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STATEMENT OF THE CASE

Except as noted below, and without waiving any objections to factual assertions made by Appellant, in general the statement of the case as set out in Appellant's brief is adequate for purposes of responding to this appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IT WHEN ALLOWED TESTIMONY ABOUT ITEMS FOUND IN THE SEARCH OF THE VAN MOORE WAS RIDING IN ON SEPTEMBER 4TH.

Moore claims that it was error for the trial court to allow testimony about the sweaters and gift cards found in a search of the van Moore was riding in on September 4th. But this evidence was not admitted as "propensity" evidence. Instead, it was admitted to show "motive, opportunity, intent, preparation, [or] plan." ER 404(b). This evidence was thus relevant and admissible to show that Moore's and her codefendant Noble's "m.o." was that Noble would steal cashmere sweaters from the Polo store, as Moore acted as her accomplice by diverting sales clerk's attention away from Noble. This evidence further showed that after stealing merchandise, the defendants would return the items without a receipt in order to get a store gift card--much as Moore did during

the theft on August 27th. Thus, the trial court did not err when it admitted this evidence.

A trial court's interpretation of an evidentiary rule is reviewed *de novo*. State v. DeVincentis, 150 Wash.2d 11, 17, 74 P.3d 119 (2003). A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. DeVincentis, 150 Wash.2d at 17, 74 P.3d 119. A trial court exercises broad discretion when making evidentiary rulings. Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000). A reviewing court will uphold a ruling on the admissibility of evidence unless the trial court's decision is manifestly unreasonable or based on untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. ER 403. However, relevant evidence is presumed admissible, and the burden is on the Appellant to show it should have been excluded. State v. Burkins, 94 Wn.App. 677, 692, 973 P.2d 15 (1999). "The trial court has broad discretion in administering the rule, and its judgment in the balancing process will be rarely disturbed" on appeal. State v. Brown, 48 Wn.App.

654, 660, 739 P.2d 1199 (1987) (quoting 5 K. Teglund, Wash. Prac., Evidence sec. 105, at 246 (2d ed.1982)). In other words, a reviewing court will defer to the assessment of the trial judge, who is best suited to determine the prejudicial effect of a piece of evidence. State v. Posey, 161 Wash.2d 638, 648, 167 P.3d 560 (2007); State v. Powell 166 Wash.2d 73, 81, 206 P.3d 321, 326 (2009). The reviewing court may affirm the trial court's ruling on any grounds supported by the record. State v. Froderf, 84 Wn.App. 20,25,924 P.2d 933 (1996).

Generally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. ER 404(b). However, such evidence may be admissible for other purposes, such as proof of *motive, opportunity, intent, preparation, plan*, knowledge, identity, or absence of mistake or accident. Id. Such exceptions exist so that "[a] defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events." State v. Lillard 122 Wash.App. 422, 431-432, 93 P.3d 969, 974 (2004), *review denied* 154 Wash.2d 1002,

113 P.3d 482 (2005), citing State v. Tharp, 27 Wash.App. 198, 205, 616 P.2d 693 (1980), *ffd*, 96 Wash.2d 591, 637 P.2d 961 (1981).

Evidence of misconduct may also be admissible to prove a scheme or plan of which the crime charged was a part. The term common scheme or plan refers to a larger criminal design of which the charged crime is only one part--an "overarching" design or plan. If such a plan exists, then proof of one part of the plan tends to prove another part of the plan. See Courtroom Handbook on Evidence, Tegland, Karl, p. 227 (2007/2008 Edition). Furthermore, "the trial judge is not required to make a specific finding of a common scheme or plan before admitting the evidence. The evidence is admissible if the trial judge concludes that the evidence is sufficient for the *jury* to conclude there was a common scheme or plan." State v. Carleton, 82 Wn.App. 680, 919 P.2d 128 (1996)" Id.

