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STATE OF WASHINGTON
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No. 36950-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Lerissa F. Iata,

Appellant.

Pierce County Superior Court

Cause No. 06-1-04270-2

The Honorable Judge Kathryn Nelson

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The accomplice liability statute is unconstitutionally overbroad.
2. Ms. Iata was convicted through operation of a statute that is unconstitutionally overbroad.
3. The trial judge erred by giving Instruction No. 27, which reads as follows:

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 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 the 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.

Supp. CP.

4. Instruction No. 27 permits conviction without proof of an overt act.
5. The trial court erred by providing an erroneous definition of knowledge.
6. The trial court erred by giving Instruction No. 10, which reads as follows:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by law as being a crime,

whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.
Supp. CP.

7. The court's knowledge instruction contained an improper mandatory presumption.
8. The court's knowledge instruction impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.
9. The trial court erred by instructing the jury on a theory of liability that the state had not included in its proposed instructions.
10. The trial court erred by instructing the jury on accomplice liability after closing arguments had commenced.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Washington's accomplice liability statute criminalizes all "aid" given with knowledge that such aid will promote or facilitate criminal activity. The word "aid" has been broadly defined to include support and encouragement, and covers speech that is not directed at and likely to incite "imminent lawless action."

1. Is Washington's accomplice liability statute unconstitutionally overbroad because it criminalizes support and encouragement of criminal activity, even where such support and encouragement is not directed at and likely to incite "imminent lawless action?"
Assignments of Error Nos. 1, 2, 3, 4.
2. Was Ms. Iata convicted under a statute that is unconstitutionally overbroad? Assignments of Error Nos. 1, 2, 3, 4.

3. Did the trial court's accomplice instruction relieve the state of its burden to prove that Ms. Iata committed an overt act?
Assignments of Error Nos. 3, 4.

The state was required to prove that Ms. Iata manufactured a controlled substance with knowledge that it was a controlled substance. The court's instructions allowed the jury to presume Ms. Iata had the requisite knowledge if she did any intentional act.

4. Did the trial court's knowledge instructions create an impermissible mandatory presumption? Assignments of Error Nos. 5, 6, 7, 8.

5. Did the trial court's knowledge instructions misstate the law and mislead the jury by conflating two *mens rea* elements?
Assignments of Error Nos. 5, 6, 7, 8.

6. Did the trial court's knowledge instructions relieve the state of its burden to establish every element of the offense by proof beyond a reasonable doubt? Assignments of Error Nos. 5, 6, 7, 8.

The state's proposed instructions and the court's instructions to the jury did not mention accomplice liability. Despite this, the prosecutor argued accomplice liability to the jury. After objection, the court provided supplemental instructions on accomplice liability.

7. Did the trial court err by providing supplemental instructions on accomplice liability after argument had commenced?
Assignments of Error Nos. 9, 10.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Police officers served a search warrant at an apartment, and found eight people within. RP 60, 78, 78, 118, 123. Among them were a male teenager in a hallway, and two adults in one bedroom. RP 78, 91, 118-119, 123. In a second bedroom, they found guns, cash, cocaine, and items for producing and distributing crack cocaine. The room was occupied by Faraji Blakeney and three small children. RP 78-80, 104-105, 153-166, 169. In the second bedroom's closet, police found a purse containing crack cocaine, a gun, identification belonging to 19-year-old Lerissa Iata, and a bank statement from a joint account owned by Ms. Iata and Mr. Blakeney. RP 163-166, 170. Ms. Iata was asleep in the living room. RP 150; CP 1.

Items used to fabricate and/or distribute crack cocaine were also found in the apartment's kitchen. RP 171-180.

Ms. Iata and Mr. Blakeney were charged with Unlawful Manufacture of a Controlled Substance and Possession of a Controlled Substance with Intent to Deliver, both with firearm and school zone enhancements. CP 1-2. Mr. Blakeney was also charged with several others crimes. RP 654-655. The cases were tried together.

At the commencement of trial, the state filed and served a set of jury instructions. Supp. CP; RP 501-509. The state's proposed instructions did not include any reference to accomplice liability. Supp. CP. The Court's Instructions to the jury, based largely on the state's proposed instructions, also omitted any reference to accomplice liability. Supp. CP. Despite this, the prosecutor argued accomplice liability at closing, and displayed an instruction on accomplice liability on a large screen. Defense counsel objected. The court took a recess, accepted the state's proposed accomplice instructions, and reinstructed the jury with new "to convict" instructions and the following instruction on accomplice liability:

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 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 the 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. Supp. CP.

The court also defined “knowledge” for the jury, using the following instruction:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.
Supp. CP.

Ms. Iata was convicted of both felonies, each with a firearm and a school bus stop enhancement. She appealed. CP 5-15, 16.

ARGUMENT

I. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH AND CONDUCT.

