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No. 54380-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jacee Crull,

Appellant.

Pierce County Superior Court Cause No. 19-1-00155-2

The Honorable Judge John R. Hickman

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Crull's conviction for residential burglary violated her Fourteenth Amendment right to due process.
2. Ms. Crull's conviction in count one was based on insufficient evidence.
3. The State failed to prove beyond a reasonable doubt that Ms. Crull wasn't licensed or privileged to enter her house.
4. The State failed to prove that Ms. Crull unlawfully entered her house because she retained her privilege to access the residence.

ISSUE 1: A conviction for residential burglary requires proof of unlawful entry. Was the evidence insufficient to prove that Ms. Crull unlawfully entered the house she'd purchased with her partner, where she hadn't relinquished her right to access and her privilege to enter hadn't been revoked by court order or otherwise?

5. The trial court improperly directed a verdict in favor of the state by instructing jurors that Ms. Crull's entry was unlawful.
6. The trial judge improperly commented on the evidence in violation of Wash. Const. art. IV, §16.
7. The trial judge's improper comments infringed Ms. Crull's Fourteenth Amendment right to due process.
8. The trial court erred by giving Instruction No. 8.

ISSUE 2: A judge may not comment on the evidence or direct jurors to return a guilty verdict. Did the trial judge misstate the law, improperly comment on the evidence, and unlawfully direct a guilty verdict by telling jurors that "[w]ith a charge of burglary, the controlling question is one of occupancy or possession, rather than title or ownership, at the time the offense was committed"?

9. The trial court violated Ms. Crull's state constitutional right to juror unanimity.
10. The trial court erred by failing to instruct jurors on the requirement of unanimity as to Ms. Crull's mode of participation.

ISSUE 3: Historically, a criminal conviction required jurors to unanimously determine if an accused person acted as principal

or accomplice. Was the common law requirement of unanimity as to the mode of participation incorporated into Wash. Const. art. I, §21?

ISSUE 4: Under the state constitution, juror unanimity is required for conviction of a criminal offense. Did the trial court violate Ms. Crull's state constitutional right to a jury trial by failing to instruct on unanimity as to the mode of her participation?

11. Ms. Crull was convicted through the operation of a statute that is overbroad in violation of the First Amendment.
12. The trial judge erred by giving Instruction No. 5, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.

ISSUE 5: A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad, in violation of the First and Fourteenth Amendments?

INTRODUCTION AND SUMMARY OF ARGUMENT

Jacee Crull owned a house together with Buddy Brock. Although she moved out, she did not relinquish her privilege to enter. Brock did not revoke her license to access the property. Nor did Brock have the legal authority to unilaterally bar Ms. Crull from her home. In light of this, the State failed to prove that she unlawfully entered the residence when she went to retrieve property. Her burglary conviction must be reversed, and the charge dismissed with prejudice.

The court provided a nonstandard instruction defining unlawful entry. The court told jurors that in burglary cases, “the controlling question is one of occupancy or possession, rather than title or ownership.” The instruction misstated the law, improperly directed a guilty verdict, and commented on the evidence. The erroneous instruction requires reversal of Ms. Crull’s convictions and remand for a new trial with proper instructions.

The court instructed jurors on accomplice liability but did not require juror unanimity as to the mode of Ms. Crull’s participation in each crime. This violated her state constitutional right to a unanimous jury. The 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. Ms. Crull's convictions must be reversed and the case remanded for a new trial with proper instructions.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jacee Crull and Buddy Brock were partners for close to twenty years; they lived together and raised Ms. Crull's children together. RP (11/19/19) 114; RP (11/20/19) 217-220. They bought a house in Bonney Lake and lived there as a family from 2007 until 2018. RP (11/19/19) 63-64, 113, 153-154; RP (11/20/19) 219-221. Ms. Crull was disabled and received benefits and had a helper regularly come to the house. RP (11/19/19) 161. Mr. Brock was employed delivering furniture. RP (11/19/19) 115.

The end of the relationship came in February of 2018. Ms. Crull had been suicidal and was hospitalized. RP (11/20/19) 222. She was only there a number of hours, but when she was released, Mr. Brock had already changed the locks.¹ RP (11/19/19) 137; RP (11/20/19) 224. Mr. Brock would later state that he had a key for Ms. Crull, but she never asked him for it. RP (11/19/19) 151.

¹ Mr. Brock later testified that he'd done this because Ms. Crull had given keys to multiple caregivers. RP (11/19/19) 137.

Over the next months, each petitioned for restraining orders against the other, and each requested possession of the house. They also each accused the other of domestic violence. RP (11/19/19) 117-119, 123, 132-135; RP (11/20/19) 233-234.

They did not speak at all, and reached no agreement on who would live in the house. RP (11/19/19) 150, 160, 163. It was purchased in both of their names, and paid for out of the household money.² RP (11/19/19) 153-160; RP (11/20/19) 219-220. Mr. Brock stayed in the house except for a brief period when he was ordered out of it. Ms. Crull became homeless. RP (11/19/19) 120-128; RP (11/20/19) 226.

