

No. 44771-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Kirk Hernandez,**

Appellant.

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Clark County Superior Court Cause No. 13-1-00236-1

The Honorable Judge John F. Nichols

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Hernandez's conviction was entered in violation of his Fourteenth Amendment right to due process.
2. The trial court erred by refusing to instruct jurors on the lawful use of force in defense of others.

**ISSUE 1:** Where self defense negates the *mens rea* for an offense, a trial court must instruct on the lawful use of force. Here the state was required to prove that Mr. Hernandez intended to inflict bodily injury. Did the trial court's refusal to instruct on self defense relieve the state of its burden to disprove the lawful use of force, in violation of Mr. Hernandez's Fourteenth Amendment right to due process?

3. Mr. Hernandez was convicted through the operation of a statute that is unconstitutionally overbroad.
4. The accomplice liability statute impermissibly permits conviction based on "words" or "encouragement" spoken with knowledge but without intent to promote or facilitate a crime.
5. The accomplice liability statute impermissibly permits conviction based on "words" or "encouragement" even absent proof that the speech is likely to incite imminent lawless action.
6. 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.

**ISSUE 2:** A statute is unconstitutional if it criminalizes speech without proof that the speaker intended to incite crime. The accomplice liability statute criminalizes speech made with knowledge that it will facilitate or promote commission of a crime, even if the speaker lacked the intent to incite imminent lawless action, and even if the speech was unlikely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

7. The court's instruction defining "substantial step" impermissibly relieved the state of its burden of establishing every element of attempted first-degree robbery.
8. The court's instructions on attempted robbery failed to make the relevant legal standard manifestly clear to the average juror.

**ISSUE 3:** A conviction for attempt requires proof that the accused person took a "substantial step" toward commission of the crime charged; the phrase "substantial step" means "conduct strongly corroborative of the actor's criminal purpose..." Here, the court's instructions defined the phrase as "conduct that strongly indicates a criminal purpose..." Did the instruction relieve the prosecution of its burden to prove the elements of attempted theft beyond a reasonable doubt, in violation of Mr. Hernandez's Fourteenth Amendment right to due process?

9. The trial court erred by imposing attorney fees in the amount of \$1,500.
10. The imposition of attorney fees without any support in the record that Mr. Hernandez has the present or future ability to pay violated his Sixth and Fourteenth Amendment right to counsel.

**ISSUE 4:** A trial court may only impose attorney fees upon finding that the offender has the present or likely future ability to pay. Here, the court imposed \$1,500 in attorney fees despite the absence of evidence supporting such a finding. Did the trial court violate Mr. Hernandez's Sixth and Fourteenth Amendment right to counsel?

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

Kirk Hernandez, Jr., his girlfriend Stephanie Torres, and Rene Castillo were at the Hideaway Lounge for a birthday celebration. RP 172-73, 235. At one point, Torres approached Patrick Wade and offered to sell him some methamphetamine. RP 102, 174. Wade accepted. Wade and Torres went outside and across the street from the bar to make the transaction. RP 102, 104. Wade hoped that he would be able to take Torres back to his apartment so he would have a “girl” to “go with” the meth. RP 68-69, 118, 120, 179. They made the exchange.

Mr. Hernandez saw Wade grope Torres’s breast. RP 182, 239. Mr. Hernandez and Castillo went over when they saw this. RP 182-83, 239. Mr. Hernandez hit Wade and told Wade to keep his hands off Torres. RP 239-40. Mr. Hernandez, Torres, and Castillo walked away and left the bar. RP 240, 248.

Wade called 911 and said that he had been robbed by four “Mexican” men. RP 81-85. He claimed that Mr. Hernandez had jumped over a fence, hit him, and taken twenty dollars out of his pocket. RP 83, 112.

The state charged Mr. Hernandez with first degree robbery. RP 34.

Later, Wade admitted that he had been buying meth from Torres and that the group had not taken any money from him against his will. RP 112. Instead, he said that Torres had ordered him to empty his pockets and that the group walked away when he refused. RP 72, 75. Wade said that he did not know why he had told the 911 operator four men had attacked him. RP 111.

The state amended Mr. Hernandez's charge to attempted first degree robbery. CP 1-2; RP 34.

