

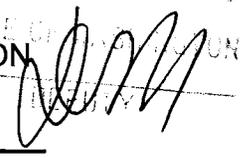
No. 41319-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON



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**STATE OF WASHINGTON,**

Respondent,

vs.

**JENNIFER M. MAU  
and  
DAVID JOHN EDEN,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Was there sufficient evidence submitted at trial to convict Mau and Eden of False Insurance Claim and/or Proof of Loss?
- B. Did the accomplice liability instruction relieve the state of its burden of proving an essential element of the accomplice liability instruction in regards to Eden?
- C. Is the accomplice liability statute unconstitutional on its face due to it being overbroad and criminalizing constitutionally protected speech in violation of the First and Fourteenth Amendments of the United States Constitution?

## II. STATEMENT OF THE CASE

The State filed an information on March 16, 2010 charging Jennifer Mau<sup>1</sup> with one count of False Insurance Claim and/or Proof of Loss. 1CP 1-3.<sup>2</sup> On March 16, 2010 the State also filed an information charging David Eden<sup>3</sup> with one count of False Insurance Claim and/or Proof of Loss. 2CP 1-3. While not charged as co-defendants, Eden and Mau's cases were joined and consolidated for trial at the trial confirmation hearing on September

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<sup>1</sup> Jennifer Mau will hereafter be referred to as Mau.

<sup>2</sup> Due to this being a consolidated case there are two sets of Clerk's Papers that were designated by each party, Mau and David Eden. The Clerk's Papers as designated by Mau under Superior Court No. 10-1-00151-9 and Court of Appeals No. 41319-1 will be referred to as 1CP. The Clerk's Papers designated by David Eden, Superior Court No. 10-1-00152-7 and Court of Appeals No. 41320-5-II will be referred to as 2CP.

<sup>3</sup> David Eden will hereafter be referred to as Eden.

16, 2010. 1RP<sup>4</sup> 3-4; 1CP 17-18. The cases proceeded to jury trial which commenced on September 22, 2010. 2RP 1.

On March 30, 2007 Mau rented a U-Haul truck from the Olympia U-Haul center located at 4<sup>th</sup> and Steele. 2RP 20-22; Ex. 25 and 37. Mau and Eden needed the truck to move items and furnishings into their new home in Morton. 2RP 225-27. Mau and Eden have been in a domestic relationship for over seven years. 2RP 373. Mau, Eden, Arlene Black, Douglas Eden, David<sup>5</sup> and Sharon Mitchel all assisted in the move. 2RP 226. The group went to the U-Haul center, Best Buy and then the storage unit before heading to Morton. 2RP 244-45. According to David it had been raining on and off. 2RP 228. David stated there were items in the truck that had gotten wet and there was water damage from the truck leaking. 2RP 229. David stated he left for a while and when he came back Mau had separated out items that she wanted put back in the U-Haul. 2RP 231. Ms. Mitchell testified there was a lot of water on the floor of the U-Haul. 2RP 248. Ms. Mitchell did give some conflicting testimony regarding what was in the U-Haul

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<sup>4</sup> There are several volumes of verbatim report of proceedings. The State will refer to the trial confirmation hearing on 9-16-10 as 1RP; there are three volumes for the jury trial, sequentially numbered, will be 2RP; the sentencing hearing conducted on 10-18-10 will be referred to as 3RP.

<sup>5</sup> David Eden's son's name is also David and will be referred to by his first name to avoid confusion, no disrespect intended.

versus a statement she had previously given Reilly Gibby. 2RP 261. David admitted he didn't see any damaged items, just that there were boxes that were wet. 2RP 235-36. Mau claimed that she made five or six trips to the dump to throw out the destroyed items. 2RP 281. Mau returned the U-Haul that Sunday, April 1, 2007, to the U-Haul center in Centralia. 2RP 282. When Mau complained about the trailer leaking she was provided an 800 number to call U-Haul's insurance company, Republic Western Insurance. 2RP 283-84.

