

FILED  
June 4, 2012  
Court of Appeals  
Division III  
State of Washington

No. 29710-1-III  
COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,  
Respondent,  
vs.  
**Joel Condon,**  
Appellant.

---

Yakima County Superior Court Cause No. 09-1-00544-9  
The Honorable Judge David A. Elofson

**Appellant's Reply Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... ii**

**TABLE OF AUTHORITIES ..... iii**

**ARGUMENT..... 1**

**I. The evidence was insufficient to prove premeditation. . 1**

**II. The trial judge should have instructed on second-degree intentional murder. .... 2**

**III. The trial court admitted identification testimony based on an unduly suggestive procedure. .... 5**

**IV. The trial court infringed Mr. Condon’s right to present a defense. .... 8**

**V. The prosecutor committed misconduct requiring reversal. .... 11**

**VI. Mr. Condon was deprived of the effective assistance of counsel. .... 12**

**VII. The accomplice liability statute unconstitutionally criminalizes protected speech. .... 14**

**VIII. The sentencing court failed to properly determine Mr. Condon’s criminal history and offender score. .... 17**

**CONCLUSION ..... 17**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Brandenburg v. Ohio</i> , 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).....	15, 17
<i>Foster v. California</i> , 394 U.S. 440, 443, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).....	6
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).....	8, 10
<i>Neil v. Biggers</i> , 409 U.S. 188, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972) .	5, 6, 7
<i>Perry v. New Hampshire</i> , ___ U.S. ___, 132 S.Ct. 716, 721, 181 L.Ed.2d 694 (2012).....	6, 10
<i>Sheppard v. Maxwell</i> , 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).....	12
<i>Simmons v. United States</i> , 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968).....	5
<i>Smalis v. Pennsylvania</i> , 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).....	2
<i>Turner v. Louisiana</i> , 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965) .....	12

### WASHINGTON STATE CASES

<i>City of Bellevue v. Lorang</i> , 140 Wash.2d 19, 992 P.2d 496 (2000) .	7, 8, 14
<i>City of Seattle v. Webster</i> , 115 Wash.2d 635, 802 P.2d 1333 (1990), <i>cert. denied</i> , 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991) .....	14
<i>In re Pullman</i> , 167 Wash.2d 205, 218 P.3d 913 (2009) .....	7
<i>Miller v. Likins</i> , 109 Wash.App. 140, 34 P.3d 835 (2001) .....	9

<i>Philippides v. Bernard</i> , 151 Wash.2d 376, 88 P.3d 939 (2004) .....	9
<i>Salas v. Hi-Tech Erectors</i> , 168 Wash.2d 664, 230 P.3d 583 (2010) .....	8
<i>State v. Bingham</i> , 105 Wash.2d 820, 719 P.2d 109 (1986) .....	1
<i>State v. Burke</i> , 163 Wash.2d 204, 181 P.3d 1 (2008) .....	7, 8
<i>State v. Cheatam</i> , 150 Wash.2d 626, 81 P.3d 830 (2003) .....	9
<i>State v. Coleman</i> , 155 Wash.App. 951, 231 P.3d 212 (2010), <i>review denied</i> , 170 Wash.2d 1016, 245 P.3d 772 (2011).....	16
<i>State v. Ferguson</i> , 164 Wash.App. 370, 264 P.3d 575 (2011).....	16
<i>State v. Fernandez-Medina</i> , 141 Wash.2d 448, 6 P.3d 1150 (2000) .....	4
<i>State v. Gentry</i> , 125 Wash.2d 570, 888 P.2d 1105 (1995).....	1
<i>State v. Gonzales</i> , 111 Wash.App. 276, 45 P.3d 205 (2002) .....	11
<i>State v. Grier</i> , 171 Wash.2d 17, 246 P.3d 1260 (2011).....	3
<i>State v. Lord</i> , 161 Wash.2d 276, 165 P.3d 1251 (2007).....	8
<i>State v. Makela</i> , 66 Wash.App. 164, 831 P.2d 1109 (1992).....	13
<i>State v. McDonald</i> , 40 Wash. App. 743, 700 P.2d 327 (1985).....	5
<i>State v. Myers</i> , 133 Wash.2d 26, 941 P.2d 1102 (1997) .....	13
<i>State v. Parker</i> , 102 Wash.2d 161, 683 P.2d 189 (1984).....	3, 4
<i>State v. Redmond</i> , 150 Wash.2d 489, 78 P.3d 1001 (2003).....	13
<i>State v. Saunders</i> , 91 Wash.App. 575, 958 P.2d 364 (1998).....	12, 14
<i>State v. Schaffer</i> , 135 Wash.2d 355, 957 P.2d 214 (1998) .....	3, 5
<i>State v. Thomas</i> , 150 Wash.2d 821, 83 P.3d 970 (2004) .....	13
<i>State v. Thorgerson</i> , 172 Wash.2d 438, 258 P.3d 43 (2011) .....	11, 12
<i>State v. Toth</i> , 152 Wash. App. 610, 217 P.3d 377 (2009).....	7, 12

