

No. 44054-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Denette Goe,

Appellant.

Cowlitz County Superior Court Cause No. 11-1-01331-3

The Honorable Judge James J. Stonier

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Ms. Goe's convictions infringed her Fourteenth Amendment right to due process because the evidence was insufficient to establish the elements of each offense.
2. The prosecution failed to prove the elements of first-degree theft beyond a reasonable doubt.
3. The prosecution failed to prove that Ms. Goe stole more than \$5,000 on a single occasion.
4. The prosecution failed to prove Ms. Goe committed multiple thefts that qualified for aggregation to a total of more than \$5,000.
5. The prosecution failed to prove the elements of forgery beyond a reasonable doubt.
6. The prosecution failed to prove that check no. 6865 for \$2800 was forged.
7. The prosecution failed to prove that Ms. Goe acted with knowledge that the money order and check no. 6865 were forged.
8. The prosecution failed to prove that Ms. Goe acted with intent to injure or defraud.
9. Ms. Goe's theft conviction violated her Fifth, Sixth, and Fourteenth Amendment right to notice of the charge against her.
10. Ms. Goe's theft conviction violated her state constitutional right to notice of the charge against her under Wash. Const. art. I, §3 and §22.
11. The Information was deficient because it failed to allege an essential element of first-degree theft.
12. Ms. Goe's conviction for first-degree theft infringed her Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of the charged crime.

13. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
14. The trial court erred by giving Instruction No. 21.
15. The court's "to convict" instruction relieved the state of its burden to prove that Ms. Goe's multiple acts of theft were part of a common scheme or plan.
16. The trial court erred by giving Instruction No. 29.
17. The court's instructions misled jurors into believing they could aggregate multiple felony thefts to convict Ms. Goe of first-degree theft.
18. The accomplice liability statute is unconstitutionally overbroad.
19. Ms. Goe was convicted through the operation of a statute that is unconstitutionally overbroad.
20. The trial judge erred by giving Instruction No. 8, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Although individual third-degree thefts that are part of a common scheme or plan can be aggregated to charge felony theft, multiple felony thefts cannot be aggregated to charge first-degree theft. In this case, the prosecution presented evidence that Ms. Goe committed multiple felony thefts of more than \$750 each; however, none exceeded \$5,000 in value. Was the evidence insufficient to prove either that Ms. Goe stole more than \$5,000 on a single occasion, or that she committed multiple third-degree thefts as part of a common scheme or plan?
2. To obtain a conviction for forgery, the prosecution was required to prove that Ms. Goe, with intent to injure or defraud, put off as true an instrument she knew to be forged. Here, the

prosecution failed to prove that check no. 6865 was forged, that Ms. Goe acted with knowledge that the money order and check no. 6865 were forged, and that Ms. Goe acted with intent to injure or defraud. Was the evidence insufficient to prove the essential elements of forgery beyond a reasonable doubt?

3. A criminal Information must set forth all of the essential elements of an offense. Here, the charging document failed to allege that Ms. Goe committed multiple acts of theft as part of a common scheme or plan, elevating the offense from a class C to a class B felony. Did the Information omit an essential element of first-degree theft, in violation of Ms. Goe's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22?
4. A trial court's "to convict" instruction must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's elements instruction allowed conviction of first-degree theft absent proof that Ms. Goe's multiple acts of theft were part of a common scheme or plan, allowing aggregation and elevating the crime to a class B felony. Did the trial court's instructions relieve the prosecution of its burden to prove the essential elements of first-degree theft in violation of Ms. Goe's Fourteenth Amendment right to due process?
5. Jurors may aggregate the losses from multiple third-degree thefts to convict a person of felony theft; however, they may not aggregate multiple felony thefts to reach the \$5,000 threshold for first-degree theft. Here, the court instructed jurors they could aggregate multiple transactions of any type to determine the degree of theft established. Did the court's instructions relieve the prosecution of its burden to prove the essential elements of first-degree theft?
6. 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?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

By the age of twenty-one, Denette Goe was married and had a one-year-old child. RP 187, 198. She had never had a job. RP 182. Her husband purchased and resold cars, and the family was having trouble making ends meet. RP 180. Ms. Goe sought employment on Craigslist, and found a listing for “Legit employment!!!” RP 148-153, 183. She emailed the employer, and was hired. RP 183.

Ms. Goe was told that she would be sent a series of checks via FedEx, and that her job was to deposit them and return 90% of the proceeds to her new employer. The remaining 10% would be her commission. RP 142-146, 184, 192. Ms. Goe was very excited to start her first real job. RP 191. She believed she was participating in something akin to a “secret shopper” program. RP 144.

