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STATE OF WASHINGTON
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No. 39178-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Donshae Coleman,
Appellant.

Thurston County Superior Court Cause No. 08-1-00634-8

The Honorable Judge Christine Pomeroy

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Coleman's Bail Jumping conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The trial judge erred by allowing the prosecutor to vouch for Phillips by introducing testimony about his promise to tell the truth.
3. The prosecutor committed misconduct by vouching for Phillips and by implying that the state could independently verify the truth of his testimony.
4. Mr. Coleman was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Defense counsel was ineffective for failing to object to improper vouching testimony that bolstered Phillips's credibility.
6. Defense counsel was ineffective for failing to object to the admission of Phillips's plea agreement.
7. Defense counsel was ineffective for eliciting testimony that Phillips's plea agreement required him to be truthful.
8. The trial court erred by admitting evidence of Mr. Coleman's prior drug-related misconduct.
9. The trial court's admission of uncharged allegations of prior misconduct violated ER 404(b).
10. The trial court provided an erroneous definition of knowledge.
11. The trial court erred by giving Instruction No. 7, which reads as follows:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is 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.

Instruction No. 7, Court's Instructions to the Jury, Supp. CP.

12. The trial court's instruction defining knowledge contained an improper mandatory presumption.

13. The court's instruction defining knowledge impermissibly relieved the state of its burden to establish each element by proof beyond a reasonable doubt.

14. The accomplice liability statute is unconstitutionally overbroad.

15. Mr. Coleman was convicted through operation of a statute that is unconstitutionally overbroad.

16. The trial judge erred by giving Instruction No. 14, 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 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. Instruction No. 14, Court's Instructions to the Jury, Supp. CP.

17. Instruction No. 14 permitted conviction as an accomplice without proof of an overt act.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Bail Jumping requires proof that the accused person failed to appear in court as required. The state did not introduce evidence that Mr. Coleman failed to appear in court as required. Did Mr. Coleman's conviction violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. A prosecutor commits misconduct by vouching for the credibility of a witness. In this case, the prosecuting attorney vouched for Phillips by implying that he could independently test the truthfulness of Phillips's testimony. Did the trial judge violate Mr. Coleman's Fourteenth Amendment right to due process by allowing the prosecutor to indirectly vouch for the informant's testimony?
3. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, Mr. Coleman's trial strategy involved discrediting Phillips's testimony, but defense counsel failed to object to improper vouching evidence that bolstered Phillips's credibility (and even elicited such testimony himself). Was Mr. Coleman denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. Evidence of prior misconduct is inadmissible if offered to establish propensity to commit the charged crime. The trial court admitted allegations of prior misconduct that established propensity and nothing else. Did the trial court's admission of propensity evidence violate ER 404(b)?
5. Conviction as an accomplice requires proof of an intentional act done with knowledge that it will promote or facilitate the commission of the charged crime. The trial court instructed the jury that "Acting knowingly or with knowledge also is established if a person acts intentionally," without limiting the intentional acts that could be used as proof of knowledge. Did the trial court's instruction misstate the law and relieve the state of its burden of proof?

6. A jury instruction creates a conclusive presumption whenever a reasonable juror might interpret the presumption as mandatory. The trial judge instructed the jury that “Acting knowingly or with knowledge also is established if a person acts intentionally,” Did the court’s instruction defining knowledge create an unconstitutional mandatory presumption?
7. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite “imminent lawless action.” The accomplice liability statute criminalizes support and encouragement of criminal activity, even where such support and encouragement is not directed at and likely to incite “imminent lawless action.” Is the accomplice liability statute unconstitutionally overbroad?
8. Accomplice liability requires proof of an overt act. The court’s instructions permitted the jury to convict Mr. Coleman even absent proof of an overt act. Did the court’s instructions relieve the state of its obligation to prove the elements of accomplice liability?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sean McGrath was a police informant, and his assignment was to purchase drugs from Sean Phillips. RP¹ 15-16, 127; Exhibit 47, Supp. CP. He bought cocaine from Phillips in a parking lot on March 6, 2008. RP 17-19.

