

FILED  
Court of Appeals  
Division II  
State of Washington  
8/13/2020 9:51 AM

No. 54380-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Jacee Crull,**

Appellant.

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

The Honorable Judge John R. Hickman

**Appellant's Reply Brief**

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**ARGUMENT..... 1**

**I. The evidence was insufficient because the State failed to prove unlawful entry..... 1**

**II. The court’s erroneous instruction defining unlawful entry requires reversal of Ms. Crull’s burglary conviction. .... 3**

**III. Ms. Crull was denied her state constitutional right to a unanimous verdict..... 5**

**IV. Washington’s accomplice liability scheme violates the First Amendment. .... 6**

**CONCLUSION ..... 7**

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Brandenburg v. Ohio*, 395 U.S. 444, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969)  
..... 6

**WASHINGTON STATE CASES**

*City of Seattle v. Webster*, 115 Wn.2d 635, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991) ..... 5

*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) ..... 4, 5

*State v. Immelt*, 173 Wn.2d 1, 267 P.3d 305 (2011) ..... 5

*State v. Walker*, 182 Wn.2d 463, 341 P.3d 976 (2015)..... 5

**WASHINGTON STATE STATUTES**

RCW 9A.52.010..... 1

## ARGUMENT

### **I. THE EVIDENCE WAS INSUFFICIENT BECAUSE THE STATE FAILED TO PROVE UNLAWFUL ENTRY.**

Jacee Crull did not “unlawfully” enter the home she was accused of burglarizing. *See* Appellant’s Opening Brief, pp. 6-12. She lived in the residence before Buddy Brock moved in. RP (11/20/19) 219-220. She was a co-owner and had occupied it with Brock for over 10 years.<sup>1</sup> RP (11/19/19) 152; RP (11/20/19) 219-220, 222, 226; Ex. 12. Her right to enter had not been revoked.<sup>2</sup>

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<sup>1</sup> The State claims that Brock separately made all the house payments. Brief of Respondent, pp. 2-3. But the evidence was that Ms. Crull managed the household budget, out of which the mortgage was paid, and both were responsible for money coming in. RP (11/19/1+9) 153-160; RP (11/20/19) 219-220.

<sup>2</sup> The State also claimed that Ms. Crull “recognized and testified” that she did not reside at the house, but the testimony was more complex than this summary:

Q. ...So at the time in August 21st of 2018, you were not living there; is that right?  
A. My things resided there.  
Q. But you did not?  
A. My animals resided there. My plants resided there. And I thought I was living there also. Just because I took a vacation –  
Q. Ma'am, ma'am –  
A. Sorry. You're right.  
Q. It says here in your testimony with your attorney, you said that you had established a new residence in 2018, November of 2018, right?  
A. Correct.  
Q. But up until that point you had established your residence in the red Yukon; is that correct?  
A. Yes, sir. I had been living in the Yukon and paying on the house.  
Q. I see. So at that point you were living in the Yukon and you said you were paying on the house as well?  
A. Yes.  
RP (11/20/19) 241-242.

Entry is unlawful when a person “is not then licensed, invited, or otherwise privileged” to enter. RCW 9A.52.010(2). Respondent accuses Appellant of “perseverat[ing] on concepts of license and privilege.” Brief of Respondent, p. 11. But ‘license’ and ‘privilege’ are the concepts at issue under RCW 9A.52.010(2).

According to Respondent, the lawfulness of a person’s entry into a jointly owned residence rests solely on current occupancy.<sup>3</sup> Brief of Respondent, pp. 10-20. Under this theory, one occupant of a residence can unilaterally exclude another occupant—even one with a superior ownership interest— simply by changing the locks while the other is away. Respondent’s argument encourages people to resort to self-help rather than relying on the legal system to determine who should occupy a jointly owned residence.

The Court of Appeals should not adopt this approach. Ms. Crull had not been lawfully excluded from the residence. Because she was a co-owner who had occupied the home prior to Brock’s arrival, her entry into the residence was not unlawful. Her burglary conviction must be reversed, and the charge dismissed with prejudice. Appellant’s Opening Brief, pp. 6-12.

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<sup>3</sup> Respondent acknowledges that “[w]hat it means to ‘enter or remain unlawfully’” is complicated. Brief of Respondent, p. 10.

**II. THE COURT’S ERRONEOUS INSTRUCTION DEFINING UNLAWFUL ENTRY REQUIRES REVERSAL OF MS. CRULL’S BURGLARY CONVICTION.**

The trial judge instructed 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 is not included in the pattern instruction approved by Washington’s Pattern Jury Instruction Committee.<sup>4</sup> WPIC 65.02, 11A Wash. Prac., Pattern Jury Instr. Crim. (4th Ed).

The language added by the court misstated the law, directed jurors to return a guilty verdict, and amounted to an unconstitutional comment on the evidence. Appellant’s Opening Brief, pp. 13-17. Because of this, Ms. Crull’s burglary conviction must be reversed. Appellant’s Opening Brief, pp. 13-17.

Respondent erroneously claims that review of the instruction is for an abuse of discretion. Brief of Respondent, p. 23. However, because the claimed error rests on an issue of law, review is *de novo*. Appellant’s Opening Brief, pp. 12-13. Respondent’s discussion of the standard of review does not address Ms. Crull’s arguments on this point. Brief of Respondent, pp. 22-23.

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<sup>4</sup> The committee operates under the auspices of the Washington Supreme Court. *See* Preliminary Materials, 11 Wash. Prac., Pattern Jury Instr. Crim. (4<sup>th</sup> Ed.).

