

No. 39178-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DONSHAE COLEMAN,

Appellant.

09 OCT 21 PM 12:00
STATE OF WASHINGTON
BY [Signature] DEPUTY
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy, Judge
Cause No. 08-1-00634-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the State produced sufficient evidence at trial to support a conviction for bail jumping.

2. Whether the prosecutor vouched for the witness Sean Phillips.

3. Whether Coleman received ineffective assistance of counsel because his attorney did not keep the unredacted plea agreement between Sean Phillips and the State from being admitted into evidence, or because he questioned Phillips about the agreement.

4. Whether evidence that Coleman had previously sold drugs to Phillips and driven him to other drug transactions was improperly admitted as ER 404(b) evidence, and if so, whether Coleman was prejudiced by the admission of the evidence.

5. Whether Jury Instruction No. 7, which defines knowledge, relieved the State of the burden to prove that Coleman acted with knowledge that his conduct promoted or facilitated the commission of robbery.

6. Whether the accomplice liability statute, RCW 9A.08.020, violates the First and Fourteenth amendments to the U.S. constitution.

7. Whether the State was required to prove an overt act before Coleman could be found guilty of robbery, and if so, whether the accomplice liability instruction relieved the State of that burden.

B. STATEMENT OF THE CASE.

The State accepts Coleman's statement of the case.

C. ARGUMENT.

1. The State produced evidence to support every element of the crime of bail jumping.

The crime of bail jumping has three elements, other than jurisdiction, as set forth in Jury Instruction No. 31. [CP 64] The only element that Coleman argues was not satisfied is the first, “[t]hat on or about the (sic) February 4, 2009, the defendant failed to appear before a court.”

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Coleman argues that the State introduced only evidence that he was on bench warrant status on February 4, 2009, not that he failed to appear. That is not the case. Even though it is a reasonable inference that a person with an outstanding bench warrant would not be present in the courtroom, the State called Diane Jones, a manager in the Clerk’s Office, to testify. She identified the various documents that the State offered as proof of the bail jumping charge, including Exhibit 43, the clerk’s minute of

February 4th. [RP 572] The minute entry read “Stricken, defendant on bench warrant status,” and Ms. Jones testified, “It means there was no hearing because the defendant did not appear, and it just tells why, because of the bench warrant.” [RP 574]¹

The jury could reasonably have made the inference that because Coleman was on bench warrant status, and his February 4, 2009, hearing was stricken, he must have failed to appear on that date. However, it wasn’t required to rely on inferences because Ms. Jones plainly told them that that Coleman did not appear.

Under the standard as set forth above, the evidence was sufficient to support Coleman’s conviction for bail jumping.

2. The prosecutor did not vouch for Sean Phillips’ credibility, and therefore there was no due process violation.

Sean Phillips, the principal in the robbery for which Coleman was tried and convicted, reached a plea agreement with the State which included the condition that he testify truthfully against Coleman. [Exhibit 48] Coleman did not object to the admission of that document into evidence. [RP 149] Relying primarily on United States v. Roberts, 618 F.2d 530 (1980), Coleman now argues that

¹ Although this evidence was not before the jury, the court on February 4, 2009, did page the courtroom without response. 02/04/09 RP 3

by placing the plea agreement before the jury, the prosecutor was impermissibly vouching for Phillips' credibility. However, about the only similarity between Roberts and this case is the fact that there was a plea agreement requiring truthful testimony that was admitted into evidence.

In Roberts, as in Coleman's case, the entire plea agreement was admitted into evidence. Id., at 532. The witness, Adamson, who testified pursuant to that agreement, was the government's chief witness. During closing argument, the prosecutor in Roberts told the jury that the issue came down to which person was lying, Adamson or one other witness, he urged the jury to read the plea agreement thoroughly and understand that if Adamson didn't testify truthfully he would lose the benefit of his bargain and suffer horrible consequences that could include the death penalty, and that a detective had been in the courtroom throughout the trial monitoring Adamson's testimony. Id., at 532-33. The Roberts court discussed whether a plea agreement may be put before a jury in its entirety, finding the trial court has discretion to exclude terms that require truthful testimony. However, once the entire agreement has been admitted, "[t]he prosecutor may not tell the jury that the government has confirmed a witness's credibility before using him. Id., at 536.

