IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JUAN R. BELTRAN, Appellant.	No. 40836-8-II UNPUBLISHED OPINION

Worswick, J. — Juan R. Beltran appeals his second-degree assault conviction, claiming that the accomplice liability instruction violated his federal constitutional rights and relieved the State of its burden of proving an overt act. We affirm.

Facts

On July 14, 2009, Leslie Smith played golf until about 6:00 pm and then went to his friend Bob Wilson's house for a few hours afterward. He had a couple drinks at both places and, on his way home, decided to stop at Mac's bar to play some pool. Since no one was there to play, he went on to the Blue Beacon, where he had one drink before going to Northwest Passage. There, he played pool, bought drinks, and consumed several beers. He befriended Beltran and Beltran's uncle, Quinn Anchetta, and left about 1:25 am with Beltran in Smith's mini-van. They went to a party, which Smith later learned was at Anchetta's apartment, and then left to get beer at 7-11.

About 3:40 am, according to Smith, he was in his mini-van about five or six blocks from Anchetta's when Beltran punched him in the side of the head. Another man dragged Smith out of

his van, kicked him, knocking out his front teeth, and stole his watch, wallet, and wedding ring. Smith suffered abrasions to his forehead, bruising and swelling to the left side of his face, bleeding in his eye, a contusion to the back of his head, loss of his front teeth, and had a concussion. Smith also had a breath alcohol content reading of .24.

Robert Nylander, who lived in an apartment overlooking the lot where the assault took place, described two men as participating in the assault. He described the one kicking Smith as about five feet six inches tall and the one standing nearby with a half case of beer as six feet tall. He also heard the taller man tell the smaller man to "get him now." Report of Proceedings at 62-63. Beltran is six feet two inches tall. Anchetta is five feet seven inches tall.

Smith was unable to identify either Beltran or Anchetta from photo montages. The police did, however, discover a blood smear on Beltran's shoe that DNA (deoxyribonucleic acid) testing showed was Smith's.[1] They also noted blood spattering both in the van on the driver's side and on the outside bumper. Beltran admitted spending part of the night with Smith but claimed that he had left him earlier in the night and two caucasian males remained with Smith. Beltran explained the blood smear as being from a salmon he had filleted on July 4.

The State charged Beltran with second-degree assault.[2] Shortly thereafter, Smith positively identified Beltran as the assailant. The trial court instructed the jury that it could find Beltran guilty as either a principal or an accomplice. The trial court gave the following instruction

[1] Jeremy Sanders from the Washington State Patrol Crime Laboratory Division testified that there was a one in nine-hundred and thirty trillion chance it could have been someone else's blood.

[2] A violation of former RCW 9A.36.021(1) (2010), *amended by* Laws Of 2011, ch.166, § 1. Effective July 11, 2011, the words "or suffocation" were added to section 1 (g). This amendment does not affect our analysis.

to explain accomplice liability:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of the crime of Assault in the Second Degree, if with knowledge that it will promote or facilitate the commission of that crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit that crime; or
>
> (2) aids or agrees to aid another person in planning or committing that 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.

Suppl. Clerk's Papers (CP) (jury instruction 16). The jury convicted Beltran and the sentencing court imposed a standard range 12-month sentence. Beltran appeals.

Discussion

I. Overbreadth

Beltran first argues that the accomplice liability statute, RCW 9A.08.020, is unconstitutionally overbroad because it criminalizes speech and conduct that the First Amendment protects.[3] The First Amendment protects speech that supports or encourages criminal activity unless the speech "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, 89 S. Ct. 1827, 23 L.

[3] Beltran can raise this claim because anyone accused of violating a statute may raise a facial invalidity claim based on overbreadth. *See City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000).

Ed. 2d 430 (1969).

Beltran complains that RCW 9A.08.020 violates this tenet because its definition of "aid" sweeps into its grasp protected speech and conduct. RCW 9A.08.020 provides:

> . . .
> (3) A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it; or
> (b) His conduct is expressly declared by law to establish his complicity.

This statute does not define "aid" but the WPIC instruction provided to the jury defined "aid" as:

> 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.

Suppl. CP at 23 (jury instruction 16).

Beltran argues that this definition criminalizes a vast amount of speech and conduct and gives examples: a professor praising ongoing acts of criminal trespass by anti-war protestors is guilty as an accomplice if his praise knowingly encourages them; a journalist is guilty for reporting about the protests if he knows that his media presence encourages the illegal activity; an attorney providing pro bono legal services to the protestors is guilty as he is supporting and encouraging them.

But these claims fail. In *State v. Coleman*, Division One of this court held that Washington's accomplice liability statute is not unconstitutionally overbroad:

> [T]he accomplice liability statute Coleman challenges here requires the criminal *mens rea* to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime. 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. 951, 960-61, 231 P.3d 212 (2010) (emphasis added), *review denied*, 170 Wn.2d 1016 (2011).

We agree with *Coleman*. In both the statute and the jury instruction set out above, "aid" is qualified: a person must know that his actions "will promote or facilitate the commission of the crime." *See* RCW 9A.08.020. This qualifier narrows "aid" to acts likely to incite or produce imminent lawless acts, advocacy that is unprotected under *Brandenburg*. RCW 9A.28.020 is not unconstitutionally overbroad and the jury instruction based on it was not improper.

II. Overt Act

Beltran also argues that the trial court's accomplice liability instruction relieved the State of its burden of proving that he committed an overt act. *See State v. Matthews*, 28 Wn. App. 198, 203, 624 P.2d 720 (1981) (accomplice liability requires overt act). The instruction here, he argues, runs afoul of *State v. Peasley*, 80 Wash. 99, 100, 141 P.3d 316 (1914), which held:

> To 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.

The accomplice liability instruction explained: "[M]ore than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." Suppl. CP at 23 (jury instruction 16).

In *State v. Renneberg*, 83 Wn.2d 735, 739, 552 P.2d 835 (1974), our Supreme Court held that "assent to the crime alone is not aiding and abetting, . . . 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." The court dismissed appellant's claims that the trial court should have instructed the jury on the necessity of an overt act, reasoning that such an instruction was unnecessary as the statute sets out the conduct that directly or indirectly contributes to the criminal offense. *Renneberg*, 83 Wn.2d at 740 (quoting *State v. Redden*, 71 Wn.2d 147, 150, 426 P.2d 854 (1967)).

Similarly here, the trial court's accomplice liability instruction required the jury to find that Beltran acted "with knowledge that it will promote or facilitate the commission of that crime." Suppl. CP at 23 (jury instruction 16). This is more than passive assent. The jury could only find that Beltran was an accomplice if it found that he directly or indirectly assisted in assaulting Smith. The trial court's instructions did not relieve the State of its burden of proving an overt act.

III. *State v. Coleman*

Lastly, Beltran asks us to disagree with *State v. Coleman*, 155 Wn. App. at 951. He argues that *Coleman* relied on distinguishable cases, misconstrued the appropriate mental state, and either misunderstands the standards for facial challenges brought under the First Amendment or misapprehends the accomplice liability statute's reach into protected speech.

But we need not address these issues. As we note above, the accomplice liability statute and the trial court's accomplice liability instruction do not criminalize lawful acts of speech and conduct. While we cite *Coleman* with approval, we have reached our conclusions independently

of it and thus we need not address Beltran's assertions about its incorrectness.

We affirm.

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.

Worswick, J.

We concur:

Van Deren, J.

Penoyar, C.J.