At trial, Mr. Hernandez proposed jury instructions regarding defense of others. RP 269. The court initially agreed to instruct the jury regarding the state's burden of disproving lawful use of force. RP 271, 281. Later, however, the state brought a case to the court's attention holding that self-defense cannot negate a robbery charge.<sup>1</sup> RP 288-290. Relying on that case, the court removed Mr. Hernandez's lawful use of force instructions from the packet over his objection. RP 294.

The court instructed the jury regarding accomplice liability. CP 36. The instructions stated that the word "aid" means "all assistance whether given by words, acts, encouragement, support, or presence." CP 36.

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<sup>1</sup> The case did not address the charge at issue, attempted robbery. *State v. Lewis*, 156 Wn. App 230, 233 P.3d 891 (2010).

The court further gave an instruction indicating that a person is guilty of attempted robbery if s/he has the intent to commit the offense and makes a substantial step toward its commission. CP 42. The instructions defined “substantial step” as “conduct that strongly indicates a criminal purpose and that is more than mere preparation.” CP 43.

The jury found Mr. Hernandez guilty of attempted robbery. RP 350; CP 6. The court sentenced Mr. Hernandez at the low end of the sentencing range “based on the facts.” RP 365.

The court ordered Mr. Hernandez to pay \$1,500 in “fees for court appointed attorney and trial per diem, if applicable.” CP 10. The court did not inquire into Mr. Hernandez’s financial situation during sentencing. RP 355-369. The court checked a box on the Judgment and Sentence indicating that Mr. Hernandez has the ability or future ability to pay legal financial obligations. CP 8.

This timely appeal follows. CP 20.

## ARGUMENT

### **I. THE COURT DENIED MR. HERNANDEZ’S RIGHT TO DUE PROCESS BY REFUSING TO INSTRUCT THE JURY ON LAWFUL USE OF FORCE.**

#### A. Standard of Review.

Jury instructions are reviewed de novo. *State v. McCreven*, 170 Wn. App. 444, 461, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). Jury instructions relieving the state of its burden of proof present an issue of constitutional magnitude. *State v. Smith*, 174 Wn. App. 359, 365, 298 P.3d 785 (2013) *review denied*, 308 P.3d 643 (Wash. 2013). Constitutional issues are reviewed de novo. *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013).

#### B. Lawful use of force can negate the intent element of attempted robbery.

Due process requires a court to instruct the jury regarding the state’s burden of proving each element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I. § 3; *Smith*, 174 Wn. App. at 365. Where self defense is at issue, the state must prove that the use of force was unlawful beyond a reasonable doubt. *McCreven*, 170 Wn. App. at 462. Due process requires that the jury be instructed regarding the state’s burden of disproving lawful use of force. *Id.*

Self defense is available in cases that do not involve assault or murder. *State v. Arth*, 121 Wn. App. 205, 209, 87 P.3d 1206 (2004). An accused person may claim that the lawful use of force negates the *mens rea* element of an offense. *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).<sup>2,3</sup>

In order to prove attempted first degree robbery, the state must prove that the accused intended to inflict bodily injury. RCW 9A.28.020; 9A.56.200. Attempted robbery includes the element of intent to commit robbery. RCW 9A.28.020; CP 45. First degree robbery includes the element of infliction of bodily injury. RCW 9A.56.200; CP 46.

The element of intent to inflict bodily injury can be negated by a claim that the use of force was lawful. *Acosta*, 101 Wn.2d at 615. If a person accused of attempted robbery in the first degree validly raises lawful use of force, the burden shifts to the state to prove beyond a

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<sup>2</sup> The supreme court has stepped away from requiring the state to disprove every defense that negates an element. *State v. Camara*, 113 Wn.2d 631, 639, 781 P.2d 483, 487 (1989). Since then, however, the court has reaffirmed that the state bears the burden of disproving lawful use of force beyond a reasonable doubt. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The court has not suggested that self-defense is unavailable in cases where it negates the *mens rea* of the charged crime.

<sup>3</sup> Because it does not require proof of intent to inflict bodily injury, robbery does not include an element that can be negated by a valid self-defense claim. *Lewis*, 156 Wn. App. at 238-39.

reasonable doubt that the use of force was not lawful. *McCreven*, 170 Wn. App. at 462.