The test is “whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness’s credibility.” Id., at 537. The primary reason that the court reversed in Roberts was the prosecutor’s statements about the detective monitoring the witness, which not only referred to evidence not in the record, but implied the government knew that Adamson had been telling the truth. Id., at 534, 536.

In Coleman’s case, the agreement was placed into evidence and Phillips testified that he was aware he would lose his favorable outcome if he did not tell the truth. [RP 150] After the defense had cross-examined Phillips, and extracted his admission that he had lied a number of times, [RP 186-88] the prosecutor on redirect asked him if his testimony had been the truth, to which Phillips replied, “Yes.” [RP 196] There was only one reference by the State to the condition of the agreement that he tell the truth, and one rehabilitative question on redirect. One of the purposes of redirect examination is to rehabilitate the witness. State v. Gould, 58 Wn. App. 175, 186, 791 P.2d 569 (1990). There was no reference to any detective monitoring the testimony, or any other mention of facts not in evidence. During the prosecutor’s closing and rebuttal arguments, he did not even once mention the plea agreement or

vouch for Phillips' veracity. In fact, the prosecutor said this in his closing argument:

And, in this case, this isn't a case where we say believe Sean Phillips because he's all we've got. This isn't that case. The instruction says, and it should be acted upon with great caution, you should not find the defendant guilty upon such testimony alone. Says such testimony alone. I'll leave it to you to decide whether Sean Phillips was being truthful with you or not. But, certainly, he accepted his responsibility in this crime. He got a pretty stiff sentence, 45 months in prison, robbery in the first degree.

. . . . [I]f you like, leave Mr. Phillips' testimony alone for a little while and say let's just look at the circumstantial evidence and then compare that to what Mr. Phillips told you.

[RP 626-27]

Pointing out to the jury the evidence that corroborates a witness's testimony is not the same thing as vouching for the witness.

While the prosecutor in Coleman's case did not argue that the agreement was a reason for the jury to believe him, it would not have been error if he had. In United States v. Rohrer, 708 F.2d 429 (1983), like Roberts a Ninth Circuit Court of Appeals decision, the court rejected an argument that admitting the "truthful testimony" portion of a cooperation agreement constituted vouching. Rohrer, 708 F.2d at 432-33. There the court found that "it was proper for the

government to point to the cooperation agreement as a factor bearing on [the witness's] credibility." Id., at 433. The government did not put its prestige behind the witness but rather asked the jury to examine the agreement to determine the witness's motives, and it did not "'implicitly' point to evidence outside the record." Id.

The Washington Court of Appeals has addressed a similar question. In State v. Ish, 150 Wn. App. 775, 208 P.3d 1281 (2009), the defendant was convicted of second degree felony murder. One of the witnesses against him was his cell mate at the Pierce County Jail, who relayed statements Ish had made to him about the killing. The witness obtained a plea agreement on his own charges, an agreement that included a provision that he testify truthfully against Ish. On cross-examination, the witness admitted to several violations of his agreement, and on redirect the State asked him about the condition that he testify truthfully, and the witness said that he had done so. Id., at 781-82. On appeal, Ish argued that the prosecutor had improperly vouched for the witness by eliciting the testimony that the plea agreement required him to testify truthfully and that it could be revoked if he breached it. Id., at 785.

