90230-5

Supreme Court No. (to be set)
Court of Appeals No. 32155-0-III
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Daniel Holcomb
Appellant/Petitioner

Grays Harbor County Superior Court Cause No. 11-1-00402-6
The Honorable Judge Mark McCauley

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Daniel Holcomb, the appellant below, asks the Court to review the published opinion of Division III of the Court of Appeals.

II. COURT OF APPEALS DECISION

Daniel Holcomb seeks review of the Court of Appeals' published opinion entered on April 10, 2014. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

1. Does Wash. Const. art. I, § 21 require juror unanimity as to the mode of an accused person's participation in a felony?

2. Does the prevailing interpretation of Washington's accomplice liability statute violate the First Amendment because it criminalizes a substantial amount of protected speech?

IV. STATEMENT OF THE CASE

Daniel Holcomb and Anthony Sumait walked past Charles Burnett's home and noticed he had a truck for sale. RP (4/3/12) 4-5, 15, 27-29, 71. Burnett was outside, and Mr. Holcomb asked Burnett about the truck. RP (4/3/12) 87, 91.

Sumait hit Burnett on the head. RP (4/3/12) 91, 103. Burnett had blurred vision and started falling, but stopped and regained awareness. He saw Mr. Holcomb in front of him, pulled out his handgun, and shot Mr. Holcomb five times. RP (4/3/12) 57, 92-93, 104. Burnett may have

thought Mr. Holcomb had something in his hand, but if so, he didn't know what.[1] RP (4/3/12) 92. Mr. Holcomb fell to the ground. RP (4/3/12) 93.

Sumait fled, and was later found a mile and a half from the scene; he had dirt and recent scrapes on his hands. RP (4/3/12) 27-29.

A neighbor who heard the shots ran over to help; this person saw no weapons near Mr. Holcomb as he lay there bleeding. RP (4/3/12) 16. Another neighbor saw a stick with a metal end on the ground, two to five feet from Mr. Holcomb. RP (4/3/12) 19-20. When the police arrived, one officer saw the stick about three feet from Mr. Holcomb's feet. RP (4/3/12) 24, 32. A paramedic kicked the stick away before the police were able to document its exact location relative to Mr. Holcomb. RP (4/3/12) 10-11.

The stick was seized and sent for testing.[2] Burnett's DNA was on the metal end of the stick. The other end had a mixture, with Mr. Holcomb comprising the main contributor. RP (4/3/12) 40-43.

After the state received the lab results, Mr. Holcomb was charged with Assault in the Second Degree, RP (4/4/12) 149, CP 1.

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[1] When Burnett gave a statement to police soon after the incident, he did not say that he saw anything in Mr. Holcomb's hands. RP (4/3/12) 99. Burnett also told a defense investigator that he saw nothing in Mr. Holcomb's hand. RP (4/4/12) 144.

[2] At that point, Mr. Holcomb had not been charged. Ex. 45; RP (4/3/12) 36, 60-61.

At trial, Burnett described being hit one time by a person who was not Mr. Holcomb. RP (4/3/12) 91-109. His former girlfriend testified that she watched the assault and that both men assaulted Burnett with stick weapons. RP (4/3/12) 71, 74, 76.

Mr. Holcomb asked the court to require the prosecution to elect one theory of liability. Alternatively, Mr. Holcomb asked the court to instruct the jury that they must be unanimous as to Mr. Holcomb's mode of participation in the offense: either Mr. Holcomb acted as an accomplice to Sumait's attack, or Mr. Holcomb was a principal and assaulted Burnett himself. RP (4/3/12) 111-118.

The court ruled that such an instruction would be a comment on the evidence and declined the defense request.[3] RP (4/3/12) 119. The state did not elect which theory it was pursuing, and the jury was not instructed that it had to be unanimous as to Mr. Holcomb's mode of participation in the crime. RP (4/4/12) 160-172. The state argued to the jury that it did not have to be unanimous as to whether Mr. Holcomb was an accomplice or a principal. RP (4/4/12) 160-161.

The jury convicted Mr. Holcomb as charged. RP (4/4/12) 196.