Here, the State sought to admit evidence found in the search of the van Moore and her codefendant were riding in on September 4th to show that the sweaters and gift cards found in the van were consistent with the sweaters stolen by Noble on August 27th, and that Moore had exchanged similar sweaters without a receipt on the same date in order to receive credit in the form of a gift card (gift cards were found in Moore's purse on September 4th). RP 26,

27,28, 98,99. The State explained its reasons for wanting to admit this evidence as follows:

PROSECUTOR: Well, it's true she's not being charged with anything that happened on September 4th. . . . Of course it's the State's theory that Moore was an accomplice in a number of ways. We've talked about the lookout word. . . . [P]art of showing that she is an accomplice and did more than just have mere presence is born out and corroborated by what was found in her possession on September 4th and those were exchanges for gift cards. That's what she did in the store on August 27th as well.

So I'm not saying it's a plan in that regard. . . . I'm saying the mere fact that she had gift cards and receipts on her person certainly is relevant much in the same way that burglary tools have been found to be relevant in other types of cases. I'm not saying that she was stealing or ripping stuff off on September 4th. . . . I . . . expect to ask . . . is that there were sweaters that were consistent with the ones that were stolen, same price on the tags, and that she had gift cards

RP 27,28. The trial court denied Moore's motion to exclude the evidence and then ruled as follows:

COURT: All right. I'm going to allow the testimony. I'm going to allow the argument to be made. You can argue what you want as to what it shows, what it doesn't show. But I'm going to allow the testimony, I'm going to allow that evidence to be submitted to the jury at this point. If something changes as the trial goes along and somehow it becomes not relevant, I'll make that ruling then. But I can't rule at this point that it's irrelevant. So the motion is denied.

RP 29. The trial court did not err when it made this ruling. The evidence found in the search of the van was relevant because the sweaters found in the van were of the same type stolen by Noble on August 27th, and were also the same as the sweaters exchanged by Moore for a gift card on August 27th. So, the evidence located in the van supported the State's theory of the case that Moore and Noble's plan involved stealing the sweaters and then exchanging them for store gift cards--which was the only "remedy" allowed by the Polo store for exchanges done without receipts. In this way, the evidence in the van showed Moore's and Noble's scheme or plan in committing the crime, and also provided the complete picture or story of the crime.

And the story of the crime committed by Moore and Noble on August 27th, went like this. Moore acted as an accomplice to Noble's theft of the sweaters when Moore acted as a "decoy" or a "distraction" while Noble loaded the cashmere sweaters into her Macy's "booster bag" in the Polo store on August 27th, 2008. RP 129, 130. The evidence showed that Moore and Noble had entered the store together and then separated, and that Ms. Moore did not attempt to make the return of her merchandise (she had no receipts) until another sales person came out from the back of the

store--the inference being that once another sales person came out on the floor, Ms. Moore needed to distract that person from seeing Ms. Noble stealing the merchandise. Id. For example, Ms. Moore asked salesperson Reid Zucati to check in the back to see if he had a particular size in a Polo dress. RP 59. But it turns out that Moore had asked *both* Zucati and another store employee (Townsend) the same question about the same merchandise item in Moore's scheme to distract the employees away from Noble as she stole the sweaters. RP 79. Zucati said that it seemed to him that Moore and Noble were together because they made eye contact and smiled at each other, but didn't speak to each other, which Zucati thought was odd, since "they acted like they knew each other but they weren't talking." RP 62. Zucati identified Moore as being the woman who asked him about the Polo dress on August 27th. RP 63. Zucati said about Moore's questions that "I could definitely tell I was being distracted. . . . she was keeping me busy." RP 65. However, as Zucati was heading to the back of the store to check on the item Moore asked him about, he nonetheless saw Noble stealing some cashmere sweaters by putting them into her Macy's "booster bag." RP 60. The cashmere sweaters stolen by Noble were tagged with security sensors designed to set off a security

alarm if taken out of the store. RP 82. But these devices would not set off the alarm if they were inside a "booster bag" like the one used by Noble to take the sweaters out of the store. RP 82,83. Once Noble had left the store, Moore exchanged some cashmere sweaters without a receipt. RP 76, 77. Store employee Townsend said that if a person doesn't have a receipt, they can get in-store credit or a gift card for the items if they provide identification. RP 76,77. Townsend identified Moore as being the person who exchanged the sweaters on August 27, 2008. RP 77.