Ms. Crull went to the house on August 21, 2018, with three friends. They went into the house and took several items. RP (11/20/19) 227-229. Ms. Crull said they were all her personal property, but Mr. Brock claimed otherwise. RP (11/19/19) 141-146; RP (11/20/19) 227-229. It was all captured on the neighbor's surveillance system. RP (11/19/19) 64-74.

The State charged Jacee Crull with residential burglary and theft. CP 2-3. Ms. Crull responded that her ownership of the house along with the lack of any order keeping her out of it meant that she could go and retrieve her own belongings. CP 23-26. The case went to jury trial.

² At trial, both would claim personal responsibility for all the house payments, though both also agreed that the household expenses were pooled. RP (11/19/19) 116, 157-158; RP (11/20/19) 219-220.

The State proposed an instruction based on WPIC 65.02. However, the proposed instruction also included the following non-standard language: “With a charge of burglary, the controlling question is one of occupancy or possession, rather than title or ownership, at the time the offense was committed.” State’s Proposed Instructions filed 11/19/19, p. 14, Supp. CP. Over objection, the court gave the non-standard instruction as requested. RP (11/20/19) 271-273. The court also gave the state’s proposed accomplice instruction. CP 34.

The jury convicted her. CP 55. Ms. Crull, in her 50s, had no criminal history and was sentenced as a first-time offender. CP 55-56. She timely appealed. CP 52.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MS. CRULL UNLAWFULLY ENTERED HER OWN RESIDENCE.

Jacee Crull shared a residence with Brock until February of 2018. They owned the house together; both names were on the deed and associated paperwork. He did not tell her she was barred from the house. Nor did he obtain a court order excluding her from the house. Ms. Crull did not relinquish her legal right to access the residence. Under these circumstances, the State failed to prove that Ms. Crull unlawfully entered her house.

A. The State failed to prove unlawful entry because Ms. Crull retained her privilege to enter her house.

Due process requires the State to prove beyond a reasonable doubt all facts necessary for conviction. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). A conviction based on insufficient evidence must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). Here, the State did not prove the essential elements of the crime charged in count one.

A conviction for residential burglary requires proof of unlawful entry. RCW 9A.52.025(1). Entry is unlawful when the person “is not then licensed, invited, or otherwise privileged” to enter. RCW 9A.52.010(2). The State bears the burden of proving (beyond a reasonable doubt) that the defendant was not licensed, invited, or privileged to enter. *State v. Schneider*, 36 Wn.App. 237, 241, 673 P.2d 200 (1983).

The critical issue here is whether Ms. Crull retained her privilege to enter the house she co-owned with Brock. A person who is privileged to enter a residence is not guilty of burglary unless that privilege has specifically been revoked or relinquished. *State v. Steinbach*, 101 Wn.2d 460, 461-463, 679 P.2d 369 (1984).

Ms. Crull did not lose her privilege to enter. She did not relinquish her right to enter, and Brock was not legally entitled to unilaterally revoke her privilege. Furthermore, even if Brock had authority to unilaterally revoke her privilege, he did not do so.

A revocation may be in the form of a court order excluding the person from the house. *Id.*; *State v. Sanchez*, 166 Wn.App. 304, 310, 271 P.3d 264 (2012). It may also come in the form of a directive from the lawful occupant or possessor of the premises. *State v. Howe*, 116 Wn.2d 466, 470, 472, 475, 476, 805 P.2d 806 (1991) (addressing parent's authority to revoke child's privilege to enter family home).

A person may be privileged to enter a residence (despite the absence of an invitation) even though not living at the residence. *See, e.g., State v. Cantu*, 156 Wn.2d 819, 824, 132 P.3d 725, 727 (2006), *as amended* (May 26, 2006). Thus, in *Cantu*, a juvenile was presumed to have license to enter his mother's home, even though he was not living there and had not been invited inside. *Id.*, at 823, 824; *see also Steinbach*, 101 Wn.2d at 461-463.

Here, Ms. Crull was presumptively privileged to enter the residence. She rented the house by herself before Brock moved in. RP (11/20/19) 219-220. They purchased the house together, and her name was on the deed. RP (11/19/19) 152; RP (11/20/19) 219-220; Ex. 12. She lived

there with her children and Brock until their relationship ended in February of 2018. RP (11/20/19) 222, 226. Even after the breakup, she did not agree that he had the sole right to possess their jointly owned property or to bar her from entering. Indeed, she sought a court order excluding him from the residence. Ex. 7-10.

At no point did Brock revoke Ms. Crull's privilege to enter.³ RP (11/19/19) 152, 225. Although he changed the locks, he testified that he did so to exclude third parties who had keys to the residence. RP (11/19/19) 137. He hid a spare key outside the house and planned to tell Ms. Crull where it was. RP (11/19/19) 151-152.

Brock did not claim he told Ms. Crull she was barred from the house. RP (11/19/19) 152. Absent such a directive (or a court order excluding her), her privilege to enter was not revoked. *See Howe*, 116 Wn.2d at 470, 472, 475, 476.