Mr. Hernandez presented sufficient evidence of lawful use of force that the court initially agreed to instruct the jury regarding defense of others. RP 271. Later, however, relying solely on *Lewis*<sup>4</sup>, the court decided not to instruct the jury on the state's burden of disproving lawful use of force. RP 288-94.

The court erred by reading *Lewis* to preclude a lawful use of force claim in a case of attempted robbery. *Lewis* held that self-defense could not be raised in a robbery case because there was no intent element to be negated. *Lewis*, 156 Wn. App. at 238-39. Mr. Hernandez's attempted robbery charge, however, required the state to prove that he intended to commit robbery (and, thus, that he intended to inflict bodily injury). Because he presented some evidence that his use of force was lawful, due process requires the state to disprove his defense-of-others claim beyond a reasonable doubt. *McCreven*, 170 Wn. App. at 462.

The court erred by refusing to instruct the jury regarding the state's burden of disproving lawful use of force beyond a reasonable doubt. *Id.*

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<sup>4</sup> *Lewis*, 156 Wn. App. at 238-39.

This error denied Mr. Hernandez’s right to due process. *Id.* His conviction must be reversed. *Id.*

**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*. *Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). 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 Wn.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>5</sup> *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

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<sup>5</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*, 163 Wn. App. 722, 733, 260 P.3d 956 (2011) *review granted*, 173 Wn.2d 1013, 272 P.3d 247 (2012) (Off-Highway Vehicle Alliance I) and *aff'd sub nom. Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 290 P.3d 954 (2012) (Off Highway Vehicle Alliance II).

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).<sup>6</sup> A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. *Immelt*, 173 Wn.2d at 6-7. 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 33.

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

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<sup>6</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. art. I, § 5.

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

Mr. Hernandez’s jury was instructed on accomplice liability. CP 36. Accordingly, Mr. Hernandez is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks*, 539 U.S. at 118-119; *Webster*, 115 Wn.2d at 640.

C. A person may not be convicted for speech absent proof of intent to promote or facilitate a crime.

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). This standard requires proof of intent; knowledge is insufficient. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

In *Freeman*, the defendant was convicted of counseling others to violate the tax laws. Some of his convictions were reversed because the trial court failed to instruct the jury on the *Brandenburg* standard:

[A]n instruction based upon the First Amendment should have been given to the jury. As the crime is one proscribed only if done willfully, the jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur.

*Freeman*, 761 F.2d at 552 (citing *Brandenburg*).<sup>7</sup>

Accomplice liability in Washington does not require proof of intent. The accomplice statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech protected by the First Amendment.

Under RCW 9A.08.020, a person may be convicted as an accomplice for speaking “[w]ith knowledge” that the speech “will

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<sup>7</sup> The court affirmed two of the convictions, finding that the “intent of the [defendant] and the objective meaning of the words used [were] so close in time and purpose to a substantive evil as to become part of the ultimate crime itself.” *Freeman*, 761 F.2d at 552.

promote or facilitate the commission of the crime.” RCW 9A.08.020.<sup>8</sup>

The statute does not require proof of intent, nor does it require any evidence regarding the likelihood that the words will produce imminent lawless action. RCW 9A.08.020. This interpretation 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). 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 U.S. Supreme Court found this speech—which would be criminal under RCW 9A.08.020—to be protected by the First Amendment.

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<sup>8</sup> The statute uses the word “aid,” which Washington courts have interpreted to include “words” or “encouragement.” RCW 9A.08.020; *see* WPIC 10.51.

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 in *Brandenburg*. 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. *Id.*

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

D. The *Coleman* court 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*, 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. at 960-961 (citations omitted).<sup>9</sup>

This is incorrect for three reasons.

First, in Washington, accomplice liability can be premised on speech made with *knowledge* that it will facilitate the crime, even if the speaker lacks the *intent* to facilitate the crime. RCW 9A.08.020; *see* WPIC 10.51. *Coleman*'s use of the phrase “in aid of” implies an intent requirement that is lacking from the statute and the pattern instruction. Under *Brandenburg*, the First Amendment protects speech made with knowledge but without intent to facilitate crime. Washington accomplice law directly contravenes this requirement.

