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COURT OF APPEALS
DIVISION II

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NO. 41319-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
BY [Signature]
DEPUTY
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JENNIFER MEGAN MAU,

Petitioner.

PETITION FOR REVIEW

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FILED
SUPERIOR COURT
STATE OF WASHINGTON
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TABLE OF CONTENTS

	Page
Table of Authorities	3
A. Identity of Petitioner	4
B. Decision of the Court of Appeals	4
<hr/>	
C. Issues Presented for Review	4
D. Statement of the Case	4
E. Argument Why Review Should Be Accepted	8
F. Conclusion	14
G. Appendix	14
1. Washington Constitution, Article 1, § 3	14
2. United States Constitution, Fourteenth Amendment	14
3. RCW 48.17.060	15
4. RCW 48.30.230	15

TABLE OF AUTHORITIES

Page

Federal Cases

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 8

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 9

State Cases

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 8

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 8

Constitutional Provisions

Washington Constitution, Article 1, § 3 8, 14

United States Constitution, Fourteenth Amendment 8, 14

Statute and Court Rules

RCW 9A.56 10

RCW 48.17.060 13

RCW 48.30.230 9, 10, 12

RAP 13.4(b)(3) 8

A. IDENTITY OF PETITIONER

JENNIFER MEGAN MAU asks this court to accept review of the decision designated in Part B of this motion.

B. DECISION

Petitioner seeks review of each and every part of the decision of the Court of Appeals affirming the Lewis County Superior Court judgment and sentence. A copy of the Court of Appeals decision is attached.

C. ISSUES PRESENTED FOR REVIEW

When a person makes a tort claim that a truck rental company's negligence has caused her damage, has she made a claim under a "contract of insurance" sufficient to support a conviction under RCW 48.30.230?

D. STATEMENT OF THE CASE

Factual History

On March 30, 2007, the defendant Jennifer Mau rented a U-Haul truck in Olympia to facilitate her family's move from a rented house in Centralia to their new mobile home in Morton. RP 20-23. When the defendant rented the truck, the manager of the U-haul dealership asked if she would like to pay for "safe move protection," which would pay for the property she was moving if it was damaged by an accident. RP 39, 84. U-Haul's "safe move protection" does not pay for water damage. *Id.* The defendant paid the extra few dollars for the "safe move protection." *Id.*

According to the defendant, when she and her family unpacked the truck after moving household possessions in it, they found that a number of items in the front of the cargo space had been damaged by water that had leaked into the cargo space during the move. *Id.* The defendant reported that they were able to dry and salvage some of those items, although some of the items were destroyed and they ended up taking them to the dump. *Id.*

Upon returning the truck, the defendant complained that it had leaked and damaged or destroyed some of her property. RP 25-27. In response, the manager of the U-haul outlet gave the defendant the telephone number of Republic Western Insurance so she could make a liability claim. *Id.* The defendant later called that number to report her loss. RP 38-39. In fact, Republic Western Insurance is a subsidiary company wholly owned by the U-Haul Corporation, which is self-insured for all of its general liability claims. RP 49. Michael Larsen, a special investigator for Republic Western, was later assigned to investigate the case. RP 36-38.

According to Mr. Larsen, there are two types of claims that a person can make against “U-Haul” for property damaged while using a “U-Haul” truck. RP 47-48. The first is under the “safe move protection” plan, if the customer paid for it. *Id.* According to Mr. Larsen, “[i]t’s not like an insurance.” RP 38-39. Rather, it simply pays for cargo damaged as the result of accident during a move. *Id.* It does not pay for water damage. RP 41-44. The second

is under a general liability claim for negligence. RP 47-48. Based upon the defendant's statements, Mr. Larsen opened up a general liability claim. RP 39-41. On April, 19, 2007, he contacted an independent adjuster by the name of Reilly Gibby to investigate the defendant's claim. RP 41-44.

