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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JACEE PEARL CRULL,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Judge John R. Hickman

No. 19-1-00155-2

BRIEF OF RESPONDENT

MARY E. ROBNETT
Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

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I. INTRODUCTION

The Defendant Jacee Crull ended her relationship with Buddy Brock and moved out of the Bonney Lake house with no intention of residing there again. Mr. Brock moved on, changed the locks, became engaged, and welcomed his new fiancée into his home. Many months later, the Defendant drove her friends from Jefferson County to Mr. Brock's residence while he was at work. They jumped the fence, entered through the sliding glass door in the back, and removed expensive appliances and a Conga drum which Mr. Brock's fiancée had gifted him. The neighbor's security camera recorded the events. The Defendant was convicted of residential burglary and theft and sentenced to community custody.

The Defendant argues that she had a right to enter the residence based on title alone. No legal authority supports this position. She argues that a jury must deliver a verdict on accomplice liability. But complicity is neither an element of the crime nor an alternative means. And she argues that her conviction implicates the First Amendment although no evidence of any speech was entered into evidence, and the validity of the complicity statute is well-established law. The Defendant acknowledges that legal precedent runs contrary to her claims. The appeal is without merit.

II. RESTATEMENT OF THE ISSUES

- A. As a matter of law, is entry into a home unlawful where the defendant is not an occupant of the residence and does not have permission to enter?
- B. Is there sufficient evidence of unlawful entry where both parties testified that the Defendant Crull no longer resided at the home and did not have Mr. Brock's permission to enter?
- C. Is the judge's instruction (that the controlling question is one of occupancy, not title) a correct statement of law? Does this statement of law offer any opinion on the evidence or the Defendant's guilt?
- D. Where accomplice liability is neither an alternate means of committing an offense nor an element of the crime which must be charged in the information, is there any constitutional rationale for overturning long-standing precedent by requiring the jury to make a unanimous finding on whether the Defendant acted as a principal or as an accomplice?
- E. Where the State did not allege that the Defendant was an accomplice based on any evidence of her speech, does her conviction implicate the First Amendment?

III. STATEMENT OF THE CASE

The Defendant Jacee Crull appeals from jury convictions for residential burglary and third degree theft, both with special allegations of domestic violence. CP 48-50, 52, 55-71.

The Offense:

The Defendant Crull and Buddy Brock were in a dating relationship from 1999 to 2018. RP (11/19/19) at 113-14. For most of their relationship, the two lived together in a Bonney Lake residence. RP (11/19/19) at 112-13; RP (11/20/19) at 217. The house is in both their names, although all

payments have come from Mr. Brock's earnings. RP (11/19/19) at 155, 157. Mr. Brock works; the Defendant receives disability income and has five children. *Id.* at 115, 161; RP (11/20/19) at 217, 220.

In February of 2018, the Defendant moved out while Mr. Brock was at work, taking her property with her. RP (11/19/19) at 63, 114, 166. She stopped making mortgage payments from their joint account and, on April 9th, she filed a petition for a vulnerable adult protection order in which she asked the court to remove Mr. Brock from the home. *Id.* at 116-20, 124. The Defendant's pleading advised that she intended to gather her property, clear title of the trailer, and get an apartment. *Id.* at 123. Mr. Brock vacated the property, complying with temporary orders until a hearing could be held. *Id.* at 120-21. He took some clothes, his computer, and his chef's knives. *Id.* at 122.

In May, the court held a hearing and denied the Defendant's petition. RP (11/19/19) at 127-28. When he was assured that the Defendant had left the Bonney Lake residence, Mr. Brock returned to his home. *Id.* at 127-29. For all practical purposes, with a lien that exceeds the value of the property, Mr. Brock is unable to sell the home. *Id.* at 162, 167-68.

When Mr. Brock returned, he learned that the Defendant taken some of his personal property from the house. *Id.* at 136-37. Mr. Brock took any

remaining items that he thought the Defendant would want to a friend's house for her to retrieve, and then he changed the locks. *Id.* at 137.

Mr. Brock began a new relationship and became engaged. RP (11/19/19) at 142, 161-62. His fiancée moved into the Bonney Lake residence. *Id.* at 161.

On August 21, 2018, the Defendant Crull drove three companions in her GMC Yukon to Mr. Brock's residence. RP (11/19/19) at 61-62, 70, 112, 124-25, 147-48; RP (11/20/19) at 205-06. One companion jumped the fence and entered through the back sliding door which was left open for the two Great Pyrenees dogs. RP (11/19/19) at 71, 137-38, 149; RP (11/20/19) at 206-07. The group removed a \$500 conga drum (a gift from Mr. Brock's fiancée), a recently purchased \$400 cooler, a \$300 set of Shun chef's knives, a Sears floor scrubber, a commercial floor blower/fan, a newly purchased Rowenta iron, and Nikon binoculars – all of which belonged to Mr. Brock. RP (11/19/19) at 139, 141-47. Mr. Brock and neighbor Mindee Rawson identified the Defendant from Ms. Rawson's surveillance video. *Id.* at 64, 70-73, 140; RP (11/20/19) at 191-94, 201. The video captured the Defendant and her friends leaping the fence, entering, taking the items from the house, and loading them into the Defendant's SUV. RP (11/19/19) at 149; RP (11/20/19) at 202-05.

Mr. Brock had not been in contact with the Defendant since February, and she did not have permission to enter or to take these items. RP (11/19/19) at 150-51; RP (11/20/19) at 262-63. He reported the crime to police explaining the toll that the Defendant's behavior had taken on him. Never knowing whether she would return, Mr. Brock had been living without a television, computer, and heirlooms – things he could not afford to keep replacing. CP 104. He constantly worried that he would return home to find she had broken in again and maybe taken his dogs. *Id.*

The Trial:

The Defendant was charged five months later, and a bench warrant issued for her arrest. CP 1; RP (8/13/19) at 9. Another six months later, she was arrested and promptly released on her own recognizance to a Port Angeles address. RP (8/13/19) at 9.

Defense counsel Helene Chabot tried three times to explain the omnibus order, but her client refused to sign. *Id.* at 5. At the omnibus hearing, the Defendant demanded a new attorney, claiming that Ms. Chabot had scared her by gritting her teeth and raising her voice. *Id.* at 5-6. While not crediting the Defendant's allegations against her attorney, the court granted the request. *Id.* at 17.

The Defendant testified at trial that she had been suicidal since the age of nine. RP (11/20/19) at 222. She claimed that, in February of 2018,

she had an allergic reaction to medication and was very upset about a “rough” Valentine’s Day and her dead mother’s birthday. *Id.* at 222. When Mr. Brock left for work, she felt “abandoned” during what she called “suicide watch.” *Id.* She went to Greater Lakes Mental Health and from there to Tacoma General Hospital. *Id.* at 222-23. She claimed she tried to call Mr. Brock, but her calls were blocked. *Id.* at 223.

She claimed when she came home a couple days later, the locks had been changed. *Id.* at 224. She admitted that she broke a window to enter, but never spoke to Mr. Brock thereafter. *Id.* at 224-25. Instead, she took up residence in her SUV with her plants. *Id.* at 226. At that point, she recognized and testified that she no longer resided at the Bonney Lake house. *Id.* at 241-42.

The Defendant moved to Jefferson County where she filed the petition for a protection order. *Id.* at 232-33. At her request, the temporary order excluded Mr. Brock from the house and from coming within 1000 feet of the house. *Id.* at 234-35. The express purpose of the temporary order was to collect her property, to get the documents and property she would need to get an apartment, and to settle claim regarding a trailer. *Id.* at 235-36. The court also granted the Defendant’s request for law enforcement services to serve Mr. Brock with the petition and order in order to assist her in retrieving her personal property. *Id.* at 236-38.