She received three checks in separate FedEx packages. RP 5-6, 168, 185.

The first check she got was for \$2500 from Chase Bank. RP 40. Ms. Goe’s husband used the ATM card for Ms. Goe’s US Bank account and deposited the check. RP 39-40, 59-60, 94-96, 108. Within the next two days, Ms. Goe and her husband withdrew \$2500 from the account, via bank tellers, the ATM and web payments. RP 65-66, 107. Chase Bank

didn't pay the check, returning it to US Bank marked "refer to maker".

RP 69-70.

The next payment was a US Postal Service money order for \$970. RP 72. Ms. Goe went to US Bank to cash the check. RP 19-21, 97-98. It was a Saturday, so teller Sandra Singleton's call to verify the money order went unanswered. RP 23. She looked at the identification Ms. Goe provided, confirmed that she held an account at the bank, and cashed the money order. RP 31-32.

The money order was not paid. It was marked with the words "non-micr," which meant that a magnetic strip was missing from the paper on which the money order was printed. RP 73, 76.

The third item was a check for \$2800 drawn on the account of AIC Title Service, LLC. Mr. Goe's husband deposited the check at a U.S. Bank ATM. RP 77, 98-99, 108, 189. Ms. Goe and her husband withdrew about \$2000 of this by means of ATM and teller transactions within the next days. RP 79, 107. This check was also returned unpaid. RP 79.

The bank froze Ms. Goe's account and asked her to come in to discuss the deposits. RP 124. She did, explaining that she obtained her job online and that she would do her best to pay the money back. RP 125-126, 193. The case was referred to police by the bank, and Ms. Goe cooperated with them as well. RP 130-142, 195. She explained her

understanding of her employment, and provided a disk containing her communication with her employer. RP 140, 143-146.

The state charged Ms. Goe with three counts of forgery and one count of first-degree theft. CP 1-2. Regarding the theft charge, the Information alleged that Ms. Goe “did wrongfully obtain or exert unauthorized control over property belonging to another, of a value exceeding \$5000, to-wit: U.S. currency, with intent to deprive U.S. Bank of such property...” It did not allege that the amount was taken during separate transactions that were part of a common scheme or plan. CP 2.

At trial, Ms. Singleton claimed that Ms. Goe had talked about her husband being deployed in Iraq when she presented the money order. RP 22. Ms. Goe testified that they had no such discussion, and Ms. Singleton acknowledged that she saw an average of 150 people per day, and that she had not met Ms. Goe before the day of their interaction at the bank. RP 31, 187.

An agent with the Postal Inspection Service explained to the jury the various anti-counterfeiting measures used on postal service money orders. The agent had received 13 weeks of training, and had learned to identify the characteristics of a true money order, including the magnetic ink used for printing, patterns of color, geometric designs, hard-to-see

swirled words, and other indicators. She opined that the postal money order at issue was not authentic. RP 116-118.

The state did not present any testimony from representatives of either of the two banks that had refused payment on the checks. RP 19-170. To prove that the check for \$2800 was forged, the prosecution relied on two pieces of information: (1) that the mailing address for the account holder (AIC Title Service, LLC¹) was the same mailing address used by the bank upon which the check was drawn², and (2) that the check had been returned unpaid, but not for insufficient funds. RP 84, 89-91, 101; Ex. 17, Supp. CP.

At the close of the state's evidence, the trial court dismissed count one, relating to the \$2500 check drawn on Chase Bank. The court ruled that the prosecution had not established that the check was forged. RP 170-177. Ms. Goe also moved to dismiss count two, relating to the AIC Title Service check. She argued that she had not deposited the check and that the prosecutor had not shown it to be forged. RP 170-171, 174-175. That motion was denied. RP 177.

¹ The Information erroneously refers to the account holder as "AIC Tire Service." CP 2.

² A witness testified that this stood out, that it "wouldn't be conducive to business," that it was "a red flag," and that "[i]t'd be a mistake made by a counterfeiter." RP 91.

Ms. Goe testified that due to her extreme financial need, she was not able to remit to her employer the 90% of each check as required by her employment agreement. RP 199.

The court instructed the jury that the elements of first-degree theft were as follows:

- (1) That on, about, or between February 1, 2011, the defendant, or her accomplice, wrongfully obtained or exerted unauthorized control over property or another;
- (2) That the property exceeded \$5,000 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That this act occurred in the State of Washington

Instruction No. 21, Court's Instructions, Supp. CP.