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[3] The next morning, defense counsel acknowledged that he'd been unable to find any cases supporting his request. RP (4/4/12) 127-8.

Mr. Holcomb moved for a new trial, arguing that his attorney denied him his right to testify. The court appointed a new attorney, held a factual hearing, and denied the motion. RP (4/16/12) 3-4; RP (5/16/12) 3-62. Mr. Holcomb also contested his criminal history. RP (7/12/12) 1-28. The court ruled that his offender score had been correctly calculated by the prosecutor, and sentenced Mr. Holcomb to 74 months in prison. RP (7/12/12) 11; CP 4-11. Mr. Holcomb timely appealed. CP 15.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that Wash. Const. art. I, § 21 requires jury unanimity as to the mode of participation in a felony. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

1. Without explanation, the Court of Appeals refused to address Mr. Holcomb's *Gunwall* argument.

In Washington, an accused person has a state constitutional right to a unanimous verdict.[4] Wash. Const. art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman,* 159 Wn.2d 509, 511, 150 P.3d 1126 (2007) (Coleman I). Because the federal right does not attach to

criminal defendants in Washington, it is necessary to determine the scope of the state right. The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Without explanation, the Court of Appeals found a *Gunwall* analysis "unnecessary." Opinion, p. 5; *see also* Opinion, p. 3 ("Mr. Holcomb incorrectly argues an analysis under [*Gunwall*] is necessary..."). This is incorrect. Absent controlling precedent, *Gunwall* provides the framework for analyzing the scope of a state constitutional right. *Gunwall*, 106 Wn.2d at 61.

2. The Supreme Court should accept review because otherwise Division III's erroneous decision, reached without benefit of *Gunwall* analysis, will guide trial courts on this important constitutional issue.

No Washington court has examined art. I, § 21 under *Gunwall* to determine whether or not an accused person has a constitutional right to jury unanimity as to the mode of participation in a felony. Historically, the common law drew sharp distinctions between accessories before the fact, accessories after the fact, principals in the first degree, and principals in the second degree, and jury unanimity was required as to the mode of

[4] The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon,* 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

participation. *Gunwall* analysis shows that art. I, § 21 incorporated this unanimity requirement.

The Supreme Court should accept review and decide this important constitutional issue. RAP 13.4(b)(3). Because the *Holcomb* decision has the potential to affect a large number of criminal cases, the issue is of substantial public interest. RAP 13.4(b)(4).

3. Wash. Const. art. I, § 21 preserves the common law right to a unanimous jury determination of an accused person's mode of participation in a felony.

The first *Gunwall* factor requires examination of the text of the state constitutional provision at issue. Wash. Const. art. I, § 21 provides that "[t]he right of trial by jury shall remain inviolate..." The strong, simple, direct, and mandatory language ("shall remain inviolate") implies a high level of protection, and, in fact, the court has noted that the language of the provision requires strict attention to the rights of individuals. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Art. I, § 21 has no federal counterpart. The Washington Supreme Court has found the difference between the two constitutions significant, and determined that the state constitution provides broader

protection.[5] *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Art. I, § 21 "preserves the right as it existed at common law in the territory at the time of its adoption." *Mace*, 98 Wn.2d at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003). Historically, the common law distinguished between four types of participants in crime:

> (1) principals in the first degree who actually perpetrated the offense; (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission; (3) accessories before the fact who aided or abetted the crime, but were not present at its commission; and (4) accessories after the fact who rendered assistance after the crime was complete.

Standefer v. U. S., 447 U.S. 10, 15, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980). Determining the proper category was crucial to a successful prosecution:

> the category determined venue (the principal had to be prosecuted where the crime took place, while the aider and abettor had to be prosecuted where his or her act of abetting took place); the phrasing of the indictment (variance was fatal); and, at times, whether the prosecution could even be initiated altogether

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[5] The court held that under the state constitution "no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime." This is in contrast to the more limited protections available under the federal constitution. *Mace*, 98 Wn.2d at 99-100.

> (accessories could be tried only after the conviction of the principal). Consequently, "considerable effort was expended in defining the categories."

Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Fordham L. Rev. 1341, 1357-58 (2002) (footnotes and citations omitted) (quoting *Standefer,* 447 U.S. at 16).

Among the other procedural requirements that flowed from these common law distinctions was the requirement of unanimity. In felony cases, the prosecution was required to plead and prove the mode of participation, and conviction required a unanimous finding on that issue:

> the common law absolutely prohibited abrogation of verdict specificity, or otherwise eliminating the requirement of unanimity of theory as between an aider and abettor and a principal...

Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. Rev. 85, 112-113 (2005).

These "'intricate' distinctions"[6] endured in Washington until they were partially abolished by the territorial legislature in 1881:

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

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[6] Id.

> counsel, aid and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals.

Code of 1881, § 956. This statute continued in effect following the 1889 adoption of the state constitution, pursuant to Wash. Const. art. XXVII, § 2.[7]

Notwithstanding this provision, Washington courts continued to distinguish between the modes of participation where required. *See, e.g., State v. Gifford*, 19 Wash. 464, 53 P. 709 (1898); *State v. Nikolich*, 137 Wash. 62, 241 P. 664 (1925). In *Gifford,* the state charged the defendant with rape as a principal (in accordance with the "no distinction" statute). After conviction, the defendant appealed, and the Supreme Court reversed because the evidence showed he'd aided and abetted the rapist by procuring the victim. In reversing the conviction, the Supreme Court made the following remarks regarding the "no distinction" statute:

> [T]he object of this statute was to do away with some of the technical hindrances which before existed in relation to the trials of accessories, and that it was the intention, under this statute, that the defendant might be indicted and tried even though the principal had been acquitted, and to make an accessory before the fact the same as a principal so far as the punishment was concerned, and so far as the mode, manner, and time of trial were concerned. But we do not think it was the intention of the legislature, in the passage of this law, to set a trap for the feet of defendants. The defendant enters upon the trial with the presumption of innocence in his

[7] That provision reads: "All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature..."

> favor, and if he were called upon to blindly defend against a crime of which he had no notice, and which, we think, would be the result of the strict construction of this law contended for, the law itself would be unconstitutional

Gifford, 19 Wash. at 468.

In *Nikolich,* several defendants were accused of aiding or abetting an unknown person ("John Doe") in the commission of an arson; however, the evidence at trial established that the fire was set by one of the codefendants (a person named Howard Carter).[8] Despite this, the jury was instructed to determine whether or not the defendants were guilty of aiding and abetting John Doe. Codefendant Howard Carter (and his wife) were acquitted of the charge, but the remaining defendants were convicted. Under these circumstances, the Supreme Court reversed, reasoning as follows:

> Even though the accessory may be tried and convicted as principal either before or after the principal actor, he may not be convicted in the absence of proof that the one to whom he is charged as accessory actually committed the crime... The result [here] is that there is no proof that the principal actor [John Doe] to which the jury were required to find the appellants aiders and abettors had anything to do with the setting of the fire.

Nikolich, 137 Wash. at 66-67. In reaching this decision, the Supreme Court quoted from a Mississippi case interpreting a similar statute:

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[8] Prior to trial, the prosecutor announced that John Doe was Howard Carter; however, no amendment was made to the charging document. *Nikolich,* 137 Wash. at 63-64.

> "[I]f the evidence shows that one or more [codefendants] were accessories before the fact, though charged in the indictment as principals, it is absolutely necessary to prove the party guilty who actually committed the felony before you can secure proof of the guilt of the accessories before the fact, though charged in the indictment as principals..."

Nikolich, 137 Wash. at 66-67 (quoting *Osborne v. State*, 99 Miss. 410, 55 So. 52, 54 (1911)).[9]

As these early cases demonstrate, the "no distinction" statute did not purport to dispense with such constitutional requirements as the right to adequate notice of the mode of participation, or the right to proof beyond a reasonable doubt of the principal's guilt (even if the principal escaped criminal liability). Similarly, nothing in the statute suggests that the legislature sought to eliminate the requirement that jurors be unanimous as to the mode of participation.[10] Code of 1881, § 956. Instead, the object of the statute was to remove certain obstacles to prosecution that had evolved under the common law scheme.[11]

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[9] The court also cited a Texas case outlining similar reasoning. *Nikolich,* 137 Wash. at 67 (citing *Gibson v. State*, 53 Tex. Crim. 349, 364, 110 S.W. 41 (1908) ("Where a party is being tried as an accessory before the fact, or as an accomplice, it is essential as a predicate for, or condition precedent to, his guilt, that the state should establish the guilt of the principal, for his guilt is dependent on that of the principal, whether the latter is on trial or not."))