Based upon Mr. Gibby's subsequent investigation, Mr. Larsen made a determination that there had been no negligence on the part of U-Haul as their testing on the truck had been unable to replicate a water leak. RP 41-44. As a result, Republic Western sent a letter to the defendant denying her claims. RP 45-46. Employees for the Washington State Office of the Insurance Commissioner later did an investigation on the defendant's claim and developed information that led them to believe that (1) there had been no water damage to any of the defendant's property, and (2) that the defendant and her husband had knowingly made a false claim to U-Haul of over \$1,500.00. RP 196-206.

Procedural History

By informations filed March 17, 2010, the Lewis County Prosecutor charged the defendant Jennifer Mau and her husband David Eden under RCW 48.30.230 with one count of making a false insurance claim. CP 1-3. This case later came on for a joint trial, with the state calling seven witnesses, including the U-Haul manager who rented the defendant the truck, along with Mr. Larsen, Mr. Gibby, and one of the investigators from the Washington

State Insurance Adjustor's Office. RP 20, 30, 36, 58, 111, 169, 196. These witnesses testified to the facts contained in the preceding *Factual History*. *See Factual History*. After the state closed its case, the defense called three witnesses. RP 213, 223, 242. Finally, the defendant took the stand and testified that the truck had leaked and damaged her property, and that her claim of damages had been truthful. RP 267-379.

After brief rebuttal evidence, the court instructed the jury and the parties presented closing argument. RP 339-408, 409-472. The jury then retired for deliberation, eventually returned verdicts of "guilty" against both the defendant and her husband. CP 54; RP 354-357. Following sentencing within the standard range, the defendant filed timely notice of appeal. CP 71-80. The defendant argued on appeal that substantial evidence did not support her conviction because (1) to be guilty of the crime charged she had to have made a claim under "a policy of insurance," and (2) evidence supported this element because she had made a tort claim, not a claim under a policy of insurance. By opinion filed June 26, 2012, the Court of Appeals, Division II, entered an unpublished opinion affirmed the defendant's conviction.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(3), this case presents a significant question of law under the due process clauses from both Washington Constitution, Article 1, § 3, as well as United States Constitution, Fourteenth Amendment. In

addition, under RAP 13.4(b)(4), this case involves an issue of substantial public interest that should be determined by this court. The following argument supports these conclusions.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant with one count of making a false claim pursuant to a contract of insurance under RCW 48.30.230. This statute states as follows:

(1) It is unlawful for any person, knowing it to be such, to:

(a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance; or

(b) Prepare, make, or subscribe any false or fraudulent account, certificate, affidavit, or proof of loss, or other document or writing, with intent that it be presented or used in support of such a claim.

RCW 48.30.230.

The gravamen of this offense is to “knowingly” make a false or fraudulent claim “under a contract of insurance,” or to “knowingly” “prepare, make, or subscribe” any false documents with the intent that they be used to make a false or fraudulent claim “under a contract of insurance.” Although the conduct required for conviction under the statute would undoubtedly constitute an attempted theft under RCW 9A.56, there are two critical differences between RCW 48.30.230 and Washington’s theft statutes. The first is that the submission of an unsuccessful false claim under RCW 48.30.230 is a completed crime, whereas it is only an inchoate crime under RCW 9A.56. At present this distinction is not merely academic because the unsuccessful false presentation of a claim for over \$1,500.00 is a class C felony under RCW 48.30.230. By contrast, the same conduct will currently

only support a conviction for a gross misdemeanor if charged as an attempted second degree theft.

The second difference between RCW 48.30.230 and Washington's theft statutes, and the critical difference in the case at bar, is that the former only applies if the false claim is made "under a contract of insurance." Thus, in order to support the conviction in this case, there must be evidence in the record to support the conclusions that the defendant made a claim "under a contract of insurance." As the following explains, there is no such evidence in the case at bar because (1) the defendant made a general liability claim against U-Haul, not a claim under the "safe move protection" coverage, and (2) U-Haul's "safe move protection" coverage is not a "contract of insurance."

