No. 44642-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jesse Clark,

Appellant.

Cowlitz County Superior Court Cause No. 11-1-01099-3

The Honorable Judge Michael H. Evans

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Clark's four bail jumping convictions violated his Fourteenth Amendment right to due process because the evidence was insufficient to prove bail jumping.

2. The prosecution failed to prove that Mr. Clark received actual notice that he was required to personally appear in court.

3. The prosecution failed to prove that Mr. Clark received actual notice of the specific time his presence was required.

4. The prosecution failed to prove that Mr. Clark had actual knowledge that he was required to personally appear in court on a particular date at a specific time.

> **ISSUE 1:** A conviction for bail jumping requires proof that the accused person received actual notice of a requirement of personal appearance on a particular date at a specific time. Here, the state failed to prove actual notice. Was the evidence insufficient to prove bail jumping?

5. The prosecution failed to prove the specific time that the trial court called Mr. Clark's case and noted his alleged absence on April 19th (count three) and August 2nd (count five).

6. The prosecution failed to prove that Mr. Clark was absent from court at 8:30 a.m. on August 6th (count six).

> **ISSUE 2:** To convict Mr. Clark of bail jumping, the prosecution was required to prove that he failed to appear in court at the specific time he'd been directed to appear. The state failed to prove that Mr. Clark failed to appear at the specific time required by the court's scheduling order. Was the evidence insufficient to prove bail jumping?

7. Mr. Clark's convictions for extortion and possession of stolen property violate the Fifth and Fourteenth Amendment prohibition against double jeopardy.

8. Two convictions violate double jeopardy if based on the "same evidence."

> **ISSUE 3:** Multiple convictions violate double jeopardy if the convictions are based on the "same evidence." Here, the evidence relied on by the state to prove extortion was sufficient to prove the possession of stolen property charge. Did entry of two convictions for the same offense violate Mr. Clark's Fifth and Fourteenth Amendment right to be free from double jeopardy?

9. Mr. Clark's convictions for four counts of bail jumping violate the Fifth and Fourteenth Amendment prohibition against double jeopardy.

10. Mr. Clark committed at most two units of bail jumping.

> **ISSUE 4:** Multiple convictions for a single unit of prosecution violate double jeopardy. Here, the evidence showed that Mr. Clark missed court on multiple occasions, but that he'd only been released by court order or admitted to bail twice. Did the entry of two bail jumping convictions for each release order violate double jeopardy?

11. The prosecutor committed misconduct that was flagrant and ill-intentioned.

12. The prosecutor improperly quantified the reasonable doubt standard in closing argument.

13. The prosecutor improperly "testified" to "facts" outside the record.

14. The prosecutor improperly bolstered the credibility of a state witness with reference to facts outside the record.

15. The prosecutor improperly bolstered the state's case by arguing that police "finally got enough evidence" to obtain a search warrant for Mr. Clark's home.

16. The prosecutor improperly urged jurors to convict based on passion, prejudice, and propensity evidence.

ISSUE 5: A prosecutor commits misconduct by quantifying the reasonable doubt standard, "testifying" to "facts" not in evidence, improperly bolstering the credibility of a witness or the strength of the state's case, or relying on passion and prejudice to obtain a conviction. Here, the prosecutor committed misconduct that was flagrant and ill-intentioned. Was Mr. Clark prejudiced by numerous instances of prosecutorial misconduct?

17. Mr. Clark was convicted through the operation of a statute that is unconstitutionally overbroad.

18. The accomplice liability statute impermissibly permits conviction based on "words" or "encouragement" spoken with knowledge but without intent to promote or facilitate a crime.

19. The accomplice liability statute impermissibly permits conviction based on "words" or "encouragement" even absent proof that the speech is likely to incite imminent lawless action.

20. The trial judge erred by giving Instruction No. 12, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.

ISSUE 6: 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 speech made with knowledge that it will facilitate or promote commission of a crime, even if the speech is not directed at inciting imminent lawless action or likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

21. The sentencing court failed to properly determine Mr. Clark's offender score.

22. The sentencing court failed to determine whether or not the extortion and possession of stolen property charges comprised the same criminal conduct.

23. Mr. Clark's extortion and possession of stolen property charges should have scored as one point because they occurred at the same time and place, against the same victim, with the same overall criminal intent.

> **ISSUE 7:** Multiple offenses comprise the same criminal conduct if they occur at the same time and place, against the same victim, with the same overall criminal purpose. Mr. Clark was prosecuted for extortion (as an accomplice) and possession of stolen property, based on allegations that he knowingly held a stolen dog at his house, in aid of a kidnapping and ransom scheme. Did the trial court err by scoring the extortion and possession of stolen property charges separately?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jessie Clark agreed to watch a bulldog for a friend. RP 265.[1] He brought the dog to his home, where he and his housemate Lori Vanderhoff cared for it. RP 267-69. He allowed the dog inside the house, and let it up on his furniture. RP 267. Later, Mr. Clark built a structure for the dog on his front porch. RP 270. The dog left Mr. Clark's house after two days. RP 286.

Two days after the dog left Mr. Clark's home, Jennifer Thomas started receiving text messages demanding her pain medication and $1,000 for the safe return of her missing bulldog, Jagger. RP 98-100, 194-95. One of the texts included a photo of Jagger, with a rope similar to one found at Mr. Clark's house. RP 235-36, Ex 39. Thomas went to the sheriff's office. RP 99.

Thomas explained to the deputies that an acquaintance named Ivy Rose Folsom had stolen Jagger from her home. RP 82, 87, 91, 131-32. The Thomas family had distributed fliers bearing Jagger's picture. They'd posted the fliers in the area between the time he was stolen and when the messages began. RP 95. In addition, local news media ran numerous stories about the missing dog. RP 373-74.