[10] One commentator has suggested that the corresponding federal statute was not meant to eliminate the requirement of unanimity as to mode of participation in federal crimes. Kurland, 57 S.C. at 101-116. Despite this, "For almost a century, federal courts, without adequate legal and historical analysis, have simply viewed the elimination of the distinctions between a principal and an aider and abettor as also dispensing the need for jury unanimity..." *Id,* at 98.

[11] Had the legislature intended to remove the unanimity requirement, it would have done so explicitly. Any attempt to do so, however, would have been found unconstitutional. *See*

The fourth *Gunwall* factor "directs examination of preexisting state law, which 'may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.'" *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, 106 Wn.2d at 62). There do not appear to be any cases addressing nonconstitutional claims on this issue. Nor has there been legislative or executive attempts to address the issue.

The fifth *Gunwall* factor (structural differences in the two constitutions) always points toward pursuing an independent analysis, "because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State's power." *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. An accused person's right to juror unanimity is an issue of particular state interest or local concern. *See State v. Silva*, 107 Wn. App. 605, 621, 27 P.3d 663 (2001) (outlining other similar areas of state interest). There is no need for national uniformity on the issue.

Gifford, 19 Wash. at 468 (noting that the statute would be unconstitutional if it dispensed with the requirement that the accused person be given adequate notice of the charged mode of participation).

Five of the six *Gunwall* factors establish that art. I, § 21 preserved the common law right of unanimity as to mode of participation in a crime; the remaining factor (pre-existing state law) does not favor either side of the analysis. Thus *Gunwall* analysis suggests that the "inviolate" right to a jury trial includes the right to jury unanimity as to the mode of participation. Art. I, § 21.

4. The Supreme Court's *Hoffman* decision should be reconsidered because the *Hoffman* court did not conduct a *Gunwall* analysis.

The Washington Supreme Court has previously held that "the right to jury unanimity" does not include unanimity as to the mode of an accused person's participation in a crime. *See State v. Hoffman*, 116 Wn. 2d 51, 104-05, 804 P.2d 577 (1991) (citing *State v. Carothers,* 84 Wn.2d 256, 525 P.2d 731 (1974)). Although the *Hoffman* case referred to the "right to jury unanimity," the court made no mention of art. I, § 21 and did not analyze the scope of that provision under *Gunwall.*[12] Instead, the court relied on the reasoning outlined in *Carothers.*[13]

[12] Nor did the court undertake any other form of guided historical analysis.

[13] Curiously the *Hoffman* court also claimed that "[t]his court reaffirmed [*Carothers*] in *State v. Davis,* 101 Wn.2d 654, 658, 682 P.2d 883 (1984)." But *Davis* had nothing to do with unanimity. Instead, the *Davis* court held that an accomplice to robbery could be found guilty of first degree robbery even absent proof of knowledge that the principal was armed.

Carothers does not provide an adequate foundation for dispensing with a constitutional right derived from centuries of common law. First, the *Carothers* court made only one passing reference to art. I, § 21. *Carothers, at* 262 (noting that the unanimity issue was constitutional and thus could be raised for the first time on review). The court did not analyze the provision to determine whether or not it protected a right to unanimity as to the mode of an accused person's participation.

Second, even if *Carothers* had examined art. I, § 21, it would not have had the benefit of *Gunwall* (which was not decided until 1986). *Gunwall* provides the appropriate framework for answering questions such as that posed by this issue. In the absence of proper *Gunwall* analysis, the *Carothers* court's reasoning amounted to little more than "pure intuition," rather than the, reasonable and"articulable reasoned" process that now governs the analysis. *Gunwall,* 106 Wn.2d at 63.