A second buy was arranged on April 4, 2008, in the parking lot of an apartment complex. RP 21, 26. A Dodge Magnum was seen in the area before Phillips appeared and got into the informant's vehicle. RP 30-31. Phillips said he needed the money before he could get the cocaine and ecstasy. When McGrath demurred, Phillips got out a gun and took the \$800 in buy money. RP 33, 136.

The surveilling police lost sight of Phillips as he ran away. RP 43. Two officers drove around the area, and then got out of their car to put on their "POLICE" vests. RP 44-46. They saw the Dodge Magnum and tried to prevent it from passing, but the car sped up, forcing one of the officers to jump out of the road. RP 47-54. Another officer gave chase; and the car soon stopped and the driver, Donshae Coleman, got out. RP 57. Mr.

¹ The Verbatim Report of Proceedings has several volumes, though the trial volumes are numbered sequentially. Since those are the only pages cited in this brief, the date for each citation will be omitted. It should be noted that there are no pages numbered 200-400, as this was a typographical error of the court reporter.

Coleman attempted to walk away, asking what he'd done, but the officers kicked him several times and took him into custody. RP 58-61, 106-107. The car had been reported stolen by its owner months before. RP 62, 557. The police found a shotgun in the back of the car, and \$673 in cash on Mr. Coleman. RP 87, 91.

A few hours later, Phillips was found hiding in a friend's house nearby. A gun and the buy money were also located there. RP 67-75.

The state charged Mr. Coleman with Robbery in the First Degree with a Firearm Enhancement, Assault in the Second Degree, and Possession of a Stolen Motor Vehicle. Information, Supp. CP. The state later alleged that Mr. Coleman had missed a required court appearance on February 4, 2009, and added a Bail Jumping charge. CP 3.

Phillips made a deal with the state to testify against Mr. Coleman in exchange for reduced charges. Exhibit 48, Supp. CP; RP 148-150. He told the jury that he could lose the state's favorable sentencing recommendation if he didn't testify truthfully. RP 150. His agreement, which was admitted into evidence and sent back to the jury, indicated that Phillips agreed to "participate in any truthful, complete and comprehensive interviews", and further "THE DEFENDANT'S MOST IMPORTANT OBLIGATION PURSUANT TO THIS AGREEMENT IS TO TESTIFY TRUTHFULLY." Exhibit 48, Supp. CP (original

capitalized). Defense counsel didn't object to the testimony or the admission of the exhibit. RP 148-150. During cross-examination, defense counsel had Phillips reiterate that he had promised to tell the truth, and that if the prosecutor thought he was lying in his testimony, charges could be added. RP 182-183. A detective called to the stand also reiterated that Phillips had agreed to testify truthfully. RP 490.

Mr. Coleman sought to limit testimony about unrelated incidents of drug dealing. RP 5-8, 63, 89, 120-121. The state prosecutor wanted to present Mr. Coleman and Phillips as drug dealing "buddies," and claimed they'd sold marijuana together since their teens.² RP 6-8, 90, 116-117. The court ruled that the prosecutor would be allowed to introduce allegations that Mr. Coleman and Philips had sold drugs together in the past. RP 122.

When Phillips took the stand, he testified that he'd purchased drugs from Mr. Coleman in the past. Although Mr. Coleman's objection was sustained and the testimony stricken, Phillips repeated the testimony almost immediately (over additional defense objections). RP 152-155. The court did not give the jury a limiting instruction regarding this testimony.

² At the time of trial, Mr. Coleman was 23. CP 2.

To support the Bail Jumping allegation, the state introduced several documents as exhibits. Exhibits 36, 37, 38, 39, 40, 42, 43, 44A, 46, Supp. CP. These included documents indicating that Mr. Coleman was to appear in court “2/4, 2009, at 9:00 a.m.” Exhibit 42, Supp. CP. There was also a minute entry indicating that Mr. Coleman’s case was stricken from the 8:30 a.m. status conference calendar, with the note “defendant on bench warrant status.” Exhibit 43, Supp. CP. The judge also read to the jury the following stipulation:

The parties stipulate that a Superior Court judge previously issued a bench warrant for the arrest of Donshae Eugene Coleman in cause number 08-1-634-8. On February 4th, 2009, Donshae E. Coleman was on bench warrant status.
RP 560-561.