The Defendant acknowledged that she had no intent to regain occupancy of the Bonney Lake house and only intended that Mr. Brock should leave on a temporary basis while she repossessed her property. *Id.* at 253-54. She claimed that under the protection of the temporary orders she returned to the house for a few hours and recovered, inter alia, a “terabyte” of information. *Id.* at 240-41, 260-61.

After she had left the relationship, the Defendant came to believe that the house had value and that “I gave up my home for nothing.” *Id.* at 221. So she returned in August and took several more items, including a floor scrubber, a steam cleaner, a steam mop, and a cooler. *Id.* at 227-28. She claimed the items belonged to her and she sold the steam mop for \$20. *Id.* at 228-29. She also admitted to taking eight drums including a Conga drum, but claimed she had done this at an earlier date. *Id.* at 250-52, 257. She denied taking the floor fan, iron, knives, and binoculars. *Id.* at 257. But she could not speak for what items her three friends removed from the house. *Id.* at 258. She claimed memory loss as to what her friends’ full names were, what they did inside the house, which one of them hopped the fence, or why he would have done that. *Id.* at 231-32, 246-48, 258-60 (“I’m having trouble remembering ten minutes ago.”). She claimed that if Rob, Don, and Stephanie entered the house at all, they were “probably” just following the dogs’ example. *Id.* at 248.

In another version of events, she drove her friends for six hours to and from the Olympic Peninsula just to say goodbye to the dogs. *Id.* at 243, 247, 249.

At the close of the State's evidence, the defense made a motion to dismiss arguing that the Defendant Crull could not burglarize a residence which she co-owned. CP 23-26; RP (11/19/19) at 53, 57, 154-60. The court reviewed the authority provided by the defense and denied the motion. RP (11/20/19) at 212-14.

When the Defendant objected to any accomplice liability instruction, the prosecutor noted that there was evidence that the Defendant both acted as a principal and also facilitated the burglary through her friends. CP 84; RP (11/20/19) at 269-70. With knowledge of the house and the items therein, she drove her friends the many hours from Jefferson County. *Id.* at 270. The surveillance tape showed that someone other than the Defendant jumped the fence and opened the front door. *Id.* at 269-70. Persons other than the Defendant carried items out to the SUV. *Id.* at 270. The court included the instruction. CP 34; RP (11/20/19) at 270-71.

The Defendant objected to the definition of unlawful entering or remaining as being "non-standard." RP (11/20/19) at 271-72. The prosecutor acknowledged that only the first of the two sentences was taken from WPIC 65.02. RP (11/20/19) at 272. The court included the

instruction, noting that this was an accurate, relevant statement of the law. CP 37; RP (11/20/19) at 272-73. The court also instructed the jury that its verdict must be unanimous. CP 44.

The jury convicted the Defendant as charged. CP 48-51. The Defendant's standard range was 3-9 months. CP 56. However, the State and Mr. Brock recommended a first time offender waiver which would allow the court to impose 0-3 months. CP 56; RP (12/6/19) at 378. The State recommended a sentence of credit for time served, 12 months community custody, a no-contact order, restitution, a mental health evaluation, and compliance with treatment recommendations. RP (12/6/19) at 378-79. The court followed the State's recommendation, commenting that "If I go any lower, I'm going to have to pay her for being here." RP (12/6/19) at 385; CP 60-61. This appeal follows. CP 52.

IV. ARGUMENT

A. There was sufficient evidence that the Defendant's presence in the house was unlawful.

The Defendant argues that, as a matter of law, her entry was lawful. Appellant's Opening Brief (AOB) at 6-12.

1. A person enters unlawfully where she is not an occupant of the premises and does not have the permission of the occupant to enter or remain therein.

A burglary occurs if the defendant "enters or remains unlawfully" in a dwelling. RCW 9A.52.025{ TA \l "RCW 9A.52.025" \s "RCW

9A.52.025" \c 4 }. What it means to “enter or remain unlawfully” is complicated. RCW 9A 52.010(2){ TA \l "RCW 9A 52.010(2)" \s "RCW 9A 52.010(2)" \c 4 } (the definitional statute includes a discussion of property which is unfenced, unused, or open to the public). In particular, the issue becomes “thorny” or “murky” in domestic violence cases. { TA \l "State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144, 149 (2007)" \s "State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144, 149 (2007)" \c 1 } State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144, 149 (2007){ TA \s "State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144, 149 (2007)" }; State v. O’Neal, 658 N.E.2d 1102, 1103 (Ohio Ct. App. 1995){ TA \l "State v. O’Neal, 658 N.E.2d 1102, 1103 (Ohio Ct. App. 1995)" \s "State v. O’Neal, 658 N.E.2d 1102, 1103 (Ohio Ct. App. 1995)" \c 2 }.

In these situations, it is helpful to remember that burglary is an offense against habitation and occupancy, not title. *Wilson*, 136 Wn. App. at 606 (citing *State v. Klein*, 195 Wash. 338, 342, 80 P.2d 825 (1938){ TA \l "State v. Klein, 195 Wash. 338, 342, 80 P.2d 825 (1938)" \s "State v. Klein, 195 Wash. 338, 342, 80 P.2d 825 (1938)" \c 1 } (the test of ownership in Washington is not legal title, but rather occupancy and possession at the time of the offense); *Clarke v. Commonwealth*, 66 Va. 908, 916-17 (1874){ TA \l "Clarke v. Commonwealth, 66 Va. 908, 916-17 (1874)" \s "Clarke v. Commonwealth, 66 Va. 908, 916-17 (1874)" \c 2 } (the important factor has

been occupancy, rather than ownership, of the home); *People v. Gauze*, 15 Cal.3d 709, 125 Cal.Rptr. 773, 542 P.2d 1365 (1975){ TA \l "*People v. Gauze*, 15 Cal.3d 709, 125 Cal.Rptr. 773, 542 P.2d 1365 (1975)" \s "*People v. Gauze*, 15 Cal.3d 709, 125 Cal.Rptr. 773, 542 P.2d 1365 (1975)" \c 2 }); 3 Charles E. Torcia, Wharton's Criminal Law § 316, at 223 (15th ed. 1995){ TA \l "3 Charles E. Torcia, Wharton's Criminal Law § 316, at 223 (15th ed. 1995)" \s "3 Charles E. Torcia, Wharton's Criminal Law § 316, at 223 (15th ed. 1995)" \c 6 } (footnote omitted). *See also O'Neal*, 658 N.E.2d at 1103 (burglary statutes are designed to protect occupancy and possession, not title); *State v. Herder*, 415 N.E.2d 1000, 1003 (Ohio Ct. App. 1979){ TA \l "*State v. Herder*, 415 N.E.2d 1000, 1003 (Ohio Ct. App. 1979)" \s "*State v. Herder*, 415 N.E.2d 1000, 1003 (Ohio Ct. App. 1979)" \c 2 }.

“Thus, in determining whether an offender’s presence is unlawful, courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises.” *Wilson*, 136 Wn. App. at 606 (emphasis added).

The Defendant perseverates on concepts of license and privilege. *See. e.g.* AOB at 8 (arguing that she was “privileged to enter” because her “name was on the deed” and that Mr. Brock was “not legally entitled” to revoke her privilege to enter). But the rule is not title. It is occupancy.