Third, the *Carothers* court focused on whether the mode of participation comprised an alternative means[14] of committing an offense. *Id,* at 262-264. The court determined that it was *not* an alternative means, and thus the unanimity issue was not controlled by *State v. Golladay*, 78 Wn. 2d 121, 470 P.2d 191 (1970) *overruled in part by State v. Arndt*, 87

[14] The court used the phrase "method or mode of committing a crime" instead of the phrase "alternative means."

Wn. 2d 374, 553 P.2d 1328 (1976).[15] This holding—that the mode of participation is not an alternative means—is not a determination of the protections afforded by art. I, § 21.[16] Whether or not the mode of participation is an alternative means of committing a crime, art I, § 21 protects the right to a unanimous jury determination as to the mode of participation.

Because the *Hoffman* court did not undertake a *Gunwall* analysis, it should be reconsidered. This is especially so because *Hoffman* rested on the limited and imperfect reasoning of *Carothers*.

5. The trial court's failure to require juror unanimity as to the mode of participation requires reversal of the conviction because the prosecution relied on proof that Mr. Holcomb acted as a principal and as an accomplice.

The rule developed for "multiple acts" cases should apply to cases where conviction might rest on principal or accomplice liability. In multiple acts cases, the failure to provide a unanimity instruction is presumed to be prejudicial.[17] *Coleman* I, 159 Wn.2d at 512; *see also State v. Vander Houwen,* 163 Wn.2d 25, 38, 177 P.3d 93 (2008). Without the

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[15] In *Golladay,* the court overturned a conviction after the trial court submitted three alternative means to the jury, one of which was not supported by sufficient evidence.

[16] If the *Carothers* holding described the scope of art. I, § 21, then multiple acts cases would also not require juror unanimity, since multiple acts are not alternative means of committing a crime. But a unanimity instruction is always required in a multiple acts case, unless the prosecution elects a particular act to support a charge.

[17] Unless the prosecution elects a particular act upon which to proceed.

election or instruction, each juror's guilty vote might be based on facts that her or his fellow jurors believe were not established. *Coleman* I, 159 Wn.2d at 512. Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman* I, 159 Wn.2d at 512. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id,* at 512.

The same rule should apply as to the mode of participation. If the court instructs on accomplice liability but there is evidence that the accused person acted as a principal, either the prosecution must elect a particular theory of liability or the court must instruct jurors that unanimity is required as to the mode of participation. *See Coleman* I, 159 Wn.2d at 512. Failure to do so is constitutional error that is presumed prejudicial and requires reversal unless harmless beyond a reasonable doubt. *Id.*

In this case, the court's instructions allowed conviction by a split jury. Under the court's instructions, the jury was entitled to convict even if they did not unanimously agree as to Mr. Holcomb's mode of participation in the assault. *See* CP 22. Some jurors may have believed he hit Burnett, while others believed he stood by while another man hit Burnett. This created a manifest error affecting Mr. Holcomb's right to a

unanimous jury under art. I, § 21, and thus may be reviewed for the first time on appeal. *See* RAP 2.5(a)(3).

The court's failure to instruct on the unanimity requirement violated Mr. Holcomb's state constitutional right to a unanimous jury under art. I, § 21. His conviction must be reversed and the case remanded for a new trial. If the prosecutor does not elect a theory of liability, the jury must be instructed on the unanimity requirement. *See Coleman* I, 159 Wn.2d at 512.

B. The Supreme Court should accept review and impose a limiting construction on the accomplice liability statute, because the prevailing interpretation violates the First Amendment. The Court of Appeals' published decision conflicts with *Brandenburg*. Furthermore, this Petition raises significant questions of constitutional law that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(1), (3), and (4).

Speech advocating criminal activity may only be punished if it "is directed to inciting or producing imminent lawless action..." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969). This standard requires proof of *intent*; knowledge is insufficient. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). In addition, *Brandenburg* requires proof that speech "is likely to incite or produce such [imminent lawless] action." *Brandenburg,* 395 U.S. at 447.

A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech.[18] *State v. Immelt*, 173 Wn.2d 1, 267 P.3d 305 (2011). The prevailing interpretation of Washington's accomplice liability statute violates the requirements of *Brandenburg*. As currently interpreted, the statute is overbroad.