The court gave the following jury instructions:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is 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.

Instruction No. 7, Court’s Instructions to the Jury, Supp. CP.

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 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. Instruction No. 14, Court's Instructions to the Jury, Supp. CP.

Defense counsel did not object to these instructions.

The jury returned verdicts of guilty on all counts, along with the firearm enhancement. CP 18; RP 659. Mr. Coleman, who had no criminal history, was sentenced to 111 months in prison, and he timely appealed. CP 18-28, 4-15.

ARGUMENT

I. MR. COLEMAN'S BAIL JUMPING CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS BEYOND A REASONABLE DOUBT.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

Under RCW 9A.76.170(1), “Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state... who fails to appear... as required is guilty of bail jumping.” Bail Jumping is a class C felony if the person’s original charge is a class C felony. RCW 9A.76.170(3).

Bail Jumping requires proof “that the defendant has been given notice of the required court dates.” *State v. Fredrick*, 123 Wn.App. 347, 353, 97 P.3d 47 (2004). *See also State v. Carver*, 122 Wn.App. 300, 306, 93 P.3d 947 (2004) (“[W]e expressly hold that the State must prove only that Carver was given notice of his court date”); *State v. Liden*, 118 Wn. App. 734, 740, 77 P.3d 668 (2003) (“Taking the evidence and all reasonable inferences in the State's favor, we fail to see how the State

proved that Liden knew the exact date on when to appear for his trial”); *State v. Ball*, 97 Wn.App. 534, 536, 987 P.2d 632 (1999) (“This means that the State ‘must prove beyond a reasonable doubt that [the defendant] knew, or was aware that he was required to appear at the [scheduled] hearing ...’”) (quoting *State v. Bryant*, 89 Wn.App. 857, 870, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017, 978 P.2d 1100 (1999)) (alterations in original).

Here, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Coleman failed to appear in court as required. The state presented evidence showing that Mr. Coleman received notice that he was to appear in court for a status conference “2/4, 2009, at 9:00 a.m.” Exhibit 42, Supp. CP. The state also introduced a minute entry indicating that Mr. Coleman’s case on the 8:30 a.m. status conference calendar was stricken, with the note “defendant on bench warrant status.” Exhibit 43, Supp. CP. Finally, Mr. Coleman stipulated that he was on bench warrant status due to a previously issued bench warrant. RP 560-561. However, there is no indication that the court waited until 9:00 a.m. (the time of the notice) to see if Mr. Coleman showed up despite his bench warrant. Nor is there any indication that the court inquired if Mr. Coleman was present, either in the courtroom or in the hallway outside the courtroom. RP 561-575.

This evidence, even when taken in a light most favorable to the state, is insufficient to convince a jury beyond a reasonable doubt that Mr. Coleman failed to appear as required on February 4, 2009. Because of this, his conviction for Bail Jumping must be reversed and the charge dismissed with prejudice. *Smalis, supra*.

II. THE TRIAL COURT ALLOWED THE PROSECUTOR TO VOUCH FOR PHILLIPS'S ACCOMPLICE TESTIMONY, AND THEREBY VIOLATED MR. COLEMAN'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

A prosecutor has a duty to act impartially and in the interest of justice. *State v. Rivers*, 96 Wn.App. 672, 675, 981 P.2d 16 (1999). Comments that encourage a jury to render a verdict on facts not in evidence are improper. *State v. Stith*, 71 Wn.App. 14, 856 P.2d 415 (1993). "A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty." *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). *See also State v. Martin*, 69 Wn.App. 686, 849 P.2d 1289 (1993).