Moore testified that she had nothing to do with her codefendant's stealing the sweaters, and that she "never saw [codefendant Noble] do what she was doing." RP 133,134. Moore also made some strange statements regarding her going to the outlet store with Noble on August 27th. Moore said that she thought her codefendant Noble "was shopping. I *had no intention of anything else.*" 12/2/08 RP 133(emphasis added). She had no intention of "anything else"? This odd response belies Moore's claim that she knew nothing about the "anything else" --that being Noble's intent to steal the sweaters while Moore acted as lookout and distracter. Moore further claimed that she went to the Polo store on August 27th with a bag of clothes to exchange them, and

that they were gifts for her family, nieces, nephews and daughter.

RP 138. Moore said that her niece was "kind of chubby" so she had to get a bigger size. Id. Moore also said, "oh, they was [sic] family gifts. I don't know where they got them." Id. When the prosecutor noted that Moore did not exchange the items as soon as she walked into the store, Moore said, "oh, I had to find out what I wanted. I had to shop for all different sizes. I had ten different nieces and nephews. . . that store is so big." Id. 139. Moore rambled on, saying, "oh, I was looking for sweat suits, and things like that in the women's section." Id. The prosecutor said, "you had eight sweaters to exchange--none of those fit?" Moore said, "like I say, I have ten nieces and nephews. I don't know how many I had on me that day to exchange. [?] I just got bigger sizes and got sweat coats [sic] and things like that." Id. Although Moore was seen walking around carrying a Ralph Loren bag plus other items in her hand (as if to purchase them), and while testifying Moore carried on about "getting bigger sizes," that day, the fact is that Moore apparently did not buy any additional items at the store-- nor did she get new merchandise in exchange for the sweaters she returned. RP 74-76. Instead, Moore got a \$481 gift card in exchange for the cashmere sweaters she exchanged without a

receipt. RP 76, 77, 79, 181. The cost of each sweater like the ones returned by Moore on August 27, 2008, and the others stolen by Noble, was \$49.99 each. RP 87,88, 89.

While Moore was testifying, the prosecutor also pointed out an inconsistency in Moore's story when he asked her about the reasons she gave the store clerk for exchanging the items, asking, "didn't [the sales clerk] say that you said 'my mom got these for my daughter'?" Moore responded, "that's not what I told her." Id. 140. And so it was on August 27th, Noble shoplifted cashmere sweaters while Moore assisted by trying to distract store employees away from Noble by questioning them about merchandise and by exchanging the some of the same type of sweaters for a store gift card. Then, about a week later, Moore and Noble returned to the area in the same type of van they had been seen leaving in on August 27th. RP 108.

Detective Buster said that about a week after the August 27, 2008, theft incident, he received another call on September 4th, from the same Polo store, that another return had been made of the same type of sweater stolen previously, without a receipt, and that the person (not Ms. Moore or Ms. Noble) got into the same type of van that Moore and Noble were seen in after the previous incident.