The Defendant alleges that “mere possession or occupancy” is not the test, because this would give a squatter the legal right to exclude others. AOB at 10. She provides not legal citation. First, it has long been the law that squatters may gain lawful title which includes the right to exclude others. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431, 434 (1984){ TA \l "*Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431, 434 (1984)" \s "*Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431, 434 (1984)" \c 1 } (discussing adverse possession). Second, the many cases the Defendant relies upon make clear that the test is occupancy. *See e.g. Wilson*, 136 Wn. App. at 606; *State v. Wilson*, 136 Wn. App. 596, 606, 150 P.3d 144, 149 (2007){ TA \s "*State v. Wilson*, 136 Wn. App. 596, 606, 150 P.3d 144, 149 (2007)" } App. at 606; *State v. Schneider*, 36 Wn. App. 237, 673 P.2d 200 (1983){ TA \l "*State v. Schneider*, 36 Wn. App. 237, 673 P.2d 200 (1983)" \s "*State v. Schneider*, 36 Wn. App. 237, 673 P.2d 200 (1983)" \c 1 }; *State v. Machan*, 322 P.3d 655 (Utah 2013){ TA \l "*State v. Machan*, 322 P.3d 655 (Utah 2013)" \s "*State v. Machan*, 322 P.3d 655 (Utah 2013)" \c 2 }; *Commonwealth v. Majeed*, 694 A.2d 336 (Pa. 1997){ TA \l "*Commonwealth v. Majeed*, 694 A.2d 336 (Pa. 1997)" \s "*Commonwealth v. Majeed*, 694 A.2d 336 (Pa. 1997)" \c 2 }.

The Defendant asserts that the relevant test comes from *State v. Steinbach*, 101 Wn.2d 460, 679 P.2d 369 (1984){ TA \l "*State v. Steinbach*, 101 Wn.2d 460, 679 P.2d 369 (1984)" \s "*State v. Steinbach*, 101 Wn.2d 460, 679 P.2d 369 (1984)" \c 2 }.

460, 679 P.2d 369 (1984)" \c 1 }. AOB at 7. The case is not relevant. It turns on a factor not present here: the minority and dependency of the juvenile respondent.

Steinbach was 14 when she left alternative residential placement to break into her mother's home to steal rifles and alcohol. *Steinbach*, 101 Wn.2d at 461-62. Her temporary placement did not terminate her privilege to enter the parental home. *Id.*{ TA \s "State v. Steinbach, 101 Wn.2d 460, 679 P.2d 369 (1984)" } at 462-63. Minor children have a "sacred right," "a constitutionally protected right to parental care and custody." *Id.* at 463. Accordingly, Steinbach had a right to presume that she was privileged to enter her own mother's home. *Id.* at 464. "Since the child's privilege to enter the parental home rises out of the parent's duty to provide for the child, once the parent fulfills that duty in some manner that does not require the child to have access to the home, the parent may revoke the child's privilege to enter." *State v. Howe*, 116 Wn.2d 466, 470, 805 P.2d 806, 808-09 (1991){ TA \l "State v. Howe, 116 Wn.2d 466, 470, 805 P.2d 806, 808-09 (1991)" \s "State v. Howe, 116 Wn.2d 466, 470, 805 P.2d 806, 808-09 (1991)" \c 1 }.

But the Defendant Crull was not a minor, and Mr. Brock was not her parent. The Defendant was an adult with adult children. She did not have

a constitutional right to her ex-boyfriend's care and custody. There was no presumption of residency to overcome.

Likewise, the Defendant's reliance on *State v. Cantu*, 156 Wn.2d 819, 132 P.3d 725 (2006){ TA \l "*State v. Cantu*, 156 Wn.2d 819, 132 P.3d 725 (2006)" \s "*State v. Cantu*, 156 Wn.2d 819, 132 P.3d 725 (2006)" \c 1 } is misplaced. Like Steinbach, the 17-year-old Cantu was presumed to have a license to enter his mother's home although he was living elsewhere. *Cantu*, 156 Wn.2d at 824 (citing *Steinbach*, 101{ TA \s "*State v. Steinbach*, 101 Wn.2d 460, 679 P.2d 369 (1984)" } Wn.2d at 462-463). The deadbolt on his mother's bedroom door, however, "gave Cantu clear implied notice that any permission to enter the home did not extend to her bedroom." *Cantu*, 156 Wn.2d at 825. The Washington supreme court found there was sufficient evidence that the entry was unlawful. *Id.*{ TA \s "*State v. Cantu*, 156 Wn.2d 819, 132 P.3d 725 (2006)" }

Cantu's burglary conviction was reversed on other grounds. The juvenile court judge had acquitted of all crimes alleged to have occurred within the bedroom. *Cantu*, 156 Wn.2d at 823 (theft in the third degree, minor in possession of alcohol, and possession of a legend drug for stealing cash, beer, and pain pills). This inconsistency together with the judge's comments on the record led the Washington supreme court to conclude that the judge had misapplied RCW 9A.52.040{ TA \l "*RCW 9A.52.040*" \s

"RCW 9A.52.040" \c 4 } as a mandatory presumption, rather than a permissive inference, of intent to commit a crime therein. *Id.* at 827-28.

This case does not assist the Defendant in her argument. The jury did not presume she intended intent to commit a crime in Mr. Brock's residence; it actually convicted her of theft beyond any reasonable doubt.

The Defendant suggests that the State was required to show either that Mr. Brock or a court explicitly communicated the revocation of a privilege to enter. AOB at 9. This is wrong. First, the State demonstrated that there was no occupancy at all. Only if there had been an occupancy at the time of the entry would the State be required to show the entry was unlicensed or unprivileged. Second, when there remains a privilege to enter and that privilege is limited, the communication of the limitation need not be explicit. It may simply be implied – for example, by a lock on a door. *Cantu*{ TA \s "State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006)" }, 156 Wn.2d at 824 (citing *State v. Crist*, 80 Wn. App. 511, 514, 909 P.2d 1341, 1343 (1996){ TA \l "State v. Crist, 80 Wn. App. 511, 514, 909 P.2d 1341, 1343 (1996)" \s "State v. Crist, 80 Wn. App. 511, 514, 909 P.2d 1341, 1343 (1996)" \c 1 }). *Cf. Machan*, 322 P.{ TA \s "State v. Machan, 322 P.3d 655 (Utah 2013)" }3d at 659-60 (agreement to live apart may be implicit or tacit). Like *Cantu*, the Defendant Crull had notice (by the changing of the locks) that any privilege she may have once had to enter had been revoked.

After the locks were changed, she entered once by breaking a window and a second time by jumping a fence. More importantly, she also readily expressed that she was no longer an occupant of the premises.

The Defendant's case is properly analyzed under case law involving estranged romantic partners, not dependent children. *Wilson*{ TA \s "State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144, 149 (2007)" }, *supra* is such a case. *Wilson*, 136 Wn. App. at 600 (defendant assaulted girlfriend at an address they were both currently occupying). *State v. Schneider*, 36 Wn. App. 237, 673 P.2d 200 (1983){ TA \s "State v. Schneider, 36 Wn. App. 237, 673 P.2d 200 (1983)" } is another such case. It is the case the trial court relied upon in denying the motion to dismiss and instructing the jury. CP 24, 37, 87; RP (11/19/19) at 53-55; RP (11/20/19) at 212-14, 272-73.

