

No. 43549-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Michael Horner,**

Appellant.

---

Thurston County Superior Court Cause No. 11-1-01616-5

The Honorable Judge Thomas McPhee

**Appellant's Opening Brief**

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## **ASSIGNMENTS OF ERROR**

1. The accomplice liability statute is unconstitutionally overbroad.
2. Mr. Horner was convicted through the operation of a statute that is unconstitutionally overbroad.
3. The trial judge erred by giving Instruction No. 9, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.
4. Mr. Horner's trafficking conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.
5. Mr. Horner's trafficking conviction violated his state constitutional right to notice of the charges against him, under Wash. Const. Article I, Sections 3 and 22.
6. The Information was deficient because it failed to fully allege that Mr. Horner knowingly trafficked in stolen property, which was the only alternative means submitted to the jury.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. 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 speech made with knowledge that it will facilitate or promote commission of a crime, even if the speech is not directed at inciting imminent lawless action or likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?
2. A criminal Information must set forth all of the essential elements of an offense. The Information charged Mr. Horner with trafficking in stolen property by several alternative means, but failed to allege that he “knowingly” trafficked in stolen property under one alternative. Did the Information omit an essential element of the offense in violation of Mr. Horner’s right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Kimberly Cole wanted to start a business cleaning up properties before they were sold. RP 193-194, 558, 584. She heard from a friend that Roland Olbrich had passed away, and that he had a large property that was a mess. RP 559, 564, 584, 591. She convinced three friends—Michael Horner, Lynita Garcia, and Johnny Dunham—to go with her to look at the property. RP 193-195, 459, 541, 544-545, 558, 584.

William White was the self-appointed guardian of the property after Olbrich's death; the two had known each other through their Alcoholics Anonymous membership. RP 297-319. Mr. White came upon the four at the property. RP 323-332. He called 911 and blocked their vehicle until police arrived. RP 81-90, 331. Police arrived and found tools and metal scrap in the back of Mr. Horner's truck. RP 98-103. They later found scrap receipts in the truck. RP 119-120.

The state filed charges. All four were charged with Burglary in the Second Degree, Trafficking in Stolen Property in the First Degree, and Theft in the Third Degree. CP 4-5. As to Mr. Horner, the charge of trafficking alleged that he:

“[A]s a principal or accomplice, did knowingly initiate, organize, plan, finance, direct, manage, or supervise the theft of property for sale to others, and/or did knowingly sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person

or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person.  
CP 4.

The case proceeded to trial. The defendants all challenged Mr. White's claim that he wasn't involved in ongoing thefts from the property. They also challenged his testimony about how he'd secured the property. RP 366-437, 448-455. In addition, witnesses came forward to tell the jury that the contents of Mr. Horner's truck were his own personal property. RP 457-506.

Three of the codefendants testified that Ms. Cole had asked them to come and help her so she could make a bid to clean up the property. RP 541, 544, 558, 564, 584, 591. Ms. Cole exercised her right to remain silent. RP 540.

The court instructed the jury on accomplice liability:

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 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. CP 13.

The court included only one alternative means in the elements instruction of the Trafficking in Stolen Property charge, requiring the jury to find that Mr. Horner “knowingly trafficked” in stolen property. CP 34.

Mr. Horner was convicted as charged. CP 41, 35-37. After sentencing, he timely appealed. CP 51-61.

## **ARGUMENT**

### **I. 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. *McDevitt v. Harborview Med. Ctr.*, \_\_\_ Wash.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2012). 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). 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.<sup>1</sup> *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; specific facts relating to speech are not essential.

The First Amendment to the U.S. Constitution provides that “Congress shall make no law... abridging the freedom of speech.” 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).<sup>2</sup> A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. *Immelt*, at \_\_\_\_.

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,

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<sup>1</sup> Ordinarily, the burden is on the party challenging the statute to show beyond a reasonable doubt that it is unconstitutional. *Washington Off Highway Vehicle Alliance v. State*, \_\_\_ Wash.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2012).