Second, the First Amendment protects much more than speech “that only consequentially further[s] the crime.” *Coleman*, 155 Wn. App. at 960-961 (citations omitted). The state cannot criminalize mere advocacy<sup>10</sup>—even if the words are spoken “in aid of a crime.” *Coleman*, 155 Wn. App. at 960-961. Words spoken “in aid of a crime” are protected unless “directed to inciting or producing imminent lawless action” and “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447;

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<sup>9</sup> In *Ferguson*, Division II court adopted the reasoning set forth in *Coleman*.

<sup>10</sup> *Hess*, 414 U.S. at 108.

*cf. Coleman*, 155 Wn. App. at 960-961. Even if the statute required proof of intent, it would remain unconstitutional unless it also required proof that the speech was likely to produce imminent lawless action.

Speech that “encourage[s] unlawful acts” is protected, unless it falls within the narrow category outlined by *Brandenburg. Ashcroft*, 535 U.S. at 253. The state cannot ban speech made with knowledge that it will promote a crime. Nor can it ban speech made with intent to promote the commission of a crime, unless the speech is (1) made with intent to incite or produce “imminent lawless action” and (2) “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447.

Third, 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. at 253. The accomplice liability statute reaches pure speech: “words” and “encouragement” are sufficient for conviction, if spoken with the appropriate knowledge. *See* WPIC 10.51; CP 36. 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. at 960 (citing *Hicks*, 539 U.S. at 122 and *Webster*, 115 Wn.2d at 641.) The court then imported the Supreme Court’s rationale from *Webster* and applied it to the accomplice liability statute. *Coleman*, 155 Wn. App. at 960-61 (citation omitted).

But *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 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; CP 36. 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.

**III. MR. HERNANDEZ’S CONVICTION FOR ATTEMPTED FIRST-DEGREE ROBBERY VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). Jury instructions are also reviewed *de novo*. *McCreven*, 170 Wn. App. at 461. Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyлло*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

B. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

Due process requires the prosecution to prove every element of the charged crime. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A trial court’s failure to instruct the jury as to every element violates due process. U.S. Const. Amend. XIV; *State v. Haberman*, 105 Wn. App. 926, 935, 22 P.3d 264

(2001). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970

(2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

C. The court's instructions relieved the state of its burden to prove that Mr. Hernandez engaged in conduct corroborating the intent to commit the specific crime of robbery in the first-degree.

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. A "substantial step" is "conduct strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978); *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325 (1995).

In this case, the trial court gave an instruction that differed from the definition of "substantial step" adopted by the *Workman* Court. The court's instruction defined "substantial step" (in relevant part) as "conduct that strongly *indicates a criminal purpose...*" CP 43, (emphasis added). This instruction is erroneous for two reasons.

First, the instruction requires only that the conduct *indicate* (rather than corroborate) a criminal purpose. The word "corroborate" means "to

strengthen or support with *other* evidence; [to] make *more* certain.” *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company) (emphasis added). The *Workman* court’s choice of the word “corroborative” requires the prosecution to provide some independent evidence of intent, which must then be corroborated by the accused’s conduct. Instruction No. 15 removed this requirement by employing the word “indicate” instead of “corroborate;” under Instruction No. 15 there is no requirement that intent be established by independent proof and corroborated by the accused’s conduct. CP 43.

Second, Instruction No. 15 requires only that the conduct indicate *a criminal purpose*, rather than *the* criminal purpose. This is analogous to the problem addressed by the Supreme Court in cases involving accomplice liability. *See State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000) (accomplice instructions erroneously permitted conviction if the defendant participated in “a crime,” even if he was unaware that the principal intended “the crime” charged); *see also State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). As in *Roberts* and *Cronin*, the language used in Instruction No. 15 permits conviction if the accused person’s conduct strongly indicates intent to commit *any* crime.

The end result was that the prosecution was relieved of its duty to establish by proof beyond a reasonable doubt every element of attempted

robbery.<sup>11</sup> Under the instructions as given, the prosecution was not required to provide independent corroboration of Mr. Hernandez's alleged criminal intent; nor was it required to show that his conduct strongly corroborated his intent to commit the particular crime of first degree robbery.

Division II has recently rejected this argument. *State v. Davis*, 174 Wn. App. 623, 635-38, 300 P.3d 465 (2013) *review denied*, 88878-7, 2013 WL 5493682 (Wash. Oct. 2, 2013). *Davis* was decided incorrectly, and should be reconsidered.

Mr. Hernandez's conviction must be reversed and the case remanded for a new trial. *Brown*, 147 Wn.2d 330.