Furthermore, absent a court order, one tenant or co-owner does not have the right to unilaterally exclude another person who has an equal right to occupancy. Under the theory proposed by the State and adopted by the trial court, anyone could criminalize a co-owner's entry onto their own

³ Instead he testified that he'd never given her "permission" to enter. He did not explain how he had the authority to grant or deny permission, given her status as co-owner of the house. RP (11/19/19) 152.

property after a temporary absence by announcing an intention to exclude the co-owner.⁴

Nor is *mere* possession or occupancy the issue in a burglary case. A squatter who occupies a home does not have the right to exclude others, despite having possession. Were it otherwise, a homeowner could be charged with burglary after being told by a squatter to stay away.

This does not mean that all owners have the unlimited right to enter their own property. Thus, for example, a landlord can be convicted of burglarizing a tenant's property. *Schneider*, 36 Wn.App. at 241. In such cases, the landlord "grants possession to a tenant under a rental agreement that precludes the landlord from entering the premises but for certain circumstances." *Commonwealth v. Majeed*, 548 Pa. 48, 53, 694 A.2d 336 (1997). In other words, "an owner of property may relinquish his or her license or privilege to enter." *Id.*; see also *State v. Machan*, 322 P.3d 655, 659 (Utah 2013) ("[A] landlord may burglarize the dwelling of a tenant because the landlord conveys the right of possession to the tenant.")

⁴ The problem is illustrated by *State v. Wilson*, 136 Wn.App. 596, 603–04, 150 P.3d 144 (2007). The *Wilson* court addressed "whether entry or remaining in a jointly shared residence, from which neither party has been lawfully excluded, is unlawful." *Id.* In *Wilson*, the defendant and his girlfriend shared a house despite an order prohibiting him from contact with her. *Id.*, at 600. Both were on the lease. *Id.*, at 600-601. Following an argument, the defendant left the house. *Id.* When he returned, the door was locked, and he forced it open, splintering the wood. *Id.* The Court of Appeals concluded that the defendant's "acts of entering and remaining inside were not themselves unlawful." *Id.*, at 604. The *Wilson* court did not consider the defendant "lawfully excluded" even though he'd been locked out of the house.

These principles are confirmed by *Schneider*. In *Schneider*, the defendant's "legal status was analogous to that of a landlord's at the time of the break-in." *Schneider*, 36 Wn.App. at 241. The defendant and her husband jointly owned a house which they rented to a third party. *Id.*, at 238. After a separation, the husband moved into the rental house and lived with the tenant. *Id.*, at 238-239. The defendant, who arranged for others to break into the rental house, was convicted of burglary. *Id.*

In upholding the defendant's burglary conviction, the *Schneider* court examined her relationship to the rental house:

At the time of the burglary, the house was occupied by a tenant, who had lived there for some time before Mr. Schneider moved in with her. It is also clear that [the defendant] never actually lived in the house during the time in question.

Id., at 241. These factors led to the court's conclusion that the defendant occupied the role of landlord who had ceded possession to another.⁵ *Id.*

Here, Ms. Crull did not agree to relinquish her privilege to enter her house. She did not convey all right of possession to Brock, or grant him the right to exclude her. Nor did she cede her right of possession to a third-party tenant, as the defendant did in *Schneider*.

⁵ Having concluded that the defendant occupied the role of landlord, the court also pointed out that the defendant's husband had not granted anyone (except a neighbor) permission to enter, and that the break-in was accomplished by breaking the door latch. *Id.*, at 241.

The *Schneider* case does not suggest that one person can unilaterally revoke another co-owner's privilege to enter jointly owned property. *Schneider*, 36 Wn.App. at 240-241. Instead, *Schneider* turned on the defendant's own actions – she ceded possession to a tenant and had not personally lived in the rental house. *Id.*

Here, because she was a co-owner of the property, Ms. Crull had an equal right to possess or occupy the house. The State did not prove that she had voluntarily ceded possession to Brock. Brock did not have the right to unilaterally revoke her privilege. Nor did the evidence show that Brock had attempted to revoke her right to enter.

Under these circumstances, the State failed to prove beyond a reasonable doubt that Ms. Crull unlawfully entered the residence. Her burglary conviction must be reversed, and the charge dismissed with prejudice. *Smalis*, 476 U.S. at 144.

B. Review is *de novo* because the case rests on legal issues.

Ordinarily, a sufficiency challenge admits the truth of the State's evidence and all reasonable inferences that can be drawn from it.⁶ See *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). However, in

⁶ The existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 892 (2006). To prove even a *prima facie* case, the State's evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. See *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (addressing *prima facie* evidence for *corpus delicti*).

this case, the sufficiency question rests on issues of law: (1) whether Ms. Crull's words and actions amounted to a legal relinquishment of her right to enter the residence she owned with Brock; (2) whether Brock had the legal right to unilaterally revoke Ms. Crull's right to access the jointly owned residence; and (3) whether, assuming such a right, Brock's words and actions amounted to a revocation of Ms. Crull's privilege to enter her residence. Because the appeal turns on issues of law, review is *de novo*. *State v. Haggard*, No. 97375-0, Slip Op. at *2 (Wash. Apr. 23, 2020).

