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 Reply Brief

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I. THE PRESENCE OF AN APARTMENT UPSTAIRS DOES NOT CONVERT A JEWELRY STORE INTO A DWELLING.

To convict a person 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. Mr. McPherson was convicted of residential burglary for allegedly entering a jewelry store in a strip mall. RP 47-50. The jewelry store had an apartment above it. RP 20-23. The state never alleged, however, that Mr. McPherson or any accomplice entered the apartment. *See* RP *generally*.

Respondent argues that *Neal* supports the state's position that the jewelry store in this case was a dwelling. Brief of Respondent, pp. 2-4. But according to *Neal*, a dwelling is "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). The state misreads *Neal.*

Neal addressed the burglary of a tool room in an apartment building. *Neal*, 161 Wn. App. at 112-13. In that case, the tool room fell within the statutory definition of "dwelling" because the entire building was used for lodging. *Id.* at 114. The *Neal* court contrasted the tool room in the apartment building to Quasimodo's loft in Notre Dame Cathedral.

Id. Because the entire cathedral is not used for lodging, a person would not be guilty of residential burglary for burglarizing nave or sacristy. *Id.* Only the portion of the building used for lodging – organ loft – could be subject to residential burglary. *Id.*

The apartment above the jewelry store is analogous to Quasimodo's organ loft, not to a tool room in an apartment building. Because the entire building in this case was not used for lodging – unlike the apartment building in *Neal* – only the portion used for lodging is subject to residential burglary. If Mr. McPherson had entered the apartment, he could have been guilty of burglarizing a "portion of a building where the portion is used for lodging." *Neal*, 161 Wn. App. at 114. But Mr. McPherson never entered the apartment. Burglary of the nave or sacristy of Notre Dame Cathedral would not qualify as residential burglary, despite Quasimodo's loft upstairs. *Id.* Likewise, burglary of the jewelry store does not qualify as residential burglary, despite the apartment upstairs. *Id.*

Mr. McPherson allegedly burglarized a jewelry store. RP 20-41. No rational jury could have found beyond a reasonable doubt that the jewelry store qualified as a dwelling. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d

67 (2013). Insufficient evidence requires reversal of Mr. McPherson's residential burglary conviction. *Id.*

II. THE ACCOMPLICE LIABILITY STATUTE VIOLATES THE FIRST AMENDMENT BY CRIMINALIZING PROTECTED SPEECH; *COLEMAN*, *FERGUSON*, AND *HOLCOMB* WERE WRONGLY DECIDED.

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). The state cannot criminalize mere advocacy. *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973).

The First Amendment protects the speech advocating the commission of a crime unless the state also proves that it 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. The Washington accomplice liability statute is unconstitutionally overbroad because it requires neither. RCW 9A.08.020.

Nevertheless, the state argues that the statute does not criminalize protected speech. According to Respondent, the accomplice liability statute only encompasses speech "that is likely to produce or incite

imminent lawless action." Brief of Respondent, pp. 6. The state quotes at length from a portion of *Coleman* stating that the Washington accomplice statute requires "the criminal *mens rea* to aid or agree to aid the commission of a specific crime with knowledge that it will further the crime." Brief of Respondent, p. 6 (*citing State v. Coleman*, 155 Wn. App. 951, 960-961, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011)).

But the portion of the *Coleman* decision respondent highlights is indicative of the problem with that case. "A specific crime" is not the same as *imminent* lawless action. Likewise, knowledge that a statement will further a crime does not rise to the level of intent to produce imminent lawless action.

The *Ferguson* court adopted the reasoning of *Coleman* whole cloth, but took the error a step further by quoting the *Brandenburg* standard and baldly stating that RCW 9A.08.020 meets the standard. *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011). By its plain language, the accomplice liability standard does *not* require proof of intent to produce "imminent lawless action" or that it is likely to produce such action. RCW 9A.08.020. The bare claim that the standard is met does not change the language of the statute.

Division III recently released a published decision, relying on *Ferguson* and *Coleman* to reject a First Amendment challenge to the accomplice liability statute. *State v. Holcomb*, --- Wn. App. ---, 321 P.3d 1288 (April 10, 2014). The *Holcomb* court makes the same mistake as *Ferguson* and *Coleman* by holding that the statute does not reach protected speech – despite the omission of an intent element -- because it requires knowledge of the crime and that the speech be "directed to inciting or producing imminent lawless action." *Holcomb*, 321 P.3d at 1291. As noted, this is incorrect – mere knowledge is insufficient, and neither the statute nor the instruction the jury received includes an imminence requirement. Like *Ferguson* and *Coleman*, the *Holcomb* court ignores the plain language of the statute and associated instruction, which do not require that speech be directed at and likely to produce imminent lawless action for conviction. RCW 9A.08.020.

Ferguson, Coleman, and *Holcomb* are wrongly decided.

The jury in Mr. McPherson's case was instructed that it could find him guilty as an accomplice if he, "with the *knowledge* that it would promote or facilitate the commission of the crime," aided or agreed to aid another person. CP 43. The word "aid" was defined for the jury as "words, acts, encouragement, support, or presence." CP 43. Parroting the language of the statute, the instruction did not inform the jury that it had to

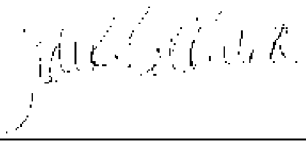
find that Mr. McPherson spoke with the intent to facilitate a crime or that his words were likely to produce imminent lawless action. CP 43. The accomplice liability statute and the instructions permitted the jury to convict Mr. McPherson for protected speech alone. His conviction must be reversed.

CONCLUSION

There was no evidence 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 May 14, 2014.

BACKLUND AND MISTRY



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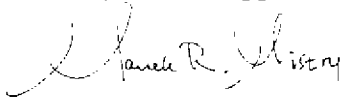

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CERTIFICATE OF SERVICE

I certify that on today's date:

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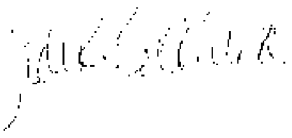
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 May 14, 2014.



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