No. 44847-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Anthony Brentin,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-00005-8

The Honorable Judge Michael H. Evans

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Brentin's first-degree theft conviction violated his Fourteenth Amendment right to due process.

2. The state introduced insufficient evidence to prove first-degree theft.

3. The prosecution failed to prove that Mr. Brentin unlawfully obtained more than $5000.

4. The prosecution failed to prove that Mr. Brentin obtained money by color or aid of deception.

5. The prosecution failed to prove that the $500 Faveluke gave Mr. Brentin was anything other than a gift.

6. The prosecution failed to prove that the $500 Faveluke gave Mr. Brentin was obtained by color or aid of deception.

7. The prosecution failed to prove that Mr. Brentin helped his wife defraud Faveluke.

> **ISSUE 1:** A conviction for first-degree theft requires proof that the defendant unlawfully obtained more than $5000. Here, the state introduced insufficient evidence to meet this threshold. Does Mr. Brentin's first-degree theft conviction violate his Fourteenth Amendment right to due process because the evidence is insufficient to prove the elements beyond a reasonable doubt?

8. The trial judge erred by allowing the state to introduce inadmissible hearsay evidence.

9. The trial judge erred by admitting Faveluke's out-of-court statement to Detective Plaza.

10. The trial judge misinterpreted ER 803(a)(5) and applied the wrong legal standard for admission of a recorded recollection.

11. The trial judge abused his discretion by admitting Faveluke's hearsay statement to Detective Plaza as substantive evidence.

ISSUE 2: A trial court may only admit a recorded recollection if it concerns a matter about which the declarant now has insufficient recollection to enable her to testify fully and accurately. Here, Faveluke testified that she had a better recollection of events at trial than at the time she provided a statement to Detective Plaza. Did the trial court err by admitting Faveluke's hearsay statement to Detective Plaza as substantive evidence under ER 803(a)(5)?

12. Mr. Brentin was denied his right to a speedy trial under CrR 3.3.

13. The trial judge erred by continuing the trial beyond Mr. Brentin's speedy trial expiration date.

ISSUE 3: A court may not continue a case beyond the expiration of speedy trial based on witness unavailability, where the state has not subpoenaed the witness. Here, the court continued Mr. Brentin's trial beyond his speedy trial expiration date based on the unavailability of a state witness who had not been properly subpoenaed. Did the court violate Mr. Brentin's CrR 3.3 right to a speedy trial?

14. Mr. Brentin was convicted through the operation of a statute that is unconstitutionally overbroad.

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

16. 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.

17. 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 4: A statute is unconstitutional if it criminalizes speech without proof that the speaker intended to incite 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?

18. Pursuant to RAP 10.1, Mr. Brentin adopts and incorporates the assignments of error set forth in Ms. Brentin's Opening Brief.

ISSUE 5: Pursuant to RAP 10.1, Mr. Brentin adopts and incorporates the issues set forth in Ms. Brentin's Opening Brief.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Susan Faveluke was a generous and eccentric figure in Woodland, Washington. In her 70's, she lived alone with her pets, first a dog named Misty Peep, then a cat named Brady. She owned several homes, and shared her wealth generously with the town, donating especially generously to the local fire and police departments. RP 171-172, 174, 177, 179, 228, 268-269, 320-321, 350, 386, 482, 682, 684. In fact, Faveluke kept cash at the ready to give to whoever might ask. RP 673.

Anthony Brentin was the fire chief in Woodland. He met Faveluke, and the two formed a relationship.[1] RP 181, 247, 735-738. She donated to the fire department, possibly as much as $300,000. RP 124, 138. Faveluke began visiting Mr. Brentin at work. RP 124, 737. When Mr. Brentin retired in 2009, the friendship between both Brentins and Faveluke continued. RP 597, 736.

Faveluke also visited staff at her local bank while on her daily rounds. She often ate at a local restaurant called the Eager Beaver. RP 267, 320, 386, 484, 697.

[1] Faveluke said, and likely believed, that she met Mr. Brentin when he saved her life at the beach . But it didn't happen. RP 244-245, 739.

She gave $20,000 to the two women who owned the Eager Beaver. She did not have any family or other relationship with them but she did like the restaurant and wanted to make sure its debts were paid off. RP 99-103, 225-227, 480, 483, 494-495. When Faveluke heard that a worker at the restaurant needed to get his teeth fixed, she offered to pay for that as well. RP 93, 145. She later forgot that she had taken these actions and accused the women of fraud. After investigation, no charges were filed. RP 103-104, 145, 160.