II. THE COURT'S INSTRUCTIONS MISSTATED THE LAW, COMMENTED ON THE EVIDENCE, AND DIRECTED A VERDICT IN FAVOR OF THE STATE.

The court added language to the standard instruction defining unlawful entry. After telling jurors that entry is unlawful unless the person is licensed, invited, or privileged to enter, the judge went on to instruct the jury that "[w]ith a charge of burglary, the controlling question is one of occupancy or possession, rather than title or ownership, at the time the offense was committed." CP 37. Ms. Crull's entire defense was premised on her ownership of the property.

The court's nonstandard instruction misstated the law, directed jurors to return a guilty verdict, and amounted to an unconstitutional comment on the evidence. Ms. Crull's burglary conviction must be reversed.

An accused person has a constitutional right to a jury determination of every fact necessary for conviction. U.S. Const. Amends. VI and XIV; Wash. Const. art. I, §§21 and 22; *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). A trial court may not direct jurors to return a guilty verdict. *State v. Christiansen*, 161 Wash. 530, 536, 297 P. 151, 153 (1931); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572, 97 S. Ct. 1349, 1355, 51 L. Ed. 2d 642 (1977).

Furthermore, under the state constitution, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. art. IV, §16. Judicial comments are presumed prejudicial. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007).

A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted.⁷ *Id.*, at 743-745. This is a higher standard than normally applied to constitutional errors. *Id.*; *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).*Cf. State v. DeLeon*, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (outlining constitutional standard for harmless error).

⁷ Judicial comments invade a fundamental right, and thus can always be raised for the first time on review. RAP 2.5(a)(3); *Jackman*, 156 Wn.2d at 743. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

Here, Judge Hickman improperly commented on the evidence by adding language to the pattern instruction defining unlawful entry. CP 37. In addition to the language of the statute, the court told jurors that “[w]ith a charge of burglary, the controlling question is one of occupancy or possession, rather than title or ownership, at the time the offense was committed.” CP 37.

This language does not appear in the pattern instruction. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 65.02 (4th Ed). Instead, it was added at the behest of the prosecutor. State’s Proposed Instructions filed 11/19/19, p. 14, Supp. CP. The State cited *Schneider* in support of its proposal. State’s Proposed Instructions filed 11/19/19, p. 14, Supp. CP.

But the *Schneider* court did not hold that “the controlling question is one of occupancy or possession.” CP 37. As discussed above, the *Schneider* court found that the defendant was in the role of a landlord who had ceded possession to a tenant. *Schneider*, 36 Wn.App. at 241. If occupancy or possession were the sole issue bearing on the lawfulness of a person’s entry, then any property owner could legally be excluded by a squatter or trespasser. *Schneider* did not create a rule privileging the rights of a squatter (who occupies or has possession of property) over the rights of the property owners themselves.

The court’s instruction misstated the law.

In addition, it amounted to a directed verdict in favor of the State. Indeed, the court gave the instruction precisely because Ms. Crull's defense was premised on her ownership of the house. RP (11/20/19) 271-273.

The sole issue at trial was the legality of Ms. Crull's entry. She testified and acknowledged that she went to the house and entered while Brock was absent. RP (11/19/19) 217-264. In closing, her attorney asserted that she had a right to enter because she owned the property and Brock had not excluded her. RP (11/21/19) 335-343. The court's instruction stripped her of her defense, requiring jurors to find that her entry was unlawful. CP 37.

The instruction also amounted to a comment on the evidence. If the lawfulness of Ms. Crull's entry hinged on relinquishment or revocation of her privilege to access the house, the instruction amounted to a comment that unlawfulness had been established by Brock's mere possession or occupancy. CP 37. The judicial comment violated Wash. Const. art. IV, §16. The record does not affirmatively show an absence of all possible prejudice. *Jackman*, 156 Wn.2d at 743-745; *Levy*, 156 Wn.2d at 725.

The court's instructions misstated the law, improperly directed a guilty verdict, and commented on the evidence in violation of art. IV, §16. Ms. Crull's burglary conviction must be reversed and the case remanded

for a new trial. *Jackman*, 156 Wn.2d at 743-745; *Levy*, 156 Wn.2d at 725.

Upon retrial, the court should instruct jurors using the language of the pattern instruction.

III. MS. CRULL WAS DENIED HER STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

The jury was instructed that Ms. Crull could be convicted as an accomplice. The court did not instruct jurors they were required to reach a unanimous decision as to Ms. Crull's mode of participation. This violated her state constitutional right to a unanimous verdict.

A. The state constitution incorporated the common law rule requiring jury unanimity as to the mode of participation in a crime.

The common law drew sharp distinctions between principals and other participants in criminal activity. Historically, jury unanimity was required as to the mode of participation. This unanimity requirement was incorporated into the state constitutional jury right.

Under Washington's constitution, "[t]he right of trial by jury shall remain inviolate."⁸ Wash. Const. art. I, §21. This provision is more protective of the jury trial right than is the federal constitution. *State v. Clark-El*, 196 Wn.App. 614, 621, 384 P.3d 627 (2016). In Washington, a

⁸ Another provision guarantees an accused person the right to "trial by an impartial jury." Wash. Const. art. I, §22.

criminal conviction requires jurors to unanimously agree that the accused person committed the charged criminal act.⁹ *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) (*Coleman I*).