(1) Substantial Evidence Only Supports the Conclusion That the Defendant Made a General Liability Claim Against U-Haul.

In the case at bar, the evidence, seen in the light most favorable to the state, indicates that the defendant made a claim that her property had been damaged when the U-Haul truck she rented leaked rainwater into the cargo area of the truck. Although the defendant did not fill out any form or writing to initiate the claim, Michael Larsen was able to testify concerning the record of her initial call to Republic Western. According to him, Republic Western's records showed that she had called making a claim that U-Haul

had been negligent in maintaining the truck she had rented, and that the water damage to her property was the result of that negligence. Based upon her call, Republic Western opened a general liability claim, not a claim under the “safe move protection” provisions.

In addition, the record presented at trial also includes the testimony of Mr. Gibby concerning his conversations with the defendant concerning her claims. At no point during his testimony did Mr. Gibby claim that the defendant had made an argument that her loss was covered under the “safe move protection” provisions. Rather, his testimony was that she had claimed that U-Haul was liable because it had failed to maintain the truck she used. Although the bulk of their conversations involved the issue of what was damaged and the value, there is nothing from his testimony from which one can infer that the defendant made a claim under the “safe move protection” provisions.

As Mr. Larsen explained during his testimony, the defendant’s claim of damages was under a theory of negligence. It had nothing to do with a policy of insurance, and its validity did not turn on either the existence or non-existence of “safe move protection” coverage. Thus, in the case at bar, there is no evidence, substantial or otherwise, that the defendant made a claim under the “safe move protection” provisions, even were this court to ultimately find that it constituted a “contract of insurance.”

(2) U-Haul's "Safe Move Protection" Plan is Not a "Contract of Insurance" Under RCW 48.30.230.

Although used in RCW 48.30.230 and in a number of other statutes involving insurance, the term "under a contract of insurance" is not defined by the legislature. In addition, few reported cases in Washington even mention RCW 48.30.230, much less address what "under a contract of insurance" means. However, while the phrase is not specifically defined, there are at least two arguments as to why U-Haul's "safe move protection" does not constitute a "contract of insurance." First, as Michael Larsen explained in his testimony, Republic Western did not consider U-Haul's "safe move protection" as a contract of insurance. He stated the following concerning this point:

U-haul is self-insured. There's typically two types of claims that we see. General Liability claims would be claims where if there was a defect it would fall under a general liability. The other applicable coverage would be safe move protection is what we like to call it. ***It's a coverage, it's not like an insurance***, but it's a coverage and it would cover the cargo in the event of an accident, upset or overturn. But it does have exclusions, water being one of them.

RP 38-39 (emphasis added).

Second, and more telling, it should be noted that under the laws of Washington State a person must be licensed in order to legally sell policies of insurance. Under RCW 48.17.060, it states as follows:

A person shall not sell, solicit, or negotiate insurance in this state for any line or lines of insurance unless the person is licensed for that line

of authority in accordance with this chapter. A person may not act as or hold himself or herself out to be an adjuster in this state unless licensed by the commissioner or otherwise authorized to act as an adjuster under this chapter.

RCW 48.17.060.

In the case at bar, there is no suggestion that the employees of U-Haul are insurance agents licensed to sell, solicit, or negotiate insurance. Neither is there any evidence that Meisha Malmer, who filled out the rental contract on the truck for the defendant, was an insurance agent licensed under RCW 48.17.060. The reason there is no evidence is that U-haul employees who fill out vehicle rental contracts for customers, and who ask if a customer wants “safe move protection,” are not selling, soliciting, or negotiating contracts of insurance under RCW 48.17.060 because “safe move protection” is not a contract of insurance. Thus, in the case at bar, even if there was substantial evidence to support the conclusions that the defendant had made a claim under the “safe move protection” provision of the rental contract, that claim was not one made under a “contract of insurance.”