Mau contacted Republic Western Insurance on April 3, 2007 claiming the U-Haul truck she had rented leaked causing damage to her property being transported in the truck. 2RP 36-38, 284. Republic Western Insurance handles all insurance claims for U-Haul. 2RP 36. A general liability claim was opened based on Mau's allegation that the U-Haul truck she rented leaked and destroyed her property. 2RP 39. This claim was not a safe move protection claim, which would only cover cargo inside the truck if the cargo was damaged in a collision. 2RP 39.

Michael Larsen, a special investigator for Republic Western Insurance, was assigned Mau's claim. 2RP 37. Republic Western Insurance is based out of southern California. 2RP 41. To assist in

the investigation of Mau's claim of loss, Republic Western Insurance hired Reilly Gibby, an insurance adjuster from Rose City Adjusters to investigate the claim. 2RP 41, 58. Mr. Larsen explained it was common place to hire an independent adjuster who was located in the area where the claim was being made. 2RP 41. Mr. Larsen consulted with Mr. Gibby during the course of the investigation of Mau's claim. 2RP 41. Mr. Larsen also requested that a water test be conducted on the truck in question to see if it leaked. 2RP 41. The safe mover plan did not cover water damage so the claim would have to be approved under the general liability claim. 2RP 43.

Mr. Gibby explained that as a claims adjuster he receives assignments from insurance companies and investigates and evaluates the value of the claims. 2RP 59. Mr. Gibby is an independent insurance adjuster who works for dozens of insurance companies. 2RP 60. Mr. Gibby had previously worked several claims for U-Haul's insurance company, Western Republic Insurance. 2RP 60. Mr. Gibby set up an appointment to meet with Mau in person to discuss her claim and get the necessary documentation from her. 2RP 62. The appointment was set for April 20, 2007 at Mau's home in Morton. 2RP 62. Mr. Gibby

emphasized to Mau that “I needed documentation for presenting her claim to Republic Western Insurance.” 2RP 64. Mau called Mr. Gibby and changed the meeting place to Spiffy’s Restaurant, located in Lewis County, Washington, without giving an explanation of why she no longer would meet at her residence in Morton. 2RP 62-63.

Mr. Gibby met with Mau at the restaurant on April 20, 2007. 2RP 64. Mau came to the meeting prepared. 2RP 64. Mau had receipts for the alleged damaged goods and prepared a seven page property inventory while Mr. Gibby sat with her. 2RP 65, 286; Ex. 5. Mr. Gibby spent 1.4 hours with Mau just preparing the inventory sheets and going over the receipts. 2RP 65. Mau had highlighted on the receipts the items she was claiming were destroyed by the water damage from the U-Haul. 2RP 67. Mau told Mr. Gibby that there were items in the truck that were not destroyed that were on the receipts that she was not requesting compensation for. 2RP 74. Mau also later faxed Mr. Gibby dump receipts for the alleged water damaged items that were taken to the dump. 2RP 68-69; Supp. Ex. 6.<sup>6</sup>

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<sup>6</sup> State submitted a supplemental designation for trial exhibit 6, the WalMart and dump receipts.

Mau also gave a taped statement to Mr. Gibby. 2RP 65; ID 8.<sup>7</sup> Mau explained that she made two trips with the truck, one after they discovered that the truck was leaking and had damaged their items. ID 8 page 8. The second trip was on Saturday, March 31, 2007. ID 8 pages 6-9. Mau stated she called U-Haul prior to turning in the truck to complain. ID 8 page 12. Mau said U-Haul told her they would have someone get a hold of her. ID 8 page 12.

At the beginning of the taped statement Mr. Gibby stated,

This is Reilly Gibby and I'm taking a recorded statement from Jennifer Mau. The date today is April 20, 2007. The time is 3:06 p.m. and we're discussing a cargo loss she had as a U-Haul customer. Uh, Jennifer do you understand we're recording this and is that being done with your permission?

ID 8 page 1. Mau stated yes and Mr. Gibby asked, "do all the answers that you intend to give, will they be true to the best of knowledge and recollection?" ID 8 page 1. Mau stated yes. ID 8 page 1. At the end of the statement Mr. Gibby asked, "And have all your answers been true and correct?" ID 8 page 21. Mau replied yes. ID 8 page 21.