The Defendant mischaracterizes *Schneider* as a landlord/tenant case. AOB at 10-11. In fact, *Schneider* was accused of crimes against her estranged husband in a rental house which they both owned but where he alone resided. *Schneider*, 36 Wn. App. at 238-39. The fact that he had been taken in by their tenant was not relevant to the holding. On appeal, *Schneider* claimed that the entry was lawful due to her shared title over the rental home. *Id.*{ TA \s "State v. Schneider, 36 Wn. App. 237, 673 P.2d 200 (1983)" } at 240.

These contentions are erroneous, because they misconstrue the nature of the offense of burglary.

The law of burglary was designed to protect the dweller, and, hence, the controlling question here is occupancy rather than ownership. *See* R. Perkins, *Criminal Law* 206 (2d ed. 1969){ TA \l "R. Perkins, *Criminal Law* 206 (2d ed. 1969)" \s "R. Perkins, *Criminal Law* 206 (2d ed. 1969)" \c 6 }. The law in Washington has long reflected this principle:

“The test, for the purpose of determining in whom the ownership of the premises should be laid in an indictment for burglary, is not the title, but the occupancy or possession at the time the offense was committed.”

State v. Klein, 195 Wash. 338, 342, 80 P.2d 825 (1938){ TA \s "State v. Klein, 195 Wash. 338, 342, 80 P.2d 825 (1938)" }, *quoting* 9 C.J. 1044 § 79. An owner of property can be guilty of burglarizing that property. For example, it is well established that a landlord can be guilty of burglarizing the premises of his tenant. *See, e.g., Bradley v. State*, 244 Ind. 630, 195 N.E.2d 347 (1964){ TA \l "*Bradley v. State*, 244 Ind. 630, 195 N.E.2d 347 (1964)" \s "*Bradley v. State*, 244 Ind. 630, 195 N.E.2d 347 (1964)" \c 2 }. *See also* AGO 10 (1974){ TA \l "AGO 10 (1974)" \s "AGO 10 (1974)" \c 6 }.

To establish that an entry is “unlawful,” the State must introduce evidence that the entrant was “not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(3){ TA \l "RCW 9A.52.010(3)" \s "RCW 9A.52.010(3)" \c 4 }.

Schneider,{ TA \s "State v. Schneider, 36 Wn. App. 237, 673 P.2d 200 (1983)" } 36 Wn. App. at 240-41. Because the defendant was not “actually liv[ing] in the house during the time in question,” and because the occupants testified that the defendant did not have permission to enter, there was sufficient evidence to “infer that Schneider was not licensed, invited or privileged to enter the house in question.” *Id.* at 241.

A privilege to enter may be demonstrated by current habitation, but not by mere ownership. If an owner previously occupied the residence, his privilege to enter is relinquished when he moves out regardless of his continuing and even exclusive title. *Commonwealth v. Majeed*, 694 A.2d 336, 338 (Pa. 1997){ TA \l "*Commonwealth v. Majeed*, 694 A.2d 336, 338 (Pa. 1997)" \s "*Commonwealth v. Majeed*, 694 A.2d 336, 338 (Pa. 1997)" \c 2 }.

Although the statute does not define “licensed or privileged to enter,” the statutory defense to burglary does not depend on ownership. ... Thus, legal ownership is not synonymous with license or privilege; an owner of property may relinquish his or her license or privilege to enter.

2 The historical principle underlying the law of burglary is the protection of the right of *habitation*. 4 William Blackstone, *Commentaries* 223. Today, although the Pennsylvania burglary statute applies broadly to any building or occupied structure, not just dwelling places, the focus remains the protection of occupancy or possession, not merely ownership. ... Further, Mrs. Majeed and her children, alone, occupied the residence. By his own admission, Appellant was living apart from his wife and children at the time of the [protection from abuse] Order and burglary. Thus, Mrs. Majeed and her children were entitled to the exclusive right of possession against Appellant. His very method of entry – kicking in the door, twice – further evidences that his license or privilege to enter the premises had expired. Because Appellant was not licensed or privileged to enter the home, the trial court and Superior Court properly upheld his conviction for burglary.

Majeed, 694 A.2d at 338 (emphasis added). Here it was not Majeed's signing of the protection order that excluded him from the house to which he alone held title, but his habitation elsewhere.

The Defendant also mischaracterizes *State v. Machan*, 322 P.3d 655 (Utah 2013) as a landlord/tenant case. AOB at 10. In fact, it was a marital case where Machan had been arrested and then restrained from entering his home for 150 days while his wife and children remained. *Machan*, 322 P.3d 655 (Utah 2013) at 657. When the restraining order expired, Machan entered and barricaded himself inside with a rifle. *Id.* at 657-58. The Utah supreme court noted that "the proper focus of our inquiry" is not determined by ownership, but by a possessory or occupancy interest at the time of entry. *Id.* at 659. Utah code requires that a spouse's relinquishment of the marital homestead must be voluntary. *Id.* at 660. Courts consider, for example, whether the exit was voluntary, personal property was removed, keys were relinquished, a separate residence was established, and re-entry was surreptitious. *Id.* Here there was no evidence to suggest that Machan's ejection from his home had been voluntary. *Id.* at 660-61. "[I]t is generally a jury question whether the parties' actions give rise to an implied-in-fact contract transferring the sole right of possession to the spouse who remains in the home." *Id.* at 659.

In our own case, under the correct rule, the jury found the Defendant's presence was unlawful beyond a reasonable doubt.

2. There is sufficient evidence that the Defendant was not an occupant and did not have permission to enter or remain.

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992){ TA \l "*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)" \s "*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)" \c 1 }. “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* A{ TA \s "*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)" } reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004){ TA \l "*State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004)" \s "*State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004)" \c 1 }. After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979){ TA \l

"*Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)" \s "*Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)" \c 2 }; *State v. Salinas*, 119 Wn.2d at 201.

Both Mr. Brock and the Defendant Crull testified that Crull did not maintain occupancy of the premises.

The Defendant Crull had moved her property out of the house on two occasions. In February, she left without notice to Mr. Brock, taking her property with her. She moved into her SUV and moved hours away to Jefferson County. In April, she returned with a protection order for the express purpose of retrieving items and documents to facilitate her final exit and move to an apartment. In May, Mr. Brock discovered items "that I thought would mean a lot to her" and took them to a friend's house in Bremerton for her to pick up. RP (11/19/19) at 137. From an objective point of view, the Defendant no longer occupied the house.

From Mr. Brock's subjective point of view, he demonstrated that the Defendant no longer occupied the house by changing the locks, removing the Defendant's property, and moving his new fiancé into the home.

And the Defendant had the same subjective viewpoint. Although she knew the locks had been changed, she did not contact Mr. Brock to ask for a key. She refused to testify as to the names of her friends or their actions, demonstrating her awareness that this would incriminate them,

because their entry and removal of property had been unlawful. And she testified that she “gave up” her home and had no intent to regain occupancy of the house. RP (11/20/19) at 221, 253-54.

Under these facts, by every standard including her own choice and admission, the Defendant did not occupy the house on August 21, 2018.

In addition, both testified that the Defendant did not have Mr. Brock’s permission to enter. RP (11/19/19) at 150-51; RP (11/20/19) at 262-63.

Therefore, there is sufficient evidence from which a rational trier of fact could have found that the Defendant’s presence in the home was unlawful beyond a reasonable doubt.

B. The court correctly instructed the jury that the controlling question is one of occupancy, not title.

The Defendant maintains her objection to a jury instruction which she characterizes now as a misstatement of the law and a comment on the evidence. AOB at 13-16.

A person enters or remains unlawfully in or upon premises where he or she is not then licensed, invited or otherwise privileged to so enter or remain.