[1] One witness testified that Mr. Clark said he had purchased the dog. RP 352.

More than two weeks later, Jagger was found dead. RP 226.

Police contacted Mr. Clark, who initially denied any knowledge of the dog. RP 403. Later, however, Mr. Clark gave the officers Johnny Jordan's name. RP 406, 410. Jordan was Ivy Folsom's boyfriend. RP 83.

The police arrested Jordan. RP 322, 397-98, 406. They found Jordan hiding in a closet in the apartment he shared with Folsom. RP 321-22. Jordan had a copy of the lost dog flier bearing Jagger's photo in his pocket. RP 171, 326-27. Jordan also had several cell phones and Jagger's name written on a small notebook. RP 324, 326-27.

The state charged Mr. Clark with possession of stolen property and extortion. CP 1. The state later charged Mr. Clark with four counts of bail jumping, alleging that he had missed two trial readiness hearings and the associated trial dates. CP 2.

To prove the bail jump charges, the state introduced testimony of the court clerks and copies of the clerk's minutes. RP 412-459; Ex. 203-21. The minutes indicate that a readiness hearing was set in Mr. Clark's case for April 19, 2012 and that trial was set for April 23, 2012. Ex. 205, 206. The minutes do not specify what time the hearings were to start. Ex. 205, 206.

At trial, a clerk testified that the April 19th hearing was supposed to begin at 9:00 am and that it is the court's general practice to inform the

accused person of when s/he is supposed to appear. RP 424. The prosecutor did not ask if Mr. Clark was actually informed of the date and time of his readiness hearing. RP 412-59. The state also did not ask what time the April 23rd trial was supposed to start, or whether Mr. Clark was told of that date and time. RP 412-59. The state did not offer a written scheduling order or any document signed by Mr. Clark acknowledging receipt of notice of the hearings.

The minutes from April 19, 2012 and April 23, 2012 show that Mr. Clark was not in court on those dates. Ex. 207, 209. The April 19th minutes do not specify the time he was determined to be absent. Ex. 207. The April 23rd minutes indicate that Mr. Clark was not present at 8:52am. Ex. 209.

The court set another readiness hearing and trial date. The clerk's minutes show that readiness and trial were set for August 2, 2012 and August 6, 2012 respectively. Ex. 211, 212. The minutes do not indicate the time at which Mr. Clark was required to appear. Ex. 211, 212.

A clerk testified that the August 2nd hearing was supposed to start at 9:00am but again, the state's attorney did not ask the clerk if Mr. Clark was informed of that time. RP 444. Another clerk testified that the August 6th trial was to begin at 8:30 a.m., and that the court generally tells the accused person the start time. RP 441-42. The state did not ask if the

judge specifically told Mr. Clark what time he needed to be in court on that date. RP 412-49. The state did not offer any written scheduling notice or other document signed by Mr. Clark indicating that he had been notified of the dates and times of the hearings.

The minutes from August 2, 2012 and August 6, 2012 indicate that Mr. Clark was absent on those dates. Ex. 214, 216. The August 2nd minutes do not indicate what time Mr. Clark was determined to be absent. Ex. 214. The August 6th minutes state that Mr. Clark was not in court at 8:56 a.m. Ex. 216.

The state called a number of witnesses regarding the extortion and possession of stolen property allegations. Several sheriff's deputies described their investigation into the text messages demanding ransom for Jagger's safe return. RP 145-62, 175-80, 187-212. Using Thomas's cell phone, law enforcement arranged to meet with the kidnapper to make an exchange. RP 146-49. The messages eventually led the police to a road near a golf course in Kelso. RP 155-56. Other deputies parked out of sight, near what they thought were the only two routes leaving the area. RP 175, 177.

At one point, a truck drove by. RP 159, 185, 211. One detective described the truck as a tan or white four-wheel-drive import with a barrel in the back. RP 159. A deputy testified that he thought the truck was a

Nissan. RP 185. Another deputy just saw a pickup truck but could not describe it. RP 211. The deputies were unable to contact the driver of the truck because it turned down a small road that they did not know about. RP 161, 167-69, 178-79. In closing, the prosecutor argued that it was "quite a coincidence" that Mr. Clark owned a white Toyota truck. RP 503.

Lori Vanderhoff, who had been staying on Mr. Clark's property, testified that Mr. Clark brought the dog to his house in his truck, and that it had an injured paw. RP 263-65. She testified that Mr. Clark had not slept for nine or ten days around the time that the dog was at his home. RP 273-74. She testified that the dog only stayed at the house two days. RP 285-86. She knew Folsom and Jordan, but did not see them during that time. RP 288-89. The dog was gone as of October 6th, which was two days before Thomas began receiving texts. RP 286, 97-98. Vanderhoff did not see Mr. Clark with the dog after it left the house. RP 292. Vanderhoff also said that she moved from Mr. Clark's property partially because of a comment he made that he had "beat the shit out of that f*cking d—." RP 275-76.[2] Vanderhoff understood "d—" to mean dog. RP 275. The state attempted to elicit the content of Vanderhoff's

[2] Mr. Clark's neighbor also told the police that he had heard the comment, but did not recall at the time of his testimony. RP 354-56.

statement to the police, but the court sustained Mr. Clark's hearsay objection. RP 388.

In closing, the prosecutor argued that Vanderhoff's statement to the police corroborated her testimony:

> And Mrs. Vanderhoff told you the same as she told the police, that she was concerned about that, the Defendant had been acting erratically, engaged in some bizarre behavior up for ten days at a stretch, and he told … her they aren't welcome on the property. RP 498.