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<sup>7</sup> ID 8 was an illustrative exhibit that the jury was able to read along with when the State played the recorded statement given by Mau. The State will be referring to ID 8 because the statement was heard by the jury during the trial but the verbatim proceedings does not contain the recording.

Mr. Gibby met with Eden on May 7, 2007 at Spiffy's Restaurant to get Eden's statement regarding the property damage and loss. 2RP 75. Eden told Mr. Gibby that he and Mau had gone to Best Buy and their storage unit to load up items into the U-Haul before heading to their home in Morton. 2RP 80. Eden also told Mr. Gibby that it was raining, that it had been like a monsoon while they were driving to their property in Morton. 2RP 80. Eden explained to Mr. Gibby that Sharon Fisher went with Mau and Eden to rent the U-Haul truck and pick up the storage. 2RP 80. This statement was contrary to what Mau told Mr. Gibby. 2RP 80. Mau had told Mr. Gibby that Ms. Fisher was waiting for Eden and Mau back at their home in Morton to assist in unpacking the truck. 2RP 80. Eden told Mr. Gibby that Mau had disposed of the items by driving the U-Haul truck to the dump on Saturday, March 31, 2007. 2RP 81. Mau had told Mr. Gibby that it was Eden who had driven the truck to the dump on Saturday. 2RP 81. Eden also told Mr. Gibby that the sewing machine had been taken right back onto the truck, it was heavy, and went to the dump on Saturday, while Mau had told Mr. Gibby that she did not take the sewing machine to the dump until later in the week. 2RP 81. Eden told Mr. Gibby that the truck had leaked terribly and the items had been thrashed. 2RP 82.

Eden stated he did not take pictures of the damaged items and did not retain the owner's manuals. 2RP 82.

Mr. Gibby testified there were a number of things that did not add up and he needed to do more investigating. 2RP 106. Mr. Gibby was concerned because Eden and Mau took the alleged damaged goods to the dump right away, without documentation such as photographs to show the alleged damage and there was no opportunity for the company to mitigate damages. 2RP 106. The dump receipts Mau provided to Mr. Gibby shows a total of 440 pounds were deposited in the landfill. Supp. Ex. 6. Edward Thomson, a loss prevention agent for IKEA, testified regarding the weight of the items from IKEA that were allegedly damaged. 2RP 169-176. The total weight of the IKEA items Mau claimed were lost was 917 pounds. 2RP 176.

Ms. Black, who is the former girlfriend of Douglas Eden, David Eden's son, testified about helping Mau and Eden load the U-Haul to move the items to the new house. 2RP 111-116. Ms. Black road behind the U-Haul to Morton and did not recall the weather as being rainy. 2RP 116-117. Ms. Black helped Eden and Mau unload the U-Haul, taking the items into the new house in Morton. 2RP 117-118. The mattress were new and still had the

plastic wrapping around them. 2RP 118. Ms. Black state there was not any damage to the items removed from the U-Haul truck. 2RP 119. Ms. Black even assisted by assembling some of the IKEA furniture, such as a coffee table, a little table and a large shelf. 2RP 119-120. Ms. Black stated the electronics, such as DVD players, televisions and Play Stations were all brought into the house and did not appear damaged. 2RP 120. Ms. Black also stated that since Mau and Eden moved into the new house in Morton she had been there at least 50 times and the items were still in the house. 2RP 122.

The State called Donald Squire, a volunteer with the National Oceanographic Atmospheric Administration (NOAA), who monitors the rain in Packwood, Washington. 2RP 387-88. Packwood is 33 miles from Morton. 2RP 391. On March 30, 2007 there was no precipitation recorded in Packwood. 2RP 395. On March 31, 2007 there was .20 inches of rain in Packwood. 2RP 395.

Mr. Gibby testified that the claim for damages against U-Haul was ultimately denied because the investigation revealed no negligence on the part of U-Haul. 2RP 43.