RP 107, 108. On September 4th the van was stopped by police, and Detective Buster identified both Moore and Noble as being inside the van. RP 118. Buster said he recognized Noble from the surveillance video. RP 94-97,110. Buster also saw a red Macy's bag in the van on the floorboard between the driver and passenger seats. RP 110, 111. Detective Buster said that the red Macy's bag had what is known as a "booster bag" inside of it. RP 119. Buster described the inside of the bag as being made of several layers of aluminum foil, which created "a pouch which basically creates a barrier to defeat security systems. When a security censor is inside of this pouch, it can pass right through the security censor without setting it off, without setting off the alarm of the security censor." RP 119. Detective Buster actually tested the bag by taking one of the sensors from the Polo store and putting it inside the bag to see if he could walk out the door of the store with the sensor inside the booster bag without setting off the store's alarm. RP 120. Buster was able to leave the store without setting off the alarm using the booster bag. RP 120. Buster also found another such foil liner in the search of the van Moore had been riding in on September 4, 2008. RP 121. Buster said that the van was full of clothing from several different outlet stores, some of it in shopping bags. RP

121. Buster said that in addition to Moore and Noble, on September 4th, there were two others in the van--Mr. Dorsey and Mr. Nguen. RP 122. Additionally, Buster found several gift cards in Moore's purse. Id. Buster said that the gift cards in Moore's purse were "in a stack" and that the dollar value of all of the gift cards was "roughly \$4,500." RP 123.

Thus, testimony about the items found in the search of the van Moore and Noble were riding in on September 4th-- items including many sweaters of the same type stolen by Moore's codefendant Noble, and of the same type of sweaters returned by Moore on August 27th for a gift card-- plus numerous gift cards found in Moore's purse--such evidence was relevant to show the codefendants' motive, intent, and overall plan in committing the theft, and to complete the "story of the crime." Moore and her codefendant's overall plan was to first steal the items and then return them to the store, getting credit for the items in the form of gift card because they obviously did not have receipts for the items. Because the evidence found in the van on September 4th was not admitted as "propensity" evidence, the trial court correctly admitted the evidence.

And-- even though there are no actual "findings" in the record showing the trial court admitted this evidence for this specific purpose-- the evidence presented does show that this would be a proper basis for admitting such evidence here. And, this Court may affirm the trial court's ruling on any grounds supported by the record. State v. Frodert, 84 Wn.App. 20, 25, 924 P.2d 933 (1996). Accordingly, this Court should affirm the trial court's ruling admitting testimony that items like those stolen by Noble on August 27th, and exchanged by Moore for a gift card on the same date were found in the search of the van Moore and Noble were riding in on September 4th.

II. SUFFICIENT EVIDENCE SUPPORTS THE "VALUE ELEMENT" OF MOORE'S CONVICTION FOR THEFT IN THE FIRST DEGREE.

Moore complains that there was insufficient evidence presented to prove that she stole items that exceeded \$1,500 in value. Appellant's Brief 16. The State disagrees.

The standard for determining sufficiency of the evidence on appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). In challenging the sufficiency of

the evidence, the appellant admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. State v. McNeal, 145 Wash.2d 352, 360, 37 P.3d 280 (2002). Circumstantial and direct evidence have equal weight. State v. Varga, 151 Wash.2d 179, 201, 86 P.3d 139 (2004). When a defendant challenges the sufficiency of evidence in a criminal case, we draw all reasonable inferences from the evidence in favor of the State and most strongly against the defendant. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wash.2d 821, 874, 83 P.3d 970 (2004) (citing State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990)). A reviewing court must defer to the trier of fact on issues of conflicting testimony, and the persuasiveness of the evidence. Thomas, 150 Wash.2d at 874-75, 83 P.3d 970 (citing State v. Cord, 103 Wash.2d 361, 367, 693 P.2d 81 (1985)).

In the present case, Moore was convicted as an accomplice for assisting codefendant Charrita Noble to commit the crime of Theft in the First Degree. The State's theory of the case was that on August 27, 2008, Moore acted as an accomplice to Ms. Noble by acting as a decoy while Noble stole cashmere sweaters from the