The First Amendment to the U.S. Constitution provides that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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 at 768, 322 P.2d 844 (1958) (collecting cases). Washington's Constitution affords a similar protection in Article I, Section 5:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.
Wash. Const. Article I, Section 5.

A statute is unconstitutionally overbroad if it criminalizes constitutionally protected speech or conduct. *City of Bellevue v. Lorang*, 140 Wn.2d 19 at 26, 992 P.2d 496 (2000). Any person accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Lorang, supra*, at 26. 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 at 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 at 1188 (10th Cir. 2005), quoting *Virginia v. Hicks* at 119; see also *Conchatta Inc. v. Miller*, 458 F.3d 258 at 263 (3d Cir. 2006). Accordingly, an overbreadth challenge will prevail

even if the statute could constitutionally be applied to the accused.

Lorang, supra, at 26.

A statute that reaches a “substantial” amount of protected conduct is unconstitutionally overbroad:

The showing that a law punishes a “substantial” amount of protected free speech, “judged in relation to the statute's plainly legitimate sweep,” *Broadrick v. Oklahoma*, 413 U.S. 601 [at] 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973), suffices to invalidate all enforcement of that law, “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression,” *id.*, at 613...

Virginia v. Hicks, at 118-119.

The First Amendment protects speech that supports or encourages criminal activity unless the speech “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 at 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes a substantial amount of speech (and conduct) protected by the First Amendment. Because of this, Ms. Iata’s conviction must be reversed and the case remanded for a new trial. Upon retrial, the state may not proceed on a theory of accomplice liability.

Under RCW 9A.08.020, a person may be convicted as an accomplice if she or he, acting “[w]ith knowledge that it will promote or facilitate the commission of the crime... aids or agrees to aid [another] person in planning or committing it.” The statute does not define “aid.” Nor has any Washington court limited the definition of aid to bring it in compliance with the U.S. Supreme Court’s admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) “imminent lawless action.” *Brandenburg v. Ohio, supra*, at 447-449.

Instead, Washington courts—and the trial judge in this case—have adopted a broad definition of “aid,” found in WPIC 10.51:

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.

See Instruction No. 27, Supp. CP. By defining “aid” to include anything more than mere presence and knowledge of criminal activity, the instruction criminalizes a vast amount of speech and conduct protected by the First Amendment, and runs afoul of the U.S. Supreme Court’s decision in *Brandenburg v. Ohio, supra*.

For example, a college professor who praises ongoing acts of criminal trespass by antiwar protestors is guilty as an accomplice if he utters his praise knowing that it will provide support and encouragement for the protestors. A journalist sent to cover the protest, who knows that media presence encourages the illegal activity, would be guilty as an accomplice simply for reporting on the protest.¹ Anyone who supports the protest from a legal vantage point (for example by carrying an antiwar sign on the sidewalk across the street) is guilty as an accomplice. An attorney who agrees to represent the protestors *pro bono* provides support and encouragement, and is thus guilty of trespass as an accomplice.

It is possible to construe the accomplice statute in such a way that it does not reach substantial amounts of constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. *Brandenburg v. Ohio, supra*. 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. 27—is overbroad. Therefore, RCW 9A.08.020 is unconstitutional.

¹ Indeed, under WPIC 10.51 and Instruction No. 27, every news program commits a crime when it covers terrorism, knowing that terrorism depends on publicity to fulfill its general purpose (intimidating and coercing persons beyond its immediate victims).

The verdict forms in this case do not indicate whether the jury convicted Ms. Iata as a principal or as an accomplice. Supp. CP. Accordingly, her convictions must be reversed and the case remanded to the trial court for a new trial. Upon retrial, the state may not pursue a theory of accomplice liability.

II. THE COURT’S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE MS. IATA COMMITTED AN OVERT ACT.

Accomplice liability requires an overt act. *See, e.g., State v. Matthews*, 28 Wn. App. 198 at 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, she must say or do something that carries the crime forward. *State v. Peasley*, 80 Wash. 99 at 100, 141 P. 316 (1914). In *Peasley*, the Supreme Court distinguished between silent assent and an overt act:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.

State v. Peasley, 80 Wash. 99 at 100, 141 P. 316 (1914).

See also State v. Everybodytalksabout, 145 Wn.2d 456 at 472, 39 P.3d 294 (2002) (“Physical presence and assent alone are insufficient” for conviction as an accomplice.)