Eden and Mau were found guilty as charged. 2RP 455; 1CP 54; 2CP 25. Eden was sentenced to 15 days with the allowance that it be served on alternative sanctions. 3RP 14; 2CP 26-34. Mau was sentenced 60 days with the allowance that the time may be served on electronic home monitoring. 3RP 9; 1CP 62-70.

### **ARGUMENT**

#### **A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO AFFIRM EDEN AND MAU'S CONVICTIONS FOR FALSE INSURANCE CLAIM AND/OR PROOF OF LOSS.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const., amend. XIV; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State.

*State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004).

When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d at 638.

Eden and Mau were each charged with one count of False Insurance Claim and/or Proof of Loss.

(1) 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 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. Liability insurance is “an agreement to cover a loss resulting from one’s liability to a third party.” BLACK’S LAW DICTIONARY, 806 (7<sup>TH</sup> ed.).

Republic Western Insurance is the insurance company that handles claims for U-Haul. 2RP 27, 36. Mr. Larsen explained there were two types of claims generally processed by Republic Western Insurance on behalf of U-Haul. 2RP 38. One type of claim would be for the safe move protection, which covers cargo in case of an accident, such as a collision. 2RP 38-39. The other type of claim is a general liability claim. 2RP 38. A defect in equipment that caused damage to a customer’s personal property would fall under a general liability claim. 2RP 38. If Republic Western Insurance found that U-Haul had rented out defective equipment that caused damage to a customer’s property it would pay out for the customer’s loss under a general liability claim. 2RP 39.

A person can claim a loss under contract of insurance without being a direct party to the contract. The statute does not require that the person claiming loss to be a direct party to the contract of insurance. See RCW 48.20.230. The statute only

requires that there be a contract of insurance for which the person is making a false or fraudulent claim to. RCW 48.20.230. A person must knowingly submit a false or fraudulent claim, but the statute does not state that the insurance company be a company that the person has contracted insurance with. RCW 48.20.230.

Republic Western Insurance is the insurance provider for U-Haul, whom U-Haul has contracted with to handle their claims. 2RP 36. This would qualify as a contract of insurance. Mau contacted Republic Western Insurance on April 3, 2007 to initiate her claim that the U-Haul truck had damaged her and Eden's property. 2RP 36-38, 284. Mau was informed by Ms. Malmer, an employee of U-Haul, that Republic Western Insurance was the insurance company for U-Haul. 2RP 27. Mau met with, filled out forms, submitted documentation and gave a taped statement to Mr. Gibby, knowing she was submitting a claim for loss to Republic Western Insurance in regards to damages allegedly caused by U-Haul. 2RP 64-82; ID 8. Eden similarly gave a statement to Mr. Gibby, knowing that they were submitting a claim for damages to Republic Western Insurance that were allegedly incurred by them from the alleged faulty U-Haul equipment. 2RP 75-82.

Both Mau and Eden argue that Mau had only purchased the safe move protection and that it did not cover the type of damage incurred by Eden and Mau and therefore, this was not a claim under contract of insurance. See Mau Brief 10; Eden Brief 9.<sup>8</sup> This argument confuses the issue. The safe move coverage Mau purchased when she rented the truck is irrelevant to the issue of whether or not Mau and Eden were knowingly making a false or fraudulent claim and or proof of loss under a contract of insurance. Given Mau and Eden's actions in meeting with Mr. Gibby, the insurance adjuster, they knew they were making a claim to U-Haul's insurance company, Republic Western Insurance.

Further, Eden's argument that the State failed to prove that he was aware of the safe move protection is equally unpersuasive. Eden Brief 9-10. Eden knowingly gave false information via his statement to Mr. Gibby in regards to the loss incurred by him and Mau. 2RP 75-82. Eden knowingly aided Mau in her fraudulent request for compensation from U-Haul. 2RP 75-82. The general liability claim was a claim for loss of goods due to the alleged negligence of U-Haul and was submitted to U-Haul's insurance company, Republic Western Insurance. 2RP 38-39.

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<sup>8</sup> Because this is a consolidated response, the State will refer to each Appellant's brief by the name of the Appellant for clarity purposes.

