IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JENNIFER MEGAN MAU, Appellant.	No. 41319-1-II Consolidated with
STATE OF WASHINGTON, Respondent, v. DAVID EDEN, Appellant.	No. 41320-5-II UNPUBLISHED OPINION

Penoyar, 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

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

truck at the Morton home and that she then helped assemble Mau and Eden's furniture; she 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.

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.