Similarly, in *State v. Renneberg*, the Supreme Court approved the following language: “to aid and abet may consist of *words spoken, or acts done...*” *State v. Renneberg*, 83 Wn.2d 735 at 739, 522 P.2d 835 (1974), *emphasis added*. The Court noted that an instruction is proper if it requires ““*some form of overt act in the doing or saying of something* that either directly or indirectly contributes to the criminal offense.”” *Renneberg*, at 739-740, *emphasis added, quoting State v. Redden*, 71 Wn.2d 147 at 150, 426 P.2d 854 (1967)

Instruction No. 27 was fatally flawed because it allowed conviction without proof of an overt act. Under the instruction, the jury was permitted to convict if Ms. Iata was present and assented to her codefendant’s crimes. Supp. CP. Thus, for example, if she were simply present waiting to be given crack cocaine, or hoping to benefit after the fact from sale of the cocaine, she could be found guilty of manufacture—even if she didn’t say or do anything to support or encourage the manufacture. Because of this, the instruction violates the “overt act” requirement of *Peasley, supra* and *Renneberg, supra*.

The last two sentences of Instruction No. 27 do not correct this problem. The penultimate sentence (“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”) does not exclude other situations. Supp. CP. Thus a person

who is present and *unwilling* to assist, but who approves of the crime, may still be convicted if she or he knows his presence will promote or facilitate the crime.

Similarly, the final sentence fails to save the instruction as a whole. Although the final sentence (“more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice”) excludes presence coupled with mere knowledge, the instruction does not exclude presence coupled with silent assent or silent approval. Supp. CP. Even with this final sentence, a person who is present and unwilling to assist, but who silently approves of the crime could be convicted.

Because the instructions allowed conviction as an accomplice in the absence of an overt act, the convictions must be reversed and the case remanded to the trial court for a new trial. *Peasley, supra; Renneberg, supra.*

III. THE COURT’S KNOWLEDGE INSTRUCTIONS CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN OF PROVING KNOWLEDGE (ARGUMENT INCLUDED FOR PRESERVATION OF ERROR)

An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at

844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). A jury instruction that misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58 at 63, 768 P.2d 470 (1989). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820 at 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

This Court has previously reversed a conviction because of problems with an instruction defining “knowledge” in the same language as Instruction No. 10. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.² The trial court’s “knowledge” instruction included the contested language at issue here: “Acting knowingly or with knowledge also is established if a person acts intentionally.” *Goble*, at 202. This Court noted that this language could be read to mean that an intentional assault established Mr. Goble’s knowledge, regardless of whether or not he actually knew the victim’s status as a police officer:

We agree that the instruction is confusing and... allowed the jury to presume Goble knew Riordan's status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.
Goble, at 203.

This Court limited *Goble* to crimes that *explicitly* include more than one *mens rea* as an element in the “to convict” instruction. *State v.*

² Although not a statutory element of Assault in the Third Degree, knowledge that the victim was a law enforcement officer performing official duties was included in the “to convict” instruction and thus became an element under the law of the case in *Goble*. *Goble at 201*.

Gerdts, 136 Wn. App. 720, 150 P.3d 627 (2007).³ *Goble* was further limited when this Court held that the problem created by the erroneous instruction could be solved by instructions that were “were clear, accurate, and separately listed [sic].” *State v. Keend*, 140 Wn. App. 858 at 868, 166 P.3d 1268 (2007).⁴

Gerdts and *Keend* should be re-evaluated. The language contained in the erroneous “knowledge” instruction creates problems whenever a crime includes two *mens rea*, regardless of whether the mental states are implicit or explicit and regardless of how artfully the other instructions are worded. The difficulty is that the instruction places no limits on which intentional acts can support a finding that a person possessed the requisite knowledge.

In this case, Ms. Iata was charged with an offense that implicitly includes two *mens rea* elements. Under RCW 69.50.401, it is unlawful for any person to manufacture a controlled substance. “Manufacture” is defined broadly to include “the production, preparation, propagation,

³ Under *Gerdts*, Mr. Goble’s conviction would not have been reversed, since he was charged with assaulting another whom he knew to be a police officer; he was not charged with “intentionally” assaulting another whom he knew to be a police officer. See *Goble*, at 200-201.

⁴ The instructions in *Keend*, which were upheld by this Court, did not differ significantly from those in *Goble*, which led this Court to reverse. Compare *Goble*, at 200-202 with *Keend*, at 863-864, 867.

compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.” RCW 69.50.101(p). There is no statutory *mens rea* element; however, the legislature’s silence on the mental state necessary for conviction is not dispositive. *State v. Anderson*, 141 Wn.2d 357 at 361, 5 P.3d 1247 (2000). Washington courts have implied a “knowledge” requirement, allowing conviction only where the accused knows the nature of the substance they are manufacturing. *See, e.g., State v. Warnick*, 121 Wn. App. 737 at 744, 90 P.3d 1105 (2004); *State v. Keena*, 121 Wn. App. 143 at 147, 87 P.3d 1197 (2004); *State v. Wallway*, 72 Wn. App. 407, 865 P.2d 531 (1994); *see also* WPIC 50.11.