In the fall of 2011, Faveluke's beloved dog Misty Peep died. This was a very hard time for Faveluke, and she was not her usual self. She appeared confused, forgetful, and disheveled. RP 270, 273, 281, 324, 387, 633, 807. Not long after her pet's death, she fell and injured herself. She stayed in a nursing care facility for some time. RP 184, 222, 332. Mr. and Mrs. Brentin visited her daily while she was there. They also took care of her house and her cat Brady. RP 223, 232-233, 687, 753. After Faveluke returned home, both Brentins continued to help Faveluke with her daily tasks of eating, bathing, home repair and taking care of various errands around town. RP 224-225, 464-465, 598, 688, 755- 758.

Mrs. Brentin and Faveluke shared a love of animals. RP 177, 234. At one point, Mrs. Brentin became concerned about a vet bill for her cat, and Faveluke offered to pay it. RP 236. This happened more than once.

When the money due the vet turned out to be less than what Faveluke had given her, Mrs. Brentin did not return the extra. RP 277-302, 507-516, 536-541, 616. Mrs. Brentin said that she offered to, but that Faveluke insisted she keep it. Faveluke did not remember that. RP 236-237, 615-616, 633.

In June of 2011, Mr. Brentin filed to run for Woodland city council. He did not intend to campaign for the office, but thought he might get elected if no one else filed. RP 743-745, 750, 793.

His former landlord wrote a letter to the editor about the race. The former landlord suggested that Mr. Brentin was not a good candidate. He wrote that Mr. Brentin still owed $4680.24 to the landlord from a house rental. RP 251, 439, 442, 474, 745.

Faveluke saw the article and offered to pay the debt. Mr. Brentin initially declined. She insisted, and he eventually accepted the money and paid the debt. RP 410, 505-506, 679, 747-748, 751, 796-797. Faveluke told her friend and neighbor that she gave the money to Mr. Brentin because of the article. She said that she wanted Mr. Brentin to pay off his debt so that the issue would not hurt his run for the city council. RP 677-681, 685-686, 697-699.

The state charged Mr. and Mrs. Brentin with theft in the first degree. CP 1-2. The Information alleged that Mr. Brentin "in a series of

transactions which were part of a criminal episode or common scheme or plan, did obtain control over property belonging to Suzanne Faveluke, to wit: United State Currency, of an aggregate value exceeding $5000, by color or aid of deception, with intent to deprive..." CP 1. The state also charged aggravating factors, alleging that Faveluke was a particularly vulnerable victim, that the offense was a major economic offense. CP 1-2.

The state requested several continuances of the trial. Mr. Brentin did not object to the first three new trial dates. RP 1-6. Trial was finally set for December 3, 2012. On November 29, 2012, the court held a readiness hearing. Once again, the state requested a continuance. The prosecutor claimed that Faveluke would not be available, apparently due to medical issues. RP 8. The state did not provide documentation from her medical caregiver. Despite this, the court found good cause and granted the continuance. RP 9-11. The court set a new trial date for January 7, 2013. RP 10.

At the readiness hearing on January 3, 2013, the state again requested a continuance. Mr. Brentin objected. RP (1/3/13)[2] 1. The defense argued that the basis for the state's request was double-hearsay from a person unqualified to give medical opinions. RP (1/3/13) 2. The

[2] The only portion of the transcript that is not sequentially numbered is from the hearing held on January 3, 2013. This hearing is cited with the date.

court granted the continuance and set the trial for January 28, 2013, telling the prosecutor that any additional continuance requests would only be considered with specific medical information from a provider. RP (1/3/13) 2-3.

January 28, 2013, saw another state request to continue the trial. The prosecutor did not file any information from a medical provider. RP 12-14. Once again, the defense objected. RP 13. The judge indicated that the pending trial date had already been stricken and set a new trial date of March 18, 2013. RP 18-19. Apparently, this date was chosen to ensure that trial took place before Faveluke underwent brain surgery. RP 27.

Trial started on March 19, 2013. RP 33.

Faveluke's testimony differed from her written statement to police. She said that she gave Mr. Brentin $500 in cash for his campaign, and never mentioned a check for $5000 for the campaign. RP 187, 171-259. She was asked to review a statement she'd signed. The statement had been written by a police officer. She testified that reviewing the statement did not help her remember events. RP 189-197, 218, 569. When asked, she said her memory was better now – during trial – than it had been when she gave her statement to police. RP 196. She also said that she'd thought "it would be nice" to give money to Mr. Brentin so he could run for office. RP 202-203.