<i>State v. Vickers</i> , 148 Wash.2d 91, 59 P.3d 58 (2002).....	5, 6
<i>State v. Workman</i> , 90 Wash.2d 443, 584 P.2d 382 (1978) .....	3

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. I.....	14
U.S. Const. Amend. XIV .....	10, 12

**WASHINGTON STATUTES**

RCW 10.61.003 .....	3
RCW 10.61.010 .....	3
RCW 9A.08.020.....	15

**OTHER AUTHORITIES**

ER 402 .....	13
ER 403 .....	13
ER 404 .....	13
ER 702 .....	9
ER 801 .....	13
WPIC 10.51.....	15, 16
<a href="http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php">www.innocenceproject.org/understand/Eyewitness-Misidentification.php</a> .....	11

## ARGUMENT

### **I. THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION.**

Premeditation may not be proved by circumstantial evidence unless “the inferences drawn by the jury are reasonable and the evidence supporting the jury’s finding is substantial.” *State v. Gentry*, 125 Wash.2d 570, 599, 888 P.2d 1105 (1995); *see also State v. Bingham*, 105 Wash.2d 820, 828, 719 P.2d 109 (1986). Here, the circumstantial evidence—even when taken in a light most favorable to the state—was insufficient to prove that Mr. Condon premeditated intent to kill Ramirez.

Mr. Condon’s stated intent was to commit robbery. RP 792. He didn’t know Ramirez, and had no prior motive to kill him. RP 1123. He didn’t shoot until Ramirez tried to take the pistol from him (or started choking Lozano, according to Lozano’s testimony). RP 745, 796-797. Neither of his two shots were designed to kill Ramirez: one went through both thighs; the other hit Ramirez’s elbow before nicking his aorta. RP 746, 775-781. Ramirez did not immediately expire; despite this, Mr. Condon made no effort to “finish him off.” RP 640, 744-747. Mr. Condon (allegedly) told a jailhouse informant that he’d “screwed up on a home invasion,” but he never made any statements indicating a premeditated intent to kill. Instead, he (allegedly) implied that he could easily have shot Lozano by accident during the incident. RP 1001-1002, 1004.

When taken in a light most favorable to the prosecution, the evidence suggests that Mr. Condon did not deliberate after forming an intent to kill Ramirez. Instead, the evidence suggests that he shot Ramirez in reaction to unfolding events. Respondent apparently does not dispute this: “when things began to fall apart... it was Condon who elected to use his weapon...” Brief of Respondent, p. 10. Nor does Respondent identify any evidence in the record that establishes a premeditated shooting rather than an unpremeditated reaction to unfolding events. Instead, without citation to the record, Respondent contends that Mr. Condon “was ready to use [the gun], not only with which [sic] to steal drugs and/or cash, but also to kill.” Brief of Respondent, p. 10.