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003) (Horton I); *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984); *United States v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996), *citing United States v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980), *cert. denied*, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981). Indirect

vouching occurs when evidence suggests that information not presented to the jury supports the witness' testimony. *Frederick*, at 1378. This "may occur more subtly than personal vouching, and is also more susceptible to abuse." *Frederick*, at 1378. Included in this category is evidence implying that the state "has taken steps to assure the veracity of its witnesses." *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir., 1990), citing *Roberts, supra*, and *United States v. Brown*, 720 F.2d 1059, 1073 (9th Cir. 1983); see also *United States v. Rudberg*, 122 F.3d 1199 (9th Cir., 1997).

In *Roberts, supra*, the trial court allowed into evidence a witness' plea bargain, which included a promise to testify truthfully. The Court of Appeals reversed:

The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.
Roberts, at 536.

In this case, the state was permitted to introduce the terms of Phillips's plea agreement, which required that he testify truthfully. Exhibit 48, Supp. CP; RP 150. Phillips was also permitted to testify that he had told the truth in his testimony. RP 196.

Even more directly than in *Roberts*, the clear implication of this testimony “is that the prosecutor is forcing the truth from [the] witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.” *Roberts*, at 536.

Because the trial judge permitted the prosecutor to vouch for Phillips’s testimony, the conviction must be reversed and the case remanded for a new trial. *Roberts, supra*.

III. IF THE VOUCHING ARGUMENT IS NOT PRESERVED FOR REVIEW, THEN MR. COLEMAN WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397

U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006) (*Horton II*). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland*); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007).

In this case, Phillips provided incriminating evidence suggesting that Mr. Coleman was fully involved in the robbery charge. There was no reason for defense counsel to allow the state to introduce Phillips's testimony about his promise to tell the truth and the unredacted plea agreement (which included language about his promise to be truthful). Nor was there any reason for defense counsel to introduce additional testimony about the promise to be truthful on his cross-examination of Phillips. RP 182-183.

Because Phillips provided the only direct testimony establishing Mr. Coleman's knowledge of the planned robbery, defense counsel's error in bolstering Phillips's testimony prejudiced Mr. Coleman. Accordingly, Mr. Coleman was denied the effective assistance of counsel. His convictions must be reversed and the case remanded to the trial court.

IV. THE ADMISSION OF UNRELATED INSTANCES OF ALLEGED MISCONDUCT VIOLATED ER 401, ER 403, AND ER 404(B) AND DEPRIVED MR. COLEMAN OF HIS RIGHT TO A FAIR TRIAL.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 403, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” A trial court’s decision under ER 403 is reviewed for an abuse of discretion. *Subia v. Riveland*, 104 Wn. App. 105, 113-114, 15 P.3d 658 (2001).

Under ER 404(b), “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” A trial court “must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). ER 404(b)’s *raison d’etre* is to exclude propensity evidence.

Where the state seeks to introduce evidence of prior bad acts, it bears a “substantial burden” of showing admission is appropriate for a purpose other than propensity, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); *DeVincentis*, at 18-19.

Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *State v.*

Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). The trial court must conduct the analysis on the record.³ *State v. Asaeli*, ___ Wn. App. ___, ___, 208 P.3d 1136 (2009) (citing *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007)). If the evidence is admitted, a limiting instruction must be given. *Asaeli*, ___, n. 35.

In this case, Mr. Coleman asked the court to exclude evidence of his prior drug use or drug dealing. RP 5-8, 63, 89, 120-121. The trial court allowed the state to introduce evidence that Mr. Coleman and Phillips had sold marijuana together in the past, under the theory that this showed that Phillips trusted Mr. Coleman and proved that the two acted in concert to commit crimes. RP 122. But when Phillips testified, his testimony was that Mr. Coleman sold him marijuana—not that they acted in concert. RP 152-153. Although Mr. Coleman’s objection was sustained and the testimony stricken, Phillips repeated the testimony almost immediately (over additional defense objections). RP 152-155. Furthermore, the court did not give the jury a limiting instruction relating to this testimony.

³ But if the record shows that the court adopted a party’s express arguments as to the purpose of the evidence and that party’s weighing of probative and prejudicial value, then the failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at ___, n. 35 (citing *State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995)).