Faveluke did remember giving Mrs. Brentin money for her cat, Mr. Socks. She claimed the money was only for the cat's treatment. She felt that she was saving the cat's life. RP 198, 206. She also said that she never spoke with Mr. Brentin about the money she gave for the cat, and that he played no role in the issue. RP 207. In fact, both Faveluke and Mrs. Brentin agreed to keep the information from Mr. Brentin. RP 207. Faveluke acknowledged that she had serious problems with her memory during this period of time [the time she gave Mrs. Brentin the money], but also claimed to have "total recall". RP 231, 244.

Over defense objection, the court admitted the officer's written statement, which had been signed by Faveluke.[3] RP 571-593. In the statement, Detective Plaza wrote that Faveluke said she gave Mr. Brentin $4900 for campaign signs only. RP 591. The statement was admitted as substantive evidence. RP 591-593.

Mr. Brentin moved to dismiss the charge after the state rested. He argued that the state had not proved accomplice liability for Mrs. Brentin's actions. He pointed out that the state had failed to prove that he knew about the money his wife had obtained, that he knew about how she'd obtained it, or that he provided any aid or encouragement. RP 819-

[3] The statement was read to the jury by the detective, but the court did not send it back during jury deliberations. RP 589.

835. The state responded that he was guilty because the Brentins were married and he'd received the benefit of the money. The prosecutor argued this evidence was sufficient when considered along with his own actions in obtaining $4900 to repay his debt. RP 823-827, 833-835. The judge denied the motion, but did note that there was no evidence of "a solicit, a command, an encouragement, or a request.... Probably not enough evidence, direct evidence, for aiding or agreeing to aid another person in planning or committing." RP 837.

The court gave the following instruction on accomplice liability, over defense objection:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. CP 60.

The state argued in closing that because the Brentins were married, it was highly unlikely that they were each independently defrauding Faveluke. RP 877. The prosecutor said that Mr. Brentin was responsible as an accomplice because he got the benefit of Mrs. Brentin's actions. RP 881. In his rebuttal, the prosecutor returned to this theme. He again told the jury that Mrs. Brentin's use of some of the money to pay the couple's bills, Mr. Brentin was guilty as an accomplice. RP 937.

During deliberations, the jury sent out two questions. The first was "[i]f the jury finds that the defendant has knowledge, as defined by instruction #10, but the jury has reasonable doubt related to instruction #11, can the jury proceed with the charge of first degree theft?" CP 67. And the second was "[i]s knowledge of the amount by the defendant necessary for 1st or 2nd degree charge?" CP 68.

Both times, the court instructed the jury to review the instructions and keep deliberating. CP 67, 68.

The jury voted guilty on the charge of theft one. They also endorsed both aggravating factors. CP 3-4. Mr. Brentin, having no criminal history, was given double his standard range of six months in jail. RP 989; CP 3-16. He timely appealed. CP 20-34.

ARGUMENT

I. THE STATE FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO PROVE FIRST-DEGREE THEFT.

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. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). A conviction based on insufficient evidence must be reversed and the charge dismissed with prejudice. *Id.*

B. The prosecution produced insufficient evidence to prove that Mr. Brentin obtained funds "by color or aid of deception."

The prosecution alleged that Mr. Brentin committed theft "by color or aid of deception." CP 1; RCW 9A.56.020(1)(b). The state's theory was that he solicited $4,900 in campaign funds from Faveluke and promised to use it solely for campaign signs.[4] RP 870-884, 929-940.

The evidence did not support this theory. Nothing in the record indicates that Mr. Brentin ever actually promised to use the money for campaign signs. Taking the evidence in a light most favorable to the state, the record suggests only that Faveluke may have discussed campaign signs

[4] The prosecutor also theorized that he acted as an accomplice to Shari Brentin, who deceived Faveluke into thinking she needed funds to treat her sick cat.

with Mr. Brentin. It does not show that he ever made a particular promise as to how the money would be used.

At best, Mr. Brentin indicated he'd use the money to further his campaign. Given the negative publicity surrounding his debt, paying off the judgment fit within such any such promise. RP 746-748.

The evidence was insufficient to prove that Mr. Brentin obtained money by color or aid of deception. He accepted Faveluke's generosity without making any specific promises. His conviction must be reversed and the charge dismissed with prejudice. *Budik*, 173 Wn.2d at 733.

C. The prosecution produced insufficient evidence to prove that Mr. Brentin wrongfully obtained more than $5,000.

To obtain a conviction for first-degree theft, the prosecution was required to prove that Mr. Brentin wrongfully obtained more than $5,000. RCW 9A.56.030. The state sought to aggregate separate incidents to reach this threshold. The first incident involved $4,900, which Faveluke gave Mr. Brentin on October 12, 2011.[5] To make up the remainder, the prosecution asked jurors to impute Shari Brentin's actions to Mr. Brentin.[6] RP 874-883.

