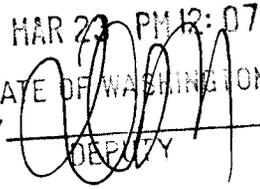


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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

David Eden,

Appellant.

Lewis County Superior Court Cause No. 10-1-00152-7

The Honorable Judge James Lawler

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Eden's insurance fraud conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The evidence established that Mr. Eden sought payment for U-Haul's negligence under a general liability claim.
3. The prosecution failed to prove that Mr. Eden sought payment "under a contract of insurance."
4. The prosecution failed to prove that Mr. Eden knew Ms. Mau had purchased a "Safe Move" insurance contract (which did not cover water damage).
5. Mr. Eden's conviction infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of the charged crime.
6. The court's instructions relieved the state of its burden to prove an "overt act," an essential element of accomplice liability.
7. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
8. The trial judge erred by giving Instruction No. 11.
9. The accomplice liability statute is unconstitutionally overbroad.
10. Mr. Eden was convicted through operation of a statute that is unconstitutionally overbroad.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict Mr. Eden of insurance fraud, the prosecution was required to prove that he presented a false or fraudulent claim "for the payment of a loss under a contract of insurance." Here, the evidence established that Mr. Eden sought payment for U-Haul's negligence, without reference to an insurance contract. Did Mr. Eden's conviction violate his Fourteenth

Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?

2. Conviction for insurance fraud requires proof that the accused person knowingly presented a false claim under a contract of insurance. The prosecution did not prove that Mr. Eden knew Ms. Mau had purchased a “Safe Move” contract from U-Haul. Did Mr. Eden’s conviction violate his Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?
3. A trial court’s instructions must inform the jury of the state’s burden to prove every essential element of the charged crime. Here, the court’s instructions allowed conviction absent proof that Mr. Eden committed an overt act, an essential element required for accomplice liability. Did the trial court’s instructions relieve the state of its burden to prove the essential elements of the charged crime, in violation of Mr. Eden’s Fourteenth Amendment right to due process?
4. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite “imminent lawless action.” The accomplice liability statute criminalizes support and encouragement of criminal activity, even where such support and encouragement is not directed at and likely to incite “imminent lawless action.” Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendment?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jennifer Mau rented a U-Haul truck in Olympia to move her family to a new home.¹ RP (9/22/10) 20-21. Her boyfriend David Eden helped with the move, as did his two sons David and Douglas Eden. Also helping were Douglas's girlfriend, Arlene Black, and a woman named Sharon Mitchell. RP (9/23/10) 226, 234, 235, 243. Ms. Mau went into the office and reviewed and signed the paperwork while Mr. Eden stayed outside and examined the U-Haul for damage. Exhibit 25, 37, Supp. CP; RP (9/24/10) 298.

They arrived at their new home in Morton around dinnertime. The group all went out to dinner before moving the items into the house. RP (9/23/10) 228, 246. It rained off and on that day. RP (9/23/10) 215-216, 228, 241, 245, 275; RP (9/24/10) 357.

As they moved items into the house, Mr. Eden noticed that things in the front of the truck were wet. RP (9/23/10) 229-230, 277. He showed Ms. Mau, and they kept wet items on their porch. It rained more during the night. RP (9/23/10) 245, 277-279.

¹ The family's home had burned to the ground three months earlier. They had two storage units of newly purchased furnishings; they also picked up more items at Best Buy en route to their new home. RP (9/23/10) 226-227, 244-245, 267-268.

They finished unloading the truck the next day, and then returned to their storage unit for another load. After unloading again, they took ruined items to the dump. RP (9/23/10) 248-250, 278-282. The rain continued throughout that day.² RP (9/23/10) 248; RP (9/24/10) 358.

Sometime during the next month, Ms. Mau complained to U-Haul staff about the damage to her property, and was given a phone number to call, in order to report a claim. RP (9/22/10) 26-27, 38. She called the number and reported that her possessions had been damaged by water when the truck leaked. RP (9/22/10) 38; RP (9/23/10) 284.

U-Haul is self-insured. RP (9/22/10) 36. Claims for damages are processed by a company called Republic Western Insurance Company, which is wholly owned by U-Haul. RP (9/22/10) 36, 49. If items are damaged by water due to faulty equipment, U-Haul pays for the loss. Such payments are not made as part of any insurance contract between the company and the renter. RP (9/22/10) 39, 84. Instead, the company pays claims under a negligence theory when it rents a customer defective equipment, such as a leaking truck. RP (9/22/10) 47-48, 49-50.