Evidence that Mr. Coleman sold Phillips marijuana was not relevant to any issue in the case. Because of this, its admission violated ER 401, 403, and 404(b). Mr. Coleman's conviction must be reversed and the case remanded for a new trial, with instructions to exclude the evidence on remand. *DeVincentis, supra*.

V. MR. COLEMAN'S ROBBERY CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S KNOWLEDGE INSTRUCTION CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. COLEMAN ACTED WITH KNOWLEDGE THAT HIS CONDUCT WOULD PROMOTE OR FACILITATE THE COMMISSION OF ROBBERY.

Under the Fourteenth Amendment's Due Process Clause, criminal defendants are presumed innocent, and the government must prove guilt beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, at 362. An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 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, 341, 58 P.3d 889 (2002). Jury instructions must be "manifestly clear," since juries

lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

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, 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, 63, 768 P.2d 470 (1989). An instruction creates a conclusive presumption whenever “a reasonable juror might interpret the presumption as mandatory.” *State v. Deal*, 128 Wn.2d 693, 701, 911 P.2d 996 (1996).

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, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

RCW 9A.08.010 (“General requirements of culpability”) defines the mental states used in the criminal code. Under certain circumstances, proof of one mental state can substitute for proof of a lesser mental state. Thus “[w]hen acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.” RCW 9A.08.010(2). Accomplice liability requires proof of an intentional action performed “[w]ith knowledge that it will promote or facilitate the commission of the crime.” RCW 9A.08.020; see also Instruction No. 14, Court’s Instructions to the Jury, Supp. CP. Applying the substitution provisions of RCW 9A.08.010, a person can be convicted as an accomplice if she or he performs an intentional act “[w]ith [intent or] knowledge that it will promote or facilitate the commission of the crime.” RCW 9A.08.020 (modified).

Here, the trial court’s instruction defining knowledge included the following language: “Acting knowingly or with knowledge also is established if a person acts intentionally.”⁴ Instruction No. 7, Court’s Instructions to the Jury, Supp. CP. The instruction did not place any limitation on the intentional acts that could establish the knowledge

⁴ This language was (presumably) intended to convey to jurors that they could convict Mr. Coleman not only if he knew he was facilitating commission of the crime, but also if he intended to facilitate commission of the crime. RCW 9A.08.010(2).

required for accomplice liability under RCW 9A.08.010. Thus the jury could have interpreted Instruction No. 7 to mean that any intentional act conclusively established Mr. Coleman's knowledge that he was promoting or facilitating the robbery—even if he were, in fact, ignorant of Phillips's plan to commit robbery.

Similar language in an instruction defining “knowledge” has previously been found to require reversal. *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.⁵ The trial court's “knowledge” instruction informed the jury that “[a]cting knowingly or with knowledge also is established if a person acts intentionally.” *Goble*, at 202. This language was found to be ambiguous, in that the jury could believe 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

⁵ 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.

State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.
Goble, at 203.

WPIC 10.02, the pattern instruction upon which Instruction No. 7 is based, has been revised in order "to more closely follow the statutory language." Comment, WPIC 10.02 (2008 Edition). Under the new instruction, "When acting knowingly [*as to a particular fact*] is required to establish an element of a crime, the element is also established if a person acts intentionally [*as to that fact*]." WPIC 10.02 (2008 Edition). The change is explained as follows:

Clearly, the principle of inferring knowledge from intent is valid only if both mental states are being evaluated with respect to the same fact. Stated somewhat differently, knowledge about Fact A (the victim's status) cannot be inferred from an intent about Fact B (committing an assault). For this reason, the instruction now includes bracketed phrases that make this point more directly. The bracketed phrases may be used depending on the evidence and arguments of a particular case.
Comment, WPIC 10.02 (2008 Edition).

As this comment demonstrates, the prior version did not adequately follow RCW 9A.08.010.⁶

⁶ The rule set forth in *Goble* has been limited to crimes (such as the Assault Two charged in this case) that include more than one *mens rea* as an element in the "to convict" instruction. *State v. Gerds*, 136 Wn. App. 720, 150 P.3d 627 (2007). Furthermore, the problem created by the ambiguous language can be corrected by instructions that are "clear, accurate, and separately listed [sic]." *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007). However, the *Keend* court did not have the benefit of the 2008 amendments to the WPIC. Had the court considered *Keend* after the amendment, it may have reached a different result.