The sheriff's deputies also testified about their search of Mr. Clark's property. RP 226-239, 300-309. They found the shelter Mr. Clark built for the dog as Vanderhoff had described it to them. RP 233-36, 298, 304. They also found dog hair on a sofa inside Mr. Clark's home. RP 237-38.

The deputies did not testify that they uncovered any evidence linking Mr. Clark to the theft of the dog, the ransom demands, the cell phone from which the demands came, or the dog's death. RP 141-240, 293-343, 370-408. No testimony indicated that Mr. Clark had any contact with either the dog or with Folsom and Jordan after the dog left his house. RP 258-92. Although Thomas later received a picture of Jagger with a rope similar to one found at Mr. Clark's home, no testimony established when the photo was taken, or when it was provided to the person who sent it to Thomas. RP 199, 235-36; Ex. 39, 122.

In closing, prosecutor asked the jurors why Mr. Clark participated in the offenses, and then answered his own question:

> Easy answer and it's an old answer: greed. Greed. Lust for money, lust for drugs. Because that's what Jagger meant to the Defendant and the people he was working with. To him, Jagger was not a pet, Jagger was not a friend of the family, Jagger was just a way to get what he wants. And he's willing to do whatever he … needs to get from him. Dog has value to him, because of what it can get him. And when the dog can't get him anything anymore, dog's not worth anything to him. And we see where that ended up.
> RP 497.

The prosecutor also stated that Vanderhoff's claims to the police were verified when they "finally get enough evidence to raid and search the defendant's house." RP 499.

In explaining the state's burden of proof, the prosecutor told the jury that:

> [T]he law says you don't have to be convinced beyond all doubt, beyond any doubt, 99%.
> RP 506.

Finally, the prosecutor said that rebuttal was his favorite part of trial because "… by [that] point, [he] get[s] to hear what the defense arguments are and they never fail to entertain." RP 526.

The court instructed the jury that it could find Mr. Clark guilty of extortion as an accomplice. Court's Instructions to Jury, No. 12, Supp. CP. The instructions permitted conviction based on "words" or "encouragement," if made "with knowledge" that they would "promote or

facilitate the commission of the crime." The court's instructions did not require proof that Mr. Clark intended to facilitate the crime. Court's Instructions to Jury, No. 12, Supp. CP.

The jury found Mr. Clark guilty of all six charges. RP 539-40. The court scored each offense separately at sentencing. CP 6. This timely appeal follows. CP 18.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. CLARK OF BAIL JUMPING.

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found the charge proven beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied,* 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. No rational trier of fact could have found Mr. Clark guilty of bail jumping beyond a reasonable doubt.

The bail jumping statute provides that:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state… and who fails to appear … is guilty of bail jumping.

RCWA 9A.76.170.

To meet the knowledge element of bail jumping, the state must prove beyond a reasonable doubt that the accused received notice of the required court dates. *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010) *review granted, cause remanded on other grounds,* 172 Wn.2d 1003, 257 P.3d 1114 (2011).

The state must also prove that the accused person was absent at the specific time at which s/he was notified the hearing would occur. *State v. Coleman*, 155 Wn. App. 951, 964, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011).

Testimony regarding a person or organization's usual practices may not be sufficient to prove that an event occurred in accordance with those practices on a particular occasion. *United States v. Lo*, 231 F.3d 471, 477 (9th Cir. 2000) *holding modified on other grounds by United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007).

1. There was insufficient evidence for a rational trier of fact to find Mr. Clark guilty of Count III.

Count III charged Mr. Clark with bail jumping based on his failure to appear on April 19, 2012. CP 2. The clerk's minutes show that the court set a readiness hearing for that date. Ex. 206. The minutes, however, do not specify what time the hearing was supposed to occur. Ex.

206. No written notice regarding this court date was offered into evidence. Nor did anyone testify that notice had been provided to Mr. Clark. RP 412-59. The clerk who prepared the minutes testified that the April 19th hearing was supposed to be at 9:00am and that it was the court's practice to inform the accused person of the date and time s/he is to appear. RP 424. No witness testified that Mr. Clark was actually informed that he was required to personally attend the April 19th hearing, or what time the hearing would be held. RP 412-59.

The clerk's minutes from the April 19th hearing indicated that Mr. Clark did not appear for that hearing. Ex. 207. The minutes do not indicate the time at which Mr. Clark was determined to be absent. Ex. 207. No witness testified regarding what time the court determined Mr. Clark was absent. RP 412-59.

The state presented insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Clark knew the date and time of his hearing. *Cardwell*, 155 Wn. App. at 47. Additionally, the state provided insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Clark was absent from court at the specific time at which his hearing was set. *Coleman*, 155 Wn. App. at 964. Mr. Clark's conviction for count III must be reversed. *Id.*

2. There was insufficient evidence for a rational trier of fact to find Mr. Clark guilty of Count IV.

Count IV charged Mr. Clark with bail jumping for failure to appear for his trial date on April 23, 2012. CP 2. Again, the state presented clerk's minutes as evidence that Mr. Clark was required to be in court on that date. Ex. 205. The minutes do not indicate the time at which Mr. Clark was required to appear. Ex. 205. Likewise, the minutes do not state that Mr. Clark was informed of the trial date or the time that he was required to be in court on April 23rd. Ex. 205. No witness testified that the court told Mr. Clark about the April 23rd trial date or gave him a time to appear in court. RP 412-59. The state did not offer any written notice that had been provided to Mr. Clark informing him of the date and time of his trial. No witness testified that such a notice existed. RP 412-59.