In addition, U-Haul offers insurance which it calls “Safe Move” coverage. Such coverage does not cover claims for water damage; water

² At some point, a neighbor who was walking in the rain pointed out a leak in the truck. RP (9/23/10) 214-216.

damage is explicitly excluded from the “Safe Move” program. RP (9/22/10) 39. Ms. Mau purchased the “Safe Move” coverage. RP (9/22/10) 84.

Republic Western hired Reilly Gibby to investigate Ms. Mau’s claim, and he ultimately recommended against paying it. RP (9/22/10) 41, 58-89; RP (9/23/10) 99-110. U-Haul denied Ms. Mau’s general liability claim because it could not replicate the leak in the truck. RP (9/22/10) 42-43. If the company had been able to replicate the leak, it would have paid the claim, but not as part of any insurance or “Safe Move” coverage. RP (9/22/10) 45, 47, 49.

The state charged Ms. Mau and Mr. Eden with False Insurance Claim. CP 1; RP (9/22/10) 3-4. Their cases were tried together. RP (5/13/10) 2-3; RP (9/16/10) 2-5.

At trial, Gibby testified that he met with Ms. Mau and together they made a list of items. RP (9/22/10) 62-69. The list was titled “Personal Property Summary Sheet” and consisted of seven pages of items, with Ms. Mau’s signature at the bottom of each sheet. Exhibit 5, Supp. CP. Gibby said that he told her to only list damaged or destroyed items. RP (9/22/10) 67, 74. Ms. Mau testified that he asked her to list all items that *may have been* damaged or destroyed. She also testified that she told him that she had not yet determined the status of all of the

property that had been moved.³ RP (9/23/10) 287; RP (9/24/10) 302-319, 322, 332, 352-353. Mr. Eden was not present at this meeting and did not sign the sheets. RP (9/23/10) 101; Exhibit 5, Supp. CP.

Gibby told the jury that he later met with Mr. Eden, characterizing his statement as “a similar account” to Ms. Mau’s. RP (9/22/10) 80. The prosecution played a recording of Ms. Mau’s statement for the jury, but did not play a recording of Mr. Eden’s statement. RP (9/22/10) 76-77, 80-82; Exhibit List, Proposed/Illustrative Exhibit 8, Supp. CP. Gibby indicated that Mr. Eden told him the leak in the truck had damaged items. Gibby did not testify that he showed Mr. Eden the list Ms. Mau had made, or that Mr. Eden told him which items were damaged. RP (9/22/10) 82, 58-89; RP (9/23/10) 99-110.

The defense moved to dismiss the case after the state rested. Defense counsel argued that the state had not proven that the claim was made “under a contract of insurance.” RCW 48.30.230; RP (9/23/10) 207-209. The court denied the motion. RP (9/23/10) 210.

The court instructed the jury on accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally

³ Receipts for items from Ikea posed a particular problem, because the receipts listed only the Swedish words Ikea uses to name each item. Accordingly, Ms. Mau listed all Ikea items on the list, which she believed was a tentative and preliminary list. RP (9/23/10) 287-289; RP (9/24/10) 302, 304-320, 332.

accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of a crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

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

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. Instruction No. 11, Court’s Instructions to the Jury, CP 21.

The jury voted to convict Mr. Eden. After sentencing, he timely appealed. RP (9/24/10) 454-456; CP 26-34, 35-44.

ARGUMENT

I. MR. EDEN’S INSURANCE FRAUD CONVICTION INFRINGED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS BEYOND A REASONABLE DOUBT.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). The interpretation of a statute is a question of law reviewed *de novo*. *State v. Engel*, 166 Wash.2d

572, 576, 210 P.3d 1007 (2009). The application of law to a particular set of facts is a mixed question of law and fact reviewed *de novo*. *In re Detention of Anderson*, 166 Wash.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel*, at 576.

B. Conviction of insurance fraud requires proof that the accused person submitted a false claim “under contract of insurance.”

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

The statute criminalizing insurance fraud is captioned “False claims or proof—Penalty,” and reads (in relevant part) as follows:

It is unlawful for any person, knowing it to be such, to:

(a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance; or

(b) Prepare, make, or subscribe any false or fraudulent account,

certificate, affidavit, or proof of loss, or other document or writing, with

intent that it be presented or used in support of such a claim. RCW 48.30.230(1). Conviction thus requires proof that the accused person fraudulently sought payment pursuant to an insurance contract. RCW 48.30.230(1)(a).

