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ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF BAIL JUMPING.

The state must prove every element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Conviction for bail jumping requires proof that the accused person failed to appear in court “as required.” RCW 9A.76.170(1). In addition, the state must prove that the accused person was given notice of the required hearing. *State v. Fredrick*, 123 Wn.App. 347, 353, 97 P.3d 47 (2004); *State v. Liden*, 118 Wn. App. 734, 740, 77 P.3d 668 (2003).

Here, the evidence proved that Mr. Coleman received notice of a status conference “2/4, 2009, at 9:00 a.m.” Exhibit 42, CP. The prosecution introduced evidence—including testimony of a court clerk—that Mr. Coleman had an outstanding bench warrant and failed to appear at the 8:30 a.m. status conference calendar. Exhibit 43, CP; RP (04/08/2009) 574. However, no evidence was introduced that Mr. Coleman failed to appear at 9:00 a.m., the time indicated on his notice. Exhibit 42, CP.

The evidence was therefore deficient: either Mr. Coleman received insufficient notice (since he was told to be present at 9:00 a.m., not 8:30

a.m.), or the state failed to prove that he didn't appear "as required," since it didn't introduce evidence that he was absent at 9:00 a.m.

Respondent fails to address the issue, but simply points to evidence establishing that Mr. Coleman didn't appear on the 8:30 calendar. Brief of Respondent, pp. 3-4. The clerk's testimony, upon which Respondent relies, was limited to an explanation of the minute entry—"there was no hearing because the defendant did not appear..."—she did not testify that the 8:30 calendar was extended to 9:00 o'clock, or that the courtroom and hallways were polled to see if Mr. Coleman was present. RP 574.

The evidence, when taken in a light most favorable to the state, does not prove the essential elements of bail jumping. Accordingly, Mr. Coleman's bail jumping conviction must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

II. THE PROSECUTOR'S VOUCHING VIOLATED MR. COLEMAN'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

A similar issue has been accepted for review by the Supreme Court. *State v. Ish*, 150 Wn.App. 775, 208 P.3d 1281 (2009), review granted at ___ Wn.2d ___ (2009). Because this issue will be controlled by the Supreme Court's decision in *Ish*, Mr. Coleman rests on his Opening Brief.

III. MR. COLEMAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO RESIST THE VOUCHING EVIDENCE.

The merits of this issue will be controlled by the Supreme Court's decision in *Ish, supra*; accordingly, Mr. Coleman rests on his Opening Brief.

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.

Mr. Coleman rests on the argument set forth in the Opening Brief.

V. THE COURT'S "KNOWLEDGE" INSTRUCTION VIOLATED MR. COLEMAN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Instructions like that used by the court to define "knowledge" (Instruction No. 7) impermissibly conflate disparate mental elements and relieve the state of its burden of proof. *State v. Hayward*, ___ Wn.App. ___, 217 P.3d 354 (2009). In *Hayward*, the Court of Appeals reaffirmed the rule, first set forth in *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005).

This case is controlled by *Hayward*.

To convict Mr. Coleman as an accomplice, the state was required to prove an intentional act, performed with knowledge that it would aid in the commission of the robbery. RCW 9A.08.020; *see also* Instruction No. 14, CP 47. Although RCW 9A.08.020 does not explicitly use the word

“intent,” this mental state is implied; otherwise, a person could be convicted for an involuntary act if it was accompanied by knowledge that it would aid in the commission of the crime. Respondent’s contention that accomplice liability requires nothing more than knowledge is incorrect.

Brief of Respondent, p. 23.

In making this erroneous argument, Respondent conflates two different issues: proof that the accused person intended to act, and proof that the accused person intended to commit the charged crime. Respondent is correct that Mr. Coleman could be found guilty as an accomplice even if he did not intend to personally commit robbery—under the statute, the state was required to prove only that he had knowledge that his actions would further the robbery. RCW 9A.08.020.

But the statute also requires proof of an intentional act: an accused person is not guilty as an accomplice unless she or he “solicits, commands, encourages... requests... aids or agrees to aid [another] person in planning or committing” the crime. RCW 9A.08.020. It is this intentional act that must be accompanied by the requisite knowledge.

Thus, an accomplice who drives a principal to the place where a crime will be committed, with knowledge of the intended crime, has performed an intentional act (driving) with the requisite knowledge (that the crime will be furthered). Without proof of the intentional act, the state

could not establish that the person solicited, commanded, encouraged, requested, aided, or agreed to aid the principal in the commission of the crime.

The state must prove both an intentional act and knowledge. By instructing the jurors that they could presume knowledge from proof of an intentional act, without any further explanation, Instruction No. 7 conflated the two requirements and relieved the state of its burden. The jury could have read the instruction to mean that Mr. Coleman's intentional action—for example, driving the car—by itself established his complicity, even if he were actually ignorant of Phillips's planned crime. This is the problem first identified in *Goble*, and addressed more recently in *Hayward*.

Respondent has not even attempted to argue that the error was harmless. Because the trial court used the erroneous instruction, Mr. Coleman's robbery conviction must be reversed, and the case remanded for a new trial, with instructions to use a proper definition of knowledge. *Hayward, supra*.

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

Mr. Coleman rests on the argument set forth in his Opening Brief.¹

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

Mr. Coleman rests on the argument set forth in his Opening Brief.²

CONCLUSION

Mr. Coleman's conviction must be reversed. The Bail Jumping charge must be dismissed with prejudice; the Robbery charge must be remanded to the trial court for a new trial.

Respectfully submitted on August 17, 2009.

¹ A Petition for Review raising similar issues is pending in the Supreme Court.

² A Petition for Review raising similar issues is pending in the Supreme Court.

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BY [Signature]
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CERTIFICATE OF MAILING

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

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Stafford Creek Corrections Center
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and to:

Thurston County Prosecuting Attorney
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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 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.

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