With a charge of burglary, the controlling question is one of occupancy or possession, rather than title or ownerships, at the time the offense was committed.

CP 37. In particular, she challenges the second sentence of the instruction.

The wording of jury instructions is within the trial court's discretion. *State v. O'Donnell*, 142 Wash.App. 314, 324, 174 P.3d 1205 (2007){ TA \l "State v. O'Donnell, 142 Wash.App. 314, 324, 174 P.3d 1205 (2007)" \s "State v. O'Donnell, 142 Wash.App. 314, 324, 174 P.3d 1205 (2007)" \c 1 }. "“Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.”” *State v. Rodriguez*, 121 Wn. App. 180, 184–85, 87 P.3d 1201 (2004){ TA \l "State v. Rodriguez, 121 Wn. App. 180, 184–85, 87 P.3d 1201 (2004)" \s "State v. Rodriguez, 121 Wn. App. 180, 184–85, 87 P.3d 1201 (2004)" \c 1 } (quoting *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000){ TA \l "State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000)" \s "State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000)" \c 1 }). “Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997){ TA \l "State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)" \s "State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)" \c 1 }.

1. The instruction was a correct statement of the law.

The Defendant continues to complain that the language of the instruction is “nonstandard,” i.e. not a verbatim recitation of a particular WPIC. AOB at 13, 15. No legal authority suggests that the correctness of a jury instruction is determined by how close it hews to the WPIC. As the Honorable Judge Hickman noted in his ruling, he had been reversed in the past for using a standard WPIC which was itself error. RP (11/20/19) at 272-73. *See e.g. State v. Richie*, 191 Wn. App. 916, 365 P.3d 770 (2015){ TA \l "State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015)" \s "State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015)" \c 1 } (standard WPIC held to be error), *overruled by State v. Nelson*, 191 Wn.2d 61, 419 P.3d 410 (2018){ TA \l "State v. Nelson, 191 Wn.2d 61, 419 P.3d 410 (2018)" \s "State v. Nelson, 191 Wn.2d 61, 419 P.3d 410 (2018)" \c 1 }; *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752, 758 (2000){ TA \l "State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752, 758 (2000)" \s "State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752, 758 (2000)" \c 1 } (standard WPIC held to be error).

As has been discussed at great length *supra*, the court’s instruction was a correct statement of the law.

2. The instruction allowed the Defendant to argue her theory of the case.

The Defendant argues that “her entire defense was premised on her ownership” of the residence. AOB at 13, 16 (“sole issue” was the legality of the entry). This is factually incorrect. She argued many defenses.

The Defendant testified and her counsel argued that she only took property that belonged to her and that had been purchased before the relationship ended. If Mr. Brock noticed other items missing, he had merely misplaced them or moved them into storage. RP (11/21/19) at 336-37. A burglary requires an intent to commit a crime therein (RCW 9A.52.025(1){ TA \1 "RCW 9A.52.025(1)" \s "RCW 9A.52.025(1)" \c 4 }). Retrieving your own property or spending time with your beloved pets is no crime. RP (11/21/19) at 339. Because the jury was not instructed on the lesser included offense of criminal trespass (CP 27-47), if the jury believed the Defendant, it would have acquitted her of all counts.

Insofar as the estranged partners disagreed over ownership of items, defense urged this was reasonable doubt in a criminal case and could only be resolved in a domestic court. RP (11/21/19) at 332, 337.

Counsel argued that if the Defendant’s friends took anything from this house, it would have been nothing more than a sandwich, and it would have been without the Defendant’s knowledge such that she would not have accomplice liability. RP (11/21/19) at 340.

Counsel argued that, in the absence of any express communication to the contrary, the Defendant reasonably believed she was welcome to enter in order to remove personal property. RP (11/21/19) at 335. This was not a criminal matter, counsel argued, but an abuse of the system where the prosecutor was “essentially prosecuting a civil case” on Mr. Brock’s behalf. *Id.* at 336.

Counsel argued that the property that was taken was worthless “junk,” i.e. no harm no foul. *Id.* at 336, 340. He appealed to the jury’s sympathies by arguing that Mr. Brock was living the high life after cruelly abandoning and replacing a life companion in her time of need, thereby inviting jury nullification. RP (11/21/19) at 333-35.

The court’s instruction did not prevent the Defendant from making all of these defenses.

The Defendant claims that the instruction directed a verdict. AOB at 16. In fact, the jury could have acquitted, if it had been persuaded that the evidence supported any of the theories argued by the defense.

Moreover, the Defendant does not have a right to an instruction that misstates the law or invites the jury to misperceive the law.

3. The instruction made no comment on the evidence.

The Defendant argues that if the law is other than she says it is, the judge’s instruction is a comment on the evidence. AOB at 16. This is

simply false. An improper judicial comment is one which charges a jury *with respect to matters of fact*. WASH. CONST. art. IV, §16{ TA \l "WASH. CONST. art. IV, §16" \s "Wash. Const. art. IV, §16" \c 3 }. Here the challenged instruction made no comment as to any fact. It left to the jury to decide whether the State had proved beyond a reasonable doubt that the Defendant entered or remained on premises where she was not licensed, invited or otherwise privileged to be.

C. The Defendant was not deprived of his right to a unanimous jury verdict where it has long been established that principal and accomplice liability are not alternative means of committing an offense.

The Defendant alleges that she was deprived of her right to a unanimous jury verdict, where the jury was instructed on accomplice liability. AOB at 17-31. The Defendant's claim fails on both the law and the facts.

1. Where accomplice liability is not an element to be charged or found, it is not an alternative means and does not implicate the right to a unanimous jury verdict.

The Defendant readily acknowledges that her claim is inconsistent with well-developed Washington law. AOB at 18. Most recently, the Washington supreme court repeated that "principal and accomplice liability

are not alternative means” of committing an offense. *State v. Walker*, 182 Wn.2d 463, 484, 341 P.3d 976, 988 (2015){ TA \l "*State v. Walker*, 182 Wn.2d 463, 484, 341 P.3d 976, 988 (2015)" \s "*State v. Walker*, 182 Wn.2d 463, 484, 341 P.3d 976, 988 (2015)" \c 1 } (citing *State v. Hoffman*, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991){ TA \l "*State v. Hoffman*, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991)" \s "*State v. Hoffman*, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991)" \c 1 }). The jury only needs to find unanimously that the defendant participated in the crime. *Walker*, 182 Wn.2d at 484. It need not conclude the manner of participation unanimously. *Id.*

Walker requested the court reconsider long-standing precedent under the theory that the Washington constitution is more protective than the federal constitution. The court answered:

A Gunwall analysis is appropriate where the contours of the Washington Constitution are not fully developed, but on this issue our precedent is clear, and Walker’s cursory Gunwall analysis is insufficient to show it should be disavowed. No 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 felony accomplice case, and we decline to do so without sufficient analysis.

State v. Walker, 182 Wn.2d 463, 484{ TA \s "*State v. Walker*, 182 Wn.2d 463, 484, 341 P.3d 976, 988 (2015)" }–85, 341 P.3d 976, 988 (2015) (emphasis added).

The Defendant misinterprets this as an invitation to raise the issue anew. In fact, the issue has been decided under section 22. *State v. Hoffman*, 116 Wn.2d 51, 126, 804 P.2d 577, 605 (1991){ TA \s "State v. Hoffman, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991)" }.