The state also offered the clerk's minutes from April 23, 2012, which stated that Mr. Clark was not in court at 8:52am on that date. Ex. 209. The court adjourned at 8:53am. Ex. 209.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Clark was aware of his April 23rd trial date. *Cardwell*, 155 Wn. App. at 47. Similarly, the state did not prove the time Mr. Clark was required to be in court on April 23rd. Finally, there was no evidence that Mr. Clark failed to appear at the specific time the trial was to start. No

rational trier of fact could have found that he failed to appear at the required time. *Coleman*, 155 Wn. App. at 964.

Mr. Clark's conviction for count IV must be reversed. *Id.*

3. There was insufficient evidence for a rational trier of fact to find Mr. Clark guilty of Count V.

Count V charged Mr. Clark with failure to appear for a readiness hearing on August 2, 2012. CP 2. The clerk's minutes – which the state offered as evidence that Mr. Clark was required to appear on that date – did not state what time the hearing would be held. Ex. 213. A clerk testified that the readiness hearing was to be at 9:00am, but did not testify as to whether Mr. Clark was informed of the date or time of the hearing. RP 444. Again, the state did not introduce written notice informing Mr. Clark of the date and time scheduled for the hearing. No witness testified that Mr. Clark received written notice. RP 412-59.

The clerk's minutes from August 2nd state that Mr. Clark was not present in court, but do not indicate what time he was determined to be absent. Ex. 214.

No rational trier of fact could have found beyond a reasonable doubt that Mr. Clark knew the date and time of the August 2nd hearing or that he failed to appear at the scheduled time. *Cardwell*, 155 Wn. App. at 47; *Coleman*, 155 Wn. App. at 964.

Mr. Clark's conviction for count V must be reversed. *Cardwell*, 155 Wn. App. at 47; *Coleman*, 155 Wn. App. at 964.

4. There was insufficient evidence for a rational trier of fact to find Mr. Clark guilty of Count VI.

Finally, count VI charged Mr. Clark with failure to appear for trial on August 6, 2012. CP 2. The clerk's minutes state that trial was set for that date. Ex. 213. Those minutes do not, however, provide a time at which Mr. Clark was required to appear. Ex. 213. A clerk testified that the trial was to start at 8:30am, and that the court generally informs the accused of that fact. RP 441-42. Again, the state did not offer any written notice informing Mr. Clark of the date and time of the trial, and no witness testified that he'd been provided written notice. RP 412-49.

The clerk's minutes from August 6th state that Mr. Clark was not present in court at 8:56am and that the court ordered that his bench warrant remain in effect at 8:57am. Ex. 216.

The clerk's statement that the court usually tells the accused of the date and time of trial is insufficient to prove that Mr. Clark, specifically, was so informed. *Lo*, 231 F.3d at 477. No rational trier of fact could have found beyond a reasonable doubt that Mr. Clark was aware of the date and time of the August 6th trial. *Cardwell*, 155 Wn. App. at 47; *Coleman*, 155 Wn. App. at 964.

Mr. Clark's conviction for count VI must be reversed. *Cardwell*, 155 Wn. App. at 47; *Coleman*, 155 Wn. App. at 964.

II. MR. CLARK'S CONVICTIONS VIOLATE THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY.

A. Standard of Review.

Double jeopardy violations are constitutional issues reviewed *de novo*. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). Double jeopardy violations constitute manifest error affecting a constitutional right, which can be raised for the first time on appeal. *State v. Turner*, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000); RAP 2.5(a)(3).

B. Mr. Clark's convictions for both possession of stolen property and extortion violated the protection against double jeopardy under the "same evidence" test.

Both the Washington state and federal constitutions prohibit multiple punishments for a single offense. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9; *In re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). The *Blockburger*[3] or "same evidence" test controls the double jeopardy analysis unless there is a clear indication that the legislature

[3] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

intended otherwise. *Womac*, 160 Wn.2d at 652. Under the *Blockburger* test, multiple convictions based on a single act violate double jeopardy if the evidence necessary to support a conviction for one offense is sufficient to support a conviction for the other. *Orange*, 152 Wn.2d at 816.

The legal elements of the offenses are not dispositive of the *Blockburger* test for double jeopardy. *Womac*, 160 Wn.2d at 652. The *Orange* court, for example, found that convictions for first degree attempted murder and first degree assault violated double jeopardy even though attempted murder required the additional element of intent to cause death. *Orange,* 152 Wn.2d at 820. Because the offenses were both based on the single act of firing one shot at another person, the evidence required for attempted murder was sufficient to support the assault conviction. *Id; see also State v. Martin*, 149 Wn. App. 689, 699, 205 P.3d 931 (2009) (finding that convictions for assault and attempted rape violated double jeopardy despite different legal elements).

Mr. Clark was charged with knowingly possessing stolen property, knowing it had been stolen. RCW 9A.56.160; CP 1. In order to find Mr. Clark guilty of possession of stolen property, the jury necessarily found that he possessed the bulldog with knowledge that it was stolen. RCW 9A.56.160; *State v. Khlee*, 106 Wn. App. 21, 24, 22 P.3d 1264 (2001).

The state's theory on the extortion charge relied on the same evidence: that Mr. Clark kept the stolen dog on his property, knowing that Jordan planned to demand ransom. RCW 9A.56.120; RCW 9A.08.020(3).