The flawed language first criticized in *Goble* requires reversal in this case. If interpreted correctly, Instruction No. 7 allowed the jury to convict for intentional, knowing, or reckless infliction of substantial bodily harm, as permitted under the substitution provisions of RCW 9A.08.010(2). However, a reasonable juror might interpret the language as creating a mandatory presumption, permitting conviction upon proof of any intentional act, even in the absence of recklessness. Since juries lack the tools of statutory construction, the trial court's failure to give an instruction that was manifestly clear requires reversal under the stringent test for constitutional error.

Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Instructions with conclusive presumptions require a more thorough harmless-error analysis than other unconstitutional instructions. The reviewing court must conclude that the error was “unimportant in relation to everything else the jury considered on the issue in question...” *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled (in part) on other grounds by Estelle v. McGuire*, 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991). In other words,

a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict...[I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone...[I]t will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue...is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.
Yates, at 403-405 (footnotes and citations omitted).

A court must examine the proof actually considered, and ask: [W]hether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict *resting on that evidence* would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said...that the presumption did not contribute to the verdict rendered.
Yates, at 403-405 (emphasis added).

Thus, a reviewing court evaluating harmless error cannot rely on evidence drawn from the entire record “because the terms of some presumptions so narrow the jury’s focus as to leave it questionable that a reasonable juror

would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed.” *Yates*, at 405-406.⁷

Here, the conclusive presumption required the jury to find Mr. Coleman acted with knowledge that he was promoting or facilitating the commission of robbery. Instruction No. 7, Court’s Instructions to the Jury, Supp. CP. The instruction provided no guidance as to what intentional acts could be considered a predicate for the presumed fact (that Mr. Coleman acted with knowledge). No limits were placed on what the jury could consider as predicate facts; under the instruction, jurors could presume knowledge from proof of *any* intentional act.

The absence of any limitation makes the conclusive presumption here worse than any of the instructions considered in the Supreme Court cases outlined above. *See, e.g., Sandstrom*, at 512 (“the law presumes that a person intends the ordinary consequences of his voluntary acts”); *Morissette, supra* (intent to steal presumed from the isolated act of taking); *Francis v. Franklin*, 471 U.S. 307, 309, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (“[the] acts of a person of sound mind and discretion are presumed to be the product of the person’s will, but the presumption may be

⁷ In *Deal, supra*, the court applied the standard test for constitutional harmless error, without reference to *Yates v. Evatt*. *Deal*, at 703. Presumably, this was because the defendant in *Deal* testified and acknowledged the facts that were the subject of the conclusive presumption. *Deal*, at 703.

rebutted,” and “[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted”); *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (“a person ‘shall be presumed to have embezzled’ a vehicle if it is not returned within 5 days of the expiration of the rental agreement,” and “‘intent to commit theft by fraud is presumed’ from failure to return rented property within 20 days of demand”); *Yates*, at 401 (“‘malice is implied or presumed’ from the ‘willful, deliberate, and intentional doing of an unlawful act’ and from the ‘use of a deadly weapon.’”).

The lack of any limitation makes it impossible to determine what portions of the record the jury considered in deciding that Mr. Coleman acted with knowledge. Jurors could have focused on evidence of *any* intentional act, and disregarded all other evidence bearing on Mr. Coleman’s mental state. Because it is impossible to make the determination required by *Yates, supra*, it cannot be said that the error was harmless beyond a reasonable doubt.

Furthermore, even considering the entire record (contrary to the requirement under *Yates, supra*), reversal is required. A reasonable juror could have acquitted Mr. Coleman of the charged crime by deciding that he was ignorant of Phillips’s plan to commit robbery. Thus the error was

not trivial, formal, or merely academic, and it cannot be said that the error was harmless beyond a reasonable doubt. *Lorang*, at 32. Because of this, Mr. Coleman's robbery conviction must be reversed and the case remanded for a new trial.