Accomplice liability can attach when a person provides "aid" by means of "words" or "encouragement." RCW 9A.08.020; WPIC 10.51. The only limitation on this criminalization of pure speech requires proof that the person acted "[w]ith knowledge that [the aid] will promote or facilitate the commission of the crime." RCW 9A.08.020.

Liability does not require proof of intent; nor does it require proof of the likelihood of imminent lawless action. *Brandenburg* , 395 U.S. at 447-449. Accordingly, the statute (as currently interpreted) violates *Brandenburg.*

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[18] 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. *Immelt,* 173 Wn.2d 1. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Immelt,* 173 Wn.2d 1. In other words, "[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds." *City of Seattle v. Webster,* 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied,* 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991). 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 *Hicks,* 539 U.S. at 119); *see also Conchatta Inc. v. Miller,* 458 F.3d 258, 263 (3rd Cir. 2006).

The Court of Appeals erroneously upheld the prevailing interpretation of RCW 9A.08.020 based on a misreading of *Brandenburg*. The court apparently believed that *Brandenburg* requires only proof of knowledge. Opinion, p. 7 (The statute "has been construed to apply solely when the accomplice acts *with knowledge* of the specific crime that is eventually charged...") (emphasis added).

This is incorrect. Under *Brandenburg,* speech may not be criminalized unless it is actually "*directed to* inciting or producing imminent lawless action." *Brandenburg,* 395 U.S. at 447 (emphasis added). A person's speech is not "directed to inciting or producing imminent lawless action" if it is made with mere knowledge that such action might result.

The Court of Appeals also ignored the second requirement of *Brandenburg*. To obtain a conviction, the prosecution must prove speech is "*likely* to incite or produce [imminent lawless] action." *Id.* (emphasis added).

Brandenburg requires proof of intent and likelihood. *Id.* The accomplice liability statute (as currently interpreted) requires neither. The Court of Appeals decision cannot stand.[19]

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[19] Divisions I and II have also upheld the prevailing interpretation of RCW 9A.08.020. *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011) (Coleman II); *State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011).

The Supreme Court should accept review and construe RCW 9A.08.020 in a manner that comports with the First Amendment. The Court of Appeals decision upholding the prevailing interpretation conflicts with *Brandenburg*. Furthermore, this Petition raises a significant question of constitutional law that is of substantial public interest. RAP 13.4(b)(1), (3) and (4).

VI. CONCLUSION

The Supreme Court should accept review, reverse Mr. Holcomb's conviction, and remand the case with directions to instruct jurors on the need for unanimity as to the mode of participation and on the limitations on accomplice liability stemming from the First Amendment.

Respectfully submitted May 5, 2014.

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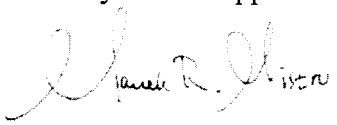

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CERTIFICATE OF MAILING

I certify that on today's date, I mailed a copy of the Petition for Review, postage pre-paid, to:

Daniel Holcomb, DOC #823122
Washington State Penitentiary
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and:

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In addition, I electronically filed the original with the Court of Appeals.

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 May 5, 2014.

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APPENDIX A:

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April 10, 2014

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CASE # 32155-0-III
State of Washington v. Daniel Seth Arthur Holcomb
GRAYS HARBOR COUNTY SUPERIOR - COURT No. 111004026

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:mk
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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DANIEL S.A. HOLCOMB, Appellant.	)	No. 32155-0-III PUBLISHED OPINION

BROWN, J. – Daniel Holcomb appeals his second degree assault conviction. He contends he was denied his constitutional right to jury unanimity. Under well-settled authority, we disagree. Mr. Holcomb next contends the accomplice liability statute is unconstitutional because it criminalizes constitutionally protected speech. We hold RCW 9A.08.020 is constitutional. Accordingly, we affirm.