A second *mens rea* must also be implied from the statute: conviction for manufacture must be based on an intentional act. Presumably, for example, a domestic violence victim who accidentally knocks over her abusive boyfriend’s crack cocaine operation when he assaults her, and thereby breaks the crack into rocks appropriate for sale, would not be guilty of manufacture, even if she knew the substance was crack cocaine, and even if she knew the smaller rocks were appropriate for

sale. Similarly, a marijuana enthusiast who reaches into his pocket and accidentally drops a marijuana seed into dirt should not be guilty of manufacture on the basis of that accidental maneuver.

Thus, as in *Goble*, the state was required to prove that Ms. Iata took some intentional act that contributed to the manufacture, and that she knew her intentional act would result in production of crack cocaine. As in *Goble*, the court also instructed the jury that “[a]cting knowingly or with knowledge... is established if a person acts intentionally.” Instruction 10, Supp. CP.

This combination of instructions permitted the jury to conclude that Ms. Iata acted with knowledge if it found that she took *any* intentional act. The court did not offer any guidance limiting which intentional acts the jury could consider in order to establish knowledge. The jury could have used the instruction properly (i.e. if Ms. Iata *intentionally* made crack, she also *knowingly* made crack), but it could also have used the instruction improperly (i.e. if Ms. Iata *intentionally* put baking soda in a bowl, she must have *knowingly* made crack, even if she actually planned to make cookies when she put the baking soda in the bowl).

Accordingly, under *Goble*, Ms. Iata’s conviction for manufacture must be reversed and the case remanded for a new trial. *Goble, supra*.

IV. THE TRIAL COURT SHOULD NOT HAVE INSTRUCTED THE JURY ON ACCOMPLICE LIABILITY AFTER ARGUMENT COMMENCED.

The state is required to serve its proposed instructions on defense counsel when the case is called for trial. CrR 6.15. If the prosecution elects to pursue a theory of accomplice liability, “it has an obligation to offer timely and appropriate instructions.” *State v. Ransom*, 56 Wn. App. 712 at 714, 785 P.2d 469 (1990). Where the state fails to propose instructions on accomplice liability, the accused “has the right to rely on the fact that the State has elected not to pursue that theory.” *Ransom*, at 714. In *Ransom*, the state did not propose instructions on accomplice liability. However, when the jury asked a question about accomplice liability, the court gave a supplemental instruction on that subject. The Court of Appeals reversed. *Ransom*, *supra*.

Here, the prosecutor filed and served proposed instructions on October 25, 2007. Those proposed instructions did not mention accomplice liability. Supp. CP. Through the nine day jury trial, the prosecution did not notify defense counsel that it was pursuing an accomplice liability theory. The issue of accomplice liability did not arise until after the prosecutor began her closing argument, when she showed the jury instructions on accomplice liability in her power point presentation (a copy of which she had apparently provided to the court but

not to defense counsel.) RP 534, 546-561. Because defense counsel had passed the entire trial under the impression that the state was not relying on a theory of accomplice liability, the trial court's late decision to give instructions on accomplice liability violated Ms. Iata's rights. *Ransom, supra*. Her convictions must be reversed and the case remanded for a new trial. *Ransom, supra*.

CONCLUSION

The accomplice liability statute criminalizes a substantial amount of speech and conduct protected by the First Amendment, and is therefore unconstitutional. Furthermore, the trial court's instructions relieved the state of its obligation to prove that Ms. Iata committed an overt act. In addition, the court's "knowledge" instruction required the jury to presume from any intentional act that Ms. Iata acted with knowledge, and thereby relieved the state of its burden of establishing every essential element of the offense. Finally, the trial court should not have instructed the jury on accomplice liability where the state failed to file and serve instructions on accomplice liability at the beginning of trial.

For all these reasons, Ms. Iata's convictions must be reversed.
Upon remand to the trial court, she may not be retried on an accomplice liability theory.

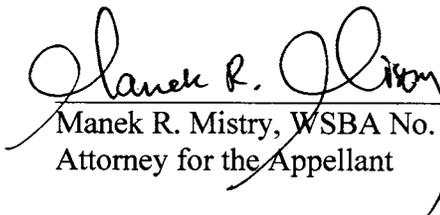
Respectfully submitted on May 21, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Lerissa F. Iata, DOC #312369
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and to:

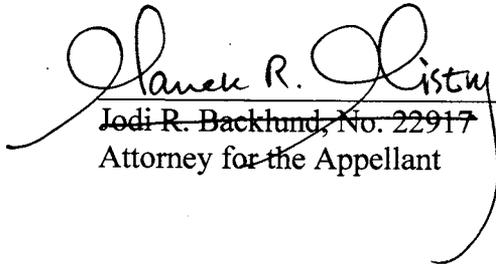
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 21, 2008.

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 21, 2008.


~~Jodi R. Backlund, No. 22917~~ # 22922
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