Washington’s Supreme Court has pointed out that “[n]o Washington court has examined article I, section 21 under *Gunwall*^{10]} to determine whether or not an accused person has a constitutional right to jury unanimity as to the mode of participation in a felony accomplice case.” *State v. Walker*, 182 Wn.2d 463, 484–85, 341 P.3d 976 (2015). In *Walker*, the court declined to address the issue, citing the petitioner’s “cursory *Gunwall* analysis.”¹¹ *Id.*, at 484.

Under *Gunwall*, “[t]he key to determining whether our state constitution offers greater jury trial rights within a particular context is the state of the law at the time of adoption of the constitution.” *Williams-Walker*, 167 Wn.2d at 913-914. This requires analysis of six “nonexclusive neutral criteria.” *Gunwall*, 106 Wn.2d at 58. Proper analysis of these factors shows that the “inviolate” right to a jury trial

⁹ Until recently, the federal constitution did not require jury unanimity in state criminal courts. *Ramos*, --- U.S. at ____.

¹⁰ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), which outlines six nonexclusive factors used to determine the scope of state constitutional protections.

¹¹ This was despite the court’s earlier determination that “it is unnecessary to engage in a full *Gunwall* analysis... to determine whether a claim under article I, section 21 warrants an inquiry on independent state grounds.” *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010).

includes a right to unanimity as to the mode of participation. This right was incorporated into the state constitution from the common law at the time of ratification in 1889. Accordingly, under Wash. Const. art. I, §21, jurors must unanimously determine if the defendant acted as a common law ‘principal’ (the perpetrator or an accomplice who was present during commission of the crime) or a common law ‘accessory’ (an accomplice who was not present during commission of the crime).

The first *Gunwall* factor requires examination of the text of the state constitutional provision. *Id.*, at 61. The plain language “provides the most fundamental guidance.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989), *amended*, 780 P.2d 260 (Wash. 1989). The constitutional provision describes as ‘inviolable’ the right to a jury trial; this language “connotes deserving of the highest protection.” *Id.* The provision’s clear and direct language “indicates a strong protection of the jury trial right.” *State v. Smith*, 150 Wn.2d 135, 150, 75 P.3d 934 (2003). Under *Gunwall*, the text weighs in favor of unanimity as to the mode of participation in an offense.

The second *Gunwall* factor also supports a unanimity requirement as to the mode of participation. This factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. *Gunwall*, 106 Wn.2d at 61. The provision declaring the jury

trial right ‘inviolable’ “has no federal counterpart.” *State v. Schaaf*, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987). This amounts to “an expression by the framers that the state right to a jury trial is broader than the federal right.” *Id.*, at 14 (citing *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982)). In *Mace*, the Supreme Court found the state constitutional provision broad enough to guarantee a jury trial for offenses deemed too insignificant to warrant a jury trial under the federal constitution. *Id.* The second *Gunwall* factor weighs in favor of an independent state constitutional right to juror unanimity as to the mode of participation.

The third *Gunwall* factor requires courts to look to state constitutional and common law history. The state constitution preserves the jury trial right “as it existed at common law in the territory at the time of its adoption.” *Mace*, 98 Wn.2d at 96. This factor weighs in favor of a unanimity requirement as to the mode of participation, because the common law required jurors to differentiate between principals and other participants (common law ‘accessories’).

Historically, the common law distinguished between four types of participants in crime. First, a principal in the first degree was the person “who actually perpetrated the offense.” *Standefer v. U. S.*, 447 U.S. 10, 15, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980). Second, a principal in the second degree was anyone who was “actually or constructively present at

the scene of the crime and aided or abetted its commission.” *Id.* The third category comprised “accessories before the fact who aided or abetted the crime, but were not present at its commission.” *Id.* Finally, an accessory after the fact “rendered assistance after the crime was complete.” *Id.*

These “‘intricate’ distinctions” were crucial to a successful prosecution. *Id.* The State was required to charge the offender under the correct theory of participation, and the accused person’s mode of participation determined the proper venue.¹² Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *Fordham L. Rev.* 1341, 1357-58 (2002). An accessory could not be convicted absent the prior conviction of the principal offender. *Standefer*, 447 U.S. at 15. Accordingly, “considerable effort was expended in defining the categories.” *Id.*, at 16.

The common law required jurors to unanimously determine if a participant acted as a ‘principal’ (who was present during commission) or an ‘accessory’ (who was not).¹³ Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 *S.C.L. Rev.* 85,

¹² The principal(s) had to be prosecuted where the crime took place, while accessories had to be prosecuted where their act of abetting took place.

¹³ Unanimity was not required as to whether a participant qualified as a principal in the first or second degree. Kurland, 57 *S.C.L. Rev.* at 100.

112 (2005). The common law “absolutely prohibited... eliminating the requirement of unanimity of theory as between an aider and abettor and a principal.” Kurland, 57 S.C.L. Rev. at 112. The federal system did not abrogate this until 1909. Kurland, 57 S.C.L. Rev. at 105, 112.