All of the evidence—even when taken in a light most favorable to the state—shows only that Mr. Condon shot Ramirez in reaction to the latter’s resistance. It does not show a premeditated plan to kill Ramirez or anyone else.

The evidence was insufficient to prove premeditation. Accordingly, Mr. Condon’s conviction for premeditated murder 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).

**II. THE TRIAL JUDGE SHOULD HAVE INSTRUCTED ON SECOND-DEGREE INTENTIONAL MURDER.**

A trial court must instruct on all applicable inferior-degree offenses requested by an accused person. *State v. Parker*, 102 Wash.2d 161, 163-164, 683

P.2d 189 (1984); RCW 10.61.003; RCW 10.61.010. Failure to do so requires reversal. *Parker*, at 164. Where the prosecution files alternative charges, the court must consider each alternative separately: if an instruction is required under one alternative, it must be given, even if it does not apply to the other alternative. The evidence need not exclude commission of the second alternative. *State v. Schaffer*, 135 Wash.2d 355, 358-359, 957 P.2d 214 (1998); *State v. Grier*, 171 Wash.2d 17, 42, 246 P.3d 1260 (2011).

Here, Mr. Condon was charged with premeditated first-degree murder.<sup>1</sup> CP 301-303. He asked the court to instruct the jury on second-degree intentional murder, which Respondent concedes is an inferior degree offense under the legal prong of the *Workman* test. Brief of Respondent, p. 12, citing *State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978). The sole issue on appeal, therefore, is whether the facts—when taken in a light most favorable to Mr. Condon—provided “even the slightest evidence” that Mr. Condon committed only second-degree murder. *Parker*, at 163-164.

The evidence, when taken in a light most favorable to Mr. Condon, provided at least “the slightest evidence” that he committed only second-degree murder. *Id.* Jurors heard that Mr. Condon entered the Ramirez home armed with a gun, that Ramirez either attempted to take the gun from him or wrestled with Lozano, and that Mr. Condon shot Ramirez twice and killed him. The two shots

were fired in rapid succession. When taken in a light most favorable to Mr. Condon, these facts suggest that he shot Ramirez, intending to kill him, in reaction to unfolding events (as outlined in the preceding section). Thus, there is at least “the slightest evidence” that he committed only second-degree murder. *Parker*, at 163-164.

Instead of examining the evidence in a light most favorable to Mr. Condon as proponent of the instruction, Respondent erroneously focuses on the defense theory of the case. Brief of Respondent, p. 15 (“The defense theory was simply that the State had not proven its case against him.”) Such an approach is prohibited under *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000). The trial court is required to apply the favorable standard to “all of the evidence that is presented at trial.” *Id.* If supported by the evidence, the requested instructions must be given, even when inconsistent with the defense theory at trial. *Id.*, at 456-462.

Mr. Condon’s argument to the jury—that the state hadn’t established the identity of the shooter—is irrelevant to the analysis. *Id.* Instead, the only question to be answered is whether the evidence, when taken in a light most favorable to the instruction’s proponent, provides “the slightest evidence” that only the inferior degree offense was committed. *Parker*, at 163-164.

---

<sup>1</sup> He was also charged in the alternative with first-degree felony murder. CP 302-303.

Likewise irrelevant is the felony murder charge. *See* Brief of Respondent, p. 16. A court considering inferior-degree instructions for one of two crimes charged in the alternative should not consider whether the evidence supports or disproves the second alternative; instead, the two alternatives are to be evaluated independently. *Schaffer, supra*. By charging premeditated murder as one of two alternative charges, the prosecution elected to risk the possibility that jurors would convict only of second-degree intentional murder, even if the evidence also established guilt on the alternative charge of first-degree felony murder. *Id.*

**III. THE TRIAL COURT ADMITTED IDENTIFICATION TESTIMONY BASED ON AN UNDULY SUGGESTIVE PROCEDURE.**

Due process generally prohibits admission of identification testimony if it is tainted by an impermissibly suggestive procedure. *Simmons v. United States*, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968); *State v. McDonald*, 40 Wash. App. 743, 700 P.2d 327 (1985). To overcome the presumption of inadmissibility, the prosecution must establish that the procedure did not create a substantial likelihood of irreparable misidentification. *State v. Vickers*, 148 Wash.2d 91, 118, 59 P.3d 58 (2002). The trial court must examine five factors in evaluating the totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188, 199-200, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972).

