No. 45056-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Justin McPherson,

Appellant.

Lewis County Superior Court Cause No. 13-1-00216-1

The Honorable Judge Nelson E. Hunt

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. McPherson's conviction for residential burglary violated his Fourteenth Amendment right to due process.

2. The state introduced insufficient evidence to prove residential burglary.

3. The state failed to prove that Mr. McPherson entered or unlawfully remained in a dwelling.

4. The state failed to prove that the jewelry store was a building or structure, or a portion thereof, which is used or ordinarily used by a person for lodging.

> **ISSUE 1:** Conviction for residential burglary requires proof that the accused entered or unlawfully remained in a building or portion of a building used for lodging. Here, the state presented evidence that Mr. McPherson burglarized a jewelry store. Was there insufficient evidence to convict Mr. McPherson of residential burglary?

5. Mr. McPherson was convicted through the operation of a statute that is unconstitutionally overbroad.

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

7. 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.

8. The trial judge erred by giving Instruction No. 11, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.

> **ISSUE 2:** A statute is unconstitutional if it criminalizes speech without proof that the speaker intended to incite imminent crime. The accomplice liability statute criminalizes speech

made with knowledge that it will facilitate or promote commission of a crime, even if the speaker lacked the intent to incite imminent lawless action, and even if the speech was unlikely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Frederick Sawlesky owns a jewelry shop in Centralia. He also owns the building the jewelry shop is in. An antique store adjoins the jewelry shop on one side. On the other side is a vacant storefront. Each shop has its own entry. RP 47-50.

Above the jewelry shop is a small apartment. There is a door at the bottom of the stairs, and another at the top of the stairs. These doors are flimsy and don't lock. The only way into the apartment is through the jewelry shop, through two doors and up the stairs. RP 20-23, 44, 67, 68. Frederick Sawlesky's son Jeremy lived in the apartment, and also worked in the jewelry shop. RP 20.

During the early morning hours of March 20, 2013, there was a break in at the jewelry shop. A hole was made in the wall from the vacant shop next door. The hole made it possible for the perpetrator to grab the jewelry. RP 31-35, Jeremy Sawlesky heard noise, went down, and fired twice at the person he saw. RP 28, 29, 31. He did not see the burglars' faces. RP 28-30. He only saw a person going back through the hole in the wall. RP 30-31.

Police identified Justin McPherson as a suspect, and he was eventually charged with residential burglary, second-degree burglary, and malicious mischief.[1] CP 1-3.

At trial, the defense argued that the apartment above the shop did not make the shop into a residence, and that the state could not prove that Mr. McPherson was involved in the burglaries. RP 451-466.

The trial court gave a standard accomplice instruction. CP 44; WPIC 10.51. The jury returned verdicts of guilty. After sentencing, Mr. McPherson timely appealed. CP 4-14, 15-25.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. MCPHERSON OF RESIDENTIAL BURGLARY.

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 guilt 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).

[1] One count of burglary was for the entry to the jewelry shop, and the other was for the entry into the vacant shop next door. RP 423-424.

B. No rational trier of fact could have found Mr. McPherson guilty of residential burglary beyond a reasonable doubt.

To find a person guilty of residential burglary, a jury must find that s/he "enter[ed] or unlawfully remain[ed] in a dwelling other than a vehicle." RCW 9A.52.025. "Dwelling" is defined as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." RCW 9A.04.110.

Under the statute, a dwelling "may be a building or structure used for lodging, or it may be any portion of a building *where the portion is used for lodging.*" *State v. Neal*, 161 Wn. App. 111, 114, 249 P.3d 211 (2011) (emphasis added). Thus, for example, Quasimodo's home in the organ loft of Notre Dame does not convert the entire cathedral into a dwelling. *Id.* A person who burglarized the loft would be guilty of residential burglary, but one who burglarized some other part of the cathedral would not. *Id.* This is assuming that French burglary law is the same as Washington's. *Id.*

Mr. McPherson allegedly burglarized a jewelry store. RP 20-41. The store is not used for lodging, and thus is not a dwelling. RCW 9A.04.110. The building as a whole is not used for lodging, even though it does have an apartment. Just as Quasimodo's loft does not convert the entire cathedral into a dwelling, the fact that there was an apartment

upstairs does not turn the commercial space into a dwelling. *Neal*, 161 Wn. App. at 114.

No rational jury could have found beyond a reasonable doubt that Mr. McPherson entered or unlawfully remained in a dwelling. *Chouinard*, 169 Wn. App. at 899. Insufficient evidence requires reversal of his residential burglary convictions. *Id.*

II. 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*. *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). 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.[2] *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

[2] 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 (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).

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).[3] 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.

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).

[3] 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.

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. McPherson's jury was instructed on accomplice liability. CP 44. Accordingly, Mr. McPherson 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. A person may not be convicted for speech absent proof of intent to promote or facilitate a crime; the First Amendment prohibits conviction based on proof of mere knowledge.

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 intent; knowledge is insufficient. *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*).[4]

Accomplice liability in Washington does not require proof of intent. The accomplice 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

[4] 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.

promote or facilitate the commission of the crime." RCW 9A.08.020; WPIC 10.51.[5] 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 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.

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

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. 11—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Id.*

Mr. McPherson'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* court 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. *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011); *see also 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).[6]

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[7]—even if the words are spoken "in aid of a crime." *Coleman*, 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;

---

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

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

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; CP 44. 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. 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.*

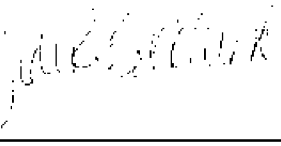
The *Coleman* court applied the wrong legal standard in upholding the accomplice liability statute. It should have analyzed the statute under *Brandenburg* instead of the test for conduct set forth in *Webster.* Accordingly, *Coleman* and *Ferguson* should be reconsidered.

CONCLUSION

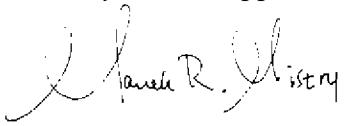
No rational jury could have found beyond a reasonable doubt that Mr. McPherson burglarized a dwelling. The accomplice liability statute criminalizes speech that is protected by the First Amendment. Mr. McPherson's convictions must be reversed.

Respectfully submitted on January 22, 2014,

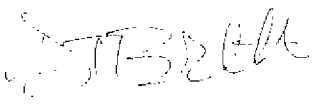
BACKLUND AND MISTRY



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



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



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Justin McPherson
c/o Regional Justice Center
620 West James Street
Kent, WA 98032

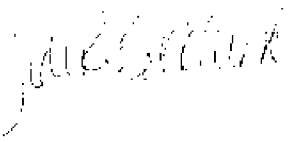
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov
sara.beigh@lewiscountywa.gov

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 January 22, 2014.



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

BACKLUND & MISTRY

January 22, 2014 - 1:41 PM

Transmittal Letter

Document Uploaded: 450569-Appellant's Brief.pdf

Case Name: State v. Justin McPherson

Court of Appeals Case Number: 45056-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: **backlundmistry@gmail.com**

A copy of this document has been emailed to the following addresses:

appeals@lewiscountywa.gov
sara.beigh@lewiscountywa.gov