<sup>2</sup> 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.

“[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).

Mr. Horner’s jury was instructed on accomplice liability as to each offense. Instructions Nos. 9, 19, 30, 35; CP 13, 23, 34, 39. Accordingly, Mr. Horner 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, 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 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.

Washington courts, including the trial judge here, 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; Instruction No. 9, CP 13. 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*.

Thus, for example, Washington’s accomplice liability statute would criminalize the speech protected by the U.S. Supreme Court in *Hess v. Indiana*, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (“We’ll take the fucking street later [or ‘again’]”), in *Ashcroft* (virtual child pornography found to encourage actual child pornography), and *Brandenburg* itself (speech “‘advocat(ing) \* \* \* the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform’”) (quoting Ohio Rev. Code Ann. s 2923.13).

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. 9—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Brandenburg*, supra.

Mr. Horner’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 Court of Appeals has upheld Washington’s accomplice liability statute. *State v. Coleman*, 155 Wash. App. 951, 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*, Division I 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). In *Ferguson*, Division II court adopted the reasoning set forth in *Coleman*. The court’s decisions in *Coleman* and *Ferguson* are incorrect for two reasons.

First, Division I’s analysis in *Coleman*—that the statute is constitutional because it does not cover “protected speech activities that are not performed in aid of a crime and that only consequentially further the crime”—is severely flawed, because the First Amendment protects

much more crime-related speech than the “speech activities” described by the court. *Coleman*, at 960-961. For example, the state cannot criminalize speech that is “nothing more than advocacy of illegal action at some indefinite future time.” *Hess*, at 108.

Contrary to Division I’s reasoning, speech encouraging criminal activity is protected even if it is performed in aid of a crime and even if it directly furthers the crime, unless it is also “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg* at 447; cf. *Coleman*, at 960-961. Merely examining the mens rea required for conviction is insufficient to save the statute, because a person can engage in criminal advocacy with the intent to further a particular crime and still be protected by the constitution.

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 all speech made with intent to promote or facilitate the commission of a 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. Thus, assuming (as the *Coleman* court claims) that

the accomplice liability statute avoids the “protected speech activities” described, such avoidance is not enough to render the statute constitutional, if it also reaches other protected speech.

Second, the Coleman court applied the wrong legal standard in evaluating the statute. The U.S. Supreme Court has drawn “vital distinctions between words and deeds, between ideas and conduct.” Ashcroft, at 253. The accomplice liability statute reaches pure speech: “words” and “encouragement” are sufficient for conviction, if accompanied by the proper mens rea. See WPIC 10.51; Instruction No. 9, CP 13. Because the statute reaches pure speech, it cannot be analyzed under the more lenient First Amendment tests for statutes regulating conduct.

But the Coleman court ignored this distinction. Specifically, the Coleman court relied on cases dealing with laws regulating behavior. The court began its analysis by noting that “[a] statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute's plainly legitimate sweep.” Coleman, at 960 (citing Hicks, at 122 and Webster, at 641.) The court then imported the Supreme Court’s rationale from Webster and applied it to the accomplice liability statute:

We find Coleman's case similar to Webster. Webster was charged under a Seattle ordinance banning intentional obstruction of vehicle or pedestrian traffic. The Washington Supreme Court explained the ordinance was not overbroad because the requirement of criminal intent prevented it from criminalizing protected speech activity that only consequentially obstructed vehicle or pedestrian traffic... In the same way, the accomplice liability statute Coleman challenges here requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime.

Coleman, at 960-61 (citation omitted). But (as noted) Webster involved the regulation of conduct—obstruction of vehicle or pedestrian traffic—and therefore, the statute could be upheld based on the distinction between “innocent intentional acts which merely consequentially block traffic...” and acts performed with the requisite mens rea. Webster, at 641-642.