The court defined property as "anything of value". Instruction No. 28, Court's Instructions, Supp. CP. In a separate instruction, the court told jurors that

Whenever any series of transactions which constitutes theft is part of a common scheme or plan, then the sum of the value of all transactions shall be the value considered in determining the amount of value.

Instruction No. 29, Court's Instructions, Supp. CP.

The judge also gave the standard definition of accomplice liability. Instruction No. 8, Court's Instructions, Supp. CP. The attorney for Ms. Goe did not object to any of these instructions. RP 208.

The jury convicted Ms. Goe as charged. RP 271-274. She timely appealed. CP 17.

ARGUMENT

I. TWO OF MS. GOE’S CONVICTIONS VIOLATED DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF EACH OFFENSE.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, No. 85367–3, ___, 291 P.3d 876 (2012). The sufficiency of the evidence may always be raised for the first time on appeal. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012). Evidence is sufficient if, when viewed in the light most favorable to the prosecution, a rational trier of fact could find each element beyond a reasonable doubt. *State v. Homan*, 172 Wn. App. 488, 490-91, 290 P.3d 1041 (2012).

B. The prosecution is obligated to prove each element of an offense beyond a reasonable doubt.

Due process 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 evidence was insufficient to prove first-degree theft.

The interpretation of a statute is a question of law reviewed *de novo*. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

Statutes that involve a deprivation of liberty must be strictly construed. *In re Detention of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). In interpreting a statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011).

The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789 (2004). Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). Courts "must not interpret a statute in any way that renders any portion meaningless or superfluous." *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 634, 278 P.3d 173 (2012).

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *State v. Engel*, 166 Wn.2d 572 at 578; *see also State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) ("Plain language does not require construction."). A court "will

not engage in judicial interpretation of an unambiguous statute.” *State v. Davis*, 160 Wn. App. 471, 477, 248 P.3d 121 (2011). On the other hand, if a criminal statute is ambiguous, the ambiguity must be interpreted in favor of the defendant. *Id*; see also *Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009); *State v. Failey*, 165 Wn.2d 673, 677, 201 P.3d 328 (2009). A statute is ambiguous when the language is susceptible to multiple interpretations. *Davis*, 160 Wn. App. 471at 477.

Conviction for first-degree theft requires proof that the accused person stole more than \$5,000. RCW 9A.56.030. By statute, multiple instances of third-degree theft may be aggregated to charge a higher degree of theft:

[W]henver any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.
RCW 9A.56.010(21)(c).

Under the plain language of the statute, aggregation is permitted only if each transaction would “constitute theft in the third degree because of value.” RCW 9A.56.010(21)(c). Third degree theft occurs when a person commits theft which “does not exceed seven hundred fifty dollars in value.” RCW 9A.56.050. The statute does not authorize aggregation of

multiple felony thefts into one or more counts of first-degree theft. RCW 9A.56.010(21)(c).

Had the legislature intended to permit aggregation of felony theft transactions, it could easily have done so. This meaning could have been achieved by omitting from the statute the phrase that begins with the word “would” and ends with the word “transactions.” As modified, the statute would read thus:

[W]henver any series of transactions which constitute theft... are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

RCW 9A.56.010(21)(c) (modified). However, the legislature chose not to do this.

Under the current language, an interpretation that permits aggregation of felony thefts is demonstrably incorrect, because it renders superfluous the phrase “would, when considered separately, constitute theft in the third degree because of value.” *See Broughton*, 174 Wn.2d 619 at 634. The legislature would not have included this phrase if it meant to allow aggregation of both felony and third-degree thefts. As written, the statute unambiguously permits aggregation only of non-felony thefts.

Even if the statute were considered ambiguous, the rules of statutory construction prohibit interpreting it to permit aggregation of multiple felony counts. First, under the rule of lenity, the statute must be interpreted in favor of Ms. Goe. *Winebrenner*, 167 Wn.2d 451 at 462. Second, omissions from a statute are deemed to be exclusions:³ the omission of felony or second-degree theft from the “would, when considered separately” clause must be understood as the legislature’s intent not to permit aggregation of thefts that are themselves already felonies. *Martin*, 163 Wn.2d 501 at 510.