The evidence necessary to convict Mr. Clark of extortion was also sufficient to convict him of possession of stolen property. *Orange*, 152 Wn.2d at 816. Convictions for both offenses constituted double jeopardy under the *Blockburger* test. *Id.*

Mr. Clark's convictions for both possession of stolen property and extortion violated the constitutional protection against double jeopardy. *Id.* His convictions must be reversed. *Id.*

C. Mr. Clark's committed at most two counts of bail jumping under the "unit of prosecution" analysis.

The protection against double jeopardy prohibits multiple convictions for the same offense. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9; *State v. Morales*, 174 Wn. App. 370, 384-85, 298 P.3d 791 (2013). Whether convictions for multiple counts of an offense constitute double jeopardy turns on the "unit of prosecution" for that offense. *Morales*, 174 Wn. App. at 384. The unit of prosecution is the "act or course of conduct the legislature has defined as the punishable act." *Id.*

Washington courts have not yet determined the unit of prosecution for bail jumping. The approach for determining the unit of prosecution, however, is "well settled." *Morales*, 174 Wn. App. at 385. The first step is analysis of the statutory language. *Id.* If a statute is ambiguous as to the unit of prosecution, the rule of lenity requires that the ambiguity be "resolved against turning a single transaction into multiple offenses." *Id.* Second, the court must review the statute's history. *Id.* Finally, the court must determine whether more than one unit of prosecution applies to the facts of the case. *Id.*

The bail jumping statute provides that:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state..., and who fails to appear ... as required is guilty of bail jumping.

RCW 9A.76.170.

The unit of prosecution analysis looks first to the language of the statute. *Morales*, 174 Wn. App. at 385. Under the language of the bail jumping statute, the accused must be released by court order as a prerequisite to culpability. RCW 9A.76.170. The provision is ambiguous as to whether one offense derives from one court order or one failure to appear. *Id.* This ambiguity must be construed in favor of a single unit of prosecution. *Id.* The rule of lenity requires that a sequence of failures to

appear (following a single release from custody) constitute one unit of prosecution. *Id.*

The statutory history does not conflict with this interpretation. Bail jumping was first criminalized pursuant to the 1975 overhaul of the criminal code. 1975 1st ex.s. c 260. The only changes to the language since then have related to the knowledge requirement and affirmative defenses. 2001 c 254 § 3; 1983 1st ex.s. c 4 § 3.

The unit of prosecution inquiry turns finally to the facts of the case. *Morales*, 174 Wn. App. at 385. Mr. Clark was convicted of four counts of bail jumping. CP 2, 4. He was only released from custody on two occasions. RP 419-20, 431-33. He engaged in two distinct courses of conduct involving alleged failure to appear following those releases. Each time, Mr. Clark had already "jumped bail" by failing to appear at a readiness hearing. Ex. 205, 206, 211. Absent another release order, he could not be charged for failing to appear again four days later. *Morales*, 174 Wn. App. at 385. The facts support only two units of prosecution for bail jumping.

The court violated the protection against double jeopardy when it entered convictions for four counts of bail jumping based only on two units of prosecution. *Id.* Mr. Clark's bail jumping convictions must be reversed. *Id.*

III. PROSECUTORIAL MISCONDUCT DENIED MR. CLARK A FAIR TRIAL.

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.*

Furthermore, an appellant can argue prosecutorial misconduct for the first time on review if it creates manifest error affecting a constitutional right.[4] RAP 2.5(a)(3). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

B. The prosecutor committed numerous instances of prejudicial misconduct at Mr. Clark's trial.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct

[4] Certain misconduct directly violates constitutional rights, and requires reversal unless harmless beyond a reasonable doubt. *See e.g. State v. Monday*, 171 Wn.2d 667, 685, 257 P.3d 551 (2011).

warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

1. The prosecutor committed misconduct by attempting to quantify the reasonable doubt standard.

Due process places the burden on the state to prove each element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 22; *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (*citing Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).[5] The presumption of innocence makes up the "bedrock principle

[5] This violation of Mr. Clark's right to the presumption of innocence created manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

upon which our criminal justice system stands." *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010). A prosecutor's misstatement of the state's burden of proof "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Id.*

A prosecutor commits misconduct by attempting to "quantif[y] the level of certainty required to satisfy its burden of proof." *State v. Fuller*, 169 Wn. App. 797, 825-26, 282 P.3d 126 (2012).

At Mr. Clark's trial, the state argued, regarding the state's standard of proof, that:

> [T]he law says you don't have to be convinced beyond all doubt, beyond any doubt, 99%.
> RP 506.

This argument improperly quantified the reasonable doubt standard. Mr. Clark's case was extremely close on the facts: the state presented no evidence linking Mr. Clark to Jordan's threats or Folsom's theft of the dog. Nothing in the record established his knowledge that the dog was stolen or that Jordan intended to demand ransom. The jurors may well have been 99% convinced of his guilt as an accomplice to extortion and yet that remaining 1% of doubt could have been reasonable. Because the evidence of Mr. Clark's knowledge was so thin, the prosecutor's improper argument prejudiced Mr. Clark.

The prosecutor's improper argument quantifying the state's standard of proof constituted flagrant, ill-intentioned, and prejudicial misconduct. *Glasmann*, 175 Wn.2d at 704. Mr. Clark's convictions must be reversed. *Id.*

2. The prosecutor committed misconduct by impermissibly bolstering the state's case.

A prosecutor commits misconduct by improperly bolstering witness credibility or the state's case. *Boehning*, 127 Wn. App. at 514; *State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993). It is also misconduct for a prosecutor to argue "facts" that have not been admitted into evidence. *Glasmann*, 175 Wn.2d at 696. It follows that a prosecutor commits misconduct by improperly bolstering the credibility of a state witness with "facts" that have not been admitted into evidence. *State v. Jones*, 144 Wn. App. at 293-94; *Boehning*, 127 Wn. App. at 514.

