16. Krill observed the male in the red shirt and another male in a black shirt come out from the building carrying metal pipes. *Id.* 22. Krill reported his observations to law enforcement. *Id.* 25-26. Krill decided to go to nearest scrap metal yard, Sutter Metals after the three individuals left his neighbor's property in a truck. *Id.* at 33, 38. At Sutter Metals, he saw the pickup he had seen and again

¹ The verbatim report of proceedings occurs in several volumes which will be referred to by date and the page number included in the volume, with the exception of the volume covering hearings on 6/4/19, 6/20/19, 8/8/19, 9/30/19, 10/3/19, 10/14/19, 10/21/19 and 1/9/20, which will collectively be referred to as 1RP.

contacted law enforcement. *Id.* 39-40. Krill identified the male in the red shirt as the appellant, Kyle Pagel. *Id.* 50.

Once at Sutter Metals, Pagel sold copper piping to the company and received a total of \$85.15, in the form of \$30 cash and \$55.15 in a check. RP (10/23/19) 84-85, 90-91. When Thurston County Sheriff's Office Detective George Oplinger arrived at Sutter Metals, he observed a black GMC getting ready to pull out. RP (10/23/19) 151. Oplinger was able to pull his vehicle in front of the GMC leaving the scene. RP (10/23/19) 151. Oplinger observed two persons in the vehicle with one in the driver's seat and one in the passenger seat. RP (10/23/19) 152. The driver was identified as Jason Bennett and the passenger was identified as Brad Connors. . RP (10/23/19) 159-161.

When Oplinger spoke with employees of Sutter Metals, one of the employees asked him if he was aware there was a third person in the truck. RP (10/23/19) 170. It was believed the third person was still on the property and the person was on the southeast corner of the fence line of the property. RP (10/23/19) 170. Oplinger and another officer were able to make contact with the person in which the person was hiding behind a dumpster. RP (10/23/19) 171. When Oplinger yelled for the person to stop, the

person did not stop which led to Oplinger and other officers to order the person to the ground for detainment. RP (10/23/19) 172. The person who was detained was identified as Kyle Pagel who Oplinger identified during his testimony. RP (10/23/19) 172. Pagel exited the vehicle while Oplinger was talking to Bennett, the driver of the vehicle. (10/23/19) 176.

When Pagel was searched after being arrested, Oplinger was able to find \$30 cash, a check from Sutter Metals directed to Pagel, a Washington State Identification card, and the original receipt with his name on it, RP (10/23/19) 183-84, 186. Oplinger read Pagel his Miranda rights. RP (10/23/19) 189. Oplinger testified regarding his conversation with Pagel, stating:

He told me that he was just contacted to make the transaction because he had I.D. and the other people didn't have I.D., that he had nothing to do with taking the items from the building.

RP (10/23/19) 188.

As a result of the events, Pagel was charged with burglary in the second degree and trafficking stolen property in the first degree. CP 1. On October 21, 2019, defense counsel, John Hansen, indicated that his client was requesting a trial continuance, stating:

He did give me names and numbers of potential defense witnesses who have had similar dealings as

are alleged in this case with a codefendant, Bradley Connors. I was able to reach and talk to one of those witnesses and I've left phone messages for the others.

1RP 39. The trial court denied the request for a continuance stating, "Mr. Hansen has attempted to contact witnesses. Who knows if he'll ever get in contact with them." 1RP 40.

On the first day of trial, Mr. Hansen again requested a trial continuance. Hansen stated:

A witness, Bradley Connors, who was with my client at the time of these events who is listed in the discovery, so the state has been aware of him since the date of this investigation, came to my office yesterday. As a result of that, my investigator followed up and located him yesterday evening and spoke with him. I do believe that he is a witness who's material to the defense.

RP (10/22/19) 5. Mr. Hansen continued:

I was not able to get a recorded statement. I was not able to subpoena him. I did not have a phone number or a location of his home or address that was good information until yesterday. My understanding is that if Mr. Connors were to testify that his testimony would be material to the defense. This is someone who was disclosed to me earlier. I did not have good contact information at the time. I did not have a phone number for him. My office, by way of my private investigator –my office investigator made contact with him yesterday afternoon and was able to follow up by going to his place of work and his residence last night. This is newly discovered information. I'm stating that I did not have this contact information until yesterday, and I've attempted to follow up on that.