In Washington, the “‘intricate’ distinctions”¹⁴ between ‘principals’ and ‘accessories’ remained in effect after ratification of the state constitution in 1889. This was so despite the enactment of a territorial statute which, on its face, appeared to eliminate all such divisions.¹⁵ Code of 1881, § 956. In 1898, the Supreme Court reaffirmed the distinction between ‘principals’ and ‘accessories.’ *State v. Gifford*, 19 Wash. 464, 53 P. 709 (1898). In *Gifford*, the State charged the defendant as a principal. *Id.*, at 465. The Supreme Court reversed, finding that the defendant was an accessory rather than a principal. *Id.* The court opined that the territorial statute would be unconstitutional if interpreted to permit conviction of an accessory as a principal. *Id.*, at 468.

The following year, relying on *Gifford*, the Supreme Court again applied the distinction between principal and accessory to reverse a

¹⁴ *Standefer*, 447 U.S. 15.

¹⁵ This territorial statute continued in effect following the 1889 adoption of the state constitution, pursuant to Wash. Const, art. XXVII, §2. That provision reads: “All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature.”

conviction. *State v. Morgan*, 21 Wash. 355, 356, 58 P. 215 (1899). In *Morgan*, the defendant was charged as a principal. *Id.* However, at trial, “[t]here was no testimony tending to show that appellant was present when the crime was committed.” *Id.* The court found that “[t]he case at bar seems to fall directly within the rule announced in [*Gifford*].” *Id.*, at 357. Because the defendant was charged as a principal but shown to be an accessory, the court reversed. *Id.*

The court again reaffirmed the distinction in 1925. *State v. Nikolich*, 137 Wash. 62, 241 P. 664 (1925). In *Nikolich*, several defendants were convicted of aiding or abetting another in committing arson. *Id.*, at 65. The Supreme Court reversed based on the acquittal of the person shown to be the principal offender.¹⁶ *Id.*, at 66-67.

These early cases show that the distinction between ‘principals’ and ‘accessories’ survived ratification of the constitution in 1889. Although they do not specifically address the requirement of unanimity, the early cases were consistent with the common law principles that predated adoption of the constitution. The third *Gunwall* factor—state common law and constitutional history—supports a unanimity requirement as to the mode of participation.

The fourth *Gunwall* factor “directs examination of preexisting

¹⁶ The principal had been erroneously charged as an accessory.

state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist, No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, 106 Wn.2d at 62). Courts must consider “[p]reviously established bodies of state law, including statutory law.” *Gunwall*, 106 Wn.2d at 61.

There are no statutory provisions addressing the need for jury unanimity regarding the mode of participation.¹⁷ Although the territorial legislature purported to abolish all distinctions between principals and other participants, the Supreme Court determined that the object of the statute was merely “to do away with some of the technical hindrances which before existed.” *Gifford*, 19 Wash. at 468 (addressing Code of 1881, §956). Had the legislature intended substantive changes, “the law itself would be unconstitutional.” *Id.*

Successor statutes were interpreted in conformity with the common-law rule equating first- and second-degree principals. *See, e.g., State v. Olson*, 50 Wn.2d 640, 642, 314 P.2d 465 (1957) (addressing former RCW 9.01.030, Laws of 1909, Ch. 249 §8); *State v. Carothers*, 84 Wn.2d 256, 264, 525 P.2d 731 (1974); *State v. McDonald*, 138 Wn.2d

¹⁷ Neither the territorial statute (Code of 1881, § 956) nor its successor statutes address the unanimity requirement. *See* Laws of 1909, Ch. 249 §8; RCW 9A.08.020.

680, 687-691, 981 P.2d 443 (1999) (addressing RCW 9A.08.020). Thus both principal and accomplice were present during the crime's commission.¹⁸

Because all defendants in these cases were present during commission of the crime, they qualified as common law 'principals.' Unanimity would not have been required under the common law rule, and thus was not required under Wash. Const. art. I, §21.

More recently, the Supreme Court has dispensed with the unanimity requirement even where a participant is not present at the scene. *See Walker*, 182 Wn.2d at 484-485. Decided in 2015, *Walker* appears to be the first Supreme Court case excusing the jury from unanimously deciding whether a participant acted as a common law 'principal' or a common law 'accessory'. *Walker* marks a departure from the common-law rule distinguishing between common law 'principals' and common law 'accessories.' *Id.*; *see Kurland*, 57 S.C.L. Rev. at 112 (2005).

Walker should have very little impact on *Gunwall* factor four. This is so because "[s]tate cases and statutes from the time of the constitution's ratification, rather than recent case law, are more persuasive in determining whether the state constitution gives enhanced protection in a

¹⁸ *See also State v. Holcomb*, 180 Wn.App. 583, 321 P.3d 1288 (2014); *State v. Alires*, 92 Wn.App. 931, 966 P.2d 935 (1998); *State v. Haack*, 88 Wn.App. 423, 958 P.2d 1001 (1997); *State v. Wilder*, 25 Wn.App. 568, 608 P.2d 270 (1980).

particular area.” *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 120, 937 P.2d 154 (1997), *amended*, 943 P.2d 1358 (Wash. 1997). In addition, the *Walker* court explicitly declined to examine the state constitutional right to unanimity as to mode of participation. *Walker*, 182 Wn.2d at 484-485. Under *Gunwall* factor four, the common law rule and cases such as *Gifford* should be given greater weight than *Walker*. *Id.* At most, factor four should be considered neutral.