Similarly, it is misconduct for a prosecutor to comment on a court's prior determination of probable cause in a case. *Stith*, 71 Wn. App. at 22. Such an argument improperly indicates to the jury that, "if there were any question of the defendant's guilt, the defendant would not even be in court." *Id.*

During closing, the prosecutor argued that:

> Mrs. Vanderhoff told you the same as she told the police, that she was concerned about that, the Defendant had been acting

> erratically, engaged in some bizarre behavior up for ten days at a stretch, and he told … her [she wasn't] welcome on the property. RP 498.

Additionally, the prosecutor argued that Vanderhoff's claims were verified when the police "finally get enough evidence to raid and search the defendant's house." RP 499.

Both of these arguments were improper.

Vanderhoff did not testify that Mr. Clark had been "acting erratically" or that he had "engaged in some bizarre behavior." RP 258-282. She did not testify that Mr. Clark ever told her or anyone else that she was not welcome on his property. RP 258-282. The state was not permitted to elicit testimony regarding the content of Vanderhoff's conversations with the police. RP 388.

The prosecutor's argument constituted "testimony" to "facts" that had not been admitted into evidence. *Glasmann*, 175 Wn.2d at 696. The prosecutor's statement about Vanderhoff's prior statements to the police impermissibly bolstered her credibility using "facts" that had been specifically excluded by the court. *Jones*, 144 Wn. App. at 293-94.

Vanderhoff was the key witness connecting Mr. Clark to the stolen dog. The state's case relied on the jury believing her testimony. The prosecutor's attempt to bolster Vanderhoff's credibility prejudiced Mr. Clark.

Additionally, the argument that the police "finally got enough evidence" to search Mr. Clark's home improperly bolstered the state's case by implying that a court had already determined that sufficient evidence supported his guilt. *Stith*, 71 Wn. App. at 22. That argument impermissibly suggested that the warrant would not have been issued if there was any doubt about Mr. Clark's guilt. *Id.* This case was very close on the facts. The argument suggesting that the court had already found Mr. Clark guilty prejudiced his defense.

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by attempting to impermissibly bolster witness credibility and the state's case. *Jones*, 144 Wn. App. at 293-94; *Stith*, 71 Wn. App. at 22. Mr. Clark's convictions must be reversed. *Id.*

3. The prosecutor committed misconduct by encouraging the jury to convict based on passion, prejudice, and propensity evidence rather than the facts of the case.

A prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. It is misconduct for a prosecutor to make arguments designed to inflame the passions or prejudices of the jury. *Id.*

The prosecutor argued that Mr. Clark participated in the extortion plot out of greed, as evidenced by the way he treated the dog:

Easy answer and it's an old answer: greed. Greed. Lust for money,

> lust for drugs. Because that's what Jagger meant to the Defendant and the people he was working with. To him, Jagger was not a pet, Jagger was not a friend of the family, Jagger was just a way to get what he wants. And he's willing to do whatever he want -- needs to get from him. Dog has value to him, because of what it can get him. And when the dog can't get him anything anymore, dog's not worth anything to him. And we see where that ended up.
> RP 497.

This argument encouraged the jury to convict Mr. Clark based on passion and prejudice rather than the evidence in the case. The evidence linking Mr. Clark to the extortion plot was tenuous at best. The jury was subjected to graphic photos of the dog's mutilated body, which were not linked to Mr. Clark in any way. RP 380-85, Ex 141-50. The prosecutor's argument linking Mr. Clark to Jagger's mistreatment invited the jury to convict based on emotion rather than fact. Mr. Clark was prejudiced by the prosecutor's improper argument.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by appealing to the jurors' passion and prejudice instead of the evidence. *Glasmann*, 175 Wn.2d at 704. Mr. Clark's convictions must be reversed. *Id.*

4. The prosecutor committed misconduct by disparaging the role of defense counsel.

A prosecutor commits misconduct by disparaging the role of defense counsel. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205

(2002). Such an argument improperly attempts to "draw a cloak of righteousness" around the state's case. *Id.*

At Mr. Clark's trial, the prosecutor stated that rebuttal is his favorite part of trial because "... by [that] point, [he] get[s] to hear what the defense arguments are and they never fail to entertain." RP 526.

This argument disparaged defense counsel and attempted to "draw the cloak of righteousness" around the state's case by dismissing Mr. Clark's defense as laughable. *Gonzales*, 111 Wn. App. at 282. The state presented only tenuous evidence connecting Mr. Clark to the extortion plot. Rather than argue the facts in this close case, the prosecutor encouraged the jury to reject Mr. Clark's defense based on his personal opinion of its value. The argument encouraged the jury to reject Mr. Clark's defense out of hand rather than consider its evidentiary merit. Mr. Clark was prejudiced by the prosecutor's improper remark.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by disparaging the role of defense counsel in closing argument. *Id.* Mr. Clark's convictions must be reversed. *Id.*

C. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Clark's convictions.

The cumulative effect of repeated instances prosecutorial misconduct can be "so flagrant that no instruction or series of instructions

can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

The prosecutor in Mr. Clark's case committed numerous instances of prejudicial misconduct by attempting to quantify the state's burden of proof, bolstering witness credibility and the state's case with "facts" not in evidence, encouraging the jury to convict based on passion and prejudice, and disparaging the role of defense counsel.

All of these instances of misconduct, whether considered individually or in the aggregate, require reversal of Mr. Clark's convictions. *Id.*

IV. 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*. *McDevitt v. Harborview Med. Ctr.*, --- Wn.2d ---, 291 P.3d 876 (2012). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). Free speech challenges are different from most constitutional challenges to statutes; under the First Amendment, the state bears the

burden of justifying a restriction on speech.[6] *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

B. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds.