C. The evidence established that Mr. Eden's claim for damages was a general liability claim for negligence, not made under a contract of insurance.

In this case, the prosecution established that Mr. Eden's wife purchased a "Safe Move" contract which did not cover water damage. (9/22/10) 84. When Ms. Mau sought payment for water damage, her claim was opened as a general liability claim. RP (9/22/10) 39. There is no indication that Mr. Eden (or Ms. Mau) ever sought payment for loss "under contract of insurance," as required by RCW 48.30.230. Therefore, the evidence was insufficient to establish an essential element of the offense. Accordingly, Mr. Eden's conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

D. Even if the claim was made pursuant to the "Safe Move" contract, the prosecution failed to prove that Mr. Eden knew of the contract's existence.

Conviction for insurance fraud requires proof that the accused person acted with knowledge. RCW 48.30.230. The statute's syntax makes clear that the knowledge requirement applies to all the other

elements of the statute: the phrase “knowing it to be such” is placed in the first paragraph, prior to the subsections listing the two alternative means by which the offense may be committed. RCW 48.30.230(1). In other words, the prosecution must prove not only that the accused person knows that the claim is fraudulent, but also that the fraudulent claim is for payment “under contract of insurance.” RCW 48.30.230(1).

In this case, the state did not prove that Mr. Eden was aware that Ms. Mau had purchased a “Safe Move” contract from U-Haul. RP (9/22/10) 19-89; RP (9/23/10) 99-212. Instead, the evidence suggested that he was not present when the contract was purchased. Exhibit 25, 37, Supp. CP; RP (9/24/10) 298. He did not sign the contract, and nothing established that anyone spoke with him about the contract. Exhibit 37, Supp. CP.

The evidence was insufficient to prove Mr. Eden’s knowledge that the claim was made “under contract of insurance.” Accordingly, his conviction must be reversed and the case dismissed with prejudice.

Smalis, supra.

II. MR. EDEN’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF ACCOMPLICE LIABILITY.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Schaler*, at 282. Although the Court of Appeals “may refuse to review any claim of error which was not raised in the trial court,” the Court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell*, ___ Wash.2d ___, ___, ___ P.3d ___ (2011). This includes constitutional issues that are not manifest. *Id.*

In addition, an appellant may raise a manifest error affecting a constitutional right for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).⁴ An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had

⁴ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kylo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wash.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

B. The court's instructions did not require the prosecution to prove an overt act, which is an essential element of accomplice liability.

Due process requires the prosecution to prove every element of the charged crime. U.S. Const. Amend. XIV; *Winship, supra*. A trial court's failure to instruct the jury as to every element requires reversal. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). This includes the essential elements required for accomplice liability. *See State v. Roberts*, 142 Wash.2d 471, 513, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wash.2d 568, 14 P.3d 752 (2000).

Accomplice liability requires proof of an overt act. *See, e.g., State v. Matthews*, 28 Wash. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, s/he must say or do something that carries the crime forward. *State v. Peasley*,

80 Wash. 99, 100, 141 P. 316 (1914). In *Peasley*, the Supreme Court distinguished between silent assent and an overt act:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.
Peasley, at 100.

See also *State v. Everybodytalksabout*, 145 Wash.2d 456, 472, 39 P.3d 294 (2002) (“Physical presence and assent alone are insufficient” for conviction as an accomplice).

Similarly, in *State v. Renneberg*, the Supreme Court approved the following language: “to aid and abet may consist of *words spoken, or acts done...*” *State v. Renneberg*, 83 Wash.2d 735, 739, 522 P.2d 835 (1974) (emphasis added). The Court noted that an instruction is proper if it requires ““*some form of overt act in the doing or saying of something* that either directly or indirectly contributes to the criminal offense.”” *Renneberg*, at 739-740 (emphasis added) (quoting *State v. Redden*, 71 Wash.2d 147, 150, 426 P.2d 854 (1967)).

Instruction No. 11 was fatally flawed because it allowed conviction without proof of an overt act. Under the instruction, the jury was permitted to convict if Mr. Eden was present and assented to Ms. Mau’s crime, even if he committed no overt act. CP 21. Because of this, the

instruction violates the “overt act” requirement of *Peasley, supra* and *Renneberg, supra*.