In this case, the prosecution presented evidence of multiple transactions in which Ms. Goe received cash from U.S. Bank. The individual amounts taken during each transaction were \$1500 and \$93 (for separate teller withdrawals on February 2, 2011), \$500 (for an ATM withdrawal on February 2, 2011), \$407.60 and \$12 (for separate web payments made on February 4, 2011), \$970 (for the fake money order cashed on February 5, 2011), \$100 (for an ATM withdrawal on February 8, 2011), \$500 (for an ATM withdrawal on February 9, 2011), and \$1200

³ See *In re Detention of Martin*, 163 Wn.2d 501, 510, 182 P.3d 951 (2008) (citing the maxim *expressio unius est exclusio alterius*); see also *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008).

(for a teller withdrawal on February 9, 2011). Ex. 11, Supp. CP; RP 65, 79.

Although the total amount exceeded \$5,000, the aggregate of the non-felony thefts amounted only to \$1612.60. Because of this, the evidence was insufficient to establish first-degree theft, even under the aggregation theory set forth in RCW 9A.56.010(21)(c). Accordingly, the conviction for first-degree theft must be reversed and the charge dismissed with prejudice.⁴ *Smalis*, 476 U.S. 140 at 144.

D. The evidence was insufficient to prove forgery.

To obtain a conviction for forgery as charged in this case, the prosecution was obligated to prove that Ms. Goe knew that each document was forged, and that she or an accomplice, acting with intent to injure or defraud “put off as true a written instrument which had been forged.” Instruction No. 11, Court’s Instructions, Supp. CP; CP 1-2. The state’s evidence failed to establish these essential elements.

1. The evidence was insufficient as to count three because the prosecutor failed to prove that check no. 6865 was forged.

⁴ In the alternative, the case may be remanded with instructions to enter judgment on the inferior degree offense of second-degree theft. *See State v. A.M.*, 163 Wn. App. 414, 421, 260 P.3d 229 (2011).

To prove that check no. 6865 for \$2800 was forged, the prosecution relied on two pieces of evidence. First, the account holder (AIC Title Service, LLC⁵) shares the same mailing address as the bank upon which the check is drawn.⁶ RP 91; Ex. 17, Supp. CP. Second, the check came back unpaid for reasons that are not in evidence. RP 84, 89-90, 101.

No reasonable trier of fact could conclude from this evidence that the check was forged. *Homan*, 172 Wn. App. at 490-91. The prosecution did not prove that AIC Title Service, LLC was an entity wholly separate from the bank, or that the two businesses did not share a mailing address. Nor did the prosecutor eliminate the possibility that the check was returned because of a stop payment, because of a hold or freeze on the account, because account rules limited the dollar amounts for which checks could be written, or for one of the many other reasons checks can be returned without being paid. RP 19-170.

2. The prosecutor failed to prove that Ms. Goe knew that the money order (count two) and check no. 6865 (count three) were forged.

⁵ The Information erroneously refers to the account holder as “AIC Tire Service.” CP 2.

⁶ A witness testified that this stood out, that it “wouldn’t be conducive to business,” that it was “a red flag,” and that “[i]t’d be a mistake made by a counterfeiter.” RP 91.

The prosecutor provided no direct evidence that Ms. Goe knew that the money order and check no. 6865 were forged, or that she acted with intent to injure or defraud. The circumstantial evidence consisted of (1) the obviousness of the Craigslist scam, (2) the speed with which Ms. Goe (and her husband) withdrew money from the account after the deposits were made, and (3) Ms. Goe's failure to remit the required percentage to her "employer." RP 19-170.

This evidence is insufficient to prove actual knowledge and intent to injure or defraud. First, absent some evidence of Ms. Goe's experience, education, and level of sophistication, the trier of fact could not conclude that she would be in a position to judge the legitimacy of the job she'd secured. Her own testimony was that she'd never had a job, and had never had a checking account. The fact that she presented identification and used her real name undermines any suggestion that she was anything but a naïve young person caught up in a scam. RP 233-254.

Second, the family's rapid withdrawal of funds following each deposit and her failure to remit the required percentage to her employer are a reflection of her financial need.

Third, Ms. Goe's failure to comply with the terms of her employment agreement might be evidence of poor judgment and/or theft

from her employer. It is not evidence of an intent to injure or defraud by committing forgery.

Because the evidence was insufficient to prove Ms. Goe's culpable mental state, her convictions for forgery must be reversed. The charges must be dismissed with prejudice. *Smalis*, 476 U.S. 140 at 144.

II. MS. GOE'S FIRST-DEGREE THEFT CONVICTION WAS ENTERED IN VIOLATION OF HER CONSTITUTIONAL RIGHT TO NOTICE OF THE CHARGE.