Since the “safe move protection” in this case was not a “contract of insurance,” substantial evidence does not support the finding on this critical element of the crime charged. Consequently, entry of the judgment of conviction for making a false claim of insurance violated the defendant’s right to due process under both Washington Constitution, Article 1, § 3, and

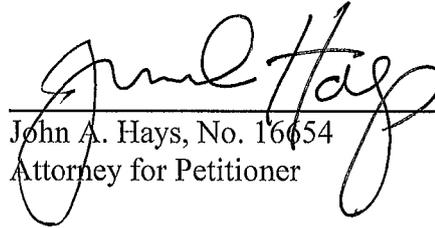
United States Constitution, Fourteenth Amendment. As a result, the Court of Appeals erred when it held, in essence, that since U-Haul's wholly owned subsidiary calls itself an "insurance" company, any claim made with that wholly owned subsidiary is *ipso facto*, a claim under a "contract of insurance." This ruling is erroneous.

F. CONCLUSION

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeal.

Dated this 9th day of July, 2012.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

G. APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 48.17.060
License required

A person shall not sell, solicit, or negotiate insurance in this state for any line or lines of insurance unless the person is licensed for that line of authority in accordance with this chapter. A person may not act as or hold himself or herself out to be an adjuster in this state unless licensed by the commissioner or otherwise authorized to act as an adjuster under this chapter.

RCW 48.30.230
False Claims or Proof — Penalty

(1) It is unlawful for any person, knowing it to be such, to:

(a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance; or

(b) Prepare, make, or subscribe any false or fraudulent account, certificate, affidavit, or proof of loss, or other document or writing, with intent that it be presented or used in support of such a claim.

(2)(a) Except as provided in (b) of this subsection, a violation of this section is a gross misdemeanor.

(b) If the claim is in excess of one thousand five hundred dollars, the violation is a class C felony punishable according to chapter 9A.20 RCW.

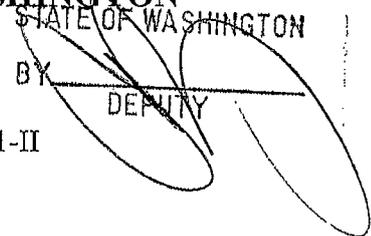
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

DIVISION II

BY  DEPUTY

STATE OF WASHINGTON,

No. 41319-1-II

Respondent,

v.

JENNIFER MEGAN MAU,

Consolidated with

Appellant.

No. 41320-5-II

STATE OF WASHINGTON,

Respondent,

v.

DAVID EDEN,

UNPUBLISHED OPINION

Appellant.

PENYOYAR, J. — Jennifer Mau and David Eden appeal their convictions for making a false insurance claim and/or proof of loss.¹ They argue that the evidence was insufficient to support their convictions. Eden further asserts that (1) the accomplice liability jury instruction relieved the State of its burden to prove that he committed an overt act and (2) the accomplice liability statute, RCW 9A.08.020, is unconstitutionally overbroad. We hold that the State presented sufficient evidence that the claim was made under a “contract of insurance,” that the trial court properly instructed the jury on accomplice liability, and that the accomplice liability statute does not criminalize constitutionally protected speech; accordingly, we affirm.

¹ In violation of RCW 48.30.230.

FACTS

On March 30, 2007, Mau rented a 24-foot truck from an Olympia U-Haul to move from a rental home in Centralia to a new home in Morton. When renting the truck, Mau purchased "safe move protection" coverage. 1 Report of Proceedings (RP) at 84. Safe move protection provides coverage when cargo is damaged in a collision; however, it does not provide water damage coverage.

Mau's boyfriend, Eden, and some of their children and friends helped with the move. The group took the truck to Best Buy; to a storage facility in Chehalis; and, finally, that evening, to the Morton home. According to Eden's son, it rained throughout the day. Another group member stated that it did not rain at all during the move. Eden's son and Sharon Mitchell said that they unloaded the truck after dinner and noticed that items in the back of the truck had gotten wet. The next day, the group used the truck to go to the dump and dispose of the damaged items and to make a second trip to the Chehalis storage unit.