The last two sentences of Instruction No. 11 do not correct this problem. The penultimate sentence (“A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime”) does not exclude other situations. CP 21. Thus a person who is present and *unwilling* to assist, but who approves of the crime, may still be convicted if she or he knows his presence will promote or facilitate the crime.

Similarly, the final sentence fails to save the instruction as a whole. Although the final sentence (“more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice”) excludes presence coupled with mere knowledge, the instruction does not exclude presence coupled with silent assent or silent approval. CP 21. Even with this final sentence, a person who is present and unwilling to assist, but who silently approves of the crime could be convicted. Such a construction gives criminals the power to transform approving bystanders into accomplices, simply by announcing the intent to commit a crime and telling the bystanders that their presence is helpful. But the law does not impose a duty on

bystanders to reject another person’s criminal activity; instead, it requires proof of an overt act.

Because the instructions allowed conviction as an accomplice in the absence of an overt act, the convictions must be reversed and the case remanded to the trial court for a new trial. *Peasley, supra; Renneberg, supra.*

C. This Court should not follow Division I’s decision in *Coleman*.

1. The *Coleman* decision misapplied First Amendment precedent.

Division I recently upheld the accomplice statute and WPIC 10.51 against an overbreadth challenge. *State v. Coleman*, 155 Wash.App. 951, 960-961, 231 P.3d 212 (2010). The Court held that the statute was constitutional because it did not cover speech “that only consequentially further[s] the crime.” *Id.* In reaching this decision, the Court relied on *City of Seattle v. Webster*, 115 Wash.2d 635, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

But *Webster* does not support Division I’s reasoning. First, in *Webster* the Supreme Court upheld an ordinance regulating behavior, not pure speech.⁵ The accomplice statute, by contrast, explicitly applies to

⁵The “pedestrian interference ordinance” made it unlawful to intentionally obstruct pedestrian or vehicular traffic. *Webster*, at 640.

“aid,” which has been defined to include support or encouragement. RCW 9A.08.020; *see also* WPIC 10.51 and CP 21. Second, in *Webster* the Supreme Court found that the inclusion of specific intent (the intent to obstruct pedestrian or vehicle traffic) as an element of the offense saved the statute from being found overbroad. But the *mens rea* for accomplice liability is knowledge, not intent. RCW 9A.08.020. Verbal encouragement coupled with knowledge is sufficient for accomplice liability. Thus guilt can attach to pure speech, even if provided without specific intent (as in *Webster*), and even if the encouragement is not directed at inciting imminent lawless action (as in *Brandenburg*). Thus *Webster* does not support the result reached by Division I.

The *Coleman* decision suffers from an additional flaw. The Court denied appellant’s challenge in part because he failed to show “any actual criminalization of protected speech.” *Coleman*, at 961. It is unclear what this ambiguous pronouncement means. The Court may have rejected appellant’s challenge because he did not personally suffer “actual criminalization of protected speech” under the facts of his case. *Id.* If so, the statement reflects a misunderstanding of the standards for facial challenges brought under the First Amendment (as set forth in *Lorang*, *Hicks*, and *Webster*).

On the other hand, the Court may have meant that the accomplice statute does not actually criminalize protected speech. If so, then the court failed to recognize that pure speech falls within the statute's reach when it takes the form of support or encouragement for criminal activity (as specifically provided in RCW 9A.08.020). Such speech is protected unless it is directed at and likely to incite imminent lawless action, as set forth in *Brandenburg*.

Division I's decision in *Coleman* was wrongly decided, and should not be followed by Division II. The statute violates the First and Fourteenth Amendments. Accordingly, Mr. Eden's conviction must be reversed.

2. The *Coleman* applied the wrong standard for evaluating the clarity of a jury instruction.

In *Coleman*, Division I analyzed an instruction equivalent to the one at issue here, and found it "adequate." *Coleman*, at 961. But jury instructions must be more than adequate; instead, they must make the relevant legal standard manifestly clear to the average juror. *State v. Kylo*, at 864.

The *Coleman* court's finding of adequacy rested on its belief that the instruction in that case "required the jury to find that Coleman knowingly, with specific criminal *mens rea*, stood ready to aid or aided

[his codefendant].” *Coleman*, at 961. This is incorrect. The instruction does not require proof of a mental state other than knowledge. *Id.*, at 961; *see also* WPIC 10.51; CP 21. This is in contrast to the instruction used in *Renneberg*, which required proof of

words spoken, or acts done, for the purpose of assisting in the commission of a crime or of counseling, encouraging, commanding or inducing its commission. To constitute an aider or abettor, it is essential that the aider or abettor should share the criminal intent of the person or party who committed the offense.