A. Standard of Review.

The interpretation of a statute is a question of law reviewed *de novo*. *State v. Engel*, 166 Wn.2d 572 at 576. Constitutional violations are also reviewed *de novo*. *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010).

A challenge to the sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.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 or not 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

Wn. App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

B. The Information was deficient because it omitted an essential element of first-degree theft.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. *State v. Johnson*, 172 Wn. App. 112, 297 P.3d 710 (2012), *as modified on denial of reconsideration* (2013). This right stems from the Sixth and Fourteenth Amendments to the federal constitution, as well as art. I, §22 of the Washington State Constitution. *State v. Brewczynski*, No. 29120–1-III, ___, 294 P.3d 825 (2013). The right to a constitutionally sufficient Information is one that must be “zealously guarded.” *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

All of the essential elements of a crime must be alleged in the charging document. *State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212 (2010). Any fact that elevates a crime from one category to another is an element of the crime. *See, e.g., State v. Rivas*, 168 Wn. App. 882, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013).

Under RCW 9A.56.040, a person is guilty of second-degree theft, a class C felony, if s/he steals property valued at more than \$750 but less than \$5,000. The offense is elevated to first-degree theft, a class B felony,

if the amount exceeds \$5,000. RCW 9A.56.030. Multiple thefts can be aggregated to reach this dollar amount, but only if they are part of a common scheme or plan. RCW 9A.56.010(21)(c).

Thus, in order to convict a person of first-degree theft arising from multiple transactions, the state must allege and prove that overall losses exceeding \$5,000 resulted from a common scheme or plan.

In this case, the Information alleged only that Ms. Goe “did wrongfully obtain or exert unauthorized control over property belonging to another, of a value exceeding \$5,000, to wit: U.S. currency, with intent to deprive U.S. Bank of such property.” CP 1-2. The state did not allege that Ms. Goe engaged in multiple transactions as part of a common scheme or plan. CP 1-2.

Accordingly, the Information was legally deficient. Because of this deficiency, Ms. Goe’s first-degree theft conviction must be reversed and the case dismissed without prejudice. *Brown*, 163 Wn.2d 501 at 198.

III. MS. GOE’S FIRST-DEGREE THEFT CONVICTION VIOLATED DUE PROCESS BECAUSE THE COURT’S “TO CONVICT” INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF THE CHARGED CRIME.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *McDevitt, at ___*. A manifest error affecting a constitutional right may be raised for the first time on review.⁷ RAP 2.5(a)(3).

Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

B. The court’s “to convict” instruction did not include all the elements of first-degree theft.

A trial court’s failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt

⁷ The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); *see State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the court's elements instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). This is so even if the missing element is supplied by other instructions. *Id*; *Lorenz*, 152 Wn.2d 22 at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

In this case, Instruction No. 21 relieved the prosecution of its obligation to prove that multiple incidents of theft were part of a common scheme or plan.

In order to aggregate multiple transactions into a single count of first-degree theft, the prosecution must allege and prove that total losses exceeding \$5,000 resulted from a common scheme or plan. RCW 9A.56.010(21)(c); RCW 9A.56.030. Here, the prosecution pursued a first-degree theft charge under the theory that Ms. Goe stole money from U.S. Bank on multiple occasions, and that the thefts were part of a common scheme or plan. RP 209-232, 254-266.

Despite this, the court's "to convict" instruction allowed conviction on proof that losses exceeded \$5,000, whether or not the multiple transactions comprised a common scheme or plan. Instruction No. 21, Court's Instructions, Supp. CP. This instruction was not available

as a “yardstick,” and thus did not make the state’s burden manifestly clear to the average juror. *Kyllo*, 166 Wn.2d 856 at 864.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is trivial, formal, or merely academic, if it is not prejudicial to the accused person’s substantial rights, and if it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Watt*, 160 Wn.2d 626 at 635. Accordingly, Ms. Goe’s first-degree theft conviction must be reversed and the case remanded for a new trial. *Id.*

C. The court’s instructions permitted jurors to improperly convict Ms. Goe of first-degree theft by aggregating multiple felony thefts.

As noted above, multiple third-degree thefts can be aggregated to obtain a conviction for felony theft. RCW 9A.56.010(21)(c). Multiple instances of felony theft cannot be aggregated to charge first-degree theft. RCW 9A.56.010(21)(c); *see also Broughton*, 174 Wn.2d 619 at 634.