Mau returned to the Olympia U-Haul in April to rent a trailer; while there, she told a U-Haul manager that some of her belongings had been damaged in the truck she had previously rented. The manager advised Mau to report the damage to U-Haul's insurance company, Republic Western Insurance Company.

Republic handles claims for U-Haul, which is self-insured. Republic is the insurance carrier for and a subsidiary of U-Haul. Michael Larsen, a Republic special investigator, described Republic as the "claims administrator" for U-Haul. 1 RP at 36. As such, Republic investigates claims for U-Haul and then determines whether the claim is valid.

On April 3, Mau called Republic to report that a leak in the truck she rented had caused water damage to her cargo. Republic assigned Mau a claim number. Republic handles two types of claims: general liability claims and claims under the safe move protection coverage. Safe move protection does not cover water damage to cargo. Based on Mau's allegation, Republic opened a general liability claim.

Republic hired Reilly Gibby, an independent insurance adjuster, to investigate the claim for Republic. As an insurance adjuster, Gibby receives an assignment from an insurance company, investigates, evaluates the value of the claim, and then pays the claim if warranted. Under a liability claim, Gibby negotiates a settlement agreement and, under the insurance company's authority, settles the claim.

Gibby called Mau and arranged to meet with her at her Morton home. Mau testified that when Gibby called her, he explained that "he was the insurance adjuster and he needed to meet with me to discuss this insurance claim." 2 RP at 285. Mau changed the meeting location to Spiffy's Restaurant. On April 20, Gibby and Mau met; Mau brought receipts to the meeting and prepared a property inventory, listing the specific items that had been damaged.² The property inventory was seven pages long and alleged approximately \$16,000 worth of damage. After the meeting, Mau faxed Gibby the receipts from her two trips to the Lewis County solid waste disposal.

² At trial, Mau testified that "it was [her] understanding that it was like a preliminary list" and she listed items that "could potentially have been damaged." 2 RP at 287; 3 RP at 347.

Later, Gibby called Mau to arrange a meeting with Eden. Mau told Gibby that Eden would meet with Gibby "but only at Spiffy's." 1 RP at 74. At their meeting, Eden told Gibby that it had rained during their drive to the Morton home.³ Eden told Gibby that the truck had leaked; that, consequently, the rain that leaked into the truck damaged their belongings; and that he did not take pictures of the damaged items or retain owner's manuals.

Gibby noted slight discrepancies in Mau's and Eden's accounts. For example, Mau told Gibby that Eden had driven the truck to the dump, but Eden told Gibby that Mau had driven the truck to the dump and disposed of the damaged property. Gibby also noted that the "dump receipts that [Mau] supplied were approximately the weight you would expect for disposal of cardboard boxes and packing things that you would have left over from the move but were not nearly the weight of the goods that she was claiming that they threw away." 2 RP at 107. In June, Mau received a letter from Republic (1) indicating that the investigation concerning her claim had been concluded and (2) declining payment for liability.

No repairs were ever made to the truck's roof. The truck's battery was changed on April 12, but the battery change is the only recorded repair made to the truck after March 30.

On March 17, 2010, the State charged Eden and Mau with one count of making a false insurance claim and/or proof of loss. The State did not charge Eden and Mau as co-defendants, but the cases were consolidated for trial.

Eden's son's former girl friend Arlene Black helped with the move and testified that on March 30 she overheard Mau ask Eden "if he would write a statement saying that the items were damaged from rain." 2 RP at 131. Black testified that, on March 30, the group unloaded the truck at the Morton home and that she then helped assemble Mau and Eden's furniture; she

³ Gibby testified that Eden used the word "monsoon" to describe the rain. 1 RP at 80.

testified that no items had been damaged during the move. At trial, Donald Squires, a volunteer for the National Oceanographic Atmospheric Administration, testified that between 4:30 PM on March 30 and 4:30 PM on March 31, it rained .20 inches in Packwood, Washington. He measured no rainfall between 4:30 PM on March 29 and 4:30 PM on March 30. Packwood is 33 miles from Morton.