The First Amendment to the U.S. Constitution provides that "Congress shall make no law… abridging the freedom of speech." 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 Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).[7] A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. *Immelt,* 173 Wn.2d at 6-7. 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. *Id* at 33.

[6] Ordinarily, the burden is on the party challenging the statute to show beyond a reasonable doubt that it is unconstitutional. *Washington Off-Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 733, 260 P.3d 956, 963 (2011) *review granted,* 173 Wn.2d 1013, 272 P.3d 247 (2012) (Off-Highway Vehicle Alliance I) and *aff'd sub nom. Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 290 P.3d 954 (2012) (Off Highway Vehicle Alliance II).

[7] Washington's constitution gives similar protection: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Wash. Const. art. I, § 5.

An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Id.* 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).

Mr. Clark's jury was instructed on accomplice liability. Court's Instructions to Jury, No. 12, Supp. CP. Accordingly, Mr. Clark is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks,* 539 U.S. at 118-119; *Webster* , 115 Wn.2d at 640.

C. The accomplice liability statute is overbroad because it criminalizes pure speech made "with knowledge" that it will encourage criminal activity rather than with the intent to incite imminent lawless action.

The First Amendment protects speech advocating criminal activity: "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Because of this, speech advocating criminal activity may only be punished if it "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). This standard requires proof of criminal intent. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

In *Freeman,* the defendant was convicted of counseling others to violate the tax laws. Some of his convictions were reversed because the trial court failed to instruct the jury on the *Brandenburg* standard:

> [A]n instruction based upon the First Amendment should have been given to the jury. As the crime is one proscribed only if done willfully, the jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur.

Freeman, 761 F.2d at 552 (citing *Brandenburg*).[8]

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech protected by the First Amendment. Under RCW 9A.08.020, a person may be convicted as an accomplice for speaking "[w]ith knowledge" that the speech "will promote or facilitate the commission of the crime." RCW 9A.08.020.[9] The statute does not require proof of intent, nor does it require any evidence regarding the likelihood that the words will produce imminent lawless action. RCW 9A.08.020. This interpretation criminalizes a vast amount of pure speech protected by the First Amendment, and runs afoul of the U.S. Supreme Court's decision in *Brandenburg*.

Thus, for example, Washington's accomplice liability statute would criminalize the speech protected by the U.S. Supreme Court in *Hess v. Indiana*, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) ("We'll take the fucking street later [or 'again']"), in *Ashcroft* (virtual child pornography found to encourage actual child pornography), and *Brandenburg* itself (speech "'advocat(ing) * * * the duty, necessity, or

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[8] The court affirmed two of the convictions, finding that the "intent of the [defendant] and the objective meaning of the words used [were] so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." *Freeman,*761 F.2d at 552.

[9] The statute uses the word "aid," which Washington courts have interpreted to include "words" or "encouragement." RCW 9A.08.020; *see* WPIC 10.51.

propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform'") (quoting Ohio Rev. Code Ann. s 2923.13). Each of these cases involved words or encouragement made with knowledge that the words or encouragement would promote or facilitate the commission of the crime, yet the U.S. Supreme Court found this speech—which would be criminal under RCW 9A.08.020—to be protected by the First Amendment.

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 in *Brandenburg*. 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. 12—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Id.*

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

D. The *Coleman* and *Ferguson* courts applied the wrong legal standard in upholding RCW 9A.08.020, and should be reconsidered in light of established U.S. Supreme Court precedent.

The Court of Appeals has upheld Washington's accomplice liability statute. *Coleman*, 155 Wn. App. 951; *State v. Ferguson*, 164 Wn.

App. 370, 264 P.3d 575 (2011). In *Coleman,* Division I concluded that the statute's *mens rea* requirement resulted in a statute that "avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime." *Coleman*, 155 Wn. App. at 960-961 (citations omitted).[10]

This is incorrect for three reasons.

First, in Washington, accomplice liability can be premised on speech made with *knowledge* that it will facilitate the crime, even if the speaker lacks the *intent* to facilitate the crime. RCW 9A.08.020; *see* WPIC 10.51. *Coleman's* use of the phrase "in aid of" implies an intent requirement that is lacking from the statute and the pattern instruction. Under *Brandenburg,* the First Amendment protects speech made with knowledge but without intent to facilitate crime. Washington accomplice law directly contravenes this requirement.

Second, the First Amendment protects much more than speech "that only consequentially further[s] the crime." *Coleman*, 155 Wn. App. at 960-961 (citations omitted). The state cannot criminalize mere advocacy[11]—even if the words are spoken "in aid of a crime." *Coleman*,

[10] In *Ferguson,* Division II court adopted the reasoning set forth in *Coleman.*

[11] *Hess,* 414 U.S. at 108.

155 Wn. App. at 960-961. Words spoken "in aid of a crime" are protected unless "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." *Brandenburg,* 395 U.S. at 447; *cf. Coleman,* 155 Wn. App. at 960-961. Even if the statute required proof of intent, it would remain unconstitutional unless it also required proof that the speech was likely to produce imminent lawless action.

Speech that "encourage[s] unlawful acts" is protected, unless it falls within the narrow category outlined by *Brandenburg. Ashcroft,* 535 U.S. at 253. The state cannot ban speech made with knowledge that it will promote a crime. Nor can it ban speech made with intent to promote the commission of a crime, unless the speech is (1) made with intent to incite or produce "imminent lawless action" and (2) "likely to incite or produce such action." *Brandenburg,* 395 U.S. at 447.