There was sufficient evidence presented to the jury to find all elements charged beyond a reasonable doubt. The convictions of Mau and Eden should be affirmed.

**B. EDEN IS BARRED FROM RAISING FOR THE FIRST TIME ON APPEAL ANY ARGUMENT REGARDING A DUE PROCESS VIOLATION FOR GIVING WPIC 10.51 WHICH EDEN ALLEGES RELIEVES THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF ACCOMPLICE LIABILITY BECAUSE HE FAILED TO PRESERVE THE ISSUE FOR APPEAL.**

Eden failed to object to jury instruction number 11 and is therefore barred from raising issue with the jury instruction under RAP 2.5(a). 2RP 385; 2CP 21. An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *State v. O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, *citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest,

and (2) the error is truly of constitutional dimension.” *Id.* (citations omitted).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *State v. McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *State v. O’Hara*, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.*

Eden is claiming the jury instruction for accomplice liability given by the trial court was erroneous and violated his Due Process rights under the 14<sup>th</sup> Amendment of the United States Constitution. Eden Brief 11. Eden argues he can raise this matter for the first time on review because the alleged error affects his constitutional right to have the State prove every element of the offense beyond a reasonable doubt. Eden Brief 11-15. While the alleged error does affect a constitutional right, no error occurred and therefore Eden

has not suffered any prejudice from the trial court's jury instruction on accomplice liability.

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Id.* Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002).

To be an accomplice to a crime a person must have more than just knowledge or physical presence. *State v. Luna*, 71 Wn. App. 755, 759, 862, P.2d 260 (1990).

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

(i) solicits, commands, encourages, or requests such other person commit it; or

(ii) aids or agrees to aid such other person in planning or committing it...

RCW 9A.08.020(3). The standard jury instruction defining accomplice liability states:

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

legally 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 the 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.

WPIC 10.51.

Eden claims WPIC 10.51, as given, relieves the State of its burden to prove each element beyond a reasonable doubt. Eden Brief 12. Eden argues that Instruction 11 is fatally flawed because it allows for a person to be convicted via accomplice liability for merely being present and assenting to the crime. Eden Brief 13; 2CP 21. Eden states that this fatal flaw in Instruction 11 eliminates

the State's burden to prove the accomplice committed an overt act, an essential element. Eden Brief 13; 2CP 21. To support his premise, Eden cites to *State v. Renneberg* and its requirement that to support that a jury "instruction is proper it requires '*some form of overt act in the doing or saying of something* that either directly or indirectly contributes to the criminal offense.'" Eden Brief 13, *citing State v. Renneberg*, 83 Wn.2d 735, 739-40, 522 P.2d 835 (1974) (emphasis added in Eden's brief).

The *Renneberg* court also found that a separate jury instruction requiring the finding of an overt act was not necessary because the requirement was already contained within the wording of the accomplice jury instruction given in that case. *Id.* at 739. Similarly, in Eden's case the jury instruction given, WPIC 10.51, correctly sets forth the law and does require more than mere presence or knowledge. 2CP 21. Eden argues the jury could find that presence and silent assent would be enough to satisfy jury Instruction 11 as given. Eden Brief 13. Division One rejected this argument in *State v. Coleman*<sup>9</sup> and this court should similarly reject it here. Instruction 11 accurately defines the law and made it clear to the jury that mere presence was not sufficient to find a person

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<sup>9</sup> *State v. Coleman*, 155 Wn. App. 951, 961, 231 P.3d 212 (2010).

guilty under an accomplice liability standard. 2CP 21. Further, Eden did not merely sit by and silently assent to Mau's criminal activity. Eden aided Mau with the overt act of giving a false statement regarding the alleged loss and in disposing of the allegedly damaged goods. 2RP 75-82. The instruction, as given, does not relieve the State from proving all elements of the crime beyond a reasonable doubt and Eden's conviction should be affirmed.