After the State presented its case, Mau's defense counsel moved to dismiss the claim for insufficient evidence, arguing that the State failed to present evidence that an insurance contract existed. The trial court denied the motion:

This was an insurance claim. The statute—an insurance policy can be direct coverage, it can cover third parties. This was an insurance claim. I don't think that the language of this statute would preclude this type of a claim being a claim for insurance. So I think that is a—I think that is too narrow of a reading of this statute and I think this statute does apply to the facts as alleged by the State and given the evidence produced so far.

2 RP at 210. The jury found Eden and Mau guilty as charged. Eden and Mau appeal.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Mau and Eden contend that the State presented insufficient evidence that they made a false insurance claim because the State failed to present evidence that the claim was made under a contract of insurance. Eden also contends that the State did not prove that Eden knew Mau had purchased a safe move protection contract from U-Haul. We disagree.

A. Standard of Review

When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d

311, 336, 150 P.3d 59 (2006) (quoting *State v. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). We draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the factfinder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

B. False Claims or Proof

It is unlawful for any person, knowing it to be such, to:

(a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance; or

(b) Prepare, make, or subscribe any false or fraudulent account, certificate, affidavit, or proof of loss, or other document or writing, with intent that it be presented or used in support of such a claim.

RCW 48.30.230(1).

Here, Eden and Mau did not have to be a party to the insurance contract with U-Haul or Republic to be convicted under the statute. Republic is the insurance carrier for and a subsidiary of U-Haul. Republic investigates claims for U-Haul and then determines each claim's validity. This relationship is sufficient to demonstrate that an insurance contract existed between U-Haul and Republic: If Republic determines that a claim is valid, it pays the claimant for his or her loss. Sufficient evidence existed that the claim was made under a contract of insurance.

Further, there is sufficient evidence that Eden and Mau had knowledge that the claim was under a contract of insurance. When Mau told the U-Haul manager that her cargo had been damaged, the manager instructed her to call U-Haul's insurance company, Republic. Republic assigned Mau a claim number. Mau met with Gibby, an insurance adjuster, and prepared a property inventory listing the damaged items. The insurance adjuster had a similar meeting with Eden. Black testified that she overheard Mau ask Eden to write a statement saying that the rain damaged the items. Viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

II. ACCOMPLICE LIABILITY INSTRUCTION

Eden argues that the trial court's accomplice liability instruction relieved the State of its burden to prove that he committed an overt act. We disagree.

Eden did not object to the instruction at trial, but the State does not dispute that the alleged error affects a constitutional right and thus may be raised for the first time on appeal under RAP 2.5(a)(3).⁴ Indeed, failure to instruct on an element of the crime charged is an error of constitutional magnitude. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

We review jury instructions de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions are flawed if they, as a whole, fail to properly inform the jury of applicable law, are misleading, or prevent the defendant from arguing his theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999).

⁴ The State contends, however, that "no error occurred and therefore Eden has not suffered any prejudice from the trial court's jury instruction on accomplice liability." Resp't's Br. at 16-17.

Mere presence at the scene of the crime, even if the defendant assented to the crime, is not enough to prove accomplice liability. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). An accomplice is criminally liable when he intended to facilitate another in committing the crime by providing assistance through his presence and actions. *State v. Trout*, 125 Wn. App. 403, 410, 105 P.3d 69 (2005).

Here, the trial court instructed the jury:

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.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

Clerk's Papers (CP) (Eden) at 21; Instr. 11. This instruction is identical to the language from the Washington Pattern Jury Instructions. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.51, at 217 (3d ed. 2008).