Polo store in Lewis County. The State presented evidence that Moore and Noble entered the Polo store together, and, later on, while Moore's codefendant Noble was stuffing sweaters into her Macy's "booster bag," on August 27th, Moore diverted attention away from Noble by asking store employees repeated questions about merchandise in the hope that such questions would divert the employee to the back of the store to look for the items requested by Moore. RP 59, 60,61.62,64,65,68.6973,74. There was also a video tape admitted which showed Noble stealing the sweaters and putting them in her Macy's bag on August 27th. RP 44,45. Store employees further testified that according to their computerized system of tracking merchandise, forty-one (41) cashmere sweaters of the type stolen by Noble and exchanged by Moore on August 27th were missing from the store's inventory for that time period. RP 80,81. The cost of those sweaters at the time of the theft was \$49.99 each. \$49.99 times 41 is over \$2,000 worth of merchandise--this is obviously over the \$1,500 value element the State had to prove for Theft in the First Degree. This evidence, viewed in the light most favorable to the State, was sufficient to prove the value element. Accordingly, Moore's conviction should be affirmed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED MOORE'S REQUEST FOR A MISSING WITNESS INSTRUCTION.

Moore claims the trial court erred when it refused to submit a missing witness instruction to the jury because Moore's codefendant Charrita Noble did not testify for the State. This argument is also without merit.

A trial court's refusal to give a requested instruction is reviewed for abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). It is error to give an instruction that the evidence does not support. State v. Hoffman, 116 Wn.2d 51,111, 804 P.2d 577 (1991). "A party's failure to produce a particular witness who would ordinarily . . . testify raises the inference in certain circumstances that the witness's testimony would have been unfavorable." State v. McGhee, 57 Wn.App. 457, 462-63, 788 P.2d 603, *review denied*, 115 Wn.2d 1013, 797 P.2d 513 (1990). To invoke the missing witness rule the defendant must establish circumstances showing that the State would not knowingly fail to call the witness unless the witness's testimony would be damaging. State v. Davis, 73 Wn.2d 271, 280, 438 P.2d 185 (1968). Additionally, a missing witness instruction is

appropriate only when the uncalled witness is "*peculiarly available*" to one of the parties. Davis, 73 Wn.2d at 276(emphasis added). For a witness to be "peculiarly available" to one party, there must have been a community interest between the party and the witness, or the party must have such a superior opportunity for knowledge of a witness that there was a reasonable probability that the witness would have been called to testify for the party except that the testimony would have been damaging. Davis, 73 Wn.2d at 277.

Moore claims that a missing witness instruction should have been granted because the State did not call her codefendant, Ms. Noble, as a witness. The trial court denied Moore's request for missing witness instructions regarding several witnesses, including Ms. Noble. The trial court ruled:

I'm finding that the witnesses are not particularly available just to the State. They are available to both parties. There was no restriction with regard to Ms. Noble and Mr. Nguyen. There's no restriction that I've heard of on their ability to testify or to be contacted by anyone else. The fact that they have their own counsel and that earlier there might have needed to be some permission from their counsel does not put them into the control of the State. But in any event, there is no restriction on their ability to testify.

RP 153,154. The trial court was correct to deny Moore a missing witness instruction.

As noted by the trial court, Moore's co-defendant Ms. Noble, cannot be characterized as being "peculiarly available" to the State- -as is required to invoke the missing witness doctrine. Indeed, as Moore's acquaintance, one would think that Ms. Noble would happily testify on Ms. Moore's behalf had Moore bothered to ask her. That Moore failed to hail Noble into court to testify on her behalf is not the fault of the State. To be sure, there was absolutely nothing preventing Ms. Moore from serving her own subpoena upon Ms. Noble. Nor did anyone put any restrictions on Ms. Moore's ability to have Ms. Noble testify. RP 153. Moore has not cited any case that stands for the proposition that if the State has entered into a plea agreement that contains a provision that the codefendant will testify against the other codefendant, that said codefendant thus becomes "peculiarly available to the State" as required for a missing witness instruction. In fact there is no law supporting such an argument. Simply put, Moore cannot meet the requirements to support the giving of a missing witness instruction as to Ms. Noble. Accordingly, Moore's argument to the contrary is without merit, and her conviction should be affirmed.