The fifth *Gunwall* factor (structural differences in the two constitutions) always points toward pursuing an independent analysis, “because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State's power.” *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). Until recently, the federal constitution did not guarantee any right to juror unanimity in state criminal prosecutions. *Apodaca* 406 U.S. at 406; *see Ramos v. Louisiana*, ---U.S. ---, 140 S. Ct. 1390, --- L.Ed.2d --- (2020) (recognizing constitutional right to unanimous jury in state prosecutions).

The state constitution has long guaranteed such a right. *See, e.g., State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Factor five weighs in favor of a state constitutional right to unanimity as to the mode of participation.

The sixth *Gunwall* factor deals with whether the issue is a matter

of particular state interest or local concern. An accused person's right to juror unanimity is an issue of particular state interest or local concern. *See State v. Silva*, 107 Wn.App. 605, 621, 27 P.3d 663 (2001). In *Silva*, the court of appeals concluded that “the manner in which an accused's state constitutional right of self representation is effectively exercised is plainly of state interest and local concern.” *Id.* The *Silva* court also outlined other matters found to be of state interest and local concern, including double jeopardy issues, the State’s interest in law enforcement, and Washington citizens’ right to privacy. *Id.* These are analogous to the right at issue here.

Factor six favors a state constitutional right to jury unanimity as to the mode of participation. This is especially true given that the U.S. Supreme Court did not recognize a federal constitutional right to unanimity in state prosecutions until recently. *Apodaca* 406 U.S. at 406; *Ramos*, ---U.S. at ____.

Five of the six *Gunwall* factors establish that art. I, §21 preserved the common law right of unanimity as to mode of participation in a crime. The remaining factor (pre-existing state law) is, at most, neutral, and thus does not favor either side of the analysis.

Gunwall analysis establishes that the “inviolable” right to a jury trial includes the right to jury unanimity as to the mode of participation. Art. I, §21. In keeping with the common law rule, jurors must determine if the

accused person is a common law ‘principal’ who was present during commission of the crime, or a common law “accessory” who was not.

B. The Supreme Court's decisions in *Carothers* and *Hoffman* do not require a different result.

No Washington court has performed a *Gunwall* analysis to determine if the state constitution guarantees a right to jury unanimity “as to the mode of participation in a felony accomplice case.” *Walker*, 182 Wn.2d at 484-485. Instead, the Supreme Court has addressed the issue without examining the state constitution. *Id.*; see also *Carothers*, 84 Wn.2d at 262-266; *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991).

In *Carothers*, the defendant was charged as a principal. *Carothers*, 84 Wn.2d at 259. Evidence showed he was present during commission of the crimes. *Id.*, at 258. In rejecting the defendant’s challenge to an accomplice instruction, the Supreme Court held that “[t]he jury was not obliged to decide who held the gun or who committed the physical act of taking possession of the property of the victims.” *Id.*, at 261. The court did not analyze the issue under the state constitution.¹⁹

In *Hoffman*, the defendant argued that he was entitled to “a

¹⁹ Even if *Carothers* had specifically examined art. I, §21, it would not have had the benefit of *Gunwall* (which was not decided until 1986).

unanimous decision as to which defendant was the principal and which the accomplice.” *Hoffman*, 116 Wn.2d at 103. As in *Carothers*, evidence showed that the defendant was present during commission of the crime. *Id.*, at 62. Relying on *Carothers*, the *Hoffman* court upheld an instruction telling the jury that it “need not determine which defendant was an accomplice and which was a principal.” *Id.* The court concluded that jurors were not required to unanimously decide “who actually shot and killed [the victim] so long as both participated in the crime.” *Id.*, at 105. Again, the court did not analyze the issue under the state constitution.

Both *Carothers* and *Hoffman* were consistent with the common law rule; hence they were also consistent with the common law requirement incorporated into Wash. Const. art. I, §21. Each defendant was present during commission of the charged crimes. Under the common law, those participants who were present during commission of the crime could be convicted as principals, regardless of the degree of their participation. *See Standefer v. U. S.*, 447 U.S. at 15; Kurland, 57 S.C.L. Rev. at 112.

In both *Carothers* and *Hoffman*, the evidence showed that each defendant was present during commission of the charged crimes. Neither *Carothers* nor *Hoffman* addressed the common law distinction between ‘principals’ (who were present) and common law ‘accessories’ (who participated but were not present). *Id.*; Kurland, 57 S.C.L. Rev. at 113.

Walker, by contrast, involved a defendant who remained in his car while two codefendants went and shot an armored truck ‘custodian.’ *Walker*, 182 Wn.2d at 470. After noting the absence of any controlling authority under the state constitution, the Supreme Court declined to address the state constitutional issue. *Id.*, at 484-485.

The Supreme Court has not determined if art. I, §21 requires juror unanimity as to the mode of a defendant’s participation in criminal activity. *Id.* Neither *Carothers* nor *Hoffman* decided the issue. They should not control here.

C. Ms. Crull’s convictions must be reversed because the trial court failed to require unanimity as to her mode of participation in the crime.