Eden relies on *State v. Peasley*, 80 Wash. 99, 141 P. 316 (1914), and *State v. Renneberg*, 83 Wn.2d 735, 522 P.2d 835 (1974), as support for his argument that his jury instruction was flawed. In *Peasley*, the Supreme Court concluded that "[t]o assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however

culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.” 80 Wash. at 100. But here the accomplice liability instruction directed the jury to determine whether Eden had acted “with knowledge that it [would] promote or facilitate the commission of the crime.” CP (Eden) at 21; Instr. 11. Thus, in order to convict under the instruction, the jury was required to find more than a morally culpable mental attitude.

In *Renneberg*, the defendant assigned error to the trial court’s instruction on aiding and abetting. 83 Wn.2d at 739. Our Supreme Court held that the trial court properly instructed the jury, concluding that “assent to the crime alone is not aiding and abetting, but the instruction correctly required a specific criminal intent, not merely passive assent, and the state of being ready to assist or actually assisting by his presence.” *Renneberg*, 83 Wn.2d at 739. The *Renneberg* court quoted *State v. Redden*, 71 Wn.2d 147, 150, 426 P.2d 854 (1967), concluding:

A separate instruction, requiring the finding of an overt act, was unnecessary; since the instruction, as given, details what acts constitute aiding and abetting under the statute; which acts themselves signify some form of overt act in the doing or saying of something that either directly or indirectly contributes to the criminal offense.

83 Wn.2d at 740.

Again, to find Eden guilty as an accomplice, the instruction required the jury to find that Eden had done more than passively assent to the crime. The accomplice liability instruction also details what overt acts constitute aiding under the accomplice liability statute, RCW 9A.08.020. Further, the instruction properly directed the jury that mere presence and knowledge of the criminal activity does not satisfy the requirements of accomplice liability. Accordingly, we hold that the trial court’s instruction properly informed the jury of accomplice liability.

III. ACCOMPLICE LIABILITY STATUTE

Finally, Eden contends that the accomplice liability statute, RCW 9A.08.020, is unconstitutionally overbroad because it criminalizes constitutionally protected speech in violation of the First and Fourteenth Amendments to the United States Constitution. We disagree.

Under RCW 9A.08.020(3)(a), a person is guilty as an accomplice if “[w]ith knowledge that it will promote or facilitate the commission of the crime,” he “[s]olicits, commands, encourages, or requests [another] person to commit [the crime]” or “[a]ids or agrees to aid such other person in planning or committing [the crime].” The First Amendment provides, in part, that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. The First Amendment applies to the states through the Fourteenth Amendment. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 511, 104 P.3d 1280 (2005).

In *State v. Coleman*, 155 Wn. App. 951, 960-61, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016 (2011), Division One of this court held that Washington’s accomplice liability statute is not unconstitutionally overbroad, reasoning:

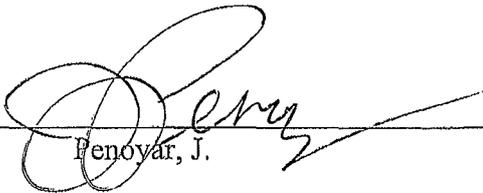
[T]he accomplice liability statute [the defendant] challenges here requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime. Therefore, by the statute’s text, its sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime.

155 Wn. App. at 960-61. In *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011), *review denied*, 173 Wn.2d 1035 (2012), we explicitly adopted Division One’s rationale in *Coleman* and held that the accomplice liability statute is not unconstitutionally overbroad. Accordingly, Eden’s claim fails.

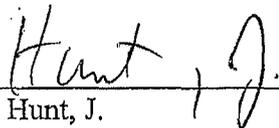
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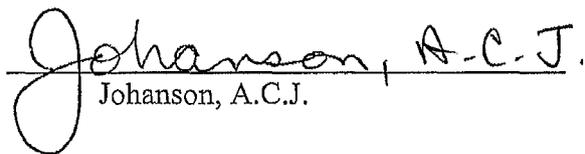
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Penoyar, J.

We concur:


Hunt, J.


Johanson, A.C.J.