No such distinction is available here, because the accomplice liability statute reaches pure speech, unaccompanied by any conduct—i.e. speech that knowingly encourages criminal activity, including speech (words or encouragement) that is not directed at and likely to incite imminent lawless action. See WPIC 10.51; Instruction No. 9, CP 13. The First Amendment does not only protect “innocent” speech; it protects free speech, including criminal advocacy directly aimed at encouraging criminal activity, so long as the speech does not fall within the rule set forth in Brandenburg.

The Coleman court applied the wrong legal standard in upholding the accomplice liability statute. It should have analyzed the statute under Brandenburg instead of the test for conduct set forth in Webster. Accordingly, Coleman and Ferguson should be reconsidered.

**II. MR. HORNER’S CONVICTION FOR TRAFFICKING VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 22.**

A. Standard of Review

Constitutional questions are reviewed de novo. McDevitt, at \_\_\_\_.

A challenge to the constitutional sufficiency of a charging document may be raised at any time. State v. Kjorsvik, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. Id, at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. Id, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. State v. Courneya, 132 Wash. App. 347, 351 n. 2, 131 P.3d 343 (2006); State v. McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. The Information was deficient as to the only alternative means of committing trafficking submitted to the jury, because it failed to allege that Mr. Horner knowingly trafficked in stolen property.

The Sixth Amendment to the Federal Constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI.<sup>3</sup> A similar right is secured by the Washington State Constitution. Wash. Const. Article I, Section 22. All essential elements must be included in the charging document. *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992).

Here, Mr. Horner was charged with first-degree trafficking in stolen property. The offense may be committed by eight alternative means. *State v. Strohm*, 75 Wash. App. 301, 307, 879 P.2d 962 (1994). One alternative means requires proof that the accused person “knowingly traffic[ked] in stolen property.”<sup>4</sup> *Id.*; RCW 9A.82.050.

The Information purported to charge all eight alternative means; however, the charging language omitted the mental element (“knowingly”) from a portion of the last alternative.<sup>5</sup> Instead of alleging that Mr. Horner “knowingly trafficked” in stolen property, the prosecutor

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<sup>3</sup> This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

<sup>4</sup> The word “traffic” is separately defined to encompass a range of conduct; however, the separate definitions of traffic do not create “means within means.” *Strohm*, at 308-309.

<sup>5</sup> Interestingly, the court defined trafficking to include all eight alternative means, but submitted only one alternative means—that Mr. Horner knowingly trafficked—to the jury. See Instructions Nos. 26 and 30, CP 30, 34.

substituted the statutory definition of traffic for the word “trafficked.” CP 4.

This would not have been a problem, except that the substitution was accomplished without applying the mental state (“knowingly”) to the entire definition. The relevant language (that Mr. Horner “did knowingly sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person”) was deficient, because it failed to fully convey an essential element—that Mr. Horner knowingly trafficked in stolen property. This omission suggests that conviction could rest upon mere purchase, receipt, possession, or control over stolen property with intent to sell, etc., even if Mr. Horner did not know the property was stolen. Cf. Instruction No. 30, CP 34 (requiring proof that Mr. Horner “knowingly trafficked in stolen property” and “knew the property was stolen.”)

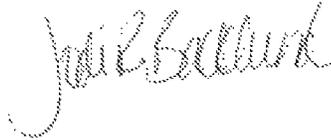
Accordingly, the Information was not sufficient to charge that Mr. Horner knowingly trafficked in stolen property, and prejudice is presumed. *Kjorsvik, supra*. Because the Information was deficient, Mr. Horner’s conviction for trafficking must be reversed and the charge dismissed without prejudice. *Kjorsvik, supra*.

**CONCLUSION**

For the foregoing reasons, Mr. Horner's trafficking conviction must be dismissed without prejudice, and the remaining charges remanded for a new trial.

Respectfully submitted on January 15, 2013,

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## CERTIFICATE OF SERVICE

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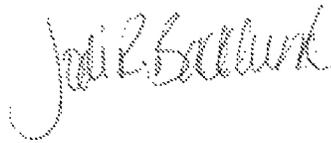
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 15, 2013.



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# BACKLUND & MISTRY

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