Here, the court instructed jurors they could aggregate “any serious of transactions which constitute theft.” Instruction No. 29, Court’s Instructions, Supp. CP. This erroneously permitted jurors to aggregate multiple felony thefts to convict Ms. Goe of first-degree theft, and relieved the prosecution of its burden to prove the elements of the offense.

The court’s instructions failed to make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864. Accordingly, the theft conviction must be vacated and the case remanded for a new trial. *Id.*

IV. 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*, at _____. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *Kirwin*, 166 Wn. App. 659 at 823. 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.⁸ *State v. Immelt*, 173 Wn.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... 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 Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).⁹ A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. *Immelt*, 173 Wn.2d 1 at 6. 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. *Id.*, at 7.

An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Id.*, at 7. In other words, “[f]acts

⁸ 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*, 176 Wn.2d 225, 290 P.3d 954 (2012).

⁹ 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. art. I, § 5.

are not essential for consideration of a facial challenge...on First Amendment grounds.” *City of Seattle v. Webster*, 115 Wn.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*, 539 U.S. 113 at 119); *see also Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3rd Cir. 2006).

Ms. Goe’s jury was instructed on accomplice liability. Instruction No. 8, Court’s Instructions, Supp. CP. Accordingly, Ms. Goe is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of her case. *Hicks*, 539 U.S. 113 at 118-119; *Webster*, 115 Wn.2d 635 at 640.

- C. The accomplice liability statute is overbroad because it criminalizes pure speech that is not directed at and likely to incite 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 she, 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*, 395 U.S. 444 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. 8, Court’s Instructions, 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*, 395 U.S. 444.

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*, 535 U.S. 234 (virtual child pornography found to encourage actual child pornography), and *Brandenburg*, 395 U.S. 444 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). Each of these cases involved words or encouragement made with knowledge that the words or encouragement would promote or facilitate the commission of the crime, yet the Supreme Court found this speech—

criminalized by RCW 9A.08.020—to be protected by the First Amendment.

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*, 395 U.S. 444. 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. 8—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Brandenburg*, 395 U.S. 444.

Ms. Goe’s convictions must be reversed and the case remanded for a new trial. *Brandenburg*, 395 U.S. 444. 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 Wn. App. 951, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011); *State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011). In *Coleman*, 155 Wn. App. 951, 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*, 155 Wn. App. 951 at 960-961 (citations omitted). In *Ferguson*, 164 Wn. App. 370, Division II court adopted the reasoning set forth in *Coleman*. The court’s decisions in *Coleman*, 155 Wn. App. 951, and *Ferguson*, 164 Wn. App. 370, are incorrect for two reasons.

First, Division I’s analysis in *Coleman*, 155 Wn. App. 951—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*, 155 Wn. App. 951 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*, 414 U.S. 105 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* 395 U.S. 444 at 447; *cf. Coleman*, 155 Wn. App. 951 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*. 395 U.S. 444; *Ashcroft*, 535 U.S. 234 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*, 395 U.S. 444 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*, 535 U.S. 234 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.

8, Court’s Instructions, Supp. CP. 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*, 155 Wn. App. 951 at 960 (citing *Hicks*, 539 U.S. 113 at 122 and *Webster*, 115 Wn.2d 635 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, 155 Wn. App. 951 at 960-61. 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*, 115 Wn.2d 635 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. 8, Court’s Instructions, Supp. CP. 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*, 395 U.S. 444.

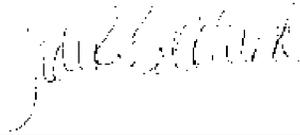
The *Coleman* court applied the wrong legal standard in upholding the accomplice liability statute. It should have analyzed the statute under *Brandenburg*, 395 U.S. 444, instead of the test for conduct set forth in *Webster*, 115 Wn.2d 635. Accordingly, *Coleman* 155 Wn. App. 95, and *Ferguson*, 164 Wn. App. 370, should be reconsidered.

CONCLUSION

For the foregoing reasons, Ms. Goe's convictions must be reversed and the case dismissed with prejudice. In the alternative, the first-degree theft charge must either be (1) dismissed without prejudice, (2) remanded for entry of judgment on second-degree theft, or (3) remanded for a new trial.

Respectfully submitted on April 22, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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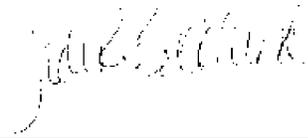
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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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 April 22, 2013.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

April 22, 2013 - 2:25 PM

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