IV. MOORE'S ALLEGATION THAT THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD IS NOT CORRECT.

Moore argues that the accomplice liability statute, RCW 9A.08.020, is overbroad and unconstitutional because it criminalizes a substantial amount of speech and conduct protected by the First Amendment. Appellant's Brief (AB) 19-23. This argument is without merit, and unsupported under current law.

The First Amendment provides that "[c]ongress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This protection is applied to the states through the Fourteenth Amendment. Adams v. Hinkle, 51 Wn.2d 763, 768, 322 P.2d 844 (1958). Washington's Constitution contains a similar provision. Wash. Const. art. I, Section 5. The standard of review under both constitutions is the same. State v. Pauling, 108 Wn.App. 445, 448, 31 P.3d 47 (2001), *rev'd on other grounds*, State v. Pauling, 149 Wn.2d 381, 69 P.3d 331 (2003)(*citing City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989)).

A statute is unconstitutionally overbroad if it infringes on constitutionally protected speech or conduct. Huff, 111 Wn.2d at 925(*citing Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 84 L.Ed. 1092 (1990)). Moore relies on Brandenburg v. Ohio, and its holding that a State may not "forbid or proscribe advocacy of the

use of force or of law violation except where such advocacy 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, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

The accomplice liability statute, RCW 9A.08.020, states, in pertinent part:

- (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
- (2) A person is legally accountable for the conduct of another person when:
 - (a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or
 - (b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or
 - (c) He is an accomplice of such other person in the commission of the crime.
- (3) A person is an accomplice of another person in the commission of a crime if:
 - (a) With knowledge that it will promote or facilitate the commission of the crime, he
 - (i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it;

RCWA 9A.08.020. Moore finds fault with the language in section (3)(ii) above, which Moore sets out as follows: "[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." Appellant's Brief 21,22. Moore complains that "[t]he statute does not define 'aid.' Nor has any Washington court limited the definition of aid to bring it in compliance with the . . . Supreme Court's admonition that a state may not criminalize advocacy unless it is directed at inciting 'imminent lawless action.'" Appellant's brief 22. Moore then finds fault with the jury instruction defining "aid." WPIC 10.51. That instruction reads:

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.

WPIC 10.51 (emphasis added). Supp. CP. Moore argues that the instruction "criminalizes a vast amount of speech and conduct protected by the First Amendment," and violates the rule from Brandenburg v. Ohio, *supra*. Appellant's Brief 22. But Moore's

argument ignores the limiting language in both the instruction and the statute. Under the instruction and RCW 9A.08.020(3)(a), a person must have knowledge that his or her actions "will promote or facilitate the commission of *the crime*" before mention of any definition of the word "aid" or assistance. Id.(emphasis added); Supp.CP.

In this case, the jury was instructed that to be convicted as an accomplice, a person must give aid with the knowledge that *giving the aid will promote or facilitate the crime.* Supp CP. Thus, when the statute and instruction are read in full, it is apparent that both comply with the ruling in Brandenburg-- that advocacy of criminal activity is not in itself criminal. 395 U.S. at 447. Accordingly, the accomplice liability statute does not prohibit a substantial amount of protected speech and is not over-broad. Huff, 111 Wn.2d at 925. Moore's argument to the contrary is without merit, and her conviction should be affirmed.

V. THE JURY INSTRUCTION DEFINING ACCOMPLICE LIABILITY IS A CORRECT STATEMENT OF THE LAW.

Moore also claims that the accomplice liability instruction relieved the State of its burden to prove that Moore committed an

overt act. AB 24. This argument is also misplaced and unsupported by binding Washington law.