In this case, before Ms. Gregorio was asked to view a lineup, she attended two of Mr. Condon's court hearings, she knew he'd been charged with murdering

her husband, and she may also have seen him identified as the shooter on television.<sup>2</sup> RP 20, 756-757. The suggestive nature of this identification procedure “made it all but inevitable” that she would identify Mr. Condon. *Foster v. California*, 394 U.S. 440, 443, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). Despite this, the trial judge failed to analyze the *Biggers* factors. RP 734-750.

Somewhat irrelevantly, Respondent focuses on the conduct of the lineup itself, rather than its timing in relation to Mr. Condon’s arrest and his first court hearings. Brief of Respondent, p. 17 (“[T]here was nothing about the lineup itself which demonstrate [sic] that it was an impermissibly suggestive procedure.”) Mr. Condon’s argument on appeal focuses on the timing of the procedure, not its mechanics. By holding a lineup after Mr. Condon had been arrested, after he’d been identified to Ms. Gregorio as the shooter, and after he’d been charged with Ramirez’s murder, the police guaranteed a positive identification. In other words, the procedure created a substantial likelihood of irreparable misidentification.<sup>3</sup> *Vickers*, at 118.

---

<sup>2</sup> Without citation to the record, Respondent claims that Ms. Gregorio “denied seeing any television coverage of Mr. Condon’s arrest, before the lineup...” Brief of Respondent, p. 17. This is misleading; Ms. Gregorio did not deny having seen other coverage between March 19<sup>th</sup> (the arrest date) and April 3<sup>rd</sup> (the lineup date). In fact, she admitted that she’d been following the news. RP 756. Furthermore, Mr. Condon’s March 20<sup>th</sup> preliminary appearance was apparently televised on that date. RP (3/31/09) 9-10.

<sup>3</sup> This is not a case in which the identification procedure was conducted without state action. In such cases, the court need not analyze the procedure to determine if it was impermissibly suggestive; instead, due process is safeguarded through cross examination and other protections afforded at trial. *Perry v. New Hampshire*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S.Ct. 716, 721, 181 L.Ed.2d 694 (2012).

Respondent also neglects to address the *Biggers* factors. Brief of Respondent, pp. 16-18. Respondent's silence on this point may be treated as a concession. See *In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). As pointed out in the Opening Brief, the totality of the circumstances weighed in favor of exclusion of the evidence. Opening Brief (Corrected Copy), pp. 24-28.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wash. App. 610, 614-15, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

Without reference to this standard, Respondent points out that Ms. Gregorio's identification was corroborated by testimony from Lozano (who admitted he'd participated in the crime) and Davis (who obtained a significant benefit after asserting that Mr. Condon had confessed to him). Brief of Respondent, p. 18. Nor could Respondent meet the stringent standard for constitutional harmless error: Ms. Gregorio's emphatic positive identification

provided the foundation of the prosecution's case against Mr. Condon. Had it been excluded, the prosecution would have had to rely on Lozano and Davis. In light of their credibility and bias problems, their testimony was not "so overwhelming it necessarily leads to a finding of guilt." *Burke, at 222.*

Accordingly, the erroneous admission of the tainted identification was not harmless beyond a reasonable doubt. The error was not trivial, formal, or merely academic. It prejudiced Mr. Condon, and had an impact on the final outcome. A reasonable jury may have been unconvinced by Lozano and Davis, and therefore would not have reached the same result produced by the erroneous admission of Ms. Gregorio's tainted identification. *Lorang, at 32.*

Accordingly, the conviction must be reversed, the identification suppressed, and the case remanded for a new trial. *Burke, at 222.*

#### **IV. THE TRIAL COURT INFRINGED MR. CONDON'S RIGHT TO PRESENT A DEFENSE.**

An accused person is guaranteed a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). This includes the right to introduce relevant admissible evidence. *State v. Lord*, 161 Wash.2d 276, 301, 165 P.3d 1251 (2007). The threshold to admit relevant evidence is extremely low. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 669, 230 P.3d 583 (2010).