**C. THE ACCOMPLICE LIABILITY STATUTE, RCW 9A.08.020, IS NOT OVERBROAD WHERE THE PROHIBITION ON AIDING ANOTHER IN PLANNING OR COMMITTING A CRIME DOES NOT MAKE UNLAWFUL A SUBSTANTIAL AMOUNT OF CONSTITUTIONALLY PROTECTED CONDUCT.**

Eden seeks to impose on the accomplice liability statute an unreasonably broad definition of the words "aid" and "encourage" in the hope that the court will overturn the statute based upon that unreasonable interpretation. Eden argues that because RCW 9A.08.020 criminalizes a substantial amount of speech and conduct protected by the First Amendment of the United States Constitution it is overbroad and unconstitutional. Eden Brief 20. This argument is without merit.

A statute is unconstitutionally overbroad if it infringes on constitutionally protected speech or conduct. *City of Seattle v. Huff*,

111 Wn.2d 923, 925, 767 P.3d 572 (1989), *citing Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). While a defendant may not normally challenge a statute unless the defendant's conduct falls within the range of constitutionally protected conduct (invalid as applied), a defendant may challenge a statute as overbroad even where the defendant's own conduct is not prohibited (facially invalid) because prior restraints on speech receive greater protection. *State v. Pauling*, 108 Wn. App. 445, 448, 31 P.3d 47 (2001), *reversed on other grounds*, 149 Wn.2d 381, 69 P.3d 331 (2003), *citing Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

Eden relies on *Brandenburg v. Ohio*, and its holding that pursuant to constitutional guarantee of free speech the State may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy 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, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969). Eden finds fault with section (3)(ii) of RCW 9A.08.020. Eden Brief 20-21. Eden argues that the language "[w]ith knowledge that it will promote or facilitate the commission of a crime. . . aids or agrees to aid [another] person in

planning or committing it” criminalizes speech protected by the First Amendment. Eden Brief 20-21.

Eden particularly challenges the word “aid,” especially as defined by WPIC 10.51, the jury instruction used in this case. “Aid” is defined as follows:

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.

WPIC 10.51. RCW 9A.08.020 indicates that a person is an accomplice if with the knowledge that it will promote or facilitate the crime, the person aids in planning or committing the crime. While aid can include encouragement, mere encouragement alone is not enough. The person giving encouragement must: 1) give the encouragement with the knowledge that it will promote and facilitate the crime; and 2) the encouragement must aid in planning or committing the crime. RCW 9A.08.020.

These restrictions mean that the accomplice liability statute does not violate the standards established in *Brandenburg*. The language of RCW 9A.08.020 qualifies aid as advocacy that is likely to produce or incite imminent lawless acts; this is not the kind of

advocacy that is protected in *Brandenburg*. Therefore, RCW 9A.08.020 is not unconstitutionally overbroad and jury instruction 11, as given to the jury, was proper. See 2CP 21. Eden's conviction should be affirmed.

**CONCLUSION**

For the foregoing reasons, this court should affirm Mau and Eden's convictions for False Insurance Claim and/or Proof of Loss.

RESPECTFULLY submitted this 23<sup>rd</sup> day of June, 2011.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

by:   
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

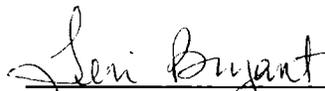
COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,	)	NO. 41319-1-II
Respondent,	)	
vs.	)	DECLARATION OF
	)	MAILING
JENNIFER MEGAN MAU,	)	
and	)	
DAVID JOHN EDEN,	)	
Appellant.	)	
_____	)	

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On June 23, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

John A. Hays  
Attorney for Jennifer Megan Mau  
1402 Broadway, Suite 103  
Longview, WA 98632

DATED this 23 day of June, 2011, at Chehalis, Washington.



Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

Declaration of  
Mailing

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BY  
STATE OF  
11 JUN 21 11:10:00  
COURT OF APPEALS  
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Prosecuting Attorney, declares under penalty of perjury under the  
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and address indicated below:

Jodi R. Backlund & Manek R. Mistry  
Attorneys for David John Eden  
PO Box 6490  
Olympia, WA 98507

DATED this 23 day of June, 2011, at Chehalis, Washington.

Teri Bryant  
Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

Declaration of  
Mailing