**IV. THE COURT ORDERED MR. HERNANDEZ TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY IN VIOLATION OF HIS RIGHT TO COUNSEL.**

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *State v. Jones*, No. 41902-5-II, 2013 WL 2407119, ---

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<sup>11</sup> This creates a manifest error affecting Mr. Hernandez's right to due process, and thus may be raised for the first time on review, pursuant to RAP 2.5(a)(3). Even if not manifest, the error may nonetheless be reviewed as a matter of discretion under RAP 2.5. See *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

P.3d --- (June 4, 2013); *Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013).

B. The court violated Mr. Hernandez's right to counsel by ordering him to pay the cost of his court-appointed attorney without first inquiring into whether he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCWA 10.01.160(3).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118

Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.<sup>12</sup> *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute’s provision that “a court may not order a convicted person to pay these expenses unless he ‘is or will be able to pay them.’” *Id.* The court noted that, under the Oregon scheme, “no requirement to repay may be imposed if it appears *at the time of sentencing* that ‘there is no likelihood that a defendant's indigency will end.’” *Id.* (emphasis added). Accordingly, the court found that “the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.*

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<sup>12</sup> In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed for an indigent defendant.

Oregon’s recoupment statute did not impermissibly chill the exercise of the right to counsel because “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”. *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to hold that the Sixth Amendment requires a court to find that the offender has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so.<sup>13</sup>

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney’s fees in all cases, as long as the accused may later petition the court for remission if s/he

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<sup>13</sup> See e.g. *State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Temin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions”); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) (“In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute”).

cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

C. The record does not support the sentencing court's finding that Mr. Hernandez has the ability or likely future ability to pay his legal financial obligations.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

In this case, the sentencing court entered such a finding without any support in the record. CP 8; RP 355-68. Indeed, the record suggests that Mr. Hernandez lacks the ability to pay the amount ordered. The court found Mr. Hernandez indigent at the end of the proceedings. CP 21. His lengthy incarceration and felony conviction will also negatively impact his prospects for employment. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. *Id.*

The lower court ordered Mr. Hernandez to pay \$1,500 in fees for his court-appointed attorney without conducting any inquiry into his present or future ability to pay. RP 355-68.

The court violated Mr. Hernandez's right to counsel. Under *Fuller*, it lacked authority to order payment for the cost of court-appointed

counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Hernandez to pay \$1,500 in attorney fees must be vacated. *Id*

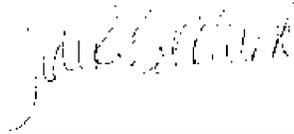
### **CONCLUSION**

The court denied Mr. Hernandez's due process rights by refusing to instruct the jury on the lawful use of force. The court instructed the jury on accomplice liability in a manner that impermissibly chills the exercise of free speech. The court's definition of "substantial step" erroneously relieved the state of its burden of proving each element of attempted robbery beyond a reasonable doubt. Mr. Hernandez's conviction must be reversed.

In the alternative, the court violated Mr. Hernandez's Sixth Amendment right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining whether he had the ability to do so. The court's order that Mr. Hernandez pay the cost of his attorney must be vacated.

Respectfully submitted on October 11, 2013,

**BACKLUND AND MISTRY**



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Attorney for the Appellant



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Attorney for the Appellant



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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:

Kirk Hernandez, DOC #303638  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

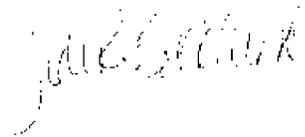
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

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 October 11, 2013.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**October 11, 2013 - 10:53 AM**

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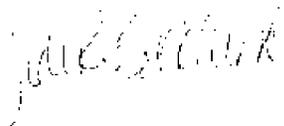
State of Washington )  
vs. ) Declaration of Service of  
Kirk Hernandez ) Verbatim Report of Proceedings

Jodi Backlund declares as follows: I certify that I mailed, at the appellant's request, a copy of the verbatim report of proceedings in the above-referenced case to the following address:

Kirk Hernandez, DOC #303638  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

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

Signed October 11, 2013 in Olympia, Washington.



Jodi Backlund, WSBA No. 22917  
Attorney at Law

*Declaration of Service of VRP*

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# BACKLUND & MISTRY

**October 11, 2013 - 12:24 PM**

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