Expert testimony is admissible if it would be helpful, and the word “helpful” is to be construed broadly. *Philippides v. Bernard*, 151 Wash.2d 376, 393, 88 P.3d 939 (2004). ER 702 favors admissibility in doubtful cases. *Miller v. Likins*, 109 Wash.App. 140, 148, 34 P.3d 835 (2001).

A “significant majority” of federal and state courts allow expert testimony regarding perception, memory, and the reliability of eyewitness identifications. *State v. Cheatam*, 150 Wash.2d 626, 646, 81 P.3d 830 (2003). When ruling on the admissibility of such testimony, a trial court must consider the particular issues in the case at hand, such as “whether the victim and the defendant are of the same race, whether the defendant displayed a weapon, the effect of stress, etc.” *Id.*, at 649.

Applying the broad “helpfulness” standard to the considerations required under *Cheatam*, the trial court should have admitted the testimony of Dr. Loftus. Ms. Gregorio’s identification was critical to the prosecution’s case. Her perception and memory were likely affected by weapon focus, cross-racial identification issues, and stress, which have all been noted as appropriate subjects for expert testimony. *See Cheatam*, at 649-650. She claimed to be 100% certain; this claim likely resulted from repeated “confirmation” that her initial identification was correct. RP 762; *see also* CP 60-78. The lineup in which she participated was severely flawed: (1) it took place after she’d already been told Mr. Condon was the shooter and after she’d had at least two opportunities to view

him in court, (2) Mr. Condon stood out as the tallest person in the lineup, (3) Mr. Condon stood out as the only Native American in the lineup, and (4) the police failed to follow the sequential double-blind procedure that is known to produce the most accurate results. RP (9/20/10) 65-126; RP (9/24/10) 230-307; RP 93.

Respondent contends that the average juror intuitively understands the failings of perception and memory in the context of all these factors. Brief of Respondent, p. 20. If this were true, then eyewitness misidentification would not be “the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing.”<sup>4</sup> Unfortunately, eyewitness misidentification is the engine that drives wrongful convictions; while science has made significant advances in explaining what goes wrong, the average juror has not yet learned to examine eyewitness testimony carefully. *See Perry*, 132 S.Ct. at 731-740 (Sotomayor, J., dissenting).

Dr. Loftus’s expert testimony would have been more than helpful to address these issues. Furthermore, the prosecution unfairly exploited the lack of expert testimony by disparaging defense counsel’s efforts to undermine Ms. Gregorio’s identification. RP 1155. Under these circumstances, exclusion of the evidence violated Mr. Condon’s right to present a defense. U.S. Const. Amend. XIV; *Holmes, supra*. His convictions must be reversed and the case remanded for a new trial.

**V. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.**

Numerous instances of prosecutorial misconduct require reversal because they infringed Mr. Condon's constitutional right to counsel and his due process right to a fair trial.

First, the prosecutor made disparaging comments on the defense role and impugned defense counsel's integrity. *See State v. Thorgerson*, 172 Wash.2d 438, 451-452, 258 P.3d 43 (2011). Specifically, the prosecutor accused defense counsel of playing tricks to confuse witnesses, that skillful trickery was part of the defense role, that "Defense 101" consisted of distracting jurors from the evidence and confusing them about the law, creating resentment toward the police and painting them as lazy or incompetent, and confusing witnesses. RP 1154-1157. The court compounded the problem by Mr. Condon's objections, thereby "giving additional credence to the argument." *State v. Gonzales*, 111 Wash.App. 276, 283-284, 45 P.3d 205 (2002).