FACTS

Mr. Holcomb and Anthony Sumait approached Charles Burnett's home, possibly to inquire about a truck for sale. Mr. Burnett was standing outside when the two men approached him. Jennifer Mingler, Mr. Burnett's girl friend, was outside and saw both men had stick-type weapons in their hands. She watched as both men struck Mr. Burnett. Mr. Burnett fell to the ground, but managed to pull out his pistol and shoot. Mr. Holcomb was hit and fell to the ground. Mr. Sumait ran off, but was soon apprehended.

Police arrived and observed Mr. Holcomb on the ground with a stick next to him. Mr. Holcomb's deoxyribonucleic acid (DNA) was found on the stick.

The State charged Mr. Holcomb with second degree assault either as a principal or accomplice. Following the State's case in chief, Mr. Holcomb asked the court, "to entertain a motion to dismiss at least the felony components of the charge . . . . I'm referring to both direct liability and accomplice liability here. I'm not asking for an out-and-out dismissal because I believe that a rational trier of fact, certainly with the inferences all pointed in the direction most favorable to the prosecution, could find that Mr. Holcomb came there with Mr. Sumait and acted as his accomplice while Mr. Sumait committed a fourth degree assault." Report of Proceedings (RP) at 112. The court denied the motion. Later, Mr. Holcomb asked the court to instruct the jury they must be unanimous as to Mr. Holcomb's mode of participation in the offense, either that Mr. Holcomb acted as an accomplice to Mr. Sumait's attack, or Mr. Holcomb acted as a principal in assaulting Mr. Burnett himself. The court ruled that such an instruction would invade the province of the jury, stating, "I can't tell the jury what to believe or not to believe. They're entitled to analyze all the witnesses and come up with their own conclusion on what factually happened." RP at 120.

During trial, the jury was instructed that to convict Mr. Holcomb, it had to find "the defendant and/or an accomplice intentionally assaulted Charles Burnett with a deadly weapon." Clerk's Papers at 22. In closing argument, the State argued the jurors did not

"have to determine whether [Mr. Holcomb acted as] an accomplice or the principal. You only have to be satisfied individually as to the facts." RP at 161-62.

The jury found Mr. Holcomb guilty as charged. He appealed.

ANALYSIS

A. Jury Unanimity

The issue is whether Mr. Holcomb was denied his constitutional right to jury unanimity. Mr. Holcomb contends the trial court erred in denying his request for an instruction telling the jury it had to be unanimous regarding whether he was an accomplice or a principal.

Generally, we review a trial court's denial of a defendant's proposed jury instruction for an abuse of discretion. *State v. Winings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005). A trial court abuses its discretion if it exercises its discretion based on untenable grounds or for untenable reasons. *State v. Smith*, 124 Wn. App. 417, 428, 102 P.3d 158 (2004).

Criminal defendants in Washington have a constitutional right to a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); CONST. art. I, § 21. We review for constitutional harmless error a trial court's alleged failure to give a unanimity instruction. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). Mr. Holcomb incorrectly argues an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) is necessary to determine whether the state constitutional provision applies to accomplice liability cases.

A person may be liable for the acts of another if he acts as an accomplice. RCW 9A.08.020. A person is an accomplice if, with knowledge that it will promote or facilitate the commission of a crime, he solicits, commands, encourages, or requests another person to commit the crime or aids or agrees to aid another in planning or committing the crime. RCW 9A.08.020(3)(a)(i), (ii). "'Accomplice liability represents a legislative decision that one who participates in a crime is *guilty as a principal*, regardless of the degree of the participation.'" *State v. McDonald*, 138 Wn.2d 680, 689, 981 P.2d 443 (1999) (quoting *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991)).

Hoffman is instructive. There, two individuals were charged with aggravated first degree murder of a police officer. Mr. Hoffman posed the same issue raised by Mr. Holcomb. Our Supreme Court held, "[I]t is not necessary that jurors be unanimous as to the manner of an accomplice's and a principal's participation as long as all agree that they did participate in the crime." *Hoffman*, 116 Wn.2d at 104. The court found no instructional error. *Id.* at 105.

And, "[t]he legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. The elements of the crime remain the same." *State v. Carothers*, 84 Wn.2d 256, 264, 525 P.2d 731 (1974), *overruled on other grounds by State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984).