Moore relies on State v. Matthews, 28 Wn. App. 198, 203, 624 P.2d 720 (1981), for her argument that accomplice liability requires an overt act. But Matthews in turn relied upon State v. Baylor, 17 Wn.App. 616, 565 P.2d 99 (1977), which held discussed the "overt act" requirement as it applied under *former* RCW 9.01.030 (1974)--but that statute has been superseded by RCW 9A.08.020; Baylor, 17 Wn.App. at 618. Moore also cites State v. Peasley, 80 Wn. 99, 100, 141 P. 316 (1914), and State v. Renneberg, 83 Wn.2d 735, 739, 522 P.2d 835 (1974). But none of these cases changes the fact that the accomplice instruction given in the instant case is an accurate statement of the law of accomplice liability. Indeed, the Renneberg Court even pointed out that, "[a] separate instruction requiring the finding of an overt act, was unnecessary. . . ." Renneberg, 83 Wn.2d 439(quoting State v. Redden, 71 Wn.2d 147, 150, 425 P.2d 854 (1967)). Nothing in the instructions given here allowed the jury to convict Moore for "merely being present" when her codefendant stole the merchandise. In other words, the accomplice instructions in this case *did* instruct the jury that, "physical presence and assent alone are not sufficient to

constitute aiding and abetting." Renneberg, at 739,740 (discussing State v. Catterall, 5 Wash.App. 373, 486 P.2d 1167 (1971)); Supp. CP. Indeed, this is the same concept set out in WPIC 10.51, which states, "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 (Instruction No. 12). In this way, the principles discussed in Peasley and Renneberg (relied upon by Moore) absolutely are reflected in WPIC 10.51--and the jury here was so instructed.

The bottom line is that the accomplice instruction given in this case (based upon WPIC 10.51)-- so far, at least-- remains a correct statement of the law according to binding precedent in this State. See 11 Washington Practice: Washington Practice Jury Instructions: Criminal 10.51, at 137 (2d. ed.2005 supp.) ("[t]he language used in this 2005 update [of WPIC 10.51] was approved in State v. Moran, 119 Wn.App. [at] 209-10[]; see also State v. O'Neal, 159 Wn.2d 500, 506 n. 5, 150 P.3d 1121 (2007)). In sum, the language of WPIC 10.51 as submitted in the present case clearly and correctly explains that "mere presence" and knowledge of criminal activity alone is not enough to find accomplice liability. Supp. CP; State v. Luna, 71 Wn.App. 755, 759, 862 P.2d 620

(1993)(in terms of accomplice liability, the aid must be rendered with knowledge that it will promote or facilitate the crime). Because WPIC 10.51 properly informed the jury that mere presence and knowledge of criminal activity alone is not enough to find accomplice liability, the instruction was a correct statement of the law, and did not mislead the jury. Supp. CP; State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001(2003). This Court should so find and should affirm Moore's conviction.

VI. THE KNOWLEDGE INSTRUCTION SUBMITTED TO THE JURY IN THIS CASE IS A CORRECT STATEMENT OF THE LAW UNDER THESE FACTS.

Moore also claims the "knowledge" jury instruction was erroneous. The State disagrees.

Moore's argument pertaining to the "knowledge" instruction has been considered and rejected by this Court. State v. Gerdtz 136 Wash.App. 720, 726-730, 150 P.3d 627(2007). However, it is also true that our Supreme Court has accepted review of the issue of whether the knowledge instruction creates a mandatory presumption in another Lewis County case. See.e.g., State v. Sibert, 135 Wn. App 1025 (2006)(controlled substance case), *review granted*, 163 Wn.2d 1059 (2008)(already argued). Nonetheless--and opposite of what Moore argues-- the State

believes that because the present case involved Moore's participation in the crime as an accomplice, the accomplice instruction here further correctly explained the degree of knowledge required of Moore in order for the jury to find that she acted with knowledge that her actions would facilitate the crime of theft in the first degree. Supp. CP; See also, section five above. Accordingly, the language of the knowledge instruction and the accomplice instruction used here prevented any "conflation of mental states"--despite Moore's argument to the contrary.