Second, the prosecutor improperly vouched for the evidence and sought conviction based on matters outside the record when he argued that the case against Mr. Condon was stronger than most prosecutions. RP 1153. This comment combined an indirect expression of personal opinion (the prosecutor's personal belief that the evidence was sufficient, measured against his professional

---

<sup>4</sup> *See* [www.innocenceproject.org/understand/Eyewitness-Misidentification.php](http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php) (5/3/2012).

experience) with a reference to facts outside the record (the strength of this case compared to other cases).

These instances of misconduct infringed Mr. Condon's Sixth and Fourteenth Amendment right to counsel and robbed Mr. Condon of his right to a verdict based on the evidence and free from improper influence. *Thorgerson, supra; Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). His convictions must be reversed and the case remanded for a new trial. *Toth, supra*.

**VI. MR. CONDON WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL**

Defense counsel failed to object or seek redaction of Lozano's March 2010 interview, allowing jurors to hear that Mr. Condon was a gang member who frequently used illegal drugs. RP 849-850; Ex. 106. He did not request that the evidence be admitted only for a limited purpose, and failed to request a limiting instruction. RP 787-823. There was no legitimate tactical reason for these lapses. Furthermore, had counsel objected, sought to limit the jury's use of the evidence, or requested a limiting instruction, he would likely have prevailed. Finally, these errors affected the outcome of the case. Accordingly, Mr. Condon was denied the effective assistance of counsel. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

Respondent erroneously suggests that the evidence was admissible under ER 801(d)(1) as a prior consistent statement. Brief of Respondent, p. 24. This is incorrect. The prosecution had not established a proper foundation for admission under that rule: the state did not show that Lozano's prior statement was made before his motive to fabricate arose, or that Lozano was unlikely to have foreseen the legal consequences of the statements, both of which are preconditions for admission under the rule.<sup>5</sup> See *State v. Thomas*, 150 Wash.2d 821, 865, 83 P.3d 970 (2004); *State v. Makela*, 66 Wash.App. 164, 168-169, 831 P.2d 1109 (1992).

Furthermore, prior consistent statements may only be introduced to rebut the charge of recent fabrication rather than as substantive evidence, and a limiting instruction should be provided (if requested). *Makela*, at 168; *State v. Redmond*, 150 Wash.2d 489, 496, 78 P.3d 1001 (2003). Counsel's failure to object or seek a limiting instruction meant the jury was permitted to consider the evidence as substantive evidence of Mr. Condon's guilt. *State v. Myers*, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997). This is especially true in light of the court's admonition to consider all the evidence. See Instruction No. 1, CP 206-209.

Even if portions of Lozano's statements were admissible under ER 801(d)(1), defense counsel should have objected on relevance grounds (under ER 402, ER 403, and ER 404(b)), especially to evidence of gang membership and

---

<sup>5</sup> In fact, Lozano had a motive to lie at the time of the interview: he clearly believed that minimizing his own involvement would be in his best interest. See Ex. 106.

drug use. Respondent implies that defense counsel made a strategic decision not to contest admission of the evidence, because Lozano's statement was "utterly incoherent, bizarre, pointless, rambling..." Brief of Respondent, p. 24 (citing RP 836). Even if counsel believed the jury should hear Lozano's rambling account of the killing, there was no strategic purpose for having evidence of gang affiliation or drug use admitted.

Without citation to the record or any authority, Respondent halfheartedly suggests that Mr. Condon has failed to establish prejudice. Brief of Respondent, p. 25. Respondent fails to respond to Mr. Condon's multi-page argument regarding prejudice. *See* Appellant's Opening Brief (corrected copy), pp. 41-45. This lack of argument suggests that Respondent is unable to rebut Mr. Condon's argument.