RP (10/22/19) 5-6. Hansen further stated, "this is information that I did not bring to the court either last Monday or yesterday because I did not have it." *Id.* at 6.

After the prosecutor objected to the request for a continuance, Hansen stated:

I can tell the court that my investigator upon going out to meet with Mr. Conners, provided him a letter from me advising him under the RPCs - - I believe it's 4.3 - - that - - that's the rule having to do with dealing with parties who are unrepresented - - that I was Mr. Pagel's lawyer, that I was not his lawyer, that I was limited in legal advice I could give him to advising that he may wish to seek his own legal counsel. Now, my understanding is that he did come yesterday at my office. There was no opportunity to make a recording at that time. Attempted to follow up with a recording.

RP (10/22/19) 9-10. Hansen continued:

As an offer of proof, Your Honor, it is my understanding that Mr. Conners would testify as to material elements of knowing or knowingly as to Mr. Pagel's knowledge as to whether they had permission to go into the building, whether my client's state of mind at the time was that based on a conversation with Mr. Conners that he thought they had permission both to go into the building, to take the scrap and to sell the scrap. My understanding is that Mr. Conners made those disclosures which would be beneficial to the defense if he would take the stand, but I again followed the duties as I see them under the RPCs to advise him he may wish to seek legal counsel. And after receiving that letter I can tell the court that we were not able to get a recorded statement.

RP (10/22/19) 10.

The trial court denied the motion for a continuance, after which Hansen stated:

On information and belief Brad Conners 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. Conners had permission and that Mr. Pagel was assisting him.

RP (10/22/2019) 11. Based on the offer of proof, the trial court reopened the argument for a continuance. The State responded:

So, if that is in fact what Mr. Conners would say, the state would certainly want to interview him and on the record. What he's saying would be used against him most certainly. It would be evidence against Mr. Conners quite certainly. He's basically putting his head in the noose if he's going to say those things. So that's the significance of that kind of thing. He's going to say it, fine. If that's what the truth is, then let's hear it. But that's the situation. That makes it pretty complicated. The state needs and asks – would be asking for the time to be able to interview him and carefully interview him about what it is that he's claiming happened here. If he's claiming that he purposely led this individual into this thing knowing full well, because he must have under the circumstances of this case, known better, than fine. Let's hear from that. But if that's the case, the state needs time here in order to prepare for that because that's something

that's extremely significant. He's going to need counsel.

RP (10/22/2019) 12.

The trial court noted, "quite frankly I find it difficult to believe that anyone's going to waive their Fifth Amendment right and make statements on the witness stand that's going to lead to their conviction and charging of this crime." *Id.* at 12-13. When the trial court asked, "So if I gave you more time, what would happen? We'd subpoena him and he'd come in and take the Fifth Amendment on the stand?" Hansen responded, "We would subpoena him. I can't presume what he would do after that." *Id.* at 14. The trial court denied the motion while expressing doubt that Conners would waive the Fifth Amendment and stated, "absent a recorded statement or something far stronger indicating this is what actually occurred....I'm exercising my discretion not to grant the motion for continuance." *Id.*

Although the motion was denied, Hansen advised the court that his office would find Conners and see if he would be able to come forward to court. RP (10/22/2019) 14. The court added him to the list of potential witnesses. RP (10/22/2019) 14. During trial, Hansen advised the trial court:

Your Honor, I'll advise the court that Mr. Jefferson of my office obtained a subpoena for Bradley Conners. My understanding is that Mr. Matthews, my investigator served it on Bradley Conners. He's due to be here at 1:30 PM. Mr. Jefferson has made arrangements for attorney Preston White to be here with Mr. Conners to offer legal advice. Mr. Conners will be available to the State.

RP (10/22/19) 105. Hansen again reiterated that he had arranged a private attorney to consult with Conners. RP (10/22/19) 107. Mr. White informed the trial court of his presence in the court room. *Id.* at 108.

Later in the proceedings, Hansen advised "I'd like to make a record that Mr. White was here in the courtroom from approximately 1:30 to about 2:20 p.m. During that time, it does not appear that Mr. Bradley Conners showed up." RP (10/22/19) 155.

The defense did not contest much of the allegations but focused on Pagel's knowledge and intent. RP (10/22/19) 136. Pagel testified that he asked Conners if what they were doing was legitimate, and Conners told him "yes...That's where I got the metal that we just turned in." RP (10/24/19) 273-274. Pagel acknowledged that he carried some of the metal out and that he had had been involved in the transaction at Sutter Metal. RP (10/24/19) 307-308, 310. When asked about why he had walked

away from the truck when law enforcement arrived, he indicated, “just to be clear with the court, I had a warrant, and that’s why I walked away.” RP (10/24/19) 311.

After Pagel testified, the trial court asked if the defense had any more witnesses, to which Hansen responded, “Unfortunately, I have not been able to get an additional witness here in the courtroom, and I have to rest.” *Id.* at 325.

The trial court instructed the jury on accomplice liability. CP 64. The jury found Pagel guilty of burglary in the second degree and trafficking stolen property in the first degree. RP (10/25/19) 213. The trial court sentenced Pagel to a total term of confinement of 17 months. RP(1/14/20) 11, CP 129-140. This appeal follows.

C. ARGUMENT.

1. Trial counsel’s performance was not deficient, nor can Pagel demonstrate prejudice.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d

668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, "judicial scrutiny of counsel's performance must be highly deferential." Strickland at 689; *See also* State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). Further:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy.

Strickland at 694-95.

Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. *Id.* at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

Pagel argues that his defense attorney’s performance was deficient due to a failure to properly investigate witnesses. The failure of an attorney to investigate or prepare for witnesses may be so unreasonable as to violate the Strickland test. Silva v. Woodford,

279 F.3d 825, 833 (9th Cir. 2002). However, there are “countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” Strickland v. Washington, 466 U.S. at 689. Counsel has the latitude to “formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.” Harrington v. Richter, 131 S. Ct. 770, 789, 178 L. Ed. 2d 624 (2011). An attorney is not required to conduct an investigation that would be fruitless or harmful to the defense. Strickland, 466 U.S. at 691. Defense counsel is not incompetent just because his strategy did not work out as well as he had hoped.

Defense counsel must at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client. This includes investigating all reasonable lines of defense, especially the most important defense.

In re Pers. Restraint of Davis, 152 Wn.2d 647, 721-722, 101 P.3d 1 (2004)(internal quotations and citations omitted).

An attorney’s action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices and ineffective assistance of claims based on a duty to investigate must be considered in light of the strength of the government’s case.

Id.

In this case, Pagel cannot overcome the presumption that his counsel's performance was reasonable. Hansen indicated that he had made attempts to follow up with witnesses provided by his client. 1 RP 39-40. The record is also clear that, despite efforts, Hansen was not able to communicate with Conners until the day before trial. RP (10/22/19) 5-6. Unlike State v. Jones, 183 Wn.2d 327, 340, 352 P.3d 776 (2015), where trial counsel offered no explanation for failing to interview three witnesses, Hansen did follow up on known witnesses. Whether or not the failure to interview a witness constitutes deficient performance depends on the reason for the trial lawyer's failure to interview. *Id.* Here, Hansen's reason for not having a sooner interview with Conners was that he did not have contact information for Conners until the day before trial. Hansen's investigation was reasonable in light of the circumstances.

Hansen had no reason to believe that Conners would be willing to waive the Fifth Amendment and testify on Pagel's behalf until Conners contacted the defense investigator. Even then, after being notified that Hansen represented Pagel, not Conners, the defense was not able to obtain a recorded statement. RP

(10/22/19) 5-6. This is not surprising considering the fact that such a statement, if made, would likely have resulted in charges being filed against Conners.

Hansen did not have a basis to seek a continuance to locate and interview Conners prior to the day of trial. As noted during the request for a trial continuance on October 21, 2019, the trial court was not likely to grant a continuance without some basis to believe the testimony was material. 1RP 40. There was no reason to believe that Conners would cooperate with the defense.

Once Hansen was made aware of a possibility that Conners would be helpful to the defense, he took reasonable efforts to secure his presence at trial. Pagel's argument that counsel should have requested a continuance or sought a material witness warrant when Conners failed to come to court after being subpoenaed ignores the high likelihood that Conners would have invoked his right against self-incrimination if he was forcibly brought before the court. It was strategic to rely on the testimony that Pagel had provided at that point, rather than delaying the proceedings to obtain a witness who, in all likelihood would assert a privilege against self-incrimination. Such an assertion could have prejudiced Pagel in the eyes of the jury based on his affiliation with Conners.