Coleman cites to language from Roberts on page 13 of his opening brief to the effect that the prosecutor is seen to be forcing

the truth from the witness and that the prosecutor knows the truth and is making sure the jury knows it. Ish cited to the same language, but the court in his case noted that “the quoted language is dicta because the court was merely giving ‘guidance’ to the trial court on remand.” Ish, 150 Wn. App. at 785-86. The Ish court found the evidence that the agreement required truthful testimony only gave the jury context in which to evaluate the testimony, and that admitting the agreement was not an abuse of discretion. “While it is improper for a prosecutor to vouch for the credibility of a witness, no prejudicial error arises unless counsel clearly and unmistakably expresses a personal opinion as opposed to arguing an inference from the evidence. Id., at 786, citing to State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

In Coleman’s case, the prosecutor offered the agreement into evidence, elicited testimony that the witness understood what it meant, and on redirect, asked the witness if his testimony had been true. Simply calling a witness could be construed as vouching for that witness. “[T]he law—with several notable exceptions, of course—assumes that a party calling one as a witness not only believes the witness to be truthful, but represents him to be truthful.” State v. Green, 71 Wn.2d 372, 378, 428 P.2d 540 (1967).

This is the only kind of vouching the State did in Coleman's case, and there was no error.

3. Coleman did not receive ineffective assistance of counsel because his attorney did not object to the unredacted plea agreement between Sean Phillips and the State being admitted into evidence, or because he questioned Phillips about the agreement.

Coleman makes the serious charge against his trial attorney that he received ineffective assistance of counsel because his attorney did not object to the admission of the unredacted plea agreement and because he questioned Phillips about his truthfulness, thus "bolstering" Phillips' testimony. [Appellant's Brief 16] His attorney was not ineffective, and in fact used the plea agreement against the State.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and prejudice resulting from it. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*,

523 U.S. 1008 (1998). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

Deficient performance occurs when counsel's performance "[falls] below an objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the

defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, "judicial scrutiny of counsel's performance must be highly deferential." *Strickland* at 689; See also State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). Further,

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland at 694-95.

It is apparent from the record that defense counsel did not object to the admission of the plea agreement because he could use it to discredit Phillips' testimony. On cross-examination, counsel elicited from Phillips his admission that, although he entered into an agreement that required his truthful cooperation, he

had repeatedly lied. He also emphasized the good deal that Phillips was getting. [RP 181-190] In closing argument, he argued strenuously that Phillips would say anything to get his plea bargain, and he wasn't at all concerned with the truth. [RP 634-37] It was to Coleman's advantage to tell the jury about the agreement; he could, and did, argue along these lines: 1) Phillips got a plea bargain based on a promise to tell the truth, 2) Phillips didn't tell the truth, 3) Phillips got an unfair break at the expense of Coleman, and 4) the jury *really* should not believe Phillips. His theme was that Phillips would say whatever the State wanted to hear, and promises of truth meant nothing to him.

This was an apparent tactical choice. Under Roberts, *supra*, the court had the discretion to admit the unredacted agreement, and it would have been a waste of effort to fight to keep it out. Instead, counsel turned the agreement to Coleman's advantage, and had the other evidence against Coleman been less solid, he might have succeeded. Trial counsel was not ineffective, but instead used the best strategy available to him. He certainly deserves better than to have his reputation besmirched by a client who received a fair trial.

4. The trial court properly admitted, pursuant to ER 404(b), evidence that Coleman had previously sold drugs to Phillips and driven him to other drug transactions.

The trial court ruled that the State could not introduce into evidence the marijuana that was found in Coleman's vehicle after his arrest because it was not packaged, there were no scales, and the quantity was consistent with personal use. The court further ruled that the State could offer evidence that on prior occasions Phillips and Coleman had sold marijuana together. The court found that such evidence was admissible under Evidence Rule (ER) 404(b) to show conspiracy, preparation, plan, knowledge, and absence of mistake or accident, that the evidence was probative, and that the prejudicial effect did not outweigh the probative value. [RP 122]