The jury right can be found in two sections of the Washington constitution. WASH. CONST. art. I, §§ 21-22{ TA \l "WASH. CONST. art. I, §§ 21-22" \s "Wash. Const. art. I, §§ 21-22" \c 3 }. Section 21 provides an inviolate right to a jury trial, although fewer than 12 jurors are required in civil cases or before “courts not of record.” Section 22 provides a right to a “speedy public trial by an impartial jury of the county in which the offense is charged to have been committed” in “criminal prosecutions.” Unanimity is not mentioned in either section. In other words, the sections are not materially different in regard to the right to a unanimous verdict. The civil right to a jury will not be more protective than the criminal right. If the matter has been decided under the criminal section 22, then it has been decided for this Defendant.

Walker{ TA \s "State v. Walker, 182 Wn.2d 463, 484, 341 P.3d 976, 988 (2015)" } relied upon *State v. Hoffman*, 116{ TA \s "State v. Hoffman, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991)" } Wn.2d 51, 103–04, 804 P.2d 577, 605 (1991). *Walker*, 182 Wn.2d at 483-84. *Hoffman* considered

whether it was appropriate to formulate a separate constitutional rule on this topic.

This court has also held under Washington Const. art. 1, § 22 (amend. 10){ TA \l "Washington Const. art. 1, § 22 (amend. 10)" \s "Washington Const. art. 1, § 22 (amend. 10)" \c 3 } that the state jury right extends only to issues of fact which determine guilt or innocence. *State v. Price*, 59 Wash.2d 788, 370 P.2d 979 (1962){ TA \l "*State v. Price*, 59 Wash.2d 788, 370 P.2d 979 (1962)" \s "*State v. Price*, 59 Wash.2d 788, 370 P.2d 979 (1962)" \c 1 }. Even if this court were inclined to do so, this is not a proper case in which to formulate a separate state constitutional rule. *See State v. Gunwall*, 106 Wash.2d 54, 61–62, 720 P.2d 808, 76 A.L.R.4th 517 (1986){ TA \l "*State v. Gunwall*, 106 Wash.2d 54, 61–62, 720 P.2d 808, 76 A.L.R.4th 517 (1986)" \s "*State v. Gunwall*, 106 Wash.2d 54, 61–62, 720 P.2d 808, 76 A.L.R.4th 517 (1986)" \c 1 }. The jury instructions at issue here, thus, did not violate Hoffman or McGinnis' constitutional rights.

Hoffman, 116 Wn.2d at 126. In arriving at its decision, the court noted that “Accomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, regardless of the degree of the participation.” *Id.* at 104. Therefore, whether one acts as a principal or accomplice does not affect the question of guilt or innocence. Liability is the same.

We addressed this issue in *State v. Carothers*, 84 Wash.2d 256, 525 P.2d 731 (1974){ TA \l "*State v. Carothers*, 84 Wash.2d 256, 525 P.2d 731 (1974)" \s "*State v. Carothers*, 84 Wash.2d 256, 525 P.2d 731 (1974)" \c 1 } and concluded that it is not necessary that jurors be unanimous as to the manner of an accomplice's and a principal's participation as long as all agree that they did participate in the crime. ...

This court reaffirmed that viewpoint in *State v. Davis*, 101 Wash.2d 654, 658, 682 P.2d 883 (1984){ TA \l "*State v. Davis*, 101 Wash.2d 654, 658, 682 P.2d 883 (1984)" \s "*State v. Davis*, 101 Wash.2d 654, 658, 682 P.2d 883 (1984)" \c 1 }. The jury in this case need not have decided whether it was Hoffman or McGinnis who actually shot and killed Officer Millard so long as both participated in the crime. The accomplice instructions were not erroneous.

Hoffman{ TA \s "*State v. Hoffman*, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991)" }, 116 Wn.2d at 104-05.

In *State v. Carothers*{ TA \s "*State v. Carothers*, 84 Wash.2d 256, 525 P.2d 731 (1974)" }, 84 Wn.2d 256, 263, 525 P.2d 731 (1974), the court noted that a charging information need not elect whether the defendant acted as a principal or an accomplice, because this is not an element of the crime. Complicity is not an alternate means of committing the crime. *Id.*

The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. The elements of the crime remain the same.

In this case, it was necessary for the state to prove that the alleged crimes were committed-that is, that the victims were shot with premeditated design and/or in the perpetration of a robbery. It further was necessary for it to prove that the petitioner had participated in one or more of the crimes charged. The jury by its verdict found that he had participated in all of them.

Carothers, 84 Wn.2d at 264, *disapproved of on other grounds by State v.*

Harris, 102 Wn.2d 148, 685 P.2d 584 (1984).

For all intents and purposes, this question has long been decided.

2. A renewed *Gunwall* analysis does not endorse a departure from long-standing precedent.

When determining whether a provision in the Washington constitution provides greater protection than its federal counterpart, the court considers:

(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

State v. Gunwall, 106 Wash.2d 54, 61–62, 720 P.2d 808, 76 A.L.R.4th 517 (1986). This analysis ensures that the decision is based on well founded legal reasons and not a mere substitution of the court’s own notion of justice over the Legislature or the United States Supreme Court. *Gunwall*, 106 Wn.2d at 62–63.

As the Defendant notes, the courts have previously considered whether the right to a jury trial is afforded greater protection under the state constitution. AOB at 19. Therefore, much of the analysis was performed decades ago.

The text: In a previous analysis, the Washington supreme court commented that the Sixth Amendment and article I, § 22 and article I, § 3

22" \c 3 } “are comparable.” *State v. Schaaf*, 109 Wn.2d 1, 13, 743 P.2d 240, 246 (1987){ TA \l "*State v. Schaaf*, 109 Wn.2d 1, 13, 743 P.2d 240, 246 (1987)" \s "*State v. Schaaf*, 109 Wn.2d 1, 13, 743 P.2d 240, 246 (1987)" \c 1 } (holding juveniles do not have a right to a jury trial). However, the ways in which they are different suggests there are greater protections under the federal constitution. The federal constitution provides for jury trials for “all crimes and “in all criminal prosecutions.” U.S. CONST. art. III, § 2{ TA \l "U.S. CONST. art. III, § 2" \s "U.S. Const. art. III, § 2" \c 3 }; U.S. CONST. amend. VI{ TA \l "U.S. CONST. amend. VI" \s "U.S. Const. amend. VI" \c 3 }. The word “all” does not appear in the state counterparts. Section 22 provides for jury trials in “criminal prosecutions.” And Section 21 permits the Legislature to restrict the number of jurors in courts of limited jurisdiction.

The Defendant urges that “inviolate” language in Section 21 suggests greater protections. AOB at 19, (citing *Schaaf*{ TA \s "*State v. Schaaf*, 109 Wn.2d 1, 13, 743 P.2d 240, 246 (1987)" }, 109 Wn.2d at 13). But the same section also directs that the Legislature may provide “for waiving of the jury” with consent of interested parties. Wash. Const. art. I, § 21{ TA \l "Wash. Const. art. I, § 21" \s "Wash. Const. art. I, § 21" \c 3 }. It is well-established that the right is waivable. *State v. Dillon*, 142 Wn. App. 269, 275, 174 P.3d 1201, 1203 (2007){ TA \l "*State v. Dillon*, 142 Wn.

App. 269, 275, 174 P.3d 1201, 1203 (2007)" \s "State v. Dillon, 142 Wn. App. 269, 275, 174 P.3d 1201, 1203 (2007)" \c 1 }.

The history: The Defendant falsely asserts that the law which existed at the drafting of the constitution required the jury to determine whether the defendant was guilty as a principal or as an accomplice. AOB at 20. She does this by misrepresenting the holdings in a variety of cases.

In *Standefer v. United States*, 447 U.S. 10, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980){ TA \l "*Standefer v. United States*, 447 U.S. 10, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980)" \s "Standefer v. United States, 447 U.S. 10, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980)" \c 2 }, the court held that an accomplice's conviction may stand although the principal be acquitted. *Accord State v. Nikolich*, 137 Wash. 62, 241 P. 664 (1925){ TA \l "*Accord State v. Nikolich*, 137 Wash. 62, 241 P. 664 (1925)" \s "Accord State v. Nikolich, 137 Wash. 62, 241 P. 664 (1925)" \c 1 }. *Standefer* does not speak to the practice in Washington territory. It observed that federal statutes in 1909 broke with common law and determined that there was no distinction between a principal and an accomplice.

Washington broke with common law fifty years earlier.

No distinction shall exist between an accessory before the fact, and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly council the act constituting the offense, or council, aid and abet in its

commission, though not present, shall hereafter be indicted, tried and punished as principals.

Laws of 1854, §125{ TA \l "Laws of 1854, §125" \s "Laws of 1854, §125" \c 4 }, page 98.

State v. Gifford, 19 Wash. 464, 53 P. 709 (1898){ TA \l "*State v. Gifford*, 19 Wash. 464, 53 P. 709 (1898)" \s "*State v. Gifford*, 19 Wash. 464, 53 P. 709 (1898)" \c 1 } regards the due process right to *notice* of the allegation against a person. There the defendant believed he was being tried for rape, only to find out for the first time at trial that the accusation was actually the promotion of prostitution. The case does not suggest that the theory of liability is an element which must be charged in the information or determined by a jury verdict. It only regards the accused's due process right to notice of the State's theory of liability.

State v. Morgan, 21 Wash. 355, 58 P. 215 (1899){ TA \l "*State v. Morgan*, 21 Wash. 355, 58 P. 215 (1899)" \s "*State v. Morgan*, 21 Wash. 355, 58 P. 215 (1899)" \c 1 } regards an error of law in the jury instruction. Morgan had been charged with burglary, but “under the instruction of the court, [Morgan] could be convicted of breaking and entering a house if he was in some way implicated or had some connection with those who did break into and enter the house.” *Morgan*, 21 Wash. at 356. Morgan had

traveled with the men and shared a room with one of them. This was insufficient to make him an accomplice to a burglary.

In *State v. Nikolich*{ TA \s "Accord *State v. Nikolich*, 137 Wash. 62, 241 P. 664 (1925)" }, the court found there was insufficient evidence that what the defendants aided and abetted was a crime. *Nikolich*, 137 Wash. 62, 66–67 (an accessory “may not be convicted in the absence of proof that the one to whom he is charged as accessory actually committed the crime”).

None of these cases suggest that complicity is an element of the crime to be charged in the information and found by a jury.

The Washington constitution preserved the jury trial right “as it existed at common law *in the territory* at the time of its adoption.” *City of Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982){ TA \l "*City of Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982)" \s "*City of Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982)" \c 1 } (emphasis added). The Washington law in existence at the time of the drafting equated accomplice liability with principal liability – just as the current law does. *Compare* Laws of 1854, §125{ TA \s "Laws of 1854, §125" }, page 98 *with* RCW 9A.08.020(3){ TA \l "RCW 9A.08.020(3)" \s "RCW 9A.08.020(3)" \c 4 }. Because principals and accomplices were treated the same, there was no reason to elevate this theory to the level of an element.

The fact of the matter is that Washington courts have never interpreted accomplice liability to be an element which must be charged or proven. *See e.g. Hoffman*{ TA \s "State v. Hoffman, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991)" }, 116 Wn.2d at 104-05; *Carothers*{ TA \s "State v. Carothers, 84 Wash.2d 256, 525 P.2d 731 (1974)" }, 84 Wn.2d at 264. And the courts have never interpreted accomplice liability to provide an alternative means of committing an offense. *Id.*

The Defendant's unhelpfully collapses accessory law into accomplice law. *See* AOB at 25 (misrepresenting that Walker, who premeditated and commanded the murder, only assisted as a common law accessory). This is error and misdirection. While federal law continues to include aiding and abetting as an act punishable as a principal, *see* 17 USC § 2{ TA \l "17 USC § 2" \s "17 USC § 2" \c 4 }, current Washington law does not. Accomplice liability (RCW 9A.08.020(3){ TA \s "RCW 9A.08.020(3)" }) is defined and punished differently from the mere rendering of criminal assistance (RCW 9A.76.050{ TA \l "RCW 9A.76.050" \s "RCW 9A.76.050" \c 4 }). The latter results in a reduction of the class of offense. *See* RCW 9A.76.070{ TA \l "RCW 9A.76.070" \s "RCW 9A.76.070" \c 4 }; RCW 9A.76.080{ TA \l "RCW 9A.76.080" \s "RCW 9A.76.080" \c 4 }; RCW 9A.76.090{ TA \l "RCW 9A.76.090" \s

"RCW 9A.76.090" \c 4 }. Crull was not charged with rendering criminal assistance. Our discussion should be limited to complicity.

The structure: The Defendant argues that “until recently” the federal constitution did not guarantee a right to a unanimous jury verdict. AOB at 26 (citing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396, 206 L. Ed. 2d 583 (2020){ TA \l "*Ramos v. Louisiana*, 140 S. Ct. 1390, 1396, 206 L. Ed. 2d 583 (2020)" \s "*Ramos v. Louisiana*, 140 S. Ct. 1390, 1396, 206 L. Ed. 2d 583 (2020)" \c 1 }). This is the opposite of what the majority stated. By the time that James Madison drafted and the States ratified the Sixth Amendment{ TA \s "*Sixth Amendment*" } in 1791, unanimous jury verdicts had been required for about 400 years. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396, 206 L. Ed. 2d 583 (2020).

Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a “constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.” A few decades later, the Court elaborated that the Sixth Amendment affords a right to “a trial by jury as understood and applied at common law, ... includ[ing] all the essential elements as they were recognized in this country and England when the Constitution was adopted.” And, the Court observed, this includes a requirement “that the verdict should be unanimous.” In all, this Court has commented on the Sixth Amendment’s unanimity requirement no fewer than 13 times over more than 120 years.

Ramos } TA \s "Ramos v. Louisiana, 140 S. Ct. 1390, 1396, 206 L. Ed. 2d 583 (2020)" }, 140 S. Ct. at 1396–97. There was no question that the Sixth Amendment right to a unanimous jury verdict applied equally to state and federal trial. *Ramos*, 140 S. Ct. at 1397. The plurality decision in *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972){ TA \l "Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972)" \s "Apodaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972)" \c 2 } was simply an anomalous detour. *Id.*

Local concerns: There is nothing particular to Washington which would suggest a reason to treat accomplice liability as an element to be found by a jury beyond a reasonable doubt.

Rationale behind jury requirement: The due process clause requires that all elements of an offense must be charged in the information and proven to a jury beyond reasonable doubt. *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970){ TA \l "In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970)" \s "In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970)" \c 2 }. When a sentencing fact (other than criminal history) increases the penalty, then it is “like” an element and must also be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct.

2348, 2362, 147 L. Ed. 2d 435 (2000)} TA \l "*Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362, 147 L. Ed. 2d 435 (2000)" \s "*Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362, 147 L. Ed. 2d 435 (2000)" \c 2 }.

The Defendant urges that the state's theory of liability must be proven to a jury. Like motive, accomplice liability is a part of the state's theory of the case and persuasive to a jury. It is human nature to desire to know the why and how, not just the what. But neither motive nor accomplice liability are elements of the offense or facts which increase the sentence. Therefore, the jury is not required to "find" them at all, much less unanimously.

The Washington supreme court has discussed this question in cases where the penalty was far more serious than it is here. *Walker*{ TA \s "*State v. Walker*, 182 Wn.2d 463, 484, 341 P.3d 976, 988 (2015)" } and *Carothers* were first-degree murder cases. *Hoffman*{ TA \s "*State v. Hoffman*, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991)" }{ TA \s "*State v. Hoffman*, 116 Wn.2d 51, 104-05, 804 P.2d 577 (1991)" } was an aggravated murder case. These are cases which demand the courts' attention. Here the only penalty imposed was that the Defendant Crull continue the mental health treatment which she has been receiving for almost the entirety of her life. This case does not raise any new concerns of public interest. *Compare* AOB at 19-28

with Petitioner's Supplemental Brief at 33-42, *State v. Walker*, 182 Wn.2d 463, 341 P.3d 976 (2015) (No. 89830-8){ TA \s "State v. Walker, 182 Wn.2d 463, 484, 341 P.3d 976, 988 (2015)" }} TA \s "State v. Walker, 182 Wn.2d 463, 484, 341 P.3d 976, 988 (2015)" }.¹

The Defendant offers no convincing or satisfying reason to depart from precedent, particularly under the facts of this case.

3. The Defendant received a unanimous jury verdict under the court's instructions, the jury poll, and the sufficient evidence in the record that she acted both as a principal and an accomplice.

If a crime can be committed in more than one way, there must be sufficient evidence of each alternative means. *State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87, 90 (2015){ TA \l "*State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87, 90 (2015)" \s "State v. Sandholm, 184 Wn.2d 726, 732, 364 P.3d 87, 90 (2015)" \c 1 }. Instructions on unanimity and the jury poll at verdict also establish a unanimous verdict. *State v. Carothers*{ TA \s "State v. Carothers, 84 Wash.2d 256, 525 P.2d 731 (1974)" }} TA \s "State v. Carothers, 84 Wash.2d 256, 525 P.2d 731 (1974)" }, 84 Wn.2d 256, 264, 525 P.2d 731 (1974).

The jury was instructed that it must reach a unanimous verdict. CP 44. The jury was polled on its verdict. RP (11/21/19) at 360. And there

¹ <http://www.courts.wa.gov/content/Briefs/A08/89830-8%20Petitioner's%20Supplemental%20Brief.pdf>

was sufficient evidence for the jury's unanimous verdict to have been based on both liability as a principal and as an accomplice.

The Defendant Crull drove three hours to her ex-boyfriend's residence. She knew his habit of leaving the back door open for the dogs to use the fenced yard. She was captured on videotape as her group entered in this manner. She admitted taking property. The videotape captures the property being placed in her SUV. She acted as a principal when she entered and removed property.

Others are also captured on videotape entering the home and walking back to the SUV with items. They would have done so, because she drove them there and showed them how to enter. They placed the property in her SUV for her benefit. She acted as an accomplice in assisting others to act on her behalf.

The jury's verdict was unanimous.

D. The Defendant's conviction does not implicate the First Amendment where the validity of the accomplice liability is well-established law and where the State did not allege that the Defendant committed a criminal offense through speech of any kind.

The Defendant argues that the accomplice liability statute is overbroad and criminalizes constitutionally protected speech. AOB at 32-41. The accomplice liability statute reads:

(3) A person is an accomplice of another person in the commission of a crime if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) Aids or agrees to aid such other person in planning or committing it; or
- (b) His or her conduct is expressly declared by law to establish his or her complicity.

RCW 9A.08.020(3){ TA \s "RCW 9A.08.020(3)" }.

The State may proscribe speech which actually incites or produces or is likely to incite or produce imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969){ TA \l "*Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969)" \s "Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969)" \c 2 }. This Court fairly recently noted that challenges to the statute on this basis:

have been rejected in *State v. Coleman*, 155 Wash.App. 951, 960–61, 231 P.3d 212 (2010){ TA \l "*State v. Coleman*, 155 Wash.App. 951, 960–61, 231 P.3d 212 (2010)" \s "State v. Coleman, 155 Wash.App. 951, 960–61, 231 P.3d 212 (2010)" \c 1 }, *State v. Ferguson*, 164 Wash.App. 370, 375-76, 264 P.3d 575 (2011){ TA \l "*State v. Ferguson*, 164 Wash.App. 370, 375-76, 264 P.3d 575 (2011)" \s "State v. Ferguson, 164 Wash.App. 370, 375-76, 264 P.3d 575 (2011)" \c 1 }, and *State v. Holcomb*, 180 Wash.App. 583, 589, 321 P.3d 1288, *review denied*, 180 Wash.2d 1029, 331 P.3d 1172 (2014){ TA \l "*State v. Holcomb*, 180 Wash.App. 583, 589, 321 P.3d 1288, *review denied*, 180 Wash.2d 1029, 331 P.3d 1172 (2014)" \s "State v. Holcomb, 180 Wash.App. 583, 589, 321 P.3d 1288, *review denied*, 180 Wash.2d 1029, 331 P.3d 1172 (2014)" \c 1 }.

State v. McPherson, 186 Wn. App. 114, 119–20, 344 P.3d 1283, 1285–86 (2015){ TA \l "*State v. McPherson*, 186 Wn. App. 114, 119–20, 344 P.3d 1283, 1285–86 (2015)" \s "*State v. McPherson*, 186 Wn. App. 114, 119–20, 344 P.3d 1283, 1285–86 (2015)" \c 1 }.

The Defendant argues that the trial court should have instructed the jury that her words were protected unless both her intent and the tendency of her words were to produce or incite an imminent lawless act. AOB at 35 (citing *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985){ TA \l "*United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985)" \s "*United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985)" \c 2 }). In *Freeman*, the issue was the court's refusal to instruct the jury on a First Amendment{ TA \l "First Amendment" \s "First Amendment" \c 3 } defense. But Defendant Crull made no such request and no such defense.

This is not surprising. A jury instruction must address the facts of the particular case. The State did not put into evidence that the Defendant committed the crime by any speech. The evidence of the Defendant's complicity is that she knew about the residence. She knew how to get there. She drove her own vehicle there. She and her friends entered together. They removed property together, placing the items in her truck to benefit her. And they left together. There is no speech at issue in this case. In the

absence of any identified speech, such an instruction would be inappropriate, confusing, and unhelpful.

Moreover, even if there had been evidence of speech, the Defendant and her friends committed the crimes together. “[T]here will be some instances where speech is so close in time and substance to ultimate criminal conduct that no free speech defense is appropriate.” *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985) } TA \l "*United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985)" \s "*United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985)" \c 2 }.

The Defendant claims that *Brandenburg* } TA \s "*Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969)" } mandates that any statute prohibiting speech must include a *mens rea* of intent, and that the knowledge *mens rea* in RCW 9A.08.020(3) } TA \s "*RCW 9A.08.020(3)*" } is insufficient. AOB at 39. This is a misreading of the case, 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.

The Defendant’s conviction under the statute does not implicate the First{ TA \s "First Amendment" } Amendment.

V. CONCLUSION

Based on the foregoing, the State respectfully requests this Court affirm the Defendant's convictions.

RESPECTFULLY SUBMITTED this 14th day of July, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ TERESA CHEN
Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762
Pierce County Prosecutor's Office
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
Telephone: (253) 798-7400
Fax: (253) 798-6636
teresa.chen@piercecountywa.gov

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7-14-20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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