The record does not support a conclusion that defense counsel acted unreasonably in light of all of the circumstances known to him. Pagel cannot demonstrate deficient performance. Additionally, Pagel cannot demonstrate that any of the alleged failures of counsel prejudiced him. It was highly likely that Connors would have asserted his right against self-incrimination even if he had been before the jury. Nothing in the record suggests that he would have actually provided the testimony that counsel hoped to elicit. Matters outside the trial record are not considered in a claim of ineffective assistance of counsel on direct appeal. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Nothing in the record demonstrates that Connors would not have asserted privilege. No continuance, additional investigation, or material witness warrant changes that fact. Pagel cannot demonstrate that the lack of Connors' testimony prejudiced his defense. His claims of ineffective assistance of counsel must fail.

2. The accomplice liability statute and instructions are Constitutional. Pagel has demonstrated no manifest error that this Court should consider.

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). Pagel relies on Brandenburg v. Ohio, and its holding that pursuant to constitutional guarantee of free speech, the State may not forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). Pagel 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 at 16-19.

Pagel particularly challenges the word "encouragement" included in the definition of "aid," defined by WPIC 10.51, the jury instruction used in this case. CP 64. The instruction states:

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

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

The language of RCW 9A.08.020 qualifies aid as advocacy that is likely to produce or incite imminent lawless acts; this is not the kind of advocacy that is protected in Brandenburg. The

accomplice liability statute has been previously attacked as being unconstitutionally overbroad. See State v. Ferguson, 164 Wn. App. 370, 264 P. 3d 575 (2011); State v. Coleman, 155 Wn. App. 951, 231 P. 3d 212 (2010), *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011); State v. Holcomb, 180 Wn. App. 583, 590, 321 P.3d 1288 (2014), *review denied*, 180 Wn.2d 1029, 331 P.3d 1172 (2014).

Coleman argued the same argument that Pagel 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 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, “because the statute’ s language forbids advocacy direct at and likely to incite or produce imminent lawless action it, does not forbid the mere advocacy of law violation that is protected under the holding of Brandenburg.” *Id.* In Holcomb, Division III of this Court rejected an argument that Coleman and Ferguson were wrongly decided because they involved conduct rather than pure speech. 180 Wn. App. at 589-590. The Court found, “Given all, like Divisions One and Two, we hold RCW 9A.08.020, the accomplice liability statute, is constitutional.” *Id.* at 590.

This Court again addressed the issue in State v. McPherson, 186 Wn. App.114, 344 P.3d 1283 (2015). In that case, the appellant likewise argued that that accomplice liability statute criminalizes constitutionally protected speech in violation of the First and Fourteenth Amendments. *Id.* at 119. Essentially the same argument that is being made by Pagel was rejected, with this Court stating, “We adhere to the prior decisions and analysis in *Coleman*, *Ferguson*, and *Holcomb*.” *Id.* at 120-121. The jury instructions in that case included the same definition of “aid,” as was included in this case. *Id.* at n.7. The case law conclusively demonstrates that

RCW 9A.08.020 and its corollary jury instruction, WPIC 10.51, are constitutional.

In order for a statute to be deemed unconstitutionally overbroad, the included protected speech must be substantial compared to the speech legitimately proscribed. “We will not invalidate a statute simply because ‘there are marginal applications in which . . . [it] would infringe on First Amendment values.’” United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990), citing to Parker v. Levy, 417 U.S. 733, 760, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974). While that equation is not easily defined, “the mere fact that one can conceive of some impermissible applications of a statute is not sufficient” to make it overbroad. State v. Immelt, 173 Wn.2d 1, 11, 267 P.3d 305 (2011). There must be a reasonable risk that the statute significantly infringes on the First Amendment rights of persons not part of the case at issue. *Id.*

Words used to aid in the commission of a crime must pertain to the specific crime charged, not to general criminal activity. State v. Carter, 154 Wn.2d 71, 109 P.3d 823 (2005). It is not reasonable to contemplate that the defendant is assisting in some general or hypothetical crime, but rather a specific, concrete crime occurring at the time or planned in the near future. Language which assists in

the commission of a crime can be considered part of the crime itself. Words which express intent or motive are not protected by the First Amendment, and words assisting in a crime can easily fall into that category. State v. Halstein, 122 Wn.2d 109, 125, 857 P.2d 270 (1993). As was noted in Ferguson, “because the statute’s language forbids advocacy direct at and likely to incite or produce imminent lawless action, it does not forbid the mere advocacy of law violation that is protected.” 164 Wn. App. at 376.