On direct examination, Phillips testified that after his sister introduced him to Coleman, he began buying marijuana from Coleman. [RP 152] The court sustained an objection. The State then asked if Coleman provided drugs to Phillips for resale, and Coleman's objection, on the grounds of relevance, was overruled. Phillips went on to explain Coleman would provide him marijuana for him to sell, but Coleman would not extend credit. That

relationship continued for some period of time. [RP 153-54] On more than ten occasions, Coleman drove Phillips to and from the locations where he conducted his drug transactions. Coleman objected to the evidence as irrelevant, and the court overruled the objections. [RP 154-55]

ER 401 defines relevant evidence as that which has “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.” ER 403 provides that all relevant evidence is admissible unless it is limited by statutory, constitutional, or other considerations. ER 404(b) prohibits admitting evidence of a person’s character in order to prove that he or she acted in conformity with that character trait. However, ER 404(b) provides:

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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

A trial court has “wide discretion” in balancing the probative and prejudicial values of evidence. State v. Coe. 101 Wn.2d 772, 782, 684 P.2d 668 (1984). Unfair prejudice is that which suggests a

decision on an improper basis, often, though not necessarily, an emotional one. State v. Rupe, 101 Wn.2d 664, 686, 683 P.2d 571 (1984)

ER 404(b) permits evidence of other “bad acts” if they go to prove something besides the bad character of the actor.

An appellate court reviews a trial court’s interpretation of an evidentiary rule de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). “Once the rule is correctly interpreted, the trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion.” Id. The trial court begins with the presumption that evidence of other bad acts is inadmissible, and the State bears the burden of establishing that the evidence falls under one of the exceptions to the general prohibition. Id.

Before the trial court admits evidence of other bad acts, those acts must be “(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving [motive, intent, identity, etc.] (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.” State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). If the evidence is admitted, the court must give a limiting instruction. Id., at 864.

Coleman argues that evidence that he was Phillips' marijuana supplier is irrelevant, but that is obviously not the case. Relevant evidence is "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." ER 401. The fact that Coleman and Phillips had a drug business relationship is very relevant to the question of whether Coleman knew Phillips was planning and conducting a drug-related robbery and whether he was assisting him in that robbery by providing transportation as well as the gun that Phillips used. The closer question is whether the probative value outweighed the prejudicial value. ER 403.

The court here excluded evidence that tended to indicate the purchase of marijuana for personal use. It excluded the small amount of marijuana found in the car, and sustained Coleman's objection to the question about Phillips simply buying marijuana from Coleman. [RP 153-54] However, the court distinguished that from evidence that the two were in the business of selling drugs together. The latter is indicated by the facts that Phillips was buying drugs from Coleman which he later sold to other people, and that Coleman was his driver for more than ten such

transactions. The court found that this evidence was more probative than prejudicial, a ruling that will be reversed, as argued above, only for abuse of discretion. Coleman maintains that evidence that he sold marijuana to Phillips does not establish that they acted in concert, but a reasonable person could find that a wholesale supplier and a retail merchant are acting in concert.

Coleman mentions in passing, but does not argue, that the court failed to give a limiting instruction to the jury. The State notes that he did not ask for one. If a party does not ask for a limiting instruction below he waives any argument on appeal that the trial court should have given one. State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16 (2007).

5. Coleman is incorrect that intent is an element of accomplice liability. Jury Instruction No. 7, which defined knowledge, did not create a mandatory presumption which misled the jury about the State's burden of proof.

Coleman's argument concerns two jury instructions, Nos. 7 and 14. Jury Instruction No. 7 reads:

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.

[Former WPIC 10.02; CP 40]

Jury Instruction No. 14 provides:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice on 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.

[WPIC 10.51; CP 47]

Coleman did not except to either of these instructions at trial, [RP 578] and he does not claim ineffective assistance of counsel for the failure to do so. Generally, when there is no objection below, an appellate court will not review a claim of instructional error unless the appellant demonstrates that a “manifest error affecting a constitutional error” occurred. State v. Gerdts, 136 Wn. App. 720, 726, 150 P.3d 627 (2007), RAP 2.5(a)(3); see also State v. Keend, 140 Wn. App. 858, 864, 166 P.3d 1268 (2007). In both Gerdts and Keend, the court accepted review because the appellants also argued that their trial attorneys were ineffective for failing to object to the instructions. Gerdts, 136 Wn. App. at 726, Keend, 140 Wn. App. at 864. In State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005), however, the court accepted review of a challenge to the knowledge instruction even though there was no exception below and no claim of ineffective assistance of counsel. The Goble court noted that if Goble could show that the instructional error relieved the State of the burden to prove the knowledge element of third degree assault, he would necessarily show an error of constitutional magnitude which will be reviewed even without an objection below. Id., at 203. Because this is the claim that

Coleman is making, the State presumes that this court will review his claim.

A challenged jury instruction is reviewed de novo. The instructions are read as a whole and the challenged portion is considered in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In a criminal trial, the jury must be instructed that the State has the burden of proving each essential element of the crime beyond a reasonable doubt. Id., at 656. That was done in Coleman's case. [Jury Instruction No. 4, CP 37]

Relying primarily on Goble, *supra*, Coleman argues that the last sentence of Instruction No. 7 permitted the jury to find that if he intentionally did any act which promoted or facilitated the robbery, it must presume that he knew that the principal was committing a robbery, and that by failing to specify which acts are at issue, the jury could presume knowledge from any act.

State v. Goble, *supra*, was an unusual case in that in the jury instructions, the State assumed the burden of proving an element of third degree assault that is not included in the statute. In that case, Goble had assaulted a police officer, and he argued that he did not know the person he struck was a policeman. The State did

not object to an instruction which included the element that Goble knew the victim was a law enforcement officer, even though the statute does not require knowledge of the victim's status. Goble, 131 Wn. App. at 200, 201 n 2. The instruction defining knowledge was the same as used in Coleman's trial. Id., at 202. The Goble court found that because the jury could have misunderstood that if it found that Goble intentionally struck the officer, it could presume that he knew the status of the victim, even though Goble testified that he did not know. Id., at 203.

The holding in Goble has since been limited to cases which require the State to prove two mental states. See Gerdts, 126 Wn. App. at 728, State v. Boyd, 137 Wn. App. 910, 924, 155 P.3d 188 (2007). Coleman himself cites to the comment to the revised WPIC 10.02:

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).

Wash. Practice Vol. 11 (3d ed. 2008), comment at 208. Coleman argues that the State was required to prove two mental states—that he did an intentional act which facilitated or promoted the robbery,

and knowledge that the act would, in fact, facilitate or promote the robbery. He does not cite to any authority for his proposition that accomplice liability requires an intentional act. It can be assumed that if Coleman did not cite to such authority, he has searched for it and did not find it. State v. Logan, 102 Wn. App. 907, 911 n. 1, 10 P.3d 504 (2000).

A plain reading of the accomplice liability instruction, Jury Instruction No. 14, shows that knowledge is the only mental state that the State is required to prove—“[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” [CP 47, emphasis added]. The State did not have to prove that Coleman intended for a robbery to occur. Since there is no second mental state for the jury to confuse, the holding of Goble is inapposite to this case.

Coleman argues that a reasonable jury could have acquitted him of robbery if it decided he was ignorant of Phillips’ plan to commit robbery, but somehow it was precluded from doing this because of the wording of Jury Instruction No. 7. The State admittedly finds this argument somewhat confusing, but it appears to the State that the jury instructions as given not only permitted but required the jury to acquit if it determined he did not know about the

robbery. He was an accomplice only if he had knowledge of the crime Phillips was committing. If he did know, then anything he did to "solicit, command, encourage, request, aid, or agree to aid" another person in committing the crime made him an accomplice. If he did not know, then nothing he did would make him an accomplice.

Here the jury obviously believed that Coleman did know that Phillips was committing a robbery. The court properly instructed the jury and the State was not relieved of its burden to prove any element of the crime. There was no error.

6. The accomplice liability statute does not violate the First Amendment to the U.S. Constitution, and therefore cannot violate the Fourteenth Amendment.

The accomplice liability statute is codified as RCW 9A.08.020 and reads, in pertinent part, as follows:

(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 another person in the commission of a 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; or

(b) His conduct is expressly declared by law to establish his complicity.

Coleman is correct that the statute does not define “aid”. It is, however, defined in WPIC 10.51, included in this record in Jury Instruction No. 14, as “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.” [CP 47]

Coleman argues that this statute is unconstitutionally overbroad by criminalizing speech or conduct that is constitutionally protected. He did not raise this issue in the court below, but because he asserts a constitutional error he may do so for the first time on appeal. RAP 2.5(a).

The First Amendment, which is made binding on the states through the Fourteenth Amendment, provides that “congress shall make no law . . . abridging the freedom of speech. U.S. Const. amend. I. Washington’s constitution provides that “[e]very person may freely speak, write and publish on all subjects, being responsible for an abuse of that right.” Wash. Const. art. I, § 5. A statute is unconstitutionally overbroad if it prohibits a substantial amount of protected speech and conduct in addition to legitimately prohibited unprotected speech or conduct. City of Seattle v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990), City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), holds that a state may not “forbid or proscribe advocacy of the mere 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, 395 U. S. at 447. Under both RCW 9A.08.020(3)(a) and Jury Instruction No. 14 [CP 47], a person must have knowledge that his or her actions “will promote or facilitate the commission of the crime” before there is any mention of the word “aid” or assistance.

The instruction given in Coleman's case meets the Brandenburg restriction that advocacy of criminal activity alone is not criminal.

Coleman produces a "parade of horrors", situations that he maintains are constitutionally protected speech or behavior yet could be construed as acts of an accomplice. [Appellant's Brief at 31-32] He does not cite to any instances where such conduct has been prosecuted. The State chooses to believe that common sense has not been so extinguished in the law as to permit that result.

7. The State was not required to prove that Coleman committed an overt act.

Coleman asserts that accomplice liability requires an overt act, and that the jury was therefore improperly instructed. He cites to State v. Matthews, 28 Wn. App. 198, 203, 624 P.2d 720 (1981), for this conclusion. In Matthews, however, the court was citing to State v. Baylor, 17 Wn. App. 616, 565 P.2d 99 (1977), for the proposition that when co-defendants are charged with a crime, the State need not "establish which defendant was the principal and which was the abettor so long as each defendant was shown to have participated in the crime and committed at least one overt act." Matthews, 28 Wn. App. at 203. In Baylor, the court held that the overt act requirement applies under former RCW 9.01.030 as it

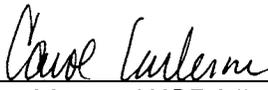
existed in 1974, but which had been superseded by RCW 9A.08.020 for offenses committed after July 1, 1976. Baylor, 17 Wn. App. at 618. The current statute, RCW 9A.08.020, does not require an overt act.

Coleman also cited to State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974), to support his contention that an accomplice must commit an overt act. Renneberg was decided in 1974 and thus was also applying an accomplice statute that has been superseded. In any event, the holding of Renneberg was simply this—“that physical presence and assent alone are not sufficient to constitute aiding and abetting.” Id., at 740. Jury Instruction No. 14 told the jury that. Coleman is incorrect that a person could be found to be an accomplice merely by giving silent assent or approval. Under the instruction, the accomplice must at a minimum, encourage or agree to aid the principal. Simple unexpressed approval would not meet this requirement, and thus State v. Peasley, 80 Wash. 99, 141 P.316 (1914), a venerable 95-year-old case, is not violated.

D. CONCLUSION.

Coleman's constitutional rights were fully protected throughout his trial. Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm his convictions.

Respectfully submitted this 20th day of October, 2009.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

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STATE OF WASHINGTON
BY Chong McAfee
DEPUTY

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of October, 2009, at Olympia, Washington.



Chong McAfee