[5] The evidence showed that she wrote a check for $5,000, but kept $100 of that amount for herself. RP 505-506.

[6] The state also introduced evidence that Faveluke gave Mr. Brentin an additional gift of $500 in cash. RP 187, 248-249. Nothing in the record suggests that he improperly

Accomplice liability requires proof of two basic elements. First, the state must prove the accused person's knowledge that his actions would promote or facilitate commission of the crime. RCW 9A.08.020(3)(a). Second, the state must prove that the accused person either encouraged the crime or aided in its planning or commission. RCW 9A.08.020(3)(a).

Here, the state did not introduce any evidence to show that Mr. Brentin encouraged or aided Shari Brentin. Indeed, the evidence suggested the contrary. Both Faveluke and Shari Brentin indicated that they'd agreed to keep the money relating to the vet bills secret. RP 207. Even if Mr. Brentin knew or should have known about his wife's malfeasance, such knowledge is insufficient to establish complicity. Neither his marriage to Shari Brentin nor the fact that he benefitted from her actions overcomes this deficiency. *See, e.g., State v. LaRue*, 74 Wn. App. 757, 762, 875 P.2d 701 (1994) (husband not guilty of welfare fraud absent proof of accomplice liability).

The state failed to prove the elements of first-degree theft. Mr. Brentin's conviction must be reversed. The charge must be dismissed with prejudice. *Budik*, 173 Wn.2d at 733.

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obtained this gift. Nor did the prosecutor rely on this transaction in closing. RP 870-884, 929-940.

II. THE TRIAL COURT SHOULD NOT HAVE ADMITTED FAVELUKE'S OUT-OF-COURT STATEMENT TO DETECTIVE PLAZA.

A. Standard of Review.

The interpretation of an evidentiary rule presents a question of law, reviewed *de novo*. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). If the trial court interpreted the rule correctly, the appellate court reviews the trial court's decision for an abuse of discretion.[7] *Id.* An erroneous ruling requires reversal if there is a reasonable probability that it materially affected the outcome. *Id.*, at 433.

B. The state failed to establish the foundation for admission of Faveluke's out-of-court statement as a recorded recollection under ER 803(a)(5).

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. ER 801. Absent an exception, hearsay is generally inadmissible at trial. ER 802. ER 803(a)(5) provides an exception for recorded recollections. The proponent of hearsay evidence must establish the

[7] A trial court abuses its discretion when it makes a decision that is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). The improper admission of evidence requires reversal if there is a reasonable probability that it materially affected the outcome of the case. *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) *review denied,* 176 Wn.2d 1006, 297 P.3d 68 (2013).

required foundation for admission. *State v. Nava*, 311 P.3d 83, 92 (Wash. Ct. App. 2013).

To introduce a recorded recollection, the proponent must show that the record concerns "a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately." ER 803(a)(5).

In this case, the prosecutor failed to establish the foundation for admission of Faveluke's hearsay statement to Detective Plaza. Faveluke did not testify that she had insufficient recollection regarding the money she gave to Mr. Brentin. Instead, she testified that she remembered the incident more clearly at the time of trial than she did at the time she gave her written statement.[8] RP 196.

Absent a proper foundation, the trial court should not have admitted Faveluke's hearsay statement as substantive evidence. ER 803(a)(5). The error requires reversal because there is a reasonable probability it materially affected the outcome. *Gresham,* 173 Wn.2d at 433.

[8] Circumstantial evidence supported this assertion: the detective and other witnesses indicated that Faveluke was disheveled and confused at the time she made the statement. RP 563, 634, 641.

The hearsay statement to Detective Plaza provided the only clear evidence suggesting that Faveluke gave Mr. Brentin $4,900 to be used for campaign signs. RP 591-592. Her testimony, by contrast, suggested that she gave him $500 for signs, possibly on a different occasion, and that she actually had a campaign sign made for him. RP 187-188, 248-249. Her testimony regarding the $4,900 proved much less clear. She told the jury she gave the money to the campaign, but then said that she believed this money would go to save Shari Brentin's cat. RP 199-200.