Pagel devotes a portion of his brief to argue that the issue raised constitutes a manifest constitutional error that should be decided for the first time on appeal. A claim of error may be raised for the first time on appeal, however, if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). However, because Coleman, Ferguson, Holcomb, and McPherson were correctly decided, Pagel can demonstrate no error, let alone manifest error affecting a constitutional right.

3. The allegations of criminal activity made in this case involved Pagel’s criminal conduct, not his speech.

Pagel discusses and relies on United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985) for the proposition that the

accomplice liability instruction allowed for protected speech made with knowledge but without intent to incite imminent lawless action. Freeman involved aiding and abetting in violation of the tax laws of the United States Code. *Id.* 551. Freeman argued that he “did nothing more than advocate tax noncompliance as an abstract idea, or at most as a remote act,” and the Ninth Circuit Court of Appeals held that the trial court erred by instructing the jury that the First Amendment was irrelevant to the case. *Id.* at 551-552. Nothing in the decision supports Pagel’s claim that the Washington State accomplice liability statute and instructions are overbroad.

As noted in Coleman, 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 a crime.” 155 Wn. App. at 960-961. The language included in the jury instructions adequately protected against the concerns raised in Freeman. CP 64. The reading is also consistent with Brandenburg, which holds that speech advocating “the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” Brandenburg, 395 U.S. at 448. Speech need not represent a “clear and present danger” for the state to prohibit it. *Id.* at 449. But it must be

“directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* at 447. There is no language directing a *mens rea* of intent. Moreover, under the facts of this case, Pagel has not shown any criminalization of protected speech.

By his own testimony, Pagel knowingly participated in the activities that led to the charges. He acknowledged that he and his collaborators went to the apartment to get metal, and stated, “Brad was gonna get money so he could pay me back so I could get a ride home.” RP (10/24/19) 295. He agreed that he went into the fenced area and carried some of the metal out. RP (10/24/19) 307-308. At Sutter Metal, it was uncontroverted that he sold the metal and received cash and a check for the sale. RP (10/24/19) 310. The charges here were clearly based on his conduct and participation in the actions. His entire defense was a belief that the activities were not illegal. Even if Pagel’s arguments were supported by law, he has not shown that his convictions implicate the exercise of free speech.

4. If any error occurred in the instructions regarding accomplice liability, that error was harmless beyond a reasonable doubt based on the facts of this case.

“Strong policy reasons support the use of harmless error analysis. ‘A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.’ State v. White, 72 Wn.2d 524, 531, 433 P.2d 692 (1967). An erroneously given accomplice liability instruction is harmless if the Court concludes beyond a reasonable doubt that the verdict would have been the same absent the error. State v. Brown, 147 Wn.2d 236, 246, 27 P.3d 184 (2001); State v. Wren, 115 Wn. App. 922, 925 (2003). An erroneously given instruction on accomplice liability is harmless if the State proves beyond a reasonable doubt that the defendant committed the crime as a principal. State v. Trujillo, 112 Wn. App. 390, 49 P.3d 935 (2002).

As noted in the previous section, based on the evidence presented in this case and Pagel’s own testimony, there is no way that the jury could have convicted Pagel as an accomplice without also finding that he acted as a principal. He went into a fenced area and carried out some of the metal. He sold the copper. Even if the accomplice liability instruction were deemed unconstitutional, the error would be harmless beyond a reasonable doubt in this case.

D. CONCLUSION.

For the reasons stated above, Pagel has failed to demonstrate that his attorney's performance at trial was deficient and failed to demonstrate that his attorney's performance prejudiced his defense. As this Court has noted numerous times, the Washington State accomplice liability statute is not unconstitutionally overbroad. The state respectfully request that this Court affirm Pagel's convictions and sentence.

Respectfully submitted this 25th day of August, 2020.



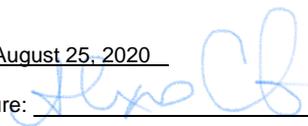
Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: August 25, 2020

Signature:  _____

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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