Respondent also claims that the erroneous instruction allowed Ms. Crull to argue “all of [her] defenses.” Brief of Respondent, p. 26. However, as Respondent concedes, one of the defenses Ms. Crull sought to present was that “in the absence of any express communication to the contrary, [she] reasonably believed she was welcome to enter in order to remove personal property.” Brief of Respondent, p. 26.

By telling jurors that “the controlling question is one of occupancy,”<sup>5</sup> the court precluded jurors from considering this part of her defense. Furthermore, counsel undoubtedly limited his argument because of the language adopted by the court. Had the court given a proper instruction, counsel would have been able to argue that Ms. Crull’s argument was lawful, based in part on her ownership interest.

The instruction’s language also amounted to a comment on the evidence. The court instructed the jury that “the controlling question is one of occupancy... rather than title or ownership, at the time the offense was committed.” CP 37. The court directed jurors to consider only the issue of occupancy at the time of the offense, rather than title or ownership, or occupancy at a prior time. The instruction privileged evidence of occupancy at the time of the offense over all other evidence bearing on the lawfulness of Ms. Crull’s entry.

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<sup>5</sup> CP 37.

It also directed a verdict. There was no dispute that Brock occupied the residence on the date of Ms. Crull's entry. Faced with the court's instruction that unlawfulness turns on occupancy at the time the offense was committed, jurors had no choice but to find Ms. Crull's entry unlawful.

The court's erroneous instruction requires reversal. The case must be remanded for a new trial with proper instructions. Appellant's Opening Brief, pp. 13-17.

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

The Court of Appeals should undertake a *Gunwall*<sup>6</sup> analysis of the statute constitutional right to jury unanimity. Appellant's Opening Brief, pp. 17-32. Respondent erroneously suggests that Ms. Crull "readily acknowledges that her claim is inconsistent with well-developed Washington law." Brief of Respondent, p. 27 (citing Appellant's Opening Brief, p. 18).

In fact, "[n]o Washington court has examined article I, section 21 under *Gunwall* to determine whether or not an accused person has a constitutional right to jury unanimity as to the mode of participation in a

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<sup>6</sup> *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.

felony accomplice case.” *State v. Walker*, 182 Wn.2d 463, 484–85, 341 P.3d 976 (2015). Ms. Crull has not “readily acknowledge[d]” that her argument is “inconsistent with well-developed Washington law.” Brief of Respondent, p. 27.

Instead, she asks the Court of Appeals to perform the *Gunwall* analysis referenced by the *Walker* court. She provided extensive briefing addressing this undecided issue. Appellant’s Opening Brief, pp. 17-32. She rests on the argument outlined in her opening brief.

#### **IV. WASHINGTON’S ACCOMPLICE LIABILITY SCHEME VIOLATES THE FIRST AMENDMENT.**

Under the First Amendment, overbreadth challenges are not fact-dependent. *State v. Immelt*, 173 Wn.2d 1, 6-7, 33, 267 P.3d 305 (2011); *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). Despite this, Respondent focuses on the facts of Ms. Crull’s case to argue against her First Amendment claim. Brief of Respondent, pp. 44-45.

This focus is misplaced. *Webster*, 115 Wn.2d at 640. Ms. Crull’s overbreadth challenge to the law of accomplice liability in Washington does not rest on the particular facts of her case. *Id.*; Appellant’s Opening Brief, pp. 32-34. The Court of Appeals should not engage in analysis of the facts to determine the validity of the accomplice liability scheme.

Speech advocating criminal activity may not be criminalized even if it is “likely to incite” imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969). Instead, such speech may only lead to conviction if it is also “directed to inciting” imminent lawless action. *Id.*

The language used is important: “directed to inciting” requires proof of the speaker’s intent. Contrary to Respondent’s argument, the *Brandenburg* standard does include “a *mens rea* of intent.” Brief of Respondent, p. 46. The speech must be both “directed to inciting” and “likely to incite” imminent lawless action. *Id.*

For the reasons outlined in Appellant’s Opening Brief, Washington’s accomplice liability scheme violates the First Amendment. Ms. Crull’s conviction must be reversed. Appellant’s Opening Brief, pp. 32-41.

### **CONCLUSION**

Ms. Crull did not unlawfully enter the home she owned (and had occupied) with Brock. Insufficient evidence supported her burglary conviction. Furthermore, the burglary conviction rested on instructions that misstated the law. The instructions included a comment on the evidence and improperly directed a verdict against Ms. Crull. The

instructions also violated her state constitutional right to a unanimous verdict. Finally, Washington's accomplice liability scheme violates the First Amendment.

The burglary conviction must be reversed, and the charge dismissed with prejudice. In the alternative, the charge must be remanded for a new trial with proper instructions.

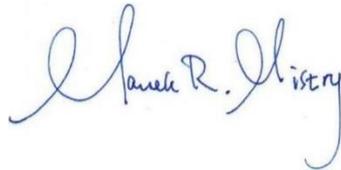
Respectfully submitted on August 13, 2020,

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## CERTIFICATE OF SERVICE

I certify that on today's date:

I emailed an electronic version of this brief to Jacee Crull at a confidential address at her request.

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@piercecountywa.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 August 13, 2020.



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**August 13, 2020 - 9:51 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54380-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Jacee P. Crull, Appellant  
**Superior Court Case Number:** 19-1-00155-2

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