The state presented very little evidence that Mr. Brentin obtained funds "by color or aid of deception." RCW 9A.56.020. Faveluke's hearsay statement to Detective Plaza provided the clearest indication of this element. RP 591-592. Because the state failed to establish the foundation for its admission under ER 803(a)(5), the trial court erred by admitting the statement. Furthermore, there is a reasonable probability that the court's error materially affected the outcome of trial. *Gresham,* 173 Wn.2d at 433. Accordingly, the theft conviction must be reversed and the case remanded for a new trial. *Id.*

III. THE COURT VIOLATED MR. BRENTIN'S RIGHT TO A SPEEDY TRIAL.

A. Standard of Review.

The application of the speedy trial rule to a specific set of facts is a question of law reviewed *de novo*. *State v. Chavez-Romero*, 170 Wn. App. 568, 577, 285 P.3d 195 (2012) *review denied,* 176 Wn.2d 1023, 299 P.3d 1171 (2013). Denial of a motion to dismiss for speedy trial purposes is reviewed for abuse of discretion. *Id.* A court necessarily abuses its discretion when it fails to apply the correct legal standard. *Hidalgo v. Barker*, 176 Wn. App. 527, 309 P.3d 687 (2013).

B. The court abused its discretion by continuing trial beyond the speedy trial period.

An accused person must be brought to trial within ninety days of arraignment. CrR 3.3(b)(1). The court may continue the trial date if "required in the administration of justice." CrR 3.3(f)(2). The continuance period is excluded from the speedy trial clock. CrR 3.3(e)(3).

A court may grant a continuance based on witness unavailability if the party seeking the continuance has exercised due diligence in securing the witness's attendance. *City of Seattle v. Clewis*, 159 Wn. App. 842, 847, 247 P.3d 449 (2011). The state has not exercised due diligence if it has not properly subpoenaed the witness prior to arguing that his/her

unavailability requires a continuance. *Id.*; *State v. Wake*, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989); *State v. Adamski*, 111 Wn.2d 574, 577, 761 P.2d 621 (1988).

In this case, Mr. Brentin accommodated the state's first three continuance requests. RP 1-6. The court set trial for December 3rd, 2012, with a speedy trial commencement date of October 25th, and a speedy trial expiration date of January 23rd, 2013. RP 6.

Trial did not begin by January 23rd. Instead, over Mr. Brentin's objection, the court granted the prosecution multiple trial continuances. RP 10, 16, 18; RP (1/3/13) 1-10. Trial did not start until March 19th, 2013. This was 55 days past the expiration of speedy trial.

The prosecutor gave the same reason for each continuance. According to the state, Faveluke's medical problems prevented her from testifying. RP 6, 8, 12; RP (1/3/13) 1. The prosecutor did not indicate what efforts the state had made to secure her presence at trial. Nothing in the record even shows that the state had served her with a subpoena.

The court should not have continued the case. First, the state did not take adequate steps to secure Faveluke's attendance. *Clewis*, 159 Wn. App. at 847. Second, the state made no effort to present Faveluke's testimony by accommodating any disability (for example, by having her

testify via closed circuit TV). Third, the record does not support the conclusion that Faveluke was unable to testify.

The court abused its discretion by granting the state's motions to continue. *Adamski*, 111 Wn.2d at 577. Mr. Brentin's conviction must be reversed and the case dismissed with prejudice. CrR 3.3(h);l *Adamski*, 111 Wn.2d at 583.

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*. *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.[9] *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

[9] 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).[10] 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).

[10] 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) (Hicks II). 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. Brentin's jury was instructed on accomplice liability. CP 60. Accordingly, Mr. Brentin 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*).[11]

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

[11] 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.[12] 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.

[12] 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. Brentin'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).[13]

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[14]—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;

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

[14] *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 113. 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; CP 60. 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. MR. BRENTIN ADOPTS AND INCORPORATES THE ARGUMENTS MADE BY MS. BRENTIN.

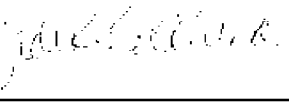
Pursuant to RAP 10.1, Mr. Brentin adopts and incorporates the arguments set forth in Ms. Brentin's Opening Brief.

CONCLUSION

For the foregoing reasons, Mr. Brentin's conviction must be reversed and the charge dismissed with prejudice. In the alternative, the case must be remanded for a new trial. Upon remand, the prosecution may not pursue a theory of accomplice liability.

Respectfully submitted on December 30, 2013,

BACKLUND AND MISTRY



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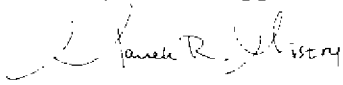

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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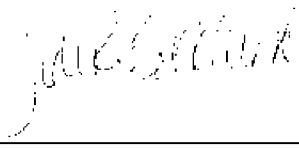
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 December 30, 2013.



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