Division Two of this court recently addressed this issue. In *State v. Walker*, __ Wn. App. __, 315 P.3d 562 (Dec. 20, 2013), the State charged Mr. Walker as an accomplice to multiple murder, assault, and robbery charges. *Id.* at 564. He argued the accomplice liability jury instruction violated his right to a unanimous jury. Relying on *Hoffman*, the court held, "The trial court's instructions were correct statements of accomplice liability law and did not deny Walker his due process." *Walker*, 315 P.3d at 567. The court continued, "There was no need for a unanimity instruction where accomplice liability allows a jury to convict as long as it finds that the elements of the crime were met, regardless of which participant fulfilled them." *Id.*

Moreover, Mr. Holcomb raises an issue that our Supreme Court has reviewed and rejected. Under the doctrine of stare decisis, we accept the rulings of the Supreme Court. Accordingly, the trial court did not violate Mr. Holcomb's right to a unanimous jury when deciding not to instruct the jury regarding unanimity as to whether Mr. Holcomb was an accomplice or principal. Mr. Holcomb fails to establish reversible error; a *Gunwall* analysis is unnecessary.

B. Constitutionality of RCW 9A.08.020

The issue is whether RCW 9A.08.020 (the accomplice liability statute) is unconstitutionally overbroad. Mr. Holcomb contends the statute criminalizes speech protected by the First Amendment. We review this constitutional issue de novo. *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997).

Under RCW 9A.08.020(3)(a)(ii), an individual may be convicted as an accomplice if he or she, acting "[w]ith knowledge that it will promote or facilitate the commission of the crime," the individual "[a]ids or agrees to aid such other person in planning or committing it." The statute does not define "aid" but Washington decisions have long accepted the pattern jury instruction's definition of "aid." *See State v. McKeown*, 23 Wn. App. 582, 591, 596 P.2d 1100 (1979) ("The word 'aid' means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and is ready to assist by his or her presence is aiding in the commission of the crime.").

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law . . . abridging the freedom of speech.'" *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). A state criminal law "may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)).

Mr. Holcomb contends the accomplice liability statute runs afoul of the First Amendment by criminalizing "aid" or "agreement to aid," defining it to include pure speech, without limiting criminalization to speech directed to inciting or producing imminent lawless action. Divisions One and Two of this court have rejected Mr.

Holcomb's contention. In *State v. Coleman*, 155 Wn. App. 951, 960-61, 231 P.3d 212 (2010), Division One relied on the mens rea requirement imposed by the statute, likening it to the pedestrian interference ordinance that our Supreme Court concluded was not overbroad in *City of Seattle v. Webster*, 115 Wn.2d 635, 802 P.2d 1333 (1990). In *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011), *review denied*, 173 Wn.2d 1035 (2012), Division Two adopted the *Coleman* analysis, adding that the statute's language forbids solely advocacy directed at and likely to incite or produce imminent lawless action.

Mr. Holcomb argues we should reject *Coleman* and *Ferguson* as wrongly decided because those cases erroneously rely on cases involving conduct, whereas the act of "aiding" can involve pure speech. But, the accomplice liability statute has been construed to apply solely when the accomplice acts with knowledge of the specific crime that is eventually charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity. *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 512, 14 P.3d 713 (2000). And the required aid or agreement to aid the other person must be "in planning or committing [the crime]." RCW 9A.08.020(3)(i). Statutes are presumed to be constitutional and wherever possible "'it is the duty of [the] court to construe a statute so as to uphold its constitutionality.'" *In re Det. of Danforth*, 173 Wn.2d 59, 70, 264 P.3d 783 (2011) (quoting *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985)). Mr. Holcomb does

not overcome this presumption. Given all, like Divisions One and Two, we hold RCW 9A.08.020, the accomplice liability statute, is constitutional.

Affirmed.

Brown, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

BACKLUND & MISTRY

May 05, 2014 - 12:17 PM

Transmittal Letter

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Case Name: State v. Daniel Holcomb

Court of Appeals Case Number: 32155-0

Party Respresented: Daniel Holcomb

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Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to jwalker@co.grays-harbor.wa.us.

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