VI. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

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, 768, 322 P.2d 844 (1958) (collecting cases).⁸ A statute is unconstitutionally overbroad if it criminalizes constitutionally protected speech or conduct. *City of Bellevue v. Lorang*, at 26.

⁸ Washington's Constitution affords a similar protection: "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.

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*, 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, 118, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003). Instead of applying the general rule for facial challenges, “[t]he Supreme Court has ‘provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or “chill” constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.’” *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005), quoting *Virginia v. Hicks* at 119; see also *Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3d Cir. 2006). Accordingly, an overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Lorang*, 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, 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, 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, Mr. Coleman’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 into 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*, 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. 14, Court’s Instructions the Jury, 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, 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.⁹ Anyone who supports the protest from a legal vantage point (for example by carrying an antiwar

⁹ Indeed, under WPIC 10.51 and Instruction No. 14, 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).

sign on the sidewalk across the street) is guilty as an accomplice. An attorney who agrees to represent the protesters *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, 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. 14—is overbroad. Therefore, RCW 9A.08.020 is unconstitutional.

In this case, Mr. Coleman was convicted as an accomplice to Phillips’s robbery. Because the accomplice liability statute is unconstitutional, the robbery conviction must be reversed and the case dismissed with prejudice.

VII. THE COURT’S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. COLEMAN COMMITTED AN OVERT ACT.

Accomplice liability requires an overt act. *See, e.g., State v. Matthews*, 28 Wn. App. 198, 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 Wn. 99,

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.
Peasley, at 100.

See also *State v. Everybodytalksabout*, 145 Wn.2d 456, 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, 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, 150, 426 P.2d 854 (1967).

Instruction No. 14 was fatally flawed because it allowed conviction without proof of an overt act. Under the instruction, the jury was permitted to convict if Mr. Coleman was present and assented to Mr. Phillips’s robbery, even if he committed no overt act. Instruction No. 14,

Court's Instructions to the Jury, Supp. CP. Because of this, the instruction violates the "overt act" requirement of *Peasley, supra* and *Renneberg, supra*.

The last two sentences of Instruction No. 14 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. Instruction No. 14, Court's Instructions to the Jury, 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. Instruction No. 14, Court's Instructions to the Jury, 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. Such a construction gives criminals the power to transform approving bystanders into accomplices, simply by announcing the intent to commit a crime and telling the bystanders that their presence is helpful.

But the law does not impose a duty on bystanders to reject another person's criminal activity; instead, it requires proof of an overt act.

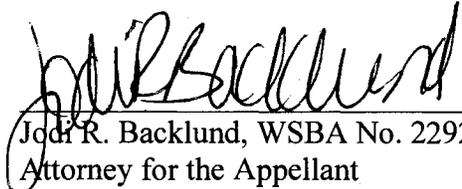
Because the instructions allowed conviction as an accomplice in the absence of an overt act, the convictions must be reversed and the case remanded to the trial court for a new trial. *Peasley, supra; Renneberg, supra.*

CONCLUSION

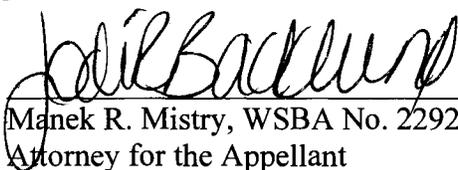
For the foregoing reasons, Mr. Coleman's conviction must be reversed and the case dismissed with prejudice. In the alternative, if the case is not dismissed with prejudice, it must be remanded to the trial court for a new trial.

Respectfully submitted on August 17, 2009.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

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

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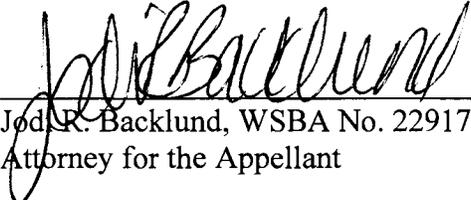
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BY 

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

All postage prepaid, on August 17, 2009.

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 August 17, 2009.



Jodi R. Backlund, WSBA No. 22917
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