Third, the *Coleman* court applied the wrong legal standard in evaluating the statute. The U.S. Supreme Court has drawn "vital distinctions between words and deeds, between ideas and conduct." *Ashcroft,* 535 U.S. at 253. The accomplice liability statute reaches pure speech: "words" and "encouragement" are sufficient for conviction, if spoken with the appropriate knowledge. *See* WPIC 10.51; Court's Instructions to Jury, No. 12, Supp. CP. Because the statute reaches pure

speech, it *cannot* be analyzed under the more lenient First Amendment tests for statutes regulating conduct.

But the *Coleman* court ignored this distinction. Specifically, the *Coleman* court relied on cases dealing with laws regulating behavior. The court began its analysis by noting that "[a] statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute's plainly legitimate sweep." *Coleman,* 155 Wn. App. at 960 (citing *Hicks,* 539 U.S. at 122 and *Webster,* 115 Wn.2d at 641.) The court then imported the Supreme Court's rationale from *Webster* and applied it to the accomplice liability statute. *Coleman,* 155 Wn. App. at 960-61 (citation omitted).

But *Webster* involved the regulation of *conduct*—obstruction of vehicle or pedestrian traffic—and therefore, the statute could be upheld based on the distinction between "innocent intentional acts which merely consequentially block traffic…" and acts performed with the requisite *mens rea*. *Webster,* 115 Wn.2d at 641-642.

No such distinction is available here, because the accomplice liability statute reaches pure speech, unaccompanied by any conduct—i.e. speech that knowingly encourages criminal activity, including speech (words or encouragement) that is not directed at and likely to incite

imminent lawless action. *See* WPIC 10.51; Court's Instructions to Jury, No. 12, Supp. CP. The First Amendment does not only protect "innocent" speech; it protects free speech, including criminal advocacy directly aimed at encouraging criminal activity, so long as the speech does not fall within the rule set forth in *Brandenburg.*

The *Coleman* court applied the wrong legal standard in upholding the accomplice liability statute. It should have analyzed the statute under *Brandenburg* instead of the test for conduct set forth in *Webster.* Accordingly, *Coleman* and *Ferguson* should be reconsidered.

V. THE COURT ERRED BY SCORING MR. CLARK'S POSSESSION OF STOLEN PROPERTY AND EXTORTION CONVICTIONS SEPARATELY.

A. Standard of Review.

Sentencing decisions are reviewed for abuse of discretion. *State v. Williams*, 29931-7-III, 2013 WL 4176076 (Wash. Ct. App. Aug. 15, 2013) (Williams I). A court abuses its discretion if a decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Id.* A court's failure to exercise discretion is itself an abuse of discretion. *Brunson v. Pierce Cnty.*, 149 Wn. App. 855, 861, 205 P.3d 963 (2009).

B. Mr. Clark's possession of stolen property and extortion convictions comprised the same criminal conduct and should have scored as one point.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime… "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim…

RCW 9.94A.589(1)(a).

In determining whether multiple offenses require the same criminal intent, the sentencing court "'should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next....'" *State v. Garza-Villarreal*, 123 Wn.2d 42, 46-47, 864 P.2d 1378 (1993) (*quoting State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v.*

Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) (Williams II); *State v. Porter,* 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

The sentencing court scored each of Mr. Clark's offenses separately. CP 6.

Mr. Clark's possession of stolen property and extortion convictions were based on the same criminal conduct. *Id.* The offenses had the same victim and were committed at the same time and place. The state's theory of Mr. Clark's liability for the extortion charge was that he acted as the hostage-holder in the scheme when he possessed the dog at his home. RP 494-507. Under the state's theory, Mr. Clark's intent – and, indeed, his actions – were identical for both charges.

The sentencing court did not consider whether Mr. Clark's convictions constituted the same criminal conduct before calculating his offender score. RP 562-564. This failure to exercise discretion was, itself, an abuse of discretion. *Brunson*, 149 Wn. App. at 861.

The court abused its discretion by scoring Mr. Clark's possession of stolen property and extortion convictions separately. RCW 9.94A.589(1)(a); *Brunson*, 149 Wn. App. at 861. Mr. Clark's sentence must be vacated and the case remanded for resentencing. *Brunson*, 149 Wn. App. at 861.

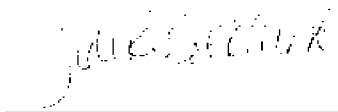
CONCLUSION

There was insufficient evidence for a rational trier of fact to find Mr. Clark guilt of the four bail jumping charges. Mr. Clark's convictions violate the constitutional protection against double jeopardy. Numerous instances of prosecutorial misconduct denied Mr. Clark a fair trial. The accomplice liability statute is unconstitutionally overbroad because it criminalizes protected speech. Mr. Clark's convictions must be reversed.

In the alternative, the court abused its discretion by scoring each of Mr. Clark's convictions separately for sentencing purposes. Mr. Clark's sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on October 3, 2013,

BACKLUND AND MISTRY



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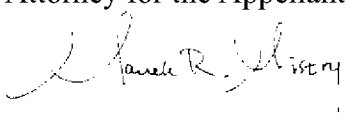

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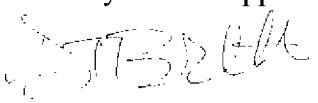

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Jesse Clark, DOC #364621
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

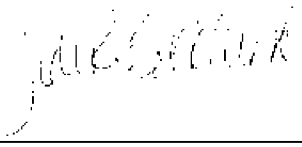
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
baurs@co.cowlitz.wa.us

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

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

Signed at Olympia, Washington on October 3, 2013.



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October 03, 2013 - 8:51 AM

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