In this case, the jury was instructed on accomplice liability. CP 34. The trial court did not instruct the jury that it had to be unanimous regarding Ms. Crull’s mode of participation in each offense. CP 34. This requires reversal of both convictions. The state constitution required the jury to unanimously determine the mode of her participation. *Kurland*, 57 S.C.L. Rev. at 112.

This is so because the common law requirement of unanimity was incorporated into the state constitution when it was ratified. Under common law, jurors were required to unanimously determine if a defendant acted as a common law ‘principal’ (who was present during

commission of the crime) or as a common law ‘accessory’ (who was not).

Failure to provide a unanimity instruction is presumed prejudicial. *Coleman I*, 159 Wn.2d at 512 (addressing multiple acts case). Reversal is required unless the error is harmless beyond a reasonable doubt. *Id.* The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt as to the fact on which unanimity is required. *Id.*

Here, the State cannot make this showing.

The court’s failure to provide a unanimity instruction as to the mode of Ms. Crull’s participation in the offense violated Ms. Crull’s state constitutional right to a unanimous jury under Wash. Const. art. I, §21. Her convictions must be reversed, and the case remanded for a new trial. *Id.*

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

Alleged constitutional errors are reviewed *de novo*. *Blomstrom v. Tripp*, 189 Wn.2d 379, 389, 402 P.3d 831 (2017). A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

To raise a manifest error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The

showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.* An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Instructions “that fail to require a unanimous verdict constitute manifest error affecting a constitutional right.” *Lamar*, 180 Wn.2d at 586. The Court of Appeals should review this manifest constitutional error *de novo*. *Id.*; *Blomstrom*, 189 Wn.2d at 389.

IV. 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.

- 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.²⁰ 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 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

²⁰ 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.

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).

Ms. Crull’s jury was instructed on accomplice liability. CP 34. Accordingly, she is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of her 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.²¹

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 this, speech advocating criminal activity may only be punished if it “is directed to inciting or producing imminent lawless action and is likely to

²¹ 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.*

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. *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 convictions²² 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.

In Washington, a person may be convicted as an accomplice for “encourage[ment]” provided “[w]ith knowledge that it will promote or

²² In the remaining counts, the defendant actually assisted in the preparation of false tax returns. *Freeman*, 761 F.2d at 552.

facilitate the commission of the crime.”²³ 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 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)

²³ 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(3)(a)(ii).

(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.* Ms. Crull'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 II*); *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,²⁴ 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 II*, 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). Encouragement, even when coupled with knowledge, is insufficient to meet the *Brandenburg* standard.

²⁴ Divisions II and III essentially adopted the *Coleman* court’s reasoning. *Ferguson*, 164 Wn.App. 370; *Holcomb*, 180 Wn.App. at 590.

The *Coleman* court’s phrase “the criminal *mens rea* to aid or agree to aid” implies that accomplice liability requires proof of intent. *Coleman* II, 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* II, 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”²⁵ 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 II*, 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 “directed to inciting or producing imminent lawless action” and “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447; *Freeman*,

²⁵ *Coleman II*, 155 Wn.App. at 960-961.

761 F.2d at 552. Accordingly, Ms. Crull’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). Ms. Crull’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.²⁶ 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 expression, the State bears the burden of establishing their constitutionality. *Id.*

²⁶ 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).

CONCLUSION

Jacee Crull was co-owner of the residence she was accused of burglarizing. After breaking up with Brock, she did not relinquish her right to access the house, and her privilege to enter had not been revoked by court order or by Brock. Furthermore, Brock lacked the authority to unilaterally exclude her; instead, he was required to obtain a court order granting him exclusive use of the residence. Under these circumstances, the State failed to prove beyond a reasonable doubt that her entry was unlawful. Ms. Crull's burglary conviction must be reversed and the charge dismissed with prejudice.

Over objection, the trial court told jurors that "the controlling question" on the issue of unlawful entry "is one of occupancy or possession, rather than title or ownership." CP 37. The court gave this instruction because Ms. Crull planned to argue that her status as co-owner gave her a privilege to enter her house. The instruction misstated the law, directed a guilty verdict, and amounted to an unconstitutional comment on the evidence. The burglary conviction must be reversed and the burglary charge remanded for a new trial with proper instructions.

The court's accomplice instruction did not require juror unanimity as to Ms. Crull's mode of participation in the charged crimes. This violated Ms. Crull's common-law right to jury unanimity and her rights

under the state constitution. Her convictions must be reversed, and the case remanded for a new trial. Upon retrial, jurors must be instructed to return a unanimous verdict as to Ms. Crull's mode of participation in the charged crimes.

The accomplice liability statute and the court's accomplice instruction allowed conviction based on protected speech. The accomplice statute (as currently interpreted) and the associated pattern instruction violate the First Amendment. Ms. Crull's convictions must be reversed and the case remanded for a new trial with proper instructions.

Respectfully submitted on May 15, 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:

Jacee Crull (Address confidential)

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

Pierce County Prosecuting Attorney
kristie.barham@piercescountywa.gov, PCpatcecf@co.pierce.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 May 15, 2020.



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