Moore relies on the ruling in State v. Goble, 131 Wash.App. 194, 126 P.3d 821 (2005), as support for her argument that the knowledge instruction used here was improper. However, Goble is distinguishable from this case for the same reasons this Court distinguished Goble in its Gerdts opinion. Although the argument in Gerdts centered around an ineffective assistance of counsel claim and the knowledge instruction, the substantive analysis nonetheless can be applied here. In Gerdts, this Court explained, "[u]nlike the offense at issue in *Goble*, there was no second mens rea element to conflate. Accordingly, *Goble* is inapposite here and . . . the substantive argument has no merit. . ." Id at 730. Similarly, it does not appear to Respondent that the instructions here involve

any "second mens rea element" either. Id. Accordingly, Goble is not relevant here, and this Court should either find the knowledge instruction given here was correct and affirm, or, in the alternative, should stay this case pending our Supreme Court's decision regarding the knowledge instruction in State v. Sibert, referenced above.¹

CONCLUSION

The trial court was correct to admit evidence of merchandise and gift cards found in the search of the van Moore and her accomplice were riding in on September 4th. This evidence was not admitted as propensity evidence but instead was admissible to show motive, intent, or plan, or to otherwise complete the story of the crime. The State presented sufficient evidence to prove that the merchandise stolen had a value of at least \$1,500 because store employees testified that forty-one sweaters of the type stolen by Noble and exchanged by Moore were missing and that each sweater had a retail price of \$49.99 at the time of the theft.

The trial court did not abuse its discretion when it denied Moore a missing witness instruction regarding the State's failure to

¹ Ms. Moore is not in custody, so she should not be adversely impacted if this Court stays this case pending resolution of the "knowledge instruction issue" in State v. Sibert, supra, which was argued several months ago (assuming that the Court reaches that issue and assuming, without conceding, that the same reasoning might apply here).

call her codefendant Charrita Noble. Moore cannot show that Noble was "peculiarly available" to the State and thus such an instruction was not warranted. Nor has Moore shown that the accomplice liability is over-broad because it penalizes Free Speech. But because the accomplice statute requires more than mere presence to trigger accomplice liability, and further specifies that an accomplice must also have knowledge that her actions will promote or facilitate *the* crime, the statute does not violate Free speech. Similarly, the accomplice instruction given in this case did not relieve the State of its burden to prove that Moore "committed an overt act" because the instruction contained the same limiting language as the accomplice statute and is thus a correct statement of the law.

Finally, the knowledge instruction as used in this case did not conflate two mental states as discussed in this Court's Goble decision. Instead, application of the knowledge instruction here is like that in this Court's Gerdtz ruling, where this Court rejected the same arguments Moore makes here. However, our Supreme Court has accepted review of a similar issue pertaining to a knowledge instruction.

Accordingly, Moore's conviction should be affirmed in all respects--unless this Court wishes to stay this case pending the outcome of our Supreme Court's decision in State v. Sibert, regarding the knowledge instruction, as discussed above.

RESPECTFULLY SUBMITTED this 14th day of September, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:



LORI ELLEN SMITH, WSBA 27961
Deputy Prosecuting Attorney

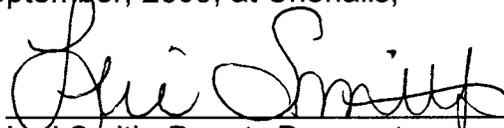
COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	NO. 38793-0-II
Respondent,)	
vs.)	
ALNISSIA MOORE,)	DECLARATION OF
Appellant.)	SERVICE BY MAIL
_____)	

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On this 14th of September, 2009, I served a copy of the State's Response Brief upon the Appellant by depositing same in the United States Mail, postage pre-paid, to the attorney(s) for Appellant at the name and address indicated below:

Backlund & Mistry
203 East Fourth Ave., Suite 404
Olympia, WA 98501

DATED this 14th day of September, 2009, at Chehalis,
Washington.


Lofi Smith, Deputy Prosecutor
WSBA No. 27961

Declaration of Service by
Mail

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DIVISION II
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