Renneberg, at 739.

The instruction used in this case permitted conviction if Mr. Eden stood by and silently assented to the crime, with knowledge that his silent assent supported or encouraged Ms. Mau. CP 21. The instruction dispensed with the “overt act” requirement, and thus violated Mr. Eden’s right to due process. Division I’s holding to the contrary is incorrect, and should not be followed by Division II.

III. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. Standard of review.

Constitutional violations are reviewed *de novo*. *Schaler*, at 282.

- B. A first-amendment challenge may be brought by anyone accused of violating a statute that is unconstitutionally overbroad.

The First Amendment to the U.S. Constitution provides that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wash.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).⁶ A statute is unconstitutionally overbroad if it criminalizes constitutionally protected speech or conduct. *Lorang*, at 26.

Anyone accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Lorang*, at 26. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Lorang*, at 26. In other words, “[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds.” *Webster*, at 640.

⁶ Washington’s Constitution affords a similar protection: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” Wash. Const. Article I, Section 5.

The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003). Instead of applying the general rule for facial challenges, “[t]he Supreme Court has ‘provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or “chill” constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.’” *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005), *quoting Virginia v. Hicks*, at 119; *see also Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3d Cir. 2006).

- C. RCW 9A.08.020 is unconstitutionally overbroad because it criminalizes pure speech that is not directed at inciting imminent lawless action and that is unlikely to incite such action.

The First Amendment protects speech that supports or encourages criminal activity unless the speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech (and conduct) protected by the First Amendment. Under RCW 9A.08.020, a person may be convicted as an accomplice if she or he, acting “[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.” The statute does not define “aid.” Nor has any Washington court limited the definition of aid to bring it into compliance with the U.S. Supreme Court’s admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) “imminent lawless action.” *Brandenburg*, at 447-449.

Instead, Washington courts—and the trial judge in this case—have adopted a broad definition of “aid,” found in WPIC 10.51:

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

See CP 21. By defining “aid” to include “words... encouragement, [or] support,” the instruction criminalizes a vast amount of speech and conduct protected by the First Amendment, and runs afoul of the U.S. Supreme Court’s decision in *Brandenburg*, *supra*.

For example, a college professor who praises ongoing acts of criminal trespass by antiwar protestors is guilty as an accomplice if he utters his praise knowing that it will provide support and encouragement for the protestors. A journalist sent to cover the protest, who knows that media presence encourages the illegal activity, would be guilty as an

accomplice simply for reporting on the protest.⁷ Anyone who supports the protest from a legal vantage point (for example by carrying an antiwar sign on the sidewalk across the street) is guilty as an accomplice. An attorney who agrees to represent the protesters *pro bono* provides support and encouragement, and is thus guilty of trespass as an accomplice.

It is possible to construe the accomplice statute in such a way that it does not reach constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. *Brandenburg, supra*. However, such a construction has yet to be imposed. The prevailing construction—as expressed in WPIC 10.51 and adopted by the trial court in Instruction No. 11—is overbroad. Therefore, RCW 9A.08.020 is unconstitutional.

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

⁷ Indeed, under WPIC 10.51 and Instruction No. 16, every news program commits a crime when it covers terrorism, knowing that terrorism depends on publicity to fulfill its general purpose (intimidating and coercing persons beyond its immediate victims).

CONCLUSION

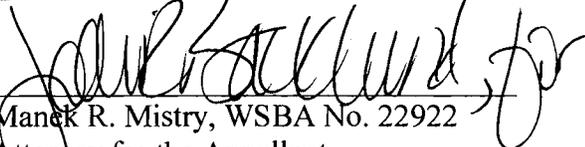
For the foregoing reasons, Mr. Eden's conviction must be reversed and the case dismissed with prejudice. In the alternative, if the case is not dismissed, it must be remanded for a new trial.

Respectfully submitted on March 21, 2011.

BACKLUND AND MISTRY



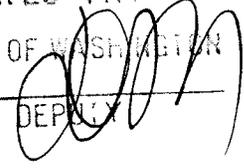
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

David Eden
757 Main Ave.
Morton, WA 98356

and to:

Lewis County Prosecutors Office
345 W Main St Fl 2
Chehalis WA 98532-4802

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 21, 2011.

I further sent an electronic copy of the Opening Brief to counsel for Codefendant, John Hays on today's date.

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 March 21, 2011.



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