Defense counsel should have objected to the admission of Lozano's recorded statement and sought a limiting instruction if his objection were overruled. His failure to do so denied Mr. Condon the effective assistance of counsel. *Saunders, at 578*. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

## **VII. THE ACCOMPLICE LIABILITY STATUTE UNCONSTITUTIONALLY CRIMINALIZES PROTECTED SPEECH.<sup>6</sup>**

---

<sup>6</sup> A First Amendment overbreadth challenge is not dependent on the facts of the particular case in which it is raised. *Lorang, at 26*; *City of Seattle v. Webster*, 115 Wash.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

Speech that encourages criminal activity is protected by the constitution, unless directed to inciting imminent lawless action and likely to produce such action. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969). Washington’s accomplice liability statute runs afoul of this protection, because it criminalizes pure speech that does not meet the *Brandenburg* standard. Accomplice liability attaches to anyone who, “[w]ith knowledge that it will promote or facilitate the commission of the crime... aids or agrees to aid [another] person in planning or committing it.” RCW 9A.08.020. The word “aid” is defined to mean “all assistance whether given by *words... encouragement, [or] support ...*” WPIC 10.51 (emphasis added); *See* CP 215. The statute thus criminalizes any word spoken with knowledge that it will facilitate the commission of the crime charged, regardless of whether or not the accused person’s speech is actually directed to incitement, regardless of whether or not it relates to *imminent* lawless action, and regardless of whether or not it is likely to produce imminent criminal activity.

The statute lacks the limitations imposed by *Brandenburg* and criminalizes a large amount of protected speech. It is overbroad and unconstitutional. Relying on *Coleman*, Respondent asserts that the statute is constitutional. Brief of Respondent, pp. 25-26 (citing *State v. Coleman*, 155

Wash.App. 951, 231 P.3d 212 (2010), *review denied*, 170 Wash.2d 1016, 245 P.3d 772 (2011)).<sup>7</sup> But *Coleman* was wrongly decided.

In *Coleman*, Division I erroneously relied on cases involving conduct: “A statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute’s plainly legitimate sweep.” *Coleman*, at 960. Consistent with cases addressing statutes criminalizing conduct rather than pure speech, the *Coleman* court reasoned that the statute survived constitutional scrutiny because the statute “avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime.” *Coleman*, at 960-961 (citations omitted).

This analysis is incorrect, because the accomplice liability statute reaches pure speech: the word “aid” means, *inter alia*, “words.” WPIC 10.51; CP 215. Thus, cases involving regulation of conduct (including those cited by the Court in *Coleman*) do not apply. Furthermore, the statute’s *mens rea* element—which, according to *Coleman*, makes the statute valid—does not require proof that the words spoken by the accused were “directed to” incitement, that they were aimed at “imminent” action, or that they were likely to produce imminent action.

---

<sup>7</sup> Division II has adopted the *Coleman* analysis. *State v. Ferguson*, 164 Wash.App. 370, 264 P.3d 575 (2011).

*Brandenburg*, at 447. Without a requirement of such proof, the statute violates the *Brandenburg* test.

Mr. Condon's convictions must be reversed and the case remanded for a new trial. *Brandenburg, supra*. Upon retrial, the state may not proceed on any theory of accomplice liability. *Id.*

**VIII. MR. CONDON'S ATTORNEY ACKNOWLEDGED AN OFFENDER SCORE OF 9+ AT SENTENCING.**

Respondent correctly points out that defense counsel acknowledged an offender score of 9+. Brief of Respondent, p. 26; RP (2/11/11) 12. In light of counsel's acknowledgement, Mr. Condon presents no additional argument.

**CONCLUSION**

Mr. Condon's conviction for aggravated first-degree murder must be reversed and the charge dismissed with prejudice. His remaining convictions must be reversed and remanded for a new trial.

Respectfully submitted on June 4, 2012.

**BACKLUND AND MISTRY**

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style.

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

A handwritten signature in blue ink that reads "Manek R. Mistry". The signature is fluid and cursive, with the first name "Manek" being the most prominent.

Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Joel Condon, DOC #820953  
Washington State Penitentiary  
1313 N 13th Ave  
Walla Walla, WA 99362

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

Kevin Eilmes  
Yakima County Prosecuting Attorney  
kevin.eilmes@co.yakima.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 4, 2012.

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant