

No. 42941-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Paul Ortegon,

Appellant.

Cowlitz County Superior Court Cause No. 11-1-00281-8

The Honorable Judge Marilyn Haan

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Ortegon's convictions infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.
2. The prosecution failed to prove that Mr. Ortegon possessed methamphetamine.
3. The prosecution failed to prove that Mr. Ortegon knew that his actions would promote or facilitate the commission of theft.
4. The accomplice liability statute is unconstitutionally overbroad.
5. Mr. Ortegon was convicted through operation of a statute that is unconstitutionally overbroad.
6. The trial judge erred by giving Instruction No. 12, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.
7. Pursuant to RAP 10.1(g), Mr. Ortegon adopts and incorporates the Assignment of Error set forth in Mr. Wilson's Opening Brief.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict Mr. Ortegon of possession of methamphetamine, the prosecution was required to establish more than mere proximity. Here, the prosecutor established only that Mr. Ortegon was the passenger in a car containing methamphetamine, which was located on the seat midway between Mr. Ortegon's seat and that of the driver. Did the possession conviction infringe Mr. Ortegon's Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. To convict Mr. Ortegon of theft as an accomplice, the prosecution was required to prove that he knew his actions would facilitate commission of the crime. Here, the

prosecution failed to establish that Mr. Ortegon knew Mr. Wilson was stealing gasoline when Mr. Ortegon accompanied him to the gas station and removed a gas cap. Did the theft conviction infringe Mr. Ortegon's Fourteenth Amendment right to due process because it was based on insufficient evidence?

3. 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 words that facilitate or promote commission of a crime, even if not directed at and likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?
4. Pursuant to RAP 10.1(g), Mr. Ortegon adopts and incorporates the Issue and Assignment of Error set forth in Mr. Wilson's Opening Brief.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Roger Wilson borrowed his friend's pick-up truck. RP 154-155. He drove it to a Flying K automated gas station in Cowlitz county, with passenger Paul Ortegon. RP 34, 165-166. In the back of the truck were two large gas tanks, holding up to 150 gallons each. RP 48-49.

Wilson had his own keypad to use at the station – he manipulated the wires, attached his keypad, and started filling the tanks. Because of these machinations, he could fill up the tanks without being charged. RP 38, 44-47, 53-55, 115-116, 147.

During most of these activities, Mr. Ortegon stood by the truck. RP 166. At one point, he opened one gas cap. RP 246.

The managers of the station were watching the surveillance online, and called police when they saw the truck. RP 42, 119. Police arrived while the pickup was still at the station, and arrested both Wilson and Mr. Ortegon. The keys to the pick-up were found in the truck bed, thrown there by Wilson. RP 51, 168.

Police obtained a warrant to search the inside of the pick-up, and found methamphetamine. RP 78, 96. It was on the seat in the center of the interior, inside a cigarette pack. RP 88, 172. A wallet containing Wilson's identification was also located in the truck, but no items

associated with Mr. Ortegon were found inside the vehicle. RP 78-83, 89, 171, 178.

The state charged both men with Theft in the Second Degree and Possession of Methamphetamine. CP 1-2. After the state rested, the court ordered the first charge reduced to Theft in the Third Degree, since the state had presented no proof of the value of the loss. RP 192.

The court gave the jury the standard accomplice liability instruction, based on pattern instructions. Court's Instructions, Supp. CP.

Both men were convicted as charged, and both timely appealed. CP 3-15, 16.

ARGUMENT

I. MR. ORTEGON'S CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF EACH OFFENSE.

A. Standard of Review

Constitutional questions are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). 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. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

- B. Due process requires the prosecution to prove every element of an offense 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). 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).

- C. The prosecution failed to prove that Mr. Ortegon possessed methamphetamine.

To obtain a conviction for possession of methamphetamine, the prosecution was required to prove that Mr. Ortegon possessed the drug. RCW 69.50.401; Instruction No. 12, Supp. CP. Where a person is not in actual possession, guilt may be premised on constructive possession; however, mere proximity is insufficient to prove constructive possession. *State v. George*, 146 Wash. App. 906, 920, 193 P.3d 693 (2008). This is so even where the accused person handles contraband, because evidence of momentary handling is insufficient to establish constructive possession. *Id.*

Here, the prosecution failed to establish possession. Instead, the state proved only that Mr. Ortegon was a passenger in a vehicle containing

methamphetamine. The methamphetamine was within reach—midway between Mr. Ortegon and the driver (Mr. Wilson)—however, the prosecution provided no additional evidence linking Mr. Ortegon to the drugs. RP 28-180. In other words, the prosecution did no more than establish mere proximity to the drug. See *George*, at 920. This does not constitute possession.¹ *Id.*

Accordingly, the evidence was insufficient for conviction. *Id.* The possession charge must be reversed and dismissed with prejudice. *Smalis*, at 144.

D. The prosecution failed to prove that Mr. Ortegon aided Mr. Wilson with knowledge that his actions would facilitate the crime of theft.

In order to convict Mr. Ortegon of theft as an accomplice, the prosecution was required to show that he provided aid “with knowledge that it will promote or facilitate the commission of the crime...” RCW 9A.08.020; Instruction No. 12, Supp. CP. The prosecution failed to prove beyond a reasonable doubt that Mr. Ortegon had the requisite knowledge.

Evidence of Mr. Ortegon’s participation was limited to video showing that he unscrewed a gas cap. Ex. 1 (Supp. CP). No additional

¹ Clearly, the jury struggled with the issue of possession, as can be seen for their note requesting a definition for the word “dominion.” Jury Note, Supp. CP.

evidence of any type was introduced to establish that he knew Mr. Wilson's activities were unauthorized.

Accordingly, the evidence was insufficient for conviction. The theft charge must be reversed and dismissed with prejudice. Smalis, at 144.

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

A. Standard of Review.

Constitutional violations are reviewed de novo. E.S., at 702.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); State v. Kirwin, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).² An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable

² The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” State v. WWJ Corp., 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Free speech challenges are different from most constitutional challenges to statutes; under the First Amendment, the state bears the burden of justifying a restriction on speech. *State v. Immelt*, 173 Wash. 2d 1, 6, 267 P.3d 305 (2011).

- B. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds.

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 Wash.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).³ A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct.

Immelt, at ____.

³ Washington's constitution gives 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.

Anyone accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. Immelt, at _____. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. Immelt, at _____. In other words, “[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds.” *City of Seattle v. Webster*, 115 Wash.2d 635, 640, 802 P.2d 1333 (1990), cert. denied, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

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 *Hicks*, at 119); see also *Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3rd Cir. 2006).

In this case, the jury was instructed on accomplice liability. Instruction No. 12, Supp. CP. Accordingly, Mr. Ortegon is entitled to

bring a challenge to the accomplice liability statute, regardless of the facts of his case. Hicks, at 118-119; Webster, at 640.

- C. The accomplice liability statute is overbroad because it criminalizes pure speech that is not directed at inciting imminent lawless action.

The First Amendment protects speech advocating criminal activity: “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S. Ct. 1389, 1403, 152 L. Ed. 2d 403 (2002). Because of this, speech advocating criminal activity may only be punished if it “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 speech (and conduct) protected by the First Amendment. Under RCW 9A.08.020, one may be convicted as an accomplice if 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.” No Washington court has 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: “The word ‘aid’ means all assistance whether given by words, acts, encouragement, support, or presence.” See WPIC 10.51; see also Instruction No. 12, Supp. CP. By defining “aid” to include “assistance... given by words... [or] encouragement...”, the instruction criminalizes a vast amount of pure speech protected by the First Amendment, and runs afoul of the U.S. Supreme Court’s decision in *Brandenburg*.⁴

It is possible to construe the accomplice statute in such a way that it does not reach 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. 12—is overbroad;

⁴ For example, anyone who praises ongoing acts of criminal trespass by Occupy Wall Street protestors is guilty as an accomplice if she or he utters praise knowing that it provides support and encouragement for the protesters. 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. Anyone who supports the protest from a legal vantage point (for example by carrying a 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.

therefore, RCW 9A.08.020 is unconstitutional. *Brandenburg*, supra; see Instruction No. 12, Supp. CP.

Mr. Ortegón's convictions must be reversed and the case remanded for a new trial. *Brandenburg*, supra. Upon retrial, the state may not proceed on any theory of accomplice liability. *Id.*

D. The Coleman and Ferguson courts applied the wrong legal standard in upholding RCW 9A.08.020, and should be reconsidered in light of established U.S. Supreme Court precedent.

The Supreme Court has drawn “vital distinctions between words and deeds, between ideas and conduct.” *Ashcroft*, at 253. Because the accomplice liability statute reaches pure speech—words and encouragement—it cannot be analyzed under First Amendment tests for statutes regulating conduct.

Despite this, the Court of Appeals has upheld the statute by applying the standards for conduct rather than pure speech. *State v. Coleman*, 155 Wash.App. 951, 960-961, 231 P.3d 212 (2010), review denied, 170 Wash.2d 1016, 245 P.3d 772 (2011); *State v. Ferguson*, 164 Wash.App. 370, 264 P.3d 575 (2011). In *Coleman*, the court concluded that the statute's mens rea requirement resulted in a statute that “avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime.” *Coleman*, at 960-961 (citations

omitted). This conclusion is incorrect; the statute's mens rea element cannot save the statute from First Amendment problems.

Speech that “encourage[s] unlawful acts” is protected, unless it falls within the narrow category outlined by *Brandenburg*. *Ashcroft*, at 253. The state cannot ban speech made with knowledge that it will promote or facilitate the commission of crime. Such speech can only be criminalized if it also meets the *Brandenburg* test. A conviction can only be sustained if the jury is instructed that it must find that the speech was (1) “directed to inciting or producing imminent lawless action...” and (2) “likely to incite or produce such action.” *Brandenburg* at 447. The jury was not so instructed in this case.

The *Coleman* and *Ferguson* courts applied the wrong legal standard in upholding the accomplice liability statute. These decisions should be revisited.

III. MR. ORTEGON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY’S FAILURE TO REQUEST AN INSTRUCTION ON UNWITTING POSSESSION.

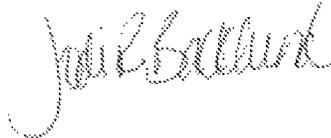
Pursuant to RAP 10.1(g), Mr. Ortega adopts and incorporates the argument set forth in Mr. Wilson’s Opening Brief.

CONCLUSION

Mr. Ortegon's convictions must be reversed, and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on July 5, 2012,

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

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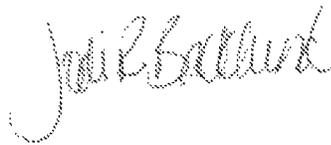
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 July 5, 2012.



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